



Resolution of price disputes
concerning supply of certain
directory information by British
Telecommunications plc to The
Number (UK) Ltd and Conduit
Enterprises Ltd
Draft Determinations and Explanatory Statement

Date: 21 August 2006

Closing Date for Responses: 21 September 2006

Contents

Section		Page
1	The Draft Determinations	2
2	Summary	22
3	Background to and history of the disputes	27
4	Submissions received	46
5	Summary of legal, regulatory and contractual provisions	54
6	Assessment of BT's USC7 obligations	85
7	Assessment of BT's GC19 obligations	106
8	Implications & Policy Considerations	176
Annex		
1	Responding to this consultation	178
2	Ofcom's consultation principles	180
3	Consultation response cover sheet	181
4	BT's provision of OSIS	183
5	BT Directory Solutions Price List	188
6	Legal, Regulatory and Contractual Framework	198
7	Comparison of relevant RVTD and USD provisions	270
8	History of Policy and BT's Obligations	272
9	BT's letter to Ofcom of 13 July 2006	288
10	Glossary	301

Section 1

The Draft Determinations

1.1 The Number Dispute

Determination under Sections 188 and 190 of the Communications Act 2003 ("2003 Act") for resolving a dispute between The Number (UK) Limited ("The Number") and British Telecommunications Plc ("BT") concerning the terms of supply by BT to The Number of certain directory information

WHEREAS—

(A) Section 188(2) of the 2003 Act provides that, where Ofcom has decided pursuant to Section 186(2) of the 2003 Act that it is appropriate for it to handle the dispute, Ofcom must consider the dispute and make a determination for resolving it. The determination that Ofcom makes for resolving the dispute must be notified to the parties in accordance with Section 188(7) of the 2003 Act, together with a full statement of the reasons on which the determination is based, and publish so much of its determination as (having regard, in particular, to the need to preserve commercial confidentiality) they consider appropriate to publish for bringing it to the attention of the members of the public, including to the extent that Ofcom considers pursuant to Section 393(2)(a) of the 2003 Act that any such disclosure is made for the purpose of facilitating the carrying out by Ofcom of any of its functions;

(B) Section 190 of the 2003 Act sets out the scope of Ofcom's powers on resolving a dispute which may include, in accordance with Section 190(2) of the 2003 Act;

- i)** making a declaration setting out the rights and obligations of the parties to the dispute;
- ii)** giving a direction fixing the terms or conditions of transactions between the parties to the dispute;
- iii)** giving a direction imposing an obligation, enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by Ofcom; and
- iv)** for the purpose of giving effect to a determination by Ofcom of the proper amount of a charge in respect of which amounts have been paid by one of the parties to the dispute to the other, giving a direction, enforceable by the party to whom sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment;

(C) Section 190(6)(a) of the 2003 Act further empowers Ofcom, where it makes a determination for resolving a dispute, it may require a party to the dispute to make payments to another party to the dispute in respect of costs and expenses incurred by that other party in consequence of the reference of the dispute to Ofcom, or in connection with it;

(D) on 22 July 2003, shortly before the coming into force of the relevant provisions of the 2003 Act, the Director published a notification in accordance with Section 48(1) of the 2003 Act entitled '*Notification setting general conditions under section 45 of the Communications*

Act 2003'¹ (“**GC notification**”), under Part II of the Schedule to which the Director set (among others) General Condition 19 (“**GC19**”), which took effect on 25 July 2003, requiring in paragraph 19.3 that—

19.3 Where the Communications Provider is requested to supply Directory Information in accordance with paragraphs 19.1 or 19.2, it shall do so on terms which are fair, cost-oriented and non-discriminatory, and in a format which is agreed between the Communications Provider and the person requesting the information. The Communications Provider shall comply with any direction made by the Director from time to time with respect to the format to be applied to the information.

(E) on 22 July 2003, the Director also published a notification² under regulation 4(10) of the Electronic Communications (Universal Service) Regulations 2003³ entitled ‘*Designation of BT and Kingston as universal service providers, and the specific universal service conditions - A statement and Notification issued by the Director General of Telecommunications on the implementation of the Universal Service Directive*’ setting out his reasons for, in effect, designating BT as a universal service provider and setting the Universal Service Conditions in Annex A thereto, such as Universal Service Condition 7 (“**USC7**”), applicable to BT which, in effect, took effect on 25 July 2003, requiring in paragraph 7.4 that—

7.4 BT shall supply the items in sub-paragraph (a) and (b) of paragraph 7.2 above on terms which are fair, objective, cost oriented and not unduly discriminatory, and in a format which is agreed between BT and the person requesting the information. Where no such agreement is reached, the Director may determine the format to be applied to the information in accordance with his dispute resolution functions.

(F) on 29 December 2003, Ofcom took over the responsibilities and assumed the powers of the five former regulators it has replaced, including the Director and, by virtue of the Transitional Provisions, the above-mentioned notifications made by the Director are to have effect as if made by Ofcom under the relevant provisions of the 2003 Act;

(G) on 7 September 2005, The Number (as a supplier of publicly available directory enquiry services within the meaning of USC7.2(b)), referred a dispute between it and BT for a determination by Ofcom under Section 185(2) of the 2003 Act;

(H) under USC7.2-5, BT is required to make available to persons specified in USC7 the database⁴ of directory information for all subscribers (including subscribers of other communications providers) that BT is required to maintain under USC7.1. As noted above, USC7.4 regulates the charges that BT may make for the provision of that database, in particular by requiring that those charges be cost oriented. The Number submitted that BT's charges do not comply with USC7.4;

(I) on 5 December 2005, Ofcom decided to handle this dispute. In Ofcom's notification to the parties of that decision, Ofcom noted that the funding arrangements for the universal

¹ See at: http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/cond_final0703.pdf

² See at: http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/uso0703.pdf

³ S.I. 2003/33.

⁴ This database is known as 'OSIS' (i.e. the Operator Service Information System).

service obligations imposed on BT via USC7 are probably incompatible with the requirements of Chapter II of the Universal Service Directive⁵.

(J) on 23 February 2006, The Number submitted a supplementary submission to its original dispute referral which included reference to BT's obligations under GC19. The Number requested that the scope of the dispute should consequently be amended to reflect its supplementary submission;

(K) under GC19, BT is required to make available to persons specified in GC19 the Directory Information of its subscribers and of other end-users assigned Telephone Numbers originally Allocated to BT, subject to paragraphs 19.3 and 19.4 of GC19. As noted above, paragraph 19.3 of GC19 requires BT to make such information available to the relevant persons on terms which are fair, cost-oriented and non-discriminatory. The Number submitted that BT's charges do not comply with the requirements of paragraph 19.3 of GC19;

(L) having considered The Number's submissions and BT's comments on these submissions, Ofcom set the scope of the issues in dispute to be resolved as follows—

- i)** whether BT's charges to The Number for supplying directory information ("**BT's charges**") are consistent with BT's obligations under USC7 and/or GC19;
- v)** subject to Ofcom's determination in respect of the issues in (i) above—
 - a)** what BT's charges should be moving forward; and
 - b)** what BT's charges should have been for the period between 25 July 2003 and the date of Ofcom's final determination in relation to this dispute, and what (if any) adjustments should be made to payments made by The Number to BT in respect of the directory information supplied during this period;

(M) in order to resolve this dispute, Ofcom has considered (among other things) the information provided by the parties and Ofcom has further acted in accordance with its general duties set out in Section 3 of, and the six Community requirements set out in Section 4, of the 2003 Act;

(N) a fuller explanation of the background to the dispute and Ofcom's reasons for making this Determination is set out in the explanatory statement accompanying this Determination;

(O) This draft determination is issued on 17 August 2006, for which responses are invited by 21 September 2006.

NOW, THEREFORE, OFCOM MAKES, FOR THE REASONS SET OUT IN THE ACCOMPANYING EXPLANATORY STATEMENT, THE FOLLOWING [DRAFT] DETERMINATION FOR RESOLVING THE DISPUTE:

I Declaration of rights and obligations, etc.

1 Subject to Ofcom's declaration in paragraph 3. below, it is hereby declared by Ofcom, pursuant to Section 190(2)(a) of the 2003 Act, that BT has not during the Relevant Period been required to make available to The Number the contents of BT's database

⁵ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002.

(currently known as 'OSIS') pursuant to paragraph 7.2(b), in accordance with the terms of paragraphs 7.4 to 7.6, of USC7.

2 For the avoidance of any doubt, as a result of the declaration in paragraph 1. above, no issue arises with respect to which Ofcom may lawfully make a declaration—

- a) pursuant to Section 190(2)(a) of the 2003 Act, setting out the proper amount of a charge by BT to The Number in respect of making available the contents of the OSIS database in machine readable form during the Relevant Period;
- c) pursuant to Section 190(2)(b) of the 2003 Act, fixing the terms or conditions (including charges) of BT making available to The Number the contents of the OSIS database in machine readable form to take effect on the first day after the Relevant Period has come to an end;
- d) pursuant to Section 190(2)(c) of the 2003 Act, imposing an obligation, enforceable by BT or The Number, to enter into a transaction between themselves on the terms and conditions fixed by Ofcom in relation to BT making available to The Number the contents of the OSIS database in machine readable form to take effect on the first day after the Relevant Period has come to an end,

by reference to, or under, USC7.

3 It is hereby declared by Ofcom, pursuant to Section 190(2)(a) of the 2003 Act, that BT has during the Relevant Period been required to make available to The Number only the information specified in the Schedule hereto pursuant to paragraph 19.1, in accordance with the terms of paragraphs 19.3 to 19.4, of GC19 to the extent that such information has been provided by BT as part of the contents of the OSIS database. However, given that The Number has requested BT to make available to it (as well as received) the full contents of the OSIS database for the Relevant Period, no issue arises with respect to which Ofcom may lawfully make a determination setting out the proper amount of a charge by BT to The Number in respect of making available only the information specified in the Schedule hereto pursuant to paragraph 19.1, in accordance with the terms of paragraphs 19.3 to 19.4, of GC19.

4 It is hereby further declared by Ofcom, pursuant to Section 190(2)(a) of the 2003 Act, that, subject to The Number making a reasonable request to BT for the information specified in the Schedule hereto on a day after the Relevant Period has come to an end, BT shall be required to make available to The Number that information pursuant to paragraph 19.1, in accordance with the terms of paragraphs 19.3 to 19.4, of GC19. Consistent with GC19, it is open to The Number and BT to negotiate and agree the means and extent, including format, in which that information is to be made available to The Number but, for BT's charge in respect of making that information available to be cost oriented in accordance with paragraph 19.4 of GC19, BT shall recover from The Number no more than the total sum of:

- a) BT's costs of establishing and operating the means of transmitting that information from BT to The Number; and
- e) BT's costs of managing the relationship with The Number, including account management, contract management and billing.

II Declaration as to payment of The Number's costs of bringing dispute

5 Ofcom is making no determination, pursuant to Section 190(6)(a) of the 2003 Act, requiring BT to make payments to The Number in respect of any costs and expenses

incurred by The Number in consequence of the reference of the dispute to Ofcom, or in connection with it.

III Binding nature and effective date

6 This Determination is binding on BT and The Number in accordance with Section 190(8) of the 2003 Act.

7 This Determination shall take effect on the day it is published.

IV Interpretation

8 For the purpose of interpreting this Determination—

- a) except as otherwise defined in paragraph 9 below of this Determination, words or expressions used in this Determination (and in the recitals hereto) shall have the same meaning as they have been ascribed in, under or for the purposes of the GC notification;
- f) headings and titles shall be disregarded; and
- g) the Interpretation Act 1978 shall apply as if this Determination were an Act of Parliament.

9 In this Determination—

- a) “**2003 Act**” means the Communications Act 2003 (c.21);
- h) “**BT**” means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by Section 736 of the Companies Act 1985, as amended by the Companies Act 1989;
- i) “**Director**” means the Director General of Telecommunications as appointed under Section 1 of the Telecommunications Act 1984;
- j) “**GC notification**” has the meaning given to it in recital (D) to this Determination;
- k) “**GC19**” means General Condition 19 referred to in recital (D) to this Determination;
- l) “**Ofcom**” means the Office of Communications;
- m) “**Relevant Period**” means the period beginning on 25 July 2003 and ending on the day of the publication of this final Determination;
- n) “**The Number**” means The Number (UK) Limited, whose registered company number is 4352737 and whose registered office is at Sterling House, Malthouse Avenue, Cardiff Gate Business Park, Cardiff F23 8RA;
- o) “**Transitional Provisions**” means Sections 408 and 411 of, and Schedule 18 (see, in particular, paragraphs 2 and 7) to, the 2003 Act, the Communications Act 2003 (Commencement No.1) Order 2003 (S.I. 2003/1900 (C. 77)) and the Office of Communications Act 2002 (Commencement No.3) and Communications Act 2003 (Commencement No 2) Order 2003 (S.I. 2003/3142 (C. 125));

- p) “**USC7**” means Universal Service Condition 7 referred to in recital (E) to this Determination.

10 The Schedule to this Determination shall form part of this Determination.

David Stewart

Director of Investigations

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

{date}

Schedule

A Introduction

1 This Schedule specifies the information that BT shall make available in meeting a reasonable request of it from The Number pursuant to paragraph 19.1 of GC19.

2 Paragraph 19.1 of GC19 provides that

“Where the Communications Provider has been Allocated Telephone Numbers in accordance with Condition 17, it shall meet all reasonable requests from any person to make available the Directory Information of:

(a) its Subscribers who have been assigned those Telephone Numbers; and

(b) any other End-User assigned a Telephone Number originally Allocated to the Communications Provider,

for the purposes of the provision of Directories and Directory Enquiry Facilities.”

3 The term ‘Directory Information’ is defined under paragraph 1 of Part 1 of the Schedule to the GC notification as follows—

““Directory Information” means, in the case of a Directory, the name and address of the Subscriber and the Telephone Number assigned to the Subscriber for their use of Publicly Available Telephone Services and, in the case of a Directory Enquiry Facility, shall be either such a Telephone Number of the Subscriber or information that such a Telephone Number of the Subscriber may not be supplied;”

4 Therefore, subject to paragraph 19.1(b) of GC19, BT is only required to make available under GC19 the name and address of each of its ‘Subscribers’ and the ‘Telephone Number(s)’ assigned to the ‘Subscriber’ for its use of ‘Publicly Available Telephone Services’.

5 The terms ‘Publicly Available Telephone Service’ (“**PATS**”) and ‘Subscriber’ are defined under paragraph 1 of Part 1 of the Schedule to the GC notification, respectively, as follows—

“Publicly Available Telephone Service” means a service available to the public for originating and receiving national and international calls and access to Emergency Organisations through a number or numbers in a national or international telephone numbering plan, and in addition may, where relevant, include one or more of the following services: the provision of operator assistance services, Directory Enquiry Facilities, Directories, provision of Public Pay Telephones, provision of service under special terms, provision of specific facilities for End-Users with disabilities or with special social needs and/or the provision of non-geographic services;

“Subscriber” means any person who is party to a contract with a provider of Public Electronic Communications Services for the supply of such services;”

B The ‘name’ of a BT ‘Subscriber’ of PATS

6 As regards the meaning of ‘name’ in the definition of ‘Directory Information’ for the purposes of GC19, BT shall only be required to make available the *name of*:

(a) **the ‘Subscriber’**, that is a person (including, but not limited to, a body of persons corporate or unincorporate) who is a party to a contract with BT for the supply of PATS, to whom relevant ‘Telephone Number(s)’ has been assigned by BT, which ‘Telephone Number(s)’ has been allocated to BT by Ofcom (or previously, the Director) in accordance with General Condition 17;

and/or

(b) **any other End-User assigned a Telephone Number originally Allocated to BT**,

where that ‘name’ is to be interpreted as including only the information specified in Column 1, but excluding the information specified in Column 2, in Table 1.1 below in respect of living individual(s) and business(es), respectively, being either the said ‘Subscriber’ or ‘other End-User’ mentioned in sub-paragraphs (a) and (b) above:

Table 1.1: Relevant information for ‘name’

PATS subscriber or ‘other End-user’ under GC19.1(b), of ‘Telephone Number(s)’	Column 1 (part of ‘name’)	Column 2 (<u>not</u> part of ‘name’)
Living individual(s)	<ul style="list-style-type: none"> • forename(s) • surname(s) • nickname(s) • initial(s) 	<ul style="list-style-type: none"> • title(s), (e.g. <i>Dr, Mr, Mrs, Miss, Ms, Father</i>) • profession/job title, (e.g. <i>accountant, solicitor, Barrstr</i>) • honours, (e.g. <i>MBE</i>) • qualifications (vocational, academic or otherwise), (e.g. <i>BSc, MBA, FRCS</i>) • information other than in Column 1 about a living individual (e.g. <i>date of birth, nationality, etc.</i>) or any information alluding to a name that is not about the living individual as

<p>Business(es) (and other bodies corporate or unincorporate)</p>	<ul style="list-style-type: none"> • full, including initial(s) or parts of, name(s) of business, company, organisation or association, registered or unregistered, (e.g. <i>Barclays Bank PLC, St X's Primary School</i>) • trading name(s) • (business) suffix(es), (e.g. <i>plc, Ltd, &Co</i>) 	<p>such (e.g. the name of a (BT) exchange to which calls are routed) or any description about the actual or intended activity/use of the 'Telephone Number' related to the living individual</p> <ul style="list-style-type: none"> • except where part of the name in Column 1 under which the business is registered, trades or is otherwise generally known, any business, service or activity/use description (e.g. <i>carpenter, bookmaker, 24 hr service, Italian Restnt, primary school</i>) • information other than in Column 1 about a business (e.g. <i>registered company number, etc.</i>) or any information alluding to a name that is not about the business as such (e.g. the name of a (BT) exchange to which calls are routed) • information other than in Column 1 relating to a specific department or individual/position within a business (e.g. <i>accounts department; Customer Service Director; etc.</i>)
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C The 'address' of a BT's 'Subscriber' of PATS

7 As regards the meaning of 'address' in the definition of 'Directory Information' for the purposes of GC19, in respect of PATS provided to fixed locations, BT shall only be required to make available the installation address containing the information specified in Column 1, but excluding the information specified in Column 2, in Table 1.2 below, of a BT 'Subscriber' of PATS referred to in paragraph 6 of this Schedule above.

Table 1.2: Ofcom's interpreted meaning of 'address' in respect of PATS provided to fixed locations

Column 1 (part of '(installation)address')	Column 2 (<u>not</u> part of '(installation)address')
<ul style="list-style-type: none"> • premises/building/number (e.g. <i>1, The Cottage</i>) • street (e.g. <i>High Street</i>) • locality (e.g. <i>village or area within town</i>) • post town/city (e.g. <i>Bromley</i>) • county (e.g. <i>Kent</i>) • post code (e.g. <i>BR1...</i>) 	<ul style="list-style-type: none"> • billing address • correspondence address • contract address • trading/head office address • PO Box

8 In this Schedule, the term "installation address" means the premises at which the exchange line has been installed for the use of the PATS in question in respect of which the

'Telephone Number(s)' has been assigned; in turn, the term 'exchange line' means apparatus (including any equipment, machinery, or device and any wire or cable and the casing or coating for any wire or cable) comprised in a Public Telephone Network and installed for the purpose of connecting a telephone exchange run to a network termination point comprised in network termination and testing apparatus installed for the purpose of providing PATS at the premises at which the network termination and testing apparatus is located.

9 As regards PATS provided at a non-fixed location, the term 'address' should for the purposes of GC19 be interpreted as referring to the address given (if any) by the 'Subscriber' to BT for the purposes of entering into the contract of supply of such PATS.

D Relevant 'Telephone Number(s)' assigned to a BT 'Subscriber' of PATS

10 The term 'Telephone Number' is defined under paragraph 1 of Part 1 of the Schedule to the GC notification as follows—

“‘Telephone Number’ means, subject to any order of the Secretary of State pursuant to section 56(7) of the 2003 Act, any number, including data of any description, that is used (whether or not in connection with telephony) for any one or more of the following purposes:

- (a) identifying the destination for, or recipient of, an Electronic Communication;*
- (b) identifying the origin, or sender, of an Electronic Communication;*
- (c) identifying the route for an Electronic Communication;*
- (d) identifying the source from which an Electronic Communication or Electronic Communications Service may be obtained or accessed;*
- (e) selecting the service that is to be obtained or accessed, or required elements or characteristics of that service; or*
- (f) identifying the Communications Provider by means of whose network or service an Electronic Communication is to be transmitted, or treated as transmitted;”*

11 Therefore, for the avoidance of any doubt, any number which:

- (a) does not satisfy the above definition of a 'Telephone Number', including which number is subject to any order of the Secretary of State pursuant to Section 56(7) of the 2003 Act (at the time of the publication of this Determination, certain numbers are excluded from that definition under the Telephone Number Exclusion (Domain Names and Internet Addresses) Order 2003, S.I. 2003/3281);
- (b) has not been allocated in accordance with General Condition 17 by the Director or Ofcom to BT; or
- (c) has not been assigned by BT under its contract with the 'Subscriber' in question for the use of PATS only,

is not required to be made available by BT under GC19.

E Directory status information

12 Pursuant to paragraph 19.4 of GC19, BT shall make available directory status information to ensure that to the requirements of Relevant Data Protection Legislation are complied with. In particular, BT shall indicate which of the following directory status options apply to the directory information provided for each specific Telephone Number:

- a) ordinary listing;
- b) directory enquiry only listing;
- c) ex-directory listing;
- d) no listing; and
- e) partial address listing.

13 The term 'Relevant Data Protection Legislation' is defined under paragraph 1 of Part 1 of the Schedule to the GC notification (as amended by the Director on 11 December 2003) as follows—

““Relevant Data Protection Legislation” means the Data Protection Act 1998 and the Privacy and Electronic Communications (EC Directive) Regulations 2003;”

1.2 Conduit Dispute

Determination under Sections 188 and 190 of the Communications Act 2003 (“Act”) for resolving a dispute between Conduit Enterprises Ltd (“Conduit”) and British Telecommunications Plc (“BT”) concerning the terms of supply by BT to Conduit of certain directory information

WHEREAS—

(A) Section 188(2) of the 2003 Act provides that, where Ofcom has decided pursuant to Section 186(2) of the 2003 Act that it is appropriate for it to handle the dispute, Ofcom must consider the dispute and make a determination for resolving it. The determination that Ofcom makes for resolving the dispute must be notified to the parties in accordance with Section 188(7) of the 2003 Act, together with a full statement of the reasons on which the determination is based, and publish so much of its determination as (having regard, in particular, to the need to preserve commercial confidentiality) they consider appropriate to publish for bringing it to the attention of the members of the public, including to the extent that Ofcom considers pursuant to Section 393(2)(a) of the 2003 Act that any such disclosure is made for the purpose of facilitating the carrying out by Ofcom of any of its functions;

(B) Section 190 of the 2003 Act sets out the scope of Ofcom's powers on resolving a dispute which may include, in accordance with Section 190(2) of the 2003 Act;

- i) making a declaration setting out the rights and obligations of the parties to the dispute;
- ii) giving a direction fixing the terms or conditions of transactions between the parties to the dispute;
- iii) giving a direction imposing an obligation, enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by Ofcom; and
- iv) for the purpose of giving effect to a determination by Ofcom of the proper amount of a charge in respect of which amounts have been paid by one of the parties to the dispute to the other, giving a direction, enforceable by the party to whom sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment;

(C) Section 190(6)(a) of the 2003 Act further empowers Ofcom, where it makes a determination for resolving a dispute, it may require a party to the dispute to make payments to another party to the dispute in respect of costs and expenses incurred by that other party in consequence of the reference of the dispute to Ofcom, or in connection with it;

(D) on 22 July 2003, shortly before the coming into force of the relevant provisions of the 2003 Act, the Director published a notification in accordance with Section 48(1) of the 2003 Act entitled '*Notification setting general conditions under section 45 of the Communications Act 2003*'⁶ (“**GC notification**”), under Part II of the Schedule to which the Director set (among others) General Condition 19 (“**GC19**”), which took effect on 25 July 2003, requiring in paragraph 19.3 that—

⁶ See at: http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/cond_final0703.pdf

19.3 *Where the Communications Provider is requested to supply Directory Information in accordance with paragraphs 19.1 or 19.2, it shall do so on terms which are fair, cost-oriented and non-discriminatory, and in a format which is agreed between the Communications Provider and the person requesting the information. The Communications Provider shall comply with any direction made by the Director from time to time with respect to the format to be applied to the information.*

(E) on 22 July 2003, the Director also published a notification⁷ under regulation 4(10) of the Electronic Communications (Universal Service) Regulations 2003⁸ entitled '*Designation of BT and Kingston as universal service providers, and the specific universal service conditions - A statement and Notification issued by the Director General of Telecommunications on the implementation of the Universal Service Directive*' setting out his reasons for, in effect, designating BT as a universal service provider and setting the Universal Service Conditions in Annex A thereto, such as Universal Service Condition 7 ("**USC7**"), applicable to BT which, in effect, took effect on 25 July 2003, requiring in paragraph 7.4 that—

7.4 *BT shall supply the items in sub-paragraph (a) and (b) of paragraph 7.2 above on terms which are fair, objective, cost oriented and not unduly discriminatory, and in a format which is agreed between BT and the person requesting the information. Where no such agreement is reached, the Director may determine the format to be applied to the information in accordance with his dispute resolution functions.*

(F) on 29 December 2003, Ofcom took over the responsibilities and assumed the powers of the five former regulators it has replaced, including the Director and, by virtue of the Transitional Provisions, the above-mentioned notifications made by the Director are to have effect as if made by Ofcom under the relevant provisions of the 2003 Act;

(G) on 20 December 2005, Conduit (as a supplier of publicly available directory enquiry services within the meaning of USC7.2(b)), referred a dispute between it and BT for a determination by Ofcom under Section 185(2) of the 2003 Act;

(H) under USC7.2-5, BT is required to make available to persons specified in USC7 the database⁹ of directory information for all subscribers (including subscribers of other communications providers) that BT is required to maintain under USC7.1. As noted above, USC7.4 regulates the charges that BT may make for the provision of that database, in particular by requiring that those charges be cost oriented. Conduit submitted that BT's charges do not comply with USC7.4;

(I) on 13 January 2006, Ofcom decided to handle this dispute. In Ofcom's notification to the parties of that decision, Ofcom noted that USC7 does not properly implements Article 5 of the Universal Service Directive¹⁰ and it is therefore beyond Ofcom's powers and unlawful;

(J) on 3 February 2006, Conduit submitted that GC19 as well as USC7 was relevant to the issues in dispute. Among other things, Conduit stated that as well as discussions relating to the provision of the OSIS product, it had specifically requested the Directory Information of

⁷ See at: http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/uso0703.pdf

⁸ S.I. 2003/33.

⁹ This database is known as 'OSIS' (i.e. the Operator Service Information System).

¹⁰ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002.

BT's subscribers from BT Retail, but that BT had refused to provide the information other than through OSIS.

(K) under GC19, BT is required to make available to persons specified in GC19 the Directory Information of its subscribers and of other end-users assigned Telephone Numbers originally Allocated to BT, subject to paragraphs 19.3 and 19.4 of GC19. As noted above, paragraph 19.3 of GC19 requires BT to make such information available to the relevant persons on terms which are fair, cost-oriented and non-discriminatory. Conduit submitted that BT's charges do not comply with the requirements of paragraph 19.3 of GC19;

(L) having considered Conduit's submissions and BT's response to these submissions, Ofcom set the scope of the issues in dispute to be resolved as follows—

- i)** whether BT's charges to Conduit for supplying directory information ("**BT's charges**") are consistent with BT's obligations under USC7 and/or GC19;
- ii)** subject to Ofcom's determination in respect of the issues in (i) above—
 - a)** what BT's charges should be moving forward; and
 - b)** what BT's charges should have been for the period between 25 July 2003 and the date of Ofcom's final determination in relation to this dispute, and what (if any) adjustments should be made to payments made by Conduit to BT in respect of the directory information supplied during this period;

(M) in order to resolve this dispute, Ofcom has considered (among other things) the information provided by the parties and Ofcom has further acted in accordance with its general duties set out in Section 3 of, and the six Community requirements set out in Section 4, of the 2003 Act;

(N) a fuller explanation of the background to the dispute and Ofcom's reasons for making this Determination is set out in the explanatory statement accompanying this Determination;

(O) This draft determination is issued on 17 August 2006, for which responses are invited by 21 September 2006.

NOW, THEREFORE, OFCOM MAKES, FOR THE REASONS SET OUT IN THE ACCOMPANYING EXPLANATORY STATEMENT, THE FOLLOWING [DRAFT] DETERMINATION FOR RESOLVING THE DISPUTE:

I Declaration of rights and obligations, etc.

1 Subject to Ofcom's declaration in paragraph 3. below, it is hereby declared by Ofcom, pursuant to Section 190(2)(a) of the 2003 Act, that BT has not during the Relevant Period been required to make available to Conduit the contents of BT's database (currently known as 'OSIS') pursuant to paragraph 7.2(b), in accordance with the terms of paragraphs 7.4 to 7.6, of USC7.

2 For the avoidance of any doubt, as a result of the declaration in paragraph 1. above, no issue arises with respect to which Ofcom may lawfully make a declaration—

- a)** pursuant to Section 190(2)(a) of the 2003 Act, setting out the proper amount of a charge by BT to Conduit in respect of making available the contents of the OSIS database in machine readable form during the Relevant Period;

- b) pursuant to Section 190(2)(b) of the 2003 Act, fixing the terms or conditions (including charges) of BT making available to Conduit the contents of the OSIS database in machine readable form to take effect on the first day after the Relevant Period has come to an end;
- c) pursuant to Section 190(2)(c) of the 2003 Act, imposing an obligation, enforceable by BT or Conduit, to enter into a transaction between themselves on the terms and conditions fixed by Ofcom in relation to BT making available to The Number the contents of the OSIS database in machine readable form to take effect on the first day after the Relevant Period has come to an end,

by reference to, or under, USC7.

3 It is hereby declared by Ofcom, pursuant to Section 190(2)(a) of the 2003 Act, that BT has during the Relevant Period been required to make available to Conduit only the information specified in the Schedule hereto pursuant to paragraph 19.1, in accordance with the terms of paragraphs 19.3 to 19.4, of GC19 to the extent that such information has been provided by BT as part of the contents of the OSIS database. However, given that Conduit has requested BT to make available to it (as well as received) the full contents of the OSIS database for the Relevant Period, no issue arises with respect to which Ofcom may lawfully make a determination setting out the proper amount of a charge by BT to Conduit in respect of making available only the information specified in the Schedule hereto pursuant to paragraph 19.1, in accordance with the terms of paragraphs 19.3 to 19.4, of GC19.

4 It is hereby further declared by Ofcom, pursuant to Section 190(2)(a) of the 2003 Act, that, subject to Conduit making a reasonable request to BT for the information specified in the Schedule hereto on a day after the Relevant Period has come to an end, BT shall be required to make available to Conduit that information pursuant to paragraph 19.1, in accordance with the terms of paragraphs 19.3 to 19.4, of GC19. Consistent with GC19, it is open to Conduit and BT to negotiate and agree the means and extent, including format, in which that information is to be made available to Conduit but, for BT's charge in respect of making that information available to be cost oriented in accordance with paragraph 19.4 of GC19, BT shall recover from Conduit no more than the total sum of:

- a) BT's costs of establishing and operating the means of transmitting that information from BT to Conduit; and
- b) BT's costs of managing the relationship with Conduit, including account management, contract management and billing.

II Binding nature and effective date

5 This Determination is binding on BT and Conduit in accordance with Section 190(8) of the 2003 Act.

6 This Determination shall take effect on the day it is published.

III Interpretation

7 For the purpose of interpreting this Determination—

- a) except as otherwise defined in paragraph 8 below of this Determination, words or expressions used in this Determination (and in the recitals hereto) shall have the same meaning as they have been ascribed in, under or for the purposes of the GC notification;

- b) headings and titles shall be disregarded; and
- c) the Interpretation Act 1978 shall apply as if this Determination were an Act of Parliament.

8 In this Determination—

- a) **“2003 Act”** means the Communications Act 2003 (c.21);
- b) **“BT”** means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by Section 736 of the Companies Act 1985, as amended by the Companies Act 1989;
- c) **“Conduit”** means Conduit Enterprises Ltd, whose registered company number in the Republic of Ireland is 244275 and whose registered office in Ireland is Conduit House, East Point Business Park, Dublin 3, Republic of Ireland;
- d) **“Director”** means the Director General of Telecommunications as appointed under Section 1 of the Telecommunications Act 1984;
- e) **“GC notification”** has the meaning given to it in recital (D) to this Determination;
- f) **“GC19”** means General Condition 19 referred to in recital (D) to this Determination;
- g) **“Ofcom”** means the Office of Communications;
- h) **“Relevant Period”** means the period beginning on 25 July 2003 and ending on the day of the publication of this final Determination;
- i) **“Transitional Provisions”** means Sections 408 and 411 of, and Schedule 18 (see, in particular, paragraphs 2 and 7) to, the 2003 Act, the Communications Act 2003 (Commencement No.1) Order 2003 (S.I. 2003/1900 (C. 77)) and the Office of Communications Act 2002 (Commencement No.3) and Communications Act 2003 (Commencement No 2) Order 2003 (S.I. 2003/3142 (C. 125));
- j) **“USC7”** means Universal Service Condition 7 referred to in recital (E) to this Determination.

10 The Schedule to this Determination shall form part of this Determination.

David Stewart

Director of Investigations

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

{date}

Schedule

A Introduction

1 This Schedule specifies the information that BT shall make available in meeting a reasonable request of it from Conduit pursuant to paragraph 19.1 of GC19.

2 Paragraph 19.1 of GC19 provides that

“Where the Communications Provider has been Allocated Telephone Numbers in accordance with Condition 17, it shall meet all reasonable requests from any person to make available the Directory Information of:

(a) its Subscribers who have been assigned those Telephone Numbers; and

(b) any other End-User assigned a Telephone Number originally Allocated to the Communications Provider,

for the purposes of the provision of Directories and Directory Enquiry Facilities.”

3 The term ‘Directory Information’ is defined under paragraph 1 of Part 1 of the Schedule to the GC notification as follows—

““Directory Information” means, in the case of a Directory, the name and address of the Subscriber and the Telephone Number assigned to the Subscriber for their use of Publicly Available Telephone Services and, in the case of a Directory Enquiry Facility, shall be either such a Telephone Number of the Subscriber or information that such a Telephone Number of the Subscriber may not be supplied;”

4 Therefore, subject to paragraph 19.1(b) of GC19, BT is only required to make available under GC19 the name and address of each of its ‘Subscribers’ and the ‘Telephone Number(s)’ assigned to the ‘Subscriber’ for its use of ‘Publicly Available Telephone Services’.

5 The terms ‘Publicly Available Telephone Service’ (“**PATS**”) and ‘Subscriber’ are defined under paragraph 1 of Part 1 of the Schedule to the GC notification, respectively, as follows—

““Publicly Available Telephone Service” means a service available to the public for originating and receiving national and international calls and access to Emergency Organisations through a number or numbers in a national or international telephone numbering plan, and in addition may, where relevant, include one or more of the following services: the provision of operator assistance services, Directory Enquiry Facilities, Directories, provision of Public Pay Telephones, provision of service under special terms, provision of specific facilities for End-Users with disabilities or with special social needs and/or the provision of non-geographic services;

“Subscriber” means any person who is party to a contract with a provider of Public Electronic Communications Services for the supply of such services;”

B The ‘name’ of a BT ‘Subscriber’ of PATS

6 As regards the meaning of 'name' in the definition of 'Directory Information' for the purposes of GC19, BT shall only be required to make available the **name of**:

- a) **the 'Subscriber'**, that is a person (including, but not limited to, a body of persons corporate or unincorporate) who is a party to a contract with BT for the supply of PATS, to whom relevant 'Telephone Number(s)' has been assigned by BT, which 'Telephone Number(s)' has been allocated to BT by Ofcom (or previously, the Director) in accordance with General Condition 17;

and/or

- b) **any other End-User assigned a Telephone Number originally Allocated to BT,**

where that 'name' is to be interpreted as including only the information specified in Column 1, but excluding the information specified in Column 2, in Table 1.3 below in respect of living individual(s) and business(es), respectively, being either the said 'Subscriber' or 'other End-User' mentioned in sub-paragraphs (a) and (b) above:

Table 1.3: Relevant information for 'name'

PATS subscriber or 'other End-user' under GC19.1(b), of 'Telephone Number(s)'	Column 1 (part of 'name')	Column 2 (<u>not</u> part of 'name')
Living individual(s)	<ul style="list-style-type: none"> • forename(s) • surname(s) • nickname(s) • initial(s) 	<ul style="list-style-type: none"> • title(s), (e.g. <i>Dr, Mr, Mrs, Miss, Ms, Father</i>) • profession/job title, (e.g. <i>accountant, solicitor, Barrstr</i>) • honours, (e.g. <i>MBE</i>) • qualifications (vocational, academic or otherwise), (e.g. <i>BSc, MBA, FRCS</i>) • information other than in Column 1 about a living individual (e.g. <i>date of birth, nationality, etc.</i>) or any information alluding to a name that is not about the living individual as such (e.g. the name of a (BT) exchange to which calls are routed) or any description about the actual or intended activity/use of the 'Telephone Number' related to the living individual
Business(es) (and other bodies corporate or unincorporate)	<ul style="list-style-type: none"> • full, including initial(s) or parts of, name(s) of business, company, organisation or association, registered or unregistered, (e.g. <i>Barclays Bank PLC, St X's Primary School</i>) 	<ul style="list-style-type: none"> • except where part of the name in Column 1 under which the business is registered, trades or is otherwise generally known, any business, service or activity/use description (e.g. <i>carpenter, bookmaker, 24 hr service, Italian Restnt, primary school</i>)

	<ul style="list-style-type: none"> • trading name(s) • (business) suffix(es), (e.g. <i>plc, Ltd, &Co</i>) 	<ul style="list-style-type: none"> • information other than in Column 1 about a business (e.g. <i>registered company number, etc.</i>) or any information alluding to a name that is not about the business as such (e.g. the name of a (BT) exchange to which calls are routed) • information other than in Column 1 relating to a specific department or individual/position within a business (e.g. <i>accounts department; Customer Service Director; etc.</i>)
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C The 'address' of a BT's 'Subscriber' of PATS

7 As regards the meaning of 'address' in the definition of 'Directory Information' for the purposes of GC19, in respect of PATS provided to fixed locations, BT shall only be required to make available the installation address containing the information specified in Column 1, but excluding the information specified in Column 2, in Table 1.4 below, of a BT 'Subscriber' of PATS referred to in paragraph 6 of this Schedule above.

Table 1.4: Ofcom's interpreted meaning of 'address' in respect of PATS provided to fixed locations

Column 1 (part of '(installation)address')	Column 2 (<u>not</u> part of '(installation)address')
<ul style="list-style-type: none"> • premises/building/number (e.g. <i>1, The Cottage</i>) • street (e.g. <i>High Street</i>) • locality (e.g. <i>village or area within town</i>) • post town/city (e.g. <i>Bromley</i>) • county (e.g. <i>Kent</i>) • post code (e.g. <i>BR1...</i>) 	<ul style="list-style-type: none"> • billing address • correspondence address • contract address • trading/head office address • PO Box

8 In this Schedule, the term "installation address" means the premises at which the exchange line has been installed for the use of the PATS in question in respect of which the 'Telephone Number(s)' has been assigned; in turn, the term 'exchange line' means apparatus (including any equipment, machinery, or device and any wire or cable and the casing or coating for any wire or cable) comprised in a Public Telephone Network and installed for the purpose of connecting a telephone exchange run to a network termination point comprised in network termination and testing apparatus installed for the purpose of providing PATS at the premises at which the network termination and testing apparatus is located.

9 As regards PATS provided at a non-fixed location, the term 'address' should for the purposes of GC19 be interpreted as referring to the address given (if any) by the 'Subscriber' to BT for the purposes of entering into the contract of supply of such PATS.

D Relevant 'Telephone Number(s)' assigned to a BT 'Subscriber' of PATS

10 The term 'Telephone Number' is defined under paragraph 1 of Part 1 of the Schedule to the GC notification as follows—

““Telephone Number” means, subject to any order of the Secretary of State pursuant to Section 56(7) of the 2003 Act, any number, including data of any description, that is used (whether or not in connection with telephony) for any one or more of the following purposes:

- (a) identifying the destination for, or recipient of, an Electronic Communication;*
- (b) identifying the origin, or sender, of an Electronic Communication;*
- (c) identifying the route for an Electronic Communication;*
- (d) identifying the source from which an Electronic Communication or Electronic Communications Service may be obtained or accessed;*
- (e) selecting the service that is to be obtained or accessed, or required elements or characteristics of that service; or*
- (f) identifying the Communications Provider by means of whose network or service an Electronic Communication is to be transmitted, or treated as transmitted;”*

11 Therefore, for the avoidance of any doubt, any number which:

- a) does not satisfy the above definition of a 'Telephone Number', including which number is subject to any order of the Secretary of State pursuant to Section 56(7) of the 2003 Act (at the time of the publication of this Determination, certain numbers are excluded from that definition under the Telephone Number Exclusion (Domain Names and Internet Addresses) Order 2003, S.I. 2003/3281);
- b) has not been allocated in accordance with General Condition 17 by the Director or Ofcom to BT; or
- c) has not been assigned by BT under its contract with the 'Subscriber' in question for the use of PATS only,

is not required to be made available by BT under GC19.

E Directory status information

12 Pursuant to paragraph 19.4 of GC19, BT shall make available directory status information to ensure that to the requirements of Relevant Data Protection Legislation are complied with. In particular, BT shall indicate which of the following directory status options apply to the directory information provided for each specific Telephone Number:

- a) ordinary listing;
- b) directory enquiry only listing;
- c) ex-directory listing;
- d) no listing; and

e) partial address listing.

13 The term 'Relevant Data Protection Legislation' is defined under paragraph 1 of Part 1 of the Schedule to the GC notification (as amended by the Director on 11 December 2003) as follows—

““Relevant Data Protection Legislation” means the Data Protection Act 1998 and the Privacy and Electronic Communications (EC Directive) Regulations 2003;”

Section 2

Summary

Main issues

- 2.1 Ofcom has published two draft determinations under Sections 188 and 190 of the Communications Act 2003 (the "**2003 Act**") for resolving two disputes: the first between The Number (UK) Limited ("**The Number**") and British Telecommunications Plc ("**BT**"); and the second, between Conduit Enterprises Ltd ("**Conduit**") and BT.
- 2.2 These two disputes were referred separately to Ofcom by The Number and Conduit on 7 September 2005 and 20 December 2005, respectively. The disputes remain procedurally distinct, but Ofcom has decided to deal with both of them in this document.
- 2.3 The primary issue arising in these disputes is whether charges paid by The Number and Conduit to BT for the supply of the contents of BT's database (known as the 'Operator Services Information System' or "**OSIS**") are consistent with BT's regulatory obligations.
- 2.4 There are two regulatory rules potentially relevant to these disputes:
 - i) BT is required under Universal Service Condition 7 ("**USC7**") to supply on request the contents of its OSIS database in machine readable form to any person seeking to provide publicly available directory enquiry services, such as those provided by The Number and Conduit.
 - ii) Separately, BT is required under General Condition 19 ("**GC19**") to supply on reasonable request certain directory information for the purposes of the provision of certain services, again such as those provided by The Number and Conduit.
- 2.5 Under both of these regulatory rules, BT must supply the information on terms which are (among others) cost oriented and in a format agreed between the parties.
- 2.6 This document also, in dealing with the matters relevant to the dispute, sets out matters relevant to dealing with the complaint filed by Thomson Directories Limited ("**Thomson**") regarding BT's obligations under GC19.

History

- 2.7 The background to these disputes, including the nature of the OSIS database and the parties' businesses and the history of the disputes, is set out in **Section 3**. The submissions made by all interested parties are summarised at **Section 4**.
- 2.8 In August 2002 and July 2000, The Number and Conduit, respectively, entered into licence agreements with BT for their use of, and access to, BT's OSIS database. Under standard terms, BT charged each licensee a combination of fixed annual charges and a "per search" charge for the data needed to provide directory enquiry services to a user. BT's own businesses also paid these charges under internal accounting arrangements.

- 2.9 BT's OSIS database contains directory information of both BT and non-BT customers and BT pays other communications providers 66 pence per compiled entry in the database to obtain this data¹¹.
- 2.10 In June 2003, BT issued notices to The Number and Conduit to terminate their OSIS licences, in the expectation that new licence terms could be agreed. No new licences have yet been agreed. In the meantime, the present licences effectively remain in force by BT granting a series of short term licence extensions.
- 2.11 During negotiations between the parties to each dispute as to the terms of new licences, the European Court of Justice ("**ECJ**") delivered its judgment on 25 November 2004 in Case C-109/03, *KPN Telecom BV v. OPTA* ("**the KPN judgment**"). This judgment was a ruling as to what 'relevant information' had, as a minimum, to be supplied to ensure provision of universal service directories and directory enquiry services under a provision of an EC directive that has now been repealed and, so far as is material to these disputes, been replaced by Article 25(2) of the Universal Service Directive ("**USD**").
- 2.12 The Court decided on the facts in that case that "relevant information" comprised the name, address and telephone number of subscribers who have not expressly objected to being listed in a published directory. The Court further decided that only costs which related to the additional costs of making such data available to the requesting parties could be recovered by KPN. As regards data other than 'relevant information', the Court held that, if such data was supplied even though not required by the EC directive, there is no requirement which prevents any additional costs (e.g. for compilation) from being invoiced to requesting parties.

Overview of Ofcom's analysis

- 2.13 The scope of these disputes was set by Ofcom to be:
- (1) Whether BT's charges to The Number and Conduit for supplying directory information ("BT's charges") are consistent with BT's obligations under USC7 and/or GC19.
 - (2) Subject to Ofcom's determination in respect of the issues in (1) above:
 - a. What BT's charges should be moving forward; and
 - b. What BT's charges should have been for the period between 25 July 2003 and the date of Ofcom's final determination in relation to these disputes; and what, if any, adjustments should be made to payments made by The Number and Conduit, respectively, to BT in respect of the directory information supplied during this period.
- 2.14 In setting the scope in this way, Ofcom made clear that the assessment of this dispute would need to consider:
- i) what rights and obligations, if any, were relevant to this dispute in relation to USC7; and

¹¹ BT has set a 'split charge' for directory information of 23.8p for a 'simple' record and £2.44 for a 'complex' record. New communications providers will be paid these sums, but in practice CPs that signed contracts before these charges were introduced are almost all on the previous terms and will be paid 66p.

- ii) what rights and obligations, if any, were relevant to this dispute in relation to GC19.
- 2.15 **Section 5** summarises the key legal, regulatory and contractual issues relating to these disputes. **Section 6** and **Section 7** then outline Ofcom's provisional conclusions in relation to USC7 and GC19 respectively.
- 2.16 Ofcom has concluded, provisionally, that USC7 is unlawful: see **Section 6**. As a result, Ofcom is minded to determine that BT is not required to provide the OSIS database under USC7. No issues can therefore arise in relation to the consistency of BT's charges for OSIS with USC7.
- 2.17 Given this, the main issue to be determined by Ofcom under the scope of these disputes is whether BT's respective charges to The Number and Conduit for supplying certain directory information via the OSIS database are consistent with BT's obligations under GC19.
- 2.18 To assess this, Ofcom has considered a series of propositions in relation to the application of GC19 (see **Section 7**). These are summarised below in order to guide the reader through this document and clearly explain Ofcom's reasons for reaching its provisional conclusions on resolving these disputes.
- 2.19 First, Ofcom has considered whether BT is a relevant communications provider for the purposes of GC19.
- 2.20 Ofcom's view is that, as explained at **paragraphs 7.17 to 7.18**, BT is a 'person' who provides ECNs (as well as ECSs) to whom Telephone Numbers have been Allocated by Ofcom (or Ofcom's predecessor, Oftel). Accordingly, BT is a relevant communications provider for the purposes of GC19. In these disputes, BT has not disputed that it is in principle subject to the obligations imposed under GC19.
- 2.21 Second, Ofcom has considered the date from which BT been required to comply with GC19.
- 2.22 Ofcom's view is that, for reasons set out at **paragraphs 7.19 to 7.24**, BT (in common with any other person qualifying as a relevant [CP] for the purposes of GC19) has been required to comply with its obligations under GC19 from 25 July 2003. It does not appear to Ofcom that BT has contested this point in these disputes.
- 2.23 Third, Ofcom has considered whether The Number and Conduit each have 'rights of access' under GC19.
- 2.24 Ofcom's view is that, as explained at **paragraphs 7.26 to 7.40**, The Number and Conduit both have 'rights of access' as they provide voice DQ services to end-users in the UK who access their services through certain telephone numbers prefixed 118. In these disputes, BT has not disputed that these parties have 'rights of access' under GC19.
- 2.25 Fourth, Ofcom has considered whether The Number and Conduit have each effectively made a request to BT for the purposes of GC19
- 2.26 For reasons set out in **paragraphs 7.41 to 7.72**, Ofcom considers that both The Number and Conduit have, as a sub-set of data from OSIS, in effect requested information falling within GC19 as part of their continuing requests under the licence arrangements for the full bundle of OSIS data. In these disputes, BT has contested

that The Number and Conduit made such requests under GC19 and BT has therefore appealed Ofcom's inclusion of BT's GC19 obligations as part of the scope of the issues in dispute to the Competition Appeal Tribunal. Those proceedings are, in effect, pending Ofcom's final determination of these disputes.

- 2.27 Fifth, Ofcom has considered what Directory Information BT is required to supply to each of The Number and Conduit on (regulated) cost oriented terms under GC19.
- 2.28 As explained at **paragraphs 7.76 to 7.92**, Ofcom concludes, provisionally, that the relevant information that BT is required to supply under GC19 relates to BT's subscribers of PATS (or, as the case may be, BT's ex-subscribers where BT was originally allocated the telephone number) and, with respect to information relating to those subscribers or ex-subscribers, comprises:
- i) the 'name' of such subscribers: see **paragraphs 7.98 to 7.103** which set out Ofcom's views on what is captured by this term;
 - ii) the 'address' of such subscribers: see **paragraphs 7.104 to 7.116** which set out Ofcom's views on what is captured by this term; and
 - iii) the 'Telephone Numbers' of such subscribers: see **paragraphs 7.117 to 7.139** which set out Ofcom's views on what is captured by this term.
- 2.29 Given that GC19 applies subject to the requirements of data protection legislation, Ofcom considers that, as explained at **paragraphs 7.140 to 7.148**, BT must make available certain information in order to comply with those requirements.
- 2.30 Finally, given the above, Ofcom has considered whether BT has made Directory Information falling within GC19 available to both The Number and Conduit on cost oriented terms.
- 2.31 For reasons set out in **paragraphs 7.210 to 7.331**, Ofcom provisionally concludes that it does not consider that BT's overall charges for the supply of OSIS are, or have been, inconsistent with BT's obligations under GC19. This is because both The Number and Conduit have requested, received and paid for access to the entire OSIS database and only a sub-set of that information falls within the regulated cost oriented terms of GC19.
- 2.32 Given this, no issues of past overpayments since 25 July 2003 arise in these disputes under the scope.
- 2.33 As to BT's charges moving forward, Ofcom considers that, should either party make a request from BT for its GC19 data as a distinct, stand-alone product, BT should provide such a data set immediately and only seek to recover the costs of making this available to the requesting party. At **paragraphs 7.222 to 7.230** of this document, Ofcom discusses what costs it regards should in principle be recovered in making GC19 data available to a requesting party.

Implications and Policy considerations

- 2.34 As Ofcom's provisional findings in these disputes are likely to have an indirect impact on persons other than the parties to these disputes, Ofcom has set out the potential wider implications in **Section 8**.

- 2.35 In that Section, Ofcom also sets out its plans to address, in a policy project, some important issues flowing from this analysis, if Ofcom confirms its provisional conclusions in the final determinations to resolve these disputes. Given Ofcom's provisional view that USC7 is unlawful, Ofcom will need to consider, as a priority, how the obligations imposed by Article 5 of the USD should be implemented in the UK.
- 2.36 Ofcom remains committed to competition in the supply of a range of directory information services in the UK and will consider as part of its ongoing DQ policy project whether it needs to make any changes to GC19 and the question of any ex ante regulation for wholesale access to BT's OSIS data.
- 2.37 In the meantime, until Ofcom has consulted with stakeholders on any such appropriate changes and any new regulation has been put in place, Ofcom expects that BT will continue to supply persons, such as The Number and Conduit, with OSIS data on a commercial basis under their OSIS licences by granting them further licence extensions and without materially altering their terms. Ofcom intends to seek appropriate assurances from BT to confirm this.

Section 3

Background to and history of the disputes

Introduction

- 3.1 This Section sets out key facts relevant to the parties' two disputes concerning the terms of access to certain directory information supplied by BT:
- the provision of directory information services in the UK, covering market liberalisation and the range of services generally on offer (see **paragraphs 3.3 to 3.9**);
 - BT's provision of the 'Operator Service Information System' ("**OSIS**") database to providers of directory information services (see **paragraphs 3.10 to 3.24**);
 - the nature of the businesses of the parties to the disputes and other interested parties (see **paragraphs 3.25 to 3.46**);
 - the history of negotiations between the parties prior to the referral of the dispute to Ofcom for resolution (see **paragraphs 3.47 to 3.58** in relation to The Number/BT dispute and **paragraphs 3.72 to 3.78** in relation to the Conduit/BT dispute);
 - Ofcom's decision to accept the disputes (see **paragraphs 3.59-3.65** in relation to The Number/BT dispute and **paragraphs 3.79-3.82** in relation to the Conduit/BT dispute);
 - the issues considered in including GC19 issues within the scope of the disputes (see **paragraphs 3.66-3.71** in relation to The Number/BT dispute and **paragraphs 3.83 to 3.86** in relation to the Conduit/BT dispute); and
 - the finalised scope of the disputes (see **paragraphs 3.83 to 3.86**)
- 3.2 Section 4 summarises the details of the main submissions made by the parties in regards to the disputes.

The provision of directory information services in the UK

- 3.3 The term 'directory information services' is used here to refer to retail services provided to UK consumers which allow the user to find a particular telephone number by reference to information about the user of that number (for example, their name). The three main categories of directory information services are:
- a) **voice directory enquiry ("DQ") services** where users call a particular telephone number to speak to an operator about their search requirements in the expectation of receiving the telephone number they are looking for;

- b) **on-line DQ services** where users will submit search requirements via a website in the expectation of receiving the telephone number they are looking for¹²; and
 - c) **paper directories** of telephone numbers together with other data.
- 3.4 The services offered can vary within the above categories. However, two main types of searching criteria exist:
- a) **name-specific searches** – i.e. the user knows the name of the person/business they require the telephone number for. e.g. “Mr R Jones, Acacia Avenue, Bristol”; “Natwest Bank, High Street, Ilford”;
 - b) **classified business searches** – i.e. the end-user wants a telephone number for a particular type of business maybe in a particular location. e.g. “Plumber in Muswell Hill”; “taxi firm in Nottingham”; “printers in Belfast”.

Voice DQ and on-line DQ services

- 3.5 The voice DQ market was liberalised in December 2002, when services on the new ‘118 XXX’ number range began operating in parallel with the legacy ‘192’ and ‘153’ DQ service access codes. The legacy services ceased operating in August 2003. Prior to the introduction of ‘118 XXX’ numbers, end-users using ‘192’/‘153’ would be routed to the DQ service provider selected by their network provider. BT operated its own voice DQ business and therefore all 192/153 calls made by BT-connected customers would route to the BT-operated voice DQ service. Other voice DQ providers would compete with BT for the wholesale business of the remaining network providers in order to receive the 192/153 calls of their customers.
- 3.6 The launch of ‘118 XXX’ numbers meant that users could directly select their preferred voice DQ service. This led to a number of new entrants providing voice DQ services in the UK (including The Number and Conduit), and it resulted in an overall reduction in BT's share of voice DQ calls. Most voice DQ providers offer callers a choice of name-specific or classified business searches. Many voice DQ providers will also offer call connection services to customers, meaning that calls are forwarded to the searched-for number without the need to re-dial. Ofcom published consumer research on voice DQ services in March 2006¹³ which showed that the average cost for voice DQ services was 54p per call without call connection for a single number request.
- 3.7 Since 2002, voice DQ volumes have fallen, while growing internet usage has led to the use of on-line DQ services increasing rapidly. On-line DQ services also tend to offer both name-specific and classified business searches to users. On-line DQ services are usually offered free to users, funded by advertising and paid-for classified links.

Paper directories

- 3.8 BT provides the only comprehensive residential plus business A to Z listings paper directory on a UK-wide basis (by distributing directories covering 171 different local areas). Each BT customer will pay for and receive a local area directory from BT as

¹² Ex-directory records, and those for inclusion only in voice DQ services are excluded from on-line searches.

¹³ http://www.ofcom.org.uk/media/news/2006/03/nr_20060327

part of BT's line rental service. Ofcom understands that BT also provides directories to customers of other communications providers ("CPs") on commercial terms.

- 3.9 Other providers supply directories containing business A to Z listings and classified business listings, where businesses are categorised by business type for ease of reference ("Plumbers", "Taxi firms", "Printers"). These directories are also published on a 'local' basis (although the defined 'local' area will vary according to publisher) and, in Ofcom's understanding, usually distributed free of charge to individuals in that local area. Businesses usually receive a free line entry in classified directories, with providers of those directories paid by the businesses which advertise in them, who pay according to the type of entry they select.

OSIS

The data in OSIS

- 3.10 BT provides the OSIS database to directory information providers ("DIPs"). OSIS provides directory data in relation to UK telephone numbers and is the database of directory information which BT itself uses to provide its own directory information services. Although all or most fixed line numbers will be in OSIS, according to the wishes of the subscribers, the number of mobile numbers in directories is lower in terms of the proportion of subscribers.
- 3.11 OSIS is provided by 'BT Contact' which is a business unit that is part of the BT Group division, BT Wholesale. OSIS is operated separately from the 'BT Directories' business (that is part of BT Retail) and provides BT's retail directories and DQ services to users. BT Contact claims to provide BT Directories with access to the OSIS data on non-discriminatory terms.
- 3.12 OSIS is used by DIPs to conduct searches requested by the users of their services. It contains various types of data relating to the use of a person's telephone number, including the manner in which such a person wishes to appear in a directory, whether for purposes of displaying its listings together with other listings (known as 'grouping') or for the purposes of processing data under data protection legislation. BT has structured OSIS so that the data is contained in various separate 'data fields'. Details of the 43 data fields provided to OSIS licensees are set out in Table 3.1 below:

Table 3.1: OSIS data fields

NO	FIELD NAME	VALUE	EXPLANATION
1	Identifier	CCYY-MM-DD- hh.mm.ss.micros	Unique identifier for each record in specified format.
2	Record type	A C E G	Categorises record as single or grouped entry Single entry Single entry cross reference Group Entry Group Entry cross reference

Draft determination on BT's charges for directory information

		J	Group Header
3	Main/Additional indicator	M, A	Identifies the main entry where identical entries exist for the same number – eg husband and wife both listed
4	Cessation date	CCYY-MM-DD	Effective date for cessation where applicable
5	Entry type	1 2 3	Captures the customer's chosen directory status DE – normal directory entry XD/NC – ex-directory no calls DQR – number is available from voice DQ
6	Tariff/customer type	1 2 3	Categorises record according to tariff type Business Not used Residential
7	Merge indicator	Any alphanumeric character	Used to distinguish between different groups with the same header details
8	Priority	A, S, Z	Sortation priority within a grouped entry. Sortation is alphabetical but can be over-ridden – A pushes to top, Z to bottom, S to middle.
9	Telephone number (internal)	e.g 113=2345678	Formatted telephone number without leading zero and = after exchange code. If ex-directory field will contain asterisks
10	Telephone number (dialable)	e.g 01132345678	Dialable number including exchange code.
11	Implementation/run date	CCYY-MM-DD	For update records this contains the effective date for the action. For data dump records (load) this contains the date that the data dump was produced from OSIS
12	Exchange code	Eg 113=234	Relevant exchange code to which number connected, including separator
13	Postcode	Eg N10 1QX	Standard format postcode May not be present if Partial Address Indicator set
14	Group Tariff Marker	1 3	Business and Mixed Residential

Draft determination on BT's charges for directory information

15	Line type	F L M N P R T Z	Type of telephone line: Fax Local rate (084) Mobile Normal Premium (09) Regional National (087) Freecall (080)
16	Free Chargeable indicator	F, C, space	Indicates whether subscriber is charged for this directory entry: 'C' if entry is to be billed, otherwise 'F' or space for free
17	Indentation level	0, 1, 2, 3, 4	Used to structure grouped entries on OSIS. For single listings field will be null
18	DQ code/PB code	e.g. -01, 545	National phonebook area
19	BCM code	Spaces 9950 9955 9999	Business classification Residential FAX Doctor Business
20	Suppression code		A 64-character string each representing a downstream system
21	Parent identifier		For grouped entries, Identifies the parent record as set out in field 1
22	Typeface	1 4 5	Type of print required in directory entry Normal Bold Superbold
23	Action indicator	D, I or U	What to do with this OSIS record: Delete, insert or update

Draft determination on BT's charges for directory information

24	TPS marker		Not used
25	Name	Brown/Smith Bayliss & Cox	Surname or name of a business/company. Initials contained within the name of a firm or company when followed by another name should be included in the name field. For example "Smith B & Jones"
26	Sub Header	HEAD OFFICE	Additional information that can sub-divide groups on a geographical basis, or by department within company detailed within group.
27	Sub Sub header	Parks Dept	See above
28	Sub Sub Sub header	Southern Branches	See above
29	Title	Dr, Sir, The, etc	Note: relates to professional titles, not Mr, Mrs, Ms
30	Initials/Forename	John, John B., J.B.	
31	Honours	OBE, MBE, KBE	
32	Business suffix	& Co., & Co. Ltd., Bros, Sons	
33	Business description	Coal Merchant, Dental Surgeon	Can be up to three words for standard entries. Up to five words for Special Directory Entries (end user charge applies)
34	Qualifier	Spares Department, Appointments only	Part of group entry. The data in this field will be shown on OSIS before the house number. Used to capture data which cannot be included in other fields
35	Premises/building name or No.	30, 30A, The Manor	
36	Street	Whitehall, Sussex Gdns, etc	
37	Locality	Stanningfield, Bromsgrove, Aston	Local area name if different from that of telephone exchange name
38	Appendix	Stores only	Appears after the locality in OSIS
39	Exchange	Cardiff, Tyneside, Brighton	Exchange name for a given phone number

40	Cross reference	TSB – see also Lloyds TSB	An entry which refers the reader to another entry in OSIS
41	Post Town		Not used
42	Post County		Not used
43	Partial Address Indicator	Y or N	Allows entry to be provided with limited address details for privacy reasons

3.13 As well as the 3 fields within OSIS which are *a/ways* not used (as noted above), not all data fields will be populated for all records. To aid discussion, Ofcom has categorised the data fields into four broad headings:

- a) **Identification data fields:** these are the fields which contain information about the user of the specific telephone number, including name and address, and the specific use to which the number is put.
- b) **Record categorisation data fields:** these are the fields which provide information about the record which will allow the record to be categorised and, hence, used in a particular way. This covers a wide variety of categorisations ranging from data about whether it is a residential or business record to the typeface required for the particular entry in the paper directory.
- c) **Record processing data fields:** these are the fields which are provided for the purpose of enabling the record to be processed by the receiving party – e.g. is the record an addition, a deletion or an amendment? When should this record take effect?
- d) **Group structure data fields:** these are the fields which specifically relate to how certain “grouped entry” records should be structured and presented within the database. “Grouped entries” are discussed below.

3.14 **Table 3.2** lists the data fields within OSIS under each of these headings.

Table 3.2: Ofcom's categorisation of OSIS data fields

Identification data fields	Record categorisation data fields	Record processing data fields	Group structure data fields
(9) Telephone number (internal)	(5) Entry type	(1) Identifier	(2) Record type
(10) Telephone number (dialable)	(6) Tarrif/customer type	(4) Cessation date	(7) Merge indicator
(13) Postcode	(12) Exchange code	(3) Main/Additional indicator	(8) Priority
(25) Name	(14) Group tariff marker	(11) Implementation date	(17) Indentation level
(26) Sub header	(15) Line type	(20) Suppression code	(21) Parent identifier
(27) Sub sub header	(16) Free chargeable indicator	(21) Action indicator	
(28) Sub sub sub header	(18) DQ code/Phone book code		
(29) Title	(19) BCM code		
(30) Initials/Forename	(22) Typeface		
(31) Honours	(39) Exchange		
(32) Business suffix	(43) Partial address indicator		
(33) Business description			
(34) Qualifier			
(35) Premises/building name or No.			
(36) Street			
(37) Locality			
(38) Appendix			
(40) Cross reference			

Data record types within OSIS

- 3.15 OSIS records may be either single or grouped entries. Single entries (including most residential entries) link one telephone number to one individual at an individual address. In contrast, grouped entries contain individual records relating to a group of telephone numbers allocated to a person or organisation. For instance, a bank or local authority may have a list of telephone numbers which they want to be published in paper directories and available to the public via on-line and voice DQ services. These numbers will have individual records which will be then be grouped together for ease of reference.
- 3.16 OSIS records for grouped entries will invariably have more "identification data fields" set than single entries and, for these entry types, "group structure data fields" will be set. The extra identification data fields within a grouped entry provide details about the actual user of that specific telephone number that distinguish it from other telephone numbers provided to the same organisation. e.g. for a local authority, records within a grouped entry will contain the name of the authority (e.g. "London Borough of Haringey"; "Winchester City Council"), the department within that authority to which the number connects (e.g. "Housing"; "Education") and possibly the use to which that number is put within the department (e.g. "Rental enquiries";

“24 hour line”; “emergency call-out”). To this end, the organisation can populate any of 6 data fields ‘Name’, ‘Sub header’, ‘Sub sub header’, ‘Sub sub sub header’, ‘Qualifier’ and ‘Appendix’ to distinguish between telephone numbers within a grouped entry.

- 3.17 The “group structure” fields then relate specifically to how the grouped entries will appear within OSIS. Organisations can have ‘header’ records which will contain no data other than the name of the organisation and then structure all other records within the group beneath this. The indentation field allows the organisation to structure the appearance so that records for, say, different sections within a department will appear indented beneath that department name. The prioritisation field will allow records to be ordered in different ways other than alphabetically. i.e. the group structure data fields are used as tools for shaping the appearance of a group of entries for ease of reference for end-users looking for specific numbers within a large organisation.
- 3.18 Given this, for voice DQ and on-line DQ name-specific searches, the data fields provided by OSIS should allow DIPs to identify specific telephone numbers from the information provided by end-users.
- 3.19 In Ofcom’s understanding, DIPs providing classified business searches will need to further enhance the data provided by OSIS to allow searches by business classification. This is because although BT provides data in the ‘business description’ field, this is not considered a suitable and reliable means of classifying businesses for search purposes. Many DIPs will buy business classification data separately to allow them to conduct such searches. However, those providing business classification data will need to contact the specific business to discuss how they should be classified.

BT’s provision of OSIS

- 3.20 **Annex 4** contains background on the way in which OSIS is provided by BT, covering the relationships BT has in place to obtain data and the tasks BT undertakes to provide the OSIS product. A brief summary of key facts is set out below:
- a) BT acquires data from various upstream CPs on terms set out in Schedule 11 of the Standard Interconnect Agreement (“**SIA**”) including charges BT pays for the receipt of data. (These contractual arrangements are considered further in **Section 5** of this document);
 - b) BT aggregates all data received to provide access to OSIS. Licensees to OSIS receive twice yearly ‘refreshes’ of the database via CD-Rom and update files via file transfer 6 days a week containing all amendments, deletions and additions to the records within OSIS.
 - c) BT charges OSIS licensees according to Section 2.0 of the BTWDS Price list (see **Annex 5**). Amounts are paid to BT based on the use the licensee makes of the OSIS data to provide retail directory information services (e.g. providers of voice DQ services will pay amounts to BT based on the number of searches they make of the OSIS data; providers of paper directories will pay amounts to BT based on the number of paper directories distributed). BT Directories accounts for transfer charges in respect of its own use of the OSIS data to provide BT’s retail directories and voice and on-line DQ services.

- d) The OSIS licence sets out the terms on which licensees may use the data and requirements to provide accurate and auditable usage information to allow invoices to be sent reflecting the use of the database.
- e) In Ofcom's understanding, OSIS licensees include:
 - i) providers of voice DQ services;
 - ii) providers of on-line DQ services;
 - iii) providers of paper A to Z listings directories;
 - iv) providers of classified directories;
 - v) tele-appenders who provide larger scale search facilities – e.g. organisations such as Equifax will obtain data from OSIS and use this to run searches on a large number of subscribers at the same time for, say, marketing companies requiring contact numbers.

The “Customer-defined” nature of OSIS data

3.21 A key point to note about the data provided by OSIS is that, in Ofcom's understanding, it is “Customer-defined”. That is, the records within OSIS are broadly built to reflect the express wishes of the subscriber of the relevant telephone number about how they wish to appear and be presented in directories and via DQ services. This will cover:

- a) the name they wish to appear, which may differ from the contractual subscriber's name to reflect the actual user of the relevant telephone number (e.g. a parent may subscribe to a phone line, but want their child's name to appear on OSIS in relation to the telephone number; a business may outsource their telecoms purchasing so that the name of the subscriber of the phone line differs from the name of the actual user);
- b) the additional identification data they may want attached to specific numbers to, for instance, appear in the ‘business description’ data field or those identification data fields specifically related to group entries – e.g. the three sub-header fields and the appendix and qualifier fields; and
- c) the overall appearance of the entry, including the way in which any group captions are structured and presented for ease of reference. Businesses creating group captions may want to direct enquirers to certain key numbers within departments for specific purposes and OSIS provides the flexibility to structure a group caption to do this.

3.22 **Annex 4** sets out the tasks BT undertakes to provide the OSIS data, including the tasks involved in gathering data. The fact that records are “customer-defined” means BT needs to undertake specific customer-facing activity to ensure the customer's wishes are captured in their OSIS record.

Nature of businesses of the parties and other interested parties

Introduction

- 3.23 To consider this dispute, it is necessary to take into account the nature of the parties' businesses.

The Number

- 3.24 The Number provides voice and on-line DQ services to end-users in the UK. Voice DQ services are provided by The Number using a variety of numbers including, most notably, 118118.¹⁴ On-line DQ services are provided on the www.118118.com website.
- 3.25 The Number provides a number of other linked information services alongside its on-line and voice DQ services, such as cinema listings and train times. The Number also offers call connection services to callers to some of its voice DQ services. As part of providing such call connection services, Ofcom understands that The Number utilizes its switch to make an outbound call to the requested telephone number using another provider's electronic communications network (within the meaning of section 32 of the 2003 Act) under certain wholesale interconnect arrangements agreed between The Number and such a provider. Pursuant to section 405 (which refers to section 32(4)) of the 2003 Act, Ofcom therefore understands that the outbound call is contractually made under the direction or control of The Number and is ultimately to be regarded as the person providing the call, i.e. the electronic communications service. In these circumstances, The Number is to be regarded as a 'communications provider' for the purposes of the 2003 Act.
- 3.26 The Number entered into its current OSIS licence agreement with BT in July 2002.
- 3.27 The Number is owned by its US parent company, InfoNXX Inc ("**InfoNXX**"), a DQ service provider in the US.

Conduit

- 3.28 Conduit operates its own branded voice DQ services in the UK through 118888 and 118848. Conduit also provides on-line DQ services through its web-site www.118.com. Conduit also provides DQ services to certain UK mobile operators on an outsourced basis. As part of its voice DQ services, Conduit provides call connection services. Ofcom understands that Conduit, in providing such call connection services, makes outbound calls to the requested telephone number under similar arrangements to those mentioned above by The Number. Ofcom therefore considers that, for similar reasons, Conduit is also to be regarded as a 'communications provider' for the purposes of the 2003 Act.
- 3.29 Conduit entered into the current OSIS licence with BT in July 2000, and has been purchasing the OSIS product from BT since October 1999.
- 3.30 Conduit is wholly-owned by Irish holding company Kandel Limited ("**Kandel**").
- 3.31 However, on 12 April 2006, Kandel became a wholly-owned subsidiary of InfoNXX, so that InfoNXX and Kandel ceased to be distinct. In a decision of 21 June 2006, the

¹⁴ The Number also uses the following numbers: 118811; 118241; 118359; 118360; 118434; 118442; 118525; 118551; 118661; 118686; 118819; 118275; and 118227.

Office of Fair Trading ("**OFT**") stated that it did not believe that the merger had resulted or could be expected to result in substantial lessening of competition within a market or markets in the UK. As such, the OFT did not refer the merger to the Competition Commission under section 22(1) of the Enterprise Act 2002¹⁵.

BT

- 3.32 BT provides telecommunications services in the UK, including narrowband and broadband connection services; local, national and international calls services, internet products and services and IT solutions. BT is both a provider of electronic communications networks and electronic communications services and, as such, is 'communications provider' for the purposes of the 2003 Act. In the year to 31 March 2006, BT's group turnover was £19.5 billion.
- 3.33 BT also provides voice DQ services in the UK through a variety of number, including most notably 118 500, and on-line DQ services via the www.bt.com website. BT also offers call connection services on some of its voice DQ services. BT also provides a 'three-in-one' paper directory on a local level consisting of 'A to Z' residential listings, 'A to Z' business listings and classified business listings.
- 3.34 As discussed above, BT supplies the OSIS database to licensees on a wholesale basis.

Thomson Directories Limited

- 3.35 Thomson Directories Limited ("**Thomson**") publishes printed classified directories in the UK. It is a wholly-owned subsidiary of SEAT Pagine Gialle SpA ("SEAT").
- 3.36 Thomson publishes 173 classified local directories, covering substantially most of the UK population.
- 3.37 Thomson entered into the current OSIS licence agreement on 1 January 2001.
- 3.38 On 4 November 2005, Thomson submitted a complaint to Ofcom that BT had breached and continued to breach USC7 by failing to provide access to OSIS data on cost-oriented terms consistent with the principles established in the KPN judgment. Given the overlap between this complaint and the two disputes under consideration, Thomson is treated as an interested party in relation to the disputes.

LSSi

- 3.39 LSSi provides national databases of telephone listings in the US, Canada, Ireland, France and the UK.
- 3.40 LSSi signed the OSIS licence in June 2002.
- 3.41 In January 2006, LSSi notified Ofcom that it wished to be treated as an interested party in respect of the disputes involving The Number and Conduit.

¹⁵ See: <http://www.of.gov.uk/NR/rdonlyres/0C67BEE7-4EBF-49D5-B62F-A743DBE51FA2/0/Infonxx.pdf>

Kingston Communications

- 3.42 Kingston Communications (“**Kingston**”) provides a range of wholesale and retail communications services to business and residential customers.
- 3.43 The Kingston Contact Centre division provides DQ services, not only for the Kingston group, but also for wholesale service providers.
- 3.44 Kingston notified Ofcom in March 2006 that it wished to be treated as an interested party in respect of the disputes involving The Number and Conduit.

History of dispute between The Number and BT

The Number's original request to resolve a dispute

- 3.45 The Number originally wrote to Ofcom on 7 September 2005, referring a dispute between it and BT under Section 185(2) of the 2003 Act as to whether and to what extent BT's charges for the supply of directory information were “fair, objective, cost oriented and not unduly discriminatory” in compliance with USC7 (the “**Initial Request**”). In so doing, The Number made specific reference to the KPN judgment.
- 3.46 The Number's view was that the only costs BT should seek to recover from OSIS charges were the incremental costs of making the contents of OSIS available and any costs properly incurred in obtaining directory data from third party telecommunications operators.
- 3.47 The Number considered that it was in dispute with BT over both the current and historic charges for access to OSIS as, it claimed, these were not consistent with BT's obligations under USC7.
- 3.48 The Number specifically requested that Ofcom resolve the dispute by issuing a direction to BT:
 - a) fixing BT's charges for making available the contents of the OSIS database to The Number moving forwards;
 - b) making retrospective adjustments to BT's OSIS charges to reflect past over-payments made by The Number since 30 August 2002;
 - c) directing BT to make payments to The Number in respect of costs and expenses incurred in submitting the dispute; and
 - d) directing BT to continue to supply the OSIS database to The Number.

History of negotiations between The Number and BT

- 3.49 In its Initial Request, The Number provided an overview of negotiations with BT in relation to the supply of data from OSIS. The Number stated that it had been in negotiations with BT since the third quarter of 2003 for a new licence to use the OSIS database. The specific question of charges for access to OSIS became an active issue after the KPN judgment was published in November 2004. The Number wrote to BT with a view to negotiating charges on 29 April 2005. In light of the KPN judgment, The Number stated:

“BT's charges should...only represent the incremental cost incurred by it in communicating directory information to [The Number] and any costs properly incurred in obtaining directory information from other third party operators. BT should not be passing on its costs in compiling or allocating its own directory information...”

- 3.50 Given this view, The Number asked BT to provide cost information to allow it to assess whether BT's charges were consistent with the principles established in the KPN case.
- 3.51 In response, BT stated that it was “*actively assessing any implications from the KPN case for the licensing of directory data under UK communications law and regulation.*”¹⁶ However, BT did not provide cost information to The Number as it stated that it was seeking clarity from Ofcom on the implications of the KPN judgment in the UK.
- 3.52 Following several exchanges between the parties, BT stated in a meeting with The Number on 2 August 2005 that it would only provide cost information to Ofcom and that it did not wish to negotiate OSIS charges with 30 or 40 individual OSIS licencees
- 3.53 In the light of BT's position, The Number advised BT that it would be referring the matter to Ofcom.
- 3.54 Ofcom received The Number's dispute referral as noted above on 7 September 2005. At that time, Ofcom did not accept the dispute for resolution (and instead proposed that the dispute would remain unresolved – in an administrative process known as the “enquiry phase” – pending resolution of the issues relating to the potentially *ultra vires* nature of USC7 (discussed below).
- 3.55 On 11 November 2005, The Number wrote to Ofcom requesting that Ofcom accept the dispute and, on 1 December 2005, appealed Ofcom's decision not to accept the dispute for resolution to the Competition Appeals Tribunal.
- 3.56 On 5 December 2005, Ofcom informed all parties that it accepted that it had erred in not accepting the dispute for resolution, and that it was appropriate for Ofcom to handle the dispute. As noted below, Ofcom also notified the parties that exceptional circumstances applied to this dispute and therefore that Ofcom considered that the four month statutory timetable normally applicable to disputes did not apply (and, given the need to deal with the issues relating to USC7, could not be met). Subsequently, The Number withdrew its appeal.

Ofcom's acceptance of the dispute between The Number and BT

- 3.57 Ofcom notified the parties on 5 December 2005 of its reasons under Section 186 of the 2003 Act that it was appropriate for Ofcom to handle the dispute.
- 3.58 A dispute referred under section 185(2) of the 2003 Act (as is the case with the two present disputes) must be one between different communications providers. Ofcom accepted the dispute on the basis that there is sufficient nexus between the provision of call connection services to users (i.e. the specific service in respect of which The Number qualifies as a communications provider) and the issue under dispute in

¹⁶ Letter from BT to The Number, dated 2 June 2006

relation to the provision of OSIS data, to conclude that The Number is a communications provider in relation to its dispute with BT. Specifically, The Number requires access to directory information from BT in order to identify telephone numbers for its users and it is this which enables The Number to also provide the call connection service to users

- 3.59 Furthermore, Ofcom considered that the parties were in dispute over the charges for access to OSIS and that this dispute would not be resolved by alternative means.
- 3.60 However, Ofcom stated that it considered that there were exceptional circumstances which would be likely to affect the statutory timetable for resolving the dispute. These exceptional circumstances related to advice received by Ofcom from leading Counsel about the probable incompatibility of USC7 with the requirements of Chapter II of the Universal Service Directive ("**USD**").
- 3.61 On 15 December 2005, Ofcom wrote to the parties attaching the Competition Bulletin entry for the dispute which included a proposed scope referring to USC7. Parties were invited to comment on the proposed scope and responses were received from both BT and The Number.
- 3.62 On 13 January 2006, Ofcom wrote again to the parties attaching a summary of the legal advice received from Counsel. This confirmed that Ofcom had been advised by Counsel that USC7 did not, among other things, properly implement Article 5 of the USD. Ofcom stated that, as a matter of domestic law, this advice, if accepted, would lead to the conclusion that USC7 was beyond Ofcom's powers and therefore unlawful.
- 3.63 Comments were invited from the parties on this legal advice and responses were received from both BT and The Number on 3 February 2006.

Inclusion of GC19 issues within scope of dispute between The Number and BT

- 3.64 On 23 February 2006, in light of the concerns raised about the legality of USC7, The Number submitted a supplementary submission to its original dispute referral which included reference to GC19 as that condition applied to BT ("**the Amended Request**"). The Number requested that the scope of the dispute should consequently be amended to reflect its supplementary submission. The non-confidential "Supplementary Sub-section F" relating to GC19 was forwarded to BT on 24 February 2006 and comments were invited.
- 3.65 The supplementary sub-section provided by The Number asserted that the charges paid by The Number under clause 7.1 of the relevant OSIS licence were directly related to BT's obligations under GC19 in addition to those under USC7 given that BT had chosen to discharge its obligations under GC19 (relating to its own-subscriber data) exclusively through the OSIS database. The Number then argued that the charges paid for access to information from OSIS were not consistent with the cost orientation obligations under GC19 given the KPN judgment.
- 3.66 Ofcom was requested to consider whether BT's ongoing and historic charges for information were, and had been, in accordance with its GC19 obligations for the period from when The Number originally signed the OSIS licence agreement in 2002.
- 3.67 BT provided comments on The Number's supplementary submission on 6 March 2006. BT argued that the additional sub-section contained nothing which established that there was a dispute between The Number and BT concerning GC19 that Ofcom

had the power to resolve under the 2003 Act. BT stated that The Number had never made a request for BT subscriber data under GC19 and that the only request from The Number had been for the data of all subscribers of any communications provider under USC7.

- 3.68 In its letter dated 8 March 2006, Ofcom informed The Number and BT of its views on the scope of the dispute before it. Ofcom had already taken the view that the parties were in dispute in relation to the charges set by BT for directory information, currently provided via OSIS. Ofcom's view was that, in considering the rights and obligations relevant to the provision of this information, it was appropriate to consider both the rights and obligations relating to USC7 and those relating to GC19. It is to be noted here that **Section 7** sets out in detail Ofcom's specific analysis in relation to BT's claim that The Number had never made a request under GC19.
- 3.69 Comments were invited on the proposed amended scope and the proposed scope was published in the Competition Bulletin. Comments were received by the parties and Ofcom informed the parties of its finalised scope in a letter dated 24 March 2006. This scope is set out at **paragraph 3.87** below.

History of dispute between Conduit and BT

Conduit's request to resolve a dispute between Conduit and BT

- 3.70 Conduit wrote to Ofcom on 20 December 2005, referring a dispute between it and BT about "the charges levied by BT for access to its OSIS database" (the "Request"). Similarly to the points raised by The Number, Conduit considered that the charges were not in compliance with BT's obligations under USC7, in particular by reference to paragraph 7.4 of that Condition and in the light of the KPN judgment.
- 3.71 Conduit listed the following issues as being in dispute:
- a) the charges for the supply of OSIS data by BT to Conduit, which in Conduit's view did not comply with the requirements of USC7; and
 - b) reimbursement of sums overpaid since October 1999.
- 3.72 Conduit requested that Ofcom resolve the dispute by:
- a) issuing a direction determining the price for providing OSIS data to Conduit;
 - b) issuing a direction requiring BT and Conduit to enter into a transaction in respect of the determined charges; and
 - c) issuing a direction requiring BT to repay amounts to Conduit in respect of past overpayments by Conduit for the OSIS data.

History of negotiations between Conduit and BT

- 3.73 In its request, Conduit stated that it originally wrote to BT on 11 May 2005 requesting that BT reduce its charges for access to OSIS and apply these lower rates retrospectively from 1 June 2000¹⁷ to 1 July 2005. Conduit also requested a detailed

¹⁷ This letter referred to backdating to 1 June 2000, although Conduit subsequently requested backdating to October 1999.

breakdown of costs incurred by BT in managing the OSIS database and a copy of its pricing proposals from 1 July 2005 onwards.

- 3.74 BT responded on 26 May 2005 stating that it was not in a position to respond to Conduit's requests and was considering what implications, if any, arose out of the KPN judgment.
- 3.75 Conduit wrote to BT Retail on 3 June 2005 requesting access to BT Retail's own subscriber directory data. In response, BT stated that it would require considerable technical and system changes for access to this data and that Conduit should continue to use the OSIS data which included the BT Retail subscriber data.
- 3.76 Following further correspondence, BT wrote to Conduit on 5 October 2005. In its letter, BT stated that the effect of the KPN judgment in the UK was unclear and no consensus had been reached at an industry level. As such, BT's view was that a formal public consultation should be conducted. BT also refuted Conduit's claims that its charges for OSIS data are not cost-oriented and stated that it was not appropriate to disclose pricing and cost information to Conduit to demonstrate this.

Ofcom's acceptance of dispute between Conduit and BT

- 3.77 Ofcom notified the parties on 13 January 2006 of its reasons under Section 186 of the 2003 Act that it was appropriate for Ofcom to handle the dispute.
- 3.78 Ofcom considers that for similar reasons identified in respect of the dispute between The Number and BT, there is sufficient nexus between Conduit's provision of call connection services to users and the issues under dispute in relation to the provision of OSIS data, to conclude that Conduit is a communications provider in relation to this dispute.
- 3.79 Furthermore, Ofcom considered that the parties were in dispute and that the dispute was unlikely to be resolved by alternative means.
- 3.80 That letter also set out details of the legal advice that Ofcom had received from its leading Counsel that USC7 did not properly, among other things, implement Article 5 of the USD and set out that, because of this, exceptional circumstances were likely to apply in this case which would affect the statutory four-month timescale for resolution.

Inclusion of GC19 issues within scope of dispute between Conduit and BT

- 3.81 In its submission dated 3 February 2006, Conduit stated, among other things, that GC19 as well as USC7 was relevant to the issues in dispute. Conduit stated that as well as discussions relating to the provision of the OSIS product, it had specifically requested the directory information of BT's own subscribers from BT Retail (see letter of 3 June 2005 referred to at **paragraph 3.77** above), but that BT had refused to provide the information other than through OSIS.
- 3.82 As such, Conduit claimed that OSIS was the "agreed format" in which BT provided the data under GC19. Conduit went on to submit that the terms of the relevant OSIS licence meant that BT was failing to meet its obligations under GC19, particularly in light of the KPN judgment. Conduit stated that Ofcom should determine the extended scope of the dispute and invite further comments from the parties.

- 3.83 On 23 February 2006, BT wrote to Ofcom and challenged Conduit's view that the scope of the dispute should be amended to include reference to GC19 compliance. In particular, BT stated that its letter of 9 June 2005 to Conduit did not constitute a refusal to supply BT's own subscriber data on a stand alone basis. Rather, BT argued that the letter stated that it was exploring technical and system changes and possible solutions to allow this data to be provided separately and that BT would keep Conduit and Ofcom informed of progress. **Section 7** sets out the detail of Ofcom's views on BT's submission.
- 3.84 On 8 March 2006, Ofcom wrote to Conduit and BT setting out its view that the parties were in dispute over the terms of supply of OSIS data and that in considering this issue it was appropriate to consider BT's obligations under both USC7 and GC19. Comments were invited on a proposed amended scope for the dispute and Ofcom wrote to the parties on 26 March 2006 with its finalised scope for these disputes. This is set out in **paragraph 3.85** below.

Scope of the Disputes

- 3.85 Ofcom has set the scope of both disputes as follows:
- (1) Whether BT's charges to The Number and Conduit for supplying directory information ("BT's charges") are consistent with BT's obligations under USC7 and/or GC19.
 - (2) Subject to Ofcom's determination in respect of the issues in (1) above:
 - a. What BT's charges should be moving forward; and
 - b. What BT's charges should have been for the period between 25 July 2003 and the date of Ofcom's final determination in relation to these disputes, and what, if any, adjustments should be made to payments made by The Number and Conduit, respectively, to BT in respect of the directory information supplied during this period.
- 3.86 In setting the scope in this way, Ofcom made clear that the assessment of this dispute would need to consider:
- a) what rights and obligations, if any, were relevant to this dispute in relation to USC7 in the light of its preliminary assessment that USC7 was ultra vires and in light of comments from the parties; and
 - b) what rights and obligations, if any, were relevant to this dispute in relation to GC19 taking full account, among other things, of the KPN judgement.

Period of potential retrospectio

- 3.87 In their original submissions, both The Number and Conduit requested reimbursement of perceived overpayments for OSIS data back to the dates at which they both began receiving OSIS data. i.e. in the case of The Number, April 2002 and in the case of Conduit, October 1999.
- 3.88 As the scope specifies, Ofcom has decided that the relevant period for consideration of any retrospective adjustment of charges in this respect is between 25 July 2003 and the date of Ofcom's final determination in relation to this dispute. In setting the

scope in this way, Ofcom clarified that it would not consider and give any direction in respect of any overpayments prior to this period.

- 3.89 This is because Ofcom's jurisdiction to handle this dispute falls under and in accordance with Section 185(2) of the 2003 Act, which concerns a dispute relating to rights or obligations conferred or imposed by or under Part 2 of the 2003 Act. In other words, the relevant obligations imposed on BT under Part 2 of the 2003 Act for the purposes of these disputes relate to BT's obligations under USC7 and/or GC19, which came into force with effect from 25 July 2003. Ofcom's powers under Section 190 of the 2003 Act are therefore limited to any period of payments made to BT since 25 July 2003.

Confidential information

- 3.90 During the course of our investigation of the matters for consideration in this dispute, we have received a substantial amount of information (including submissions) from the parties (as well as certain other persons). Ofcom has received such information either by those persons sending it voluntarily (or on our invitation) or in response to formal requests by Ofcom using its statutory powers.
- 3.91 Most of the information has been sent to Ofcom on a confidential or commercially sensitive basis, despite our repeated requests to the parties that they should make, where possible, information (particularly with regard to submissions of a legal nature) available to all other interested parties, and either to send it all on a non-confidential basis or to mark for redaction only such limited material that properly may be regarded as raising confidentiality concerns.
- 3.92 We have made those requests as we have taken the general view in this case that disclosure of information (including, where we consider it appropriate, on our website) is likely to facilitate the resolution of these disputes. In particular, in order to resolve the issues at dispute, Ofcom needs to first set out the parties' positions and views and then assess them to arrive at our determination, which process includes responding to the parties' points in an open and transparent manner, so far as is possible.
- 3.93 In light of this, we have taken a view on information sent to us and marked by the parties as confidential or commercially sensitive information. We have decided that, for above-mentioned reasons, that a certain amount of that information should nonetheless be disclosed in the public consultation version of this document for the purpose of facilitating the carrying out of our functions in resolving this dispute, pursuant to our disclosure powers under Section 393 of the 2003 Act.

Section 4

Submissions received

Introduction

- 4.1 Various submissions and representations have been made by the parties to the disputes and other interested parties throughout the period of Ofcom's consideration of the relevant issues. This Section summarises the views of these parties and considers the points made by the parties regarding each of three topics:
- a) consistency of OSIS charges with USC7 obligations and relevance of the KPN judgment;
 - b) the enforceability of USC7; and
 - c) consistency of OSIS charges with GC19 obligations and relevance of the KPN judgment.
- 4.2 Ofcom's views on the points raised by parties are addressed in detail in **Section 6** and **Section 7** as part of Ofcom's overall assessment of BT's charges. This section therefore only provides an overview of the positions of the parties on the main issues rather than detail all the specific points raised.

Consistency of OSIS charges with USC7 obligations

Introduction

- 4.3 As detailed in **Section 3**, both Conduit and The Number originally submitted that their disputes with BT over the charges made to access OSIS data related to the consistency of those charges with BT's USC7 obligations in the light of the KPN judgment and its interpretation of the meaning of "cost orientation". Thomson raised similar issues in its separate complaint. The parties' submissions in relation to USC7 therefore focussed on:
- a) setting out why the KPN judgment, which was focussed on the predecessor to Article 25 of the USD, was relevant to the provision of data under USC7 by linking the obligation to provide OSIS data to the obligation to provide "relevant information"; and
 - b) explaining how "cost orientation" should be interpreted within the context of USC7 given the principles established by the KPN judgment.

Main submissions from The Number

- 4.4 The Number referred to various parts of the KPN judgment and the Opinion of the Advocate General¹⁸ to conclude that "*Relevant information must... be sufficient to enable users of a directory to identify the subscribers for whom they are looking*" and stated that this requirement was met by all the data fields provided by BT through OSIS.

¹⁸ Opinion of Advocate General Poiares Maduro in case C-109/03, KPN Telecom BV v. OPTA, delivered on 14 July 2004.

- 4.5 The Number also stated that, under USC7, BT is required to make available “the contents of the database” to any person seeking to provide publicly available DQ facilities. The Number therefore argued that in the UK context “relevant information” is comprised in “the contents of the database”.
- 4.6 In terms of charging, The Number asserted that in the KPN judgment, “cost oriented” was held to mean that charges for the supply of relevant information could include “*only the costs of actually making [relevant information] available to third parties*”.
- 4.7 Notwithstanding The Number’s assertion that “relevant information” comprises the entire contents of the OSIS database, it also considered an alternative approach in which OSIS is argued to contain “additional data” as well as “relevant information”.
- 4.8 The Number referred to the decision of the German regulator dated 17 August 2005, in which, The Number stated, the regulator held that all mandatory data, irrespective of whether the obligation to provide the data was based on national or EU law, may only be charged at incremental cost. As USC7 requires BT to provide “the contents of the database” to third parties, The Number asserted that the contents are therefore “mandatory data”, regardless of whether they consist of both “relevant information” and “additional data”. BT should, therefore, be providing OSIS data at the incremental cost of provision.¹⁹

Main submissions from Conduit

- 4.9 Conduit agreed with The Number’s submission in relation to the assessment of what constitutes “relevant information” for the purposes of Article 25(2) of the USD and concluded that the fields currently made available in the OSIS database constitute relevant information.
- 4.10 Conduit stated that BT’s charges did not reflect the KPN judgment as they were based on a per-search fee which did not reflect the costs of making the data available to third parties. Conduit stated that BT’s charges were based on the stand-alone costs incurred in compiling and maintaining the OSIS database. Conduit’s view was that the KPN judgment established that such costs should not be passed on to third parties accessing OSIS.
- 4.11 Furthermore, Conduit argued that the charges were excessive by comparison to those imposed by operators in other EU member states and also in relation to Conduit’s own estimates of what it should cost BT to run OSIS in terms of personnel and systems costs.

Main submissions from Thomson

- 4.12 Thomson’s view is that Member States have discretion under the USD as to the scope of information that is to be supplied under Article 25 of the USD. Thomson argued that in the UK this discretion was exercised so as to encompass the complete contents of the database under USC7.2. Given this, BT should only charge the costs of making the OSIS database available to third parties
- 4.13 On 4 November 2005, Thomson submitted a complaint (the “Complaint”) that BT was in violation of its obligations under USC7.2 and USC7.4 in that BT was not providing

¹⁹ The Number also noted that in this case, BT’s provision of any “additional information” would be subject to UK and EC competition law.

subscriber data on cost-oriented terms. As a result, Thomson requested that Ofcom take enforcement action and issue a notification under Section 94 of the 2003 Act to that effect. Thomson also requested that BT remedy the consequences of its breaches by paying back to Thomson the excess charges paid to BT, together with interest. Thomson cited the KPN judgment as giving clear guidance on the fees that can be charged for providing subscriber data to directory publishers under the USD – i.e. that these fees are limited to the additional costs of supplying the data to directory publishers and should exclude the costs of compiling and maintaining the database.

- 4.14 Thomson argued that BT's charges are usage-based and not cost-based and that the principles on which fees are charged are incompatible with BT's obligations as interpreted in the light of the KPN judgment. Furthermore, Thomson argued that fees that vary according to the type of directory provided by the recipient cannot be imposed as the costs of provision would not vary according to the use to which the data is ultimately put.

Main submissions from BT

- 4.15 BT's response to The Number's Initial Request was that it was not appropriate for Ofcom to seek to resolve the issues listed as being in dispute through its dispute powers under the 2003 Act. This was because all of the issues were related to how the KPN judgment should be applied in the UK and BT's view was that, since any decision by Ofcom on such issues would have significant and far-reaching implications for the directory services industry as a whole and not just The Number, the issues were more appropriately considered and resolved through a public consultation. Furthermore, BT stated that it could not feasibly negotiate charges for OSIS data with The Number on a bilateral basis.
- 4.16 More substantive points were raised by BT in response to Thomson's complaint. BT stated that it had acted in good faith to create a pricing structure for OSIS which was compliant with its cost-orientation principles. BT stated that the OSIS usage-based pricing structure incorporating total cost recovery was introduced by BT at the instructions of Oftel following its market review of the directories sector in 1997-1999. BT stated that it had shared details of this OSIS pricing structure with Oftel in February 2000 and the fundamentals of the pricing had not changed since then. BT's view was that Oftel (or Ofcom) had never raised any objections or any issues of concern and that, therefore, it would be unfair to find that BT had breached USC7 based on a new interpretation of cost-orientation.
- 4.17 BT also argued that the scope of the KPN judgment did not cover the provision of directory data for use in classified directories. This was because, BT claimed, the ECJ had interpreted the predecessor to Article 25(2) of the USD as meaning that the Member State's obligation to ensure that entities allocating telephone numbers to subscribers respond to all reasonable enquiries about the provision of relevant information "comes within the context of the supply of a universal service."
- 4.18 In responding to the dispute referral made by Conduit, BT made similar points to those raised above, concluding overall that Ofcom should consider the implications of the KPN judgment to the provision of directory data in the UK as part of a broader policy consultation.

The validity of USC7

Introduction

- 4.19 Ofcom wrote to all parties, including Thomson, on 13 January 2003 attaching a summary of advice from its Leading Counsel stating its preliminary conclusion that USC7 was unlawful. All parties provided comments on this advice on or shortly before 3 February 2006 which are summarised below and addressed in more detail in Section 8.

Main submissions from The Number

- 4.20 The Number disagreed with Ofcom's view on the validity of USC7 and stated that Ofcom had taken an inappropriately narrow view of Oftel's discretion when implementing the USD in the UK.
- 4.21 The Number's view was that it was within Oftel's power, within the general designation of BT as a universal service provider, to require BT to provide OSIS at the wholesale level as part of a scheme which overall ensured that at least one comprehensive DQ service was available to end-users.
- 4.22 In the alternative, The Number argued that, even if Article 8(1) of the USD did not permit this, USC7 was in any event permitted under the broad discretion given at Article 3 of the USD to determine the most efficient and appropriate approach for ensuring that the universal service is available to end-users at affordable prices.
- 4.23 The Number also argued that BT was out of time to challenge the domestic vires of USC7.

Main submissions from Conduit

- 4.24 Conduit first questioned whether Leading Counsel had been properly directed by Ofcom in three areas, namely:
- a) whether Counsel had been properly directed to consider the correct statutory basis for USC7. Conduit claimed that Ofcom's summary was based on an analysis of Sections 65-67 of the 2003 Act, whereas USC7 was imposed under the Electronic Communications (Universal Service) Regulations 2003 (the "**Universal Service Regulations**"), which were made under the European Communities Act 1972;
 - b) whether Counsel had been directed to Article 5 of the Competition Directive or whether any consideration had been given to the compatibility of such Counsel's interpretation of Article 8 of the USD with the new directives or broader public law principles of proportionality. In particular, Conduit referred to the following text in the Summary: "... Therefore, Article 8 plainly requires that the Article 5 services should be achieved by designating one or more undertakings to guarantee that all end-users receive comprehensive DQ services". Conduit argued that, in practice, such an approach would involve Ofcom granting the provider of the 'universal directory enquiry service' a special right to require all network operators providing connections to end users to interconnect with (or otherwise to provide access to) its service. No such right is enjoyed by other DQ service providers; and

- c) whether Counsel had been directed to consider the legal analysis conducted by Oftel prior to imposing USC7.

4.25 Notwithstanding these comments, Conduit submitted that it was not in a position to evaluate the reasoning in Ofcom's Summary of Leading Counsel's advice and therefore requested that Ofcom provide it with a copy of Counsel's opinion. This was provided to Conduit and the other parties on 2 March 2006. No further comments were received from Conduit on this point.

Main submissions from Thomson

4.26 Thomson reserved its position in relation to the legality of USC7 in light of the potential consideration of BT's compliance with GC19 in relation to the provision of certain directory data to Thomson.

Main submissions from BT

4.27 BT agreed with Leading Counsel's conclusions on USC7, and, in so doing, made a number of specific comments which are considered in detail in **Section 6**.

Consistency of OSIS charges with GC19, including meaning of "relevant information"

Introduction

4.28 As set out in **Section 3**, in light of Ofcom's preliminary view on the status of USC7, both The Number and Conduit requested that Ofcom also consider whether BT's charges for the provision of certain directory data were consistent with BT's obligations under GC19. Similarly to the points raised in relation to BT's obligations under USC7, the parties have focussed on the following main points:

- a) explaining how the KPN judgment relating to the provision of "relevant information" under the predecessor to Article 25 of the USD is relevant to the provision of directory information under GC19 and how this relates to the provision of OSIS data.
- b) outlining the appropriate interpretation of "cost orientation", in light of the KPN judgment, for the setting of BT's charges for the provision of certain directory data.

Main submissions from The Number

4.29 In its Amended Request, The Number stated that BT has chosen to discharge its obligations under GC19 exclusively through the OSIS database and the OSIS licence agreement. The Number highlighted that no separate supply of BT subscriber data is, or has ever been, available to wholesale directory enquiry service providers from BT.

4.30 The Number stated that, therefore, at the very least, BT's charges for OSIS which are attributable to the provision of BT's numbers are required by GC19 to be cost-oriented. Given the KPN judgment this meant, according to The Number, that charges for this data should include only the incremental costs of making those numbers available to The Number – e.g. the cost of FTP file transfers.

4.31 The remainder of BT's charges for OSIS reflect the directory information in the OSIS database provided by other upstream providers in relation to their own subscribers.

The Number argued that as the only way of receiving BT's own subscriber data is through OSIS, OSIS licensees are obliged, if they want to receive BT's data, to pay for other CPs' data as well, even though they have no direct relationship with these providers and no control over their charges. BT, it is argued, should therefore ensure that the data provided to the OSIS database by the other CPs is also provided on cost-oriented terms in accordance with GC19.

- 4.32 In this respect, The Number argued that the uniform charge of 66p per listing paid to other upstream CPs cannot be cost-oriented because it is excessive and because the charge should not be identical for each CP. The Number argued that BT should only be allowed to pass on in OSIS charges any costs reflecting payments to upstream CPs to the extent that these are cost oriented.
- 4.33 The Number also argued that the "agreed format" for the supply of BT's own data under GC19 was and is the OSIS database, meaning that BT's charges for OSIS as a whole rather than just BT's own subscriber data must be cost-oriented. As such, it is argued that BT must only pass on the costs of making available to The Number the incremental costs of making OSIS available. The Number believes that BT in fact passes on all the costs attributed to the assembly and running of the OSIS database to third party users.
- 4.34 Notwithstanding its view on "agreed format", The Number argued that it was clear that BT's charges should not include any amount attributable to the internal transfer payment made by BT Wholesale to BT Retail in respect of BT subscriber numbers input onto OSIS. The Number argued that any such charge would represent the sort of double recovery and "excessive and unwarranted offset" of costs which, according to the KPN judgment, voice telephony providers should not be allowed to make as these costs relate to activities which are inextricably linked to the provision of the telephony service.
- 4.35 Given its arguments, The Number concluded that BT has been contravening GC19 since its inception.
- 4.36 In a further submission, on 26 May 2006, The Number set out its views on what, in light of KPN, should constitute "relevant information" in the UK context.
- 4.37 The Number's view is that "relevant information" is information sufficient to identify subscribers and that as all the data The Number receives from the OSIS database is necessary to correctly identify subscribers, it is therefore all "relevant information".
- 4.38 Furthermore, The Number argued that a DQ service in the UK should be "good quality" given that one of the aims of the Revised Voice Telephony Directive (Directive 98/10/EC) ("**RVTD**") was to ensure the availability of "good quality fixed public telephone services". The quality of the DQ service provided by The Number was dependent on the provision of all the OSIS data fields. All should therefore be considered "relevant information".

Main submissions from Conduit

- 4.39 Conduit agreed with the above assessment by The Number as to what constitutes 'relevant information' for the purposes of Article 25(2) of the USD and that the fields currently made available in the OSIS database constitute 'relevant information'.
- 4.40 In its letter dated 26 May 2006 to Ofcom, Conduit made additional submissions specifically as regards its interpretation of 'relevant information' for the purposes of

this dispute in the context of the KPN case. In that letter, Conduit maintained that all of the information contained in OSIS is 'relevant information' or 'basic data' in accordance with KPN as such fields are necessary to identify a subscriber and are subsets of data identified as basic information by the ECJ. Also, Conduit submitted that no information which is systematically provided in the OSIS database should be considered 'additional data' in accordance with the KPN judgment.

Main submissions from Thomson

- 4.41 In its letter dated 5 June 2005 to Ofcom, Thomson submitted that the name, address and telephone number of a subscriber constitute 'relevant information' as defined in the KPN case. Thomson then further submitted that the fields in OSIS that Thomson has indicated that it uses make up 'relevant information'.
- 4.42 Thomson did not, however, believe all data provided by OSIS constitutes relevant information, giving the example of group structuring information provided by OSIS. Thomson concluded that, were 'grouping' data unavailable via OSIS, it would use its own formatting methods to structure listings and that grouping data should not be considered "relevant information".
- 4.43 Thomson did however specifically argue that the concept of 'relevant information' under Article 25(2) USD includes aggregated third party subscriber information, that is, in effect 'Directory Information' also of non-BT subscribers.

Main submissions from BT

- 4.44 BT argued that The Number had never made a request to BT for BT data under GC19 and had only requested the data of all subscribers of any CP under USC7. Given the absence of a specific request, there could be no "evidence of failed commercial negotiation" or that "best endeavours have been used to resolve the dispute through commercial negotiation" as required, according to BT, before Ofcom resolves a dispute.
- 4.45 BT stated that the dispute alleged by The Number concerned BT's supply of OSIS data and therefore to the charge for all access to all subscribers' directory data, not a charge for BT subscriber data on its own. Any dispute related only to USC7 and BT referred to the fact that Ofcom had been advised that this condition was unlawful.
- 4.46 In concluding that Ofcom should not address GC19 by extending the scope of the dispute between The Number and BT, BT proposed that a public consultation was the most appropriate and efficient way of dealing with issues concerning GC19.
- 4.47 BT also commented on The Number's argument that as the only way of receiving a supply of BT's own subscriber data is through OSIS, BT's charges for all OSIS data should be cost-oriented. BT's view was that if USC7 was unlawful, then BT would only have a regulatory obligation to provide the data covered by GC19 on cost oriented rates. BT's charges for all other data supplied by BT would not be regulated. The Number was therefore asking Ofcom to find a regulatory obligation where none existed.
- 4.48 BT's view is that OSIS and its pricing structure implemented USC7, not GC19. BT's OSIS charges were for all data not for BT subscriber data on its own. As it was Ofcom's decision to impose USC7 on BT, Ofcom imposed on BT and the industry the current OSIS arrangements and the expense of implementing them. If Ofcom determined retrospectively that OSIS and its pricing structure implemented GC19, it

would be changing the basis on which the OSIS pricing arrangements and pricing structure were introduced.

- 4.49 BT's starting point was that 'relevant information' should be strictly interpreted under the KPN ruling; it also noted that the term 'Directory Information' is also restrictively defined in the GCs.
- 4.50 Whilst BT sees merit in interpreting KPN literally to mean that GC19 requires only subscriber name, address and telephone number, it recognises the data needs to be fit for purpose. However, in so doing, it rejects the claims that all the data currently provided by BT through OSIS is necessary for the provision of comprehensive DQ services. Instead BT sets out the specific data fields that it believes could be made available to fulfil GC19 obligations. These are set out in more detail in **Section 7**.

Section 5

Summary of legal, regulatory and contractual provisions

Introduction

- 5.1 This Section sets out certain legal, regulatory and contractual provisions relevant to Ofcom's consideration of BT's regulatory obligations in these disputes as set out in **Section 6** and **Section 7**, respectively, of this document. In particular, the structure of this Section is as follows:
- i) key provisions of relevant Community law (see **paragraphs 5.3 to 5.10**);
 - ii) key provisions of relevant implementing domestic UK legislation and regulation (see **paragraphs 5.11 to 5.17**);
 - iii) details of the KPN judgment (see **paragraphs 5.18 to 5.68**); and
 - iv) contractual arrangements relating to the provision of OSIS (see **paragraphs 5.69 to 5.92**).
- 5.2 A more detailed account of the previous and current legal and regulatory framework is set out at Annexes 6, 7 and 8 of this document to provide the full context in which the above-mentioned key provisions should be considered.

Key provisions of relevant Community law

- 5.3 Under Chapter II (entitled 'Provision of a defined set of services which may be funded in the context of universal service') of the (now repealed, but which is central to the analysis in the KPN judgment) **RVTD**, Article 6 set out certain 'directory services', the availability of which Member States were required to ensure pursuant to Article 3(1) of the RVTD, in the following terms:

Article 6

Directory Services

1. The provisions of this Article are subject to the requirements of relevant legislation on the protection of personal data and privacy, such as Directive 95/46/EC and Directive 97/66/EC.
2. Member States shall ensure that:
 - (a) subscribers have the right to have an entry in publicly available directories and to verify and, if necessary, correct or request removal of that entry;
 - (b) directories of all subscribers who have not expressed opposition to being listed, including fixed, mobile and personal numbers, are available to users in a form approved by the national regulatory authority, whether printed or electronic, or both, and are updated on a regular basis;
 - (c) at least one telephone directory enquiry service covering all listed subscribers numbers is available to all users, including users of public pay telephones;

3. In order to ensure provision of the services referred to in paragraph 2(b) and 2(c), Member States shall ensure that all organisations which assign telephone numbers to subscribers meet all reasonable requests to make available the relevant information in an agreed format on terms which are fair, cost oriented and non-discriminatory.

4. Member States shall ensure that organisations providing the service referred to in paragraph 2(b) and 2(c) follow the principle of non-discrimination in their treatment and presentation of information provided to them.

- 5.4 In the context of universal service directory services, the 7th recital to the RVTD's preamble clarified the following:

(7) Whereas provision of directory services is a competitive activity; whereas Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data regulates the processing of personal data (2); whereas Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (1), in particular in the Integrated Services Digital Network (ISDN) and in digital mobile networks, will give the subscriber the right to be omitted, or to have certain data omitted, from a printed or electronic directory at his or her request; whereas users and consumers desire comprehensive directories and directory enquiry service covering all listed telephone subscribers and their numbers (including fixed, mobile and personal telephone numbers); whereas the situation whereby certain telephone directories and directory services are provided in a manner which is perceived to be free of charge to the user is not affected by this Directive;

- 5.5 The RVTD was repealed by Article 26 of the Framework Directive and was replaced, in part, by Article 5 (under Chapter II, entitled 'Universal Service Obligations, including Social Obligations') of the Universal Service Directive as follows:

Article 5

Directory enquiry services and directories

1. Member States shall ensure that:

(a) at least one comprehensive directory is available to end-users in a form approved by the relevant authority, whether printed or electronic, or both, and is updated on a regular basis, and at least once a year;

(b) at least one comprehensive telephone directory enquiry service is available to all end-users, including users of public pay telephones.

2. The directories in paragraph 1 shall comprise, subject to the provisions of Article 11 of Directive 97/66/EC, all subscribers of publicly available telephone services.

3. Member States shall ensure that the undertaking(s) providing the services referred to in paragraph 1 apply the principle of non-discrimination to the treatment of information that has been provided to them by other undertakings.

- 5.6 In addition, under Chapter IV of the USD (entitled 'End-User Interests and Rights'), another provision relating to directories and DQ services is included as follows:

Article 25

Operator assistance and directory enquiry services

1. Member States shall ensure that subscribers to publicly available telephone services have the right to have an entry in the publicly available directory referred to in Article 5(1)(a).
2. Member States shall ensure that all undertakings which assign telephone numbers to subscribers meet all reasonable requests to make available, for the purposes of the provision of publicly available directory enquiry services and directories, the relevant information in an agreed format on terms which are fair, objective, cost oriented and non-discriminatory.
3. Member States shall ensure that all end-users provided with a connection to the public telephone network can access operator assistance services and directory enquiry services in accordance with Article 5(1)(b).
4. Member States shall not maintain any regulatory restrictions which prevent end-users in one Member State from accessing directly the directory enquiry service in another Member State.
5. Paragraphs 1, 2, 3 and 4 apply subject to the requirements of Community legislation on the protection of personal data and privacy and, in particular, Article 11 of Directive 97/66/EC.

- 5.7 The relevant recitals in the USD's preamble which relate to Articles 5 and 25, respectively, read as follows:

(11) Directory information and a directory enquiry service constitute an essential access tool for publicly available telephone services and form part of the universal service obligation. Users and consumers desire comprehensive directories and a directory enquiry service covering all listed telephone subscribers and their numbers (including fixed and mobile numbers) and want this information to be presented in a non-preferential fashion. Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (1) ensures the subscribers' right to privacy with regard to the inclusion of their personal information in a public directory.

(35) The provision of directory enquiry services and directories is already open to competition. The provisions of this Directive complement the provisions of Directive 97/66/EC by giving subscribers a right to have their personal data included in a printed or electronic directory. All service providers which assign telephone numbers to their subscribers are obliged to make relevant information available in a fair, cost-oriented and non-discriminatory manner.

- 5.8 Furthermore, under Chapter V of the USD (entitled 'General and Final Provisions'), Article 32 makes it, in effect, plain that the USD does not seek to completely harmonise throughout the Community the regulation as to (end-user) services other than those mentioned in the USD. However, in respect of any such 'additional services' that are made publicly available in a particular Member State, Article 32 provides that, apart from the universal services covered by Chapter II of the USD, no compensation mechanism involving specific undertakings may be imposed in respect of them:

Article 32*Additional mandatory services*

Member States may decide to make additional services, apart from services within the universal service obligations as defined in Chapter II, publicly available in its own territory but, in such circumstances, no compensation mechanism involving specific undertakings may be imposed.

- 5.9 The 46th recital to the USD's preamble provides an indication as to the types of service that might become relevant in this context:

(46) Where a Member State seeks to ensure the provision of other specific services throughout its national territory, such obligations should be implemented on a cost efficient basis and outside the scope of universal service obligations. Accordingly, Member States may undertake additional measures (such as facilitating the development of infrastructure or services in circumstances where the market does not satisfactorily address the requirements of end-users or consumers), in conformity with Community law. As a reaction to the Commission's e-Europe initiative, the Lisbon European Council of 23 and 24 March 2000 called on Member States to ensure that all schools have access to the Internet and to multimedia resources.

- 5.10 It is also to be noted that **Annex 6** of this document sets out details of the relevant data protection legislation that is referred to in these provisions.

Key provisions of current applicable UK legislation and regulation

- 5.11 **Annex 6** of this document sets out the background as to how the requirements under the RVTD were implemented under the previous UK legislative and regulatory framework. That Annex also sets out a more detailed description as to Ofcom's relevant regulatory powers under the current legislation, the Communications Act 2003 (the "Act").
- 5.12 In summary, on 22 July 2003, shortly before the coming into force of the relevant provisions of the 2003 Act, the Director General of Telecommunications (the "DGT") relying on his transitional powers published a notification in accordance with Section 48(1) of the 2003 Act entitled '*Notification setting general conditions under Section 45 of the Communications Act 2003*²⁰ (the "**GC notification**").
- 5.13 Under that notification, the DGT set a number of GCs, which are contained in Part II of the Schedule to it, that were to take effect on 25 July 2003. They include GCs 8 and 19, which are the ones relevant to these disputes:

8. OPERATOR ASSISTANCE, DIRECTORIES AND DIRECTORY ENQUIRY FACILITIES

8.1 The Communications Provider shall ensure that any End-User can access:

(a) operator assistance services; and

(b) a Directory Enquiry Facility containing Directory Information on all Subscribers in the United Kingdom who have been assigned Telephone Numbers by any Communications

²⁰ See at: http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/cond_final0703.pdf

Provider, except those Subscribers who have exercised their right to have their Directory Information removed,

except where such services or facilities have been rendered inaccessible to a particular End-User by the Communications Provider at the End-User's request or for the purposes of debt management.

8.2 Where the Communications Provider assigns Telephone Numbers to Subscribers, it shall ensure that each of those Subscribers is, on request, supplied with a Directory containing Directory Information on all Subscribers who have been assigned Telephone Numbers in the Subscriber's local area. Directories containing Directory Information for all other Subscribers outside the local area who have been assigned Telephone Numbers by any Communications Provider must be supplied to the Subscriber on request. Any Directories supplied shall not contain Directory Information for those Subscribers who have exercised their right to have their Directory Information removed.

8.3 A Directory may be produced by the Communications Provider, or by another person. Where a Directory is produced by the Communications Provider, the Communications Provider shall ensure that it is updated on a regular basis (at least once a year). The Director may from time to time direct that a Directory is available in a particular form.

8.4 The Communications Provider may charge End-Users a reasonable fee for making available a Directory Enquiry Facility, local Directory and any additional Directories, and may charge its Subscribers a reasonable fee for inclusion of Directory Information in a Directory or as part of a Directory Enquiry Facility.

8.5 This Condition applies subject to the requirements of Relevant Data Protection Legislation.

8.6 For the purposes of this Condition, "Communications Provider" means a person who provides Publicly Available Telephone Services (except Public Pay Telephones).

...

19. PROVISION OF DIRECTORY INFORMATION

19.1 Where the Communications Provider has been Allocated Telephone Numbers in accordance with Condition 17, it shall meet all reasonable requests from any person to make available the Directory Information of:

- (a) its Subscribers who have been assigned those Telephone Numbers; and
- (b) any other End-User assigned a Telephone Number originally Allocated to the Communications Provider,

for the purposes of the provision of Directories and Directory Enquiry Facilities.

19.2 Where the Communications Provider has been authorised (either directly or indirectly) to use Telephone Numbers Allocated to another person, it shall on request supply to:

- (a) the person who was originally Allocated such Telephone Numbers; or
- (b) if different from the above, the person who authorised the use of such Telephone Numbers by it,

the Directory Information of the Communications Provider's Subscribers and of any other End-User assigned a Telephone Number from such Telephone Numbers.

19.3 Where the Communications Provider is requested to supply Directory Information in accordance with paragraphs 19.1 or 19.2, it shall do so on terms which are fair, cost-oriented and non-discriminatory, and in a format which is agreed between the Communications Provider and the person requesting the information. The Communications Provider shall comply with any direction made by the Director from time to time with respect to the format to be applied to the information.

19.4 This Condition applies subject to the requirements of Relevant Data Protection Legislation.

19.5 For the purposes of this Condition, "Communications Provider" means a person who provides an Electronic Communications Network or an Electronic Communications Service.

- 5.14 Part I of the Schedule to the GC notification contains definitions which apply, except in so far as the context otherwise requires, throughout the Schedule. Part I includes the following definitions of particular relevance to GCs 8 and 19 and a general provision dealing with the interpretation of the GCs:

...

"Communications Provider" means, unless the contrary intention appears, a person who provides an Electronic Communications Network or provides an Electronic Communications Service;

...

"Directory" means a printed document containing Directory Information on Subscribers of Publicly Available Telephone Services in the United Kingdom which is made available to members of the public;

"Directory Information" means, in the case of a Directory, the name and address of the Subscriber and the Telephone Number assigned to the Subscriber for their use of Publicly Available Telephone Services and, in the case of a Directory Enquiry Facility, shall be either such a Telephone Number of the Subscriber or information that such a Telephone Number of the Subscriber may not be supplied;

"Directory Enquiry Facility" means Directory Information provided by means of a Public Telephone Network;

...

"Public Electronic Communications Service" means any Electronic Communications Service that is provided so as to be available for use by members of the public;

...

"Relevant Data Protection Legislation" means the Data Protection Act 1998 and the Telecommunications (Data Protection and Privacy) Regulations 1999;

...

"Subscriber" means any person who is party to a contract with a provider of Public Electronic Communications Services for the supply of such services;

"Telephone Number" means, subject to any order of the Secretary of State pursuant to section 56(7) of the Act, any number, including data of any description, that is used (whether or not in connection with telephony) for any one or more of the following purposes:

(a) identifying the destination for, or recipient of, an Electronic Communication;

- (b) identifying the origin, or sender, of an Electronic Communication;
 - (c) identifying the route for an Electronic Communication;
 - (d) identifying the source from which an Electronic Communication or Electronic Communications Service may be obtained or accessed;
 - (e) selecting the service that is to be obtained or accessed, or required elements or characteristics of that service; or
 - (f) identifying the Communications Provider by means of whose network or service an Electronic Communication is to be transmitted, or treated as transmitted;
- ...

Interpretation

2. For the purpose of interpreting the Conditions in this Schedule:

- (a) except in so far as the context otherwise requires, words or expressions shall have the meaning assigned to them in the Schedule and otherwise any word or expression shall have the same meaning as it has in the Act;
- (b) headings and titles shall be disregarded;
- (c) expressions cognate with those referred to in this Schedule shall be construed accordingly; and
- (d) the Interpretation Act 1978 shall apply as if each of the Conditions in this Schedule were an Act of Parliament.

5.15 On 22 July 2003, the DGT also published in reliance of his transitional powers his a notification setting out his reasons for designating BT as a universal service provider (the **“USO notification”**) and setting the universal service conditions (**“USCs”**) applicable to BT.

5.16 USC7, as set out in the notification to BT under regulation 4(10) of the Universal Service Regulations set out in Annex A to the statement attached to the USO notification, reads:

Condition 7: Maintenance and supply of a Directory Information database and Directories

7.1 BT shall maintain a database containing Directory Information for all Subscribers who have been allocated Telephone Numbers by any Communications Provider ('the database'). BT shall ensure that the database is updated on a regular basis.

7.2 BT shall, in accordance with paragraphs 7.3 and 7.4 below, and on request, make available:

(a) to any Communications Provider subject to paragraph 8.2 of General Condition 8 for the purpose of allowing that Communications Provider to comply with that paragraph, such Directories as BT compiles which comply with the requirements of that General Condition;

(b) to any person seeking to provide publicly available Directory Enquiry Facilities and/or Directories, the contents of the database, in machine readable form.

7.3 BT shall supply the items in sub-paragraph (a) and (b) of paragraph 7.2 above at the reasonable request of the person requesting such items. Without prejudice to the generality of the foregoing, BT may refuse to supply such items if:

(a) the person requesting such items does not undertake to process the data or information contained in them in accordance with any Relevant Code of Practice, and/or

(b) BT has reasonable grounds to believe that the person requesting such items will not comply with Relevant Data Protection Legislation.

7.4 BT shall supply the items in sub-paragraph (a) and (b) of paragraph 7.2 above on terms which are fair, objective, cost oriented and not unduly discriminatory, and in a format which is agreed between BT and the person requesting the information. Where no such agreement is reached, the Director may determine the format to be applied to the information in accordance with his dispute resolution functions.

7.5 In complying with the obligations set out in paragraphs 7.1 to 7.4 above, BT shall:

(a) not unduly discriminate in the treatment of data or information supplied to it by other persons; and

(b) have due regard, in such manner as is appropriate, to any Subscriber who has expressed opposition to inclusion of Directory Information about that Subscriber in a Directory or as part of a Directory Enquiry Facility.

7.6 This Universal Service Condition applies subject to the requirements of Relevant Data Protection Legislation.

- 5.17 **Annex 6** of this document sets out details of the relevant current data protection legislation referred to in GC19 and USC7 above.

The KPN v. OPTA Judgment

The parties' reliance on the judgment in bringing these disputes

- 5.18 As seen from the parties' main submissions summarised in **Section 4** of this document, the consistency of BT's charges for the supply of OSIS data with its regulatory obligations and the KPN judgment itself is central to The Number and Conduit bringing their respective disputes with BT for Ofcom's resolution. As a result, it is appropriate to set out the following details of the KPN judgment prior to Ofcom's consideration of the judgment's application to the UK regulation and to the facts present in these disputes:

- the factual background against which the ECJ gave its preliminary ruling on the predecessor provision to Article 25(2) of the USD, that is Article 6(3) of the RVTD;
- the Advocate General's proposals to the ECJ on the interpretation of the concepts 'relevant information' and 'cost orientation';
- the ECJ's preliminary ruling on that interpretation, together with its reasoning;
- Ofcom's views on the continued binding nature of the KPN judgment to the USD.

- 5.19 Other than Ofcom's views on the continued binding nature of the KPN judgment to the USD, Ofcom considers that the details set out below should be uncontroversial

as they mainly consist of citations from the relevant parts of the Advocate General's Opinion and the ECJ's judgment.

Factual Background in KPN

- 5.20 As the universal service provider of voice telephony in the Netherlands, KPN had a statutory obligation under the Dutch Telecommunications Act to publish a universal telephone guide, i.e. telephone directory. KPN outsourced the actual publication and distribution of this guide to Telefoongids Media BV.
- 5.21 For the purposes of publishing rival telephone directories on CD-ROM and on the internet, Denda Multimedia BV ("**Denda**") and Topware CD-Service AG ("**Topware**") requested KPN to place at their disposal certain *basic data of each of KPN's subscribers* (i.e. name, address, town/city, telephone number and postal code and an indication of whether the number is used exclusively as a fax number), as well as *all of the additional information* – other than advertisements – published by KPN in its 'white pages' (i.e. mobile phone number, profession, listing under a different name or in other municipalities). Denda and Topware produced (amongst other things) paper telephone directories as well as electronic directories, which were initially produced on CD-ROM and were subsequently intended to be made available on the internet.
- 5.22 KPN first refused to provide the additional information. It also refused to supply the basic records at a price lower than NLG 0.85 (EUR 0.39) per entry, which according to Denda and Topware was considerably overpriced. As a result, they lodged a complaint against KPN with the Dutch NRA ("**OPTA**") claiming that KPN's refusal to provide the additional information, and the price charged for the basic records, contravened the Dutch provision implementing Article 6(3) of the RVTD ("**Article 43 of the BOHT**").
- 5.23 Article 43 of the BOHT provided that any person who supplies for use numbers of the fixed public telephone service, numbers of the mobile public telephone service and numbers of the personal number service, 'shall make those numbers together with *associated information* available upon request, in an agreed format and on terms which are fair, cost oriented and non-discriminatory' (emphasis added), for the purpose of providing telephone directories and the subscriber enquiry service referred to in the Dutch Order on Universal Service Provision.
- 5.24 OPTA decided that KPN was obliged only to provide the basic data of its subscribers. However, it decided that the price charged by KPN should not exceed the marginal costs of the actual provision of the basic data, possibly increased by a reasonable profit surcharge. In particular, it decided that KPN was to charge less than NLG 0.005 (EUR 0.0023) per entry. Complaints against this decision were lodged by KPN, Denda and Topware.
- 5.25 In a subsequent decision, OPTA amended its earlier decision and decided that KPN was under an obligation to provide *all the information that it receives ready for use from its subscribers*, including the telephone number of the connection; name and initial letters, possibly company name; full address, including postcode; possible additional entry of the telephone number under a different name; entry as to whether the connection is used (exclusively) as a fax line; additional entry of mobile telephone number(s); additional entry relating to profession and additional entries in other municipalities. OPTA also upheld its earlier finding as to the permissible charge per entry.

- 5.26 As a result, KPN lodged an appeal against the OPTA's decision before the District Court of Rotterdam, but it was rejected. KPN then appealed to the Dutch Administrative Court for Trade and Industry. This Court stayed the appeal and decided to refer to the ECJ the following questions for a preliminary ruling:

(1) Is "relevant information" in Article 6(3) of Directive 98/10/EC ... to be interpreted as meaning only the numbers together with the name, address and postcode of the person to whom the number has been issued and any entry as to whether the number is used (exclusively) as a fax line published by the organisations concerned or does "relevant information" also cover other data at the disposal of the organisations such as an additional entry relating to a profession, another name, another municipality or mobile telephone numbers?

(2) Is "meet ... reasonable requests ... on terms which are fair, cost oriented and non-discriminatory" in the provision referred in Question 1 to be interpreted as meaning that:

(a) numbers together with the name, address and postcode of the person to whom the number has been issued must be made available for a remuneration of only the marginal costs involved in actually making them available, and

(b) data other than those referred to in paragraph (a) must be made available for a remuneration intended to cover the costs of what the provider of these data shows he has incurred in obtaining or providing these data?

Advocate General's Opinion

The Opinion

- 5.27 On 14 July 2004, Advocate General Poiares Maduro delivered his opinion.
- 5.28 The Advocate General proposed that the ECJ should determine the two questions referred for a preliminary ruling as follows:

(1) Relevant information for the purposes of Article 6(3) of Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment is the information that is required to be included in a telephone directory in the context of the provision of universal directory services in the light of specific national conditions. This necessarily includes the minimum records that users of telephone directories normally need in order to identify the subscribers of the numbers they are looking for.

(2) Regarding the provision of 'relevant information' on terms that are 'fair, cost oriented and non-discriminatory' within the meaning of Article 6(3) of Directive 98/10/EC, only the costs of actually supplying that information should be taken into account and other costs in respect of which a provider of voice telephony can demonstrate that it had to incur them in order to be able to fulfil its obligation to collect and supply relevant directory information and which it would not have incurred in the framework of the management of its own customer accounts.

- 5.29 The Advocate General's reasons for each answer are set out below.

Reasons for Advocate General's definition of 'relevant information'

- 5.30 After citing various provisions in relevant directives (as well as noting that corresponding provisions have been included in Articles 5 and 25(2) of the USD), the Advocate General analysed this question as follows:

19. The literal wording of Directive 98/10/EC does not offer much concrete guidance as to the meaning of 'relevant information' in Article 6(3). In order to provide an answer to the first question referred by the national court, the context of this provision and the purpose of the Directive have to be considered. ⁽¹¹⁾

20. As has been observed, the aim of the Directive is to ensure the availability throughout the Community of good-quality fixed public telephone services and to define the set of services to which all users, including consumers, should have access at an affordable price. Clearly, the aspiration to define and harmonise universal telephony services, in particular directory services, is a corollary of the liberalisation of the markets for voice telephony. It would be unpractical for consumers if, as a result of having several providers of voice telephony, directory information were to become scattered over several telephone directories. Likewise, changing provider would be less attractive if this were to involve unsolicited exclusion from telephone directories. These disadvantages for end-users could even have a detrimental effect on competition in the market of voice telephony services. Article 6 of the Directive therefore safeguards the existence of universal directory services, lest the market were not to provide for them. It facilitates the production of universal telephone directories by requiring Member States to ensure that all telephone providers make directory information available. As part of this provision, the notion 'relevant information' should be considered against the background of the mainly user-oriented objective of the Directive.

21. Essentially three approaches to interpreting the term 'relevant information' were presented to the Court. KPN's interpretation relates 'relevant' to what is necessary for setting up and maintaining a voice telephone connection. KPN submits that 'relevant information' comprises only information which is provided by subscribers with a view to publication in a telephone directory and is at the same time inextricably linked to the provision of fixed telephone services.

22. The second interpretation, supported by the OPTA and Denda, relates the term 'relevant' to what is required to achieve competition in the market for directory services. According to the OPTA and Denda, 'relevant information' includes all information published by KPN itself in its own telephone directory. This interpretation is underpinned by the desire to counterbalance the advantage acquired by KPN in the market for telephone directory services, as a result of its history of being the main – and, until recently, exclusive – voice telephony provider and publisher of universal telephone guides in the Netherlands. In order to be able to publish a telephone directory that can adequately compete with the KPN guide, competitors must necessarily have at their disposal all the information mentioned in that guide.

23. The third alternative, advocated by the Commission, relates 'relevant' to what is needed for the provision of universal directory services.

24. Only the third approach does justice to the aim of Directive 98/10/EC. As the Commission correctly submitted, 'relevant' for the purpose of the Directive does not mean relevant in order to be able to compete in a market for universal directory services, but relevant for ensuring the provision of those services. The Directive – in line with Article 6 of Commission Directive 96/19/EC – recognises that the provision of directory services is a competitive activity and it therefore facilitates the creation of multiple comprehensive telephone guides, requiring the existence of at least one, but this does not mean that its objective is to promote competition in the market for directory services, instead of the preservation of a universal service of a determined quality.

25. It also follows from the aim of Directive 98/10/EC that, contrary to what is argued by KPN, 'relevant information' cannot simply be limited to information that is inextricably linked with the provision of voice telephony services. The duty of voice telephony providers to supply 'relevant information' for the provision of a universal directory also entails a duty to gather this information, even if it is not strictly necessary for the provision of voice telephony.

⁽¹²⁾²¹ Evidently, the duty of providers to gather relevant directory information is without prejudice to any rights of subscribers not to share personal information or to have it barred from publication in universal telephone directories.

26. Given that Directive 98/10/EC does not offer a plain definition and that the concept of universal service is influenced by the evolution of the market and national differences in user demand, it is left to each Member State to define the exact scope of the term 'relevant information' in the light of specific national conditions. ⁽¹³⁾²² However, any interpretation should take the following aspects into account.

27. First of all, 'relevant information' should at least be held to include the listing of fixed, mobile and personal numbers with the name, address and town/city connected to these numbers. These are the minimum records that users of telephone directories need to identify the subscribers of the numbers they are looking for. This information must consequently be considered 'relevant' in the meaning of Article 6(3) of Directive 98/10/EC.

28. Secondly, as was ascertained above, 'relevant' for the purposes of Article 6(3) means relevant for the provision of a universal service. When determining relevant information in addition to the minimum set of records, Member States should take into account what a typical user requires from a telephone directory which may vary among Member States. In this regard they can take into consideration what users traditionally expect to find in a telephone guide – for example, profession, title, etc. – and, doubtless, a long-standing exclusive provider of telephone guides may have shaped user expectations and desires to a large extent, as the OPTA pointed out in its written submissions. Yet, it cannot automatically be assumed that whatever this provider has published or will publish in its directories must therefore be labelled relevant within the meaning of the Directive. In the Dutch context, this would render the standard for universal directory services and the obligation for every voice telephony provider to collect and supply relevant information entirely dependent on what KPN decides to publish in its telephone guide. Neither the text nor the aim of Article 6 supports such a contingent interpretation. ⁽¹⁴⁾²³

29. The OPTA has submitted that Article 43 of the BOHT imposes an obligation on KPN to supply all directory information at its disposal, even if KPN was not under a duty to collect that information. However, the Directive itself does not support this interpretation. Article 6(3) introduces an equal obligation to collect and supply directory information for every provider of voice telephony, without distinguishing on grounds of market structure or the existence of a statutory obligation to publish a comprehensive telephone directory. KPN can be expected neither to collect nor to supply more information than other providers of voice telephony with mere reference to Article 6(3) of the Directive.

30. Besides, as the recital 7 to the Directive underlines, the provision of directory services is a competitive activity. Competition between providers of directory services may also require competition as to the contents of directories. Voice telephony providers may very well obtain more information than what is relevant for the purposes of Article 6(3) of the Directive, as long as this does not contravene the requirements of privacy and data protection. They are equally free to publish – or have published for them – a directory with more than the 'relevant' information. The possibility that some telephone directories may offer more information than others does not impair the availability of universal directory services, as long as users are able to find the information they typically consider relevant.

²¹ This footnote of the Opinion states: 'A similar situation exists in respect of ex-directory information, i.e. the information that someone does not want to be mentioned in a telephone directory. Even though that information is not strictly needed for the provision of voice telephony, telephony providers are under an obligation to maintain a list of their own customers who do not wish to be listed.'

²² This footnote of the Opinion states: 'See Article 1(1) of Directive 98/10/EC'

²³ This footnote of the Opinion states: 'Another matter is whether the Directive precludes Member States from imposing obligations on providers of voice telephony to supply other subscriber data than those which are necessary to guarantee universal directory service. Although such measures should of course be compatible with the rules of Community law, I conclude that there is nothing in the Directive itself that prevents Member States from imposing such further obligations.'

...[The Advocate General then considered the potential application of Article 82 of the EC Treaty in cases where dominant undertakings refused to supply subscriber information that does not fall under Article 6(3) of the RVTD]

44. In sum, beyond the minimum set of records that fall within the term 'relevant information', Member States should define, in the light of national circumstances, which information is relevant for the provision of universal directory services. Every provider of voice telephony is under an obligation – limited only by the rights of their subscribers – to collect this information from their subscribers and to meet all reasonable requests to make it available to those who intend to publish a universal telephone directory. In so far as KPN is under an obligation to supply more information than that which must be considered relevant for the provision of a universal directory service, this does not follow from Article 6(3) of Directive 98/10/EC, but, possibly, from the application of Article 82 EC. It would have to be assessed whether KPN is in a position where it can prevent effective competition with its own telephone directory by withholding subscriber information that falls outside the scope of Article 6(3) of Directive 98/10/EC.

Reasons for Advocate General's definition of 'cost oriented'

5.31 The Advocate General answered this question by stating as follows:

45. By its second question, relating to the same provision of Directive 98/10, the referring court seeks an interpretation of the words 'meet ... reasonable requests ... on terms which are fair, cost oriented and non-discriminatory', in order to determine how to calculate the tariff KPN is allowed to charge for the abovementioned data. More specifically, the referring court wishes to know which of the costs incurred in connection with the activities of gathering, maintaining and supplying relevant directory information, may be incorporated in the tariff.

46. It goes without saying that providers of voice telephony incur costs in connection with collecting, maintaining and supplying subscriber information. The same is true in respect of ex-directory information, i.e. the information that someone does not want to be mentioned in a telephone directory. Even though that information is not strictly needed for the provision of voice telephony, it follows from Article 6(2) and (3) of Directive 98/10/EC that every provider is under an obligation to maintain a list of their own customers who do not wish to be listed.

47. The allocation of costs related to maintaining ex-directory lists was one of the issues addressed by the Court in its judgment of 6 December 2001 in the case *Commission v France*.⁽³²⁾ The case concerned, inter alia, a national scheme for sharing the net costs of the obligation to provide universal fixed voice telephony services. The scheme included the maintenance of an ex-directory list as a cost component for provision of the universal service of creating a comprehensive telephone directory. However, the Court decided that maintaining an ex-directory list falls within the scope of the management of the providers' own customer accounts, rather than within the scope of the universal service of creating a comprehensive telephone directory.⁽³³⁾ In my opinion, the same must be assumed regarding relevant directory information.

48. For the purpose of cost allocation, maintaining a database with relevant directory and ex-directory information must first and foremost be seen as an activity attached to the provision of voice telephony services and not as a separate activity for which extra costs have to be incurred in order to enable the publication of universal telephone directories. After all, it is of the utmost importance for providers of voice telephony that its subscribers are mentioned in telephone directories, because this will stimulate the use of their services.

49. When Article 6(3) refers to the provision of 'relevant information' on terms that are cost-oriented, it implies that compensation of the costs of gathering and maintaining a database with that information cannot be part of those terms. These costs have to be incurred by every provider of voice telephony and are already included in the costs and revenue of a normal voice telephony service. Passing these costs on to persons requesting directory information, be it by retroactive distribution or otherwise, would result in an

overcompensation that cannot be reconciled with the requirements and the objective of Article 6(3).

50. The proposal by KPN to relate the tariff for 'relevant information' to the number of end-users of the telephone directories cannot be considered cost-oriented within the meaning of Article 6(3) of the Directive. The cost of collecting and maintaining that information is related to the number of voice telephony subscribers, not to the number of universal telephone directories or users of those directories.

51. The situation would only be different if a telephone provider can demonstrate that it had to incur specific extra costs in order to be able to fulfil its obligation to collect and supply relevant directory information to publishers of comprehensive telephone directories and that it would not have incurred those costs in the context of the management of its own customer accounts. An obvious example is the cost of transferring directory information to a third-party publisher. The notion of fair and cost-oriented terms in Article 6(3) requires those costs to be borne by the publishers of telephone directories.

52. The classic consequence of Article 6(3) would be that the end-users of voice telephony bear the costs connected with gathering and maintaining directory information, (34) while the end-users of a telephone directory bear the costs connected with supplying that information to the publisher of 'their' directory. ⁽³⁵⁾

53. It must be concluded that the notion 'cost-oriented' requires that providers of voice telephony may recoup from the publisher of a universal telephone directory the actual costs of transferring the relevant directory information to that particular publisher. Remaining costs can only be taken into account if a telephone provider can demonstrate that it had to incur those costs in order to be able to fulfil its obligation to collect and supply relevant directory information and that it would not have incurred those costs in the framework of the management of its own customer accounts.

54. By contrast, the terms governing provision of subscriber information that falls outside the scope of Article 6(3) of the Directive but would have to be supplied by virtue of Article 82 of the Treaty may allow for a reasonable return on investments made in order to collect and maintain that information.

55. Nevertheless, both Article 6(3) of the Directive and Article 82 EC require terms of supply to be non-discriminatory. Those terms of supply cannot therefore, without objective justification, place competing publishers of telephone directories at a disadvantage vis-à-vis a competitor associated with the provider of voice telephony services from which the subscriber information is solicited.

The ECJ's Judgment

The Judgment

5.32 On 25 November 2004, the ECJ delivered its judgment on the two questions by determining that:

1. Article 6(3) of Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment must be interpreted as meaning that the words 'relevant information' refer only to data relating to subscribers who have not expressly objected to being listed in a published directory and which are sufficient to enable users of a directory to identify the subscribers they are looking for. Those data include in principle the name and address, including postcode, of subscribers, together with any telephone numbers allocated to them by the entity concerned. However, it is open to the Member States to provide that other data are to be made available to users where, in light of specific national circumstances, they appear to be necessary in order to identify subscribers.

2. Article 6(3) of Directive 98/10, in so far as it provides that the relevant information must be provided to third parties on terms which are fair, cost oriented and non-discriminatory, must be interpreted as meaning that:

- with regard to data such as the name and address of the persons and the telephone number allocated to them, only the costs of actually making those data available to third parties may be invoiced by the supplier of the universal service;
- with regard to additional data which such a supplier is not bound to make available to third parties, the supplier is entitled to invoice, apart from the costs of making that provision, the additional costs which he has had to bear himself in obtaining the data provided that those third parties are treated in a non-discriminatory manner.

5.33 The ECJ's reasons for reaching that view in respect of each question are set out below.

Reasons for the ECJ's definition of 'relevant information'

5.34 Similarly to the Advocate General, the ECJ started its analysis by citing relevant provisions of the legal framework as well as facts underlying the reference. It then stated:

15 By its first question the national court is essentially asking what are the data referred to in the words 'relevant information' in Article 6(3) of the Directive.

16 It must first of all be noted that Article 6(3) of the Directive does not define the concept of 'relevant information' in regard to subscribers which entities allocating telephone numbers are expected to provide to third parties. That concept must therefore be interpreted in light of its context and of the purpose of the Directive.

17 Thus, under the second paragraph of Article 1(1) of the Directive, the aims of the Directive are to ensure the availability throughout the Community of good quality fixed public telephone services and to define the set of services to which all users, including consumers, should have access in the context of universal service in the light of specific national conditions, at an affordable price and, pursuant to the title of the Directive, 'in a competitive environment'.

18 The Directive thus aims to ensure a balance between the specific interests of the supplier of the universal service and those of undertakings within the competitive sector, as well as those of users, including consumers.

19 With regard first of all to the universal service, it is important to recall that that service is defined in Article 2(2)(f) of the Directive as a defined minimum set of services of specified quality available to all users irrespective of their geographical location and, in the light of specific national conditions, at an affordable price.

20 As the Commission correctly submits, it is clear from the words '[i]n order to ensure provision of the services referred to in paragraph 2(b) and 2(c)', at the beginning of Article 6(3) of the Directive, that the Member States' obligation to ensure that entities allocating telephone numbers to subscribers respond to all reasonable enquiries about the provision of relevant information comes within the context of the supply of a universal service.

21 It is therefore necessary to consider the data necessary for securing the supply of such a service.

22 In that connection Article 6(2)(b) of the Directive provides only that directories must contain, in order to be available to users, all subscribers who have not expressed opposition to being listed, including fixed, mobile and personal numbers. As KPN has rightly pointed out,

it follows that data other than those mentioned in that provision are not necessary in order to produce a telephone directory in the context of a universal service.

23 The question none the less arises whether such a limitation on the data in the context of the supply of information to the competitors of the supplier of the universal service meets the requirements of liberalisation of the telecommunications market which forms the backdrop to the Directive. OPTA and Denda express serious doubts as to that and argue that only a broad interpretation of the concept of the data to be provided is such as to ensure fair competition.

24 According to KPN, the Directive is not however intended to enable third parties to benefit from the endeavours of the supplier of the universal service, such as the costly compilation of the additional data, as those endeavours do not form part of its obligations in regard to the supply of the service in the strict sense. Any other interpretation of the Directive would lead to a distortion of competition between companies producing directories since one of them would be obliged to help its competitors yet they would not be under any obligation to reciprocate.

25 In that regard it is common ground that the Directive repeatedly mentions its purpose, which is to encourage the opening up of a competitive market in the telecommunications field. With regard more particularly to directories, the seventh recital to the Directive states that the 'provision of directory services is a competitive activity'. In addition, in so far as it provides for the making available to competing companies of certain subscriber-related information, Article 6(3) of the Directive corroborates that purpose.

26 In the Member State concerned the fact that there are companies compiling directories other than the supplier of the universal service, such as Denda and Topware, demonstrates that a competitive market in directories has in fact developed.

27 However it is not impossible that the refusal to provide the information in question in the main proceedings may influence the circumstances in which such a competitive market involving companies offering directories can develop. As to those circumstances, Article 6(3) of the Directive provides that they must be 'fair, cost oriented and non-discriminatory'. Therefore, if the supplier of the universal service complies with the requirements of that provision he is not bound also to provide all the additional information sought by competitors.

28 It follows that the refusal to make available to third parties data other than that listed in Article 6(2)(b) of the Directive is compatible with the liberalisation of the telecommunications market, which is one of the objectives of the Directive.

29 Finally, with regard to the specific interests of users, including those of consumers, it is primarily those persons who are supposed under the second paragraph of Article 1(1) of the Directive to benefit from the competitive conditions on the market in question. The seventh recital of the Directive states that users and consumers 'desire comprehensive directories and a directory enquiry service covering all listed telephone subscribers and their numbers (including fixed, mobile and personal telephone numbers)', and Article 6(2)(b) of the Directive is worded analogously.

30 The counterpart of that need for information on the part of users is the right under Article 6(2)(a) of the Directive not only to appear in a directory but also to request the total or partial withholding of certain information appearing therein. Similarly as the Commission rightly pointed out, Article 6(1) of the Directive expressly refers to certain

31 Moreover, as the Court has held, albeit in another context, but which relates none the less to the application of Article 6(2) of the Directive, that provision embraces the principle that every service provider must maintain a list of its own customers who do not wish to be listed in the general directory and not disclose the names of those customers to the publisher of the general telephone directory (Case C-146/00 Commission v France [2001] ECR I-9767 paragraph 68).

32 Plainly, therefore, the protection of personal data and privacy is a factor of the first importance to be taken into account in determining the data that an operator is required to make available to a third-party competitor. In fact a broad approach requiring the indiscriminate provision of all the data at an operator's disposal, with the exception, however, of those concerning subscribers who in no way wish to appear on a published list, is not reconcilable either with the protection of those data or with the privacy of the persons concerned.

33 Nor, consequently, does the account taken of the specific interests of the users of the services at issue, including consumers, militate in favour of a broad construction of the concept of 'relevant information'.

34 In light of all the foregoing considerations concerning the various interests at stake the words 'relevant information' in Article 6(3) of the Directive must be strictly interpreted. The entities allocating telephone numbers must therefore communicate to third parties only data relating to subscribers who have not expressly objected to being listed in a published directory and which are sufficient to enable users of a directory to identify the subscribers they are looking for. Those data include in principle the name and address, including post code, of subscribers, together with any telephone numbers allocated to them by the entity concerned.

35 In light of that, and as the Commission argues and the Advocate General notes at point 28 of his Opinion, there may be differences at national level in the demand among users of voice telephony services. Inasmuch as, by using the words 'relevant information', the directive does not seek complete harmonisation of all the criteria which may appear necessary to identify subscribers, the Member States retain competence for determining whether in a specific national context certain additional data ought to be made available to third parties.

36 The reply to the first question must therefore be that Article 6(3) of the Directive must be interpreted as meaning that the words 'relevant information' refer only to data relating to subscribers who have not expressly objected to being listed in a published directory and which are sufficient to enable users of a directory to identify the subscribers they are looking for. Those data include in principle the name and address, including postcode, of subscribers, together with any telephone numbers allocated to them by the entity concerned. However, it is open to the Member States to provide that other data are to be made available to users where, in light of specific national circumstances, they appear to be necessary in order to identify subscribers.

Reasons for the ECJ's definition of 'cost oriented'

5.35 The ECJ answered this question as follows:

37 By its second question the national court is essentially asking which elements of the costs of compiling, updating and providing relevant information on subscribers may be included in the price of the supply of the data in the context of Article 6(3) of the Directive.

38 In that regard it is sufficient to state, as OPTA and Denda rightly point out, that the compilation of the basic data relating to subscribers, that is to say their names, addresses and telephone numbers, is inextricably linked to the telephony service and does not demand any particular effort on the part of the provider of the universal service.

39 As the Advocate General stated at point 49 of his Opinion, the costs relating to the compilation, or allocation, of those data, unlike the costs incurred in making them available to third parties, must in any event be borne by the supplier of a voice telephony service and are already included in the costs and revenue of such a service. In those circumstances, passing the costs associated with compiling or allocating data on to persons requesting access to them would result in an excessive and unwarranted offset of the costs in question.

40 It follows that, when communicating those data to competing companies on the market for the provision of directories, only the additional costs associated with that communication may be invoiced by the supplier of the universal service but not the costs relating to the compilation of those data.

41 However, it would be otherwise in the case of additional data in respect of which the supplier of the universal service has himself had to bear the additional costs of compilation. In such a case, if the supplier of the universal service decides to make such data available to third parties, even though not bound by the directive to do so, there is no provision in the Directive to prevent those additional costs from being invoiced to the third parties, provided that those third parties are treated in a non-discriminatory manner.

42 The reply to the second question must therefore be that Article 6(3) of the Directive, in so far as it provides that the relevant information must be provided to third parties on terms which are fair, cost oriented and non-discriminatory, must be interpreted as meaning that:

– with regard to data such as the name and address of the persons and the telephone number allocated to them, only the costs of actually making those data available to third parties may be invoiced by the supplier of the universal service;

– with regard to additional data which such a supplier is not bound to make available to third parties, the supplier is entitled to invoice, apart from the costs of making that provision, the additional costs which he has had to bear himself in obtaining the data, provided that those third parties are treated in a non-discriminatory manner.

Ofcom's Views on the Binding Nature of the KPN judgment to the USD

Introduction

5.36 Although the current EC framework is “new” in certain respects, the provisions relevant to these disputes have not materially changed from the previous EC framework. In **Section 7** of this document, Ofcom therefore sets out its provisional views as to how the ECJ's judgment in *KPN* should be properly applied to relevant current domestic regulation in the UK.

5.37 However, as noted below, the ECJ's preliminary ruling in *KPN* is a ruling binding only with regard to the legal interpretation of the Community law measure specifically considered by it, namely Article 6(3) of the RVTD (as opposed to Article 25(2) of the USD), in light of the facts before it at that time. For the reasons set out below, Ofcom nonetheless considers that it is likely that the ECJ would arrive at substantially the same conclusions in respect of the meanings of the concepts ‘relevant information’ and ‘cost orientation’ if it were to analyse the position specifically under Article 25(2) of the USD in light of the same set of facts as in the *KPN* case. (We also note that the Advocate General referred to the corresponding new provisions in the USD, given that the provisions in the RVTD for the ECJ's consideration had been repealed a year before he delivered his Opinion.) As Ofcom is not able to make a reference for a preliminary ruling²⁴ to confirm the point, it will ultimately be a matter for the ECJ to decide, if necessary.

²⁴ In Case C-256/05, the ECJ made an order on 6 October 2005 that it “clearly has no jurisdiction to answer the question referred by the Telekom-Control-Kommission” (which is the Austrian national regulatory authority) for a preliminary ruling in the procedure concerning Telekom Austria AG on the following question: *Is Commission Decision C(2004)4070 final of 20 October 2004, by which the Telekom-Control-Kommission is required under Article 7(4) of Directive 2002/21/EC 1 to withdraw the draft decision notified on 20 July 2004, in Procedure M 9/03 M 9a/03 registered by the Commission under No AT/2004/0090, relating to the market analysis in respect of the market for ‘transit services in the fixed public telephone network’, valid in the light of*

- 5.38 That said, in Ofcom's understanding, neither of the parties to these disputes contest that the *KPN* judgment is of relevance to the application of Article 25 of the USD. Indeed, both The Number and Conduit have placed much weight on this judgment in their submissions. In these circumstances, it is appropriate for Ofcom to set out its own views as to the application of *KPN* in some detail.

Similar (textual) provision in Article 25(2) of the USD

- 5.39 Article 6(3) of the RVTD reads in key respects in almost identical terms to Article 25(2) of the USD, as the following comparison illustrates²⁵:

[In order to ensure provision of the services referred to in paragraph 2(b) and 2(c),] Member States shall ensure that all [organisations] undertakings which assign telephone numbers to subscribers meet all reasonable requests to make available, for the purposes of the provision of publicly available directory enquiry services and directories, the relevant information in an agreed format on terms which are fair, objective, cost oriented and non-discriminatory.

- 5.40 The *main difference* in the wording of the two Articles *relates to the purpose* in respect of which the 'relevant information' requested is to be made available. As seen from the above, under the RVTD, the purpose was '[i]n order to ensure provision of the services referred to in paragraph 2(b) and 2(c)', that is to say *universal service* directories and DQ services. In contrast, the USD instead refers to for the purposes of the provision of *publicly available* DQ services and directories.
- 5.41 In this context, it is to be noted that the legislative draftsmen could have drafted this provision similarly to that under RVTD simply by, for example, substituting references to 'paragraph 2(b) and 2(c)' for 'Article 5(1)(a) and (b)'. Therefore, this textual difference raises a potential question as to whether it affects the application in general of the preliminary ruling in *KPN* to Article 25(2) of the USD.
- 5.42 However, in Ofcom's view, the different wording in Article 25(2) is not intended to introduce anything new substantively, so as to affect the ECJ's preliminary ruling on the concepts of 'relevant information' and 'cost orientation'. This is because Ofcom considers that the different wording is, in part, a result of the legislative draftsmen separating the substantive provisions in Article 6 of the RVTD into two separate Articles in the USD: on the one hand, Article 5 (in Chapter II) dealing with universal service aspects of directories and DQ services, and Article 25 (in Chapter IV) dealing with (among other things) certain end-user rights in relation to directory information more broadly (thus, not limited to the strict universal service context under Chapter II), on the other hand.
- 5.43 Indeed, **Table 5.1** below shows, in broad terms, that the provisions in Article 6 of the RVTD have been substantively retained in the USD, but separated into two different Articles, depending upon whether the subject-matter relates to end-users of universal service (Article 5) or end-users of certain other services (Article 25). A fuller comparison of the actual texts in the respective texts of those Articles is set out in the table at **Annex 7** of this document.

Article 253 of the EC Treaty, Articles 7(4), 8(2), 14, 15 and 16 of Directive 2002/21/EC, the Commission guidelines on market analysis and the markets recommendation of the Commission?

²⁵ The text italicised in the square brackets shows the textual difference in Article 6(3) of the RVTD, whereas the underlined text shows the textual difference in Article 25(2) of the USD; the provisions otherwise read in the same terms.

Table 5.1: Overview of the location of the provisions in Article 6, as set out in the USD

Article(s) in the RVTD	Article(s) in the USD
6(1) →	5(2) and 25(5)
6(2)(a) →	25(1)
6(2)(b) →	5(1)(a)
6(2)(c) →	5(1)(b)
6(3) →	25(2)
6(4) →	5(3)

5.44 Furthermore, in Ofcom's view, the reference in Article 25(2) of the USD to '*for the purposes of the provision of publicly available directory enquiry services and directories*' should be read both literally and in its proper context. One type of publicly available directory envisaged by Article 25(2) is plainly a *universal service* directory. Indeed, Article 25(2) facilitates to an extent the requirements in Article 5(2) of the USD that universal service directories shall comprise, subject to data protection legislation, all PATS subscribers, on the one hand, and in Article 25(1) of the USD that PATS subscribers have a right to have an entry in the universal service directory, on the other hand.

5.45 However, in Ofcom's view, there is nothing in the USD to suggest that the reference to '*publicly available directory enquiry services and directories*' is limited to universal service DQ services and directories covered by Article 5 of the USD. Other types of publicly available DQ services and directories other than universal service ones may therefore fall within Article 25(2) and any such providers would therefore have 'rights of access' to 'relevant information' under the terms of that Article. In this context, by a universal service directory Ofcom considers that it is one that satisfies the definition of 'universal service' in Article 2(j) of the Framework Directive, that is to say "*the minimum set of services, defined in Directive 2002/22/EC (Universal Service Directive), of specified quality which is available to all users regardless of their geographical location and, in the light of specific national conditions, at an affordable price*". In other words, a *universal service* directory, in light of that definition, is one:

- **of (minimum) quality**, which is specified²⁶ in Article 5 of the USD in that it must (1) be comprehensive comprising, subject to data protection legislation, all PATS subscribers; (2) be updated on a regular basis, at least annually; and (3) be in a form approved by the relevant authority, whether printed or electronic, or both;
- **of availability to all users regardless of their geographical location**, which is to be ensured pursuant to Article 8 of the USD by designating an undertaking to provide it; and

²⁶ See Article 3(1) of the USD.

- ***of an affordable price in the light of specific national conditions***, which may therefore mean²⁷ that the universal service directory must be provided to end-users at prices that depart from those resulting from normal market conditions.

5.46 Ofcom considers that the reference in Article 25(2) of the USD in more general terms to the provision of publicly available directories recognises the fact that the provision of directories (as well as DQ services) is open to competition, which is reflected in the 35th recital to the USD's preamble. However, Ofcom sees no reason why that competitive environment should have the effect of the ECJ reaching different conclusions on the interpretation of the concepts of 'relevant information' and 'cost orientation'. (However, there are some textual differences in the USD as compared to provisions in Article 6 of the RVTD that, in Ofcom's view, have certain implications on the interpretation of 'relevant information', such as the omission of any reference in the relevant provisions of the USD to 'personal telephone numbers': see further in **Section 7** of this document.)

The definition of 'relevant information' and the approach to interpretation

- 5.47 The concept of 'relevant information' was not defined in the RVTD and remains undefined also for the purposes of the USD under the current EC framework.
- 5.48 As there is no literal and ordinary meaning of this concept, it must therefore (as a matter of Community law) be interpreted in light of its purpose (aims) and context in order to achieve the result pursued by the USD. Such an approach to interpretation was taken by both the Advocate General and the ECJ in *KPN*. For reasons set out below, the aims (and context) remain, in so far as is material, the same as they were under Article 6(3) of the RVTD.

Similar aims of the USD

- 5.49 Having made reference to the aims of the RVTD, the Advocate General focused on the practical considerations flowing from the application of these aims. In particular, he emphasised that the aspiration to define and harmonise universal telephony services, in particular directory services, is a corollary of the liberalisation of the markets for voice telephony. The RVTD therefore safeguarded, in his view, the existence of universal directory services, where the market would not so provide. He therefore stated that the concept of 'relevant information' should be considered against the background of the mainly user-oriented objective of the RVTD.
- 5.50 The ECJ also took into account the relationship between the harmonisation and liberalisation aims being pursued in this context. In light of this, it stated that the RVTD "aims to ensure a balance between the specific interests of the supplier of the universal service and those of undertakings within the competitive sector, as well as those of users, including consumers". In dealing with this balance, the ECJ first drew attention to the definition of a "universal service" in the RVTD.
- 5.51 The ECJ then dealt with the above purpose in respect of which the 'relevant information' requested would be made available, namely to ensure the provision of *universal service directories and DQ services*. In light of this, it concluded that the obligation to meet reasonable requests in Article 6(3) of the RVTD comes within the context of the supply of a universal service. Therefore, the ECJ held that data other

²⁷ See, in particular, the 4th recital to the USD's preamble.

than those relating to all subscribers who have not expressed opposition to being listed (including fixed, mobile and personal numbers) are not necessary to produce a telephone directory in the context of universal service.

- 5.52 Importantly, the ECJ then considered whether such a limitation on the data in the context of the supply of information to the competitors of the supplier of the universal service would meet the requirements of liberalisation of the telecommunications market which formed the backdrop to the RVTD. It concluded that such an approach was compatible with the liberalisation aims of the RVTD. In this context, it referred to KPN's submission that the RVTD was not intended to enable third parties to benefit from the endeavours of the supplier of the universal service, such as the costly compilation of the additional data, as those endeavours do not form part of its obligations in regard to the supply of the service in the strict sense. Any other interpretation of the RVTD would, in the ECJ's view, lead to a distortion of competition between companies producing directories, since one of them would be obliged to help its competitors yet they would not be under any obligation to reciprocate.
- 5.53 To support its conclusion, the ECJ made, in particular, reference to the 7th recital of the RVTD's preamble, which stated that the provision of directory services is a competitive activity and this was in line with the purpose of the RVTD to encourage the opening of a competitive market. In this context, the ECJ noted that the fact that there were Dutch companies compiling directories (such as Denda and Topware) other than the supplier of the universal service demonstrated that a competitive market in directories had, in fact, developed.
- 5.54 Ofcom considers that the ECJ's reasoning set out above would in this respect remain largely unaffected by the provisions in the USD if the ECJ were asked to reconsider this matter for the purposes of Article 25(2) of the USD, for a number of reasons.
- 5.55 First, as regards the relationship between the harmonisation and liberalisation aims being pursued in the RVTD referred to by the ECJ (and the Advocate General), we have cited the USD's scope and aims above (see also **Annex 6** for a more detailed analysis of the RVTD and the USD). It is clear that, in all material respects, they are substantively the same as in the RVTD. Indeed, it is also to be noted that this relationship is mentioned in the 1st recital to the USD's preamble, as follows:
- (1) The liberalisation of the telecommunications sector and increasing competition and choice for communications services go hand in hand with parallel action to create a harmonised regulatory framework which secures the delivery of universal service. The concept of universal service should evolve to reflect advances in technology, market developments and changes in user demand. The regulatory framework established for the full liberalisation of the telecommunications market in 1998 in the Community defined the minimum scope of universal service obligations and established rules for its costing and financing.
- 5.56 Ofcom also considers that the balance that the RVTD aimed to ensure (as referred to by the ECJ) is also present in the USD. In this context, as seen above, the ECJ focused on the definition of a "universal service" in the RVTD. That definition has essentially been brought forward to the current EC framework in almost identical terms in the USD (see above).
- 5.57 Secondly, as regards the proper universal service context in which 'relevant information' should be considered, universal service directories remain relevant to Article 25(2) of the USD, although it has been extended to cover other types of publicly available DQ services and directories (see above).

- 5.58 Thirdly, the ECJ's conclusion about the compatibility of such an approach with the liberalisation aims of the RVTD also holds true under the USD. **Annex 7** to this document sets out a table showing how all of the relevant provisions in Articles 6 and 9 of the RVTD have been brought forward to the USD. It is clear from that table that they remain, in material respects, unchanged for present purposes. In particular, that table also shows that the link between universal service and other directory services remains in the USD in that Article 25 cross-refers to Article 5.
- 5.59 Also, as already noted above, the competitiveness point made in the 7th recital of the RVTD's preamble has been repeated in the 35th recital to the USD's preamble, where it provides that "[t]he provision of directory enquiry services and directories is already open to competition". As in the Netherlands, this is also the reality in the UK where there are a number of competing providers, such as in the provision of DQ services. Indeed, Ofcom notes that the competitiveness point was generally reinforced by the European Commission when it rejected a proposal by the European Parliament to make all directory services free or subject to a minimal charge²⁸.
- 5.60 Furthermore, as regards the specific interests of users and consumers, the ECJ noted that it was primarily those persons who are supposed under the second paragraph of Article 1(1) of the RVTD to benefit from the competitive conditions on the market. In this context, the ECJ (again) referred to the 7th recital of the RVTD's preamble, where it stated that users and consumers 'desire comprehensive directories and a directory enquiry service covering all listed telephone subscribers and their numbers (including fixed, mobile and personal telephone numbers)'. Ofcom notes that this statement of objective has been retained in similar terms in the 11th recital to the USD, where it provides "[u]sers and consumers desire comprehensive directories and a directory enquiry service covering all listed telephone subscribers and their numbers (including fixed and mobile numbers) and want this information to be presented in a non-preferential fashion".
- 5.61 Overall, Ofcom considers that there is no support in the USD to suggest that the ECJ would decide that the concept of 'relevant information' should be ascribed a different meaning simply on the basis that Article 25(2) of the USD makes reference to publicly available DQ services and directories other than universal service ones by having regard to the aims of the USD.

Similar protection of personal data and privacy

- 5.62 The ECJ decided that the protection of personal data and privacy was a *factor of the first importance* to be taken into account in determining the data that an operator is required to make available to a third-party competitor under Article 6(3) of the RVTD. This was because a broad approach requiring the indiscriminate provision of all the data at an operator's disposal, with the exception of those concerning subscribers who do not wish to appear on a published list, was not reconcilable either with the protection of those data or with the privacy of the persons concerned.

²⁸ See Section 3.2.1, at p.4, of the Commission position of 14 September 2001 on the Parliament's 1st reading, COM(2001) 503 final, which provides that: "The Parliament's amendment required operator assistance services as well as directory enquiry services to be made available free of charge or for a minimal charge. Commission rejected this proposed amendment for two reasons. Operator assistance and directory services form part of the elements of universal service that must be made available to all subscribers on an affordable basis and which are supervised by national regulatory authorities responsible for monitoring universal service. Secondly, directory enquiry services are now provided by operators on a competitive basis. ***In addition to the universal directory, end-users may therefore use other directories, either in electronic or printed form. Making all directory services free or subject to a minimal charge would constitute over-regulation that would stifle competition in the provision of this service.***" (emphasis added).

- 5.63 In this context, the ECJ stated that the counterpart of the need for comprehensive information in directories and DQ services is the subscriber right under Article 6(2)(a) of the RVTD not only to appear in a directory but also to request the total or partial withholding of certain information appearing therein. This was also clear from Article 6(1) of the RVTD, which expressly referred to certain Community provisions on the protection of personal data and privacy. The ECJ also referred to its previous judgment in Case C-146/00 *Commission v France* [2001], ECR I-9767. In that case, albeit in a different context (but which relates nonetheless to the application of Article 6(2) of the RVTD), the ECJ held that this provision embraced the principle that every service provider must maintain a list of its own customers who do not wish to be listed in the general directory and not disclose the names of those customers to the publisher of the general telephone directory.
- 5.64 In Ofcom's view, the protection of personal data and privacy remains a factor of the first importance to be taken into account in determining the data that an operator is required to make available to a third-party competitor under Article 25(2) of the USD. Indeed, Article 25(5) provides that Article 25(2) apply subject to the requirements of Community legislation on the protection of personal data and privacy and, in particular, Article 11 of Directive 97/66/EC; Article 5(2) of the USD provides in similar terms as regards the content of universal service directories.

Strict interpretation to 'relevant information' and partial harmonisation only

- 5.65 The ECJ's overall conclusion was that, in the light of the considerations concerning the various interests at stake (i.e. the balancing exercise) set out above, the concept of 'relevant information' must be interpreted strictly. The ECJ therefore held that the entities allocating telephone numbers must therefore communicate to third parties only data relating to subscribers who have not expressly objected to being listed in a published directory and which are sufficient to enable users of a directory to identify the subscribers they are looking for. It stated that such data include, in principle, the name and address, including post code, of subscribers, together with any telephone numbers allocated to them by the entity concerned.
- 5.66 The ECJ emphasised that the RVTD did not seek complete harmonisation of all the criteria which may appear necessary to identify subscribers. Therefore, it stated that the Member States retained competence for determining whether in a specific national context certain additional data ought to be made available to third parties. In this context, the ECJ concurred especially with point 28 of the Advocate General's Opinion, which provided that:

28. Secondly, as was ascertained above, 'relevant' for the purposes of Article 6(3) means relevant for the provision of a universal service. When determining relevant information in addition to the minimum set of records, Member States should take into account what a typical user requires from a telephone directory which may vary among Member States. In this regard they can take into consideration what users traditionally expect to find in a telephone guide – for example, profession, title, etc. – and, doubtless, a long-standing exclusive provider of telephone guides may have shaped user expectations and desires to a large extent, as the OPTA pointed out in its written submissions. Yet, it cannot automatically be assumed that whatever this provider has published or will publish in its directories must therefore be labelled relevant within the meaning of the Directive. In the Dutch context, this would render the standard for universal directory services and the obligation for every voice telephony provider to collect and supply relevant information entirely dependent on what KPN decides to publish in its telephone guide. Neither the text nor the aim of Article 6 supports such a contingent interpretation.

- 5.67 In Ofcom's view, the USD has not introduced any materially different provisions in substance, so far as is material to these disputes, so as to suggest that a different and less strict interpretation should be taken to the concept of 'relevant information' for the purposes of Article 25(2) of the USD, as compared to Article 6(3) of the RVTD.
- 5.68 Nor does the Community legislator appear to have expressed an intention (such as in the recitals to the USD's preamble or even in the travaux préparatoires) that this legislative policy would be subject to change under the current EC regulatory framework with regard to matters covered under Article 6(3) of the RVTD. In particular, there is no suggestion, in Ofcom's view, that the legislator has sought to completely harmonise the criteria which may appear necessary to identify subscribers in the context of what constitutes 'relevant information'.

Relevant Contractual Arrangements

Introduction

- 5.69 Prior to setting out Ofcom's views on the application of the regulatory obligations to the facts present in these disputes, it is appropriate to set out the relevant contractual arrangements relating to BT's supply of OSIS data. In particular, there are potentially two different contractual relationships relevant to BT's eventual supply of directory information via its OSIS database to The Number and Conduit, respectively.
- 5.70 On the one hand, there is an agreement between BT and another person supplying to BT directory information relating to that person's customers to whom it has allocated telephone number(s) (the "**BT Upstream Contract**").
- 5.71 On the other hand, there is an agreement between BT and another person (such as The Number and Conduit, respectively) for a non-exclusive licence in respect of the use by that person of the information provided by BT from its OSIS database. BT and The Number entered into such an agreement on 23 August 2002, which provisions commenced on 30 August 2002 ("**The Number's Licence**"). BT and Conduit have entered into such agreement, which provisions commenced on 1 July 2000 ("**Conduit's Licence**").
- 5.72 In Ofcom's understanding, both of those agreements (each entitled 'Directory Information Licence Agreement') have been entered into in standard form and, so far as is material to these disputes, we therefore do not need to make a distinction between the two. References below to the licences and licensees are therefore references to The Number's Licence and Conduit's Licence, respectively.

The BT Upstream Contract

General

- 5.73 This dispute does not involve any particular BT Upstream Contract. We therefore simply make reference to the standard type of the BT Upstream Contract, as published on BT Wholesale's website.²⁹

²⁹ The standard type of agreement is set out in Annex C, Schedule 11 (entitled '*Directory Information Supply*') to BT's Standard Interconnection (NCC) Agreement, Issue 3.1 (23/08/01), which is available at: http://www.btwholesale.com/content/binaries/service_and_support/contractual_information/docs/nsia/nsch11.rtf

- 5.74 By way of overview, the standard BT Upstream Contract contains provisions about:
- obligations as to the supply of information (paragraph 2);
 - charges and payment (paragraph 3);
 - BT's ownership and rights of use of the information supplied (paragraph 4);
 - the parties' overriding compliance with statutory and other obligations (paragraph 5);
 - the parties' rights to terminate the agreement with 12 months' prior notice (paragraph 6);
 - obligations to comply with certain restrictions, controls and security arrangements (paragraph 7);
 - review of the agreement clauses, including the referral of disputes arising under the agreement for resolution by the DGT (OfTel) [*sic*];
 - the specification of certain 'BTDS Manuals' (Appendix 11.1).

Supply obligations

- 5.75 Paragraph 2.1 makes it plain that an 'Operator' (which is defined simply as "the other Party to this Agreement"³⁰) shall supply 'Operator Customer Information' to BT DirectorySolutions ("**BTDS**", that is the BT unit responsible for facilitating 'Direct Access' and for inputting 'Operator Customer Information' into the 'BTDS OSIS Database': see paragraph 1) for inclusion in the 'BTDS OSIS Database' to facilitate:

2.1.1 the maintenance by BTDS of a UK core directory information database; and

2.1.2 the provision of directory information services and of directories.

2.1.3 the publication by BT of directories and provision of directory enquiry services which include Operator Customer Information and Industry Customer Information supplied to BTDS, pursuant to Condition 2 of the BT Licence.

- 5.76 The terms 'BTDS OSIS Database' and 'Operator Customer Information' are defined under paragraph 1 as follows:

"BTDS OSIS Database"

the BTDS Operator Services Information System database (including any replacement system) containing information (including without limitation, names, address and telephone numbers) relating to subscribers provided with publicly available telephone services;

"Operator Customer Information"

information provided relating to persons having a telephone number allocated or sub allocated to the Operator in accordance with the UK national numbering scheme (including

³⁰ See Annex D to BT's Standard Interconnection Agreement to which paragraph 1.1 of the standard BT Upstream Contract refers, available at: http://www.btwholesale.com/content/binaries/service_and_support/contractual_information/docs/nsia/nannexd.rtf

information relating to telephone numbers which the Operator has allocated for its own use), including associated Status Information;

5.77 Paragraph 2 then sets out a number of obligations imposed on the 'Operator' and BT (BTDS) under the agreement. As regards the 'Operator', it suffices to note here that it must (among other things):

- supply to BTDS all 'Operator Customer Information' in the format described in the 'Independent Core Database Standard File Format' (paragraph 2.2.1);
- obtain all necessary consents under data protection legislation to enable the 'Operator' to pass 'Operator Customer Information' to BTDS, or enter OSIS Information onto the BTDS OSIS Database under the terms of this Agreement and for BTDS to 'Utilise' their 'Operator Customer Information'.

5.78 The term 'Utilise' has been defined under paragraph 1 as:

copy, publish, extract, sell, supply and licence copies, in order to discharge BT's obligations pursuant to Conditions 2, 81 and 82 of the BT Licence.

5.79 Additional obligations (some of which are of similar nature that apply mutually to the 'Operator' and BT) relate to the 'Operator Customer Information' ensuring (among other things) its accuracy and completeness, updating, forecasting, responding to certain reports, notifying contact details and supplying the information by one or more of the following means:

- 'Direct Access' (i.e. "direct on-line inputting by the Operator of Operator Customer Information on to the BTDS OSIS Database via the BT Gateway"³¹);
- 'On-line Batch Access' (i.e. "the provision of Operator Customer Information by the Operator to BTDS online, by the LORS system or any successor thereto, for inputting by BTDS to the BTDS OSIS Database"³²);
- submission of 'Hard Copy' (i.e. "the submission of Operator Customer Information to BTDS by means of paper, facsimile, or disc, for inputting by BTDS to the BTDS OSIS Database"³³);
- such other means as may be agreed from time to time by the parties in writing such agreement not to be unreasonably withheld.

Charges and payment

5.80 Subject to certain qualifications under paragraph 3 of the BT Upstream Contract, the charges payable for 'Operator Customer Information' are those specified from time to time in the BTDS Price List.

5.81 Section 1³⁴ of the current BTDS Price List sets out the rates to be paid by the 'Operator' for inclusion of 'Operator Customer Information' in BT's Operator Services Information System (OSIS); Section 3³⁵ of that List sets out details of network charge

³¹ Paragraph 2.5.1, read in light of paragraph 1.

³² Paragraph 2.5.2, read in light of paragraph 1.

³³ Paragraph 2.5.3, read in light of paragraph 1.

³⁴ See at: http://www.btwholesale.com/content/binaries/solutions/directory_solutions/library/btdsection1iss721.doc

³⁵ See at: http://www.btwholesale.com/content/binaries/diusect3_62.rtf

change notices and price change notifications relating to the DIU Price List Sections 1.0 and 2.0:

5.82 These Sections are set out in **Annex 5**.

Statutory and other obligations

5.83 Finally, paragraph 5.1 of the BT Upstream Contract provides:

The Parties shall comply in all respects with the provisions of any statutes and any other obligations imposed by law or by any other competent authority and the provisions of any codes whether voluntary or obligatory which are relevant to any obligation of the Parties under this Agreement and in particular (but without prejudice to the generality of the foregoing) the Parties undertake and agree that they will comply with the Data Protection Act 1998 in all respects (including maintaining all relevant registrations) and that they shall not disclose any data the subject of such Act to any person not authorised by the disclosing Party's registration under such Act. The terms of this paragraph shall override any conflicting obligations on the Parties under this Schedule.

BT's downstream licence arrangements

General

5.84 By way of overview, the licences contain provisions about:

- definitions and interpretation (paragraph 1);
- commencement and grant (paragraph 2);
- obligations of the Licensee, i.e. The Number (paragraph 3);
- obligations of BT (paragraph 4);
- mutual obligations (paragraph 5);
- Database and Amendment Information (paragraph 6);
- charges and payment (paragraph 7);
- audit rights and records (paragraph 8);

5.85 The remainder of the licences contain 'boilerplate' standard type of clauses in contracts, such as confidentiality, force majeure, termination and so on. We will in the following sub-sections set out only those provisions that relate to the matters in dispute between the parties, that is to say the charges to be paid by The Number and Conduit, respectively, to BT under these licences in light of BT's regulatory obligations.

The Number's and Conduit's rights of use

5.86 Before dealing with the charges, we need to set out what they relate to under the licences.

5.87 The Schedule to the licences provide:

SCHEDULE

(Rights)

1. Use and extent of Licence

The Licensee may make available within the Territory, one or more of the following:

Business/Residential Customer Alphabetical (A-Z) Products or Services.

Classified Products or Services

and the extent of the Database and Amendment Information in relation to Residential/Business customer entries and Directory Status Classifications shall be agreed within a Customer Service Plan for the Licensee in accordance with the Guidelines and the Licensee's Rights as agreed above.

2. Location

The Database and Amendment Information will be supplied to the location(s) set out in the Customer Service Plan.

3. Copying

The Licensee may make copies of the Database and Amendment Information for the purpose of producing Products or Services at other locations permitted under this agreement.

- 5.88 The terms 'Business/Residential Customer Alphabetical (A-Z) Products or Services' and 'Classified Products or Services' are defined in paragraph 1.5 and 1.8, respectively, as follows:

"Business/Residential Customer Alphabetical (A-Z) Products or Services" means Products or Services compiled from Business Customer and/or Residential Customer Entries from the Database.

"Classified Products or Services" means Products or Services compiled from a Classified Database.

- 5.89 The terms used in those definitions are, in turn, defined as follows:

1.18 "Products or Services" means products or services derived from the exercise of the Rights to be made available by the Licensee only in the Territory.

1.4 "Business Customer" means an individual, partnership, body corporate, or statutory body with an Entry on the Database classified as business and includes Entries recorded in the category known as Government and Business.

1.19 "Residential Customer" means a person with an Entry on the Database classified as residential.

1.15 "Entry" means the collection of data fields on the Database and Amendment Information as set out in the Independent Core Database Data Definition document (including fields for name, address and telephone number relating to a Residential Customer or a Business Customer) or any part or parts of an Entry.

1.11 "Database" means the data file of Entries contained in the database system or systems run by or on behalf of BT (currently known as OSIS) used (inter alia) for the

production of directory information products and services, which shall be delivered or supplied to the Licensee to the extent set out in the Schedule.

1.7 "Classified Database" means a database, the copyright of which is vested in the Licensee and which is generated, owned and maintained by the Licensee, derived partly or wholly from Business Customer Entries by contacting Business Customers to:

(a) agree the uses to which the Business Customer's data will be put and whether the Business Customer will be included in the Classified Database; and

(b) agree how the Business Customer will be classified in the Classified Database; and

(c) verify and enhance (where possible and without obligation on the Licensee) the Business Customer's data in the Business Customer Entry.

1.2 "Amendment Information" means information which updates the Database by changing, adding or deleting Entries and includes without limitation:

(a) data updates in respect of Entries;

(b) proformas containing bulk number change information;

(c) bulk exchange change information;

(d) reasonable information on the mechanisms BT adopts to update the Database.

Charges to be paid to BT

5.90 Paragraph 7 of the licences provides:

7. CHARGES AND PAYMENT

7.1 The Licensee shall pay to BT the Annual Charge specified in the BT DirectorySolutions Price List from time to time and such other charges as are set out from time to time in the BT DirectorySolutions Price List which relate to the Rights granted under this agreement

7.2 The Annual Charge shall be payable yearly in advance on the Commencement Date and each anniversary of the Commencement Date and the Annual Charge shall be credited against the other charges incurred by the Licensee under this agreement in each yearly period, provided that this shall not in any way affect the Licensee's absolute obligation to pay the total amount of Annual Charge and the charges due in each yearly period in respect of the exercise of the Rights and other charges under this agreement in excess of the Annual Charge. Subject only to the provisions of clause 13.1 the Annual Charge shall not be refundable on any termination of this agreement,

7.3 Subject to the provisions of clauses 7.4 and 7.5 the Licensee shall issue to BT, on or before the 15th day of each calendar month, a statement broken down by Business/Residential Customer Alphabetical (A-Z) Products or Services and Classified Products or Services, in accordance with the form of the template supplied by BT from time to time, showing:

7.3.1 the number of Searches made on each type of its Products or Services; and

7.3.2 the number of Credits shipped, issued or distributed; and

7.3.3 the number of printed directories shipped, issued or distributed

during the preceding calendar month (nil returns being required).

7.4 Where the Licensee grants licences in respect of its Classified Database, or any part of it, to third parties, use by any third party may be excluded from the statement required under clause 7.3.

7.5 A Licensee exercising Rights to make available Classified Products or Services may elect to pay the whole of the amount of the Classified Annual Usage Cap in advance on the commencement of any year of this agreement and supply no statements in respect of Classified Products or Services for that relevant year period.

7.6 BT will invoice the Licensee on the basis of the statements supplied under clause 7.3 (taking account of the Annual Charge and the Classified Annual Usage Cap where applicable) and payment of each invoice will be due on the 30th day following the date of such invoice. If the Licensee fails to issue a statement by or on the 15th day of any month BT will issue an estimated statement for that period based on an average of the three previously submitted statements.

7.7 Interest shall be payable on any moneys which are not paid by the due date and shall accrue and be calculated on a daily basis both before and after judgement at the rate of 4% per annum above the base lending rate from time to time of HSBC Bank plc for the period from the due date for payment until the date on which the monies are actually paid.

7.8 BT may review the charges set out in the BT DirectorySolutions Price List at any time provided that BT shall give to the Licensee not less than 28 days prior written notice of any change.

5.91 Section 2.0³⁶ of the current BTDS Price List, which is referred to in that paragraph 7, is set out in full at **Annex 5**.

BT's obligations to supply information to Licensees in prescribed form

5.92 Paragraph 4 of the licences provides:

4.1 BT shall:

4.1.1 deliver the Database to the Licensee as soon as reasonably practicable after the Commencement Date, at a location and on a date to be agreed between the parties, by a series of data files, in a form prescribed by BT from time to time in the Guidelines;

4.1.2 supply to the Licensee Amendment Information, by electronic data transfer or other method prescribed by BT from time to time in the Guidelines, at the frequency set out in the Guidelines;

provided that BT may delay or suspend the delivery or supply of the Database and Amendment Information if it is not satisfied that the Licensee has made appropriate arrangements for data receipt.

³⁶ See at: http://www.btwholesale.com/content/binaries/solutions/directory_solutions/library/BTDSsection2%20Mar04.rtf

Section 6

Assessment of BT's USC7 obligations

Introduction

- 6.1 This Section sets out Ofcom's reasoning and, where relevant, supporting evidence for its provisional findings with regard to BT's obligations under USC7 in relation to these disputes.
- 6.2 The structure of this Section is as follows:
- first, Ofcom's analysis of the unlawfulness of USC7 which explains also why the position with regard to directories suffers from the same defects as noted above in relation to DQ services (see the Thomson complaint) (see **paragraphs 6.4 to 6.48**);
 - secondly, Ofcom's views on submissions by the parties to the disputes (as well as another interested person, i.e. Thomson) explaining why Ofcom maintains provisionally its views on the unlawfulness of USC7 (see **paragraphs 6.49 to 6.106**);
 - thirdly, and finally, Ofcom's provisional findings, which are reflected in the draft determinations resolving the two disputes (see **paragraphs 6.107 to 6.110**).
- 6.3 **Section 8** sets out certain implications that the resolution of these disputes might have for others who rely on BT supplying them access to the OSIS database under USC7. That Section also sets out Ofcom's present policy plans in broad terms in addressing any issues arising from its decisions made in these disputes. In **Section 7**, Ofcom sets out its separate assessment of BT's obligations under GC19.

Ofcom's Analysis

Background

- 6.4 On 13 January 2006, Ofcom decided in the light of the unusual circumstances of this case (as set out in **Section 3**) that it would be appropriate on this occasion to disclose to the parties to the two disputes a summary of legal advice from its Leading Counsel in respect of the lawfulness of USC7.
- 6.5 We emphasised, however, to the parties that the fact that Ofcom shared this advice with the parties at that stage should not be taken as a determination (or draft determination) in itself by Ofcom to resolve the disputes. We set out this advice below, but we emphasise that it is not Ofcom's usual practice to disclose its legal advice externally and the fact that it is set out again below should not be taken as a change of that practice going forward.

Summary of Ofcom's preliminary conclusions on the lawfulness of USC7

- 6.6 In summary, Ofcom considers (as advised by leading Counsel) that USC7 does not properly implement Article 5 of the USD. In essence, that is because (in relation to DQ services) the mechanism in USC7 fails to impose an obligation on any undertaking (and, in particular, on BT as a designated provider) to guarantee that at least one comprehensive DQ service is provided to all end-users. This position may

be contrasted with other universal service obligations imposed on BT, such as under USC1, which properly implement provisions in Chapter II of the USD, such as Article 4.

6.7 As a matter of domestic law, a conclusion that USC7 does not implement Article 5 of the USD leads automatically to the conclusion that it is beyond Ofcom's powers and hence unlawful.

6.8 Furthermore, the particular provision in USC7.4 relating to the regulation of charges is incompatible with the USD or with the provisions of the 2003 Act that implement the USD. In other words, even if the rest of USC7 were compatible with the USD, USC7.4 itself is flawed and *ultra vires*.

6.9 Further detail of these conclusions is set out below.

Article 5 and the terms of USC7

6.10 As already seen in **Section 5** of this document, Article 5 of the USD provides:

Directory enquiry services and directories

1. Member States shall ensure that:

(a) at least one comprehensive directory is available to end-users in a form approved by the relevant authority, whether printed or electronic, or both, and is updated on a regular basis, and at least once a year;

(b) at least one comprehensive telephone directory enquiry service is available to all end-users, including users of public pay telephones.

2. The directories in paragraph 1 shall comprise, subject to the provisions of Article 11 of Directive 97/66/EC, all subscribers of publicly available telephone services.

3. Member States shall ensure that the undertaking(s) providing the services referred to in paragraph 1 apply the principle of non-discrimination to the treatment of information that has been provided to them by other undertakings.

6.11 USC7 was imposed by the DGT in July 2003. In summary:

- USC7.1 requires BT to maintain a database with directory information for all subscribers who have been allocated a telephone number by any communications provider (in practice, the data that would be required by any supplier of DQ services);³⁷
- USC7.2(b) requires the contents of that database to be made available to any supplier of DQ services (not to end-users), subject to the data protection law qualifications in USC7.3;
- USC7.4 requires charges made by BT for making the database available to suppliers to be fair, objective, cost oriented and not unduly discriminatory;

³⁷ All communications providers who allocate numbers to subscribers have to supply that information to BT (or anyone else wishing to supply directories or DQ services) under GC19, implementing in this respect Article 25(2) of the USD.

- USC7.6 imposes duties of non-discrimination and (in essence) ensuring that information may be excluded at the wish of the subscriber.
- 6.12 It is plain from USC7 therefore that it does not impose any obligation on BT (or any other undertaking) to provide, or secure the provision of, a DQ service to any end-users (or all end-users) – rather, it imposes on BT the obligation to provide, on non-discriminatory and regulated terms, persons wishing to supply DQ services to end-users with the basic “raw material” – the database – that enables them to do this. In short, it requires BT to provide the database at a “wholesale” level, but does not require it to provide services at a “retail” level to end-users.
- 6.13 When he explained the reasoning behind this structure, the DGT said:

As explained in Chapter 3, Oftel believes that the condition is required in order that Articles 5 and 25 of the Universal Service Directive are properly implemented. It is the most proportionate and effective way to ensure that providers of publicly available directories or DQ services are in practice able to access the information they need to compile directories and make services available.³⁸

- 6.14 The reasoning behind this statement was that, as a matter of fact, there are and have always been a number of persons able and willing to provide comprehensive DQ services to all end-users. Moreover, GCs 8 and 6, applicable to all communications providers in the UK, require them to allow their end-users (or users of pay phones) access to all DQ services; Ofcom considers that GCs 8 and 6 fully and properly implement in this respect Article 25(3) of the USD.
- 6.15 Therefore, as a matter of practical reality, a situation has been brought about in which all UK end-users have access through their respective communications providers to comprehensive DQ services. The provisions of USC7 play a key part in achieving that result. This does not, however, answer the question of whether this point is sufficient in law as a basis for USC7.

Lawfulness of USC7

- 6.16 In principle, the lawfulness of USC7 has to be examined under both UK and EC law; that is to say, it must:
- fall within the power to set a USC in Sections 65-67 of the 2003 Act, which (as a result of the proper construction of those Sections, particularly s.65(1)) brings one to the question of whether it is required by EC law; and
 - (assuming it is permitted by UK law) also be permitted by EC law and in particular by the relevant directives on electronic communications.
- 6.17 As regards the question as to whether USC7 implements a Community obligation (that is, Sections 65-67 of the 2003 Act), Ofcom considers that the effect of Sections 67(1) and 65(1) of the 2003 Act is that USCs may be imposed only in order to secure compliance with Community obligations and, in particular and for present purposes, the obligation in Article 5(1)(b) of the USD.
- 6.18 Taking that point, Ofcom would note in particular that:

³⁸ See §5.42 of the USO notification; which reasoning is repeated at § 3.74-3.80 of the USO notification, the passages of which are cited fully in **Annex 6** of this document

- Section 67(1) provides that “*OFCOM may set any such [USCs] as they consider appropriate for securing compliance with the obligations set out in the universal service order.*”;
 - in turn, Section 65(1) provides that the Secretary of State must, in a universal service order, set out “*the extent to which the things falling within subsection (2) must, for the purpose of securing compliance with Community obligations for the time being in force, be provided, made available or supplied throughout the United Kingdom.*”; and
 - the current Services Order identifies³⁹, as the “things” to be made available in order to comply with a Community obligation, the same “things” (with immaterial differences in wording) as are set out in, inter alia, Article 5(1)(b) of the USD, that is to say it provides that “*at least one comprehensive telephone directory enquiry facility shall be made available to all end-users, including users of public pay telephones*”.
- 6.19 Under the 2003 Act, therefore, Ofcom can impose USC7 if and only if USC7 is appropriate to secure compliance with the obligation on Member States in Article 5(1). If it is not, then as a matter of UK law it is unlawful even if it may otherwise be permissible as a matter of EC law.
- 6.20 To start with, Article 8 of the USD refers to the designation of one or more undertakings to “*guarantee*” the provision of the universal services set out in (*inter alia*) Article 5(1). The natural legal reading of “*guarantee*” in this context is that there are one or more undertakings which are, between them, under a legal duty to ensure that Article 5(1) services are available to all end-users. Therefore, Article 8 plainly requires that the Article 5 services should be achieved by designating one or more undertakings to guarantee that all end-users receive comprehensive DQ services. But USC7 fails to achieve this; neither BT nor any other undertaking is under any obligation either to provide or to guarantee the provision of Article 5 services.
- 6.21 Put another way, the USD is implemented correctly in this respect only if there is an enforceable obligation on an undertaking to make sure that all end-users receive DQ services. But there is plainly no such obligation on BT (or any other undertaking).
- 6.22 The view that implementation of Article 5 requires that there be a legally enforceable duty on an undertaking to provide or ensure the provision of Article 5 services is strengthened by the language of the USD. In particular, Article 1(2) refers to a “*minimum set of services of specified quality to which all end-users have access*”; similar language is used in the 4th recital. That language plainly suggests that the USD requires the imposition of a legal obligation on the designated undertaking to ensure that those services are provided.
- 6.23 In this context, it is also to be noted that the DGT’s reasoning (as cited under **paragraph 6.13** above) suggests that the main reason for choosing this means of implementing Article 5 was that it was hoped to create competition between a number of suppliers of DQ services. However, this strongly suggests that the DGT’s prime objective in imposing USC7 was the generation of competition as between DQ service providers rather than the implementation of the USD.

³⁹ In paragraphs 2 and 3 of the Schedule to the Services Order.

- 6.24 The DGT's reasoning cited above also raises the issue as to whether USC7 may, in part, be seen as implementing Article 25(2) of the USD. However, as will be considered further in **Section 7** of this document, the obligation in Article 25(2) to supply "*relevant information*" extends only to data relating to the provider's own subscribers, and not to other subscriber data that the provider might happen to have by reason of, for example, its being the designated provider of a universal DQ service under Article 5 of the USD. That interpretation is supported by the ECJ's view (at §34) in *KPN v. OPTA*, which case has been considered in **Section 5** of this document, that a strict approach has to be adopted to the construction of the term "*relevant information*". Therefore, as USC7.1 requires BT to maintain a database with directory information for all subscribers who have been allocated a telephone number by any communications provider, it cannot be said that this provision implements Article 25(2) of the USD.
- 6.25 As regards the question of the consistency of the obligations in USC7 with the relevant directives, the USD does not contemplate that the obligations placed on designated undertakings might require them to supply services at a "wholesale" level, that is to say, to other communications providers or other non-end-users (collectively referred to as "**intermediaries**"). This can be seen most clearly in the provisions in the USD relating to cost recovery schemes (Article 12 and Annex IV). Those provisions are conspicuously silent on how payments made by intermediaries for such supplies are to be treated – a silence which points to the conclusion that the USD does not contemplate that universal service obligations will require supplies to intermediaries.
- 6.26 Any suggestion that an obligation to supply an intermediary might be acceptable as part of a universal service obligation that also included a requirement to supply (or guarantee supply to) end-users would run into a further difficulty when one comes to consider the cost recovery provisions (that is, Articles 12 and 13) of the USD.
- 6.27 It seems to be plain from both Case C-146/00 *Commission v. French Republic* and *KPN v. OPTA*, cited above, that the ECJ takes the view that the only costs recoverable under the cost recovery provisions (in what is now the USD) are those costs which are closely and necessarily linked to universal service obligations. That, in turn, means that the universal service obligations imposed by Member States need to be tightly confined to what is necessary to implement the USD.
- 6.28 Accordingly, not only are the provisions of USC7 without basis in domestic law (because they do not implement obligations under Chapter II of the USD), but they are also inconsistent with the USD. This view is supported by the views of the European Commission obtained by BT, which are cited fully in **Annex 6** of this document.

The Financing Provision in USC7.4

- 6.29 Even if the rest of USC7 were soundly based, there is a further difficulty with USC7.4 which means that this obligation falls away in any event. However, to deal with the latter, the analysis set out below proceeds on the (false) assumption that USC7 in general terms implements Article 5 of the USD and, further, that USC7.4 is an essential part of the scheme of USC7 in that the obligation on BT to supply the database at a "wholesale" level becomes nugatory if there are no restrictions upon its terms and charges for such supply. If that would be right, then USC7.4 regulates, in

effect, charges levied by BT in order to recover the costs of discharging its universal service obligation⁴⁰.

- 6.30 To consider the lawfulness of that arrangement, it is appropriate to first summarise the substance of the financing provisions in Chapter II of the USD, which are cited fully in **Annex 6** of this document.
- 6.31 As might have been predicted from the reference in Article 3(1) to the provision of the Chapter II (universal) services to end-users "*at an affordable price*", the USD contains provisions for the control of the price at which the designated undertakings make such services available. Article 9 therefore provides for the monitoring by Member States of the "*evolution and level of retail tariffs*", in particular "*by reference to national consumer prices and income*". It also provides that Member States may require the provision of Chapter II services "*to consumers*" at tariffs departing from normal commercial conditions, in particular to ensure their availability to those on low incomes or with special social needs. (In that light, it seems plain that Article 9 is dealing with *retail* pricing to end-users or consumers, and has no applicability to *wholesale* tariffs.)
- 6.32 Article 10 goes on to reinforce Article 9 by providing, among other matters, that Member States must ensure that designated undertakings cannot require the subscriber to take additional unnecessary services as a condition of supply of Chapter II services; this provision deals with the possibility that designated undertakings might seek to recover losses incurred supplying Chapter II services at non-commercial rates by requiring subscribers to purchase additional, profitable services as a condition of supply.
- 6.33 The imposition of a requirement to provide Chapter II services, particularly at non-commercial tariffs or on a basis involving geographical averaging or price caps⁴¹, could impose an unfair burden on designated undertakings. Articles 12 and 13 contain provisions that allow Member States to relieve that unfair burden by calculating the net costs of the provision of the Chapter II service in question; a detailed mechanism for doing that is set out in Article 12 and in Annex IV and Article 8(2). Article 13 then allows Member States to make arrangements either to compensate the designated undertaking for that net cost from public funds or to share that net cost, in accordance with the general principles set out in paragraphs (2) and (3), amongst providers of electronic communications services.
- 6.34 Articles 12 and 13 of the USD are implemented by Sections 70 to 72 of the 2003 Act. Section 70 provides that Ofcom may from time to time review the extent of the financial burden imposed; under sub-section (3) the financial burden is to be assessed on the basis of the net cost of compliance after taking into account benefits accruing to the undertaking from its designation and the application to it of universal service conditions. Section 71 then sets up a mechanism by which Ofcom may, if it considers that the financial burden imposed is unfair on the undertaking concerned, require that other communications providers make a contribution; the contribution scheme must be drawn up in accordance with regulations made by Ofcom under Section 71.

⁴⁰ It being assumed for present purposes that BT's obligations under USC7 are part of its universal service obligation; if they are not then USC7 (including USC7.4) is *ultra vires* in any event.

⁴¹ See Article 9(4).

- 6.35 In the light of the above summary of the financing provisions, it is to be noted, by way of a preliminary observation, that the USD is completely silent on how to treat payments made by non-end-users in respect of the performance of universal service obligations. This rather suggests that the assumption here – that the USD contemplates the performance of universal service obligations by making supplies to non-end-users (see **paragraph 6.25** above) – is in fact false.
- 6.36 Leaving that aside, to make sense of the USD on that (false) basis, three approaches are in principle possible in regard to Articles 12 and 13:
- i) **Very narrow view.** This view is that Articles 12 and 13 preclude Member States from setting up a sharing mechanism based on compulsory contributions by all communications providers⁴² to the costs of complying with universal service obligations (“**USO costs**”) outside the Art 12/13 mechanism, but leaves them free to regulate charges made to non-end-users for the provision of goods or services for matters which fall within the universal service obligations.
 - ii) **Narrow view.** This view is that Articles 12 and 13 preclude Member States from regulating, outside the Art 12/13 mechanism, the extent to which communications providers contribute to USO costs.
 - iii) **Broad view.** This view is that Articles 12 and 13 preclude Member States from regulating, outside the Article 12 and 13 mechanism, the extent to which anyone other than end-users contributes to USO costs.
- 6.37 There are a number of reasons why Ofcom considers that the broad view is the correct one.
- 6.38 First, any provisions as to the extent to which anyone other than end-users contributes to USO costs is a “compensation mechanism” in that the aim is to provide for the recovery of USO costs.
- 6.39 Secondly, the USD plainly precludes any compensation mechanism outside Articles 12 and 13. Thus, the 4th recital expresses a general concern that compensation mechanisms may result in a distortion of competition, and then expresses the view that this should not result if certain conditions are met – those conditions plainly refer to the mechanism in Articles 12 and 13. The concern that any compensation mechanism needs to meet certain criteria is also expressed in the 18th and 23rd recitals; again, it is clear that those recitals point to the mechanism in Articles 12 and 13 as the mechanism that satisfies those criteria.
- 6.40 On the basis of the broad view, there is no doubt that USC7.4 is precluded, as it plainly regulates the extent to which intermediaries contribute to USO costs. Accordingly, even were the rest of USC7 to be defensible, USC7.4 would nonetheless be found to be flawed.

Article 32 of the USD

- 6.41 Finally, it should also be considered whether Article 32 of the USD would provide legal basis for imposing USC7, particularly in the light of the KPN judgment.

⁴² Subject to the possibility of a minimum turnover threshold (Article 13(3)).

- 6.42 However, there are a number of reasons why Article 32 does not provide a sound and proper legal basis for imposing USC7.
- 6.43 To start with, Article 32 concerns Member States' discretion to make available additional services, apart from services within the universal service obligations as defined in Chapter II of the USD. In other words, Article 32 does not impose a Community obligation. As explained above, the 2003 Act confers no power on the Secretary of State to include a provision which is not a Community obligation in an order under Section 65(1), and he has (rightly) not done so in relation to imposing Article 32 in the Services Order, SI 2003/1904. It follows that Ofcom has no power to implement Article 32 by way of a USC under Section 67 of the 2003 Act. Therefore, as a matter of domestic law, USC7 is unlawful even if it may otherwise be permissible as a matter of EC law.
- 6.44 Although strictly irrelevant to the present issue concerning the validity of USC7, one might seek to argue that Article 32 obligations could possibly be imposed as consumer protection measures using point 8 of Part A of the Annex to the Authorisation Directive (2002/20/EC) (although this route was not in fact chosen). If so, the domestic enabling powers are arguably already in place under Section 51(1)(a) of the 2003 Act to impose such obligations by way of a GC. However, given that a GC may only be applied generally either to all providers or a specified class of providers⁴³, it would in any event appear impossible to impose an obligation similar to that of USC7 in the form of a GC on BT only – so that this argument cannot provide a legal basis for USC7. Article 32 of the USD cannot therefore provide a sufficient legal basis for USC7.
- 6.45 In any event, Article 32 of the USD is clear on its face that it precludes a financing provision; for reasons set out above, that prohibition precludes provisions such as those contained in USC7.4.

Directories

- 6.46 Since the present disputes relate to DQ services, the provisions of USC7 have not been specifically considered by Ofcom to the extent that it seeks to implement Article 5(1)(a) concerning comprehensive directories.
- 6.47 However, in essence, Ofcom's view is that the implementation here suffers from the same defects as noted above in relation to DQ services, that is to say that under USC7 there is no requirement on BT (or any other undertaking) to supply all end-users with directories but rather to supply other communications providers with directories.
- 6.48 In addition, the same problems discussed above concerning the financing provision in USC7.4 apply equally in this context.

Ofcom's views on submissions by the parties and interested persons

- 6.49 In our letters of 13 January 2006 to the parties in the present disputes, Ofcom set out the main conclusions of its Leading Counsel's advice, as detailed above, and enclosed a briefing note (i.e. the 'Summary') of that more detailed advice. In the letters, Ofcom specifically invited the parties to comment on that advice. (A similar

⁴³ Section 46(2) of the 2003 Act.

letter was sent to Thomson, which was also invited to make such comments.) Ofcom subsequently sent a copy of the Counsel's advice in full to all parties, following a request from Conduit.

- 6.50 This Section summarises the comments Ofcom has received on its Leading Counsel's advice and sets out its views on those comments.

No requirement for designated provider to provide the ultimate end-user

- 6.51 In the Annex to its letter dated 3 February 2006, The Number sets out the reasons why it considers that Ofcom's Leading Counsel was wrong to conclude that USC7 does not properly implement Article 5 of the USD and is therefore unlawful. The Number disagrees with Leading Counsel's view that the mechanism in USC7 fails to impose an obligation on any undertaking (and, in particular, on BT as a designated provider) and thereby fails to "guarantee" that at least one comprehensive DQ service is provided to all end-users.
- 6.52 The Number supports Ofcom's reasoning at the time, as cited in **Section 5** of this document, that GC8 and GC19 were insufficient to ensure that the obligations under Articles 5 and 25 of the USD were met efficiently and transparently, in particular to avoid significant duplication of efforts.
- 6.53 Ofcom maintains the view set out by its leading Counsel above. Article 5 of the USD requires that at least one undertaking 'guarantee' that at least one comprehensive DQ service is available to all end-users. USC7 does not achieve that guarantee. Article 5 of the USD does not, however, provide a basis for a universal service obligation to compile and supply to providers of DQ services a comprehensive database of all subscribers, which is what USC7 seeks to do. The fact that USC7 may provide a means by which, in practice, end-users are able to access comprehensive DQ services does not affect the point that it fails to achieve the required guaranteed service and further imposes a "wholesale" supply obligation not found in Article 5 of the USD.
- 6.54 The Number disputes the propositions in the preceding paragraph.
- 6.55 First, with regard to the 'guarantee' in Article 8(1) of the USD, The Number argues that it is not the designated undertaking(s) who must guarantee the provision of the universal service. In this context, The Number recognises that (in the English text of the USD) it could be seen as ambiguous as to whether it is the designated undertakings guaranteeing the provision of the universal service or the measures taken by the Member State (i.e. designation of certain undertakings) which will guarantee the provision of the universal service. However, it submits that the true meaning derived from Articles 3(1), 4(10), 5(1) and 6(1)—which require Member States to 'ensure' that certain universal services are provided—of Article 8(1) of the USD is that Member States are to be enabled to designate undertakings 'in order to' guarantee the provision of the universal service. To support that conclusion, The Number refers to the 13th recital to the USD's preamble which refers to "suitable measures in order to guarantee", which proposition it considers are supported by the French and Portuguese texts of the USD.
- 6.56 Ofcom considers, however, that the purpose of Article 8(1) of the USD is that the designated undertakings should indeed guarantee provision of universal services (rather than that they are designated in order to fulfil the Member States obligation to ensure their provision); that purpose is reflected in the natural reading of the English version.

- 6.57 As to The Number's point about the French and Portuguese texts of the USD, the French language version is inconclusive on the point ("*Les États membres peuvent désigner une ou plusieurs entreprises afin de garantir la fourniture du service universel*"), but both the Spanish and German versions of Article 8(1) of the USD clearly support the natural English construction ("*Los Estados miembros podrán designar una o más **empresas que garanticen** la prestación del servicio universal*"; "*Die Mitgliedstaaten können ein oder mehrere **Unternehmen** benennen, **die** die Erbringung des Universaldienstes... **gewährleisten***"), in both cases making it clear, by the use of a relative pronoun after the word meaning "undertakings", that it is the designated undertakings that must guarantee the universal service. Article 5 of the USD therefore requires there to be an undertaking which guarantees the supply the universal service at issue (i.e. a comprehensive DQ service) to end-users; but it is plain that no such obligation is, in fact, imposed on BT by USC7.
- 6.58 However, even if The Number were right in its construction of Article 8(1) so that it was not necessary for an undertaking to have the responsibility of guaranteeing the provision of the universal service but rather that it was for the Member State to guarantee its provision (which, for the avoidance of doubt, is not accepted by Ofcom), the fact remains that USC7 does not provide any 'guarantee' that the universal service will be provided. Even if BT fully complies with its obligations under USC7, no service is provided to end-users unless BT (or other undertakings) *choose* to make that service available – and there is no mechanism by which Ofcom (or any other body) can require any person to provide those services if no-one chooses to do so. That makes it impossible to see how USC7 could be said to achieve a 'guarantee' of such provision.
- 6.59 The Number disagrees with the proposition that there is nothing in the USD which contemplates the provision of a universal service at a wholesale level rather than to end-users. Rather, it submits that there is nothing in the USD which either requires or precludes a designation for the provision of the universal service at the wholesale level. To support this argument, The Number states that the provision by BT of the OSIS database at the wholesale level represents an 'element' of the universal service within the meaning of Article 8(1) of the USD, which makes plain reference to 'different elements' being provided by different designated undertakings.
- 6.60 Ofcom believes that its Leading Counsel's advice is correct in concluding that there is nothing in the USD which contemplates the provision of a universal service at a wholesale level rather than to end-users, for the reasons given from **paragraph 6.25** onwards above. As to The Number's reliance on the phrase 'different elements' in Article 8(1), Ofcom considers that it is misplaced in this context.
- 6.61 As set out in **Annex 6**, Article 8(1) provides:
1. Member States may designate one or more undertakings to guarantee the provision of universal service as identified in Articles 4, 5, 6 and 7 and, where applicable, Article 9(2) so that the whole of the national territory can be covered. Member States may designate different undertakings or sets of undertakings to provide different elements of universal service and/or to cover different parts of the national territory.
- 6.62 Also relevant is the 9th recital, which provides that:
- (9) The provisions of this Directive do not preclude Member States from designating different undertakings to provide the network and service elements of universal service. Designated undertakings providing network elements may be required to ensure such construction and maintenance as are necessary and proportionate to meet all reasonable requests for

connection at a fixed location to the public telephone network and for access to publicly available telephone services at a fixed location.

- 6.63 In Ofcom's view, the purpose of the reference to 'different elements' in that Article (as well as in that recital) is to allow different undertakings to be designated to provide different universal services (e.g. that one undertaking may be designated to provide a comprehensive directory to all end-users and another may be designated to make available to all end-users a comprehensive DQ service). In any event, the contention that a universal service may be broken up into different elements with each different element being supplied by a different undertaking does not address the point that 'wholesale' provision is not an 'element' of a universal service at all: universal service is service to end-users and does not include any wholesale supply.
- 6.64 The Number further disagrees with the proposition that Articles 9 and 10 and Annex IV support Leading Counsel's advice that the designation of BT to provide the universal service at anything other than the retail level is inconsistent with the USD and therefore unlawful. In The Number's view, whilst these Articles deal with retail pricing and end-user issues, their existence does not in itself *preclude* a designation at the wholesale level or *require* a designation at the retail level. It argues that what these Articles do is to provide for the situation where a designated undertaking is providing services at a retail level. The fact that provision at the wholesale level is not provided for in the same way is not to be taken to mean that it is not possible or permitted to designate for provision at a wholesale level or to regulate the cost and pricing of that provision.
- 6.65 Ofcom takes the view that those provisions, taken together with the absence of any positive indication whatsoever that the USD contemplates the provision of universal service at anything other than the retail level, support its Leading Counsel's advice.

Broad discretion for most efficient approach to provide element of a service

- 6.66 In the Annex to its letter dated 3 February 2006, The Number makes an alternative submission in the event that Article 8(1) would not permit an undertaking to be designated to provide an element of the universal service at the wholesale level. The Number argues that USC7 is, in any event, permitted under the broad discretion given to Member States under Articles 3(2) of the USD to determine the most efficient and appropriate approach for ensuring that the universal service is available to end-users at affordable prices.
- 6.67 The Number submits that this broad discretion reflects Article 249 of the EC Treaty, which states that "*A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods*".
- 6.68 In The Number's view, the discretion for the DGT/Ofcom to set USCs is equally broad. Although The Number agrees with Leading Counsel's advice that the effect of Sections 67(1) and 65(1) of the 2003 Act is that such conditions may be imposed only in order to secure compliance with Community obligations, it submits that the advice wrongly fails to emphasise the very broad discretion left to the DGT/Ofcom in this respect by Section 67(1), which states that "*Ofcom may set any such universal service conditions as they consider appropriate for securing compliance with the obligations set out in the universal service order*" (emphasis added). In its view, in determining the *form and methods* necessary to secure compliance with the obligation in Article 5(1) of the USD, the UK was entitled to decide that an element of the universal service could be secured by requiring BT to perform certain functions

under USC7, namely the maintenance and supply of a comprehensive database of UK directory information to persons seeking to provide directory enquiry services.

- 6.69 The Number further argues that the requirement in Article 5(1) can be met in more than one way and there is certainly no prohibition in terms in the USD on the wholesale supply provided for in USC7 or on Ofel's scheme generally. As a result, it contends that the advice wrongly concludes that the designation of an undertaking to provide the universal service to end-users is mandated by the USD and is therefore the only way to achieve the result required by Article 5(1). In The Number's view, the only thing mandated by Article 5 is that the *universal service is ultimately provided*. The way in which it is provided is left entirely to the Member States' discretion, and in fact Ofel chose under GC8 to require every communications provider assigning telephone numbers to provide access to a comprehensive directory enquiry facility to end-users, rather than designating one undertaking to do so.
- 6.70 In light of the above, The Number concludes that the *combined effect* of USC7 and GC8 and GC19 is that the comprehensive directory and directory enquiry service are provided to end-users in the most effective manner as determined by Ofel. USC7 is therefore a necessary component in the legal framework designed overall to secure compliance with Article 5(1) of the USD and achieve the required result. It also points out that, in implementing a directive, a Member State is entitled to rely in whole or in part on pre-existing legislation or provisions enacted without reference to the directive provided that the overall legal context ensures full application of the directive in a sufficiently clear and precise manner. In support of this statement, The Number relies on *Commission v. The Netherlands*, Case C-190/90⁴⁴. The Number argues that the DGT/Ofel was therefore entitled to rely on GC8, on the wording of Condition 82 in BT's previous licence under the 1984 Act (see **Annex 6**), and on the fact that BT already compiled a comprehensive database of UK directory information which it was required to provide to persons seeking to provide DQ services.
- 6.71 For reasons already set out above, we do not accept this argument by The Number.
- 6.72 First, we do not think its analysis is assisted by reference to Article 249 of the EC Treaty. The result to be achieved in this particular respect under Article 5 of the USD is as set out in the advice, that is to say an enforceable obligation on a designated universal service provider to make available the 'things' (to use the terminology in the Services Order) under that Article directly to all end-users (as opposed to intermediaries). As already explained, this specific result has not been achieved by way of implementing measures in the UK (see also Article 38 of the USD in this respect). Clearly, the UK has exercised its discretion as to form and methods by transposing the provisions of the USD under a combination of UK primary and secondary legislation (including the Services Order), which are in themselves compatible with the USD insofar as they confer appropriate powers and duties upon the DGT/Ofcom in order to allow universal service conditions to be imposed that achieve the result required by the USD. However, that does not alter the conclusion that USC7 does not achieve that result.
- 6.73 Second, as regards to The Number's reference to 'appropriate' under Section 67(1) of the 2003 Act, Ofcom's view is that the end result of the 'appropriate' measure must be to secure compliance with the obligations set out in the Services Order. For the reasons given above, Ofcom does not consider that USC7 secures compliance with

⁴⁴ [1992] ECR I-3265.

the Services Order or with the USD. Furthermore, Ofcom does not see that *Commission v. The Netherlands*, Case C-190/90 supports the point that The Number is making. Indeed, if anything, that case reinforces Ofcom's opinion in that individuals must be able to rely on their rights under a directive transposed into the domestic legal framework (whether existing or new) before the national courts⁴⁵. In other words, if there is no enforceable obligation on BT under USC7 to make available to end-users (say) a DQ service, then such end-users cannot rely on their 'rights' before national courts in order to secure that universal services are provided to them as end-users.

- 6.74 In this context, we note that Thomson in its letter dated 5 June 2006 to Ofcom appears to be making a similar point to The Number with regard to the combined effect of USC7 and GC8, albeit by reference to directories. In particular, Thomson challenges leading Counsel's advice that the implementation of Article 5(1)(a) of the USD suffers from the same defects as noted in relation to DQ services. Thomson argues as follows:

6.21 This statement overlooks the effect of the GC obligation on each communications provider to make available directories to its subscribers, which fully complies with Article 5 (Article 5 does not require that a single provider be designated for the supply of comprehensive directories). Moreover, Article 5 does not require that end users be provided with a comprehensive directory, simply that such a directory be "available" to them. That requirement is fully satisfied by GC8.2 in conjunction with USC7. Article 5 is therefore properly implemented by GC8.2 and USC7.

6.22 Moreover, the database that BT is required to maintain under USC7.1 is – as a matter of practical reality – essential for BT to fulfil its directory obligations and entirely consistent with Article 5.

6.23 As explained above, the obligation to supply information under USC7.2 is entirely consistent with the principles of the KPN judgment and with the wording of Article 25(2) of the Directive.

- 6.75 We do not consider Thomson's argument to be of relevance. Neither leading Counsel, nor Ofcom, has suggested that a 'single' provider has to be designated for the supply of comprehensive directories and note that Article 8(1) of the USD anticipates that "one or more undertakings" could be designated. As mentioned above, the point is that BT has no enforceable obligation in its capacity as a universal service provider to provide Article 5(1)(a) directories. Nor do we see the distinction that Thomson appears to be making between providing a directory and making it available. It suffices here to note that the literal and ordinary meaning of the word 'provide' (using the Shorter Oxford English Dictionary) is "supply or furnish for use; make available; yield, afford".
- 6.76 As regards the issue of combined effect and practical reality, we refer to our views on the arguments made by The Number, which are equally applicable to directories under Article 5 of the USD, as they essentially repeat points already made. On Thomson's point about the consistency of USC7.2 with the KPN principles, we do not accept this point for reasons set out in **Section 7** of this document. A requirement on BT to provide the contents of its OSIS database is plainly wider than a requirement to provide 'relevant information' under Article 25 of the USD.

⁴⁵ See, for instance, §17 of the ECJ's judgment.

Ability to regulate price at the wholesale level

- 6.77 In the Annex to its letter dated 3 February 2006, The Number also takes issue with Leading Counsel's advice when it concludes that, even if the rest of USC7 is defensible, USC7.4 is flawed because it regulates the extent to which intermediaries contribute to USO costs and is therefore a compensatory mechanism outside Articles 12 and 13 of the USD.
- 6.78 The Number argues that all the costs of OSIS are necessarily covered in the fees paid by OSIS licensees and there is, as a consequence, no net cost and no deficit or under-recovery by BT which would necessitate a mechanism by which intermediaries are required to contribute to that particular aspect of the universal service. The Number therefore concludes that Articles 12 and 13 never come into play.
- 6.79 We do not accept this argument. Among other things, the purpose and effect of USC7.4 is to regulate the amount that DQ service providers have to contribute to the costs of the provision by BT of (what is assumed for these purposes to be) a universal service obligation imposed upon it. For the reasons given above, the USD does not permit such regulation outside the scope of the specific provision of Articles 12 and 13.
- 6.80 Furthermore, The Number makes assumptions as to the OSIS fees covering BT's costs of its compliance with USC7. Although we do not think this matter addresses the points in Leading Counsel's advice, it suffices to note that no such assumptions can be made until a review of BT's financial burden has been carried out by Ofcom under Section 70 of the 2003 Act.
- 6.81 In its letter dated 5 June 2006 to Ofcom, Thomson also challenges our Leading Counsel's advice that USC7.4 is unlawful. In particular, Thomson claims that Article 25 envisages the supply of aggregated data and must be interpreted in accordance with KPN principles. According to Thomson, the principles set out by the ECJ in the KPN judgment fully support the obligation to supply aggregated information in circumstances – such as BT's – where the universal service provider independently collects that information under a distinct regulatory obligation. It concludes that USC7.4 does nothing more than to reflect the wording of Article 25(2), which states that relevant information is to be provided on "terms which are fair, objective, cost oriented and non-discriminatory".
- 6.82 We do not accept this argument. For reasons set out in **Section 7** of this document, we do not consider aggregated data fall within GC19 and Article 25. Therefore, we consider that Thomson's argument is based on an incorrect premise.

BT is out of time to challenge domestic vires of USC7

- 6.83 In the Annex to its letter dated 3 February 2006, The Number argues that BT is significantly out of time to challenge the domestic lawfulness of USC7 by way of judicial review proceedings.
- 6.84 First, Ofcom would note that it was not BT which originally raised issue of the lawfulness of USC7 in relation to the disputes. Rather, Ofcom itself first raised this point following consultation with Counsel. Second, more broadly, The Number's point is misconceived. If USC7 is *ultra vires*, then Ofcom has no power to order BT to

comply with its terms, and any such decision by Ofcom could properly be challenged by BT whether or not BT would now be permitted to seek a judicial review of the original decision to impose USC7⁴⁶.

Impact on DQ services market of designating BT only as a DQ provider

- 6.85 In the Annex to its letter dated 3 February 2006, The Number makes a further argument based on the adverse consequences to competition that in its view would follow were Ofcom to accept Leading Counsel's advice and then to seek to correct the current position by designating BT as the universal service provider of DQ services to end-users. The Number argues that such a designation would have the potential to distort existing competition in the DQ services market.
- 6.86 Ofcom notes this point, but does not consider it to be relevant to the immediate issue before us and it does not affect the conclusions of its Leading Counsel's advice. Rather the point would need to be considered should Ofcom confirm the proposals in these draft determinations and therefore need to consult on proposals for the correct implementation of Article 5 of the USD, as required by the Services Order. Details about Ofcom's intentions in this respect are set out at **Section 9** of this document.

Lack of clarity that Ofcom has properly directed Leading Counsel

- 6.87 In its letter dated 3 February 2006 to Ofcom, Conduit submits that it was not in a position to evaluate the reasoning on which Ofcom proposes to rely as set out in Ofcom's Summary of Leading Counsel's advice. It therefore requested that Ofcom provided it with a copy of Counsel's opinion to enable Conduit properly to consider the analysis relied on by Ofcom. On 2 March 2006, Ofcom provided such a copy to Conduit (and all other parties). Ofcom has not, however, received any further submissions by Conduit on that opinion. However, already in its 3 February letter, Conduit questions whether Ofcom's Leading Counsel has been properly directed by Ofcom in three broad respects.
- 6.88 First, Ofcom's Summary is based on an analysis of Sections 65-67 of the 2003 Act, whereas the USO notification was issued under the Universal Service Regulations, which were made under the European Communities Act 1972. In this context, Conduit notes that the Summary also lacks any analysis of the transitional provisions in paragraph 7 of Schedule 18 to the 2003 Act and therefore questions whether Counsel has been properly directed to consider the correct statutory basis for USC7.
- 6.89 Ofcom notes that Conduit has not argued that Leading Counsel's analysis did not apply with equal force to the position before the coming into force of the 2003 Act. In any event, the lawfulness of USC7 must now be considered in terms of the statute that is now in force, that is to say the 2003 Act. In this regard, Ofcom concurs with the response made by BT to Conduit's submission (see further below).
- 6.90 The second point made by Conduit concerns the implications of Counsel's reference to 'receive' in the following passage of the Summary: "...Therefore, Article 8 plainly requires that the Article 5 services should be achieved by designating one or more undertakings to guarantee that all end-users **receive** comprehensive DQ services". Conduit argues that, in practice, such an approach would involve Ofcom granting the

⁴⁶ The position is the same, for example, as where a prosecution is brought for an offence under a bye-law which the defendant considers to be invalid; the defendant is entitled to raise that point in his defence and the Court must decide the question of the legality of the bye-law; see *Boddington v. British Transport Police* [1999] 2 AC 143.

provider of the 'universal directory enquiry service' a special right to require all network operators providing connections to end users to interconnect with (or otherwise to provide access to) its service. No such right is enjoyed by other DQ service providers and it is therefore unclear to Conduit whether Counsel was directed to Article 5 of the Competition Directive or whether any consideration has been given to the compatibility of such an interpretation with the new directives or broader public law principles of proportionality.

- 6.91 Ofcom notes in this regard that Article 25(3) of the USD requires Member States to "*ensure that all end users provided with a connection to the public telephone network can access ... directory enquiry services in accordance with Article 5(1)(b)*". That Article is implemented by GC8.1(b) (set out in **Section 5** of this document). Ofcom considers that a correct implementation of Article 5 of the USD would involve requiring a designated service provider to make a comprehensive DQ service available to any end-user; the designated provider would therefore be obliged to make that service available to end-users on the networks of other communications providers. Those other communications providers would, in turn, be subject to GC8.1(b). Ofcom does not see what other 'special right' would need to be granted to the designated service provider apart from GC8.1(b) (which is plainly based on Article 25(3) of the USD), and therefore it does not see that any difficulty arises under the Competition Directive.
- 6.92 The third point by Conduit relates to the extent to which Counsel was directed to consider the legal analysis conducted by Oftel prior to the USO notification was issued by the DGT on 22 July 2003.
- 6.93 Ofcom does not consider this to be a relevant question.

BT generally supports Leading Counsel's advice

- 6.94 In its letter of 3 February 2006 to Ofcom, BT agrees with Ofcom's Leading Counsel's conclusions so far as USC7 is concerned, subject to its more specific comments as summarised below.
- 6.95 First, BT agrees that the 2003 Act empowers Ofcom to impose USCs only if and to the extent that they are appropriate for securing compliance with the obligations set out in the USD, in particular Article 5(1) of the USD.
- 6.96 BT also considers it certainly well arguable that USC7 is unlawful on the basis indicated in Leading Counsel's advice, namely that it fails to give effect to an obligation under Article 8 of the USD to impose a duty on at least one provider to guarantee the provision of the universal services, in this case those set out in Article 5(1) of the USD. However, in light of its following additional comments, BT does not think it is necessary to express a final view on that point.
- 6.97 BT agrees that the obligations purportedly imposed on BT by USCs 7.1 to 7.4 (to maintain a database of information regarding all subscribers who have been allocated a telephone number by *any* communications provider, to supply the contents of that database to any supplier of publicly available DQ or directories services, and limiting the charges made by BT for such supply) do not reflect any obligations in the USD and are therefore *ultra vires*. In particular, BT submits that the regime set out in the USD contemplates that all communications providers who assign telephone numbers to subscribers will be required to meet all reasonable requests to make available, for the purposes of the provision of publicly available DQ and directories services, the relevant information (Article 25(2)). BT points out that

the 'relevant information' in this context refers to information in relation to subscribers to whom *that provider* has assigned telephone numbers. Article 25(2) then requires the cost of making such 'relevant information' available to be "fair, objective, cost oriented and non-discriminatory". Article 25(2) is reflected, in the UK's domestic provisions, in GC19.3. It is the predecessor to Article 25(2) that has been considered by the ECJ in the *KPN* case.

- 6.98 BT further points out in this context that, if a Member State has imposed an obligation on a provider to guarantee the provision of the universal service set out in Article 5(1) of the USD, then that designated provider will of necessity have to obtain relevant information from all other providers who assign telephone numbers, in order to enable it to provide a universal DQ and/or directories service. It is through Article 25(2) that a designated universal provider would be able to obtain such relevant information. However, in BT's view, nothing in the USD contemplates or requires Member States to impose on any provider a universal service obligation to obtain, aggregate *and make available to competing DQ or directories providers* relevant information, or indeed any subscribers other than those to whom it has itself assigned telephone numbers. Access to such relevant information would be possible through Article 25(2) (GC19 in the UK). Indeed, BT argues that there is no basis for the imposition of wholesale universal service obligations under the USD and refers to exactly this argument that BT made to Ofcom during Ofcom's 2003 consultation on the implementation of the USD (see further at **Annex 6** of this document).
- 6.99 According to BT, it follows that nothing in the USD contemplates or requires any provision as to the charges that a provider subject to such an obligation as is referred to above (assuming it existed) might levy for the provision of such aggregated data. In particular, Article 25(2) has absolutely no application to any such supply of data. It further follows that USC7 is not appropriate to implement the UK's obligations under the USD and is *ultra vires*.
- 6.100 BT also agrees with Ofcom's Leading Counsel's conclusion that Article 32 of the USD does not support the validity of USC7.
- 6.101 If either USC7 as a whole, or USC7.4 in particular, is *ultra vires*, then BT argues that the present dispute simply falls away. In this context, BT makes some provisional observations even if USC7 were held to be *intra vires*. For reasons already set out above, BT claims that the restriction in USC7.4 on the amount which BT may charge for the supply of aggregated data does not implement Article 25(2): in short, Article 25(2) only applies to the charges made for data relating to the supplier's own subscribers. Accordingly, USC7.4 is not properly to be read in the light of Article 25(2), being neither required nor authorised by that provision. The correct construction of USC7.4, if it is *intra vires*, is that 'cost oriented' refers to the true cost of the supply in question, which in turn includes the additional burden of obtaining and aggregating data from other providers. *KPN* would not prescribe the charges which could be made for such supply.
- 6.102 Separately, in its letter of 23 February 2006, BT responds to Conduit's suggestion that Ofcom's Leading Counsel's opinion is defective because the statutory basis of USC7 was not Sections 65-67 of the 2003 Act, but Section 2(2) of the European Communities Act 1972. For a number of reasons, BT considers that this point is incorrect, and in any event does not really affect the position.
- 6.103 First, BT points out that the USCs were on 22 July 2003 notified *as proposals* under regulation 4(10) of the Universal Service Regulations, which were in turn made under

Section 2(2) of the European Communities Act 1972. Regulation 4(10) provided that the DGT in specified circumstances:

“may, by publication of a further notification, set out the proposals...as he intends that effect would be given to them upon the coming into force of any enactment...which implements the provision of the Universal Service Directive to which the proposals relate...”

6.104 Thus, at the time the USCs were notified, they were proposals for measures that, it was intended, would be given effect upon the coming into effect of the relevant enactment to implement the USD. Using the language of the Explanatory Note to the Regulations, they were “preparatory tasks”. BT further points out that it was only on the coming into effect of the enactment itself, viz the 2003 Act which came into force on 25 July 2003, that the USCs took effect as such. They were henceforth deemed (by paragraph 7 of Schedule 18 to the 2003 Act) to have been made under Section 45 of the 2003 Act, which in turn cross-refers to Section 67, as that paragraph 7 makes clear:

7 (1) Where a proposal for the designation of a person as a universal service provider has been confirmed under regulation 4(10) of the Electronic Communications (Universal Service) Regulations 2003 (S.I. 2003/33), the designation is to have effect after the commencement of section 66 of this Act as a designation in accordance with regulations under that section.

(2) Where in any person's case a proposal to set a condition has been confirmed under regulation 4(10) or 5(4) of those regulations, that condition is to have effect after the commencement of that section as a condition set by OFCOM under section 45 of this Act and applied to that person.”

6.105 It follows, according to BT, that all questions as to the legality and scope of the USCs are to be determined on the basis that the USC were made under Section 67. In any event, BT points out that Conduit has not identified any material difference between the powers in Section 67 of the 2003 Act and those in Section 2(2) of the European Communities Act 1972 that might alter the outcome of this issue. Finally, BT submits that the points made in its letter of 3 February 2006, which support the view that USC7 is invalid, are founded on the terms of the USD itself rather than on any domestic enabling provisions. Those points would apply equally even if Conduit were right to say that the statutory basis of the USCs is the European Communities Act 1972.

6.106 As noted above, Ofcom concurs with the response made by BT to Conduit's submission relating to the implications of the statutory basis of USC7.

Ofcom's Provisional Findings on USC7

Declaration and directions concerning charges

6.107 For reasons set out above, and having considered the submissions made by the parties, Ofcom is minded to conclude that USC7 (and, in particular, USC7.4 itself) is flawed and *ultra vires*.

6.108 On that basis, Ofcom proposes to resolve these disputes by declaring, pursuant to Section 190(2)(a) of the 2003 Act, that BT has not during the period beginning on 25 July 2003 and ending on the day of the publication of these determinations been required to make available to The Number and Conduit, respectively, the contents of BT's OSIS database pursuant to paragraph 7.2(b), in accordance with the terms of paragraphs 7.4 to 7.6, of USC7. However, to the extent that BT has chosen to make

available certain information that it is required to supply under GC19 (see further in **Section 7** of this document) as part of the contents of the OSIS database, BT has during that period been required to make available to The Number and Conduit such specific information on terms discussed in that section. We will discuss the implications of the latter for these disputes in **Section 7**.

6.109 As a result of the above, no issue arises with respect to which Ofcom may lawfully make a declaration:

- a) pursuant to section 190(2)(a) of the 2003 Act, setting out the proper amount of a charge by BT to The Number and Conduit, respectively, in respect of making available the contents of the OSIS database in machine readable form during the Relevant Period;
- b) pursuant to section 190(2)(b) of the 2003 Act, fixing the terms or conditions (including charges) of BT making available to The Number and Conduit, respectively, the contents of the OSIS database in machine readable form to take effect on the first day after the Relevant Period has come to an end;
- c) pursuant to section 190(2)(c) of the 2003 Act, imposing an obligation, enforceable by either of the parties to the two disputes, to enter into a transaction between themselves on the terms and conditions fixed by Ofcom in relation to BT making available to The Number and Conduit, respectively, the contents of the OSIS database in machine readable form to take effect on the first day after the day of the publication of these determinations,

by reference to, or under, USC7.

6.110 The above-mentioned proposed declarations are set out in each of Ofcom's proposed draft determinations in **Section 1** of this document. In **Section 9** of this document, we set out briefly the steps we plan to take in the first instance to ensure that Article 5 of the USD is properly implemented and to formally revoke the wholesale access obligations placed on BT to provide contents of its OSIS database. We also set out in **Section 9** our further plans in addressing issues arising out of these disputes relating to OSIS.

Direction regarding The Number's costs in referring the dispute

6.111 The Number has requested in its Initial Request that, in so far as BT's obligations under USC7 are concerned, Ofcom exercises its discretion under section 190(6)(a) of the 2003 Act and directs BT to make payments to The Number in respect of costs and expenses incurred by The Number in consequence of the reference of the dispute to Ofcom. (Conduit has not made a similar request to Ofcom for its costs and expenses, so we therefore deal only with The Number's request below.)

6.112 In support of its request, The Number considers that Ofcom should give such direction taking into account the reasons why it had to refer the dispute to Ofcom, namely, in The Number's view, BT has refused:

- i) to provide it with costs information;
- ii) to discuss with it the implications of the KPN judgment for BT's charging;
- iii) to engage in negotiations with it at all on BT's charging.

6.113 The Number has made a similar request in its Amended Request for Ofcom to give a direction under Section 190(6)(a) of the 2003 Act for the same reasons as set out above in so far as BT's obligations under GC19 are concerned. This matter is considered separately in **Section 7** of this document.

6.114 As regards this request by The Number, it is to be noted that Ofcom has a discretion under Section 190(6)(a) of the 2003 Act to require a party to pay another party's costs in bringing a dispute. Specifically, Ofcom's powers are in this respect as follows:

(6) Where OFCOM make a determination for resolving a dispute, they may require a party to the dispute—

(a) to make payments to another party to the dispute in respect of costs and expenses incurred by that other party in consequence of the reference of the dispute to OFCOM, or in connection with it; and

(b) to make payments to OFCOM in respect of costs and expenses incurred by them in dealing with the dispute.

6.115 Therefore, Ofcom may direct a party to make payments to another party to the dispute in respect of costs and expenses incurred by that other party:

- i) in consequence of the reference of the dispute to Ofcom; or
- ii) in connection with it.

6.116 Ofcom has to date never exercised its discretion to award costs under Section 190(6)(a) in any regulatory dispute⁴⁷. In Ofcom's experience of dealing with disputes referred to it, parties normally do not make such requests as they seemingly accept that they will incur costs, such as legal costs and expenses by, for example, taking up the time of senior managers and internal experts, in dealing with disputes as part of the regulatory dialogue with Ofcom and other parties.

6.117 We have nonetheless considered The Number's request carefully, but we would be minded not to make the direction it has requested for the reasons set out below. First, we consider that we should have regard to the fact that The Number has, in effect, been unsuccessful with regard to this part of the dispute relating to USC7.

6.118 Secondly, we do not consider that the three reasons given by The Number for claiming its costs support The Number's claim. Ofcom does not consider that there are any particular factors suggesting that BT has acted unreasonably in its negotiations with The Number leading to its dispute reference to Ofcom so as to suggest that BT should pay The Number's costs. Indeed, as is clear from Ofcom's above-mentioned provisional findings with regard to USC7, Ofcom's determination on issues of law or construction under relevant legislation or regulation have been sought by the parties and such a determination could have affected the parties' commercial negotiations, if known at the relevant time. It is also shown from the documentation annexed to The Number's Initial Request concerning the negotiations that BT reasonably believed that it had a strong case on the merits throughout the negotiations.

⁴⁷ The term 'regulatory dispute' is used here because, in its judgment in *Hutchison 3G (UK) Limited v. The Office of Communications*, 29 November 2005, [2005] CAT 39, the Competition Appeal Tribunal has made it clear (at paragraph 138) that Ofcom's intervention as arbiter between the parties is as a regulator, not as a third party resolving a dispute.

6.119 For these reasons, Ofcom is not proposing to exercise its discretion under Section 190(6)(a) of the 2003 Act to require BT to pay The Number's costs in bringing this dispute. In other words, BT and The Number shall bear their own respective costs and expenses incurred by them in consequence of the reference of this dispute to Ofcom, or in connection with it.

Section 7

Assessment of BT's GC19 obligations

Introduction

- 7.1 Given Ofcom's provisional findings on the unlawfulness of USC7 in **Section 6**, it follows that to the extent that BT's provision of OSIS data is regulated, the relevant obligations arise under GC19. This **Section 7** considers what BT's obligations under GC19 comprise, and the implications for BT's pricing of access to the OSIS database.
- 7.2 To recap, the two disputes concern, in essence, the price paid by The Number and Conduit to BT for accessing certain directory information via OSIS. The disputes have arisen as a consequence of the KPN judgment in interpreting the meaning of 'cost orientation'. As already set out above in **Section 6**, in light of the particular facts in that case, the ECJ ruled that KPN could only recover transmission costs in supplying certain basic directory information to Denda and Topware as this basic data was already collected and compiled by KPN to provide its voice telephony service. The Number and Conduit both suggest that the implications of that judgment are that BT should substantially reduce its prices to them for OSIS data and it should repay them for alleged past overpayments.
- 7.3 In Ofcom's understanding, this reading of the KPN judgment has played an important part in the positions the parties took in their negotiations with BT and it ultimately led them to refer their respective disputes to Ofcom. The parties rely on GC19 as an alternative legal basis to support their claims, despite the different formulation of words used in USC7 (i.e. "*the contents of the database, in machine readable form*") as compared with GC19 (which refers to a defined set of 'Directory Information' only).
- 7.4 In summary, Ofcom disagrees with the approach taken by The Number and Conduit in analysing the implications of the KPN judgment by reference to UK domestic legislation and regulation. This section therefore sets out Ofcom's reasoning and, where relevant, supporting evidence for its provisional findings with regard to BT's obligations under GC19 (set out in full in **Annex 6** to this document) in relation to the issues raised in its disputes with The Number and Conduit.
- 7.5 In resolving these disputes in relation to GC19, it is first necessary to address and consider two preliminary issues in order to conclude that The Number and Conduit are (and were), in fact, entitled to obtain certain information from BT under GC19:
- whether (or not) BT is a person subject to the requirement to provide the 'information to The Number and Conduit under GC19 (see **paragraphs 7.10 to 7.24**); and
 - whether (or not) The Number and Conduit have 'rights of access' to the information under GC19 (see **paragraphs 7.25 to 7.72**).
- 7.6 For the reasons set out below, Ofcom considers that The Number and Conduit were entitled to receive certain information from BT under GC19.
- 7.7 Ofcom then considers the two main issues in relation to GC19:

- what information BT is required to make available to The Number and Conduit, respectively, under GC19 (see **paragraphs 7.73 to 7.148**); and
- on what basis and on what terms such information should be provided under GC19 (see **paragraphs 7.151 to 7.160**).

7.8 This two-stage approach follows the approach taken by the ECJ in the KPN judgment. In this context, we refer to Ofcom's reasoning set out in **Section 5** of this document as to why it considers that the ECJ's judgment is relevant and provides certain guidance in interpreting GC19, which is designed to give effect to Community legislation as contained in Article 25(2) of the USD.

7.9 The analysis above is then applied to assess whether the terms on which BT currently supplies certain directory data from OSIS comply with its obligations under GC19 (see **paragraphs 7.167 to 7.237**). Ofcom then considers the submissions of the parties (see **paragraphs 7.238 to 7.326**) before summarising its provisional findings in respect of resolving the disputes as they relate to GC19 (see **paragraphs 7.327 to 7.334**).

Persons required to provide Directory Information

7.10 Paragraphs 1 and 5 of GC19 provide:

19.1 Where the Communications Provider has been Allocated Telephone Numbers in accordance with Condition 17, it shall meet all reasonable requests from any person to make available the Directory Information of:

- (a) its Subscribers who have been assigned those Telephone Numbers; and
- (b) any other End-User assigned a Telephone Number originally Allocated to the Communications Provider,

for the purposes of the provision of Directories and Directory Enquiry Facilities.

...

19.5 For the purposes of this Condition, "Communications Provider" means a person who provides an Electronic Communications Network or an Electronic Communications Service.

7.11 For BT to be required to provide the information to be made available under GC19 to The Number and Conduit, respectively, it is necessary to consider:

- is BT a relevant 'Communications Provider' for the purposes of GC19?
- if so, since what date has BT been required to comply with GC19?

BT is a relevant 'Communications Provider' for the purposes of GC19

7.12 As is clear from **Section 5** of this document, GC19 was a condition set to implement the obligations contained in Article 25(2) of the USD, which makes it plain that

Member States shall ensure that all *undertakings* which assign telephone numbers to subscribers...

(Emphasis added)

- 7.13 In accordance with Ofcom's enabling powers under Section 46(2)(b) of the 2003 Act, the obligations set out in GC19 apply to a 'Communications Provider', which is defined, pursuant to GC19.5, to apply to a "**person who provides an Electronic Communications Network or an Electronic Communications Service**". (We note that a further issue arises as to whether the entitlement of The Number and Conduit to certain information under GC19 depends on the ECS provided by BT being of a particular description: see analysis below about PATS in relation to the meaning of 'Directory Information'.)
- 7.14 Under paragraph 1 of Part 1 of the Schedule to the GC notification, the terms ECN and ECS are defined as follows:

"Electronic Communications Network" means—

a) a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of Signals of any description; and

(b) such of the following as are used, by the person providing the system and in association with it, for the conveyance of the Signals—

(i) apparatus comprised in the system;

(ii) apparatus used for the switching or routing of the Signals; and

(iii) software and stored data;

"Electronic Communications Service" means any service consisting in, or having as its principal feature, the conveyance by means of an Electronic Communications Network of Signals, except in so far as it is a Content Service;

- 7.15 The word 'person' includes⁴⁸ a body of persons corporate or unincorporate. In light of the reference in Article 25(2) of the USD to 'undertakings', Ofcom takes the view that the word 'person' should be interpreted broadly and that certain guidance provided by the ECJ on the meaning of an 'undertaking' for the purposes of EC competition law is relevant also in this context. For instance, any entity engaged in an economic activity⁴⁹, regardless of its legal nature, can be interpreted as being an 'undertaking'. It also includes undertakings that form a single economic entity⁵⁰, such as companies within the same corporate group, where a company within that group is not independent in its decision making. (In some cases (but which does not appear to be the case with regard to BT for the purposes of this dispute), where separate single economic entities are in fact (contractually) involved in the provision of (say) an ECS, it is also necessary to have regard to the meaning of the word 'provide(s)' ascribed to it under the 2003 Act⁵¹.)
- 7.16 In addition to being a person who provides an ECN or an ECS, GC19.1 requires that such person must also have been "**Allocated Telephone Numbers in accordance with Condition [GC]17**" in order to qualify as a 'Communications Provider' for the

⁴⁸ See Schedule 1 to the Interpretation Act 1978, which applies pursuant to paragraph 2(d) of Part 1 of the Schedule to the GC notification.

⁴⁹ See, for instance, *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, Case C-41/90 [1991] ECR I-1979, which leading case has been upheld by the ECJ most recently in *FENIN v. Commission*, Case C-205/03P (unreported) on 11 July 2006.

⁵⁰ See, for instance, *Viho v. Commission*, Case C-73/95 P [1996] ECR I-5457.

⁵¹ See section 405(1), which makes it clear that 'provide' in this context is to be construed in accordance with section 32(4), of the 2003 Act, namely: "references, where one or more persons are employed or engaged to provide the network or service under the direction or control of another person, to the person by whom an electronic communications network or electronic communications service is provided are confined to references to that other person".

purposes of meeting any obligations under GC19. Under paragraph 1 of Part 1 of the Schedule to the GC notification, the terms 'Allocation', ECN and ECS are defined as follows:

"Allocation", in relation to a Telephone Number, means allocation by the Director [*now Ofcom*];

7.17 In applying these preconditions to the facts in the present disputes, it is clear to Ofcom that:

- **BT falls within the meaning of 'a person'**: Ofcom considers that BT's obligations under GC19 apply to BT, whose registered company number is 1800000, and any BT subsidiary or holding company, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985, as amended by the Companies Act 1989.
- **BT is a person who provides ECNs (as well as ECSs)**: this is clear from the nature of its business, as discussed in **Section 3** of this document.
- **BT is such a person to whom 'Telephone Numbers' have been allocated in accordance with GC17 by Ofcom/Ofcom**: this is clear (and not in dispute).

7.18 Accordingly, BT (in common with any person providing an ECN or an ECS, who has been Allocated Telephone Numbers in accordance with GC17) is a relevant 'Communications Provider' for the purposes of GC19. We note from its submissions to Ofcom that BT has not disputed that this is the case.

BT has been required to comply with GC19 since 25 July 2003

7.19 BT has been required to comply with its obligations under GC19 since it came into force with effect from 25 July 2003. This matter is plain from the GC notification itself:

THEREFORE

1. The Director General of Telecommunications ('the Director') in accordance with section 48(1) of the Communications Act 2003 ('the Act') **hereby sets pursuant to section 45 the general conditions as set out in the Schedule to this Notification, to take effect from 25 July 2003.**

2. The Director is proposing to set the general conditions referred to in paragraph 1 above on all communications providers of a particular description as specified in each of the general conditions referred to in paragraph 1 above.

3. The effect of, and the Director's reasons for setting, the general conditions referred to in paragraph 1 above are contained in the document "The General Conditions of Entitlement – Final Statement" published by the Director on 9 July 2003.

4. The Director has sent a copy of this Notification to the Secretary of State in accordance with section 50(1)(a) of the Act.

5. Except as otherwise defined in this Notification, words or expressions used shall have the same meaning as in the Act.

DAVID ALBERT EDMONDS

DIRECTOR GENERAL FOR TELECOMMUNICATIONS

22 JULY 2003

(Emphasis in italics and bold added)

- 7.20 As regards the coming into force of GC19, it is to be noted that, in exercising its functions to make a declaration setting out the rights and obligations of the parties to a dispute under Section 190(2)(a) of the 2003 Act, as requested by The Number and Conduit, Ofcom is in this dispute exercising a jurisdiction similar to that of the Courts. In this respect, Ofcom is, in effect, requested to interpret and apply a provision of law (here, GC19) to the relevant facts in order to clarify and explain, where necessary, its meaning and scope as it ought to be, or have been, understood and applied from the moment of its entry into force. (It is further to be noted that, in resolving a dispute under the 2003 Act, Ofcom's intervention as arbiter between the parties is as a regulator, not as a third party arbitrator⁵². Such dispute resolution is therefore a form of regulation and it must, in particular, be aimed at achieving the policy objectives of Article 8 of the Framework Directive, as implemented in Section 4 of the 2003 Act.)
- 7.21 In light of this, Ofcom should therefore emphasise that BT has at all material times been subject to GC19, as well as apparently bound by USC7 to make available, on request, "to any person seeking to provide publicly available Directory Enquiry Facilities and/or Directories, the contents of the [OSIS] database, in machine readable form". This is because GC19 is a condition that is applied *generally* either to all persons providing an ECN or ECS; or to all persons providing such a network or service of a particular description specified in the condition, and therefore at all material times has applied in parallel with the apparent obligation under USC7.
- 7.22 Furthermore, at paragraph 8.9 of the second GC consultation (as cited in **paragraph A6.111 in Annex 6**), Ofcom made it clear that the obligations in GCs 8 and 19 are "quite distinct" in a direct response to a suggestion by BT to expressly link GC8 with GC19 (then draft GC22). Also, at paragraph 3.77 of the USO notification (again, as set out in **paragraph A6.130 of Annex 6** of this document), Ofcom made it specifically clear that GCs 8 and 19 "are not sufficient on their own to ensure that the obligations under Articles 5 and 25 of the Universal Service Directive are met efficiently and transparently".
- 7.23 In other words, the fact that Ofcom is proposing in **Section 6** of this document to determine, in effect, USC7 as being *ultra vires*, for the purposes of declaring what rights and obligations the parties to this dispute have, is not a matter that has any bearing on the application of GC19. GC19 has been lawfully imposed on (among others) BT since 25 July 2003. Indeed, BT appears to have recognised that it would be subject to the GC19 obligation in resisting the lawfulness of USC7, particularly when it responded to the USO consultation in May 2003 stating: "[s]imilarly, while Article 25 is concerned with the exchange of information between operators this is also satisfied by Condition 22 [now GC19] of the General Conditions". This also follows from the informal response by staff at the European Commission on which BT relied in that response, as cited fully in **Annex 6** of this document. More recently, BT has in its discussions with The Number specifically acknowledged "its obligations in the Universal Service Condition and General Condition 19" (see BT's e-mail of 1 July 2005, cited at **paragraph 7.65** of this document).

⁵² The judgment of the Competition Appeal Tribunal in *Hutchison 3G (UK) Limited v. The Office of Communications*, 29 November 2005, [2005] CAT 39, paragraph 138.

7.24 However, a separate issue arises for the purposes of this dispute as to whether The Number and/or Conduit has made a reasonable request to BT for it to make available its 'Directory Information' in respect of data supplied under its contractual arrangements with The Number and Conduit, respectively, so as to trigger BT's obligations under GC19. We now turn to that issue.

Persons having 'rights of access' to Directory Information

7.25 The second preliminary issue that Ofcom should establish before proceeding with its consideration of the two main issues at dispute is:

- whether The Number and/or Conduit is a person eligible to make a request to BT for 'Directory Information' under GC19?
- if so, whether or not The Number and/or Conduit has, in effect, made such a request for the purposes of this dispute?.

The Number and Conduit have 'rights of access' under GC19

7.26 As noted above, GC19.1 provides that BT "...shall meet all reasonable requests from any person to make available the Directory Information of...for the purposes of the provision of Directories and Directory Enquiry Facilities".

7.27 It is clear from the respective descriptions of The Number's and Conduit's businesses set out in **Section 3** that both **The Number and Conduit are in the business of providing 'Directory Enquiry Facilities'**. That term is defined under paragraph 1 of Part 1 of the Schedule to the GC notification, as follows:

"Directory Enquiry Facility" means Directory Information provided by means of a Public Telephone Network;

7.28 In addition, for the avoidance of any doubt, it is plainly the case that each of The Number and Conduit is a '**person**' (which term, as seen above, is itself defined broadly in the Interpretation Act 1978).

7.29 Nor is there any doubt that each of The Number and Conduit has requested information from BT under their respective licences "**for the purposes of the provision of...Directory Enquiry Facilities**".

7.30 Accordingly, in Ofcom's view, both The Number and Conduit have, in principle, 'rights of access' to certain 'Directory Information' from BT (as well as from any other 'Communications Provider' to whom GC19 applies). Save as to the next question considered below as to whether The Number and/or Conduit have in fact made requests to BT for 'Directory Information' to be made available under GC19, BT has not contested in these disputes that they have such 'rights of access'.

7.31 However, BT has questioned whether two other categories of person would be entitled to access to Directory Information from BT under GC19: namely:

- i) intermediate suppliers (such as those persons simply gathering, maintaining, compiling or otherwise operating databases containing 'Directory Information', such as data aggregators), who do not themselves provide either directories or DQ services to end-users;
- ii) business classified directories providers

- 7.32 These issues are not integral to the resolution of the disputes before Ofcom. However, Ofcom considers that providing some guidance on this matter would be helpful in clarifying the rights and obligations related to GC19.
- 7.33 In considering whether intermediate suppliers have rights of access, Ofcom's initial view is that provided that a person requested 'Directory Information' falling within GC19 for the *ultimate* purposes of it being used to provide 'Directories' or 'Directory Enquiry Facilities', Ofcom may consider any refusal to provide such intermediate suppliers access to that information as constituting an unduly restrictive interpretation of GC19. In this regard, we note that, in the KPN case, KPN was under a domestic statutory obligation to publish a universal service guide, i.e. directory, but it 'outsourced' the actual publication and distribution of this guide to Telefoongids Media BV. However, it is unclear to Ofcom whether the latter company formed part of KPN's group of companies (say, similar to BT) or whether Telefoongids Media BV was a distinct economic entity from KPN.
- 7.34 As regards business classified directories, such as Thomson, BT has in a letter dated 6 July 2006 to Ofcom contested that Thomson has 'rights of access' under GC19. Whilst BT's arguments are specifically directed at Thomson, its reasoning appears more wide-ranging and it is therefore appropriate to make our observations clear in this context. BT makes two points in this regard, namely: (1) GC19 only provides rights to directory information for the purposes of the provision of universal service directories or DQ services; and (2) the scope of the KPN judgment does not cover the provision of directory data for purposes unrelated to the provision of universal service directories or DQ services.
- 7.35 In **Section 5** of this document, we note that there is nothing in the USD to suggest that the reference in Article 25(2) of the USD to 'publicly available directory enquiry service and directories' is limited to universal service DQ services and directories covered by Article 5 of the USD. We therefore refer generally to our analysis in that Section and limit our observations in the following to deal with specific points raised by BT's reasoning in support of its two above-mentioned points.
- 7.36 BT first argues that the purpose of Article 25(2) is to facilitate only the provision of the universal service directories and DQ services. According to BT, the 11th recital to the USD's preamble sets out three criteria (i.e. a directory must be (i) an essential access tool to PATS; (ii) presented in a non-preferential fashion; and (iii) comprehensive) that are to be satisfied to constitute a universal service directory. BT concludes that classified directories do not satisfy those criteria. BT further claims that the fact that Article 25(2) does not refer to Article 5 does not alter this position because (a) there is no right in the USD for an end-user to have an entry in a non-universal service directory or DQ service; (b) end-user rights and universal service would not be served by reading into Article 25(2) a regulatory requirement to give 'rights of access' to providers of non-universal service directories providers; and (c) Article 25(2) clearly refers to the same universal service directory as Article 25(1) when it refers to publicly available directory. As to its second point concerning KPN, BT simply refers to paragraph 20 of the ECJ's judgment and paragraph 44 of the Advocate General's Opinion, which refer to the supply of universal service directories.
- 7.37 Ofcom agrees that Article 25(2) facilitates such provision, but that this Article also facilitates the provision of other types of publicly available DQ services and directories. Ofcom therefore does not consider that its reliance on the 11th recital assists BT, but in any event we refer BT to our views set out in **Section 5** of this document as to what constitutes a universal service directory under the USD. In

addition, we do not consider that BT's claims as to Article 25(2) not referring to Article 5 are of any merit. We set out below our views as to the two purposes which the definition of 'Directory Information' serves, one of which is essentially about providing access to directory information at the wholesale level under Article 25(2), in line with the response by the European Commission to the questions put to it by BT in 2003 (see **Annex 6** of this document for that response). On that basis, its claims (a) and (b) would appear to simply fall away. As to its claim (c), we do not find any support for this assertion and refer BT also to **Section 5** of this document for our views on this, specifically in the context of the KPN case.

- 7.38 In that light, we consider that, in assessing whether providers of business classified directories would be entitled to GC19 data, the starting point of any analysis must be the phrase "for the purposes of the provision of Directories and Directory Enquiry Facilities" in GC19.1. Therefore, in Ofcom's view, it is plain from even the definition of a 'Directory' that it is irrelevant how the information is presented, arranged or otherwise, such as showing suppliers of goods and services 'classified' by reference to the goods or services they supply or advertising. As 'Subscribers' of PATS include businesses (and not only living individuals), it follows that a classified directory also falls within the meaning of a 'Directory'. In any event, Ofcom understands that Thomson local directories incorporate alphabetical listings sections A-Z, which are unclassified. On that basis, it appears to Ofcom that Thomson would have 'rights of access' under GC19.
- 7.39 As regards the KPN judgment itself, Ofcom does not consider that it somehow provides any support to refuse a provider of classified directories (such as Thomson) 'rights of access' to certain information under Article 25(2) of the USD (and therefore, by implication, also under GC19). The facts in KPN were that both Denda and Topware requested the information from KPN for the purposes of publishing rival telephone directories on CD-ROM and on the internet. Whilst the ECJ was not specifically asked to rule on this point, it gave its ruling without suggesting that even the provision of an electronic (as opposed to a paper) directory would materially affect the legal analysis. Indeed, the ECJ specifically acknowledged⁵³ the factual background by pointing out that Denda and Topware produced paper as well as electronic directories and that the information was requested to be used in this regard.
- 7.40 Accordingly, Ofcom considers that a person's 'rights of access' to certain information under GC19 do not depend on whether or not 'Directories' are in any particular form and their nature as classified or unclassified.

The Number and Conduit have requested 'Directory Information' within GC19

- 7.41 In order for GC19.1 to apply, each of The Number and Conduit has to have made a *reasonable request* to BT for its 'Directory Information'. In other words, BT's obligations under GC19 (including the provision on 'cost oriented' terms) apply only if:
- The Number and/or Conduit have requested information that falls within the meaning of 'Directory Information' for the purposes of GC19; and
 - such request has been made to a reasonable extent.

⁵³ §8 of the ECJ's judgment.

- 7.42 As to the former, it is unnecessary to establish fully what falls within and outside the meaning of 'Directory Information' in this context. This is specifically considered under **paragraphs 7.73 to 7.148** below. It suffices here to note, in broad terms, that BT's OSIS database comprises, at least in part, information that falls within the meaning of 'Directory Information'. However, whatever the precise meaning of 'Directory Information', it is equally clear (as we will explain below) that the database contains information about 'Subscribers' other than BT's own. On that basis alone, it is, in Ofcom's view, clear that the OSIS database contains information that falls outside as well as within BT's obligations under GC19.
- 7.43 In this context, it is also relevant to note that the present disputes essentially concern BT's charges for the supply to The Number and Conduit of (among other things) 'Business/Residential Customer Alphabetical (A-Z) Products or Services' under the provisions of paragraph 7 of their respective licences, as set out in **Section 5** of this document. It is clear both from the descriptions in the licences, and on the evidence presently before Ofcom relating to information supplied by BT to The Number and Conduit, respectively, pursuant to those licences, that the entries on the OSIS database include 'fields' for name, address and telephone number relating to all residential and business customers (and not just BT's), which entries are comprised in those 'Products or Services'.
- 7.44 In light of this, Ofcom considers that to the extent that information provided by BT to The Number under its OSIS licence with BT falls within the meaning of 'Directory Information' for the purposes of GC19, BT is required to provide that part of the information under the terms of GC19. The fact that BT has contractually provided a 'bundled' (as opposed to a stand-alone) product or service does not, in Ofcom's view, change that (regulatory) position: The Number and Conduit have nonetheless requested, as a matter of fact, a sub-set of data from OSIS that falls within the terms of GC19. The impact of that bundling on the question of whether or not BT's charges are (and have been) 'cost-oriented' is considered under **paragraphs 7.210 to 7.237** and **paragraphs 7.327 and 7.331** below.
- 7.45 We note that this question of whether or not The Number and Conduit have, in fact, made requests for the purposes of GC19 forms part of the subject-matter of the two recent appeals⁵⁴ to the Competition Appeal Tribunal brought against Ofcom for extending the scope of the present disputes to include GC19 issues, as BT submits that no such disputes exist between the parties.
- 7.46 Following the first case management conference held on 27 June 2006, the Competition Appeal Tribunal has decided to postpone the date for serving a defence until after the next case management conference fixed for 12 December. In short, Ofcom considers that those appeals by BT are premature as Ofcom's findings in the present disputes as to their scope are, as part of Ofcom's final determinations in resolving them, appealable to the Tribunal under Section 192 of the 2003 Act. However, it is appropriate to deal in this document with certain points made by BT in its appeals.
- 7.47 In its notices of appeal, BT argues that The Number has never made a (reasonable) request to BT for its 'Directory Information', so as to trigger BT's obligations under GC19 for the purposes of this dispute. As regards Conduit, BT makes a similar submission but it specifically points out that, at least until BT's receipt of Conduit's

⁵⁴ *British Telecommunications plc v. The Office of Communications*, Case No: 1063/3/3/06 (re: The Number dispute); *British Telecommunications plc v. The Office of Communications*, Case No: 1064/3/3/06 (re: the Conduit dispute).

letter of 3 June 2005, Conduit never made any request under GC19 for data only in relation to BT's own subscribers and/or the end-users who have telephone numbers originally allocated to it. BT then makes two particular points in support of its argument.

- 7.48 Before setting out our main views on those two points, we note that, subject to BT's position that The Number and Conduit have never made a request to BT under GC19 in the first place, it has not been suggested by BT that The Number and/or Conduit have somehow made *unreasonable* requests for information under their licences, to the extent that they fall within the provisions of GC19. We are therefore proceeding on the basis that, if we are right with regard to the matters subject to the BT's appeals, the reasonableness of The Number's request is not in itself in dispute between the parties. As a result, we do not need to further consider this matter in this context.
- 7.49 Turning to the issue of whether The Number and/or Conduit have made requests to BT, it is first to be noted that BT confirmed to Ofcom in a meeting on 20 December 2005 that it is, in effect, fulfilling its obligations under GC19 by virtue of its supply of OSIS data, which comprise data about its own subscriber customers. BT, however, also pointed out to Ofcom that there have been technical issues in making the GC19 information available separately. BT has also informed Ofcom that the resolution of those issues had been put on hold in light of the *KPN* case and until further clarity has been provided by Ofcom with regard to the application of that case to UK regulation. In the meantime, it assured Ofcom that persons (such as The Number and Conduit) may still obtain BT's GC19 data via OSIS.
- 7.50 In Ofcom's letters of 8 March 2006 to the parties in the two disputes, we explained in light of particularly those statements by BT that it had 'signalled' to Ofcom and the industry that BT has been discharging its GC19 obligations through its provision of subscriber information via OSIS and BT has not made its own subscriber information available separately from OSIS. As regards similar 'signals' given by BT to the industry, it suffices here to cite BT's response of 9 June 2005 itself to Conduit's letter of 3 June 2005, which response (headed "Re: Request for BT subscriber directory information") reads:

Thank you for your letter dated 8th [sic] June 2005. As I am sure you are aware, your request for a direct supply of BT subscriber data from BT Retail varies considerably from the existing, long-standing arrangements for access to directory information from BT Wholesale's Directory Solutions database.

Given these arrangements, BT's direct provision of BT subscriber directory data on a stand-alone basis requires a significant level of technical and system changes. We are exploring solutions and keeping Ofcom informed of our progress. We will keep you apprised as well.

In the meantime, you can obtain directory data from the Directory Solutions database (OSIS), which of course includes BT subscriber data.

Any provision by BT of subscriber directory data will be strictly limited to the purposes for which we are obliged to provide it. Use of that data will be subject to terms and conditions similar to those existing between BT and licensees for the right to use data stored in the Directory Solutions database.

- 7.51 We also note that, in its notices of appeal, BT points out that Ofcom did not give any particulars in its 8 March 2006 letters as to the manner in which BT has so 'signalled' this point to Ofcom and the industry. BT states, however, that the only indication as to what Ofcom had in mind appeared from a letter of 16 March 2006 by Ofcom in

relation to its investigation of a parallel complaint by Thomson, in which Ofcom stated:

...However, our view is that it is appropriate to investigate whether BT may have breached the terms of GC19 in providing directory information to Thomson. BT has signalled to Ofcom and the industry that it has been discharging its GC19 obligations through its provision of subscriber information via OSIS and BT has not made its own subscriber information available separately from OSIS. Indeed, in its original and supplemental complaint Thomson has highlighted an exchange of correspondence between Thomson and BT in 2004 in relation to GC19 (as referred to in paragraph 31 of Thomson's supplemental complaint). During this exchange, BT stated in a letter from Dave Shaw to Thomson dated 20 May 2004 that "... **BT has an obligation to supply its data for alphabetical directories and we choose to discharge this responsibility through BT Wholesale and the OSIS data base.**"

We note BT's reference to the obligation – i.e. the GC19 obligation – applying to data to be used in alphabetical directories. We also note that BT implies in this statement and in subsequent correspondence with Thomson that the GC19 obligations may not apply to the supply of directory information to be used in classified directories...

(Emphasis added)

- 7.52 In its notices of appeal, BT submits that Ofcom has drawn an inappropriate and incorrect conclusion from the sentence emphasised above in Mr Shaw's letter where, according to BT, it is clear from the correspondence as a whole that BT certainly did not take the view either that any obligations under GC19 had arisen, or that its provision of OSIS data had anything to do with GC19. BT claims that the entire correspondence makes clear that BT viewed its obligations under GC19 as separate and distinct from its obligations under USC7. In light of BT's submissions, we have reviewed the relevant correspondence⁵⁵, but we remain of the view that it shows that, in effect (even if BT did not attach the GC19 label to it), BT accepted that it discharges its GC19 obligations through OSIS, although it contested that it had to meet these obligations in relation to Thomson's request of data for classified purposes.
- 7.53 We now turn to the detail of the two particular points made by BT in support of its argument that The Number and Conduit have not made requests to BT for its 'Directory Information', which points further elaborate on certain similar points put by BT to Ofcom during its investigation. (BT makes a number of other points for the purposes of the appeals. Ofcom will respond fully to all points made by BT once further directions have been given by the Tribunal in these appeals).
- 7.54 First, BT argues that the licences granted to The Number and Conduit were entered into before GC19 came into force (that is on 23 August 2002 and 1 July 2000, respectively) and BT's supply of data to them under these licences have been made pursuant to the predecessor of USC7, which is a distinct obligation to GC19. Thus, according to BT, BT's licensing and supply of OSIS data before and after the imposition of GC19 and USC7 in July 2003 were done pursuant to (i) obligations under USC7 and its predecessors and/or (ii) purely commercial arrangements, and not (iii) GC19 or any predecessor provision.
- 7.55 Secondly, a relevant request in the context of GC19 must, according to BT, mean a request that refers to, or is plainly referable to, the condition in question. BT argues

⁵⁵ As attached at Annex 14 to the BT appeal in respect of the Conduit dispute

that this follows, first, as matter of ordinary fairness and common sense. Further, in BT's view, unless a request makes clear to which provision it pertains, the recipient does not know to what obligations it is subject, and hence what is expected of it; nor can it assess whether or not the request is, in that context, reasonable; nor can any meaningful attempt be made to agree be made to agree the terms on which the data is to be supplied.

- 7.56 The first of those two points by BT appears to be based on the contractual form or description of the 'Business/Residential Customer Alphabetical (A-Z) Products or Services' provided by BT to The Number and Conduit, including the date on which their licences were entered into, respectively. Ofcom does not, however, accept that such form or description is determinative of the true legal effect of the 'Business/Residential Customer Alphabetical (A-Z) Products or Services'⁵⁶ in those licences. In substance, as explained above, the licences provide, at least in part, for the supply by BT of information that falls within the meaning of 'Directory Information' for the purposes of GC19.
- 7.57 In Ofcom's view, neither the perception of the parties (at the point the licences were entered into), or even the industry, nor the contractual arrangements between the respective parties to these disputes can serve to defeat, or somehow preclude BT from being required to comply with the express regulatory requirement under GC19 to provide 'Directory Information' on (among other things) cost oriented terms. BT cannot contract out of its regulatory obligations, and The Number and Conduit, respectively, cannot waive their rights to receive 'Directory Information' on cost oriented terms under GC19 by contract. It is therefore wholly untenable for BT to maintain (as it has throughout our investigation and seemingly also in the appeals) that its provision of GC19 data is depending on certain technical issues being resolved and Ofcom's prior clarification on the application of GC19 to it.
- 7.58 Support for Ofcom's view in this respect may arguably also be found in the ECJ's judgment in the *KPN* case itself. At paragraph 9, the ECJ states that:

9 According to the order for reference, Denda and Topware requested PTT Telecom BV, KPN's predecessor in law until 1998, to place at their disposal the data relating to KPN's subscribers to the voice telephony service for the purposes of publishing their own directories. Beyond what is strictly basic data such as the subscriber's name, address, telephone number and possibly postal code and an indication of whether the number is used exclusively as a fax number, the two companies were interested in particular in transmitting additional information contained in the white pages of the directory published by KPN's predecessor, other than advertisements. That included for example also stating subscribers' professions, any listings under a different name or in other municipalities and additional mobile phone numbers.

- 7.59 In other words, in light of the ECJ's ultimate ruling that 'relevant information' comprised the basic data (as opposed to the additional data also requested by Denda and Topware), the ECJ itself did not attach any importance to the fact that their request for data was more wide-reaching than what KPN was actually required to provide under Article 6(3) of the RVTD (now Article 25(2) of the USD, and hence GC19).
- 7.60 In any event, Ofcom considers that the key point is that The Number and Conduit have since 25 July 2003 had rights to be provided with BT's own subscriber data

⁵⁶ See, for example, the House of Lords in *In Re Spectrum Plus Ltd (In Liquidation)* [2005] 3 WLR 58, para 53.

under GC19. This is undeniably a sub-set of the OSIS data that they both have requested (albeit perhaps under the guise of USC7). Therefore, Ofcom considers that these 'disputes' – which are disputes as to the terms on which OSIS data have been and are to be supplied to The Number and Conduit – necessarily include disputes as to the terms on which BT's own subscriber data have been and are to be supplied to The Number and Conduit, respectively. In other words, even if The Number and/or Conduit had not invoked GC19 as such, it nonetheless remains the case that GC19 regulates the terms on which BT's own subscriber data (which data forms part of the wider OSIS data) has been and are to be supplied. BT's answer to the question put to it by Ofcom on 20 December 2005 – namely, what would BT have said had The Number and/or Conduit asked for GC19 data in July 2003? – was that it would have stated that BT was already supplying them with those data under their respective licences. Accordingly, it is entirely proper for Ofcom to apply GC19 to (that part of) these disputes.

- 7.61 As regards BT's second specific point that requests by The Number and Conduit, respectively, must be requests that refer to, or are plainly referable to, GC19, we do not agree for several reasons. First, as discussed above, the parties cannot contract out of their regulatory obligations. Furthermore, at the meeting on 20 December 2005, Ofcom asked BT a specific question as to how BT would respond to a person who requested information only about BT's own subscribers under GC19. BT confirmed to Ofcom that, in addition to it fulfilling in effect its obligations under GC19 via the supply of OSIS data, it had received two or three letters regarding such access in the autumn of 2004 following the *KPN* ruling. BT explained in this context that it had looked to Ofcom for clarity on the appropriate definition of 'relevant information' and cost oriented charges and, in the meantime, all persons requesting any data specifically by reference to GC19 would be receiving its subscriber data via OSIS.
- 7.62 Therefore, Ofcom has not seen any evidence that BT would have treated requests by The Number and/or Conduit's any differently even if such requests were to refer to GC19. On the basis of BT's response to Ofcom, it would have treated such a request as a request for OSIS data because The Number and Conduit, in fact, required more comprehensive data than simply BT's own subscriber information. Indeed, in response to The Number's Initial Request, BT explained in its letter of 20 September 2005 that it could not feasibly negotiate with The Number on a bilateral basis and that the application of the ruling in the *KPN* case should be addressed by Ofcom in a formal consultation. This also possibly suggests, in Ofcom's view, that BT would have treated, as a matter of practical reality, a request by express reference to GC19 the same way as it would have treated any other request for its OSIS data. On the information presently before Ofcom, there is nothing to suggest to Ofcom that BT would have meaningfully attempted to negotiate a GC19 request in a different manner.
- 7.63 As to the point about The Number and Conduit making their requests plainly referable to GC19, we further consider that, on the information presently before Ofcom, there can have been little doubt in BT's mind that they were indeed making such references in its negotiations with BT for a new licence to use 'Business/Residential Customer Alphabetical (A-Z) Products or Services'. In this context, we note from The Number's letter dated 29 April 2005 to BT that The Number specifically requested (at page 2) a breakdown of the "cost elements included in BT's charges for the supply of directory information relating to BT subscribers". That letter was followed by a chain of correspondence between the parties during which BT appears to have taken essentially the same approach as it has set out in the above-mentioned letter of 20 September 2005 to Ofcom.

- 7.64 The said correspondence reveals that, to start with, in its response of 2 June 2005 to The Number, BT states that:

...I confirm that we are actively assessing any implications from the *KPN* case for the licensing of directory data under UK communications law and regulation.

We note that you reserve your position regarding the charges The Number pay BT for business and residential directory information and any dispute reference to Ofcom.

We fully appreciate the current regulatory obligations under which BT provides directory information...

While we do not agree or admit any of the assertions raised in your letter, we do agree that any changes required by law to the licensing of directory information will be taken as appropriate.

- 7.65 In its e-mail of 1 July 2005 to The Number's legal representatives, BT itself specifically acknowledged that GC19 was a relevant regulatory obligation in this context by stating that:

...BT are concerned about The Number's apparent disinterest in the industry forum being chaired by Ofcom to consider the implications of *KPN*. We had understood that The Number were going to participate. BT consider that this forum represents an ideal opportunity for directory information licences and operators to discuss their views and make them clear to Ofcom and BT has gone to a considerable amount of effort to make this possible. While BT is and remains open to discussing these issues with The Number, we did make it clear at our meeting that we would not be able to engage in agreeing anything with The Number in isolation to what happened with the forum. BT's regulatory and legal obligations require to its fulfilment of its obligations in the Universal Service Condition and General Condition 19 that BT adopts a fair and non-discriminatory approach and we do believe that at this stage it can be best achieved working with the industry forum...

- 7.66 As regards Conduit making its request plainly referable to GC19, we consider that its letter of 3 June 2005 to BT ought to have been understood by BT as such a request. However, in a meeting with Ofcom on 19 May 2006, Conduit confirmed that it would nonetheless have needed the additional data it currently receives from OSIS.
- 7.67 Nor does Ofcom therefore consider that any issue of fairness genuinely arises on the facts in this case. BT is a company with significant regulatory expertise at its disposal. As shown in **Section 5** and **Annex 6** of this document, it participated actively in the consultations on proposals to impose (among other) obligations under GC19. It is (and has been) fully aware of its obligations under GC19 for some time. Moreover, as shown from the above correspondence, it fully bore those obligations in mind when attempting to negotiate the new licences with The Number and Conduit, respectively. Indeed, if BT on receipt of a request for directory information considered that it could not work out what legal right was being invoked, BT could have asked the maker of the request (in these cases, The Number and Conduit, respectively) to clarify its position.
- 7.68 BT's more specific point about its ability to assess whether or not a request is, in the context, reasonable is equally unattractive. If anything, a request under GC19 is more limited than a request for its OSIS data. BT is naturally free to organise its system of supplying such data in a manner of its choosing in discharging its GC19 obligations, but it must in exercising that choice ensure that it complies with all of its regulatory obligations, like any other person subject to meeting a request in respect of its data under GC19.

- 7.69 In any event, we consider that BT's argument to the effect that a request must refer to GC 19 before GC 19 can be considered on a dispute referral under Section 185(2) focuses on form rather than substance and is misconceived. BT appears to argue that, because (in particular) The Number did not apply the GC19 label to its request, it cannot now rely on GC19. On this argument, The Number would have to put in a separate request to BT including the words "GC19" and then negotiating again.
- 7.70 The logic of BT's argument is not appropriate and could perhaps lead to absurd outcomes in respect of other obligations that BT has under the 2003 Act, such as an obligation to negotiate interconnection on request under GC1.1 or to provide number portability upon request on reasonable terms under GC18. As to the latter, the Competition Appeal Tribunal recently dismissed an appeal by Media, Marketing and Promotions ("**MMP**") concerning its number portability obligations against a decision by Ofcom, where MMP relied on certain contracts entered into in 2000, by stating⁵⁷ that:
- ...We accept the submission of OFCOM that neither the perception of the parties, or even the industry, nor the contractual arrangements between MMP and PTR or between PTR and THUS can serve to defeat, or preclude MMP (or THUS) from complying with the express provisions of the legislation. We accept OFCOM's submissions that MMP cannot contract out of its regulatory obligations and nor could PTR have waived, or otherwise be precluded from relying on, its statutory rights...
- 7.71 Finally, we simply note that BT's position about making a request plainly referable to GC19 would be unsustainable by reference to its own contractual documentation, such as the terms of BT's Upstream Contract. We understand that the standard form contract is silent with regard to GC19, although (as seen from **Section 5** above) it does contain references to BT's (now repealed) licence conditions. For reasons set out above, in our view, a person requested to supply BT with its directory information under the terms of GC19 could not refuse such a supply simply on the basis that BT's Upstream Contract makes no reference to GC19.
- 7.72 Accordingly, for the above reasons, Ofcom is satisfied that BT has been under an obligation to provide certain information to The Number and Conduit under GC19 since 25 July 2003.

Directory Information to be made available under GC19

Introduction

- 7.73 We now turn to the main issue in these disputes. This concerns what constitutes 'relevant information'. Once this question is resolved, we can turn to the issue of BT's charging in light of the 'cost orientation' requirement in GC19.
- 7.74 We note that, in contrast to BT's position, the other parties argue that all OSIS data should be made available by BT under GC19, including aggregated third party (non-BT) subscriber information as well as 'grouping' of data.
- 7.75 The structure of the remainder of this section is as follows:

⁵⁷ *Media Marketing & Promotions v. Office of Communications*, Case No: 1053/3/3/05, [2006] CAT 12, 15 May 2006, §208.

- our analysis showing that GC19 concerns 'Directory Information' of BT's PATS subscribers and ex-subscribers, where BT was originally allocated the relevant telephone number only (see **paragraphs 7.76 to 7.92**);
- our clarification on the two separate (but linked) purposes for which the term 'Directory Information' is used (see **paragraphs 7.93 to 7.96**);
- our provisional conclusions on the meaning of 'name' (see **paragraphs 7.98 to 7.103**), 'address' (see **paragraphs 7.104 to 7.116**) and 'Telephone Number' (see **paragraphs 7.117 to 7.139**);
- our reasoning as to why directory status information falls within GC19 (see **paragraphs 7.140 to 7.148**);
- our provisional conclusions on the basis and terms upon which 'Directory Information' must be provided under GC19 (see **paragraphs 7.149 to 7.166**);
- our conclusions on how the data BT is required to provide under GC19 aligns with the data BT currently provides from OSIS (see **paragraphs 7.167 to 7.209**);
- our analysis of BT's OSIS Charges in light of the above provisional conclusions (see **paragraphs 7.210 to 7.237**);
- our detailed views on the submissions made by the parties and interested persons during our investigation (see **paragraphs 7.238 to 7.326**); and
- our provisional findings on GC19 in concluding on the matters at dispute (see **paragraphs 7.327 to 7.331**).

'Directory Information' of BT's PATS subscribers only

BT's subscribers only

7.76 The plain terms of GC19.1 make it clear that it concerns only:

...the Directory Information of:

(a) **its Subscribers** who have been assigned those Telephone Numbers; and

(b) any other End-User assigned a Telephone Number originally Allocated to the Communications Provider,

...

(Emphasis added)

7.77 As regards 'Directory Information' for the purposes of GC19.1(a), we note that the term '**Subscriber**' has been defined under paragraph 1 of Part 1 of the Schedule to the GC notification as meaning:

...any person who is party to a contract with a provider of Public Electronic Communications Services for the supply of such services.

7.78 GC19.1(a) refers to "**its Subscribers**", making it clear that the 'Directory Information' concerns only a 'Communications Provider's' own 'Subscribers'. That point is further apparent from the qualification in GC19.1(a) that it is necessary for the

'Communications Provider' to *assign*⁵⁸ certain 'Telephone Number(s)' to "its Subscribers", which assignment in turn depends on the 'Communications Provider' having been allocated the Numbers in accordance with GC17 by Oftel/Ofcom.

- 7.79 These provisions in GC19 about the persons to whom the 'Directory Information' must relate in order to 'trigger' a particular 'Communications Provider's' obligations correspond, in Ofcom's view, to the terms of Article 25(2) of the USD. That Article concerns only "*all undertakings which assign telephone numbers to subscribers*". By definition (in the Framework Directive)⁵⁹, the term 'subscriber' means:

...any natural person or legal entity who or which is party to a contract with the provider of publicly available electronic communications services for the supply of such services.

- 7.80 On the basis of that definition, if an entity making available ECSs for use by members of the public would be engaged in an economic activity, such an undertaking is subject to the Article 25(2) requirement where it enters into a contract with an individual or a body of persons corporate or unincorporate for the supply of such services in respect of which it has assigned one or more telephone numbers to that individual or body.

- 7.81 This analysis accords with the ECJ's judgment in the *KPN* case itself. In its reply (at §36) to the first question referred to it on the interpretation of Article 6(3) of the RVTD, the ECJ stated:

36 The reply to the first question must therefore be that Article 6(3) of the Directive must be interpreted as meaning that the words 'relevant information' refer **only to data relating to subscribers** who have not expressly objected to being listed in a published directory and which are sufficient to enable users of a directory **to identify the subscribers** they are looking for. Those data include in principle the name and address, including postcode, **of subscribers**, together with any telephone numbers allocated to them by the entity concerned. However, it is open to the Member States to provide that other data are to be made available to users where, in light of specific national circumstances, they appear to be necessary in order **to identify subscribers**.

(Emphasis added)

- 7.82 References to the term 'subscribers' are used throughout the judgment (as well as in the Advocate General's Opinion). These references are not accidental but, indeed, reflect the wording of Article 6(3) of the RVTD itself, which uses in material respects the same wording as in Article 25(2) of the USD, namely "*all [organisations] which assign telephone numbers to subscribers*". The term 'subscriber' is defined in Article 2(2)(c) of the RVTD in terms similar to the meaning its corresponding term has for the purposes of the USD, as follows:

(c) "subscriber" shall mean any natural or legal person who or which is party to a contract with the provider of publicly available telecommunications services for the supply of such services;

- 7.83 Given that terminology (such as a 'user') are also used in both the RVTD as well as the USD, this shows in Ofcom's view that it was the legislative intention to use the

⁵⁸ Paragraph 3.122 of the final GC statement explains that the term 'assign' is used in the sense of sub-allocation from a communications provider to a particular end user.

⁵⁹ By virtue of the first paragraph of Article 2 of the USD, the definition of 'subscriber' in Article 2(k) of the Framework Directive applies also to the USD.

more specific meaning of a 'subscriber' for the purposes of Article 6(3) of the RVTD and Article 25(2) of the USD, respectively.

- 7.84 Accordingly, it is plain that both the terms of 'Directory Information' and 'relevant information' (in light also of the *KPN* case) are limited to the name, address and telephone number(s) *of the subscriber*. It is therefore not possible in statutory interpretation under purely domestic law to, for instance, add words that are not contained in GC19. To enable Ofcom to do so would require a prior modification to GC19 or to the definition of 'Directory Information'.
- 7.85 Furthermore, there is nothing in the USD (or in the *KPN* case) to suggest that the wording "name, address and telephone number(s) *of the subscriber*" has to be read widely. Given that GC19 is entirely consistent with the *KPN* case, no issue arises about any duty on Ofcom, when interpreting UK legislation designed to give effect to Community legislation, to construe the domestic legislation so far as possible so as to make it compatible with the Community legislation (see Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*⁶⁰). Indeed, given that the ECJ's conclusion (at §34) was that the words 'relevant information' *must* be strictly interpreted (taking into account the various interests at stake), it would be at odds with the *KPN* case for Ofcom to take such an interpretative approach. In this context, we also note that there is nothing to suggest that the UK has exercised a "relevant information plus" option, which the ECJ recognised (at §36) was available to Member States, namely "...it is open to Member States to provide that other data are to be made available to users where, in light of specific national circumstances, they appear to be necessary in order to identify subscribers". On that basis, we do not consider any actual user (as opposed to subscriber) information as falling within GC19.

BT's subscribers of PATS only

- 7.86 As noted above, the definition of a 'Subscriber' refers to the supply of 'Public Electronic Communications Services'. However, that definition must be read together with the definition of 'Directory Information' which makes it plain that GC19 concerns only "*the name and address of the Subscriber and the Telephone Number assigned to the **Subscriber for their use of Publicly Available Telephone Services***".
- 7.87 It is therefore clear that the meaning of a 'Subscriber' has been ascribed a narrower meaning for the purposes of interpreting the meaning of 'Directory Information' itself. It concerns only subscribers of PATS, which term has been defined under paragraph 1 of Part 1 of the Schedule to the GC notification as meaning:

...a service available to the public **for originating and receiving** national and international calls and access to Emergency Organisations through a number or numbers in a national or international telephone numbering plan, and in addition may, where relevant, include one or more of the following services: the provision of operator assistance services, Directory Enquiry Facilities, Directories, provision of Public Pay Telephones, provision of service under special terms, provision of specific facilities for End-Users with disabilities or with special social needs and/or the provision of non-geographic services;

(Emphasis added)

⁶⁰ [1990] ECR I-4135.

- 7.88 The more precise meaning of PATS is considered below in relation to the meaning of 'Telephone Number(s)'. However, in light of the 'subscriber' definition in the Framework Directive, a potential issue arises here as to whether or not the definition of a 'Subscriber' for the purposes of GC19.1(a) should be interpreted more widely, so as to read publicly available ECS (which is a wider term than PATS), in order to properly implement Article 25(2) of the USD. For reasons set out below, Ofcom's view is that the narrower (PATS) meaning does accord with the USD's provisions. As a result, in Ofcom's view, the definition of a 'Subscriber' for the purposes of GC19.1(a) should not be interpreted more widely, so as to read publicly available ECS, but instead simply PATS.

BT's ex-subscribers where BT originally allocated the telephone number

- 7.89 Pursuant to GC19.1(b), 'Directory Information' may, in the alternative, concern "any other End-User assigned a Telephone Number originally Allocated to the Communications Provider". The term 'End-User' means in this context:

"End-User", in relation to a Public Electronic Communications Service, means:

- (a) a person who, otherwise than as a Communications Provider is a Customer of the provider of that service;
- (b) a person who makes use of the service otherwise than as a Communications Provider; or
- (a)[sic] a person who may be authorised, by a person falling within paragraph (a), so to make use of the service;

- 7.90 GC19.2 then provides a regulatory mechanism by which certain persons (such as the 'Communications Provider' originally allocated the telephone number) may obtain the 'Directory Information' to which GC19.1(b) refers.

Provisional conclusions on certain aspects of 'Directory Information'

- 7.91 It follows from the above that BT's obligations under GC19 extend neither to 'Directory Information' of 'Subscribers' of other communications providers, nor to 'Directory Information' of any other end-user assigned a telephone number, but to whom BT did not originally allocate that number (collectively referred to as "**others' GC19 data**"). Nor does actual user information fall within GC19, that is to say, information about the actual user of the telephone number(s) assigned to the subscriber to the extent that in certain circumstances this may differ from information about the subscriber (e.g. a parent may subscribe to the provision of PATS for a child at a separate address; a local council may subscribe to the provision of PATS for a school or a library within its area; a holding company may subscribe to the provision of PATS for a range of subsidiaries; and so on).
- 7.92 On that basis, as OSIS contains also other CPs' GC19 data, we propose to reject the submissions made by the parties to the effect that all of the information contained in OSIS is 'relevant information' or 'basic data' in accordance with the *KPN* case. To the extent that OSIS contains others' GC19 data, it falls outside any obligations that BT has under GC19.

The meaning of 'Directory Information' and its two purposes

- 7.93 Turning to the meaning of the term 'Directory Information' itself, this term has been defined under paragraph 1 of Part 1 of the Schedule to the GC notification as follows:

“Directory Information” means, in the case of a Directory, **the name and address of the Subscriber and the Telephone Number assigned to the Subscriber for their use of Publicly Available Telephone Services** and, in the case of a Directory Enquiry Facility, shall be either such a Telephone Number of the Subscriber or information that such a Telephone Number of the Subscriber may not be supplied;

(Emphasis added)

- 7.94 Ofcom takes the view that the term ‘Directory Information’ serves two distinct (but related) purposes. First, it is used for the purposes of GC8 to make clear what type of information must be provided by a particular communications provider either (i) when an end-user is accessing a ‘Directory Enquiry Facility’; or (ii) when supplying, on request, a ‘Directory’ to any of its subscribers, respectively. In other words, it is a term used at the retail (user) end of the supply value chain of directories and DQ services.
- 7.95 In this context, the reference to ‘a printed document’—containing names and addresses of subscribers and the telephone number assigned to them for their use of PATS—provides clarity as regards the ‘output’, which a communications provider needs to supply in order to comply with its obligations under GC8 in respect of directories. Also, in relation to a ‘Directory Enquiry Facility’, similar clarity is provided by GC8 (as read in light of the definition of ‘Directory Information’), where it provides that the ‘output’ of such a service must be “either such a Telephone Number of the Subscriber or information that such a Telephone Number of the Subscriber may not be supplied”.
- 7.96 Secondly, the term ‘Directory Information’ is also used to specify what information must be supplied at a **wholesale** level by undertakings subject to GC19 to providers of directories or DQ services at a retail level. To be clear, the meaning of ‘Directory Information’ in this context is not aimed at the ‘output’ products or services to the retail users (such as a printed document or the provision of simply a telephone number or, as the case may be, that such number has been withheld). Rather, the term ‘Directory Information’ is here focusing on the **raw and basic data** that forms part of the input information, which is essential in order to provide those ‘output’ products or services, that is “the name and address of the Subscriber and the Telephone Number assigned to the Subscriber for their use of Publicly Available Telephone Services”.
- 7.97 In light of that preliminary observation, we now turn to the natural and ordinary (or, as the case may be, defined) meaning, in Ofcom’s view, of each element contained in within the term ‘Directory Information’, that is to say (i) name; (ii) address; and (iii) ‘Telephone Number’.

The meaning of ‘name’

- 7.98 Turning to the interpretation of the word ‘name’ and to what it comprises in principle, Ofcom considers that the starting point is to consider its natural and ordinary meaning. To this end, the word ‘name’ is defined in The Shorter Oxford English Dictionary as:

A word or combination of words constituting the individual designation by which a person, animal, place, or thing is known, spoken of, etc.

- 7.99 ‘Title’, however, is not included within ‘name’. The Oxford English Dictionary meaning of ‘title’ as more commonly used today and in plain English is:

a word, such as *Dr, Mrs, or Lord*, used **before or instead of** someone's **name** to indicate **rank, profession, or status**

(Emphasis added)

7.100 In other words, 'title' is something different to someone's name and it therefore falls outside the literal and ordinary meaning of a 'name'. Indeed, as a matter of ordinary English, someone who acquires another title (for example, because a knighthood is conferred on him, or because she obtains a PhD) is not usually said to have "changed his (or her) name".

7.101 For that reason, Ofcom considers that 'title' is not, in principle, captured within the meaning of 'Directory Information' for the purposes of GC19. This conclusion also corresponds to the ruling in *KPN*; in particular, it is to be noted that the Advocate General regarded "profession, title, etc." as information in addition to the minimum set of records— telephone numbers with the name, address and town/city connected to these numbers—that users of telephone directories need to identify the subscribers of the numbers they are looking for.

7.102 Accordingly, Ofcom's provisional view is that 'Directory Information' includes the *name of*:

- i) **the 'Subscriber'**⁶¹, that is a person (including, but not limited to, a body of persons corporate or unincorporate) who is a party to a contract with a provider of PATS for the supply of such services (here, BT), to whom relevant 'Telephone Number(s)' (see further below) has been assigned by that provider, which 'Telephone Number(s)' has been allocated to that provider by Ofcom (or previously, the DGT) in accordance with GC17 (GC19.1(a));

and/or

- ii) "**any other End-User assigned a Telephone Number originally Allocated to the Communications Provider** [here, BT]" (GC19.1(b)).

where that 'name' is to be interpreted as including only the information specified in Column 1, but excluding the information specified in Column 2, in **Table 7.1** below in respect of living individual(s) and business(es), respectively, being either the said 'Subscriber' or 'other End-User' mentioned in the sub-paragraphs above:

Table 7.1: Meaning of 'name'

PATS subscriber <u>or</u> 'other End User' under GC19.1(b) of 'Telephone Number(s)'	Column 1 (part of 'name')	Column 2 (<u>not</u> part of 'name')
Living individual(s)	<ul style="list-style-type: none"> • forename(s), including first and middle • surname(s) • nickname(s) 	<ul style="list-style-type: none"> • title(s), (e.g. <i>Dr, Mr, Mrs, Miss, Ms, Father</i>) • profession/job title, (e.g. <i>accountant, solicitor, Barrstr</i>)

⁶¹ As read in light of the definitions of 'Subscriber' and 'Directory Information' under paragraph 1 of Part 1 of the Schedule to the GC notification, as well as the terms of GC19.

<p>Business(es) (and other bodies corporate or unincorporate)</p>	<ul style="list-style-type: none"> • initial(s) • full, including initial(s) or parts of, name(s) of business, company, organisation or association, registered or unregistered, (e.g. <i>Barclays Bank PLC, St X's Primary School</i>) • trading name(s), • (business) suffix(es), (e.g. <i>plc, Ltd, &Co</i>) 	<ul style="list-style-type: none"> • honours, (e.g. <i>MBE</i>) • qualifications (vocational, academic or otherwise), (e.g. <i>BSc, MBA, FRCS</i>) • information other than in Column 1 about a living individual (e.g. <i>date of birth, nationality, etc.</i>) or any information alluding to a name that is not about the living individual as such (e.g. the name of a (BT) exchange to which calls are routed) or any description about the actual or intended activity/use of the 'Telephone Number' related to the living individual • except where part of name in Column 1 under which the business is registered, trades or is otherwise generally known, any business, service or activity/use description (e.g. <i>carpenter, bookmaker, 24 hr service, Italian Restnt, primary school</i>) • information other than in Column 1 about a business (e.g. <i>registered company number, etc.</i>) or any information alluding to a name that is not about the business as such (e.g. the name of a (BT) exchange to which calls are routed) • information other than in Column 1 relating to a specific department or individual/position within a business (e.g. <i>accounts department; Customer Service Director; etc.</i>)
	<p>7.103</p>	<p>Ofcom considers for reasons set out above that actual user information falls outside GC19. Ofcom's views on presentational aspects in relation to 'name' are set out in paragraphs 7.197 to 7.206.</p>

7.103 Ofcom considers for reasons set out above that actual user information falls outside GC19. Ofcom's views on presentational aspects in relation to 'name' are set out in paragraphs 7.197 to 7.206.

The meaning of 'address'

7.104 As seen above, the term 'Directory Information' provides that, in addition to the 'name', the 'address' of the 'Subscriber' must also be provided for the purposes of GC19. There is no definition of 'address' prescribed specifically for these purposes and the natural and ordinary meaning of that word should therefore be considered as a starting point. The traditional usage of this word may be taken from The Shorter Oxford English Dictionary where it provides:

The superscription of a letter etc.; the name of the place to which anyone's letters etc. are directed; one's place of residence.

7.105 It would appear, however, that a more modern and plain English meaning of 'address' in the Oxford English Dictionary is simply:

the details of the place where someone lives or an organization is situated.

- 7.106 Taking that definition in the GC19 context, this would mean, in principle, that 'address' comprises the details of the place where the 'Subscriber' (or ex-subscriber under GC19.1(b)) of PATS *lives* (i.e. an individual's residential address) or (as the case may be) *is situated* (i.e. a business address).
- 7.107 However, Ofcom recognises that this principal meaning could, in certain circumstances, on its face result in a number of different addresses becoming relevant in the GC19 context. This is because certain 'Subscribers' may have more than one address, such as multi-location businesses or individuals with second homes, each of which could be a residential or business address and thus satisfying the above dictionary meaning.
- 7.108 Indeed, evidence gathered by Ofcom during its investigation has shown that for the provision of PATS to a given 'Subscriber', a CP may collect and store some or all of the following different 'addresses':
- the address for the premises at which the fixed telephone line is to be installed ("**installation address**");
 - the address to which bills or invoices should be sent ("**billing address**");
 - the address for general correspondence or marketing, including any PO Box address ("**correspondence address**");
 - the address for matters relating to the contract of supply of PATS ("**contract address**"); and
 - in the case of a body of persons corporate or unincorporate, the address of the registered or principal office ("**trading/head office address**").
- 7.109 There may then be further addresses falling within the natural and ordinary meaning of the word 'address' which, though related to the specific Subscriber, are not related to the provision of the PATS for which the Subscriber has been assigned the relevant telephone number and which are therefore not collected by the CP. For example, a high street bank will have numerous locations around the UK at which it is situated. Each of these locations is an address of the bank within the dictionary definition. Therefore where the bank subscribes to PATS at one location (say, Slough), the definition of 'address' of the subscriber could capture another location at which the bank is situated (say, Keighley) even though that location has no direct relevance to the provision of PATS.
- 7.110 To address this potential confusion over which 'address' is relevant under GC19 and consistent with Ofcom's approach to the meaning of 'name' of a 'Subscriber' discussed above, Ofcom takes the view however that this dictionary meaning has to be read in light of the definitions of 'Subscriber' and 'Directory Information' to which the concept of 'address' is linked in this context. In Ofcom's view, this means that it is necessary to interpret 'address' by reference to the supply of the PATS in question and the 'Telephone Number' assigned for the use of that PATS.
- 7.111 Ofcom considers that this approach is consistent also with the ECJ's conclusion in the *KPN* case that the words 'relevant information' must be strictly interpreted and refer only to the data which is sufficient to enable users of a directory to identify the *subscribers* they are looking for. In this regard, the primary purpose of providing an

address for the subscriber (which again must be distinguished from the actual user of the telephone number) is in order to allow them to be identified by users looking to obtain the relevant telephone number.

- 7.112 For PATS provided at fixed locations, this would mean under GC19 that a CP need only make available the *installation address* of the 'Subscriber', i.e. the premises at which the exchange line⁶² has been installed for the use of the fixed PATS in question in respect of which the 'Telephone Number(s)' has been assigned to the 'Subscriber'. This is because it is the installation address that is of utmost importance in both supplying and using the fixed PATS (including maintenance and repair) as well as for users of a directory identifying subscribers by obtaining the relevant telephone number for fixed PATS of the 'Subscriber' in question. On that basis, Ofcom takes the view that the remaining four above-mentioned types of address, and any other address or addresses which may relate to that subscriber, do not need to be made available by a CP under GC19 in relation to fixed PATS.
- 7.113 As to PATS provided at non-fixed locations (such as PATS provided over mobile networks), there is no installation address required for the purposes of supplying and using such PATS (including maintenance and repair). The 'nomadic' nature of the service also means that there is no particular address in relation to which users of directories could necessarily link to the relevant telephone number assigned for the use of the mobile PATS. It is nonetheless possible that, for a given 'Subscriber' of mobile PATS, the CP may collect and store a number of separate addresses for billing, contract and general correspondence/marketing purposes.
- 7.114 Again, given that there is no natural link here between the provision of the mobile PATS and a specific location, it appears to Ofcom that the most appropriate address (if any) in relation to mobile PATS is the address given by the 'Subscriber' to the CP for the purposes of entering into the contract of supply of the mobile PATS. In most instances, Ofcom would expect that this address normally corresponds to the residential or business address of the 'Subscriber' or even, where the 'Subscriber' also has a fixed PATS provided by the same or different CP to the person supplying the mobile PATS, the installation address for the supply of a fixed PATS. However, as there are at present relatively few mobile telephone numbers listed on OSIS and therefore available via directory services, there is little empirical evidence in the UK to gauge what address would typically be chosen by the 'Subscriber' and what address users of directories refer to in identifying the subscribers of mobile PATS they are looking for.
- 7.115 In summary, Ofcom takes the view that the term 'address' should for the purposes of GC19 be interpreted as referring to the installation address containing the information specified in Column 1 (which information Ofcom regards would normally fall within the natural and ordinary meaning of an 'address'), but excluding the information specified in Column 2, in **Table 7.2** below, of a BT subscriber (or, as the case may be, ex-subscriber) of PATS provided at fixed location.

⁶² In this context, the term 'exchange line' refers to apparatus (including any equipment, machinery, or device and any wire or cable and the casing or coating for any wire or cable) comprised in a public telephone network and installed for the purpose of connecting a telephone exchange run to a network termination point comprised in network termination and testing apparatus installed for the purpose of providing PATS at the premises at which the network termination and testing apparatus is located.

Table 7.2: Ofcom's interpreted meaning of 'address' in respect of PATS provided to fixed locations

Column 1 (part of '(installation)address')	Column 2 (<u>not</u> part of '(installation)address')
<ul style="list-style-type: none"> • premises/building/number (e.g. 1, <i>The Cottage</i>) • street (e.g. <i>High Street</i>) • locality (e.g. <i>village or area within town</i>) • post town/city (e.g. <i>Bromley</i>) • county (e.g. <i>Kent</i>) • post code (e.g. <i>BR1...</i>) 	<ul style="list-style-type: none"> • billing address • correspondence address • contract address • trading/head office address • PO Box

7.116 As regards PATS provided at a non-fixed location, Ofcom takes the view that the term 'address' should for the purposes of GC19 be interpreted as referring to the address given (if any) by the 'Subscriber' to the CP for the purposes of entering into the contract of supply of such PATS.

The meaning of 'Telephone Number'

Definition of 'Telephone Number'

7.117 The parties to the disputes have not made any submissions as to the types of telephone number that fall within GC19, despite it making plain references to (among other things) the defined term 'Telephone Number'. However, as three broad categories of numbers fall outside GC19 (and therefore affect the parties' claims as to their alleged rights to receive OSIS data on regulated (cost oriented) terms), it is necessary to clarify the position.

7.118 As regards the meaning of 'Telephone Number', this term is defined under paragraph 1 of Part 1 of the Schedule to the GC notification, as follows:

"Telephone Number" means, subject to any order of the Secretary of State pursuant to section 56(7) of the Act, any number, including data of any description, that is used (whether or not in connection with telephony) for any one or more of the following purposes:

- (a) identifying the destination for, or recipient of, an Electronic Communication;
- (b) identifying the origin, or sender, of an Electronic Communication;
- (c) identifying the route for an Electronic Communication;
- (d) identifying the source from which an Electronic Communication or Electronic Communications Service may be obtained or accessed;
- (e) selecting the service that is to be obtained or accessed, or required elements or characteristics of that service; or
- (f) identifying the Communications Provider by means of whose network or service an Electronic Communication is to be transmitted, or treated as transmitted;

7.119 In light of that definition and the terms of GC19 itself, we now turn to three broad categories of numbers that fall outside GC19.

Excluded Telephone Numbers: internet domain name or address

- 7.120 The first category of numbers falling outside GC19 relates to internet domain names or internet addresses, including email addresses.
- 7.121 Specifically, as a result of the Telephone Number Exclusion (Domain Names and Internet Addresses) Order 2003⁶³, which is an order of the Secretary of State made pursuant to Section 56(7) of the 2003 Act and came into force on 29 December 2003, any number which is used as (a) an internet domain name; (b) an internet address; or (c) an address or identifier incorporating either an internet domain name or an internet address, including an email address, is to be excluded from treatment as a telephone number for the purposes of Chapter 1 of Part 2 of the 2003 Act.
- 7.122 Given that the definition of 'Telephone Number' is subject to that Order, matters excluded in the Order are therefore outside the meaning of 'Directory Information' for the purposes of GC19.

Excluded Telephone Numbers: non-allocated 'Telephone Numbers'

- 7.123 The second category of numbers falling outside GC19 relates to 'Telephone Numbers' that have not been allocated to BT (as a communications provider) in accordance with GC17 by Ofcom.
- 7.124 This exclusion of numbers is made plain from the terms of GC19.1 itself, which provides that GC19 only applies "[w]here the Communications Provider has been Allocated Telephone Numbers in accordance with [General] Condition 17". (For the avoidance of any doubt, whilst our focus here is on the significance and meaning of 'Allocated' in accordance with GC17, that wording in GC19.1 also makes it clear by reference to "the Communications Provider" that we are concerned only with numbers allocated to BT, as opposed to numbers allocated to other 'Communications Providers'.
- 7.125 The Annex⁶⁴ to GC17 sets out certain telephone numbers that many communications providers use, but which have not been allocated by Oftel/Ofcom, such as certain access codes, e.g. to emergency services. As such, these non-allocated telephone numbers also fall outside GC19.
- 7.126 We also note that The Number argues (in particular, in its briefing paper to Ofcom on 'relevant information' of 26 May 2006) in effect that all OSIS data fall within GC19, including "8.d. fields for 'telephone numbers' include: Telephone Number (internal); Telephone Number Dialable; Exchange Code; DQ Code (National geographical area); Exchange".
- 7.127 Ofcom understands that the difference between Telephone Number (internal) and Telephone Number (dialable) is in the format in which the numbers are currently presented within OSIS (see table 3.1 in Section 3 of this document). Both data fields essentially provide the relevant 'Telephone Number'. The other fields mentioned by The Number are considered by Ofcom to fall under the "record categorisation data fields" heading. These fields essentially provide detail on the telephone exchange to

⁶³ S.I. 2003/3281.

⁶⁴ The Annex to GC17 was modified on 8 March 2006 to include a new Type A Access Code "101" for access to Non-Emergency Service: see Ofcom's Statement entitled 'National Single Non-Emergency Number - Designating number "101"' at http://www.ofcom.org.uk/consult/condocs/snen/snen_statement.pdf

which the line is provided (both by dialling code and exchange name) and the code for the local area paper directory in which the entry will appear and, in Ofcom's understanding, are used to help categorise records so that they can be used in a certain way or so that a broader set of search criteria can be used by DIPs to identify suitable records.

7.128 However, the examples of Exchange Code and DQ Code are not numbers that have been allocated to BT by Oftel/Ofcom. They therefore fall outside GC19, contrary to The Number's submissions.

Excluded Telephone Numbers: 'Telephone Numbers' not assigned for PATS

7.129 The third and final category of numbers falling outside GC19 relates to those numbers that have not been assigned by BT to its 'Subscribers' for use in connection with PATS. The Number and Conduit have not made any submissions specifically on this point, but their submissions imply an assumption that all telephone numbers fall within GC19. We anticipate that the exclusion from GC19 of non-PATS numbers will have the largest impact of the three categories of excluded numbers and we therefore take this opportunity to clarify Ofcom's view on this matter.

7.130 To start with, the definition of 'Directory Information' makes it clear that the relevant telephone numbers in this context are only those "***assigned to the Subscriber for their use of Publicly Available Telephone Services***". The literal and plain meaning of the words "their use of [***PATS***]" shows, in Ofcom's view, that the unambiguous legislative intent is to ensure that only those persons who have contracted with providers for the supply of PATS fall within GC19. In other words, persons who have contracted with providers for the supply of public available ECSs (but which are not PATS) do not fall within GC19.

7.131 As a result, it is necessary to consider more closely what is meant by PATS in this context. The full PATS definition under paragraph 1 of Part 1 of the Schedule to the GC notification has been cited above. In short, in Ofcom's view, a service constitutes PATS if, and only if, it meets all of the following 'gating criteria':

- "a service available to the public";
- "for originating and receiving national and international calls and";
- "access to Emergency Organisations";
- "through a number or numbers in a national or international telephone numbering plan".

7.132 In other words, Ofcom considers that:

- where a public available ECS does not meet *all* of the above-mentioned gating criteria, it is not a PATS; and
- where a public available ECS does meet *all* of these criteria, it automatically becomes a PATS.

- 7.133 This is not a new approach taken by Ofcom to the interpretation of "PATS". Indeed, Ofcom recently reaffirmed this position, in the context of Voice over Internet Protocol ("VoIP") services (the "**VoIP document**")⁶⁵, and that position is supported by the European Commission's Expert Group on Emergency Access (EGEA)⁶⁶. It follows from the above gating criteria that the public available ECS must under the terms of supply contract in question be (among other things) **a two-way service** (i.e. for originating and receiving national and international calls).
- 7.134 Therefore, to take an example, if the publicly available ECS is to be used with a telephone number for receiving calls only under the supply contract, it would not constitute a PATS. Hence, it would not fall within the meaning of 'Directory Information' or, therefore, the ambit of GC19. Services of this type might include some personal numbering services enabling end-users using '070' telephone numbers to be called or otherwise contacted by other persons, but without the ability to make calls themselves. It may also include special services (e.g. freephone) where end-users receive calls only by way of number translation services of 'virtual' telephone numbers (e.g. '0844', '0845', '0870' and '0871'). The same seemingly applies to premium rate services (e.g. '090' and '091' numbers). In addition, the National Telephone Numbering Plan⁶⁷ contains specific restrictions, so that certain 'Telephone Numbers' can only be used as a one-way service, such as services comprising 'National-Dialling-Only Numbers' (see the Plan at Part B3.1.5).
- 7.135 Ofcom has considered whether an alternative interpretation should be given to the PATS term in this particular context. This is particularly appropriate to consider as a different (and wider meaning) has been given to the term "PATS" for the purposes of GC18 concerning number portability.
- 7.136 The reasons for taking that wider approach in GC18 are set out in, for instance, the VoIP document. Ofcom's wider interpretation was recently upheld by the Competition Appeal Tribunal, when the Tribunal accepted that "...for the reasons submitted by OFCOM, that OFCOM was not precluded by the terms of the Universal Service Directive from enacting the wider definition of Publicly Available Telephone Service found in General Condition 18 for the purposes of imposing obligations in respect of number portability".⁶⁸
- 7.137 In this context, however, there is no analogous basis for a wider interpretation. The definition of PATS under paragraph 1 of Part 1 of the Schedule to the GC notification is clear and unambiguous, requiring the gating criteria to be satisfied in the GC19 context for a service to be a PATS.
- 7.138 Nor does Ofcom consider that the PATS term needs to be interpreted differently, so as to be compatible with Article 25(2) of the USD. The PATS definition in GC19 is plainly compatible with that Article and it does not raise any issues similar to that of Article 30, which provision GC18 (number portability) seeks to implement. This conclusion is supported by an analysis of several provisions in the USD, which are

⁶⁵ See document entitled '*Regulation of VoIP Services – Statement and further consultation*', published by Ofcom on 22 February 2006: <http://www.ofcom.org.uk/consult/condocs/voipregulation/voipregulation.pdf>

⁶⁶ See EGEA's response to Ofcom's VoIP document in its Working Document entitled '*Regulatory Clarification of ECS/PATS and Fixed/non-Fixed*', EGEA06-08, of 23 May 2006 available at:

<http://www.ofcom.org.uk/consult/condocs/voipregulation/responses/egea.pdf>

⁶⁷ The National Telephone Numbering Plan, published by Ofcom on 30 March 2006:

<http://www.ofcom.org.uk/telecoms/ioi/numbers/261701.pdf>

⁶⁸ *Media Marketing & Promotions v. Office of Communications*, Case No 1053/3/3/05, [2006] CAT 12, §243.

making clear references to PATS as meaning a service that meets the gating criteria (as opposed to simply being a public ECS), such as:

- Article 25(2), read in light of Article 25(1), of the USD

These provisions make it clear that only 'subscribers to *publicly available telephone services*' have a right to an entry in the publicly available directory referred to in Article 5(1)(a) of the USD. To ensure that this is made possible, Article 25(2) then provides a mechanism, so that all undertakings which assign telephone numbers 'to subscribers' are required to provide the 'relevant information' only. The context in which the words 'to subscribers' is used in Article 25(2) therefore suggests that this provision in turn refers, in particular, facilitating (albeit not exclusively) those 'subscribers to publicly available telephone services' to which Article 25(1) refers.

- *Article 5(2) of the USD*

According to Article 5(2) of the USD, the universal service directories themselves must only comprise, subject to certain data protection rights, 'all subscribers of *publicly available telephone services*'. In Ofcom's view, there does not appear any reason consistent with the USD to suggest that the effect of Article 25(2) should be read broadly to, in effect, ensure that users of publicly available directories (other than universal service directories, i.e, Article 5) have access to more comprehensive information. It suffices here to recall the point about the provision of directory services being a competitive activity, which point is reflected in the USD's recitals.

- *The aims and purposes as explained in the recitals to the USD's preamble*

The 11th recital unambiguously makes it clear that directory information constitute an 'essential access tool for *publicly available telephone services*'. In this context, Ofcom notes that the USD's legislative draftsman removed a reference to 'personal telephone numbers' in this recital in describing what users of directories desire, which reference had been included in the 7th recital to the RVTD's preamble, as follows:

11th recital of USD: "...Users and consumers desire comprehensive directories and a directory enquiry service covering all listed telephone ***subscribers and their numbers (including fixed and mobile numbers)***..."

7th recital of RVTD: "...whereas users and consumers desire comprehensive directories and directory enquiry service covering all listed telephone ***subscribers and their numbers (including fixed, mobile and personal telephone numbers)***..."

(Emphasis added)

Ofcom takes the view that the step to remove the reference to 'personal telephone numbers' was intentional, particularly as the text has otherwise been transferred in its entirety from the previous to the new framework to indicate users' desirability in terms of directory information. Indeed, the 7th recital of the RVTD reflects the reference to 'personal numbers' in Article 6(2)(b) of the RVTD to which Article 6(3) refers, which reference has been removed for the purposes of Articles 5 and 25 of the USD. Again, the legislative draftsman has intentionally, in Ofcom's view, decided to rewrite these provisions by making reference instead to the precisely defined PATS term.

- *The plain and unambiguous meaning of PATS*

The definition of PATS for the purposes of GC19 reads in material respects the same as in the definition of that term for the purposes of the USD – see Article 2(c) of the USD which reads:

(c) 'publicly available telephone service' means a service available to the public for originating and receiving national and international calls and access to emergency services through a number or numbers in a national or international telephone numbering plan, and in addition may, where relevant, include one or more of the following services: the provision of operator assistance, directory enquiry services, directories, provision of public pay phones, provision of service under special terms, provision of special facilities for customers with disabilities or with special social needs and/or the provision of non-geographic services;

In Ofcom's view, the legislative draftsman could have chosen the wider term 'publicly available electronic communications service' (which is used in the new directives, including the USD (e.g. Article 22), should the legislator have intended a different meaning. Nor does Ofcom consider that any other factors are present (such as in Article 30 of the USD making specific reference to the porting of 'non-geographic numbers') to suggest that a different meaning should be given to the PATS term in this context.

7.139 Given that Ofcom anticipates that a significant proportion of numbers contained in OSIS relates to non-PATS numbers, it is to be noted that The Number and Conduit are not entitled to receive this information from BT under the terms of GC19.

Relevant Data Protection Legislation

7.140 We have set out above our provisional views as to the meaning of 'name', 'address' and 'Telephone Number' within the definition of 'Directory Information' for the purposes of GC19. In Ofcom's view, there is a further category of information that may fall within GC19 on the basis that, pursuant to GC19.4, GC19 applies subject to the requirements of 'Relevant Data Protection Legislation'.⁶⁹

7.141 The term 'Relevant Data Protection Legislation' was amended on 11 December 2003 for the purposes of (among others) GC19 to mean the Data Protection Act 1998 ("DPA") and the Privacy and Electronic Communications (EC Directive) Regulations 2003.

7.142 Under the DPA, data subjects are afforded protection as to the fair processing of personal data in accordance with that Act's requirements and principles. The term 'personal data' is defined in the DPA as:

"personal data" means data which relate to a living individual who can be identified—
(a) from those data, or

⁶⁹ This condition closely reflects the provision in Article 25(5) of the USD, which makes it expressly clear that (among others) Article 25(2) of the USD applies subject to the requirements of Community legislation on the protection of personal data and privacy and, in particular, Article 11 of Directive 97/66/EC. Since 31 October 2003, Directive 97/66/EC has been repealed and references to that Directive shall be construed as being made to the Directive on Privacy and Electronic Communications: see Article 19. So far as Article 25(s) of the USD is concerned, this is, in effect, therefore a reference to Article 12 of the Directive on Privacy and Electronic Communications, which provision is fully cited in **Annex 6** of this document.

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

"data" means information which—

(a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,

(b) is recorded with the intention that it should be processed by means of such equipment,

(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or

(d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

7.143 Although nothing in the 2003 Regulations relieves a person of his obligations under the DPA in relation to the processing of personal data, regulation 18 contains specific provisions relating to directories of subscribers to publicly available ECS, whether in printed or electronic form, which are made available to members of the public or a section of the public, including by means of DQ services.⁷⁰

7.144 In particular, these Regulations further build on requirements in the DPA (such as transparency requirements) offered to living individuals (including an unincorporated body of such individuals), who are subscribers. Such *individual subscribers* have:

- i) a right free of charge not to have personal data included in a directory unless they have been informed by the collector of the personal data of the purposes for the data inclusion as well as an opportunity to determine whether it should be so included (regulation 18(2));
- ii) a right not to be searched in reverse (i.e. their names and/or addresses are generated from a telephone or fax number) unless they have given their prior informed express consent (regulation 18(3)); and
- iii) the right, without charge, to verify, correct or withdraw data of them included in a directory at any time (regulation 18(5)).

7.145 Under the Regulations, corporate subscribers also have a right not to be included in a directory where that subscriber has advised the producer of the directory that it does not want its data to be so included (regulation 18(4)). Corporate subscribers do not, however, have the full range of rights otherwise available to individual subscribers under the Regulations (or the DPA).

7.146 In other words the Regulations prescribe, in effect, that the data of a subscriber, whether individual or corporate, should be included in a directory and/or a DQ service only to the extent and in relation to the purpose for which such subscriber has advised the producer of the directory or DQ service.⁷¹ As regards the matter of a

⁷⁰ The term 'subscriber' is defined under regulation 2(1) as "...a person who is a party to a contract with a provider of public electronic communications for the supply of such services".

⁷¹ Regulation 18(1), "...applies in relation to a directory of subscribers, whether in printed or electronic form, which is made available to members of the public or a section of the public, including by means of a directory enquiry service."

subscriber advising the producer, Ofcom understands that as a matter of practical reality such advice is taken by the primary collector of the data, which is normally the subscriber's Communications Provider.

- 7.147 Therefore, as set out below, we consider that certain information should be made available under GC19 in order to comply with the requirements under regulation 18 (and, where applicable, the DPA). In this context, we refer to 'directory status information' as meaning such data which indicates the extent to which the relevant subscriber wishes to be included or partially or totally withheld either from a printed directory or a DQ service.
- 7.148 The precise nature of this directory status information is considered within the context of OSIS at **paragraphs 7.184 to 7.194** below.

The basis and terms upon which Directory Information must be provided

The terms of GC19

- 7.149 The plain terms of GC19.3 requires that the supply of 'Directory Information' in accordance with paragraphs 19.1 or 19.2 is done on *terms which are fair, cost-oriented and non-discriminatory, and in a format which is agreed between the Communications Provider and the person requesting the information.* (These requirements closely reflect the wording in Article 25(2) of the USD, which requires that the 'relevant information' must be provided *in agreed format on terms which are fair, objective, cost oriented and non-discriminatory.*)
- 7.150 We now set out Ofcom's view as to the meaning of 'cost orientation' and 'in agreed format' in this context.

The meaning of 'cost oriented' charges

- 7.151 As noted in **Section 5** above, the ECJ ruled that:

2. Article 6(3) of Directive 98/10, in so far as it provides that the relevant information must be provided to third parties on terms which are fair, cost oriented and non-discriminatory, must be interpreted as meaning that:

- with regard to data such as the name and address of the persons and the telephone number allocated to them, only the costs of actually making those data available to third parties may be invoiced by the supplier of the universal service;
- with regard to additional data which such a supplier is not bound to make available to third parties, the supplier is entitled to invoice, apart from the costs of making that provision, the additional costs which he has had to bear himself in obtaining the data provided that those third parties are treated in a non-discriminatory manner.

- 7.152 Ofcom considers that the ruling must be read in the context of the questions put to the ECJ and the reasons given by the ECJ for reaching that conclusion in light of that background. Similarly, therefore, it is necessary in these disputes for Ofcom to take into account the facts and background against which these disputes arise in relation to BT's supply of all OSIS data to the parties and to apply the ECJ's ruling on 'cost orientation' accordingly. That analysis is set out in **Section 5** below and we here focus solely on providing clarity as to the principal meaning of 'cost oriented' charges under GC19 in light of the ECJ's ruling.

- 7.153 As to the question of which elements of the costs of compiling, updating and providing 'relevant information' on subscribers may be included in the price of the supply of the data, the ECJ said that "*it is sufficient to state*" that "*the compilation of the basic data relating to subscribers, that is to say their names, addresses and telephone numbers, is inextricably linked to the telephony service and does not demand any particular effort on the part of the provider of the universal service*".
- 7.154 Therefore, in the ECJ's view, the costs relating to such compilation (unlike the costs incurred in making them available to third parties) "*must in any event be borne by the supplier of a voice telephony service and are already included in the costs and revenue of such a service*". In those circumstances, the ECJ held that passing the costs associated with compiling (or allocating data) on to persons requesting access to them would result in an excessive and unwarranted offset of the costs in question. On that basis, charges would not be 'cost oriented' if they were seeking to recover such costs. On the other hand, "*additional costs associated with ... communication [of that basic data to persons requesting access to them]*" would be recoverable as no issue of overcompensation would arise since they are not already included in the costs of revenue of providing a voice telephony service.
- 7.155 As regards data other than the basic data, the ECJ made it clear that "[i]n such a case, if the supplier of the universal service decides to make such data available to third parties, even though not bound by the directive to do so, there is *no provision in the Directive to prevent those additional costs from being invoiced to the third parties, provided that those third parties are treated in a non-discriminatory manner*".
- 7.156 Given that the background against which the ECJ gave its ruling (namely, the basic data) appears to closely reflect what Communications Providers must supply under GC19 (given our provisional conclusions set out above). Therefore, Ofcom considers, in principle, that charges for such information must only be based on the additional costs associated with communicating it to persons requesting it. On the evidence received by Ofcom during its investigation into these disputes, we note that BT (as well as each of certain other providers also subject to GC19) collects this information for the purposes of providing PATS to its respective subscribers. As in the KPN judgment, we therefore regard the collection of that information as inextricably linked to the provision of PATS and, in effect, as already included in the costs and revenue of such a service.
- 7.157 As regards data other than the information that must be supplied under GC19, Ofcom takes the view that such data is not required to be provided on regulated (cost oriented) terms and consistent with the KPN judgment a person providing such data (such as BT) to other persons that have requested it is not prevented from recovering costs relating to this data. The evidence indicates that The Number and Conduit have requested and been supplied by BT with all OSIS data.
- 7.158 Nevertheless, to the extent that a sub-set of data supplied by BT via OSIS falls within the requirements of GC19, we consider provisionally that *additional costs associated with communicating it* to persons requesting it means those costs related to actually making that data available to the requesting party. This is discussed in more detail in **paragraphs 7.210 to 7.237** below, but, in summary, would include the costs incurred in physically sending the data by file transfer or extracting data onto a CD-Rom and then sending this to the requesting party along with the costs incurred in establishing and maintaining the necessary commercial relationship with the requesting party in order to provide the data (e.g. billing). All these costs are clearly additional to costs BT – or any other CP – would incur in managing the customer account to provide the relevant PATS.

7.159 Given our provisional views with regard to the directory status information that should be provided under GC19 (see **paragraphs 7.140 to 7.148** above), we note that the costs of gathering the relevant data from the customer should not be recovered from those requesting the 'Directory Information' falling within GC19, other than any additional cost associated with communicating it to them. In support of this provisional conclusion, we rely on the ECJ's judgment in *Commission v. France*⁷², Case C-146/00, as applied by the Advocate General in the *KPN* case in this context, when he states:

46. It goes without saying that providers of voice telephony incur costs in connection with collecting, maintaining and supplying subscriber information. **The same is true in respect of ex-directory information, i.e. the information that someone does not want to be mentioned in a telephone directory. Even though that information is not strictly needed for the provision of voice telephony, it follows from Article 6(2) and (3) of Directive 98/10/EC that every provider is under an obligation to maintain a list of their own customers who do not wish to be listed.**

47. The allocation of costs related to maintaining ex-directory lists was one of the issues addressed by the Court in its judgment of 6 December 2001 in the case *Commission v France*.⁽³²⁾ The case concerned, inter alia, a national scheme for sharing the net costs of the obligation to provide universal fixed voice telephony services. The scheme included the maintenance of an ex-directory list as a cost component for provision of the universal service of creating a comprehensive telephone directory. **However, the Court decided that maintaining an ex-directory list falls within the scope of the management of the providers' own customer accounts, rather than within the scope of the universal service of creating a comprehensive telephone directory.**⁽³³⁾ **In my opinion, the same must be assumed regarding relevant directory information.**

48. For the purpose of cost allocation, **maintaining a database with relevant directory and ex-directory information must first and foremost be seen as an activity attached to the provision of voice telephony services and not as a separate activity for which extra costs have to be incurred in order to enable the publication of universal telephone directories.** After all, it is of the utmost importance for providers of voice telephony that its subscribers are mentioned in telephone directories, because this will stimulate the use of their services.

7.160 This conclusion appears to be supported by the ECJ in the *KPN* judgment itself as it refers (at §31 of its judgment), albeit in the context of considering the meaning of 'relevant information', to its judgment in *Commission v. France*, where it holds as follows:

67. Secondly, Article 6(2) and (3) of Directive 98/10 provides that every service provider must assist in the creation of telephone directories by providing the relevant information, that is to say, information about those of its customers who do not object to being listed.

68. As the Commission has pointed out, that implies a principle that every service provider must maintain a list of its own customers who do not wish to be listed in the general directory and not disclose the names of those customers to the body which prepares the general telephone directory. **Every service provider will, therefore, have its own ex-directory list, the maintenance of which falls within the scope of the management of its own customer accounts, rather than within the scope of the universal service.** The fact that customers of a new market entrant must pay to be included in the ex-directory list maintained by the new entrant has no bearing on the costs of or revenue derived from the creation of telephone directories by the established service providers themselves.

⁷² [2001] ECR I-9767.

(Emphasis added)

The meaning of 'in agreed format'

- 7.161 Ofcom takes the view that, in the context of GC19, the term 'format' refers to the way in which the data which CPs are required to provide under GC19 (as detailed in Section 9.4 above) is sent and received. This would cover:
- i) the medium by which the data is made available (analogously to the medium for a sound recording, e.g. DAT, CD formats, etc) – i.e. how will the data be sent/received?; and
 - ii) related process issues which allow the data to be understood and used by the recipient in the appropriate way – i.e. what will the data look like when received?
- 7.162 In terms of the medium in which the required GC19 data is made available, the CP and the person requesting the 'Directory Information' could agree to provide the data in a spreadsheet that the latter might wish to receive by way of hard copy lists sent in the post or electronically as an attachment to an e-mail. Alternatively, that person may wish to receive it downloaded on (say) a CD-ROM, which CD-ROM would need to be delivered in some way to the third party, whether by post, courier or some other form of transport. Another possible medium would be an automatic feed over an electronic communications network directly into the database operated by the person requesting the 'Directory Information'.
- 7.163 The process issues relate to the need for the parties to agree what the actual data will look like when sent by the agreed medium to enable the data to be processed by the recipient. It seems clear that the parties would want to agree a consistent format for receiving the required data for ease of use by the recipient, particularly as data is likely to be provided on an ongoing basis – i.e. a recipient may receive all a CP's GC19 data following an initial request, but will then require ongoing updates to this data set. In the spreadsheet example, this will involve the parties agreeing a consistent structure of the spreadsheet. When sending data by electronic transfer, the parties will need to agree the precise data fields that will make up a record so that the recipient knows how to read any strings of data received.
- 7.164 Critical to this, it seems important that along with the actual data which a CP is required to provide under GC19, certain other bits of data will need to be provided to facilitate processing – i.e. what we call 'record processing data'. This may involve having a unique identifier for each record provided and providing information on what the recipient should do with the record to the extent that it could be a completely new entry or could be a deletion of or amendment to an existing entry. This aspect of the 'format' relates to the practical way in which the data which the CP is required to provide under GC19 can be sent to the requesting party.
- 7.165 In this regard, Ofcom would make a clear distinction between record processing data, which is purely aimed at allowing any record received by the agreed medium to be used appropriately, and additional information data about the subscriber and the telephone number beyond that required to be supplied by GC19. Overall, the 'format' is about agreeing how the required GC19 data is to be sent from the CP to the recipient.
- 7.166 In this dispute, save as to a legal argument by The Number as to the meaning of 'agreed format' (see further under **paragraphs 7.267 to 7.271** below), the 'format' agreed between the parties does not appear to be an issue at dispute as such. What

is at issue in these disputes is the extent to which any information comprised in the OSIS data fields supplied by BT to The Number and Conduit comprises 'Directory Information' within Ofcom's interpreted meaning set out above.

OSIS data and BT's GC19 requirements

Introduction

7.167 Ofcom now considers how the obligations on BT to provide 'Directory Information' under GC19 relate to the data BT currently provides from OSIS. Ofcom has clarified in **paragraphs 7.76 to 7.139** that Directory Information refers only to (here, broadly speaking) the name, address and telephone number of the 'Subscriber' while to comply with GC19.4 requirements, CPs should also provide 'directory status information' in relation to any 'Directory Information' provided.

7.168 In **Section 3**, Ofcom has categorised the data fields provided by OSIS as follows:

- a) identification data fields;
- b) record categorisation data fields;
- c) record processing data fields; and
- d) group structure data fields.

7.169 These categorisations are again referred to below in considering which specific data fields within OSIS relate to data which BT is obliged to provide under GC19.

Directory Information: 'name', 'address' and 'Telephone Number' of Subscriber

7.170 It should be clear that within OSIS, data relating to a subscriber's name, address and telephone number will be captured within certain of the 'identification data fields'. These fields are therefore examined in more detail below in relation to single line entry records and group entry records.

Single line entry records

7.171 Where a subscriber has a single telephone number, the identification data fields supplied from OSIS will link that telephone number with the appropriate name and the address to which that number is installed by populating the fields set out in **Table 7.3** below in relation to residential and business customers, respectively:

Table 7.3: OSIS fields for single line entry records

RESIDENTIAL CUSTOMERS	BUSINESS CUSTOMERS
(9) Telephone Number (internal)	(9) Telephone Number (internal)
(10) Telephone Number (dialable)	(10) Telephone Number (dialable)
(13) Postcode	(13) Postcode
(25) Name	(25) Name
(29) Title	(32) Business suffix
(30) Initials/Forename	(33) Business description
(31) Honours	(35) Premises/building name or No.
(35) Premises/building name or No.	(36) Street
(36) Street	(37) Locality
(37) Locality	(40) Cross reference
(40) Cross reference	

- 7.172 By reference to **Table 7.3** above concerning our interpretation of 'name', this demonstrates that some of the identification data fields provided against a single line entry will fall outside GC19 requirements. In particular, for individuals, data fields '(29) title' and '(31) honours' would not be covered by the requirement to provide the subscriber name, and, for businesses, data field '(33) business description' also goes beyond what is required under GC19.
- 7.173 Ofcom is not assessing here the usefulness of these data fields to DIPs in certain situations – e.g. when two or more subscribers have the same name, these fields may provide further distinguishing data (e.g. “Smith & Sons, Butchers” or “Smith & Sons, Painters and Decorators”). However, these pieces of data do not align with the data that BT is required to provide under GC19.
- 7.174 Furthermore, even data provided within certain fields which appear at first first to fit with the definition of 'name' (for individuals, fields '(25) name', '(29) title' and '(30) Initials/forename'; for businesses, fields '(25) name' and '(32) business suffix') may not in all cases relate to the 'name' of the *Subscriber*, when compared to **Table 7.1** above.
- 7.175 OSIS sometimes populates its fields relating to 'name' with the 'actual user' name in those cases where there is a distinction to be made between the individual or entity subscribing contractually to the telephone service and the individual or entity actually using the service. Examples will include, for individuals, parents subscribing for services for use by children living away from home and, for businesses, where the management of the phone service is outsourced to a separate company so that the 'Subscriber' is the outsourcing company even though the number is used by the separate company.
- 7.176 Ofcom recognises that DIPs may want to receive the 'actual user' name in all cases as this might be of more direct relevance to the provision of directory information

services to their customers. However, as discussed above, GC19 only requires CPs to provide the name of the *subscriber* to the relevant PATS.

- 7.177 Linked to the issue of 'actual user' name, data field '(40) Cross reference' allows individuals or businesses to effectively be identified by different names under a separate entry which re-directs to the main entry – e.g. TSB, see Lloyds TSB. This data therefore falls outside that which BT is obliged to provide under GC19.
- 7.178 In relation to the 'address', Ofcom understands that in most cases OSIS provides the relevant address data fields in respect of the installation address of the relevant telephone number. The data in fields '(13) postcode', '(35) premises/building name or no.', '(36) street' and '(37) locality' will all fall within the definition of Directory Information to the extent that for any given record they relate to the installation address.
- 7.179 As to telephone number, OSIS currently provides data in two separate fields presenting the numbers in different formats. It is not for Ofcom to prescribe the format in which BT provides the telephone number to DIPs, but clearly it suffices to note that the telephone number must be provided in a recognisable form. Furthermore, BT is clearly only obliged to provide data relating to any telephone number to the extent that the telephone number in question satisfies the meaning of 'Telephone Number', as set out under **paragraphs 7.117 to 7.139** above, such as assigned for use of PATS.
- 7.180 As noted in **paragraphs 7.117 to 7.139** above, Ofcom's provisional view is that this would exclude NTS numbers such as 0800, 0845, etc. In noting this exclusion, Ofcom acknowledges that the provision of such NTS numbers from OSIS and, subsequently, within directories and via DQ services is of key importance to DIPs and to users of directories and DQ services. As we understand it, businesses with multiple branch locations, such as banks, will often want their published contact number to be an NTS number routing to a central call centre rather than, for instance, a geographic number routing to a specific branch. NTS numbers will account for a significant volume of business numbers within OSIS. However, Ofcom is focussed here on identifying the data which BT is specifically required to provide under GC19. The impact of this is discussed further in **Section 8**.

Grouped entries

- 7.181 As discussed in **Section 3**, where a subscriber – usually a business – has more than one telephone number, OSIS creates 'grouped captions' to display the numbers together. Linked to this, OSIS captures additional identification data in relation to records within a group.
- 7.182 A key point to note with grouped entries is that the subscriber can structure their entry as they choose and the actual data input into the various identification data fields is not rigidly defined. As such, numbers may be grouped by branch location or functional department or other criteria in any particular order, the primary aim being to create a grouped caption which will direct users of directory information services to the telephone number relevant to their specific needs.
- 7.183 However, Ofcom's view is that the identification data used within groups and the data relating to structuring those groups falls outside of GC19. As explained in **Table 7.1** above, the 'name' of the Subscriber is defined by reference to its (say) formal or trading name of the business and will not include details on the department name or the specific use to which a number is put (e.g. "24 hour service line"). Records within

grouped entries will therefore include certain 'Directory Information' as well as additional data that BT is not required to provide under GC19.

Directory status information

7.184 **Paragraphs 7.140 to 7.148** sets out Ofcom's provisional view that, given GC19.4, CPs should also provide certain directory status information in relation to any 'Directory Information' that BT is required to provide under GC19 in order to ensure that Subscriber data has been provided in line with the advice from the 'Subscriber' in question about how the data could be used in directories and in DQ services.

7.185 BT currently provides its Subscribers with the following options in relation to directory entries:

- ordinary listing;
- directory enquiry only listing;
- ex-directory listing;
- no listing; and
- partial address listing.

7.186 The first four options are mutually exclusive, but the 'partial address listing' is used in conjunction with the first three options, so that a subscriber who wishes to have a listing of some kind can, in accordance with the DPA and the Privacy and Electronic Communications (EC Directive) Resolutions 2003, as referred to in **paragraphs 7.140 to 7.148**, specify which of their address data should be included in a directory. Where a subscriber requests a partial address listing, the subscriber will be asked to state which parts of the address are to be omitted from the listing.

7.187 In terms of how this information is currently presented in OSIS, the two fields potentially relevant for data protection purposes are 'entry type' and 'partial address indicator' (PAI). **Table 7.4** below relates the options set out above to the appropriate entry type in OSIS, together with (according to BT's classifications) a summary of the expectations of the target of a search.

Table 7.4: Directory entry types

SUBSCRIBER OPTION	ENTRY TYPE	SUMMARY	NAME	ADDRESS	NUMBER
Ordinary listing	DE – normal directory entry	The target is happy for everything to be known about them	No identification of gender	No restrictions unless PA is set	No restrictions
Directory enquiry only listing	DQR – number available via DQ but not Phone Book	The target wants everything except their number hidden from the	No more to be revealed than provided by the enquirer	No more to be revealed than provided by the enquirer	No restrictions

		enquirer			
Ex-directory listing	XD – ex-directory	The target wants everything hidden from the enquirer except that they exist and don't want their number given out	No more to be revealed than provided by the enquirer	No more to be revealed than provided by the enquirer	Not to be revealed

- 7.188 Where the subscriber chooses to have no listing, as distinct from an ex-directory listing, no records for that subscriber's telephone numbers will be passed to OSIS.
- 7.189 Ofcom understands that there is a further breakdown of 'XD' into 'XD/NC' (ex-directory/no calls) and 'XD/CO' (ex-directory/calls offered). The distinction between them is that in the latter case subscribers may be willing to accept a call if they know the identity of the caller, but in any case calls cannot be connected by the DQ provider, and the caller must contact operator services using access code '100' to be connected. In Ofcom's understanding, 'XD/CO' was only ever used for BT subscribers, and the facility is now obsolescent and is being phased out. The default for ex-directory entries is that calls are not offered.
- 7.190 We note that under regulation 18(2) an individual subscriber must have been informed about the purposes of the directory in which his personal data are to be included. If, having been informed of the purposes of an ex-directory listing – i.e. that callers to a DQ service will be informed only that the person exists – the subscriber then chooses to have an ex-directory listing, Ofcom considers that, if the information is not provided under GC19, that purpose cannot be achieved and the processing of the data could be in breach of the protection offered under the legislation.
- 7.191 'Entry type' does not specify whether certain items of personal data are to be omitted from listings, and thus on its own is incapable of fully reflecting the requirements of regulation 18(2)(b). In order to fully meet the data protection requirements, the option must be provided to further exclude information from the records of individual subscribers. There are four address fields which may be omitted: premises/building name/number; street; locality; and postcode. Where any of these are omitted, the data are not provided to OSIS and the fields will be blank.
- 7.192 In Ofcom's understanding, the OSIS 'PAI' field has a dual purpose: first to indicate to OSIS that records provided under GC19 should not be rejected as incomplete because some fields are blank; and secondly, to indicate to DQ providers that subscribers have deliberately withheld some personal data, and that records must not be enhanced with other data, for example from commercially available databases.
- 7.193 For partial address information, the information which the subscriber wishes to withhold does not need to be supplied under GC19. In that case, it would be sufficient simply to exclude this information from the set of information which must be supplied under GC19 on the basis that it is not necessary to identify a subscriber. However, as noted above, the PAI has a further purpose, which is to indicate to DQ providers that the subscriber wishes to have this information withheld from any directory and that records must not be enhanced with any other data.

- 7.194 Given the above, Ofcom is of the view that under GC19, BT is also obliged to provide data in the fields 'entry type' and 'partial address indicator' together with any 'Directory Information' supplied in order to ensure compliance with Relevant Data Protection Legislation to which GC19.4 refers.

Record categorisation data fields

- 7.195 Leaving aside the data fields relating to 'entry type' and 'partial address indicator' which Ofcom has included within the "record categorisation data fields", no other fields under this heading are caught within the definition of 'Directory Information' or the requirements of GC19. Again, to be clear, Ofcom is not assessing here the usefulness of such data to DIPs who may demand such data to enable them to treat records in a certain way and to simplify how different record types – e.g. residential and business – are handled. However, Ofcom's clarification on this point is to make clear what data GC19 explicitly obliges BT to make available to DIPs.

Record processing data fields

- 7.196 In Ofcom's provisional view, the requirements of GC19 do not capture explicitly the data provided from OSIS in the "Record processing data fields" category. However, it is clearly necessary for a receiver of data from BT under GC19 to be able to process and effectively use the data received. The fields within OSIS under this category reflect the historic basis on which BT has sent and DIPs have received OSIS data. Therefore, to the extent that at least a sub-set of the data fields provided by OSIS is related to the data BT is required to provide under GC19, these record processing data fields can be viewed as necessary elements to allow the practical provision of the GC19 data and, as set out above, could be viewed as relevant to the 'format' in which the GC19 data is provided by BT.

Group structure data fields

- 7.197 With regard to the group structure data fields as defined by Ofcom at **Section 3**, as part of their respective submissions to Ofcom that everything provided by BT via OSIS falls within GC19 (see further in **paragraphs 7.240 to 7.252** below), both The Number and Conduit argue (in contrast to Thomson's position) specifically that BT is required to provide them with certain presentational information. This essentially covers the group structure data fields.
- 7.198 In Ofcom's view, there is nothing in GC19 that, as a matter of statutory interpretation under purely domestic law, requires BT to provide presentational information such as the group structure data fields. What is required to be provided under GC19 is the 'Directory Information' itself within the meaning that we have set out above but not the presentational aspects that relate to such information. For the avoidance of any doubt, this provisional conclusion also accords with the relevant provisions of the USD and the ECJ's judgment in the *KPN* case.
- 7.199 To start with, it appears to us plain that presentational aspects do not come within the universal service context as such. Indeed, we note that the 11th recital to the USD's preamble (which deals with the policy objectives of the need for a universal service directory) provides:

Directory information and a directory enquiry service constitute an essential access tool for publicly available telephone services and form part of the universal service obligation. **Users and consumers desire comprehensive directories and a directory enquiry service covering all listed telephone subscribers and their numbers (including fixed and mobile**

numbers) and **want this information to be presented in a non-preferential fashion.** Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector ⁽¹⁾ ensures the subscribers' right to privacy with regard to the inclusion of their personal information in a public directory.

(Emphasis added)

- 7.200 We therefore do not see anything in the USD to suggest that a wider interpretation should be taken with regard to publicly available DQ services and directories (other than those provided under Article 5 of the USD to provide universal services) to which Article 25(2) of the USD refers, and which services and directories are provided in competition with universal service ones.
- 7.201 In particular, such a conclusion is entirely consistent with the ECJ's overall conclusion that the concept 'relevant information' must be strictly interpreted. In our understanding, such presentational information is not strictly speaking necessary even for securing the supply of a universal service directory. Nor is the presentational information properly to be regarded as a record in itself that users of telephone directories need in order to identify the subscribers they are looking for; the record(s) exist independently, but which the presentational information seek to deal with in a particular manner and/or structure.
- 7.202 The words of the Advocate General in the *KPN* case in this context lend some support and guidance on this, where he states that "[y]et, it cannot automatically be assumed that whatever [the provider of the universal service directory] has published or will publish in its directories must therefore be labelled relevant within the meaning of the Directive. In the Dutch context, this would render the standard for universal directory services and the obligation for every voice telephony provider to collect and supply relevant information entirely dependent on what KPN decides to publish in its telephone guide. Neither the text nor the aim of Article 6 supports such a contingent interpretation"⁷³.
- 7.203 Indeed, it is clear from the *KPN* case that any refusal to make data (other than the data the ECJ principally determined as 'relevant' in light of the facts before it) available to third parties is *compatible with the liberalisation aims* of the directive. If third parties were to *benefit from the endeavours of the supplier* of the universal service directory, such as the costly compilation of the additional data, this would lead to a distortion of competition between companies producing directories as there would be no obligation on third parties to reciprocate⁷⁴. It was further reinforced in that case that 'relevant information' does not mean information relevant in order to enable third parties *to compete in a market* for universal directory services⁷⁵.
- 7.204 In addition, the Advocate General specifically recognises that the provider of the universal service directory (which, in the UK, is in effect BT) can be expected neither to collect nor to supply more information than other providers of voice telephony with mere reference to (now) Article 25(2) of the USD. He continues to clarify that the possibility that some *telephone directories may offer more information than others*

⁷³ §28 of the Advocate General's Opinion.

⁷⁴ §§23-28 of the ECJ's judgment.

⁷⁵ §24 of the Advocate General's Opinion.

does not impair the availability of universal directory services, as long as users are able to find the information they typically consider relevant⁷⁶.

7.205 Finally, as regards the ECJ's clarification that it is open to the Member States to provide that other data are to be made available to users where, *in light of specific national circumstances*, they appear to be necessary in order to identify subscribers, it suffices simply here to note that this option has not (yet) been exercised in the UK.

7.206 In summary, therefore, any presentational information (such as 'grouping') that The Number and Conduit have thus far received by BT has, in effect, been provided by BT on an unregulated basis.

Provisional Conclusions

7.207 Of the data provided by OSIS only certain records and certain data fields within those records are, in Ofcom's provisional view, aligned with BT's specific obligations under GC19 to provide 'Directory Information'.

7.208 In Ofcom's provisional view, the data fields currently provided by OSIS set out in **Table 7.5** below match, save as to the more detailed observations set out above, the data which BT is obliged to provide under GC19 to the extent that the data fields relate to PATS Telephone Numbers originally allocated to BT and in so far as the subscribers have not advised BT of their choice to have no directory entry:

Table 7.5: Data fields relevant to GC19 currently provided by OSIS

RESIDENTIAL CUSTOMERS	BUSINESS CUSTOMERS
(9) Telephone number (internal)	(9) Telephone number (internal)
(10) Telephone number (dialable)	(10) Telephone number (dialable)
(13) Postcode	(13) Postcode
(25) Name	(25) Name
(30) Initials/forename	(32) Business suffix
(35) Premises/building name or No.	(35) Premises/building name or No.
(36) Street	(36) Street
(37) Locality	(37) Locality
(5) Entry type	(5) Entry type
(43) Partial address indicator	(43) Partial address indicator

7.209 The historic provision of the record processing data fields by BT is also relevant to GC19 requirements to the extent that such fields were required to ensure those receiving GC19 data within OSIS could use that data appropriately. However, to be

⁷⁶ §§29-30 of the Advocate General's Opinion.

clear, moving forward BT (or any other CP) need only provide record processing data to the extent that it is required to ensure that parties receiving GC19 data can process that data in the appropriate way.

Ofcom's Analysis of BT's OSIS Charges

- 7.210 This Section sets out Ofcom's approach to assessing whether BT's charges for the set of directory entry data provided from OSIS are, and have been, consistent with BT's obligations under GC19 in light of our provisional conclusions set out above.
- 7.211 As part of its overall investigation, Ofcom has considered the following:
- a) the charges BT has applied for providing OSIS data to DIPs and the subsequent revenues received; and
 - b) the activities BT undertakes in delivering the OSIS product to DIPs and the related costs of provision.
- 7.212 However, these revenues and costs need to be assessed against the specific obligations on BT to provide a defined set of directory data under GC19 – i.e. the 'Directory Information' of BT's PATS subscribers and other PATS end-users assigned numbers allocated to BT. As Ofcom has set out above, the data which BT is and has been obliged to provide to The Number and Conduit under GC19 is only a sub-set of the data which BT is and has been providing from OSIS. It is helpful to conceptualise OSIS as supplying four separate notional products (i.e. categories of information):
- i) 'Directory Information' of subscribers assigned PATS telephone numbers allocated to BT ("the BT GC19 data set");
 - ii) Directory entry data of subscribers assigned PATS and non-PATS telephone numbers allocated to BT in addition to "Directory Information" at (i) ("the BT additional data set");
 - iii) 'Directory Information' of subscribers assigned PATS telephone numbers allocated to other CPs ("the OCP GC19 data set"); and
 - iv) Directory entry data of subscribers assigned PATS and non-PATS telephone numbers allocated to other CPs in addition to "Directory Information at (iii) ("the OCP additional data set").
- 7.213 Any individual data record provided by OSIS relating to a PATS telephone number will be either a combination of product (i) and (ii) or a combination of product (iii) and (iv).⁷⁷ Data records relating to non-PATS telephone numbers will fall within either product (ii) or product (iv).
- 7.214 In Ofcom's provisional view, it is only notional product (i) that is required to be provided by BT's specific obligations under GC19.
- 7.215 The only way, up to now, that The Number and Conduit and other DIPs can obtain the BT GC19 data set is by purchasing access to the entire OSIS database. No

⁷⁷ Every data record will include "record categorisation data fields" which fall outside the requirements of GC19, therefore no actual data records will be purely notional product (i) or (iii).

separate BT GC19 data set product has been made available to DIPs. Therefore, to receive the BT GC19 data set, The Number and Conduit have paid for, and received, access to the OSIS database (for simplicity, in this analysis we will use the term "OSIS" to refer to this access and associated services).

7.216 The issue is therefore whether BT's charges for OSIS are and have been consistent with its GC19 obligations to provide the BT GC19 data set on non-discriminatory and cost oriented terms. In assessing this, it is not appropriate for Ofcom to seek to determine the charges BT applies and has applied in respect of the provision of data sets that are not regulated (i.e. (ii) to (iv)). Since in respect of the provision of notional products (ii) to (iv), there is no regulatory obligation, Ofcom does not consider it can or should determine the charges for these products within these disputes.

7.217 Therefore, to assess the issue of whether BT's charges for OSIS are consistent with its GC19 obligations, Ofcom must consider the following scenarios:

- whether by only providing the aggregated (full) form of OSIS to the parties, BT was requiring them, in effect, to pay for records and data fields in OSIS that they did not require and these inflated the appropriate charges for the regulated BT GC19 data set; or
- whether the parties demanded and used (full) OSIS, including the BT GC19 data set.

7.218 From submissions received and information gathered during this investigation from The Number and Conduit, Ofcom's provisional views are that:

- a) the parties have received and used the full OSIS data set provided to them;
- b) the parties continue to want to receive the full OSIS data set; and
- c) although Conduit made an enquiry about the terms of which BT Retail would provide the directory data of its own subscribers (letter to Dave Shaw, BT Retail of 3 June 2005), no party has made a specific request for the BT GC19 data set as defined above as a stand-alone product separate from the OSIS data set.

7.219 This means that there is no basis for stating that The Number and Conduit should have only paid an amount for OSIS in respect of the cost oriented charge of providing the BT GC19 data set. Further, BT's GC19 obligations do not provide a guide or basis for determining the price for the full OSIS data set.

7.220 The only price set by BT was for the bundle of the four notional data products and so there is, and was, by definition, no stand alone price for notional product (i) – the BT GC19 data set – against which to compare what a cost-oriented charge would look like. There is no readily identifiable implicit price for the GC19 data set given that only a pure bundle – of notional products (i) to (iv) – was available from OSIS. This situation is in contrast to what would have been the case had the notional products (ii) to (iv) been available as a separate bundle or each as separate products with associated stand alone prices.⁷⁸

⁷⁸ Where information on incremental and stand-alone prices is available these can be used to determine boundaries for the implicit price. However, as noted by Oxera in Assessing profitability in competition policy analysis: OFT economic discussion paper (2003, paragraph 6.31): "... in some cases, the range between these two extremes [i.e. incremental and stand-alone

- 7.221 Given this, there can be no case for concluding that BT's current or historic charges for OSIS are or have been inconsistent with BT's GC19 obligations. No case for retrospective adjustment of these charges therefore arises.
- 7.222 Moving forward, BT must comply with its GC19 obligations. This means that where The Number, Conduit or any other DIP requests that BT provides the BT GC19 data set as a separate service from OSIS, then BT must provide this data set on cost-oriented and non-discriminatory terms as required by GC19.
- 7.223 In line with the principles established in the KPN judgment and given the definition of the GC19 data set specified in this determination, this would mean that BT could only recover the costs of making available the BT GC19 data set to the requesting party or parties. Ofcom's analysis has clearly established that the data BT is obliged to provide under GC19 is data which BT already gathers in order to process new orders and manage account amendments and cancellations.
- 7.224 As discussed in **Section 3** and **Annex 4**, the data provided from OSIS is currently "Customer-defined" insofar as, currently, CPs only submit data into OSIS which reflects the express wishes of their subscribers about the identification data attached to any given telephone number in an OSIS record and the appearance of those records, specifically in relation to the structure and presentation of individual records within group captions. **Annex 4** also sets out, however, that in 70% of cases, BT is currently able to "auto-generate" OSIS records from data already gathered in managing the customer's account. In these cases, the customer's desired directory entry aligns with their "subscriber name", the installation address and the relevant phone number and so no further customer-facing activities are required to create a directory entry and no further costs are therefore incurred.
- 7.225 Ofcom's view is that the data which BT is obliged to provide under GC19 would similarly be able to be provided to requesting DIPs without the need for further customer interaction. The necessary data is captured and stored as part of the management of the customer's account and therefore the costs of these activities will be recovered from the provision of PATS to that customer. They should not, following the KPN judgment, therefore, be recovered from charges to DIPs.
- 7.226 The type of costs associated with making available the BT GC19 data set might typically include:
- a) costs of establishing and operating the means of transmitting the data from BT to the DIP(s); and
 - b) costs of managing the relationship with the DIP(s), including account management, contract management and billing.
- 7.227 The nature of these costs will be dependent on precisely how BT makes available any separate BT GC19 data set. This is not for Ofcom to prescribe at this point. Any

price] can be very wide. In such cases, the revenue allocation may be difficult as there may be few objective reasons to choose an allocation between incremental and stand alone revenues, or indeed a cost-based allocation, without further information about consumers' willingness to pay. **Indeed, in cases of pure bundling, information on stand-alone and incremental prices is not available at all.**" (emphasis added.)

party wanting the separate BT GC19 data set will need to agree with BT the precise format for delivering the data and the frequency with which updates should be provided. As has been noted, OSIS data is currently updated 6 days a week and provided by file transfer. The BT GC19 data set may be provided less frequently by a different means. This will depend on the requirements of the DIP(s).

- 7.228 Ofcom would expect BT to be in a position to meet the requirements of any DIP requesting the separate BT GC19 data set immediately. Ofcom does not believe that there would be significant work involved in extracting the relevant data from its systems and delivering this to DIPs. On an ongoing basis, the update information which any DIP would require would be a sub-set of the data BT currently provides from CSS to OSIS for "auto-generated" records.
- 7.229 If BT chooses to meet requests for the separate GC19 product by simply providing the BT GC19 data set from out of the OSIS system, then, in charging for this product, BT should only be recovering the costs of making available the relevant data fields from the OSIS database to the requesting party.
- 7.230 Clearly, any party requesting the BT GC19 data set from BT as a stand alone service would not necessarily also receive data sets (ii) to (iv) from BT. The party would have the option to request product (iii) data from all other Communications Providers directly and these CPs would be obliged to provide their GC19 data set on cost-oriented charges as set out above. Alternatively, the DIP may seek to purchase this CP data from a third party – which may include BT – who has accumulated the data directly. This data would be purchased on commercial terms.
- 7.231 Any of the additional data within products (ii) and (iv) would either need to be purchased from the relevant CP on commercial terms or from third parties supplying such data or otherwise obtained direct from the customer themselves. The options here will be driven by the precise requirements of the DIP in relation to the additional data they require.
- 7.232 In the alternative, any DIP who continues to require all the data within the OSIS product from BT will be purchasing that product on commercial terms. It should be noted, however, that in supplying the OSIS product, BT's conduct would be subject to competition law.
- 7.233 As should be clear, the provisional conclusions reached by Ofcom in relation to the compliance of BT's OSIS charges with GC19 are not contingent on any analysis of BT's historic costs and revenues of supplying OSIS. The critical issue is that GC19 applies to a sub-set of data within OSIS, this GC19 data set was only available as part of the pure bundle of information products supplied through OSIS, and both The Number and Conduit required and used the broader range of data provided by OSIS.
- 7.234 Nevertheless, during its investigation, in order to progress its investigation and consider all potential outcomes, Ofcom initiated an analysis of BT's costs and charges of providing OSIS data in parallel with its work to consider the specific obligations placed on BT by USC7 and GC19.
- 7.235 During this investigation, Ofcom has therefore requested, and received, extensive cost information from BT to allow such an initial analysis to take place. To assist in the analysis of the data received from BT, Ofcom retained consultants to construct a flexible model which could utilise the data to provide different views of revenues and costs based on transparent and flexible assumptions on different possible allocations

and apportionments of costs. Ofcom's intention was to use this model as appropriate in the light of its conclusions on BT's USC7 and GC19 obligations.

- 7.236 Any final outputs required to resolve the disputes would, therefore, be based on Ofcom's conclusions on the precise obligations on BT under USC7 and GC19. The model could not produce meaningful outputs in isolation from Ofcom's views, nor was it intended from the outset that it would be the case.
- 7.237 Initial outputs from the model left some costs unapportioned and further work would have been required to understand the relevant cost drivers and cost-volume relationships to produce a robust view of costs to a disaggregated level of detail below the overall OSIS data set – e.g. to show costs of providing the BT GC19 data. However, Ofcom's provisional conclusions on GC19 and USC7 make such work unnecessary. As the issue of whether BT's charges are consistent with USC7 and GC19 does not ultimately depend on the analysis of the cost information provided by BT, Ofcom takes a provisional view that it does not intend to make any conclusions regarding the appropriate allocations and apportionments of the overall OSIS costs provided by BT.

Ofcom's views on submissions by the parties and interested persons

- 7.238 The above analysis sets out Ofcom's provisional conclusions on the specific requirements on BT to provide directory information under GC19 and the implications for the charges BT sets, and has set, for access to the OSIS database.
- 7.239 **Section 4** of this document sets out the main submissions made by the parties and certain other interested persons during the course of Ofcom's consideration of these disputes. This section deals with the more detailed submissions made in respect of GC19 and its relevance to OSIS charges in light of the analysis set out above.

'Relevant information' – all OSIS data is necessary to identify subscribers

Submissions from The Number

- 7.240 At §2.71 of its Amended Request, The Number states that all of its arguments in the Initial Request on the interpretation of the ECJ's ruling in the KPN judgment and on the meaning of 'relevant information' in the UK context apply equally in relation to BT's obligation to comply with GC19.
- 7.241 Therefore, we understand The Number to be arguing (as summarised at §1.16 of its Initial Request also in the GC19 context):

As regards the issue of what constitutes "relevant information" in the UK in light of the *KPN* case, The Number considers that the data feed it currently receives from BT is "relevant information" (see OSIS Standard Extract Product Description at **Annex 6**). That data consists essentially of name, telephone number, address (including post code), the nature of the business, and grouping (by main business/entity name with sub-headings for the different branches or departments which have different numbers allocated to them by BT or another telecommunications operator). All the elements in the data feed which The Number uses are what users in the UK traditionally expect to find in a directory.

- 7.242 In Section B of the Initial Request, The Number elaborates on that argument by submitting that:⁷⁹
- i) the requirement (taken from paragraph 1 of the ECJ's answer to the reference for a preliminary ruling) that 'relevant information' must be sufficient to enable users of a directory to identify the subscribers for whom they are looking is met by the various elements of the data feed currently supplied by BT; and
 - ii) all those elements are what users in the UK traditionally expect to find in a directory (by reference to the words of the Advocate General at paragraph 28 of the Opinion); specifically, as regards 'grouping', The Number submits that user expectations and desires have been shaped by BT to users as part of the 192 service and the printed telephone directories distributed by BT.
- 7.243 In its briefing paper of 26 May 2006 on 'relevant information', The Number essentially repeats this argument, albeit by more detailed references to the data fields in OSIS relating to 'name', 'address' and 'telephone numbers'.⁸⁰ It also submits that OSIS contains 'no additional information' in the KPN sense (i.e. no fields for profession, mobile number or listings under a different name or in a different location as in KPN's 'white pages').⁸¹
- 7.244 Under **paragraphs 7.73 to 7.139** of this document, Ofcom has set out our view as to the meaning in the UK of, in effect, 'relevant information' – i.e. BT's requirement to provide Directory Information under GC19 - which we regard as entirely consistent with the KPN judgment.
- 7.245 Critically, The Number's analysis does not analyse or interpret the provisions of domestic UK legislation or regulation and instead focuses on what, in The Number's view, users in the UK traditionally expect to find in a directory, The Number makes reference to the words of the Advocate General at paragraph 28 of the Opinion concerning Member States' defining 'relevant information' in light of domestic users' requirements. However, the critical issue is that this option, albeit clearly exercisable, has not in fact been exercised in GC19.
- 7.246 Given this, even if, for example, Ofcom were to carry out consumer research to specifically identify UK users' requirements for directory information, to require BT, or any other CP, to supply such information, would first require Ofcom to amend GC19.
- 7.247 In **Section 8** of this document, Ofcom sets out the implications and policy matters arising as a result of its investigations. Ofcom recognises that The Number and the other parties have a commercial demand for the data currently received from OSIS and the scope of the data which BT is obliged to provide under GC19 would appear to fall some way short of this. As is made clear in this Section, our analysis in these disputes must focus on BT's specific requirements given the national regulations in place. Ofcom will consider whether any changes may be needed to these regulations and whether such changes would be appropriate as part of its ongoing DQ policy project.
- 7.248 So far as The Number's references to OSIS data fields are concerned, we refer to our analysis under **paragraphs 7.167 to 7.209** of this document as to how BT's

⁷⁹ §§2.10-2.16.

⁸⁰ §§2-10, 30-39 of The Number's briefing paper.

⁸¹ §§4-5, 37-39.

requirements to provide certain data under GC19 align with the specific data fields provided by OSIS, including the issue of 'grouping'.

Submissions from Conduit

- 7.249 In its separate Request, Conduit agrees with the above assessment by The Number as to what constitutes 'relevant information' for the purposes of Article 25(2) of the USD and that the fields currently made available in the OSIS database constitute 'relevant information'.⁸² Accordingly, Ofcom's views apply equally to Conduit's dispute with BT.
- 7.250 In its letter dated 26 May 2006 to Ofcom, Conduit has made additional submissions specifically as regards its interpretation of 'relevant information' for the purposes of this dispute in the context of the KPN judgment. In that letter, Conduit maintains that all of the information contained in OSIS is 'relevant information' or 'basic data' in accordance with the KPN judgment as such fields are, in fact, necessary to identify a subscriber and are subsets of data identified as basic information by the ECJ. Also, Conduit submits that no information which is systematically provided in the OSIS database should be considered 'additional data' in accordance with the KPN judgment and it mentions the OSIS field of 'business description' as an example. Again, this line of reasoning follows that of The Number and we therefore refer to our analysis and views set out in **paragraph 7.73 to 7.209** above under which we have provisionally concluded (among other things) that 'business description' specifically does not fall within the meaning of 'Directory Information' for the purposes of GC19.
- 7.251 On the other hand, we do agree with Conduit's submission in that letter that the provision of 'XD listings' information falls within GC19 on the basis that this data is directory status information. We also agree with two further points that Conduit makes in its 26 May 2006 letter. First, in defining 'relevant information' in the UK context, it is to be recognised that the ECJ in the KPN judgment referred to 'data' and not specifically to 'fields'. That said, again for reasons already set out above, we disagree with the conclusions that Conduit seeks to draw from this point, so far as it suggests that certain fields in OSIS contain 'name' and 'address' data outside the fields Ofcom identified as relevant to the specific definitions of 'name' and 'address' detailed above.
- 7.252 The second point by Conduit concerns 'grouping'. Conduit submits that, where a large number of fields are used to display the name of a subscriber, then some method of 'grouping' must be used to display the data in a sensible manner. Ofcom agrees with Conduit's emphasis in this context that such 'grouping' is not 'data' for the purposes of the *KPN* decision; it is simply a method of displaying data. However, we reject the relevance of the point that Conduit draws out from this, that is to say the existing grouping structure in OSIS cannot simply be removed without making the database effectively unusable by DQ providers. As we consider such presentational information as something that falls outside GC19, BT is not required to provide it to DQ service providers and, hence, Conduit's point is without any merit.

Submissions of Thomson

- 7.253 In its letter dated 5 June 2005 to Ofcom, Thomson submits that the name, address and telephone number of a subscriber constitute 'relevant information' as defined in

⁸² See under section 2.3.1 of Conduit's submission.

the KPN judgment. Thomson, however, then submits that those fields in OSIS that Thomson uses make up 'relevant information'. Ofcom's analysis above sets out why only a specific set of data fields within OSIS are relevant to the data BT is required to provide under GC19. The fields used by Thomson include data and information that fall outside BT's GC19 requirements.

7.254 On the other hand, Thomson states in that letter that 'grouping' is used by BT in the OSIS database to display the information relating to any organisation which has more than one telephone number where that organisation wishes its name to appear only once in its listing information and wishes the rest of the listing information to be formatted in a certain way, rendering information easier to read. It continues by stating that the 'grouping' data provided in OSIS formats the records for all subscriber's telephone numbers so that that listing is structured in the way the subscriber desires. Thomson concludes that, were 'grouping' data unavailable via OSIS, it would use its own formatting methods to structure listings. Moreover, in its Initial Complaint to Ofcom, Thomson submits that BT's 'grouping' of data is not an exercise which BT is required to undertake pursuant to the USD⁸³. Ofcom notes that the latter submission by Thomson accords with Ofcom's provisional findings in this regard.

Submissions of BT

7.255 In the light of the submissions of the other parties, it is appropriate to turn to BT's position on 'relevant information' as set out in its letter of 14 June 2006 to Ofcom on a without prejudice basis to the two appeals lodged against Ofcom's decision to extend the disputes to cover GC19. BT's starting point is that 'relevant information' should be strictly interpreted under the KPN judgment; it also notes that the term 'Directory Information' is also restrictively defined in the GCs.

7.256 Whilst BT sees merit in interpreting *KPN* literally to mean that GC19 requires only subscriber name, address and telephone number, it recognises the data needs to be fit for purpose. But in so doing it rejects that all the data currently provided by BT through OSIS is necessary for the provision of comprehensive DQ services. In particular, BT strongly disagrees with The Number's and Conduit's submissions that users' expectations of what appears in BT's directory are 'national circumstances' dictating what is necessary to identify subscribers. First, expectations do not amount to necessity. Secondly, the KPN judgment expressly envisages that providers in BT's position may negotiate to provide additional information, for which they can pass on the costs provided they do so in a non-discriminatory fashion. It cannot be the case that, if they do so, then over time that additional information transforms itself into information 'necessary to identify subscribers', with the result the provider must cease charging for it. According to BT, that would be an untenable interpretation of the KPN judgment.

7.257 In particular, BT gives two examples of information (in a broad sense) that are unnecessary to identify a business subscriber and therefore should not be required to be provided by BT or other 'Communications Providers' under GC19, namely:

- i) displaying the nature of a business (e.g. Florist);
- ii) grouping business listings under sub-headings, sub sub headings etc.

⁸³ At §A.1.9.

- 7.258 As regards the latter, BT points out that 'grouping of data' (for example, listing all the branches of a bank under a sub header 'branches') is intended to create structural separation for ease of presentation when a business has a number of listings of similar nature. According to BT, such 'grouping' structure is not necessary to identify subscribers: ensuring that each branch is listed singularly with sufficient information to identify one from another ought to be equally satisfactory to providers of a comprehensive DQ service.
- 7.259 Furthermore, BT points out that, as set out by the KPN judgment, it is not the purpose of GC19 simply to replicate the scope of the information held for example in BT's phone book. Therefore, GC19 should not include information, for example, relating to Special Directory Entries, such as bold and superbold typeface. Nor does GC19 require 'grouping' of data (mixed groups or otherwise).
- 7.260 BT then sets out a possible approach to defining the concept of a subscriber 'name' more broadly than simply the generic title of the business or organisation. It believes that, in principle, GC19 could be fulfilled by strictly limiting the scope of 'relevant information' by scoping a very small number of generic fields to define the concept of a 'name'. That said, BT points out that the information required to populate these fields is currently collected and held in OSIS in a number of fields and it would require industry consultation and agreement to figure how precisely to populate these generic 'name' fields.
- 7.261 Finally, BT acknowledges that the following information could be provided, in addition to that required to identify subscribers, in order to assist customers:
- i) *directory status* – i.e, whether the subscriber's listing is ex-directory (XD), restricted (DQR) or full directory entry (DE);
 - ii) *partial address indicator* – indicating where a listing contains a customer specific address (address components omitted) and address cannot be enhanced;
 - iii) *tariff* – residential or business;
 - iv) *fields that are necessary to process data* (e.g. an action indicator field) which do not relate to the name, address or telephone number.
- 7.262 Ofcom understands BT's submission to propose that GC19 should be interpreted to provide more information than Ofcom has suggested in **paragraphs 7.73 to 7.209**, in particular with regards to 'name'. BT is also suggesting that certain other information could be provided along with this data to "assist customers". Ofcom has set out its interpretation of the specific requirements placed on BT by GC19. Given the clarity Ofcom has provided, we do not accept that any industry-wide consultation or agreement is required before BT provides a BT GC19 data set product separate from OSIS in response to any request received.
- 7.263 However, we do recognise that the proposals from BT to provide data in addition to the strictly defined 'name' to allow users of directories and DQ services to identify specific telephone numbers may be of interest to some DIPs and may be viewed as more attractive than the strictly defined GC19 data set. As noted in **Section 8**, Ofcom will consider whether the definition of Directory Information within the GCs needs to be extended to align with the requirements of the industry and BT's proposals will be considered in this exercise.

The Number's comments on BT's submission

7.264 In response to BT's letter of 14 June 2006, The Number has made the following points in its letter dated 6 July 2006 to Ofcom:

- Grouping/captioning: The Number sets out a number of practical difficulties and consequences it considers would be the result if 'grouped' listings were no longer supplied from OSIS. The Number notes that:

If DQ operators tried to carry out grouping themselves by calling every number within a grouped listing (The Number estimates there are 600,000 such listings), then not only would this represent a significant distraction from the actual business of answering DQ calls (and require a number of additional staff to make those calls), it would also represent a nuisance for subscribers.

- Current costs of grouping/captioning: The Number raises its concern about payments made by BT to the upstream providers for their directory information. In particular, it draws Ofcom's attention to an alleged arrangement which has the effect, in its view, of sharing the benefit of BT's unreasonable charges with upstream providers. This is because The Number asserts that UK upstream providers have arranged for BT to carry out discharging their respective obligations under GC19 via OSIS free of charge, including grouping for the upstream providers, and BT then, despite carrying out valuable services for the upstream providers, makes a payment of 66p per listing to them for their directory information, and those payments, in The Number's understanding, form part of the OSIS running costs.
- National circumstances/Users' expectations: In response to BT's strong disagreement with The Number's interpretation of what constitutes 'relevant information' under the KPN judgment (in particular The Number's reference to users' expectations and national circumstances in the UK), The Number states that support for its position is found in paragraph 1 of the ECJ's judgment and paragraph 28 of the Advocate General's Opinion, by emphasising cited passages in those paragraphs where they refer national circumstances and what a typical user requires and traditionally expects to find.
- Business descriptions: The Number submits that it is essential to know the nature of a business in order to be able to tell identically or similarly named businesses apart and give the caller the correct number. In this context, it refers to an example of knowing which of two companies named 'Lloyds & Sons' is the florists and which is the funeral home is essential to being able to identify the business subscribers Lloyds & Sons the florists.
- Industry consultation: The Number rejects BT's suggestion that a way forward in resolving the issue of what constitutes 'relevant information', and how such information might be supplied differently in future, would be to have some form of industry consultation. In particular, The Number responds that, inevitably, because of their conflicting interests and interpretations of the KPN judgment, there will never be consensus on this issue between BT and the other upstream providers, on the one hand, and telephone DQ operators, tele-appenders, Internet DQ providers, printed directory providers and other industry players, on the other, so industry-wide consultation will not work. The Number concludes that it is clear that in this case there can be no resolution without the intervention of the regulator.

- Additional information: In response to BT's suggestion—that, whilst BT would be willing to provide ex-directory information, the partial address indicator and tariff fields, it is not required to identify subscribers—The Number submits that these data *are* required to identify subscribers and therefore 'relevant information' (which should be supplied at charges based on the incremental cost of provision only). Specifically, The Number submits that:
 - as regards ex-directory information, this is required by DQ providers in order to identify subscribers, even if they are then required not to give out the number, but instead to tell the caller that the number is ex-directory; in this context, The Number states that DQ providers not currently paying for ex-directory information receive no entry for an ex-directory subscriber, so are unable to identify the subscriber and tell if the number is ex-directory or does not exist) – without this information, callers would waste time and money calling other DQ providers mistakenly thinking that previous DQ providers simply could not find the number in question;
 - as regards the partial address indicator field, this contains essential information about the 'address' of a subscriber, so it has a similar function to ex-directory information in that it enables subscribers to be identified, but then gives subscribers the right, under data protection rules, to prevent some of their address information being revealed;
 - as regards the tariff field, this denotes whether numbers are residential or business and is required in order to be able to search for and identify business numbers with national coverage; this is because, according to The Number, DQ operators are not permitted to search for residential numbers without the caller giving an approximate location; on the other hand, business numbers can be searched without requiring callers to specify a location, thereby enabling DQ providers to search nationally for companies using national call centres (e.g. DVLA, British Airways or Direct Line Insurance) – residential and business numbers therefore need to be distinguished from each other using the tariff field in order to enable national searching of business numbers to be carried out and business numbers with national coverage to be identified.

7.265 Having considered these submissions carefully, we do not consider that The Number's response raises any substantially new points or arguments that alter or affect the provisional conclusions set out above. Ofcom, however, makes a few observations on its response:

- Grouping/captioning: The Number has highlighted two practical problems it envisaged if 'grouped' listings were not supplied from OSIS. The critical question in relation to the dispute is what information BT is required to supply pursuant to GC19, which makes no reference (whether expressly or by implication) to OSIS and in our provisional view, would not include 'group structure' data fields related to how different records relating to the same business should appear within OSIS 'captions'. Ofcom recognises the commercial need for The Number to receive the data provided from OSIS, including the grouping information. Ofcom would note that there is nothing on the facts of the case (in Ofcom's understanding) to suggest that BT would no longer supply commercially (i.e. on unregulated terms) the data it presently supplies via OSIS to The Number, for example after Ofcom has made a final decision in these disputes.

- Current costs of grouping/captioning: In light of our analysis above, GC19 only relates to BT's own subscribers. Therefore, payments made by BT to the upstream providers are not directly relevant. If persons (such as The Number and Conduit) have requested to receive also such upstream provider data from BT via OSIS (as opposed to approaching each of such providers), then that is a commercial matter and not something regulated under GC19.
- National circumstances/Users' expectations: We note (as already pointed out above) that the *option* of extending the nature of the data considered within the interpretation of 'relevant information', as highlighted by the ECJ and the Advocate General, does not assist The Number as this option has not, in fact, been exercised in the UK in GC19.
- Business descriptions: Again, we refer to our analysis and views set out above under which we have provisionally concluded (among other things) that 'business description' specifically does not fall within the meaning of 'Directory Information' for the purposes of GC19.
- Industry consultation: We have already responded above to BT's point that industry consultation and agreement would be required to populate new fields in OSIS in relation to its current obligations under GC19. As regards any issue as to how information might be supplied differently in future, it is unclear to Ofcom whether The Number is suggesting that Ofcom could, as part of resolving these specific disputes, take this opportunity to, in effect, re-write BT's obligations under GC19. For the avoidance of any doubt, such a suggestion would have no basis at law and we would therefore reject it. In this context, it is to be noted again that Ofcom intends to separately consider certain issues as part of its planned policy project (see further in **Section 8** of this document), such as whether any proposals should be made by Ofcom to modify GC19 for future purposes.
- Additional information: Ofcom's views on the data BT should provide under GC19 in order to ensure that Directory Information is provided in compliance with Relevant Data Protection Legislation are set out above. These include 'entry type' data which covers ex-directory status listings and the 'partial address indicator' field, but exclude the 'tariff' field. To be clear, although Ofcom believes the data fields detailed here should be provided under GC19, Ofcom does not believe this data is caught by the definition of directory information.

BT's latest submission on relevant information

7.266 **Annex 9** sets out in full a submission received from BT on 13 July 2006 in response to the submissions made by The Number, Conduit and Thomson on the interpretation of 'relevant information'. Among other things, this letter proposes information which BT could make available under GC19. As above, BT's proposals go beyond Ofcom's provisional views on the data BT is specifically required to make available under GC19. However, Ofcom recognises that BT's proposals may be more commercially attractive to DIPs than the strictly-defined set of GC19 data. Ofcom will consider BT's proposals within its DQ policy project in considering whether 'Directory Information' needs to be more broadly defined within the GCs.

'Relevant information' – all OSIS data is the 'agreed format'

- 7.267 In its Amended Request, The Number makes an argument that the 'agreed format' for the supply of BT's own data under GC19 was and is the OSIS data.⁸⁴
- 7.268 Ofcom concludes provisionally that it should not accept this argument.
- 7.269 In **paragraphs 7.73 to 7.209** Ofcom set out the data fields which we provisionally conclude relate to the data BT is specifically required to provide under GC19. Furthermore, we acknowledge that in so far as this data has been provided from OSIS – i.e. as a sub-set of the data provided from OSIS – the 'record processing data fields' provided by OSIS can be considered to be relevant to the 'agreed format' in which the BT GC19 data set has been supplied. It follows that the file transfer process for delivering OSIS to The Number and Conduit can also be viewed as part of the 'agreed format' in which the BT GC19 data set is and has been supplied.
- 7.270 However, at **paragraph 7.165**, Ofcom drew a distinction between 'record processing data fields' and 'additional information data fields' in relation to the 'agreed format'. The latter data fields will relate to information provided by OSIS in the 'identification data fields', 'record categorisation fields' and 'group structure data fields' which falls outside of the defined BT GC19 data set as set out by Ofcom at **paragraphs 7.73 to 7.209**. It is not appropriate to state that this information should be considered as part of the 'agreed format' in which the BT GC19 data set is delivered, simply because parties have wanted and used more information than BT was required to provide under GC19. As discussed, the provision of the additional information (notional products (ii) to (iv)) is effectively on unregulated, commercial terms and the fact that the parties have an agreement to supply such information – i.e. the OSIS licence – does not automatically bring it within the scope of GC19 by virtue of the format argument.
- 7.271 Ofcom does not therefore agree that all OSIS data is in 'the agreed format' and therefore covered by BT's GC19 obligations. These obligations only relate to the provision of "relevant information" as set out above at **paragraphs 7.73 to 7.209**.

'Relevant information' – all OSIS data is needed for a 'good quality' DQ service

- 7.272 In its briefing paper of 26 May 2006 on 'relevant information', The Number makes a further argument in the alternative.⁸⁵ The Number submits that, by reference to the ECJ's note of Article 1(1) of the RVTD and in light of specific national circumstances, one of the aims of the RVTD was to ensure the availability of "good quality fixed public telephone services", an aim that The Number points out is repeated in Article 1(1) of the USD. On that basis, The Number argues that a DQ service in the UK should therefore be 'good quality' and contain all information considered necessary in the UK context to accurately identify subscribers. It also argues that a good quality DQ service should be able to tell users whether a number is ex-directory rather than simply unavailable.⁸⁶

⁸⁴ §§2.67, 2.68, 2.70 and 2.75. In this context, we assume that The Number is by its reference to 'agreed format' referring to the words "and in a format which is agreed between the Communications Provider and the person requesting the information" in GC19.3, which implements the phrase 'in an agreed format' used in Article 25(2) of the USD.

⁸⁵ §§11-22 of The Number's briefing paper.

⁸⁶ §§40-41 of The Number's briefing paper.

- 7.273 In this context, The Number relies on certain recent research carried out by Ofcom and the Independent Committee for the Supervision of Standards of Telephone Information Services (“**ICSTIS**”) into DQ services in the UK as a “*good indicator of what constitutes a “good quality” DQ service in the UK*”.⁸⁷
- 7.274 Ofcom provisionally concludes that it should reject this argument for a number of reasons.
- 7.275 To start with, we refer to our analysis above as to what information we consider comprises in the UK context ‘relevant information’ under GC19. As the provisions in GC19 and Article 25(2) of the USD contain no requirements relating to the quality of ‘relevant information’, we consider that our analysis remain unaffected by The Number’s argument with regard to ‘good quality’ DQ services. In particular, we do not consider that any references to the aims set out in Article 1(1) of the USD or the *KPN* case assist The Number’s argument in this regard.
- 7.276 Whilst the ECJ started its analysis by noting the aims of the RVTD, the importance of that note is explained in the following 18th paragraph of its judgment, where it states that the RVTD “*aims to ensure a balance between the specific interests of the supplier of the universal service and those of undertakings within the competitive sector, as well as those of users, including consumers*”. There is nothing in the remainder of the ECJ’s judgment which, in Ofcom’s view, provides any support for the point that The Number is making with regard to ‘good quality’ DQ services. Indeed, the ECJ’s conclusion that the words ‘relevant information’ in Article 6(3) of the RVTD *must be strictly interpreted* by reference to its analysis of the various interests at stake suggests a contrary position to that taken by The Number.
- 7.277 We specifically note here also that the Advocate General commented that ‘relevant information’ does not mean information relevant in order to enabling third parties *to compete in a market* for universal directory services, but relevant for ensuring the provision of those services, including the preservation of a universal service of a determined quality.⁸⁸ Further, he recognised, in effect, that the quality may vary, so that some *telephone directories may offer more information than others* and that this fact would not impair the availability of universal directory services, as long as users are able to find the information they typically consider relevant.⁸⁹
- 7.278 As to the Advocate General’s comment about the preservation of a *universal service* of a *determined* quality, we have already commented in **Section 5** of this document that a *universal service* directory under the USD, in light of the ‘universal service’ definition, is one that (among other things) meets the minimum requirements specified in Article 5 of the USD in that it must (1) be comprehensive comprising, subject to data protection legislation, all PATS subscribers; (2) be updated on a regular basis, at least annually; and (3) be in a form approved by the relevant authority, whether printed or electronic, or both. This links back to the aims of Article 1(1) of the USD as the legislator seemingly anticipates that the needs of the end-users in respect of certain directories may not necessarily be met satisfactorily by the market.
- 7.279 As regards *universal service* DQ services, Article 5 of the USD specifies that “at least one comprehensive telephone directory enquiry service is available to all end-users,

⁸⁷ Ofcom/ICSTIS Research Paper entitled ‘Evaluation of Directory Enquiry Services’, 29 March 2006.

⁸⁸ §24 of the Advocate General’s Opinion.

⁸⁹ §§29-30 of the Advocate General’s Opinion.

including users of public pay telephones". In addition, pursuant to Article 11 of the USD, only undertakings that have been designated to provide such a DQ service under Article 5 are to be required to publish adequate and up-to-date information concerning their performance in the provision of universal service, based on the quality of service parameters, definitions and measurement methods set out in Annex III to the USD. As to universal service DQ services, this means in particular that designated undertakings should publish statistics as to their response times in answering calls in accordance with the ETSI standard EG 201-769-1. Again, all of this links back to the aims of Article 1(1) of the USD in case the supply and quality assessment are not met by market forces themselves in today's competitive environment.

- 7.280 In contrast, however, there is no provision in the USD dealing with directories or DQ services that are not universal service ones provided by one or more designated undertakings guaranteeing the availability of them to all end-users, even where such provision would fall outside normal commercial market conditions. Thus, The Number's point about 'good quality' DQ services in relation to the USD's aims is not supported by the provisions of the USD themselves. In this context, we also agree with the distinction drawn by the staff of the European Commission set out in its response of 15 April 2003 to BT (see **Annex 6** of this document): the USD does not regulate the provision of wholesale directory information services, but it does regulate access to directory information at the wholesale level.
- 7.281 Indeed, under UK domestic legislation, there is a separate regulatory regime under which content (including any quality assessment) related issues with regard to DQ services in general may be addressed. This regime concerns (content) regulation of premium rate services. In this context, it is to be noted that Ofcom's recent consultation on whether it should approve under Section 121 of the 2003 Act the ICSTIS' Code of Practice (11th Edition) specifically provides (among other things), so far as is potentially relevant to the issue raised by The Number, that: "*7.8.2 a In respect of a DQ service which is held out as providing numbers for the generality of end-users in the United Kingdom (or a part of the United Kingdom), that service must be provided using sources which include up-to-date information about all end-users in the United Kingdom (or that part of the United Kingdom) in relation to whom directory information can be obtained under General Condition 19.1 of the General Conditions of Entitlement (as amended by Ofcom from time to time)*".⁹⁰
- 7.282 The above-mentioned Ofcom/ICSTIS research to which The Number refers does not appear to be relevant in this context. Specifically, we do not agree with The Number's suggestion that this research, in effect, relates to any regulatory obligations, in particular where it states that "*[i]n order for any DQ operator to provide "good quality" DQ service which would pass Ofcom's measures of accuracy and meet the standard required by the [USD], they would therefore need to be supplied with grouped subscriber data including different departments and divisions within organisations*".
- 7.283 We have already pointed out above that the USD does not impose any standards in relation to DQ services such as those provided by The Number. Nor, as regards The Number's assertion about DQ services passing Ofcom's measures of accuracy, is the Ofcom/ICSTIS research seeking to impose or recommend any accuracy standards. Rather, the research has simply defined positive outcomes from the consumer research under the labels of 'specific accuracy' and 'general accuracy' in

⁹⁰ See Ofcom's consultation document entitled 'Approval of the ICSTIS Code of Practice (11th Edition)', published on 8 June 2006, available at: <http://www.ofcom.org.uk/consult/condocs/icstiscode/icstiscode.pdf>

order to provide a direct comparison between the services tested and with data collected in previous such research. In this context, we also note that The Number makes certain points about competitiveness in the market in DQ services in its briefing paper of 26 May 2006 on 'relevant information' by linking it to those labels. These points relate to issues that are, in substance, covered elsewhere in its submissions to which we have already responded.⁹¹

'Relevant information' – aggregated data needed to promote competition

7.284 In its letter dated 5 June 2006 to Ofcom, Thomson submits that the concept of 'relevant information' under Article 25(2) of the USD includes aggregated third party subscriber information, that comprises, in effect, 'Directory Information' also of non-BT subscribers.

7.285 In this context, Thomson (rightly) points out that, in the *KPN* case, Denda and Topware only requested that KPN provide its own subscriber information and that the "case must therefore be read in light of its particular facts".⁹² However, Thomson then goes on to suggest that its argument is nonetheless entirely consistent with the underlying principles applied by the ECJ in *KPN*. In support of its argument, Thomson submits:⁹³

...Where a Member State has elected to impose the Article 5 obligation to produce a comprehensive directory on one party, so that that party aggregates data in fulfilment of a universal service obligation, that party must be obliged to provide all the aggregated data it has gathered in performing that obligation to third parties. If it is not obliged to provide aggregated data that party will be put at a competitive and financial advantage compared with other communications and directory providers who seek to acquire and aggregate the same subscriber information again with no financial assistance. Indeed, the wording of Article 25 leaves considerable latitude to support this result, stating only that "relevant information" is to be provided, without specifying whether or not that "relevant information" relates to the communications provider charged with supplying subscriber information. The Directive further clarifies the point, stating that:

"It is important that universal service obligations are fulfilled in the most efficient fashion so that users generally pay prices that correspond to efficient cost provision" [14th recital to the USD's preamble]; and

"Member States shall determine the most efficient and appropriate approach for ensuring the implementation of universal service, whilst respecting the principles of objectivity, transparency, non-discrimination and proportionality" [Article 3(2) of the USD]

7.286 Thomson then sums up its argument by submitting that:⁹⁴

BT does not aggregate data twice, once for the Phone Book and once for its OSIS database. Its Phone Books, for which it is paid to aggregate data universal service regime and in relation to which it is independently obliged to aggregate data, are produced using OSIS data. To interpret Article 25 in any way other than that BT is required to supply aggregated subscriber information to its licensees from OSIS would create a duplication of costs and a competitive imbalance totally at odds with the aim of the Universal Service Directive to promote "effective competition and choice" [Article 1(1) of the USD]

⁹¹ §§23-29 of The Number's briefing paper.

⁹² §§6.9 and 6.14.

⁹³ §6.15.

⁹⁴ §6.16.

- 7.287 Ofcom provisionally concludes that it should reject Thomson's argument, for the following reasons.
- 7.288 We do not follow the logic in its argument where, to take an example only, it seeks to link provisions specific to the provision of a universal service (i.e. Article 3(2) which is in Chapter II of the USD) with provisions that address specific end-user interests and rights issues (i.e. Article 25 which is in Chapter IV of the USD).
- 7.289 The argument appears to be based on certain unsupported assertions of fact. For instance, no evidence (or elaboration) has been provided to support its point about suffering a competitive and financial advantage. Nor is it clear to Ofcom what Thomson means by stating that BT "is paid to aggregate data universal service regime" (see citation of Thomson's response above). Nor is it entirely clear to Ofcom in relation to which competitive activity or specific market Thomson is referring to as not being promoted, whether it is the DQ market in general or other more specific market.
- 7.290 In any event, Ofcom refers to its analysis and reasons set out above for concluding that GC19 only refers essentially to BT's own subscribers.

'Relevant information'/'Cost orientation' – comparative reviews

- 7.291 The Number has made a number of submissions, both with regard to the concepts of 'relevant information' and cost orientation, arguing that European comparisons are relevant to be taken into account by Ofcom in the UK context.⁹⁵ For instance, it specifically refers to fee arrangements in respect of the supply of directory information in Germany, France, Italy, The Netherlands, Austria and Sweden.
- 7.292 In particular, it submits that a decision of 17 August 2005 by the German NRA (Bundesnetzagentur, the Federal Network Agency) on 'relevant information' in the German context is likely to be very close to what 'relevant information' should be in the UK context. The Number makes this submission given that Deutsche Telekom is, like BT, an aggregator of directory information from upstream providers and, according to The Number, Deutsche Telekom also divides its data into number of different data fields in the same way that BT does. In support of its argument, The Number has provided its own summary of the German decision as well as an (unofficial) English translation of it.
- 7.293 We have considered The Number's submissions on comparative reviews carefully, but they do not change our conclusions. To start with, as regards the German decision, we note from the translation provided by The Number that the Federal Network Agency based, in part, its decision by interpreting German domestic law. In our understanding, Section 47 of the German Telecommunications Act of 22 June 2004 ("TKG") appears to have been central to its analysis.
- 7.294 However, it is not clear to us from that decision as to what Section 47 of the TKG actually provides. Ofcom does not, of course, have any view on the application of German law, including its methods of statutory interpretation. It suffices here to note that it appears that German domestic law has implemented Article 25(2) of the USD, so as to prescribe more widely directory information (other than such information that

⁹⁵ See §§1.8-1.10, 2.24-2.26 of its Initial Request; its Summary of German Regulator's decision on Deutsche Telekom AG's fees for the provision of subscriber data, 14 October 2005; §§42-46 of its briefing paper of 26 May 2006 on 'relevant information'.

we consider should fall within GC19 pursuant to our analysis above) that should be comprised in the concept of 'relevant information' in Germany. (The same would seemingly apply to other regulatory decisions, including fee arrangements, to which The Number refers, such as Sweden, where domestic laws might substantially differ to what is required in the UK.)

7.295 Indeed, the translation provided by The Number seems to support that note (and also reveals potential other differences in German law) as the following extracts of that translation shows:

...It follows from this, that with the obligation to provide participants' data regulated in Section 47 TKG, the legislator did not only intend to deal with the necessary minimum requirements in accordance with Art. 25 para. 2 USD for guaranteeing a basic supply via a universal service. But rather, also an obligation to contract was to be constituted in respect of such participants' data, which exceed the mandatory required measure in accordance with the Directive...[page 22]

...The fact that the national legislator, in the opinion of the Ruling Chamber, by creation of Section 47 TKG has taken advantage in a permitted manner of the latitude for implementation in accordance with Art. 25 para. 2 USD, does not mean, however, that all subscriber data, which are available to the company, obligated in accordance with Section 47 para. 1 TKG must be passed on upon demand. But rather, the information available at the company must be information, which fulfils the further qualification-characteristics of Section 47 para. 2 TKG...[page 23]

7.296 We further note that, in the German decision, it appears that the German NRA did not consider that the KPN principles were generally applicable to Article 25. This view, if we have properly understood the unofficial translation of the German decision provided by The Number⁹⁶, would contradict our views as set out in **Section 5** of this document. We further understand, as noted in Section 7 of this document, that neither of the parties to these disputes contest that the *KPN* judgment is of relevance to the application of Article 25 of the USD.

7.297 As to this issue, we refer to our analysis and reasons in this document which explain why we have reached our conclusions with regard to the applicability of the *KPN* case.

7.298 Our observations above deal with potential differences that might exist under domestic laws in other Member States. In addition, it is also likely to be the case that the facts and national circumstances vary from one Member State to another. Indeed, the likelihood of such variations is specifically recognised by the ECJ as well as the Advocate General in the *KPN* case. Therefore, leaving aside any differences in the respective national laws, the decisions (or any fee arrangements) in other Member States are decisions (or arrangements) on their own facts and we have to make a decision on the facts of this case, as shown by our analysis above.

7.299 Furthermore, we note that the German decision (as The Number's summary itself notes) records the difficulty of making comparative reviews where there are considerable structural differences between countries, as follows:

Although a comparison with the fees paid for the provision of subscriber data in the international sector indicates that the provision-fees of the Party Concerned are unfairly excessive in the sense of Section 47 para. 4 s. 1 in conjunction with Sections 38 para. 2-4, 28

⁹⁶ We refer to, in particular, pages 36-37 of the unofficial translation provided by The Number.

para. 1 s. 1 TKG, n adequate delimitation, to which extent the fees charged by the Party concerned exceed an analogous price of the competition, is not possible, however, on the basis of a comparative market review, because considerable structural differences exist. Taking into consideration the specialities of the comparative markets – e.g. by correction factors – is also not possible on the basis of the available information.

...[page 37]

- 7.300 Finally, we note that the Competition Appeal Tribunal has not placed great weight on the decisions of other national regulatory authorities, even where such decisions relate to GCs in the UK which implement provisions of the new directives that are mandatory in nature and are not dependant on any specific national circumstances (such as under Article 25(2) of the USD): see *British Telecommunications plc v. Office of Communications (formerly the Director General of Telecommunications)(CPS Save Activity)*.⁹⁷
- 7.301 In its separate Request, Conduit adopts essentially the same position as The Number with regard to the relevance of comparative reviews (although it adds references to a judgment dated 26 October 2005 by the Dutch Trade and Industry Appeal Tribunal applying the preliminary ruling in the *KPN* case to KPN, as well as detail with regard to the position in Cyprus).⁹⁸ In its Initial Complaint to Ofcom, Thomson also sets out a comparison with other European jurisdictions to argue that its fees charged by BT for the supply of OSIS data grossly exceed, in its view, the fees which are commonplace outside of the UK. For the avoidance of any doubt, we refer to our views set out above with regard to such comparisons made by Conduit and Thomson, respectively.

Cost orientation – only incremental costs in making all OSIS data available

Submissions by The Number

- 7.302 In its Initial Request, The Number submits that, following the interpretation by the ECJ in *KPN* of the meaning of 'cost oriented', BT, as a supplier of the universal service, should not be passing on costs it incurs in the assembly, compilation and updating of its own directory information to those seeking access to that information. The only costs which BT may pass on are the incremental costs incurred by BT in making 'relevant information' available to those persons requiring access to that information and the incremental costs incurred in making 'additional data' available as required by such persons.⁹⁹ In this context, The Number premises its submission on its view that all the information contained in the OSIS database is 'relevant information'.¹⁰⁰ The Number then submits that, notwithstanding its assertion that 'relevant information' comprises everything currently in the OSIS database, if there were any 'additional data' in OSIS, the same rule as to charging only incremental cost would apply to such data.¹⁰¹

⁹⁷ Case No: 1025/3/3/04, [2004] CAT 23, at §345: "We have not found it useful to consider the decisions of other national regulatory authorities to which our attention was drawn, interesting although they are."

⁹⁸ See under sections 1.1 (summary), 2.3.1 (Dutch judgment), 2.3.2 (German decision), 2.3.3 (other European countries)

⁹⁹ In particular, at §§2.3 and 2.33 of its Initial Request, The Number cites from paragraph 2 of the ECJ's judgment.

¹⁰⁰ See, in particular, §§1.13 and 2.35 of its Initial Request.

¹⁰¹ §2.17 of its Initial Request.

- 7.303 According to The Number, the incremental costs incurred by BT in making that information available may also include any costs properly incurred by BT in obtaining directory information from third party telecommunications operators.¹⁰² (The Number submits that these third parties would not, of course, include BT Retail as BT Retail is only a division of BT), although similarly those operators are also required under the USD, and following the KPN case, to charge only the cost of making directory information available to BT.
- 7.304 In this context, The Number states that BT pays a fixed amount to the other 60 or so telecommunications operators for their directory information, which The Number notes (citing the BT Directory Solutions Price List) is 66 pence per listing and thus does not appear to be uniformly cost oriented under the KPN ruling.¹⁰³ The Number also notes that, in its understanding, BT also 'accounts' for the 66 pence per listing to go to BT Retail for the internal transfer/supply of BT's own subscriber information to the OSIS database and that BT passes on the entire cost which it attributes to the running of the OSIS database (less a proportion 'accounted' for by BT Retail for its usage in relation to its 118500 DQ service) to third party customers for directory information like The Number.
- 7.305 The Number submits that BT's charges for the supply of directory information in the OSIS database are therefore not cost oriented.
- 7.306 We set out our more detailed analysis in **paragraphs 7.210 to 7.237** above as to our provisional conclusions with regard to our analysis of BT's OSIS charges. It therefore suffices here to make some preliminary points on The Number's submission that BT may pass on to The Number only the incremental costs incurred by it in making all OSIS data available to The Number. The key point here is that Ofcom does not consider that all the information contained in the OSIS database is 'relevant information' (that is, all such data, as supplied to The Number, does not fall within GC19).
- 7.307 Nor do we see any basis for The Number's submission that BT could only recover such incremental costs even if there were any 'additional data' in OSIS. It appears to Ofcom that such a position is at odds with the ECJ's judgment and reasoning in the *KPN* case itself. In this context, we refer to our provisional conclusion set out above that, as regards data other than the information that must be supplied under GC19, such data is not required to be provided on regulated (cost oriented) terms and consistently with the KPN judgment a person providing such data (such as BT) to other persons requesting it is not prevented from recovering costs relating to this data.
- 7.308 In its Amended Request, The Number does not appear to make any substantially new points, but largely maintains the position above.¹⁰⁴ The Number does, however, make some more detailed points to support its above-mentioned submissions specifically with regard to GC19. In particular, it submits that, at the very least, BT's charges for OSIS which are attributable to the provision of BT's numbers (which The Number understands make up around two-thirds of the OSIS database) are required by GC19 to be cost oriented, meaning that they should be cost-based and not usage-based and should only include the incremental costs of making those numbers

¹⁰² §§1.13 and 2.35 of its Initial Request.

¹⁰³ §§1.15, 2.4, 2.7 (in the context of The Number's claim for retrospection) and 2.34 of its Initial Request.

¹⁰⁴ §§2.61ff.

available to The Number (e.g. the cost of physical CD-ROMs, FTP file transfers, an ISDN line and customer account management for the DQ service providers).

- 7.309 Following our analysis and provisional conclusions above about the specific information BT must make available under GC19, we do not accept the basis for The Number's premise as it simply refers to identifying costs in OSIS "which are attributable to the provision of BT's numbers" even though these costs would in part relate to BT additional data (i.e. the notional product (ii)) as well as non-PATS BT telephone numbers. As set out above, Ofcom's provisional view is that it is not appropriate to determine the charges for products (ii) to (iv) as part of this dispute and that, as such, it is not appropriate to determine the charge for the BT GC19 data set given that The Number and Conduit wanted and used the full OSIS product. On that basis, Ofcom provisionally concludes that it should reject this submission by The Number.
- 7.310 The Number then notes in its Amended Request that the remainder of BT's charges for OSIS reflect the directory information in the OSIS database provided by other upstream communications providers in relation to their subscribers (which, according to The Number, is approximately a third of the numbers in the database). In light of that statement, The Number submits that, as the only way of receiving a supply of BT's own data is through OSIS, OSIS licensees are obliged, if they want to receive BT's data, to pay for other communications providers' data as well, even though they have no direct relationship with those providers and no control over their charges. The Number submits that BT (as the party contracting with the upstream providers) should therefore have ensured (and should ensure) that the data provided to the OSIS database by other communications providers is provided on cost oriented terms in accordance with GC19. In this context, The Number points out that it does not consider that the current uniform charge of 66 pence per listing can be cost oriented in accordance with GC19 and with the KPN meaning of 'cost oriented'. The Number asserts that, aside from the excessive nature of the charge, it is also identical for every communications provider irrespective of what their actual costs of making available are, which must according to The Number be different in each case. The Number concludes that BT should only be allowed to pass on, in its charges for OSIS, costs reflecting payments to upstream providers to the extent that their charges are also cost oriented.
- 7.311 Ofcom does not consider that this submission by The Number is supported by any legal obligations imposed on BT. In our understanding, The Number has requested BT to supply it with all OSIS data, including other communications providers' data, and it has therefore been supplied with such data. Indeed, on the information presently before us, there is nothing to suggest that The Number specifically wanted other communications providers' data excluded from BT's supply of OSIS data. We do not therefore understand the significance of The Number's submission that OSIS licensees have "to pay for other communications providers' data as well". In any event, we disagree with The Number's argument that BT is and was under any obligation to ensure that "the data provided to the OSIS database by other communications providers is provided on cost oriented terms in accordance with GC19" (although, of course, failure to provide this data on cost-oriented terms may be a contravention of those operators' obligations under GC19). In this regard, we refer to our provisional conclusions set out above that, for the purposes of these disputes, BT's GC19 obligation only applies in relation to BT's own subscribers.
- 7.312 In its Amended Request, The Number submits in the alternative that, on the basis the 'agreed format' for the supply of BT's own data under GC19 was and is the OSIS database, BT's charges for OSIS as a whole, rather than just its own data, must be

cost oriented. According to The Number, BT must therefore, in relation to its charges for OSIS be passing on only the incremental costs of making OSIS available to The Number (e.g. the cost of physical CD-ROMs, FTP file transfers, an ISDN line and customer account management for the DQ service providers). In this context, The Number draws attention to its understanding that BT, in fact, passes on all the costs it attributes to the assembly and running of the OSIS database to third party users of directory information, like The Number.

- 7.313 Given that The Number premises this submission on the 'agreed format' for the supply of BT's own data under GC19 being the OSIS database as a whole, we provisionally conclude that we should reject it for reasons set out above concerning our views on the meaning of 'in agreed format' under GC19 and that such an interpretation as put forward by The Number is incorrect.
- 7.314 The Number also submits that, regardless of whether or not OSIS is the 'agreed format' for BT's supply of its own data pursuant to GC19, it is clear that BT's charges should not include any amount attributable to the internal transfer payment that, in its understanding, BT Wholesale makes to another division of BT (BT Retail), in respect of BT subscriber numbers which are input into OSIS. The Number submits that this amount is likely to be 66 pence per listing, although it points out that this has yet to be confirmed as it claims that BT refuses to provide The Number with any costs information which might enable the amount to be identified. If confirmed, The Number claims that this is exactly the sort of double recovery and "excessive and unwarranted offset" of costs which, according to the KPN judgment, voice telephony providers should not be allowed to make, as these costs relate to activities which are inextricably linked to the provision of the telephony service. The Number further points out that this internal transfer payment is likely to make up the bulk of BT's current charges.
- 7.315 Ofcom notes that BT's stated OSIS costs do include a 66p per transaction internal transfer charge for the supply of BT subscriber data from BT Retail to BT OSIS. This charge relates to the provision of data fields relating to the BT GC19 data set and additional BT data – i.e. notional products (i) and (ii). As Ofcom has set out, it is not appropriate to determine the charge BT should make for the provision of anything more than the GC19 data set given that any additional data supplied over and above GC19 is not regulated. Moving forward, if DIPs request the stand-alone GC19 product, then Ofcom has clarified that the costs BT recovers from charges should not include the costs of compiling the GC19 data, but only the costs of making it available to the requesting DIP, given the definition of relevant information as set out above.

Submissions from Conduit

- 7.316 In its separate Request, Conduit refers to the emphasis placed by The Number in its citation of the KPN judgment referred to above as charges only including the costs of actually making 'relevant information' available to third parties.¹⁰⁵ It then goes on to submit, like The Number, that BT's charges do not reflect the KPN judgment.¹⁰⁶ In

¹⁰⁵ Section 2.3.1 of Conduit's Request.

¹⁰⁶ Section 2.3.2 of Conduit's Request. Under paragraph 2(d) of its letter dated 3 February 2006 to Ofcom, Conduit maintains this position specifically with regard to GC19. Conduit does so on the basis that the 'agreed format' (to which GC19 refers) is OSIS. We refer to our comments above under paragraphs 7.267 to 7.271 noting that, in our understanding, Conduit does not (at least expressly) go as far as The Number with regard to the 'agreed format' point. Rather, we understand Conduit's submission as to mean that GC19 has (in addition to USC7) also been 'triggered' as BT only provides directory information in the format of OSIS.

particular, Conduit states that, in its understanding, BT has set its charges to date on the basis of the standalone costs incurred in compiling and maintaining (i.e. 'running') the OSIS database. Such costs are recovered on a *per search basis*, notwithstanding that there is no, according to Conduit, incremental cost to BT in providing additional searches. In this context, it refers to the ECJ's reasoning in the KPN judgment at paragraphs 38 and 39 of the judgment that the costs associated with running OSIS should not be passed on to third parties accessing OSIS. (Conduit then seeks support for its view by comparing BT's position with that of Deutsche Telekom and the recent German decision, to which Ofcom has already responded above.)

- 7.317 Ofcom notes that BT's charges for OSIS data have been set on the basis of recovering the total costs of running the OSIS database and have been recovered on a usage-basis. However, as Ofcom has set out, GC19 requirements only relate to a sub-set of data provided by OSIS and it is not appropriate for Ofcom to determine the charge for the full OSIS data.
- 7.318 For the sake of completeness, it is to be noted that Conduit makes two additional points in its separate Request with regard to BT's charges for access to directory information. First, it claims that BT's charges are excessive in comparison with other EU Member States.¹⁰⁷ As to this, Ofcom refers to its views set out above under **paragraphs 7.291 to 7.301** relating to comparative reviews under which Conduit's submission has been considered.
- 7.319 Secondly, Conduit submits that BT's current charges constitute an unlawful and unjustifiable universal service mechanism.¹⁰⁸ Specifically, Conduit contends that, under the current system, BT effectively 'shares' the running costs of the OSIS database with other providers (notwithstanding that, in Conduit's view, BT would need to incur all these costs even if it did not provide third parties with access to its database). In this context, Conduit states that, as the obligation to provide access to the OSIS database is a universal service obligation, a method for sharing such costs will constitute a universal funding mechanism. It then goes on to explain to why the requirements of the USD in relation to such funding have not, in its view, been complied with.¹⁰⁹ In Ofcom's view, as Conduit's submission is premised on there being a universal service obligation on BT to provide access to OSIS, it is not necessary to consider the merits of this argument in light of our provisional conclusions with regard to BT's obligations under USC7, as set out in **Section 6** of this document.

Submissions by Thomson

- 7.320 In its Complaint to Ofcom, Thomson makes observations and submissions to Ofcom similar to those made by The Number and Conduit on the ECJ's interpretation of 'cost oriented' in the KPN judgment and by reference to comparative reviews of the positions adopted in certain EU countries, albeit specifically with regard to their application also to directories.¹¹⁰ In particular, Thomson argues that BT's charges are

¹⁰⁷ Section 2.3.3 of Conduit's Request.

¹⁰⁸ Section 2.3.4 of Conduit's Request.

¹⁰⁹ In particular, Conduit states that a universal funding mechanism can only be introduced by a Member State in circumstances in which Articles 12-14 of the USD apply and the requirements contained therein are complied with. In the present circumstances, Conduit argues that this would require Ofcom to consider that the provision of the universal service by BT represents an unfair burden on BT. However, according to Conduit, the requirements of the USD in relation to universal funding mechanisms have not been complied with in respect of the OSIS database to date, and arguably these requirements cannot be complied with, because there is no objective reason to conclude that the development of a directory database system is an 'unfair burden' on BT when other providers are required to fully fund the investment into their own directory database systems.

¹¹⁰ In particular §§A.1.4, A.1.7, B.4.6-4.7, B.7.3(ii) and B.7.8-7.10 of its Complaint.

usage-based and not cost based and, therefore, the principles on which fees are charged are incompatible with BT's obligations as interpreted by the ECJ in the KPN judgment.¹¹¹ (In particular, Thomson refers to §50 of the Advocate General's Opinion in support of its point on usage-based charging).¹¹² It goes on to suggest that the simplest and most transparent method of allocation of BT's legitimate costs across OSIS licensees would be to impose a fixed fee per annum payable monthly, under which at the beginning of every year BT's total additional costs of supplying OSIS data to all licensees is divided by the total number of licensees.

- 7.321 Thomson submits also that it wishes only to obtain basic subscriber data from BT (i.e. the name, address and telephone number of subscribers), although Ofcom understands that Thomson's view of 'basic' data takes a wider view on what this 'basic' data actually comprises as compared to Ofcom's provisional conclusions set out above. Ofcom further understands that, despite that view, Thomson argues that BT may only charge for its supply the costs of making all the information stored in the OSIS database, regardless of whether the information pertains to its own subscribers or to subscribers of other communications providers and regardless of whether the data pertains to business or residential subscribers.¹¹³ (In its letter dated 5 June 2006 to Ofcom, Thomson specifically submits that BT was not entitled, in supplying aggregated information on the subscribers of all communications providers, to charge its OSIS licensees for more than the additional costs of supplying that aggregated data to them in accordance with the principles set out by the ECJ in the KPN judgment.¹¹⁴ To pass on the costs BT had incurred in paying other communications providers for their data to OSIS licensees would permit BT to recover a cost for which it is already compensated as part of the universal service regime and which it would in any event have incurred to produce its comprehensive directories.) However, Thomson makes it clear that it otherwise does not wish to obtain value added data of the kind the ECJ in the KPN judgment decided could be charged on the basis over and above the additional costs of supply and Thomson specifically refers to BT's costs in 'grouping' its OSIS data in this context.¹¹⁵
- 7.322 In addition, Thomson has produced an estimate, based on its own experience of supplying its database to third parties, of the costs Thomson would expect BT to incur in supplying OSIS data, broken down into start up costs and running costs. According to Thomson, BT's current charges to Thomson for OSIS data are 17,360% as large as a sensible reading of the costs predicted by this estimate.¹¹⁶ Finally, Thomson claims that BT's own documents demonstrate that they have sought to recover the costs of collecting OSIS data from OSIS licensees, in particular Thomson refers to the BT Wholesale document regarding "Costing of Directory Data Collection" dated 17 December 2003 showing that BT sought to recover the "reasonable costs of collecting this [OSIS] data to whomever they supply the data".¹¹⁷
- 7.323 In Ofcom's view, Thomson's submissions do not raise any points of substance that are materially different to those raised by The Number and Conduit. We therefore refer to our views set out above. However, we should make the following additional observations in relation to a few specific points made by Thomson.

¹¹¹ In particular, §§A.1.5, B.4.8-4.10, B.7.3(iii) and B.7.11-7.13 of its Complaint.

¹¹² §B.4.8 of its Complaint.

¹¹³ §B.5.19 of its Complaint.

¹¹⁴ In particular, §§6.1 and 6.7-6.10.

¹¹⁵ §§A.18 and A.1.9 of its Complaint.

¹¹⁶ In particular, §§B.7.3(i) and B.7.6-7.7 of its Complaint.

¹¹⁷ In particular, §§B.7.3(iv) and B.7.14-7.15 of its Complaint.

- 7.324 First, we do not think §50 of the Advocate General's Opinion assists Thomson's point on usage-based charging. Whilst Thomson has cited only the first sentence in that §50, the second sentence of it reinforces the rationale of the conclusions reached by the Advocate General (as essentially upheld by the ECJ) that 'cost orientation' is inextricably linked to the provision of the telephony service and compilation costs must in any event be borne by the supplier of that service as they are already included in the costs and revenue of such a service (the second sentence reads: "The cost of collecting and maintaining that information is *related to the number of voice telephony subscribers*, not to the number of universal telephone directories or users of those directories").
- 7.325 In any event, as only some information requested by Thomson (even on its premise, which is seemingly somewhat narrower than the positions adopted by The Number and Conduit) falls within BT's obligations under GC19, the remainder of the information that Thomson wishes to receive from BT (such as aggregated subscriber data of other communications providers) is, in effect, provided by BT on unregulated terms¹¹⁸.
- 7.326 Again, we do not consider that any issue of BT being compensated as part of the universal service regime arises and our provisional findings in respect of USC7 as set out in **Section 6** of this document are also to be taken into account in this context.

Ofcom's Provisional Findings on GC19

Declaration and directions concerning charges

- 7.327 Having considered the submissions made by the parties, Ofcom is minded to declare, pursuant to Section 190(2)(a) of the 2003 Act, that BT has during the period beginning on 25 July 2003 and ending on the day of the publication of these determinations been required to make available to The Number and Conduit, respectively, only the information specified in this Section above pursuant to paragraph 19.1, in accordance with the terms of paragraphs 19.3 to 19.4, of GC19 to the extent that such information has been provided by BT as part of the contents of the OSIS database.
- 7.328 However, given that The Number and Conduit have both requested BT to make available to them (as well as received) the full contents of the OSIS database for that period (i.e. more than the GC19 data), no issue arises with respect to which Ofcom may lawfully make a determination setting out the proper amount of a charge by BT to The Number and Conduit, respectively, in respect of making available only that specified information pursuant to paragraph 19.1, in accordance with the terms of paragraphs 19.3 to 19.4, of GC19. Indeed it is impossible to identify the price charged for the GC19 data only as explained above at paragraph 7.220.
- 7.329 In addition, Ofcom is proposing to declare, pursuant to Section 190(2)(a) of the 2003 Act, that, subject to The Number and/or Conduit making a reasonable request to BT only for the information specified in the Schedule hereto on a day after that period has come to an end, BT shall be required to make available to The Number and/or Conduit only that information pursuant to paragraph 19.1, in accordance with the terms of paragraphs 19.3 to 19.4, of GC19. For the avoidance of any doubt, it is a

¹¹⁸ Thomson provided an estimate of the costs it would expect BT to incur in supplying OSIS data.

matter for the parties to negotiate and agree the means and extent, including format, in which that information is to be made available but, for BT's charge in respect of making that information available to be cost oriented in accordance with paragraph 19.4 of GC19, BT shall recover from The Number and/or Conduit no more than the total sum of:

- a) BT's costs of establishing and operating the means of transmitting that information from BT to The Number; and
- b) BT's costs of managing the relationship with The Number, including account management, contract management and billing¹¹⁹

7.330 The above-mentioned proposed declarations are set out in each of Ofcom's proposed draft determinations in **Section 1** of this document. **Section 8** below sets out Ofcom's plans for a separate policy project to consider the issues arising from this determination.

7.331 Finally, in accordance with our usual practice set out in the Better Policy Making guidelines¹²⁰, it is to be noted that Ofcom has not carried out an Impact Assessment ("IA") in resolving these disputes. Those guidelines expressly provide that IAs will not normally be carried out when conducting investigations and, in particular, state (at paragraph 4.5) that "[a]lso, when resolving a dispute Ofcom will not generally carry out an Impact Assessment where the dispute relates to regulation which has been put in place as a consequence of an Impact Assessment and/or primary or secondary legislation." However, in resolving these disputes with regard to BT's obligations under GC19, Ofcom has considered, and acted in accordance with, its general duties set out in Section 3 of, and the six Community requirements set out in Section 4, of the 2003 Act. Specifically, Ofcom considers that, in simply applying GC19 to the facts in these disputes, it is acting in accordance with those duties to achieve the objectives of GC19, the setting under Section 45 of the 2003 Act of which is a function to which those duties already apply.

Direction regarding The Number's costs in referring the dispute

7.332 As seen from **Section 6** of this document, The Number has requested in its Amended Request that, in so far as BT's obligations under GC19 are concerned, Ofcom exercises its discretion under Section 190(6)(a) of the 2003 Act and directs BT to make payments to The Number in respect of costs and expenses incurred by The Number in consequence of the reference of the dispute to Ofcom. (Conduit has not made a similar request to Ofcom for its costs and expenses, so we therefore deal only with The Number's request below).

7.333 In support of its request, The Number considers that Ofcom should give such direction taking into account the same reasons why it had to refer the dispute to Ofcom as The Number has put forward in relation to the similar claim for costs in relation to USC7.

7.334 For the same reasons as we have set out in **Section 6** we are not proposing to make the direction requested by The Number as we similarly consider that The Number has, in effect, been largely unsuccessful with regard to this part of the dispute relating

¹¹⁹ See paragraphs 7.222 – 7.237 above.

¹²⁰ See document entitled 'Better Policy Making: Ofcom's approach to Impact Assessment' issued by Ofcom on 21 July 2005: http://www.ofcom.org.uk/consult/policy_making/guidelines.pdf

to GC19. Our additional reasons set out in that Section also apply to GC19. In other words, BT and The Number shall bear its own respective costs and expenses incurred by them in consequence of the reference of this dispute to Ofcom, or in connection with it.

Section 8

Implications & Policy Considerations

Introduction

- 8.1 Ofcom's provisional proposals for resolving these disputes have uncovered two areas of concern:
- a) Ongoing protection of users' rights in relation to DQ services and directories – i.e. Ofcom is required by the USD to ensure that end-users in the UK have access to at least one comprehensive directory and at least one comprehensive DQ service; and
 - b) Ongoing competition in the provision of directory information services in the UK – i.e. whether Ofcom's findings in relation to the application of USC7, and the more limited data which BT and other CPs are obliged to provide under GC19, give rise to concerns about the ongoing competitive supply of directory information services in the UK.
- 8.2 This Section therefore outlines the activities that Ofcom plans in order to urgently address these matters, which are likely to concern not only the parties to these disputes, but also other stakeholders.
- 8.3 Ofcom plans to issue a brief policy announcement outlining in more detail how these issues will be addressed shortly after the publication of the final determinations resolving these specific disputes.

Guaranteeing user access to directory information services

- 8.4 In the event that it confirms its provisional finding that USC7 is *ultra vires*, Ofcom would, as a matter of priority, seek to make proposals to ensure that the UK is compliant with its obligations under the USD to ensure that end-users in the UK have access to at least one comprehensive DQ service and at least one comprehensive directory. This is likely to require the designation of a universal service provider.
- 8.5 In the meantime, until Ofcom has consulted with stakeholders on any appropriate changes and put any required new regulation in place, Ofcom is not aware of any reason why customers should not continue to receive directory information services, such as the BT Phonebook, as normal.

Competition in the supply of directory information services

- 8.6 Ofcom remains committed to competition in the supply of a range of directory information services in the UK. Ofcom recognises that DIPs currently purchasing OSIS data from BT are likely to be concerned at the provisional findings in relation to USC7 and GC19. However, Ofcom does not believe that if the disputes were resolved in this way it would give rise to immediate problems. Ofcom will be seeking assurances from BT regarding the ongoing provision – and the terms and conditions of such provision – of data from OSIS. Furthermore, should BT refuse to continue to supply OSIS data on materially the same terms, Ofcom would consider the position under competition law.
- 8.7 As part of its ongoing DQ policy project, Ofcom will review the following:

- a) The overall suitability of GC19 and, in particular, the current definition of 'Directory Information'. Ofcom will ascertain whether any changes should be proposed to GC19 in light of present national domestic circumstances. This may involve conducting consumer research to identify what UK users of directories and DQ services regard as sufficient data to identify the subscribers they are looking for. Ultimately, however, any such regulatory proposals will need to be consistent with the requirements of the relevant EC directives.
- b) The extent to which DIPs utilise their GC19 rights to obtain core data direct from BT and other CPs. Ofcom expects that all relevant CPs, if they are not already able to do so, should take steps to ensure that they can, on receipt of reasonable requests, make such data available immediately in meeting such requests by DIPs.
- c) The question of any future ex ante regulation in relation to wholesale access to BT's OSIS data.

Annex 1

Responding to this consultation

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made by **5pm on 21 September 2006**.
- A1.2 Ofcom strongly prefers to receive responses as e-mail attachments, in Microsoft Word format, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 2), among other things to indicate whether or not there are confidentiality issues. The cover sheet can be downloaded from the 'Consultations' section of our website.
- A1.3 Please can you send your response to james.tickel@ofcom.org.uk.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- James Tickel
Competition Group
4th floor
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- Fax: 020 7783 4103
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Also note that Ofcom will not routinely acknowledge receipt of responses.

Further information

- A1.6 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact James Tickel on 020 7783 4406 or email james.tickel@ofcom.org.uk.

Confidentiality

- A1.7 Ofcom thinks it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt (when respondents confirm on their response cover sheet that this is acceptable).
- A1.8 All comments will be treated as non-confidential unless respondents specify that part or all of the response is confidential and should not be disclosed. Please place any confidential parts of a response in a separate annex, so that non-confidential parts may be published along with the respondent's identity. Please note Ofcom's approach to confidentiality in the resolution of this dispute as set out in Section 3 above at paragraph 3.92 – 3.95. Ofcom would request that any claims to

confidentiality are supported by an explanation of why you consider the information to be confidential.

- A1.9 Ofcom reserves its power to disclose any information it receives where this is required to carry out its legal requirements. Ofcom will exercise due regard to the confidentiality of information supplied.
- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use, to meet its legal requirements. Ofcom's approach on intellectual property rights is explained further on its website, at www.ofcom.org.uk/about_ofcom/gov_accountability/disclaimer.

Next steps

- A1.11 Following the end of the consultation period, Ofcom intends to publish a statement after consideration of responses.
- A1.12 Please note that you can register to get automatic notifications of when Ofcom documents are published, at http://www.ofcom.org.uk/static/subscribe/select_list.htm.

Ofcom's consultation processes

- A1.13 Ofcom is keen to make responding to consultations easy, and has published some consultation principles (see Annex 2) which it seeks to follow, including on the length of consultations. Ofcom notes that this consultation is in relation to a dispute and therefore a different length of consultation applies (see Ofcom's guidelines on complaints available at http://www.ofcom.org.uk/bulletins/eu_directives/guidelines.pdf.)
- A1.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk. We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, whose views are less likely to be obtained in a formal consultation.
- A1.15 If you would like to discuss these issues, or Ofcom's consultation processes more generally, you can alternatively contact Vicki Nash, Director, Scotland, who is Ofcom's consultation champion:

Vicki Nash
Ofcom (Scotland)
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW
Tel: 0141 229 7401
Fax: 0141 229 7433
E-mail: vicki.nash@ofcom.org.uk

Annex 2

Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will normally allow ten weeks for responses to consultations on issues of general interest.

A2.6 There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

After the consultation

A2.8 We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 3

Consultation response cover sheet

- A3.1 In the interests of transparency, we will publish all consultation responses in full on our website, www.ofcom.org.uk, unless a respondent specifies that all or part of their response is confidential. We will also refer to the contents of a response when explaining our decision, without disclosing the specific information that you wish to remain confidential.
- A3.2 We have produced a cover sheet for responses (see below) and would be very grateful if you could send one with your response. This will speed up our processing of responses, and help to maintain confidentiality by allowing you to state very clearly what you don't want to be published. We will keep your completed cover sheets confidential.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their cover sheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses in the form of a Microsoft Word attachment to an email. Our website therefore includes an electronic copy of this cover sheet, which you can download from the 'Consultations' section of our website.
- A3.5 Please put any confidential parts of your response in a separate annex to your response, so that they are clearly identified. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

What do you want Ofcom to keep confidential?

Nothing	<input type="checkbox"/>	Name/contact details/job title	<input type="checkbox"/>
Whole response	<input type="checkbox"/>	Organisation	<input type="checkbox"/>
Part of the response	<input type="checkbox"/>	If there is no separate annex, which parts?	

If you want part of your response, your name or your organisation to be confidential, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response. It can be published in full on Ofcom's website, unless otherwise specified on this cover sheet, and I authorise Ofcom to make use of the information in this response to meet its legal requirements. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

Annex 4

BT's provision of OSIS

Introduction

- A4.1 This Annex provides an overview of the activities BT currently undertakes in supplying directory data from the OSIS database, based on the information provided by BT during this investigation.
- A4.2 BT's activities in providing data from OSIS can be broken down as follows:
- (1) activities related to obtaining directory entry data of subscribers from the relevant upstream CPs, broken down by:
 - (a) activities to obtain the directory entry data of BT's subscribers and of other end-users assigned numbers originally allocated to BT; and
 - (b) activities to obtain the directory entry data of the subscribers of other CPs assigned numbers not originally allocated to BT.
 - (2) activities relating to using the data received at (1) to create the OSIS product for supply to DIPs.
- A4.3 It is important to understand the nature of these activities and, in particular, to understand how these activities may relate to the provision of the data which BT is obliged to provide to DIPs under GC19. In assessing these activities, Ofcom has looked at both those activities within OSIS and the activities elsewhere in BT which are involved in gathering subscriber data for inclusion within OSIS.
- A4.4 In assessing the activities below, it should be noted that as discussed in **Section 3** and **Section 7** above, at the current time, the precise data provided from OSIS appears to be 'Customer-defined'. By this, we mean that upstream customers – i.e. those purchasing PATS and who are assigned telephone numbers – are provided with the opportunity to amend or add to the data their CP provides to OSIS and OSIS therefore provides to DIPs. It follows that given that the data provided to OSIS is 'Customer -defined' the CP must conduct activities to discuss their customer's requirements and capture these as appropriate.

Activities to obtain directory entry data from upstream Communications Providers

- A4.5 To obtain the required directory entry data from upstream CPs, BT establishes contractual arrangements under Schedule 11 of the Standard Interconnect Agreement (SIA), as discussed in **Sections 3 and 5** of the main explanatory document to these draft determinations. The associated documentation to Schedule 11 sets out the data which each CP must provide to BT in relation to the CP's subscribers. The data that BT requires from upstream CPs is naturally linked to the data that BT provides from OSIS. This means that BT requires more from other CPs than just the GC19 data set detailed in **Section 7** of this document.
- A4.6 Since 2000, BT has paid upstream communications providers for their directory data under Schedule 11 of the SIA. BT pays the majority of upstream CPs 66p per record for transactions – covering updates to records, deletions of records and new

records. This charge is fixed regardless of the level of detail provided and the data fields which may be populated in any given record – i.e. 66p will be paid for a single entry providing essentially name, address and telephone number and for a grouped entry providing data in all of the sub-header fields, as well as the annex and qualifier fields along with the group structure data.

- A4.7 BT does pay a differentiated charge for single and group entries for a small number of CPs as set out in its OCCN of October 2003. However, the majority of CPs did not agree to the OCCN and therefore still receive the flat transaction charge.
- A4.8 Transfer charges apply in respect of data passed from upstream parts of BT to OSIS at the rate of 66p per transaction.
- A4.9 As well as understanding the amounts paid by BT OSIS for directory data of BT subscribers, Ofcom has also obtained information on the activities carried out by the relevant upstream parts of BT – i.e. separately from OSIS – in compiling the required directory data.

Activities undertaken to obtain data of BT's subscribers

- A4.10 The activities undertaken by BT upstream from OSIS relate to specific customer-facing activities to capture the subscriber's requirements for how they want their data to be presented within OSIS (and therefore by voice DQ providers and in paper directories). These fall into three areas.
- (1) The first point of contact between BT and the Subscriber will be the **15X agents** (i.e. those BT agents taking calls on 150, 151, etc). Where these agents take orders (or amendments or deletions) for phone lines they will capture much of the data for single line directory entries and input this onto BT's main Customer Relationship Management (CRM) system, CSS. They will then confirm the Subscriber's chosen directory status and in many cases, create a directory entry onto OSIS.
 - (2) However, in other cases the 15X agent will not be able to process the Subscriber's requirements in relation to a directory entry. This will include where a grouped entry is required. In these cases the task of creating the entry and ensuring it is input onto OSIS is passed to the **Upstream Data Team**. The Upstream Data Team is also involved in processing certain directory entries relating to ported numbers and of Wholesale Line Rental ("**WLR**") service providers. The latter provide the relevant OSIS directory data for their subscribers via BT – i.e. they do not interface directly with OSIS.
 - (3) Finally, in some cases a Subscriber will want to create a Special Directory Entry. In these cases the **Special Directory Entry team** will liaise with the Subscriber to understand their requirements and ensure these are captured on OSIS.

Customer Service Channel 15X

- A4.11 The activities under this category relate to the tasks carried out by BT's customer-facing 15X agents in creating the directory entry records for input onto OSIS.
- A4.12 When taking orders for new telephone lines at an installation, a BT Retail sales agent will capture information on the customer such as the relevant Subscriber

name, the installation address and, where different, the billing address. This data on the subscriber installation is captured on CSS, BT's main CRM system. A CSS record will relate to a specific installation address to which the relevant PATS are provided and contain all telephone numbers at that installation and the name of the subscriber at that installation. In the first instance, BT requires this data to process the order and manage the account appropriately.

- A4.13 This means that for some single line entries, the BT agent will have already captured the identification information needed to create the directory entry in the process of taking the order. However, the subscriber may have specific requirements for their directory entry which do not align with this data set.
- A4.14 Therefore, before submitting an entry onto OSIS, the 15X agent will ask the customer to confirm their preferred directory status and read back a proposed "default" directory entry which will pick up various pieces of data already collected from the customer – i.e. the subscriber's name, installation address and telephone number together with other pieces of identification data, such as "title" and "honours" which are collected as part of the general account/installation information.
- A4.15 If the customer is satisfied that the directory entry against that telephone number should appear as set out by the default entry, then the agent will accept this and that entry will be "auto-generated" from CSS onto OSIS by file transfer.
- A4.16 The precise data fields that will be populated for any given auto-generated record will vary according to the specific record. For instance, only a small proportion of residential listings will have data in the "title" field (to clarify, this only relates to professional "titles") and in the "Honours" field given that only selected individuals with have such data listed.
- A4.17 BT has stated that approximately 70% of all directory listings – which includes 90% of all residential listings – are auto-generated. In all these cases, BT is effectively utilising data already captured for the purposes of providing the customer with PATS and ongoing management of their account.

Upstream Data Team

- A4.18 It follows from the data provided above that, according to BT, approximately 30% of listings on OSIS are not auto-generated from CSS records. In these cases, further manual intervention is required to ensure the appropriate directory entry is input onto OSIS. Most of the directory listings requiring manual intervention are handled by a team within BT Directories, known as the Upstream Data Team. For listings requiring special entries onto OSIS, the Special Data Entry team is used. The Upstream Data Team also ensures that the overall data relating to BT subscribers on OSIS is accurate and up-to-date.
- A4.19 The Upstream Data Team operates as a stand-alone team within BT Directories in BT Retail. The overall purpose of the team is to ensure that entries onto OSIS in respect of BT Retail subscribers and the subscribers of WLR Service Providers align with both customer requirements and the requirements of OSIS. In summary, the team does this by:
- (1) Liaising directly with the end-user customer or the WLR service provider to identify the specific directory listing requirements of the customer and then either implementing these onto CSS for records to be subsequently auto-generated or inputting the requirements directly onto OSIS.

- (2) Dealing with problems arising from auto-generated records, including number portability issues and other error reports from OSIS where records have not been accepted – e.g. where a telephone number already exists or unacceptable words have been found in the proposed listing.

A4.20 BT has provided a more detailed breakdown of the work items carried out by the Upstream Data Team and these are summarised below.

- The CSS Queue contains items relating to directory entries on CSS orders for residential customers that have not been completed by the 15X customer service agents. Items could be in this queue for a number of reasons including:
 - the customer may have been unsure of their directory requirements at the time of placing the order;
 - the customer may require a partial address to be entered;
 - the customer may wish to create a residential grouped entry.
- The OSIS Queue contains all business listings which require work by members of the Upstream Data Team in order to input the appropriate data onto OSIS. This will occur when the customer requires a group listing or needs to discuss their requirements in more detail than the customer service agent could deal with.
- Customer Contact Handling (CCH) is a sub-system of CSS and communicates customer's directory issues to the Upstream Data Team. These include requests for information, requests for changes to directory entries, complaints or requests to contact the customer. Again, the Upstream Data Team will liaise direct with the customer to address these issues and ensure OSIS entries are appropriate.
- The Select Directory Update (SDU) Queue on CSS shows any bulk address changes carried out as a result of changes to the Royal Mail's Postal Address File (PAF) and where there may be directory entries that could be affected. CSS proposes changes to entries which are then amended or accepted manually by the Upstream Data Team.
- A variety of CSS reports are produced for the Upstream Data Team to check. The Upstream Data Team deals with the errors identified by these reports and then manipulates the data on CSS to correct it.
- OSIS error reports are also produced on a daily basis and sent to the Upstream Data Team to show where a mis-match has occurred between the data sent to OSIS and the data which already exists on OSIS. Again, the Upstream Data Team deals with such errors.
- The National Liaison team within the Upstream Data Team works specifically with larger national customers, including high street banks and Councils, to provide a single point of contact to discuss directory requirements. The team will then manage the appearance of customers' directory entry listings on OSIS. The majority of the listings are either group listings or non-geographic numbers. The Upstream Data Team undertakes the work to collect the necessary data and build the entries for the customers.
- The Data Integrity Team processes a set of daily, weekly and monthly reports which are produced to check the quality of entry inputs, by both 15x customer

service advisors and by the Upstream Data Team. All business entries are checked and a range of reports are produced for residential entries to check various known potential issues. For instance, the sensitive words report looks for entries which have a full address shown but where the customer may not want the full address published – e.g. women's refuges, rape crisis centres.

Special Directory Entry team

- A4.21 Special Directory Entries (SDEs) allow customers to have additional words in directory entries under "Business Description" or enhanced typeface in paper directories or alternative entries in the same or additional phone books – e.g. where a business may be known by more than one name.
- A4.22 The SDE team processes specific orders for these entries received from the CCH team and other routes. They create orders for SDEs on CSS and create the specific entries on OSIS. This will involve capturing all the directory data for a particular customer as well as the specific SDE fields relating to typeface, "Business Description" and in which directories the entries should appear.
- A4.23 BT charges end-users for SDEs at rates published in Section 1, part 19, sub-part 1 of the BT Retail Price List and the SDE team is responsible for billing for this service. BT has provided details of the revenues it receives direct from customers for SDEs.

Activities within OSIS

- A4.24 Once data has been provided to OSIS in the specified format, BT will then undertake activities within BT Wholesale Directory Services which result in the ongoing supply of the OSIS product to DIPs. The tasks carried out by BT as specified by BT as part of this investigation include:
- OSIS system maintenance, application support and fault management
 - Data processing issues: e.g. processing data prior to acceptance on the database; management of data issues relating to data already on the database
 - Supplier management of CPs providing data to OSIS and other relevant suppliers;
 - Commercial management and account/service management of DIPs, including:
 - establishing specific interfaces to supply the product to DIPs;
 - monitoring licence compliance;
 - complaint handling;
 - billing
 - Business planning and performance monitoring
 - Business continuity management
 - People management, training

Annex 5

BT Directory Solutions Price List

A5.1 This Annex sets out parts 1, 2 and 3 of the current BT Directory Solutions Price List. The price list is available on-line at www.btwholesale.com

Section 1.0

For terms and conditions applicable to these charges see Schedule 11 (formerly Schedule 150/150a).

The rates to be paid by the Operator for inclusion of Operator Customer Information in BT's Operator Services Information System (OSIS) shall be as follows:

1.1 Transaction Charges

Description	Effective Date	Until	Charge (p)
For each customer entry provided by the Operator via hardcopy	01/10/1997	31/03/2000	108.44
For each customer entry provided by the Operator via hardcopy	01/04/2000		260.00
For each customer entry provided by the Operator via disc or EDI requiring manual processing by BT to input to OSIS	01/01/1999		Nil
For each customer entry provided by the Operator via disc or EDI not requiring manual processing by BT to input to OSIS	01/01/1999		Nil
Deletion	01/10/1997		Nil
For each customer entry input by the Operator using on-line access to OSIS	01/01/1999		Nil
Viewing	01/04/1998		Nil

1.2 Data Holding Charge

Description	Effective Date	Until	Charge
Data Holding Charge	01/10/1997	31/12/1998	31.5200
Data Holding Charge	01/01/1999		Nil

1.3 Charges for Direct Access and On-Line Batch Access

Description	Effective Date	Until	Charge (£)
For each Smart Card (including replacements)	01/04/1998		50.0000

1.4 Payments made to OLOs

Description	Effective Date	Until	Charge (£)
Electronic Payment per transaction	01/04/1999	30/09/2001	0.13905
Electronic Payment per transaction	01/10/2001	Until superseded by paragraph 1.5 below	0.6600

The following OLOs will be paid in accordance with table 1.4

Schedule 11 Operators
Andover Cablevision Ltd
Aggregated Telecom Ltd
Anglia Cable Ltd
Cable & Wireless U.K
Cable and Wireless (Guernsey) Limited
Cable Television Ltd
Cable Thames Valley Ltd
CableTel Cardiff Ltd
CableTel Central Hertfordshire Ltd
CableTel Hertfordshire Ltd
CableTel Herts and Beds Ltd
CableTel Newport
CableTel North Bedfordshire Ltd
CableTel Northern Ireland Ltd
CableTel Surrey and Hampshire Ltd
CableTel West Glamorgan Ltd
Colloquium Ltd
Comtel Coventry Ltd
Diamond Cable (GrimClee) Ltd
Diamond Cable (Leicester) Ltd
Diamond Cable (Lincoln) Ltd
Diamond Cable (Mansfield) Ltd

Schedule 11 Operators
East Coast Cable Ltd
EESCAPE Ltd
Heartland Cablevision UK Ltd
Herts Cable Ltd
Inclarity plc
Jersey Telecom Limited (Formerly States of Jersey Telecommunications)
Kingston Communications (Hull) plc
Lichfield Cable Communications Ltd
Manx Telecom Ltd
Nexus Telecommunications plc
NPlusOne Limited
NTL Cambridge Ltd
NTL Darlington Ltd
NTL Glasgow (Paisley & Ren)
NTL Glasgow (Bearsden & Miln)
NTL Glasgow (Gt Glasgow)
NTL Glasgow (Inverclyde & Eastwood)
NTL Glasgow (NW Glasgow & Clydebank)
NTL Group Ltd
NTL Kirklees
NTL Midlands Ltd
NTL Teesside Ltd
NTL Telecom Services Ltd
O2 (UK) Ltd
Opera Telecom Ltd
Oxford Cable Ltd
Patientline UK Ltd
Pipemedia Limited
Stafford Communications Ltd
Starcomm Ltd
Swindon Cable Ltd
T-Mobile (UK) Ltd
Telewest Communications plc
Telstra Europe Ltd (Formerly Telecentric Solutions Ltd)
The Airtime Group Limited (Formerly Torc Europe)
Torch Communications Ltd
Vodafone
Wessex Cable Ltd

1.5 Payments made to OLOs

Description	Effective Date	Until	Charge (£)
Electronic Payment per Simple Data transaction	17/12/2003		0.238
Electronic Payment per Complex Data transaction	17/12/2003		2.44

The following OLOs will be paid in accordance with table 1.5:

Schedule 11 Operators
1 st Rate Telecom Limited
4D Telecom Limited
Band-X Ltd
Call Sciences Ltd
Call UK Ltd
Centrica Telecommunications Ltd
COLT Telecommunications
Easynet Group PLC
Eircom U.K Ltd
Energis Communications Ltd
Fibernet UK Limited
FleXtel Limited
Gamma Telecommunications
Global Crossing (UK)
Global One Communications Holding Ltd
IBSC Ltd (Formerly AUCS Communications Services (UK) Ltd)
Interweb Design Ltd
KDDI Europe Limited
London Digital Ltd
Magrathea Telecommunications Ltd
MCI Worldcom Ltd
Medius Networks Ltd
NetKonec Communications PLC
NPlusOne Ltd
Opal Telecom Ltd (Formerly Core Telecommunications Ltd)
PNC Telecom Services Ltd
Primus Telecommunications Ltd
Rateflame Limited
Reach Europe Ltd
Redstone Communications Ltd
Singtel (Europe) Limited
Skymaker Limited
Spacotel UK Ltd
Spitfire Network Services Ltd

Schedule 11 Operators
Swiftnet Ltd
Syntec UK Ltd
Telco Global Networks Ltd
Telecom One Ltd
Telxl Limited
Thus plc
Tiscali UK Ltd
Totem Communications Ltd
Tweedwind Ltd
Wavecrest (UK) Ltd
Your Communications Ltd

Notes:

- 1) "The Retail Price List contains the relevant information regarding access methods suitable for access to OSIS".
- 2) " The BT Directory Solutions "OSIS Product Manual" guidelines contains documentation with relevant information regarding access methodology and can be found via the URL www.btwholesale.com/btcontact/library
- 3) OCCN dated 22 October 2003 with an effective date of 17 December 2003 refers – these prices shall apply to operators signing after 20 October 2003; and to pre-20 October 2003 operators when agreed or determined.
- 4) The following definitions apply with effect from 17 December 2003:

Simple Data

Means

- (a) Operator Customer Information relating to a telephone number submitted to (BT Wholesale Directory Solutions referred to as BTDS in this document) by means of SFF (Standard File Format) via On-line Batch Access;
- or
- (b) Operator Customer Information relating to a telephone number which has been processed manually by the Operator via Direct Access, where that Operator Customer Information has not been "Grouped" by the Operator; and which in either case, consists of a single line entry.

Complex Data

Means

Operator Customer Information relating to a telephone number that has been processed manually by the Operator via Direct Access, where that Operator Customer Information has been "Grouped" by the Operator.

Grouped

Means

Collected together and organised into a hierarchical structure of two or more Entries which relate to the same business or organisation (such business or organisation being a Subscriber of the Operator), and the material modification or cessation of such Entries. Each such Entry must relate to an individual branch, office or department of the same business or organisation within the same "DQ Area". The Entries (except in the case of subscribers known to be sole traders or partnerships) shall not be referenced to the personal names of individual natural persons (save where such person or name is also the name of the business or organisation concerned). This definition relates to BUSINESS GROUPS ONLY.

HEADER - Barclays Bank

ENTRY – 14 High St, 1111 222222

ENTRY – 22 Church St, Yeovil 1212 333333

Or (Including any of the 3 levels of sub headers)

HEADER – Barclays Bank

S/HEADER – Branches

ENTRY – 14 High St, 1111 222222

ENTRY – 22 Church St, Yeovil 1212 333333

“DQ Area”

Means

A geographical area defined by BT that may consist of 1 or more exchange number ranges.

In the above definitions the following terms have the meanings set out below:

Entry

Means

Data associated to one telephone number belonging to a single Subscriber, such Subscriber being a sole trader, partnership, body corporate or statutory body.

Subscriber

Means

Any natural or legal person who or which is a party to a contract with the Operator for the supply of publicly available telephone services in the United Kingdom, Channel Islands, or the Isle of Man.

Direct Access

Means

Direct on-line inputting by the Operator of Operator Customer Information on to the BTDS OSIS (Operator Services Information System) Database via the BT Gateway;

On Line Batch Access

Means

The provision of Operator Customer Information by the Operator to BTDS online, by the LORS system or any successor thereto, for inputting by BTDS to the BTDS OSIS Database;

Section 2

For terms and conditions applicable to these charges see the Directory Information Licence Agreement

2.1 Annual Charge for BT Wholesale Directory Solutions Licensees

Description	Effective Date	Until	Charge	
			£	p
Annual Charge, in lieu of usage	01-07-2000	-	25,000.00	-
Localised Use Annual Charge, in lieu of usage	11-12-2000	-	2,500.00	-

2.2 Charges for Business/Residential Customer Alphabetical (A-Z) Products or Services

Description	Effective Date	Until	Charge	
			£	p
Alphabetically listed printed telephone directories, per book	01-07-2000	30-09-2001	-	23.00
	01-10-2001	-	-	28.8
Alphabetically listed voice or voice activated Directory Information Services utilising XD & DQR data, per search	01-07-2000	30-09-2001	-	0.61
	01-10-2001	-	-	0.76
Alphabetically listed voice or voice activated Directory Information Services not utilising XD & DQR data, per search	01-10-2001	-	-	0.5
Alphabetically listed other uses not utilising XD & DQR data, per search (Note 1)	01-07-2000	30-09-2001	-	0.30
	01-10-2001	-	-	0.38
Alphabetically listed other uses from a Database containing utilising XD & DQR data, per search (Note 1)	01-10-2001	-	-	0.5

2.3 Charges for Business Customer Classified Products or Services

Description	Effective Date	Until	Charge	
			£	p
Classified listed printed telephone directories, per book	01-07-2000	30-09-2001	-	3.00

Draft determination on BT's charges for directory information

	01-10-2001	-		3.75
Classified voice or voice activated Directory Information Services, per search	01-07-2000	30-09-2001	-	0.15
	01-10-2001	-		0.19
Classified listed other uses, per search (Note 1)	01-07-2000	30-09-2001	-	0.15
	01-10-2001	-		0.19
Classified Annual Usage Cap (Note 2)	01-07-2000	30-09-2001	500,000.00	-
	01-10-2001	-	625,000.00	-

2.4 Charges for Audit Files via LORS 1 and LORS 2

Description	Effective Date	Until	Charge	
			£	p
Audit files via LORS 1 (Note 3) *	01-07-2001	31-10-2003	£120.31	-
Audit files via LORS 2 (Note 3)	01-07-2001	-	£67.17	-

* NB: Service no longer available. LORS1 has been replaced by LORS2.

2.5 Charge for Refresh Extracts

Description	Effective Date	Until	Charge	
			£	p
Refresh Extracts	01-07-2001	-	£217.26	

Notes:

Draft determination on BT's charges for directory information

1) Including all electronic machine-readable formats (for example Internet applications and single or multiple user applications)

2) In any one licence year any licensee shall never pay more than £625,000.00 for usage in classified listed products and services. This cap does not include usage for alphabetical listed products and services, where a licensee is manufacturing or providing both.

3) Operators are allowed 1 free Audit File download request per calendar year further downloads are chargeable.

Section 3

The following details Network Charge Change Notices and Price Change Notifications relating to the DIU Price List Sections 1.0 and 2.0.

3.1 NCCN

Description	NCCN No.	Current Charge	New Charge	Effective Date	% Change
Entries in BTs OSIS –for each customer entry provided by the operator via hard copy	190	108.44	260.00	01/04/2000	140

3.2 Price Change Notifications

Description	DPCN No.	Current Charge	New Charge	Effective Date	Communicated to Industry
Use of Operator Services Information System (OSIS) Data Under Licence	001	---	TBC (Note 1)	01/05/2000	31/03/2000
Use of Operator Services Information System (OSIS) Data Under Licence	002	---	Please refer to Section 2	01/07/2000	02/06/2000
Use of Operator Services Information System (OSIS) Data Under Licence (Revised)	002b	---	Please refer to Section 2	01/07/2000	27/06/2000
Use of Operator Services Information System (OSIS) Data Under Licence (Revised)	003	---	Please refer to Section 2	11/12/2000	13/11/2000
Charges for Audit Files via LOR 1 and LORS 2	004	---	Please refer to Section 2.4	01/07/2001	31/05/2001
Charges for Ad-hoc refresh Extracts	004	---	Please refer to Section 2.5	01/07/2001	31/05/2001

Description	DPCN No.	Current Charge	New Charge	Effective Date	Communicated to Industry
Charges for Ad-hoc refresh Extracts	005	---	Please refer to Section 2	01/10/2001	31/08/2001

Notes:

- 5) Please note that actual charges for effect from 1 May 2000 cannot be published within this notification due to ongoing discussions within the Industry. The purpose being to give formal notification that those charges finally agreed through discussion and consultation will be effective from 1 May 2000.

Annex 6

Legal, Regulatory and Contractual Framework

Introduction

- A6.1 This Annex sets out more detail about the key legislative and regulatory provisions which together establish the framework within which Ofcom has considered the requests for determinations in relation to the payments made by The Number and Conduit, respectively, to BT for the supply of certain directory information. Some of these provisions have already been set out in **Section 5** of this document, and this Annex simply serves to put them in their more general and detailed context.
- A6.2 Much of the detail (including lengthy citations of legislation as well as of certain regulatory documents) included in this Annex is not material to the reasoning behind Ofcom's provisional findings in respect of the regulatory obligations in dispute between the parties. However, given especially that the parties to the two disputes (as well as Thomson as an interested party) have referred Ofcom in their respective submissions to a substantial proportion of these provisions (including the history of the obligations in dispute under the previous framework) in support of their cases, it is appropriate to set them out fully in this Annex. In this context, it is also to be noted that Ofcom considers that some of those party submissions based on (now repealed) legislation and regulation do not require a specific response by Ofcom, but their existence are nonetheless noted by the text in this Annex.
- A6.3 In particular, this Annex is structured in two main parts as follows:
- **the previous EC and UK framework:** overall, this shows (among other things) how the liberalisation and harmonisation objectives have evolved in relation to directory information services, including access to certain directory information; and
 - **the current EC and UK framework:** overall, this shows (among other things) how those objectives have been brought forward into the current framework, including the policy intentions behind certain domestic regulation transposing relevant EC law.

Previous Legal and Regulatory Framework

The Previous EC Framework

Liberalisation measures

- A6.4 Until the late 1980s, the regulation of telecommunications services and equipment was a matter for each Member State and not something covered by Community legislation. Following certain policy initiatives, the European Commission then published in 1987 its Green Paper on the development of the Common Market for Telecommunications services and equipment¹²¹. That paper essentially set out the

¹²¹ COM (87) 290.

European Commission's plans to intervene by legislative means to ensure a more flexible telecommunications market throughout the Community in which innovation played a key part to future developments.

- A6.5 As a result, it used its powers for the first time¹²² under Article 90(3) (now Article 86(3)) of the EC Treaty to adopt in 1998 a directive¹²³ abolishing special or exclusive rights to import, market, connect, bring into service and maintain telecommunications terminal equipment. By that liberalisation directive, the European Commission in effect brought an end to certain monopoly rights which had until then been reserved to national telecommunications organisations (the “**telco incumbents**”).
- A6.6 Since then, a number of initiatives to legislate at Community level have been taken, both from the perspectives of liberalising and harmonising aspects of the telecommunications sector. The measures taken are too numerous to deal with in any detail in this context. However, particularly in the light of *KPN* case (see further about this case at **Section 5** of this document), it is relevant to briefly consider only a few of the provisions of directives adopted under the previous EC regulatory framework in some further detail. But, in order to more fully appreciate the developments leading to the current EC framework, a brief overview is set out below of the main directives under the previous framework.
- A6.7 In 1990, the European Commission adopted under Article 90(3) (now Article 86(3)) of the EC Treaty a further liberalisation directive on competition in the markets for telecommunications services (the “**Services Directive**”)¹²⁴. In particular, Article 2(1) of the Services Directive required as follows:

Without prejudice to Article 1 (2), Member States shall withdraw all special or exclusive rights for the supply of telecommunications services other than voice telephony and shall take the measures necessary to ensure that any operator is entitled to supply such telecommunications services.

- A6.8 In addition, Article 1(2) of the Services Directive made it clear that:

This Directive shall not apply to telex, mobile radiotelephony, paging and satellite services.

- A6.9 The intention was to provide for a gradual liberalisation of telecommunications services throughout the Community. Therefore, in a series¹²⁵ of subsequent liberalisation directives, further telecommunications services were, in effect, brought within the scope of the Services Directive by amendments made to it. With the exception of radio-broadcasting and television (which services were carved out by the definition of ‘telecommunications services’), all special or exclusive rights for the provision of telecommunications services, including the establishment and the provision of telecommunications networks required for the provision of such

¹²² In Cases C-271/90, etc., [1992] ECR I-5833, certain Member States (such as France) challenged the directive on the basis that the liberalising aims of it was a matter falling with the legislative powers of the Council of Ministers only, thus the European Commission lacked legal basis. However, the Court of Justice upheld the directive.

¹²³ Directive 88/301/EEC of 16 May 1998 on competition in the markets in telecommunications terminal equipment, OJ L 131, 27.5.1988, p.73.

¹²⁴ Directive 90/388/EEC of 28 June 1990, OJ L 192, 24.7.1990, p.10.

¹²⁵ Directive 94/46/EC of 13 October 1994 (satellite communications), OJ L 268, 19.10.1994, p.15; Directive 95/51/EC of 18 October 1995 (cable television networks), OJ L 256, 26.10.1995, p.49; Directive 96/2/EC of 16 January 1996 (mobile and personal communications) OJ L 020, 26.1.1996, p.59; Directive 1999/64/EC of 23 June 1999 (telecommunications networks and cable TV networks owned by a single operator are separate legal entities), OJ L 175, 10.07.1999, p.39.

services, were eventually required to be withdrawn by the Full Competition Directive¹²⁶.

- A6.10 Thus, the provision of (amongst other things) voice telephony and directory and enquiry services were opened up to competition from 1 January 1998 as a result of the Full Competition Directive. The 4th recital of that Directive's preamble set out the following reasons as to why the continuation of the exception granted with respect of voice telephony was no longer justified, namely:

(4) In 1990, the Commission, however, granted a temporary exception under Article 90 (2) in respect of exclusive and special rights for the provision of voice telephony, since the financial resources for the development of the network still derived mainly from the operation of the telephony service and the opening-up of that service could, at that time, threaten the financial stability of the telecommunications organizations and obstruct the performance of the task of general economic interest assigned to them, consisting in the provision and exploitation of a universal network, i.e. one having general geographic coverage, and that connection to it is being provided to any service provider or user upon request within a reasonable period of time.

Moreover, at the time of the adoption of Directive 90/388/EEC, all telecommunications organizations were also in the course of digitalizing their network to increase the range of services which could be provided to the final customers. Today, coverage and digitalization are already achieved in a number of Member States. Taking into account the progress in radio frequency applications and the on-going heavy investment programmes, optic fibre-coverage and network penetration are expected to improve significantly in the other Member States in the coming years.

In 1990, concerns were also expressed against immediate introduction of competition in voice telephony while price structures of the telecommunications organizations were substantially out of line with costs, because competing operators could target highly profitable services such as international telephony and gain market share merely on the basis of existing substantially distorted tariff structures. In the meantime efforts have been made to balance differences in pricing and cost structures in preparation for liberalization. The European Parliament and the Council have in the meantime recognized that there are less restrictive means than the granting of special or exclusive rights to ensure this task of general economic interest.

- A6.11 As regards the liberalisation of directory and enquiry services, Article 1(6) of the Full Competition Directive in effect inserted into the Services Directive a new Article 4b as follows:

Member States shall ensure that all exclusive rights with regard to the establishment and provision of directory services, including both the publication of directories and directory enquiry services, on their territory are lifted.

- A6.12 The following recitals to the Full Competition Directive's preamble provided clarity of the aims of that new Article:

(13) Subject to reasonable compensation, the right of new providers of voice telephony to interconnect their service for call completion purposes with the existing public telecommunications network at the necessary interconnection points, including access to customer databases necessary for the provision of directory information, is of crucial importance in the initial period after the abolition of the special and exclusive rights regarding voice telephony and telecommunications infrastructure provision...

¹²⁶ Directive 96/19/EC of 13 March 1996, OJ L 074, 22.3.1996, p.13.

...

(17) A number of Member States are currently still maintaining exclusive rights with regard to the establishment and provision of telephone directory and enquiry services. These exclusive rights are generally granted either to organizations which are already enjoying a dominant position in providing voice telephony, or to one of their subsidiaries. In such a situation, these rights have the effect of extending the dominant position enjoyed by those organizations and therefore strengthening that position, which, according to the case-law of the Court of Justice of the European Communities, constitutes an abuse of a dominant position contrary to Article 86. The exclusive rights granted in the area of telephone directory services are consequently incompatible with Article 90 (1) of the Treaty, in conjunction with Article 86. These exclusive rights consequently have to be abolished.

(18) Directory information constitutes an essential access tool for telephony services. In order to ensure the availability of directory information to subscribers to all voice telephony services, Member States may include obligations for the provision of directory information to the general public within individual licences and general authorizations.

Such an obligation should not, however, restrict the provision of such information by new technological means, nor the provision of specialized and/or regional and local directories contrary to Article 90 (1) of the Treaty, in conjunction with point (b) of the second paragraph of Article 86 of the Treaty.

- A6.13 In the Full Competition Directive, the European Commission also took the opportunity to deal with certain other matters, such as the financing of universal service and permissible licensing conditions, including requirements to ensure access to customer databases necessary for the provision of universal directory information.

Harmonisation measures

- A6.14 At the same time as adopting the Services Directive, the Council adopted under Article 100a (now Article 95) of the EC Treaty a directive¹²⁷ following a proposal by the European Commission on the establishment of the internal market for telecommunications services through the implementation of open network provision (“**ONP**”). That directive (the “**ONP Framework Directive**”) in effect set out a framework for the harmonisation of conditions for open and efficient access to and use of public telecommunications networks and, where applicable, public telecommunications services. Such ONP conditions would also be required to comply with certain basic principles of being based on objective criteria, transparent and published, and guaranteeing equality of access and must be non-discriminatory.
- A6.15 That directive also set out a work programme for adopting further ONP directives, particularly in the subsequent three years. Thus, between 1992 and 1998, a number of further harmonisation ONP directives were adopted dealing with to start with leased lines¹²⁸.
- A6.16 The Interconnection Directive¹²⁹ established a regulatory framework for securing the interconnection of telecommunications networks and in particular the interoperability

¹²⁷ Directive 90/387/EEC of 28 June 1990, OJ L 192, 24.7.1990, p.1.

¹²⁸ Directive 92/44/EEC of 5 June 1992, OJ L 165, 19.6.1992, p.27, amended by Directive 97/51/EC of 6 October 1997, OJ L 295, 29.10.1997, p.23.

¹²⁹ Directive 97/33/EC of 30 June 1997, OJ L 199, 26.7.1997, p.32, amended by Directive 98/61/EC of 24 September 1998, OJ L 268, 3.10.1998, p.37.

of services, and with regard to ensuring provision of universal service in an environment of open and competitive markets through application of ONP principles. The provisions of that Directive were implemented in the UK by the Telecommunications (Interconnection) Regulations 1997¹³⁰ (the "**1997 Interconnection Regulations**").

- A6.17 A common framework for general authorisations and individual licences in the field of telecommunications services was also established by a further harmonisation Licensing Directive¹³¹, which provisions were implemented in the UK by the Telecommunications (Licensing) Regulations 1997¹³².
- A6.18 Amongst other things, the Annex (which was copied out in the transposing UK regulations) to the Licensing Directive set out an exhaustive list of the types of licence conditions that Member States could impose, including:

...

3.2. financial contributions to the provision of universal service, in accordance with Community law;

3.3. communication of customer database information necessary for the provision of universal directory information;

...

4.5. provision of universal service obligations in accordance with the Interconnection Directive and Directive 95/62/EC of the European Parliament and of the Council of 13 December 1995 on the application of open network provision (ONP) to voice telephony (1);

...

- A6.19 The Licensing Directive prescribed, in effect, the types of licences for which the conditions in that Annex could be included. In particular, Article 4(1) specified that the conditions under points 2 and 3 of the Annex could be included in general authorisations (commonly known as "class licences" in the UK at that time) and Article 8 specified that the conditions under points 2 and 4 of the Annex could, in addition to those for general authorisations, be included in individual licences.
- A6.20 Moreover, two further ONP directives¹³³ were adopted specifically to deal with the provision of voice telephony. The second of these directives, the Revised Voice Telephony Directive (Directive 98/10/EC) ("**RVTD**"), which was implemented in the UK by the Telecommunications (Open Network Provision) (Voice Telephony) Regulations 1998¹³⁴ (the "**RVTD Regulations**"), replaced the earlier Directive 95/62/EC on the same matter, which had been implemented by the Telecommunications (Voice Telephony) Regulations 1997¹³⁵. Article 1(1) of the RVTD set out its aims, namely:

¹³⁰ S.I. 1997/2931.

¹³¹ Directive 97/13/EC of 10 April 1997, OJ L 177, 7.5.1997, p.15.

¹³² S.I. 1997/2930.

¹³³ Directive 95/62/EC of 13 December 1995, OJ L 321, 30.12.1995, p.6, replaced by Directive 98/10/EC of 26 February 1998, OJ L 101, 1.04.1998, p.24.

¹³⁴ S.I. 1998/1580.

¹³⁵ S.I. 1997/1886.

The aims are to ensure the availability throughout the Community of good quality fixed public telephone services and to define the set of services to which all users, including consumers, should have access in the context of universal service in the light of specific national conditions, at an affordable price.

- A6.21 In terms of the types of obligations that could be imposed on market players, the recitals to the RVTD's preamble clarified the following in the context of universal service:

(3)...whereas, in moving to a competitive market, there are certain obligations which should apply to all organisations providing telephone services over fixed networks and whereas there are others which should apply only to organisations enjoying significant market power or which have been designated as a universal service operator in accordance with Article 5;

...

(6) Whereas the importance of the fixed public telephone network and service is such that the latter should be available to anyone reasonably requesting it; whereas, in accordance with the principle of subsidiarity, it is for Member States to decide on the basis of objective criteria which organisations have the responsibility for providing the universal service for telecommunications as defined in this Directive, taking into account the ability and, where appropriate, the willingness of organisations to provide all or part of it; whereas corresponding obligations could be included as conditions in authorisations to provide publicly available telephone services; whereas, in accordance with Article 5(1) of Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (1), Member States may establish mechanisms for sharing the net cost of the universal service obligations with other organisations operating public telecommunications networks and/or publicly available voice telephony services;...

- A6.22 As regards the concept of 'universal service', Article 2(2)(f) of the RVTD defined it as:

'universal service' means a defined minimum set of services of specified quality which is available to all users independent of their geographical location and, in the light of specific national conditions, at an affordable price;

- A6.23 In Chapter II of the RVTD (entitled 'Provision of a defined set of services which may be funded in the context of universal service'), Article 3(1) made it in effect clear that the said 'defined minimum set of services' is a reference to the services set out in Chapter II. In that Chapter, **Article 6 of the RVTD** then set out 'directory services' as one of those services, the availability of which Member States were required to ensure also pursuant to Article 3(1), in the following terms:

1. The provisions of this Article are subject to the requirements of relevant legislation on the protection of personal data and privacy, such as Directive 95/46/EC and Directive 97/66/EC.

2. Member States shall ensure that:

(a) subscribers have the right to have an entry in publicly available directories and to verify and, if necessary, correct or request removal of that entry;

(b) directories of all subscribers who have not expressed opposition to being listed, including fixed, mobile and personal numbers, are available to users in a form approved by the national regulatory authority, whether printed or electronic, or both, and are updated on a regular basis;

(c) at least one telephone directory enquiry service covering all listed subscribers numbers is available to all users, including users of public pay telephones;

3. In order to ensure provision of the services referred to in paragraph 2(b) and 2(c), Member States shall ensure that all organisations which assign telephone numbers to subscribers meet all reasonable requests to make available the relevant information in an agreed format on terms which are fair, cost oriented and non-discriminatory.

4. Member States shall ensure that organisations providing the service referred to in paragraph 2(b) and 2(c) follow the principle of non-discrimination in their treatment and presentation of information provided to them.

A6.24 To ensure access to the DQ service, Article 9 in Chapter III of the RVTD provided:

Member States shall ensure that all users provided with a connection to the fixed public telephone network can:

(a) connect and use terminal equipment suitable for the connection provided, in accordance with national and Community law;

(b) access operator assistance services and directory enquiry services in accordance with Article 6.2(c), unless the subscriber decides otherwise;

(c) ...

Member States shall ensure that mobile users can also access the services mentioned in (b) and (c).

A6.25 In the context of universal service directory services, the 7th recital to the RVTD's preamble clarified the following:

(7) Whereas provision of directory services is a competitive activity; whereas Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data regulates the processing of personal data (2); whereas Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (1), in particular in the Integrated Services Digital Network (ISDN) and in digital mobile networks, will give the subscriber the right to be omitted, or to have certain data omitted, from a printed or electronic directory at his or her request; whereas users and consumers desire comprehensive directories and directory enquiry service covering all listed telephone subscribers and their numbers (including fixed, mobile and personal telephone numbers); whereas the situation whereby certain telephone directories and directory services are provided in a manner which is perceived to be free of charge to the user is not affected by this Directive;

A6.26 Finally, as noted in that 7th recital and Article 6 of the RVTD, data protection issues are particularly relevant in this context. In that regard, Article 11 of the Telecoms Data Protection Directive (97/66/EC)¹³⁶, which was implemented in the UK by the Telecommunications (Data Protection and Privacy) Regulations 1999¹³⁷ and the Telecommunications (Data Protection and Privacy) (Amendment) Regulations

¹³⁶ Directive 97/66/EC of 15 December 1997 (processing of personal data and the protection of privacy in the telecommunications sector), OJ L 024, 30.1.1998, p. 1.

¹³⁷ S.I. 1999/2093.

2000¹³⁸ (together the “**Telecoms Data Protection Regulations**”), specifically deals with such issues in the context of directories as follows:

Article 11

Directories of subscribers

1. Personal data contained in printed or electronic directories of subscribers available to the public or obtainable through directory enquiry services should be limited to what is necessary to identify a particular subscriber, unless the subscriber has given his unambiguous consent to the publication of additional personal data. The subscriber shall be entitled, free of charge, to be omitted from a printed or electronic directory at his or her request, to indicate that his or her personal data may not be used for the purpose of direct marketing, to have his or her address omitted in part and not to have a reference revealing his or her sex, where this is applicable linguistically.
2. Notwithstanding paragraph 1, Member States may allow operators to require a payment from subscribers wishing to ensure that their particulars are not entered in a directory, provided that the sum involved does not act as a disincentive to the exercise of this right, and that, taking account of the quality requirements of the public directory in the light of the universal service, it is limited to the actual costs incurred by the operator for the adaptation and updating of the list of subscribers not to be included in the public directory.
3. The rights conferred by paragraph 1 shall apply to subscribers who are natural persons. Member States shall also guarantee, in the framework of Community law and applicable national legislation, that the legitimate interests of subscribers other than natural persons with regard to their entry in public directories are sufficiently protected.

A6.27 The 21st recital to the Telecoms Data Protection Directive's preamble clarified in relation to that Article as follows:

(21) Whereas directories are widely distributed and publicly available; whereas the right to privacy of natural persons and the legitimate interest of legal persons require that subscribers are able to determine the extent to which their personal data are published in a directory; whereas Member States may limit this possibility to subscribers who are natural persons;

A6.28 To transpose those provisions into UK law, the Telecoms Data Protection Regulations read as follows:

PART IV

DIRECTORIES OF SUBSCRIBERS

Application and interpretation of Part IV

17.—(1) This Part shall apply in relation to a directory of subscribers to publicly available telecommunications services, whether in printed form or in electronic form—

- (a) which is made available to the public or a section of the public, or
- (b) information from which is provided by a directory enquiry service.

(2) In this Part any reference to a directory is a reference to such a directory as is mentioned in paragraph (1), "production" in relation to a directory means its publication or preparation and cognate expressions shall be construed accordingly.

¹³⁸ S.I. 2000/157.

(3) Such a request as is mentioned in paragraph (3) of regulation 18 or paragraph (2) of regulation 19 shall be treated for the purposes of the regulation in question as having no application in relation to an edition of a directory which was first produced before the request was received by the producer of the directory; and, for the purposes hereof, an edition of a directory which is revised after it was first produced shall be treated as a new edition.

Entries relating to individuals

18.—(1) This regulation applies in relation to a directory which includes entries which relate to subscribers who are individuals, and any person who produces such a directory shall, without charge to any such subscriber, ensure that it complies with this regulation.

(2) Except to the extent, if any, to which the subscriber in question has consented otherwise, such a directory shall not contain any personal data whereof the data subject is a subscriber who is an individual other than data which are necessary to identify him and the number allocated to him.

(3) Without prejudice to paragraph (2), where a subscriber who is an individual has so requested the producer of such a directory then, in his case—

(a) no entry relating to a number specified in the request shall be included in that directory;

(b) no entry therein shall contain a reference which reveals his sex; and

(c) no such entry shall contain such part of his address as is so specified.

(4) Where, in connection with the production of a directory, information relating to a particular subscriber is supplied to the producer thereof by some other person—

(a) where the other person has in his possession such a request by that subscriber as is mentioned in paragraph (3) (to whomsoever made) or a copy or record of such a request, he shall, without undue delay, transmit a copy of that request or a copy of that record to the producer of the directory, and

(b) subject to receipt by the producer of the directory of a copy of a request or of a record thereof so transmitted, the request in question shall be treated for the purposes of paragraph (3) as if it had been made to that producer.

Entries relating to corporate subscribers

19.—(1) This regulation applies in relation to a directory which includes entries which relate to corporate subscribers and any person who produces such a directory shall, without charge to any such subscriber, ensure that it complies with this regulation.

(2) Where a corporate subscriber has so requested the producer of such a directory, then, in its case, no entry relating to a number specified in the request shall be included in that directory.

(3) Paragraph (4) of regulation 18 shall have effect for the purposes of this regulation as if any reference therein to paragraph (3) of that regulation were a reference to paragraph (2) of this regulation.

Supplementary provisions relating to directory enquiry services

20. Where a person directs an enquiry relating to a particular subscriber to a directory enquiry service but there is either no entry relating to that subscriber, or no entry relating to his number, in a directory used by that service, nothing in this Part shall be taken to preclude the person in question being told the reason, or possible reason, why there is no such entry, in

particular, that, in pursuance of a request made by the subscriber for the purposes of regulation 18(3), regulation 18(3)(a) applies or, in the case of a corporate subscriber, in pursuance of a request made by it for the purposes of regulation 19(2), that provision applies.

- A6.29 For the sake of completeness, it is also to be noted that a number of measures were also taken under this previous EC framework to deal mainly with spectrum related issues. But, as such issues are not relevant for present purposes, it is unnecessary to consider them here.

The Previous UK Framework

- A6.30 Prior to the enactment of the 2003 Act, the main statute relating to telecommunications and other electronic communications was the Telecommunications Act 1984 (the “**1984 Act**”).
- A6.31 The 1984 Act introduced fundamental changes to the regulatory regime applicable to telecommunications in the UK at that time. In particular, it created a telecoms regulator, an officer known as the Director General of Telecommunications (the “**DGT**”; also “the Director”) as appointed by the Secretary of State, whose office was the Office of Telecommunications (“**Oftel**”).
- A6.32 Another important aspect of the 1984 Act was the abolition of the exclusive privilege of running telecommunication systems conferred on British Telecommunications by the British Telecommunications Act 1981. The 1981 Act in effect passed on the exclusive privilege of running telecommunication systems throughout the British Islands to British Telecommunications from the Post Office, whose monopoly had previously resided with the office of Postmaster General. The 1984 Act also ensured that all the property, rights and liabilities, other than excepted liabilities, to which British Telecommunications was entitled or subject immediately before 6 August 1984 became property, rights and liabilities of the successor company, BT.
- A6.33 One of the DGT’s main functions under the 1984 Act was to secure compliance with the licensing regime. Indeed, under Section 5 of the 1984 Act, a person running a telecommunication system within the UK would be guilty of an offence unless he was authorised to do so by a licence under Section 7. To start with, only BT and Mercury Communications Ltd were granted licences in 1984, thus creating a duopoly. However, in the early 1990s, the market was opened up and a number of new national so-called Public Telecommunications Operators (“**PTOs**”) were given licences.
- A6.34 In exercising his licensing function, the DGT could impose certain licence conditions that, subject to certain exceptions, would be subject to enforcement action by him in the event of non-compliance by a licensee. As regards to matters relevant to the subject matter of the present dispute, the DGT was empowered pursuant to Section 7 of the 1984 Act to impose such licence conditions (whether relating to the running of a telecommunication system to which the licence relates or otherwise) as appeared to him to be requisite or expedient having regard to his duties under Section 3 of the 1984 Act, the provisions of Articles 4(1), 8(1) and 8(2) of the Licensing Directive and the obligations imposed on him in pursuance of the 1997 Interconnection Regulations.

- A6.35 Under Section 3(1)(a) of the 1984 Act, the DGT had a statutory duty, which was shared with the Secretary of State, to ensure that there were provided throughout the UK *directory information services*¹³⁹ to satisfy all reasonable demand¹⁴⁰ which services, by definition under Section 4(3)(b) of the 1984 Act, were also a type of a "telecommunication service".
- A6.36 As a result, BT was originally granted a licence imposing on it certain obligations with regard to directory information services under Condition 3. The full text of that Condition, together with a more detailed historical background as regards BT's licence obligations, including OfTel policy, in this regard is set out in **Annex 8** to this document.
- A6.37 In summary, however, Condition 3 (as subsequently amended) required BT (among other things) to:
- provide a directory information service to its own retail customers by means of a switched voice telephony system;
 - provide such directories as it "publishes and makes available generally" to its retail customers to anybody in the UK who asks for them in writing;
 - provide all interconnecting PTOs with directory information about its own customers to ensure, in effect, that all PTOs provided as comprehensive a service as possible and also that each PTO included in its directory information service directory information about the customers of other PTOs, to the extent that it had such information;
 - subject to certain conditions being fulfilled by the interconnecting PTO in question, provide access (including on-line access or including the provision of an appropriate storage medium containing the data in machine readable form) to all the names, addresses and telephone numbers on the electronic database which is used by BT to provide directory information services "on reasonable terms (which may include recovery of fully allocated costs and a reasonable return on capital employed)".
- A6.38 As is further explained in **Annex 8** to this document, a number of modifications of BT's licence were then made to BT's licence to open up the market in the provision of directory information services, including allowing new entities, not necessarily PTOs, to provide such services, including directories.
- A6.39 Such modifications were also made to implement the requirements imposed under EC legislation, such as those under the RVTD.

¹³⁹ That is to say, a service consisting in the provision by means of a telecommunication system of directory information for the purpose of facilitating the use of a service falling within section 4(3)(a) of the 1984 Act and provided by means of that system; a service falling within section 4(3)(a) being a service consisting in the conveyance by means of a telecommunication system of anything falling within paragraphs (a) to (d) of section 4(1) of the 1984 Act, namely a) speech, music and other sounds; (b) visual images; (c) signals serving for the impartation (whether as between persons and persons, things and things or persons and things) of any matter otherwise than in the form of sounds or visual images; or (d) signals serving for the actuation or control of machinery or apparatus.

¹⁴⁰ In addition, section 8(2) of the 1984 Act specifically provided that, where a licence granted under section 7 to a particular person included a condition requiring that person to provide such directory information services to which this subsection applied as were specified in the licence or were of a description so specified, section 8(1) had effect as if the conditions there mentioned included a condition requiring that person to provide without charge for subscribers who are blind or otherwise disabled such directory information services to which this subsection applied as were appropriate to meet the needs of those subscribers and were specified in the licence or were of a description so specified.

- A6.40 Of particular relevance to the matters in the present dispute, Condition 82 of BT's licence required BT to provide certain directory information to non-PTOs, as follows:

DIRECTORIES AND DIRECTORY INFORMATION

82.1 The Licensee shall in accordance with the following provisions, on request by any person other than a public telecommunications operator subject to the obligations in Condition 2, make available to him for the purpose of enabling the provision of directories or a directory information service:

- (a) the contents of the database, in machine readable form, which the Licensee uses to compile directories for the purpose of complying with its obligation under Condition 2; and
- (b) on-line access (including a search facility) to the database which the Licensee uses to provide a Directory Information Service for the purpose of complying with its obligation under Condition 2 above.

82.2 If, following a written representation by the Licensee that the market for provision of any of the items in sub-paragraphs (a) and (b) above is competitive, the Director determines that such market is competitive in any specified area of the United Kingdom, the obligation upon the Licensee in paragraph 82.1 above will cease to apply with respect to the provision of such item in respect of that specified area.

82.3 The Licensee shall supply the items in sub-paragraphs (a) and (b) of paragraph 82.1 above at the reasonable request of the person requesting such items. Without prejudice to the generality of the foregoing, the Licensee may refuse to supply such items if the person requesting such items does not undertake to Process the data or information contained in them in accordance with any relevant Code of Practice, or the Licensee has reasonable grounds to believe that the person requesting such items will not comply with Relevant Data Protection Legislation.

82.4 The Licensee shall supply the items in sub-paragraphs (a) and (b) in paragraph 82.1 above having due regard, in such manner as is appropriate, to any Subscriber who has expressed opposition to inclusion of Director Information about that Subscriber in a directory or as part of a directory information service provided to end-users.

82.5 Where the Licensee is requested to supply the items in sub-paragraphs (a) and (b) of paragraph 82.1 above, the Licensee shall do so on terms which are fair, cost oriented and non-discriminatory, and in a format which is agreed between the Licensee and the person requesting the information or approved by the Director, where no such agreement is reached.

- A6.41 However, given that the DGT's dispute resolution function under regulation 6 of the 1997 Interconnection Regulations only extended to disputes concerning interconnection, a person other than a public telecommunications operator could not bring a dispute to the DGT to resolve any issues arising from BT's obligations under that Condition 82. On the other hand, the DGT could take enforcement action under Section 16 of the 1984 Act if BT would fail to comply with its obligations.

Current Legal and Regulatory Framework

The Current EC Framework

Generally about the framework

- A6.42 Following several policy initiatives and consultations (particularly the so-called 1999 Communications Review, COM(1999) 539) on reviewing the previous EC framework, a package of directives was adopted to establish a harmonised

framework for the regulation of electronic communications services (“**ECSSs**”), electronic communications networks (“**ECNs**”), associated facilities and associated services.

A6.43 The repeal, simplification and changeover (in the form of adopted measures) of the previous to the current EC framework is, in very broad terms, illustrated diagrammatically in **Figure A6.1** below.

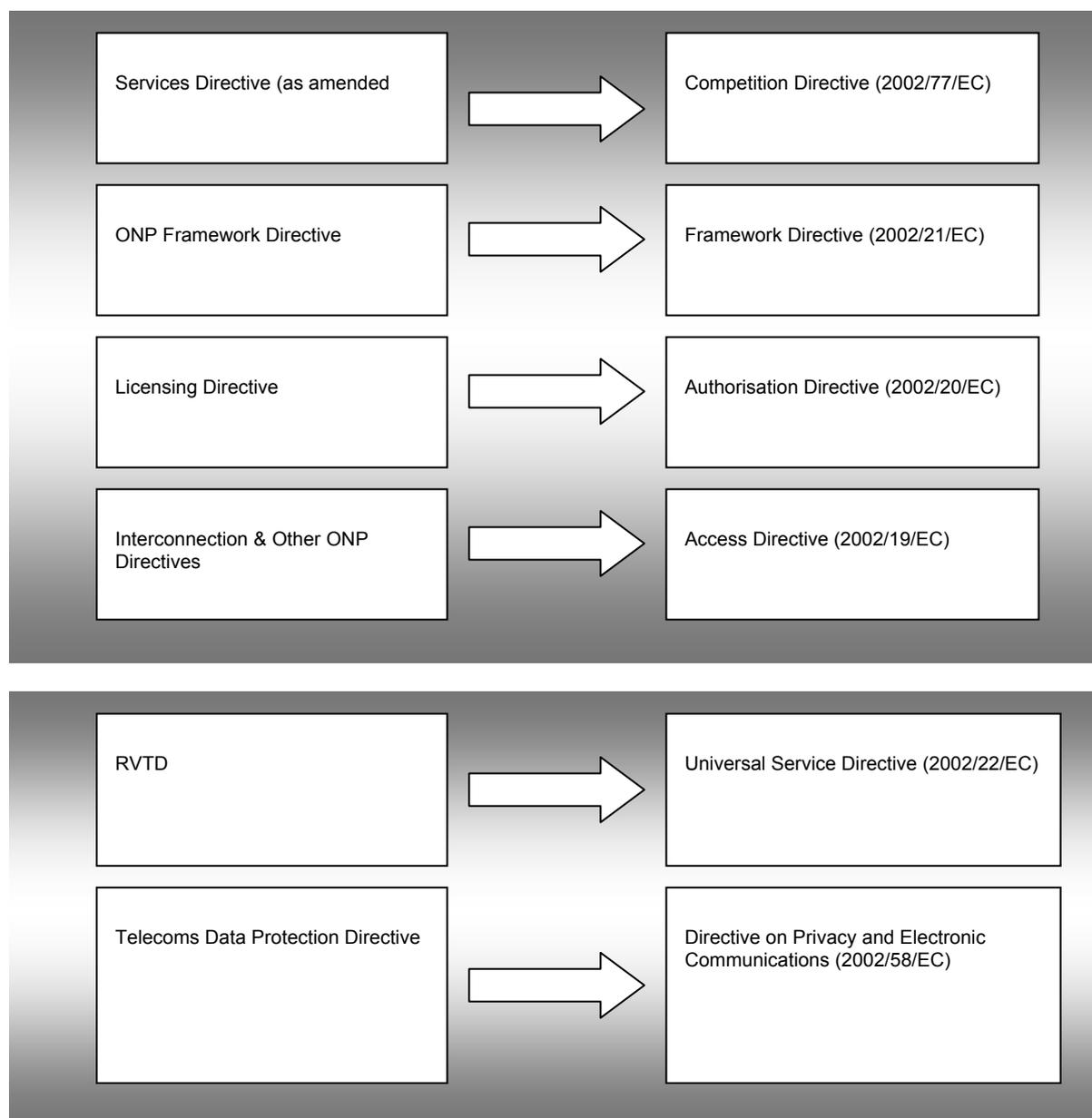


Figure A6.1: The changeover of the previous to the current EC directives

A6.44 Except for the Competition Directive and the Directive on Privacy and Electronic Communications, these new directives entered into force on 24 April 2003, when they were published in the Official Journal of the European Communities. However, Member States were required to transpose them into domestic law first by 24 July 2003 and to then apply these measures from 25 July 2003.

A6.45 In short, the new framework is designed to create harmonised regulation across the Community and is aimed at reducing entry barriers and fostering prospects for

effective competition to the benefit of consumers. Thus, the Framework Directive¹⁴¹ provides the overall structure for the new regulatory regime and sets out fundamental rules and objectives which read across all four directives. Under Article 8, national regulatory authorities (“**NRAs**”), such as Ofcom, are in effect required to take all reasonable measures aimed at achieving three key policy objectives in carrying out the regulatory tasks specified in the four directives, namely the promotion of competition, the development of the internal market and the promotion of the interests of the citizens of the European Union.

- A6.46 The Authorisation Directive¹⁴² establishes a new system whereby any person will be generally authorised to provide electronic communications services and/or networks without prior approval. Authorisation systems, such as individual or class licences, involving explicit decisions or administrative acts by NRAs permitted under the Licensing Directive are now prohibited. That said, an NRA may impose on ECN and ECS providers certain obligations. However, under Article 6 of the Authorisation Directive, such obligations must either fall within the maximum list of conditions specified in the Annex to the Directive or constitute specific obligations permitted under the directives. The latter concern obligations specified in the Access Directive¹⁴³, e.g. where providers have been designated as having significant market power (“**SMP**”), or obligations imposed on those designated to provide universal service.
- A6.47 The following conditions set out in the maximum list, which are particularly relevant for present purposes, may be imposed by NRAs:

The conditions listed in this Annex provide the maximum list of conditions which may be attached to general authorisations (Part A), rights to use radio frequencies (Part B) and rights to use numbers (Part C) as referred to in Article 6(1) and Article 11(1)(a).

A. Conditions which may be attached to a general authorisation

1. Financial contributions to the funding of universal service in conformity with Directive 2002/22/EC (Universal Service Directive).

...

8. Consumer protection rules specific to the electronic communications sector including conditions in conformity with Directive 2002/22/EC (Universal Service Directive).

C. Conditions which may be attached to rights of use for numbers

4. Obligation to provide public directory subscriber information for the purposes of Articles 5 and 25 of Directive 2002/22/EC (Universal Service Directive).

- A6.48 The Access Directive concerns the regulation of access to, and interconnection of, ECNs and associated facilities. It therefore establishes rights and obligations for operators and for undertakings seeking interconnection or access to their networks or associated facilities. In particular, in Chapter II, it prescribes rights and obligations on operators of public ECNs to negotiate interconnection with each other for the purpose of providing publicly available ECSs. That Chapter also sets

¹⁴¹ Directive 2002/21/EC of 7 March 2002, OJ L 108, 24.4.2002, p. 33.

¹⁴² Directive 2002/20/EC of 7 March 2002, OJ L 108, 24.4.2002, p. 21.

¹⁴³ Directive 2002/19/EC of 7 March 2002, OJ L 108, 24.4.2002, p. 7, which essentially sets out the terms on which providers may access each others' networks and services with a view to providing publicly available electronic communications services.

out in more general terms of the powers and responsibilities of the NRAs with regard to access and interconnection.

A6.49 In Chapter III, the Access Directive sets out (among other things) types of obligations that may be imposed on operators that have been designated as having SMP on a specific market as a result of a market analysis carried out in accordance with Article 16 of the Framework Directive. The provision of, and access to, directory information is not a matter specifically covered under the Access Directive.

Liberalisation measures

A6.50 Before dealing with relevant provisions of the fourth main new directive, the Universal Service Directive¹⁴⁴ (the “USD”) (which is the important harmonisation measure for the purposes of the issues underlying the present dispute), it is to be noted that the Service Directive (as amended) has been repealed and replaced by the new liberalising Competition Directive¹⁴⁵. The liberalisation provision for directory services remains substantially the same, as the comparison of the two texts in Figure A6.2 shows.

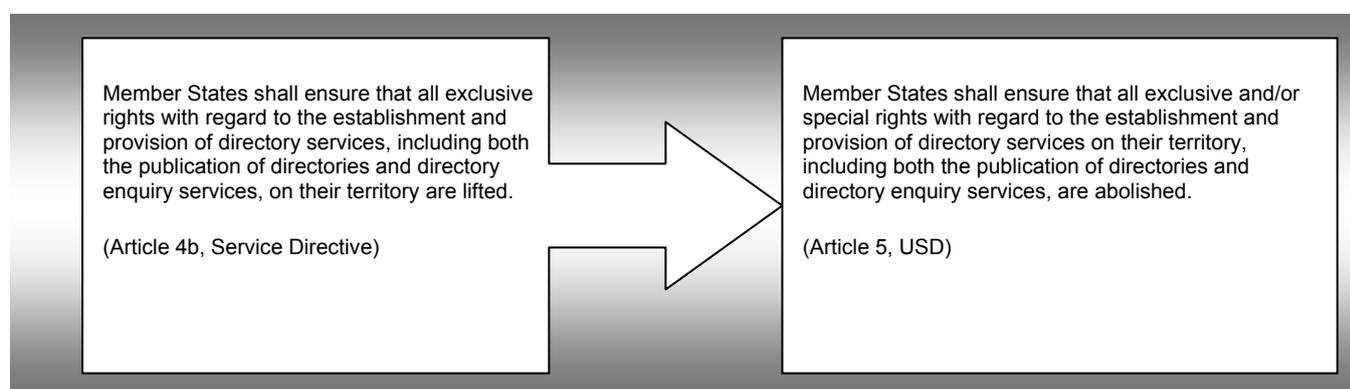


Figure A6.2: The retained liberalisation measure

The USD

A6.51 Given the importance of the provisions of the USD to the present dispute, it is necessary to consider them in some detail below. To start with, it is to be noted that the USD is structured so that it contains five Chapters. Leaving aside Chapter I (which sets out scope, aims and definitions), the USD regulates in the remaining Chapters a number of different matters, an overview of which can be illustrated as follows:

- **Chapter II:** This Chapter deals with the provision of *universal services*, including DQ services and directories (Article 5). It sets out obligations to be imposed on undertakings designated to provide such services under domestic law. Such services are to be provided to all end-users.
- **Chapter III:** This Chapter deals with the provision of certain retail services, the minimum set of leased lines as well as carrier selection and carrier pre-selection. It sets out obligations to be imposed on undertakings designated as having SMP in a

¹⁴⁴ Directive 2002/22/EC of 7 March 2002, OJ L 108, 24.4.2002, p. 51.

¹⁴⁵ Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services, OJ L 249, 19.9.2002, p.21.

particular market under domestic law. Those ultimately intended to benefit from such regulation are the end-user customers to whom such services are made available by the SMP operator in question.

- **Chapter IV:** This Chapter deals with the provision of certain consumer protection matters, such as standards of contract, network integrity, number portability as well as “access to operator assistance, DQ services and directory information” (Article 25). In relation to each such obligation to be imposed under domestic law, this Chapter prescribes in effect the type of undertaking that is to be subject to the obligation in question and also the persons benefiting from such an obligation.
- **Chapter V:** This Chapter deals with (among other things) the provision of additional services falling outside Chapter II that may be regulated under domestic law by virtue of Article 32.

A6.52 As noted above, the USD's scope and aims are set out in its Article 1. In comparison to the RVTD, the aims remain in material respects the same as the following comparison illustrates:

The aims are to ensure the availability throughout the Community of good quality fixed public telephone services and to define the set of services to which all users, including consumers, should have access in the context of universal service in the light of specific national conditions, at an affordable price.

(Article 1(1), RVTD)

Within the framework of Directive 2002/21/EC (Framework Directive), this Directive concerns the provision of electronic communications networks and services to end-users. The aim is to ensure the availability throughout the Community of good quality publicly available services through effective competition and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market.

(Article 1(1), USD)

...With regard to ensuring provision of universal service within an environment of open and competitive markets, this Directive defines the minimum set of services of specified quality to which all end-users have access, at an affordable price in the light of specific national conditions, without distorting competition...

(Article 1(2), USD)

A6.53 In addition, the provisions of the RVTD in respect of the competitiveness in, and the desirability of, the provision of directories and directory services and the definition of 'universal service' have substantially been repeated for the purposes of the USD, as illustrated by the following extracts:

Directory information and a directory enquiry service constitute an essential access tool for publicly available telephone services and form part of the universal service obligation. Users and consumers desire comprehensive directories and a directory enquiry service covering all listed telephone subscribers and their numbers (including fixed and mobile numbers) and want this information to be presented in a non-preferential fashion. Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector ⁽¹⁾ ensures the subscribers' right to privacy with regard to the inclusion of their personal information in a public directory.

(11th recital to the USD's preamble)

The provision of directory enquiry services and directories is already open to competition. The provisions of this Directive complement the provisions of Directive 97/66/EC by giving subscribers a right to have their personal data included in a printed or electronic directory. All service providers which assign telephone numbers to their subscribers are obliged to make relevant information available in a fair, cost-oriented and non-discriminatory manner.

(35th recital to the USD's preamble)

"universal service" means the minimum set of services, defined in Directive 2002/22/EC (Universal Service Directive), of specified quality which is available to all users regardless of their geographical location and, in the light of specific national conditions, at an affordable price;

(Article 2(j) of the Framework Directive)

- A6.54 In the light of that overview and the comparison of certain provisions in the USD and the RVTD set out above, a more comprehensive explanation of the provisions of the USD particularly relevant to this dispute is set out below.
- A6.55 First, to cite the scope and the aims of the USD more fully, it is necessary to turn to Article 1, which provides:

Article 1

Scope and aims

1. Within the framework of Directive 2002/21/EC (Framework Directive), this Directive concerns the provision of electronic communications networks and services to end-users. The aim is to ensure the availability throughout the Community of good quality publicly available services through effective competition and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market.
2. This Directive establishes the rights of end-users and the corresponding obligations on undertakings providing publicly available electronic communications networks and services. With regard to ensuring provision of universal service within an environment of open and competitive markets, this Directive defines the minimum set of services of specified quality to which all end-users have access, at an affordable price in the light of specific national conditions, without distorting competition. This Directive also sets out obligations with regard to the provision of certain mandatory services such as the retail provision of leased lines.

- A6.56 In other words, that Article makes a number of points clear in respect of what the USD is aiming to achieve, in particular that:
- it (mainly) concerns the provision of ECNs and ECSs *to end-users*;
 - it, therefore, establishes the *rights of end-users* and the *corresponding obligations on undertakings* providing publicly available ECNs and ECSs, particularly where the needs of end-users as to good quality publicly available services and choice are not satisfactorily met by the market and through effective competition;
 - it ensures the provision of universal service within an environment of open and competitive markets by defining the minimum set of services of specified quality to which all end-users have access, at an affordable price in the light of specific national conditions, without distorting competition; and
 - it sets out obligations with regard to the provision of certain mandatory services, such as the retail provision of leased lines.

A6.57 Whilst DQ services and directories are not expressly mentioned in the definitions¹⁴⁶ of ECN and ECS, the definition of a 'publicly available telephone service' ("PATS") in Article 2(c) does make reference to them, as follows:

(c) 'publicly available telephone service' means a service available to the public for originating and receiving national and international calls and access to emergency services through a number or numbers in a national or international telephone numbering plan, and in addition may, where relevant, include one or more of the following services: the provision of operator assistance, directory enquiry services, directories, provision of public pay phones, provision of service under special terms, provision of special facilities for customers with disabilities or with special social needs and/or the provision of non-geographic services;

A6.58 That definition therefore plainly envisages directory information as an incidental, but not mandatory, part of a service to constitute PATS. (A more detailed discussion of the mandatory elements of the PATS definition is set out below.)

A6.59 As regards the USD's aim of ensuring universal service, it has been noted above that the definition of 'universal service' set out above and Article 1(2) of the USD itself makes it clear that the USD defines the minimum set of (universal) services of specified quality to which all end-users have access, at an affordable price in the light of specific national conditions, without distorting competition. This minimum set is defined in Chapter II of the USD, which main set is set out in Articles 4 to 7 of the USD, namely:

- Article 4 specifies a service of specified quality concerning the provision of access at a fixed location;
- Article 5 specifies a service of specified quality concerning the provision of DQ services and directories;
- Article 6 specifies a service of specified quality concerning the provision of public pay telephones; and
- Article 7 specifies a service of specified quality concerning the provision of special measures for disabled users.

A6.60 The identified *universal service* of particular relevance for the purposes of the present dispute is in Article 5 of the USD, which specifically provides:

Article 5

Directory enquiry services and directories

1. Member States shall ensure that:

¹⁴⁶ See Article 2 of the Framework Directive: (a) 'electronic communications network' means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed; and (c) 'electronic communications service' means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks.

(a) at least one comprehensive directory is available to end-users in a form approved by the relevant authority, whether printed or electronic, or both, and is updated on a regular basis, and at least once a year;

(b) at least one comprehensive telephone directory enquiry service is available to all end-users, including users of public pay telephones.

2. The directories in paragraph 1 shall comprise, subject to the provisions of Article 11 of Directive 97/66/EC, all subscribers of publicly available telephone services.

3. Member States shall ensure that the undertaking(s) providing the services referred to in paragraph 1 apply the principle of non-discrimination to the treatment of information that has been provided to them by other undertakings.

A6.61 The terms “end-user” and “subscriber” referred to in that Article are defined in Article 2 of the Framework Directive, which definitions apply pursuant to the first paragraph of Article 2 of the USD, as follows:

(k) ‘subscriber’ means any natural person or legal entity who or which is party to a contract with the provider of publicly available electronic communications services for the supply of such services;

...

(n) ‘end-user’ means a user not providing public communications networks or publicly available electronic communications services.

A6.62 Article 5 should, however, be read in the light of a number of related provisions in Chapter II of the USD. To start with, Article 3 of the USD prescribes that Member States have to ensure that the services set out in Chapter II are made available domestically. Specifically, Article 3 provides:

Article 3

Availability of universal service

1. Member States shall ensure that the services set out in this Chapter are made available at the quality specified to all end-users in their territory, independently of geographical location, and, in the light of specific national conditions, at an affordable price.

2. Member States shall determine the most efficient and appropriate approach for ensuring the implementation of universal service, whilst respecting the principles of objectivity, transparency, non-discrimination and proportionality. They shall seek to minimise market distortions, in particular the provision of services at prices or subject to other terms and conditions which depart from normal commercial conditions, whilst safeguarding the public interest.

A6.63 Chapter II of the USD then sets out certain provisions to supplement the above-mentioned ones to deal specifically with, put broadly, the following issues:

- the designation of undertakings to provide the universal services (Article 8);
- how end-users’ affordability of tariffs (which, as seen above, is one of the key characteristics of a universal service) may be achieved by Member States (Article 9) and the related issue as regards their ability to monitor and control their expenditure (Article 10);
- the quality of service of designated undertakings (Article 11);

- the costing and financing of universal service obligations, including transparency (Articles 12-14); and
- finally, as the concept of universal service is not a static one but is anticipated to evolve over time, the process to review the scope of universal service (Article 15).

A6.64 For the purposes of Ofcom's assessment of BT's obligations relevant to this dispute (see further in **Section 5 and 6** of this document), the following provisions should in particular be fully cited:

Article 8

Designation of undertakings

1. Member States may designate one or more undertakings to guarantee the provision of universal service as identified in Articles 4, 5, 6 and 7 and, where applicable, Article 9(2) so that the whole of the national territory can be covered. Member States may designate different undertakings or sets of undertakings to provide different elements of universal service and/or to cover different parts of the national territory.
2. When Member States designate undertakings in part or all of the national territory as having universal service obligations, they shall do so using an efficient, objective, transparent and non-discriminatory designation mechanism, whereby no undertaking is a priori excluded from being designated. Such designation methods shall ensure that universal service is provided in a cost-effective manner and may be used as a means of determining the net cost of the universal service obligation in accordance with Article 12.

Article 9

Affordability of tariffs

1. National regulatory authorities shall monitor the evolution and level of retail tariffs of the services identified in Articles 4, 5, 6 and 7 as falling under the universal service obligations and provided by designated undertakings, in particular in relation to national consumer prices and income.
2. Member States may, in the light of national conditions, require that designated undertakings provide tariff options or packages to consumers which depart from those provided under normal commercial conditions, in particular to ensure that those on low incomes or with special social needs are not prevented from accessing or using the publicly available telephone service.
3. Member States may, besides any provision for designated undertakings to provide special tariff options or to comply with price caps or geographical averaging or other similar schemes, ensure that support is provided to consumers identified as having low incomes or special social needs.
4. Member States may require undertakings with obligations under Articles 4, 5, 6 and 7 to apply common tariffs, including geographical averaging, throughout the territory, in the light of national conditions or to comply with price caps.
5. National regulatory authorities shall ensure that, where a designated undertaking has an obligation to provide special tariff options, common tariffs, including geographical averaging, or to comply with price caps, the conditions are fully transparent and are published and applied in accordance with the principle of non-discrimination. National regulatory authorities may require that specific schemes be modified or withdrawn.

Article 10

Control of expenditure

1. Member States shall ensure that designated undertakings, in providing facilities and services additional to those referred to in Articles 4, 5, 6, 7 and 9(2), establish terms and conditions in such a way that the subscriber is not obliged to pay for facilities or services which are not necessary or not required for the service requested.
2. Member States shall ensure that designated undertakings with obligations under Articles 4, 5, 6, 7 and 9(2) provide the specific facilities and services set out in Annex I, Part A, in order that subscribers can monitor and control expenditure and avoid unwarranted disconnection of service.
3. Member States shall ensure that the relevant authority is able to waive the requirements of paragraph 2 in all or part of its national territory if it is satisfied that the facility is widely available.

...[Article 11 concerns the quality of service of designated undertakings]

Article 12

Costing of universal service obligations

1. Where national regulatory authorities consider that the provision of universal service as set out in Articles 3 to 10 may represent an unfair burden on undertakings designated to provide universal service, they shall calculate the net costs of its provision.

For that purpose, national regulatory authorities shall:

- (a) calculate the net cost of the universal service obligation, taking into account any market benefit which accrues to an undertaking designated to provide universal service, in accordance with Annex IV, Part A; or
- (b) make use of the net costs of providing universal service identified by a designation mechanism in accordance with Article 8(2).

2. The accounts and/or other information serving as the basis for the calculation of the net cost of universal service obligations under paragraph 1(a) shall be audited or verified by the national regulatory authority or a body independent of the relevant parties and approved by the national regulatory authority. The results of the cost calculation and the conclusions of the audit shall be publicly available.

Article 13

Financing of universal service obligations

1. Where, on the basis of the net cost calculation referred to in Article 12, national regulatory authorities find that an undertaking is subject to an unfair burden, Member States shall, upon request from a designated undertaking, decide:

- (a) to introduce a mechanism to compensate that undertaking for the determined net costs under transparent conditions from public funds; and/or
- (b) to share the net cost of universal service obligations between providers of electronic communications networks and services.

2. Where the net cost is shared under paragraph 1(b), Member States shall establish a sharing mechanism administered by the national regulatory authority or a body independent from the beneficiaries under the supervision of the national regulatory authority. Only the net

cost, as determined in accordance with Article 12, of the obligations laid down in Articles 3 to 10 may be financed.

3. A sharing mechanism shall respect the principles of transparency, least market distortion, non-discrimination and proportionality, in accordance with the principles of Annex IV, Part B. Member States may choose not to require contributions from undertakings whose national turnover is less than a set limit.

4. Any charges related to the sharing of the cost of universal service obligations shall be unbundled and identified separately for each undertaking. Such charges shall not be imposed or collected from undertakings that are not providing services in the territory of the Member State that has established the sharing mechanism.

A6.65 To further clarify the meaning and purpose of those provisions, the following recitals of the USD's preamble should, in particular, be noted:

(1) The liberalisation of the telecommunications sector and increasing competition and choice for communications services go hand in hand with parallel action to create a harmonised regulatory framework which secures the delivery of universal service. The concept of universal service should evolve to reflect advances in technology, market developments and changes in user demand. The regulatory framework established for the full liberalisation of the telecommunications market in 1998 in the Community defined the minimum scope of universal service obligations and established rules for its costing and financing.

...

(4) Ensuring universal service (that is to say, the provision of a defined minimum set of services to all end-users at an affordable price) may involve the provision of some services to some end-users at prices that depart from those resulting from normal market conditions. However, compensating undertakings designated to provide such services in such circumstances need not result in any distortion of competition, provided that designated undertakings are compensated for the specific net cost involved and provided that the net cost burden is recovered in a competitively neutral way.

...

(7) Member States should continue to ensure that the services set out in Chapter II are made available with the quality specified to all end-users in their territory, irrespective of their geographical location, and, in the light of specific national conditions, at an affordable price. Member States may, in the context of universal service obligations and in the light of national conditions, take specific measures for consumers in rural or geographically isolated areas to ensure their access to the services set out in the Chapter II and the affordability of those services, as well as ensure under the same conditions this access, in particular for the elderly, the disabled and for people with special social needs. Such measures may also include measures directly targeted at consumers with special social needs providing support to identified consumers, for example by means of specific measures, taken after the examination of individual requests, such as the paying off of debts.

...

(10) Affordable price means a price defined by Member States at national level in the light of specific national conditions, and may involve setting common tariffs irrespective of location or special tariff options to deal with the needs of low-income users. Affordability for individual consumers is related to their ability to monitor and control their expenditure.

(11) Directory information and a directory enquiry service constitute an essential access tool for publicly available telephone services and form part of the universal service obligation. Users and consumers desire comprehensive directories and a directory enquiry service covering all listed telephone subscribers and their numbers (including fixed and mobile

numbers) and want this information to be presented in a non-preferential fashion. Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (1) ensures the subscribers' right to privacy with regard to the inclusion of their personal information in a public directory.

...

(18) Member States should, where necessary, establish mechanisms for financing the net cost of universal service obligations in cases where it is demonstrated that the obligations can only be provided at a loss or at a net cost which falls outside normal commercial standards. It is important to ensure that the net cost of universal service obligations is properly calculated and that any financing is undertaken with minimum distortion to the market and to undertakings, and is compatible with the provisions of Articles 87 and 88 of the Treaty.

...

(23) The net cost of universal service obligations may be shared between all or certain specified classes of undertaking. Member States should ensure that the sharing mechanism respects the principles of transparency, least market distortion, non-discrimination and proportionality. Least market distortion means that contributions should be recovered in a way that as far as possible minimises the impact of the financial burden falling on end-users, for example by spreading contributions as widely as possible.

...

(25) Communications markets continue to evolve in terms of the services used and the technical means used to deliver them to users. The universal service obligations, which are defined at a Community level, should be periodically reviewed with a view to proposing that the scope be changed or redefined. Such a review should take account of evolving social, commercial and technological conditions and the fact that any change of scope should be subject to the twin test of services that become available to a substantial majority of the population, with a consequent risk of social exclusion for those who can not afford them. Care should be taken in any change of the scope of universal service obligations to ensure that certain technological choices are not artificially promoted above others, that a disproportionate financial burden is not imposed on sector undertakings (thereby endangering market developments and innovation) and that any financing burden does not fall unfairly on consumers with lower incomes. Any change of scope automatically means that any net cost can be financed via the methods permitted in this Directive. Member States are not permitted to impose on market players financial contributions which relate to measures which are not part of universal service obligations. Individual Member States remain free to impose special measures (outside the scope of universal service obligations) and finance them in conformity with Community law but not by means of contributions from market players.

A6.66 Outside the context of the provision of universal service in Chapter II of the USD is the provision of certain consumer protection matters set out in Chapter IV. (Chapter III, which concern regulatory controls that may be imposed on undertakings with SMP in specific retail markets, is not relevant for the purposes of this dispute.) By way of overview, those consumer protection matters are broadly as set out in **Table A6.1** below:

Table A6.1: The consumer protection matters in Chapter IV of the USD

Provision in Chapter IV	Consumer protection measure
Article 20	<ul style="list-style-type: none"> • consumers subscribing to services providing connection or access to the public telephone network as well as to ECS have a right to a

	<ul style="list-style-type: none"> contract • minimum information to be included in such a contract • subscribers right to withdrawal from contracts without penalties • subscribers right to notice of modifications to contracts
Article 21	<ul style="list-style-type: none"> • consumers of PATS have a right to transparent and up-to-date information on applicable tariffs and prices and on standard terms and conditions
Article 22	<ul style="list-style-type: none"> • consumers of publicly available ECS to comparable, adequate and up-to-date information on the quality of such services by providers
Article 23	<ul style="list-style-type: none"> • providers of the public telephone network and PATS at fixed locations to ensure network integrity
Article 24	<ul style="list-style-type: none"> • interoperability of consumer digital TV equipment to be ensured
Article 25	<ul style="list-style-type: none"> • [SEE BELOW]
Article 26	<ul style="list-style-type: none"> • consumers of PATS and public pay telephones are to be able to call emergency services using the single European emergency call number '112'
Article 27	<ul style="list-style-type: none"> • the '00' code is the standard international access code • European access codes may be used, but consumers of PATS must kept fully informed
Article 28	<ul style="list-style-type: none"> • end-users from other Member States should, in general, be able to access non-geographic numbers
Article 29	<ul style="list-style-type: none"> • undertakings operating public telephone networks to make available to end-users certain additional facilities, where NRAs so require
Article 30	<ul style="list-style-type: none"> • PATS' subscribers right to number portability
Article 31	<ul style="list-style-type: none"> • Member States' powers to impose 'must carry' obligations for the transmission of specified radio and TV broadcast channels and services

A6.67 It is, as part of that context, that Chapter IV of the USD prescribes (in Article 25) three particular end-user rights in relation to directory information, namely:

- PATS subscribers have a right to an entry in a *universal service* directory (Article 25(1));
- end-users provided with a connection to the public telephone network must be able to access operator assistance services and *universal service* DQ services (Article 25(3)); and
- end-users in one Member State must not by regulation be prevented from accessing directly the DQ service in another Member State (Article 25(4)).

A6.68 To ensure that a PATS subscriber's right to an entry in a *universal service* directory referred to in Article 5(1)(a) is in reality made possible, Article 25(2) provides a mechanism, so that all undertakings which assign telephone numbers 'to subscribers' are required to provide certain directory information (which is referred to as 'relevant information' in that Article). In this respect (as well as in the case of the three above-mentioned end-user rights), the end-user(s) in question are further protected, so that these matters apply subject to compliance with data protection requirements.

A6.69 The above is clear from the plain reading of **Article 25 of the USD**, which provides:

Article 25

Operator assistance and directory enquiry services

1. Member States shall ensure that subscribers to publicly available telephone services have the right to have an entry in the publicly available directory referred to in Article 5(1)(a).
2. Member States shall ensure that all undertakings which assign telephone numbers to subscribers meet all reasonable requests to make available, for the purposes of the provision of publicly available directory enquiry services and directories, the relevant information in an agreed format on terms which are fair, objective, cost oriented and non-discriminatory.
3. Member States shall ensure that all end-users provided with a connection to the public telephone network can access operator assistance services and directory enquiry services in accordance with Article 5(1)(b).
4. Member States shall not maintain any regulatory restrictions which prevent end-users in one Member State from accessing directly the directory enquiry service in another Member State.
5. Paragraphs 1, 2, 3 and 4 apply subject to the requirements of Community legislation on the protection of personal data and privacy and, in particular, Article 11 of Directive 97/66/EC.

A6.70 As regards Chapter V of the USD, it suffices to note that Article 32 of the USD makes it plain that the USD does not seek to completely harmonise throughout the Community the regulation as to (end-user) services other than those mentioned in it. That said, in respect of any such 'additional services' that are made publicly available in a particular Member State, Article 32 provides that, apart from the universal services covered by Chapter II of the USD, no compensation mechanism involving specific undertakings may be imposed in respect of them.

A6.71 Article 32 reads:

Article 32

Additional mandatory services

Member States may decide to make additional services, apart from services within the universal service obligations as defined in Chapter II, publicly available in its own territory but, in such circumstances, no compensation mechanism involving specific undertakings may be imposed.

- A6.72 The 46th recital to the USD's preamble provides an indication as to the types of service that the legislative draftsman anticipates might become relevant in this context; it reads:

(46) Where a Member State seeks to ensure the provision of other specific services throughout its national territory, such obligations should be implemented on a cost efficient basis and outside the scope of universal service obligations. Accordingly, Member States may undertake additional measures (such as facilitating the development of infrastructure or services in circumstances where the market does not satisfactorily address the requirements of end-users or consumers), in conformity with Community law. As a reaction to the Commission's e-Europe initiative, the Lisbon European Council of 23 and 24 March 2000 called on Member States to ensure that all schools have access to the Internet and to multimedia resources.

Directive on Privacy and Electronic Communications

- A6.73 The Directive on Privacy and Electronic Communications¹⁴⁷ entered into force on 31 July 2002, when it was published in the Official Journal of the European Communities, but which Directive had to be transposed by UK domestic law before 31 October 2003. This Directive repealed and replaced the Telecoms Data Protection Directive.

- A6.74 As regards directories, Article 12 of this Directive provides:

Article 12

Directories of subscribers

1. Member States shall ensure that subscribers are informed, free of charge and before they are included in the directory, about the purpose(s) of a printed or electronic directory of subscribers available to the public or obtainable through directory enquiry services, in which their personal data can be included and of any further usage possibilities based on search functions embedded in electronic versions of the directory.
2. Member States shall ensure that subscribers are given the opportunity to determine whether their personal data are included in a public directory, and if so, which, to the extent that such data are relevant for the purpose of the directory as determined by the provider of the directory, and to verify, correct or withdraw such data. Not being included in a public subscriber directory, verifying, correcting or withdrawing personal data from it shall be free of charge.
3. Member States may require that for any purpose of a public directory other than the search of contact details of persons on the basis of their name and, where necessary, a minimum of other identifiers, additional consent be asked of the subscribers.
4. Paragraphs 1 and 2 shall apply to subscribers who are natural persons. Member States shall also ensure, in the framework of Community law and applicable national

¹⁴⁷ Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ L 201, 31.7.2002, p.37.

legislation, that the legitimate interests of subscribers other than natural persons with regard to their entry in public directories are sufficiently protected.

A6.75 The 38th and 39th recitals to that Directive's preamble elaborate on those provisions as follows:

(38) Directories of subscribers to electronic communications services are widely distributed and public. The right to privacy of natural persons and the legitimate interest of legal persons require that subscribers are able to determine whether their personal data are published in a directory and if so, which. Providers of public directories should inform the subscribers to be included in such directories of the purposes of the directory and of any particular usage which may be made of electronic versions of public directories especially through search functions embedded in the software, such as reverse search functions enabling users of the directory to discover the name and address of the subscriber on the basis of a telephone number only.

(39) The obligation to inform subscribers of the purpose(s) of public directories in which their personal data are to be included should be imposed on the party collecting the data for such inclusion. Where the data may be transmitted to one or more third parties, the subscriber should be informed of this possibility and of the recipient or the categories of possible recipients. Any transmission should be subject to the condition that the data may not be used for other purposes than those for which they were collected. If the party collecting the data from the subscriber or any third party to whom the data have been transmitted wishes to use the data for an additional purpose, the renewed consent of the subscriber is to be obtained either by the initial party collecting the data or by the third party to whom the data have been transmitted.

The Current UK Framework

General background

- A6.76 The requirements of the current package of European Community directives discussed above were transposed into UK law by the 2003 Act, the relevant provisions of which entered into force on 25 July 2003. Prior to this date, in 2002, Ofcom was established as a statutory corporation by the Office of Communications Act 2002. On 29 December 2003, Ofcom took over the responsibilities and assumed the powers of the five former regulators it replaced, including the DGT and therefore Oftel.
- A6.77 Pursuant to Section 1 of the 2003 Act, a number of functions were either transferred or conferred on Ofcom, including functions conferred on Ofcom by or under the 2003 Act. The latter include Ofcom's powers under Section 45 of the 2003 Act to set conditions of entitlement to provide ECNs, ECSs and so on, which powers were exercised by the DGT until Ofcom took over on 29 December 2003.
- A6.78 However, whilst the 2003 Act empowered the DGT (and subsequently Ofcom) to set conditions of entitlement, the scheme of the 2003 Act and, in particular its repeal of Section 7 of the 1984 Act, had the effect of abolishing the previous licensing regime discussed above. Indeed, the abolition of licensing was one of the requirements under the new package of directives, so as to ensure that the provision of all ECSs and ECNs is generally authorised and to put an end to the system of explicit decisions or any other administrative acts (such as licences) by national regulatory authorities prior to being allowed to provide ECSs and ECNs.
- A6.79 In other words, in the UK, the previous licensing regime under the 1984 Act has been replaced by a so-called General Authorisation regime. Thus, everyone is generally authorised to provide ECSs and ECNs in the UK. However, that General Authorisation is subject to any obligations imposed on a person under a condition of

entitlement. All providers of ECSs and ECNs can therefore enter the market as they wish, although they have to comply with any obligations imposed on them.

A6.80 As regards the conditions of entitlement, Section 45 of the 2003 Act confers powers to set the following types of such conditions:

- (1) a general condition (“**GC**”);
- (2) a universal service condition (“**USC**”);
- (3) an access-related condition;
- (4) a privileged supplier condition;
- (5) an SMP condition, which can be either an SMP services condition or an SMP apparatus condition.

A6.81 For the purposes of the present dispute, the powers to set GCs and USCs are the relevant ones. According to Section 45(3) of the 2003 Act, a GC may contain only provisions authorised or required by Sections 51, 52, 57, 58 or 64 of the 2003 Act, whereas a USC may, according to Section 45(4) of the 2003 Act, contain only provisions authorised or required by Section 67 of the 2003 Act. (Further details about these enabling powers under Section 45 of the 2003 Act are set out below.)

A6.82 Section 46 of the 2003 Act then prescribes the person to such conditions may apply, which reads, so far as material to this dispute, as follows:

- (1) A condition set under section 45 is not to be applied to a person except in accordance with the following provisions of this section.
- (2) A general condition may be applied generally—
 - (a) to every person providing an electronic communications network or electronic communications service; or
 - (b) to every person providing such a network or service of a particular description specified in the condition.
- (3) A universal service condition, access-related condition, privileged supplier condition or SMP condition may be applied to a particular person specified in the condition.
- ...
- (5) The particular person to whom a universal service condition is applied—
 - (a) except in the case of a condition relating to matters mentioned in subsection (3) of section 66, must be a communications provider designated in accordance with regulations under that section; and
 - (b) in that excepted case, must be a communications provider so designated or a person who is not such a provider but who is so designated for the purposes only of conditions relating to those matters.

A6.83 Importantly, the GCs therefore apply to anyone who is providing an ECS or ECN, or a particular description of an ECN or ECS specified in the GC in question. Therefore, it is the responsibility of each and every provider to ensure compliance with its GC obligations upon such provision as no individual notification will be given

to it by Ofcom that certain obligations apply to it. Failure to comply with such obligations is subject to enforcement action by Ofcom. Accordingly, a provider must consider whether it falls within the definition of a "Communications Provider", which term is defined separately for each and every GC.

- A6.84 In contrast, the USCs may only apply to a designated universal service provider under Section 66 of the 2003 Act, which (so far as is material to this dispute) reads:

66 Designation of universal service providers

- (1) OFCOM may by regulations make provision for the designation of the persons to whom universal service conditions are to be applicable.
- (2) Subject to subsection (3), those regulations are not to authorise the designation of a person other than a communications provider.
- (3) The regulations may provide for a person other than a communications provider to be designated for the purposes only of conditions relating to—
- (a) the supply of directories capable of being used in connection with the use of an electronic communications network or electronic communications service; and
- (b) the making available of directory enquiry facilities capable of being used for purposes connected with the use of such a network or service.
- ...

- A6.85 In respect of the USCs currently in force, BT was, in fact, designated by the DGT as a universal service provider in a notification¹⁴⁸ (the "**USC notification**") under regulation 4(10) of the Electronic Communications (Universal Service) Regulations 2003¹⁴⁹ (the "**Universal Service Regulations**").

- A6.86 These Regulations were made by the Secretary of State under Section 2(2) of the European Communities Act 1972. However, the transitional provisions in paragraph 7 of Schedule 18 to the 2003 Act have the effect of treating that designation as a designation in accordance with regulations under Section 66, because they provide:

Pre-commencement proposals relating to universal service matters

- 7 (1) Where a proposal for the designation of a person as a universal service provider has been confirmed under regulation 4(10) of the Electronic Communications (Universal Service) Regulations 2003 (SI 2003/33), the designation is to have effect after the commencement of section 66 of this Act as a designation in accordance with regulations under that section.
- (2) Where in any person's case a proposal to set a condition has been confirmed under regulation 4(10) or 5(4) of those regulations, that condition is to have effect after the commencement of that section as a condition set by OFCOM under section 45 of this Act and applied to that person.

¹⁴⁸ See document entitled 'Designation of BT and Kingston as universal service providers, and the specific universal service conditions - A statement and Notification issued by the Director General of Telecommunications on the implementation of the Universal Service Directive', published by Ofcom on 22 July 2003, see at: http://www.ofcom.org.uk/static/archive/ofcom/publications/eu_directives/2003/uso0703.pdf

¹⁴⁹ S.I. 2003/33.

(3) Where an appeal under regulation 6 of those regulations against a decision under them has been brought but not concluded before the commencement of section 192 of this Act—

(a) that appeal is to be stayed or sisted as from the commencement of the section; but

(b) the appellant is to have a new right of appeal under the section against the decision (as it has effect by virtue of this paragraph) as if—

(i) it were the corresponding decision made by OFCOM under Chapter 1 of Part 2 of this Act; and

(ii) it had been made immediately after the commencement of the section.

(4) Tribunal rules (within the meaning of Chapter 3 of Part 2 of this Act) may, in relation to an appeal stayed or sisted under sub-paragraph (3), make transitional provision for requiring steps taken and things done for the purposes of that appeal to be taken into account, to the extent set out in the rules, in the case of an appeal brought by virtue of paragraph (b) of that sub-paragraph.

A6.87 Under Section 47 of the 2003 Act, Ofcom can only set conditions where it is satisfied that a condition is:

(a) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;

(b) not such as to discriminate unduly against particular persons or against a particular description of persons;

(c) proportionate to what the condition or modification is intended to achieve; and

(d) in relation to what it is intended to achieve, transparent.

A6.88 Section 48 of the 2003 Act sets out the procedure for setting, modifying and revoking conditions of entitlement, such GCs and USCs.

A6.89 In the carrying out of its functions generally, Ofcom's principal duties are set out in Section 3 of the 2003 Act. Also, Ofcom's overriding duties, should a conflict arise with that principal duty, are those set out in Section 4 of the 2003 Act, where Ofcom carries out its functions under Chapter 1 of Part 2 (which concerns, for instance, the setting of GCs and USCs) and under Chapter 3 of Part 2 in relation to disputes referred to Ofcom under Section 185 of the 2003 Act. Sections 3 and 4 of the 2003 Act read as follows:

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.

...

(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 practice¹⁵⁰.
- (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 the investment and innovation in relevant markets;
- ...
- (k) the opinions of consumers in relevant markets and of members of the public generally;
- ...
- (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.
- ...
- (14) In this section—
- “citizens” means all members of the public in the United Kingdom;
- “communications matters” means the matters in relation to which OFCOM have functions;
- “general duties”, in relation to OFCOM, means—
- (a) their duties under subsections (1) to (5); and (b) the duty which, under section 107(5), is to rank equally for the purposes of subsections (6) and (7) with their duties under this section;
- (b) “relevant markets” means markets for any of the services, facilities, apparatus or directories in relation to which OFCOM have functions.

¹⁵⁰ In this context, it is to be noted that Ofcom has set out seven Regulatory Principles, namely (i) Ofcom will regulate with a clearly articulated and publicly reviewed annual plan, with stated policy objectives; (ii) Ofcom will intervene where there is a specific statutory duty to work towards a public policy goal which markets alone cannot achieve; (iii) Ofcom will operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required; (iv) Ofcom will strive to ensure its interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome; (v) Ofcom will always seek the least intrusive regulatory mechanisms to achieve its policy objectives; (vi) Ofcom will research markets constantly and will aim to remain at the forefront of technological understanding; and (vii) Ofcom will consult widely with all relevant stakeholders and assess the impact of regulatory action before imposing regulation upon a market: see <http://www.ofcom.org.uk/about/sdrp/>

4 Duties for the purpose of fulfilling Community obligations

...

(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 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 set out in subsection (10) as is necessary for—

(a) facilitating service interoperability; and

(b) securing freedom of choice for the customers of communications providers.

...

- A6.90 As regards to the above-mentioned enabling powers under Section 45(3) of the 2003 Act relevant to this dispute, GC8 contains provisions authorised or required by Section 51(1)(a), whereas GC19 contains provisions authorised or required by Section 58(1)(d), which sections read:

General conditions: subject-matter

51 Matters to which general conditions may relate

(1) Subject to sections 52 to 64, the only conditions that may be set under section 45 as general conditions are conditions falling within one or more of the following paragraphs—

(a) conditions making such provision as OFCOM consider appropriate for protecting the interests of the end-users of public electronic communications services;

...

(2) The power under subsection (1)(a) to set conditions for protecting the interests of the end-users of public electronic communications services includes power to set conditions for that purpose which—

(a) relate to the supply, provision or making available of goods, services or facilities in association with the provision of public electronic communications services; and

(b) give effect to Community obligations to provide protection for such end-users in relation to the supply, provision or making available of those goods, services or facilities.

...

58 Conditions about allocation and adoption of numbers

(1) General conditions may include conditions which—

...

(d) impose requirements on a communications provider in connection with the adoption by him of telephone numbers;

...

(3) The conditions that may be set under subsection (1)(d) include conditions imposing requirements with respect to the provision of information for purposes connected with—

(a) the compilation of directories; and

(b) the provision of directory enquiry facilities.

- A6.91 It has already been mentioned above that the enabling power to set a USC is that it may only contain provisions authorised or required by Section 67 of the 2003 Act, which reads:

67 Subject-matter of universal service conditions

(1) OFCOM may set any such universal service conditions as they consider appropriate for securing compliance with the obligations set out in the universal service order.

(2) Universal service conditions applied to a person must include a condition requiring him to publish information about his performance in complying with the universal service conditions that apply to him.

- (3) A condition set in accordance with subsection (2) must contain provision which—
- (a) requires information published in accordance with it to be updated from time to time and published again;
 - (b) requires information so published to satisfy the requirements that OFCOM consider appropriate for securing that it is adequate; and
 - (c) requires information so published to be framed by reference to the quality of service parameters, definitions and measurement methods for the time being set out in Annex III to the Universal Service Directive.
- (4) A condition set in accordance with that subsection may impose requirements as to—
- (a) the times at which information published in accordance with it is to be published; and
 - (b) the manner in which that information is to be published.
- (5) Universal service conditions may impose an obligation on a person to whom they apply to do one or both of the following, if required to do so by OFCOM—
- (a) to make facilities available for enabling information published in pursuance of a condition applied to that person under subsection (2) to be independently audited;
 - (b) to meet the costs of any independent auditing of that information that is required by OFCOM.
- (6) The reference in subsection (5) to the independent auditing of information is a reference to its being audited by a qualified auditor—
- (a) for accuracy; and
 - (b) for its usefulness in the making of comparisons with information published by other designated universal service providers.
- (7) Universal service conditions may impose performance targets on designated universal service providers with respect to any of the matters in relation to which obligations may be imposed by such conditions.
- (8) In setting a universal service condition, OFCOM must have regard to any guidance about matters relating to pricing that is contained in the universal service order.
- (9) In this section “qualified auditor” means a person eligible, in accordance with Part 2 of the Companies Act 1989 (c 40), for appointment as a company auditor.

A6.92 The reference in Section 67(1) to the securing of compliance with the obligations set out in the ‘universal service order’ is, pursuant to Section 151(1) of the 2003 Act, a reference to the order for the time being in force under Section 65.

A6.93 Section 65 reads:

Universal service conditions

65 Obligations to be secured by universal service conditions

(1) The Secretary of State must by order (“the universal service order”) set out the extent to which the things falling within subsection (2) must, for the purpose of securing compliance with Community obligations for the time being in force, be provided, made available or supplied throughout the United Kingdom.

- (2) Those things are—
- (a) electronic communications networks and electronic communications services;
 - (b) facilities capable of being made available as part of or in connection with an electronic communications service;
 - (c) particular methods of billing for electronic communications services or of accepting payment for them;
 - (d) directories capable of being used in connection with the use of an electronic communications network or electronic communications service; and
 - (e) directory enquiry facilities capable of being used for purposes connected with the use of such a network or service.
- (3) The universal service order may contain guidance about matters relating to the pricing of things that the order says must be provided, made available or supplied.
- (4) Before making or varying the universal service order, the Secretary of State must consult OFCOM and such other persons as he considers appropriate.

A6.94 The order for the time being in force since 25 July 2003 under that section is the Electronic Communications (Universal Service) Order 2003¹⁵¹ (the “**Services Order**”), which reads (so far as is material to this dispute):

Universal service obligations

3. The extent to which the things falling within section 65(2) of the Act must be provided, made available or supplied throughout the United Kingdom is set out in the Schedule to this Order.

Guidance on the pricing of universal service obligations

4. The matters set out in the Schedule should be offered at prices that are:

- (a) affordable for all end-users; and
- (b) uniform throughout the United Kingdom, unless OFCOM have determined that there is clear justification for not doing so.

SCHEDULE

Article 3

...

Directories

2.—(1) At least one comprehensive directory shall be made available to end-users in a form approved by OFCOM, whether printed or electronic, or both, and it shall be updated at least once a year.

(2) This directory shall comprise, subject to the provisions of the Telecommunications (Data Protection and Privacy) Regulations 1999, the details of all subscribers of publicly available

¹⁵¹ S.I. 2003/1904.

telephone services and their telephone numbers, including fixed and mobile telephone numbers.

Directory Enquiry Facilities

3.—(1) At least one comprehensive telephone directory enquiry facility shall be made available to end-users, including users of public pay telephones.

(2) This facility shall comprise, subject to the provisions of the Telecommunications (Data Protection and Privacy) Regulations 1999, the details of all subscribers of publicly available telephone services and their telephone numbers, including fixed and mobile telephone numbers.

- A6.95 In other words, the effect of paragraph 7(2) of Schedule 18 to the 2003 Act, read in light of above-mentioned Articles and paragraphs in the Schedule to the Services Order as well as Section 408(5) of the 2003 Act, is that the current USCs set by the DGT are to have effect after 29 December 2003 as USCs set by Ofcom under Section 45 of this Act and applied to BT.
- A6.96 The 2003 Act then sets out certain provisions that are pertinent to the setting of USCs and which will be considered more carefully in other Sections of this document. These provisions, which cover tariffs, directories and DQ services as well as financing the obligations imposed under the USCs, read:

68 Tariffs etc for universal services

(1) It shall be the duty of OFCOM—

- (a) to keep under review universal service tariffs; and
- (b) to monitor changes to those tariffs.

(2) Universal service conditions may require one or more of the following—

- (a) the use of a common tariff, or of common tariffs, in relation to anything mentioned in section 65(2);
- (b) the use, in such cases as may be specified or described in the conditions, of such special tariffs in relation to anything so mentioned as may be so specified or described;
- (c) the fixing of tariffs used in accordance with the conditions by the use of such methods, and by reference to such methods of computing costs, as may be so specified or described.

(3) Universal service conditions must secure that the terms on which a person is provided with anything required by the universal service order do not require him—

- (a) to pay for an unnecessary additional service; or
- (b) to pay, in respect of anything required by the order, any amount that is attributable to the provision to him of such a service.

(4) The references in subsection (3), in relation to a person, to an unnecessary additional service are references to anything the provision of which—

- (a) he has to accept by reason of his being provided, at his request, with something required by the order (“the requested service”); and

(b) is not necessary for the purpose of providing him with the requested service.

(5) It shall be the duty of OFCOM, in setting a universal service condition about universal service tariffs, to have regard to anything ascertained by them in the performance of their duty under subsection (1).

(6) References in this section to a universal service tariff are references to any of the tariffs used by designated universal service providers in relation to the things for the time being required by the universal service order.

(7) References in this section to providing a person with anything include references to making it available or supplying it to him.

(8) In this section "tariff" includes a pricing structure.

69 Directories and directory enquiry facilities

(1) This section applies where universal service conditions require a designated universal service provider—

(a) to supply a directory capable of being used in connection with the use of an electronic communications network or electronic communications service; or

(b) to make available directory enquiry facilities capable of being used for purposes connected with use of such a network or service.

(2) The universal service conditions applied to the provider must include the conditions that OFCOM consider appropriate for securing that the provider does not unduly discriminate against a source of relevant information—

(a) in the compiling of the directory or the answering of directory enquiries; or

(b) in the treatment in the directory, or for the purposes of the facilities, of any relevant information from that source.

(3) In this section—

(a) references to relevant information are references to information provided for inclusion in the directory or for use in the answering of directory enquiries; and

(b) references to a source of relevant information are references to a communications provider or designated universal service provider who provides relevant information.

70 Review of compliance costs

(1) OFCOM may from time to time review the extent (if any) of the financial burden for a particular designated universal service provider of complying in relation to any matter with any one or more of the universal service conditions applied to him.

(2) Where—

(a) regulations under section 66 require the financial burden of so complying to be taken into account in determining whom to designate, and

(b) the regulations provide for a particular method of calculating that burden to be used for the purposes of that determination,

that must be the method of calculation applied on a review under this section.

- (3) Where subsection (2) does not apply, the financial burden of so complying is to be taken to be the amount calculated by OFCOM to be the net cost of compliance after allowing for market benefits accruing to the designated universal service provider from—
- (a) his designation; and
 - (b) the application to him of universal service conditions.
- (4) After carrying out a review under this section OFCOM must either—
- (a) cause the calculations made by them on the review to be audited by a person who appears to them to be independent of designated universal service providers; or
 - (b) themselves carry out an audit of those calculations.
- (5) OFCOM must ensure, in the case of every audit carried out under subsection (4), that a report on the audit—
- (a) is prepared; and
 - (b) if not prepared by OFCOM, is provided to them.
- (6) It shall be the duty of OFCOM, in the case of every review under this section, to publish—
- (a) their conclusions on the review; and
 - (b) a summary of the report of the audit which was carried out as respects the calculations made for the purposes of that review.
- (7) The publication of anything under subsection (6) must be a publication in such manner as OFCOM consider appropriate for bringing it to the attention of the persons who, in their opinion, are likely to be affected by it.

71 Sharing of burden of universal service obligations

- (1) This section applies where OFCOM—
- (a) have concluded, on a review under section 70, that complying in relation to any matter with universal service conditions imposes a financial burden on a particular designated universal service provider; and
 - (b) have published that conclusion in accordance with that section.
- (2) OFCOM must determine, in the case of the designated universal service provider, whether they consider it would be unfair for that provider to bear, or to continue to bear, the whole or any part of so much of the burden.
- (3) If—
- (a) OFCOM determine that it would be unfair for the designated universal service provider to bear, or to continue to bear, the whole or a part of the burden, and
 - (b) an application for a determination under this subsection is made to OFCOM by that provider,

OFCOM may determine that contributions are to be made by communications providers to whom general conditions are applicable for meeting that burden.

- (4) The making of any of the following must be in accordance with regulations made by OFCOM—
- (a) a determination by OFCOM of the extent of the financial burden that exists for the designated universal service provider of complying in relation to any matter with universal service conditions;
 - (b) an application for the purposes of subsection (3)(b);
 - (c) a determination by OFCOM of whether it is or would be unfair for the designated universal service provider to bear, or to continue to bear, the burden of complying in relation to any matter with universal service conditions;
 - (d) a determination of the extent (if any) to which that is or would be unfair.
- (5) The assessment, collection and distribution of contributions under subsection (3) is not to be carried out except in accordance with a mechanism provided for in a scheme contained in regulations made by OFCOM.
- (6) It shall be the duty of OFCOM to exercise their power to make regulations under this section in the manner which they consider will secure that the assessment, collection and distribution of contributions under subsection (3) is carried out—
- (a) in an objective and transparent manner;
 - (b) in a manner that does not involve, or tend to give rise to, any undue discrimination against particular communications providers or particular designated universal service providers, or against a particular description of them; and
 - (c) in a manner that avoids, or (if that is impracticable) at least minimises, any distortion of competition or of customer demand.
- (7) Regulations made by OFCOM under this section may provide for a scheme containing the provision mentioned in subsection (5), and for any fund set up for the purposes of such a scheme, to be administered either—
- (a) by OFCOM; or
 - (b) by such other person as may be specified in the regulations.
- (8) A person other than OFCOM is not to be specified in regulations under this section as the administrator of such a scheme or fund unless he is a person who OFCOM are satisfied is independent of both—
- (a) the persons who are designated universal service providers; and
 - (b) communications providers to whom general conditions are applicable.
- (9) Section 403 applies to the powers of OFCOM to make regulations under this section.
- 72 Report on sharing mechanism**
- (1) This section applies where regulations under section 71 provide for a scheme for the assessment, collection and distribution of contributions under subsection (3) of that section.
- (2) OFCOM must prepare and publish a report setting out, in relation to the period to which it applies—

- (a) every determination by OFCOM that has had effect in relation to a time in that period as a determination of the costs of providing anything contained in the universal service order;
 - (b) the market benefits for each designated universal service provider that have accrued to him during that period from his designation and from the application to him of universal service conditions; and
 - (c) the contribution made under section 71(3) by every person who has made a contribution during that period.
- (3) The first report under this section must be prepared in relation to the period of twelve months beginning with the coming into force of the first regulations to be made under section 71.
- (4) Every subsequent report must be prepared in relation to the period of twelve months beginning with the end of the period to which the previous report applied.
- (5) Every report under this section—
- (a) must be prepared as soon as practicable after the end of the period to which it is to apply; and
 - (b) must be published as soon as practicable after its preparation is complete.
- (6) OFCOM are not required under this section—
- (a) to publish any matter that is confidential in accordance with subsection (7) or (8); or
 - (b) to publish anything that it would not be reasonably practicable to publish without disclosing such a matter.
- (7) A matter is confidential under this subsection if—
- (a) it relates specifically to the affairs of a particular body; and
 - (b) publication of that matter would or might, in OFCOM's opinion, seriously and prejudicially affect the interests of that body.
- (8) A matter is confidential under this subsection if—
- (a) it relates to the private affairs of an individual; and
 - (b) publication of that matter would or might, in OFCOM's opinion, seriously and prejudicially affect the interests of that individual.
- (9) The publication of a report under this section must be a publication in such manner as OFCOM consider appropriate for bringing it to the attention of the persons who, in their opinion, are affected by the matters to which it relates.

A6.97 As regards data protection issues, Telecoms Data Protection Regulations were revoked, and replaced by the Privacy and Electronic Communications (EC

Directive) Regulations 2003¹⁵², which were made on 18 September 2003 and came into force on 11 December 2003.

A6.98 Regulation 18 of these Regulations sets out provisions concerning directories, as follows:

Directories of subscribers

18.—(1) This regulation applies in relation to a directory of subscribers, whether in printed or electronic form, which is made available to members of the public or a section of the public, including by means of a directory enquiry service.

(2) The personal data of an individual subscriber shall not be included in a directory unless that subscriber has, free of charge, been—

(a) informed by the collector of the personal data of the purposes of the directory in which his personal data are to be included, and

(b) given the opportunity to determine whether such of his personal data as are considered relevant by the producer of the directory should be included in the directory.

(3) Where personal data of an individual subscriber are to be included in a directory with facilities which enable users of that directory to obtain access to that data solely on the basis of a telephone number—

(a) the information to be provided under paragraph (2)(a) shall include information about those facilities; and

(b) for the purposes of paragraph (2)(b), the express consent of the subscriber to the inclusion of his data in a directory with such facilities must be obtained.

(4) Data relating to a corporate subscriber shall not be included in a directory where that subscriber has advised the producer of the directory that it does not want its data to be included in that directory.

(5) Where the data of an individual subscriber have been included in a directory, that subscriber shall, without charge, be able to verify, correct or withdraw those data at any time.

(6) Where a request has been made under paragraph (5) for data to be withdrawn from or corrected in a directory, that request shall be treated as having no application in relation to an edition of a directory that was produced before the producer of the directory received the request.

(7) For the purposes of paragraph (6), an edition of a directory which is revised after it was first produced shall be treated as a new edition.

(8) In this regulation, “telephone number” has the same meaning as in section 56(5) of the Communications Act 2003 but does not include any number which is used as an internet domain name, an internet address or an address or identifier incorporating either an internet domain name or an internet address, including an electronic mail address.

The relevant GCs

A6.99 On 22 May 2002, the DGT published a consultation document entitled ‘*The General Conditions of Entitlement*’¹⁵³ (the “**first GC consultation**”). That consultation set out

¹⁵² S.I. 2003/2426.

the DGT's initial proposals for a set of draft GCs to apply to communications providers upon the UK's implementation of the new package of EC directives in order to provide ECNs and ECSs of a specified type or description.

- A6.100 In the Summary (at paragraph S.7) of that document, the DGT made it clear that, whilst the approach to the draft GCs had generally been to maintain and reflect the policy position under the PTO licence obligations, certain changes were proposed to reflect obligations required under the new directives. In particular, one main difference pointed out in that document (at paragraph 1.4 under the sub-heading 'Scope of the new EC Directives') was the broader scope of the new directives, which difference had therefore been reflected in the GCs themselves, namely:

1.4. The new Directives are broader in scope than previous EC legislation in that they apply to 'electronic communications' as opposed to 'telecommunications'. The obligations contained in the new Directives are intended to apply to the provision of an electronic communications network, or an electronic communications service, or an associated facility (see clause 22 of the Communications Bill for definitions of these terms). This broader approach means that traditional distinctions between, for example, licensed network operators and unlicensed resellers (or 'systemless service providers') no longer apply. Resellers will, in general, be providing electronic communication services, and therefore will be subject to the same regulatory regime as those existing network operators who are also providing electronic communication services. Further, providers of electronic communication networks and services which go beyond voice telephony (eg internet service providers) will all be subject to the same framework. All providers of communications networks or services will be known as 'communications providers' in the UK.

- A6.101 The first GC consultation (at paragraphs 1.8 and 1.9 of that document) also explained that, unlike individual specific conditions (such as those imposed on communications providers following universal service or SMP designations), the GCs would apply to *all* communications providers, or all communications providers of a particular type, depending on the nature of the obligation.
- A6.102 Then, in Chapter 3 of the first GC consultation, the DGT sets out a brief commentary on each proposed GC, including how the condition would fit within the terms of the Annex to the Authorisation Directive and the Communications Bill (as it was then). Paragraphs 3.19 to 3.21 are headed "Condition 8: Operator assistance, directories and directory enquiry facilities" and read:

3.19 This condition requires all providers of publicly available telephone services to ensure that any end users of such services can access operator assistance services and directory enquiry facilities. This condition is also needed to comply with Article 5(1)(a) of the Universal Service Directive, which requires at least one comprehensive directory (whether printed or electronic) to be available to all end users. It would be disproportionate, impractical and unworkable to require every home to be supplied with directories which list every telephone number throughout the United Kingdom. Oftel proposes therefore to maintain the current system which requires every operator of a public telephone network who is also a provider of publicly available telephone services to ensure the supply to their own subscribers of a directory for telephone numbers in their local area, which must be updated yearly. It is not required that each provider of telephone services to the public produce their own directory or directories. However, directories for all other areas in the UK must be made available to a

¹⁵³ See at: <http://www.ofcom.org.uk/static/archive/oftel/publications/licensing/2002/enti0502.htm>

subscriber on request. Communications providers are entitled to charge for such additional directories.

3.20 Providers of public pay telephones are excluded from the application of this condition because they are subject to their own specific requirements in relation to access to directory enquiry facilities by way of Condition 6: Public Pay Telephones (see paragraphs 3.14 to 3.16).

3.21 This condition is required to implement the obligations contained in Articles 5(1) and 25(1) and (3) of the Universal Service Directive, and falls within condition 8 of Part A of the Annex to the Authorisation Directive. OFCOM will be entitled to set this condition under clause 38(1)(a) of the Communications Bill.

A6.103 The proposed draft GC8 is set out at Annex 3 of the first GC consultation, as follows:

8. OPERATOR ASSISTANCE, DIRECTORIES AND DIRECTORY ENQUIRY FACILITIES

8.1 The Communications Provider shall ensure that any End user can access:

(a) operator assistance services, and

(b) a Directory Enquiry Facility containing Directory Information on all Subscribers who have been allocated Telephone Numbers by any Communications Provider, except those Subscribers who have exercised their right to have their Directory Information removed.

8.2 Where the Communications Provider allocates Telephone Numbers to Subscribers, it shall ensure that each of those Subscribers is, on request, supplied with a Directory containing Directory Information on all Subscribers who have been allocated Telephone Numbers in the Subscriber's local area. Directories containing Directory Information for all other Subscribers outside the local area who have been allocated Telephone Numbers by any Communications Provider must be supplied to the Subscriber on request. Any Directories supplied shall not contain Directory Information for those Subscribers who have exercised their right to have their Directory Information removed.

8.3 Where a Directory is produced by the Communications Provider (or by another person on the Communication Provider's behalf), the Communications Provider shall ensure that it is updated on a regular basis (at least once a year). OFCOM may direct from time to time that a Directory is available in a particular form.

8.4 The Communications Provider may charge End users a reasonable fee for making available a Directory Enquiry Facility, local Directory and any additional Directories, and may charge its Subscribers a reasonable fee for inclusion of Directory Information in a Directory or as part of a Directory Enquiry Facility.

8.5 This Condition applies subject to the requirements of Relevant Data Protection Legislation (in particular, the right of a Subscriber to, free of charge, verify, correct or request removal of their own Directory Information from a Directory and/or a Directory Enquiry Facility).

8.6 In this Condition, "Communications Provider" means a Communications Provider which provides Publicly Available Telephone Services (except Public Pay Telephones).

A6.104 Paragraphs 3.60 to 3.61 of the first GC consultation are then headed "Condition 22: Provision of subscriber directory information" (which is now GC19) and read:

3.60 This condition requires all communication providers with a numbering allocation to pass on their subscriber directory information to any other provider of publicly available telephone services. Its purpose is to ensure the provision of the most comprehensive directory database(s) from which directory products and services can be provided.

3.61 This condition is required to implement the obligations contained in Article 25(2) of the Universal Service Directive, and falls within condition 4 of Part C of the Annex to the Authorisation Directive. OFCOM will be entitled to set this condition under clause 44(1)(d) and (3) of the Communications Bill.

A6.105 The proposed draft GC22 is set out at Annex 3 of the first GC consultation, as follows:

22. PROVISION OF DIRECTORY INFORMATION

22.1 Where the Communications Provider has been allocated Telephone Numbers by OFCOM in accordance with Condition 20, it shall meet all reasonable requests from any Communications Provider of Publicly Available Telephone Services to make available the Directory Information of:

- (a) its Subscribers who have been allocated those Telephone Numbers, and
- (b) any other End user sub-allocated a Telephone Number originally allocated to the Communications Provider

for the purposes of the provision of Directories and Directory Enquiry Facilities.

22.2 Where the Communications Provider has been sub-allocated Telephone Numbers by another person, it shall on request supply to:

- (a) the person who sub-allocated such Telephone Numbers to it; or
- (b) if different from the above, the Communications Provider who was originally allocated such Telephone Numbers by OFCOM

the Directory Information of the Communications Provider's Subscribers and of any other End user assigned a Telephone Number from the Telephone Numbers sub-allocated to the Communications Provider.

22.3 Where the Communications Provider is requested to supply Directory Information in accordance with paragraphs 22.1 or 22.2, it shall do so on terms which are fair, cost-oriented and non-discriminatory, and in a format which is agreed between the Communications Provider and the person requesting the information. Where no such agreement is reached, OFCOM may determine the format to be applied to the information.

22.4 This Condition applies subject to the requirements of Relevant Data Protection Legislation.

A6.106 Annex 3 of the first GC consultation also sets out certain proposed definitions that, in addition to a general interpretation section (dealing with, among other things, the application of the Interpretation Act 1978 as if each of the GCs were an Act of Parliament) would apply to the two GCs mentioned above, including the following:

...

"Communications Provider" means a person who provides an Electronic Communications Network or provides an Electronic Communications Service;

"Directory" means a printed document containing Directory Information which is made available to members of the public;

"Directory Information" means, in the case of a Directory, the name, address and Telephone Number of the Subscriber and, in the case of a Directory Enquiry Facility, may include the

Telephone Number only of the Subscriber or information that the Telephone Number of the Subscriber may not be supplied;

"Directory Enquiry Facility" means Directory Information provided by means of a Public Telephone Network;

...

"Public Electronic Communications Services" means any Electronic Communications Service that is provided so as to be available for use by members of the public;

...

"Subscriber" means any natural or legal person or legal entity who or which is party to a contract with the provider of Public Electronic Communications Services for the supply of such Services;

"Telephone Number" means, subject to any order of the Secretary of State pursuant to section 43(8) of the Act, any number, including data of any description, that is used (whether or not in connection with telephony) for any one or more of the following purposes:

- (a) identifying the destination for, or recipient of, an Electronic Communication;
- (b) identifying the origin, or sender, of an Electronic Communication;
- (c) identifying the route for any Electronic Communication;
- (d) identifying the source from which any Electronic Communication or Electronic Communications Service may be obtained or accessed;
- (e) selecting the service that is to be obtained or accessed, or any required elements or characteristics of that service; or
- (f) identifying the Communications Provider by means of whose network or service any Electronic Communication is to be transmitted, or treated as transmitted.

...

A6.107 At Annex 2 of the first GC consultation, a cross-reference table¹⁵⁴ for standard fixed and mobile PTO licences granted under the 1984 Act, so far as material to this dispute, is set out as follows:

¹⁵⁴ The purpose of this table was to assist understanding the move from the current regime to the new obligations, where the first column listing the obligations contained in the standard fixed and mobile PTO licences and second column identifying whether the requirement continues to apply or has been removed. At paragraph 2.4 of the first GC consultation, it was explained by reference to that table that, if the PTO obligation remains applicable, the second column of the table lists the new general condition most similar to the current condition. However, that paragraph also made the following clear: "...Where no general condition exists, a similar obligation may be featured elsewhere in the new regime (eg it may be a specific condition or exist on the face of the Communications Bill). It should be noted that these are the Director's initial views issued for consultation. It must also be stressed that the existence of a new general condition next to a current licence condition does not necessarily represent an 'exact fit'. No general condition is exactly the same as a previous licence condition. This is because all the general conditions, whether new or similar to existing obligations, have been drafted in an attempt to remove any unnecessary wording and complicated structure in order to make them easier to understand without losing legal certainty."

Standard PTO licence condition and reference to legal derivation	Proposed general condition of entitlement and reference to legal derivation
...	...
2 Requirement to provide Directory Services	8 Operator Assistance, Directories and Directory Enquiry Facilities Art. 5 and 25 Universal Service Directive (USD) Condition 8 of Annex A to the Authorisation Directive (AD)
...	...
29 Obligation to Supply Numbering Information on Request	22 Provision of Subscriber Directory Information Art. 5 and 25 USD Condition 4 of Annex C to the AD

- A6.108 On 19 March 2003, the Department of Trade and Industry and Oftel issued a joint consultation document¹⁵⁵ (the “**second GC consultation**”) setting out a contingency plan for the interim implementation of the new package of EC directives with effect from 25 July 2003 should the Communications Bill (as it was then) not have received Royal Assent in sufficient time. That consultation included further drafts of the general conditions, which were updated in response to the comments received as a result of the first GC consultation.
- A6.109 So far as material to this dispute, the second GC consultation explains (at paragraph 2.5) that the key issue in respect of the GCs considered in that document is to address whether there are any additional comments on the amendments made to the GCs since the first GC consultation. It is further explained (at paragraphs 7.1 to 7.5 of that document) that Oftel’s comments on the responses to the first GC consultation are set out in Annex B, and the proposed GCs that might be made under the 2003 Act (as opposed to at the time proposed Electronic Communications (General Conditions) Regulations) are set out in Annex C, to that document, comments on which were specifically invited (see at paragraph 13.1).

¹⁵⁵ See at: http://www.communicationsact.gov.uk/Interim_Implementation_update.htm

A6.110 As regards to that Annex C, save as regards some minor changes to the definition of 'Subscriber', no changes were proposed to the definitions¹⁵⁶ in the first GC consultation considered above. As to draft GC8, it reads in that annex as follows:

8. OPERATOR ASSISTANCE, DIRECTORIES AND DIRECTORY ENQUIRY FACILITIES

8.1 The Communications Provider shall ensure that any End-User can access:

(a) operator assistance services; and

(b) a Directory Enquiry Facility containing Directory Information on all Subscribers who have been allocated Telephone Numbers by any Communications Provider, except those Subscribers who have exercised their right to have their Directory Information removed,

except where such services or facilities have been rendered inaccessible to a particular End-User by the Communications Provider at the End-User's request or for the purposes of debt management.

8.2 Where the Communications Provider allocates Telephone Numbers to Subscribers, it shall ensure that each of those Subscribers is, on request, supplied with a Directory containing Directory Information on all Subscribers who have been allocated Telephone Numbers in the Subscriber's local area. Directories containing Directory Information for all other Subscribers outside the local area who have been allocated Telephone Numbers by any Communications Provider must be supplied to the Subscriber on request. Any Directories supplied shall not contain Directory Information for those Subscribers who have exercised their right to have their Directory Information removed.

8.3 A Directory may be produced by the Communications Provider, or by another person. Where a Directory is produced by the Communications Provider, the Communications Provider shall ensure that it is updated on a regular basis (at least once a year). Ofcom may direct from time to time that a Directory is available in a particular form.

8.4 The Communications Provider may charge End-Users a reasonable fee for making available a Directory Enquiry Facility, local Directory and any additional Directories, and may charge its Subscribers a reasonable fee for inclusion of Directory Information in a Directory or as part of a Directory Enquiry Facility.

8.5 This Condition applies subject to the requirements of Relevant Data Protection Legislation (in particular, the right of a Subscriber to, free of charge, verify, correct or request removal of their own Directory Information from a Directory and/or a Directory Enquiry Facility).

8.6 In this Condition, "Communications Provider" means a person who provides Publicly Available Telephone Services (except Public Pay Telephones).

A6.111 Ofcom commented on the amendments made to that draft GC8 since the first GC consultation and on the responses it had received, as follows:

8. Operator Assistance, Directories and Directory Enquiry Facilities (clause 48(1)(a))

8.1 This condition has undergone some amendment following the first consultation. Additional paragraphs have been added to condition 8.1 so as to make transparent the application of the obligation to provide access to operator assistance and directory enquiries in the event that a particular end-user has chosen not to receive access to such services or

¹⁵⁶ That is to say, the definitions of 'Communications Provider', 'Directory', 'Directory Enquiry Facility', 'Directory Information', 'Public Electronic Communications Services', and 'Telephone Number'.

where access to such services has been restricted on account of debt management. Of tel believes it would be disproportionate for the obligation in 8.1 to apply where access to such services has been restricted for this purpose.

8.2 There will also be a difference in this condition under the SIs compared to that under the Communications Bill. Under the SIs, due to the prohibition on legislative sub-delegation, it is not possible to include a power under the condition allowing the Director to direct, from time to time, the format of a printed directory. However it is proposed that this provision will exist in the general condition set under the Communications Bill. Of tel is of the view that this is a proportionate requirement in that Of tel does not anticipate that this power will be used unless the need for clarity and consistency in the form of printed directories arises – at present, Of tel is of the view that such clarification is unnecessary, although Of tel wishes to keep this area under review.

8.3 Other minor amendments have been made in response to the first consultation as set out below.

Responses

8.4 BT has suggested that this condition be expressly linked with Condition 22 - Provision of Subscriber Directory Information: in particular, this condition should explicitly state that there will be no breach where failure to provide access to all subscriber information is the result of the failure of a third party to supply the information, or due to errors or omissions in the information supplied. The Operators Group commented that an individual provider is not in a position to ensure that a directory is updated annually if that provider does not produce the directory. Energis has suggested that yearly updating is excessive, and that 18 months to 2 years would be sufficient.

8.5 A number of respondents queried the continued prominence of paper directories, given the proliferation of on-line directories. The Mobile Broadband Group, in particular, objected to the requirement to provide paper directories to their subscribers. Energis also sought clarification on the face of the condition that this obligation applies only to the retail line rental provider, so as to avoid duplicate provisioning where CPS or wholesale line rental services are operating.

8.6 Telegate has suggested that such directories be required to include at the beginning of each volume, in a non-preferential manner, all active directory enquiry short codes which give access to UK and international telephone numbers.

8.7 WACT has requested that there be an obligation to take account of the Welsh language in the provision of operator assistance, DQ and directories.

8.8 Energis has suggested that Condition 8.5 be omitted as it repeats relevant data protection legislation

Of tel view

8.9 Of tel disagrees that an express link to Condition 22 is necessary, and sees the obligation in this condition as being sufficiently transparent and quite distinct from the obligation to supply subscriber directory information to enable the provision of comprehensive directory services. However Of tel agrees that it would be disproportionate and unduly discriminatory for individual providers to be responsible for annual updating of a directory where they themselves do not produce it – Condition 8.3 has been amended accordingly. (Of tel notes that this does not affect a provider's obligations to supply directory information under Condition 22 on reasonable request so as to ensure the provision of accurate directory services.) Of tel does not believe it is objectively justifiable to allow for less than annual updating, due to the specific terms of Article 5 of the USD.

8.10 As explained in the first consultation, this obligation implements, in part, Article 5 of the USD. The Director is (and Ofcom will be) required to ensure that all end-users have

access to a directory. Oftel believes it would be unduly discriminatory for this requirement to be read so as to exclude end-users of mobile telephone services. It is possible that some endusers in the UK may choose to have only a mobile phone. The USD requires that those endusers be able to access a directory.

8.11 While Oftel believes that electronic directories are likely to assume greater importance in the future, the fact remains that such directories are not yet available to all endusers, specifically those that do not have Internet access. For this reason, Oftel is of the view that it is objectively justifiable for printed directories to remain the standard for the time being.

8.12 Oftel notes that the obligation to supply a printed directory is triggered only on the request of a subscriber. Oftel believes that this limitation is proportionate and will avoid duplication in provision of printed directories where an end-user subscribes to more than one telephone service (e.g. fixed and mobile or direct and indirect access). Oftel also notes that this obligation is identical in effect to the current obligation on all fixed and mobile PTO licence holders.

8.13 Oftel does not agree that it is proportionate for the general condition to require printed directories to list, in a non-preferential manner, all directory enquiry codes with the new 118xxx format, although Oftel anticipates that it and Ofcom will investigate any allegation of anti-competitive or discriminatory behaviour in the normal way.

8.14 Finally, and as set out above, Oftel is of the view that the general conditions are not the appropriate place for language requirements, and that reference to relevant data protection requirements are a useful and transparent reminder in this context.

A6.112 Oftel made those comments in the light of (among others) the following response¹⁵⁷ made by BT in September 2002 to the first GC consultation:

Condition 8 Operator assistance, directories and directory enquiry facilities

20. To discharge their obligations under Condition 8.1, providers would be dependent on each others' performance of their duties under Condition 22. It would be useful if this linkage were acknowledged in the text of both conditions. In particular, it should be explicitly stated in Condition 8 that any failure to make available to end-users the information referred to in Condition 8.1 would not constitute a breach of the condition where this resulted from the failure of a third party to supply the information as required by Condition 22 or equally from the existence of errors or omissions in the information supplied.

21. Condition 8.1(b) would require that end-users have access to directory information on all subscribers who have been allocated telephone numbers by any communications provider in the UK. This requirement would cover information on mobile as well as fixed subscribers and would therefore represent a significant departure from the current obligations and from the definition of Inland Directory Enquiry Service drawn up by Oftel in anticipation of the introduction of 118XXX codes for access to directory enquiry services. We would welcome clarification of how Oftel envisages this condition working in practice.

22. Article 5.1 of the Universal Service Directive states that directories may be printed or electronic, and a number of other general conditions refer to the publication of information on the internet. However, in the Definitions attached to the general conditions, "Directory" is defined as "a printed document containing Directory Information". BT believes that providers should have the flexibility to discharge their obligations through the provision of electronic directories and that Condition 8 should be amended accordingly.

¹⁵⁷ See at: <http://www.ofcom.org.uk/static/archive/oftel/publications/responses/2002/enti0502/bt.pdf>

...

Condition 22 Provision of directory information

55. The comments on Condition 8 made in paragraph 20 refer to this condition.

(Emphasis added)

A6.113 As to draft GC22 in Annex C to the second GC consultation, it reads in that Annex as follows:

22. PROVISION OF DIRECTORY INFORMATION

22.1 Where the Communications Provider has been allocated Telephone Numbers by Ofcom in accordance with Condition 20, it shall meet all reasonable requests from any person to make available the Directory Information of:

- (a) its Subscribers who have been allocated those Telephone Numbers; and
- (b) any other End-User sub-allocated a Telephone Number originally allocated to the Communications Provider,

for the purposes of the provision of Directories and Directory Enquiry Facilities.

22.2 Where the Communications Provider has been sub-allocated Telephone Numbers by another person, it shall on request supply to:

- (a) the person who was originally allocated such Telephone Numbers by Ofcom; or
- (b) if different from the above, the person who sub-allocated such Telephone Numbers to it,

the Directory Information of the Communications Provider's Subscribers and of any other End-User assigned a Telephone Number from the Telephone Numbers suballocated to the Communications Provider.

22.3 Where the Communications Provider is requested to supply Directory Information in accordance with paragraphs 22.1 or 22.2, it shall do so on terms which are fair, cost-oriented and non-discriminatory, and in a format which is agreed between the Communications Provider and the person requesting the information. Ofcom may from time to time direct the format to be applied to the information, and the Communications Provider shall comply with any such direction.

22.4 This Condition applies subject to the requirements of Relevant Data Protection Legislation.

A6.114 Oftel commented on a minor amendment made to that draft GC22 since the first GC consultation and on the responses it had received, as follows:

22. Provision of Directory Information (clause 45(1)(d) and (3))

22.1 This condition has undergone minor amendment following the first consultation in the interests of transparency. The first paragraph has been changed so as to require information to be passed to any person reasonably requesting it for the purpose of the provision of publicly available directories and directory enquiry facilities. In Oftel's view, this wording more accurately reflects the intention of Article 25(2) of the USD. Oftel has also clarified Ofcom's direction making power with respect to the format of information in paragraph 20.4, although this will not appear in the SI regime due to the prohibition against legislative subdelegation.

Responses

22.2 The Operators Group have queried the operation of Condition 22.1 where a customer is supplied with a wholesale line rental product from BT in that it appears that the obligation would be on BT to supply the information, not the customer's telephony provider.

Of tel view

22.3 Of tel is of the view that the provision of a wholesale line rental product from BT incorporates a sub-allocation of a telephone number for the purposes of this condition. Hence the provider purchasing the wholesale line rental product from BT will be obliged to pass the directory information of its subscribers to BT under paragraph 22.2 of the condition.

A6.115 On 9 July 2003, the DGT published a Final Statement entitled '*The General Conditions of Entitlement*'¹⁵⁸ (the "**final GC statement**") setting out his reasons for making the General Conditions and summarising the results of two consultations which had preceded the final GC statement. Again, in the 'Summary' (at paragraph S.7) of that document, the DGT repeated that the proposed GCs had been drafted to reflect the obligations required by the new directives, as follows:

S.7 The proposed general conditions at annexes A and B to this statement have been drafted to apply appropriate regulation reflecting the obligations required by the new EC Directives as closely as possible, and have been subject to two rounds of consultation over the past year. Stakeholders are advised to read this statement in conjunction with the consultation documents issued by Of tel in the first and second rounds of consultations (links to these documents can be found on the following page). Those documents contain further details of the policy behind and legal basis for each condition.

(The final GC statement also sets out (under paragraph 1.6) a table, which provides a breakdown of the application of each proposed GC, and an example of who is likely to be caught by it. As regards GCs 8 and 19 (which had in the first consultation been numbered GCs 8 and 22, respectively), that table reads:

General Condition	Applies to	Example
...
8: Operator Assistance, Directories and Directory Enquiry Facilities	Providers of Publicly Available Telephone Services, except public payphones	Fixed and mobile voice telephony services by means of which an end user might reasonably expect to access the emergency services, including indirect access / resellers
...
19: Provision of Directory Information	All Communications Providers, where they apply for, are allocated	Those network or service providers which hold, use or apply for,

¹⁵⁸ See at: <http://www.ofcom.org.uk/static/archive/oftel/publications/licensing/2003/cond0703.htm>

	or use telephone numbers	telephone numbers
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- A6.116 Under the sub-heading 'Definitions' in Chapter 2 of the final GC statement, OfTel set out its comments on responses made to the second GC consultation, so far as is material to this dispute, as follows:

2.8 The Operator's Group also suggested amendments to the following terms:

"Directory": OfTel is not proposing to amend this definition as suggested, in that it does not think that the fact that a Directory must be provided "on request" should influence the definition of a Directory.

"Directory Information": OfTel agrees with the Operator's Group suggestion, and has amended the definition so as to remove the word "may" and instead to read "in the case of a Directory Enquiry Facility shall be either the Telephone Number of the Subscriber or information that the Telephone Number of the Subscriber may not be supplied".

...

- A6.117 In Chapter 3 of the final GC statement, OfTel then set out the DGT's reasons for adopting the GCs and its comments on responses received on the draft GCs proposed in the second GC consultation. In particular, so far as material to this dispute, it explain:

Condition 8: Operator Assistance, Directories and Directory Enquiry Facilities (clause 48(1)(a))

Responses

3.46 The Operator's Group suggested various clarifications to this Condition so as to ensure that international directory enquiry facilities are not inadvertently covered, and so as to clarify the operation of the obligations in this Condition with those in Condition 6. They also suggested that paragraph 8.5 be deleted.

3.47 BT suggested that a definition of Telephone Number specific to Condition 8 is needed to restrict the definition to Telephone Numbers which have been allocated to Subscribers for the purpose of their use of Publicly Available Telephone Services, given the otherwise extremely broad definition of Telephone Number.

3.48 BT was further of the view the intention of Article 5.1(a) of the Universal Service Directive, insofar as it refers to approval of the form of a Directory, is that the relevant authority should approve the form of the Directory Information contained therein ie the alphabetical listing of subscribers, and not any other aspect of a Directory. They suggested that amendments be made accordingly, as well as other amendments to the definitions of "Directory" and "Directory Information".

3.49 BT also requested clarification from OfTel on how it envisages the new requirement to include information on mobile subscribers in local area directories working in practice.

OfTel's comments

3.50 OfTel does not expect communications providers to provide an international directory enquiry facility by default, and has amended the Condition and the definitions of "Directory" so as to clarify that these facilities need only contain information on UK subscribers. The definition of "Directory Information" has also been amended so as to clarify that it only refers to telephone numbers assigned to subscribers for their use of publicly available telephone services.

3.51 Although Article 25(5) of the Universal Service Directive makes specific reference to data protection legislation, Oftel is content to delete the reference to specific rights from paragraph 8.5, although notes that the provisions of the relevant data protection legislation still impact on the operation of the Condition as a whole.

3.52 Article 5 of the Universal Service Directive requires 'at least one comprehensive directory (be) available to end-users in a form approved by the relevant authority'. In Oftel's view, this is more appropriately implemented by the current draft condition 8.3 rather than BT's proposal.

3.53 Oftel recognises the difficulties associated with mobile directory information data, and Oftel is content to discuss the issues surrounding the inclusion of mobile directory information data with stakeholders. However, Oftel intends to maintain the current drafting of the Condition as it accords with the wording and intention of the Universal Service Directive.

...

Condition 19: Provision of Directory Information (clause 55(1)(d) and (3))

3.145 This Condition was previously numbered 22, but has been renumbered following consultation.

Responses

3.146 The Operator's Group were of the view that it is onerous to require the communications provider to have to agree the format in which the information is to be supplied with the person requesting such information on each occasion, and suggested that the relevant text be deleted. They have also sought further guidance on the application of this Condition to mobile communications providers.

Oftel's comments

3.147 In Oftel's view, it is entirely reasonable and justified to expect communications providers to agree on the format of the data (with the person requesting the data). Oftel notes that the Director will be able to direct the format of the data, so communications providers should be reassured that any person requesting the data will not be able to demand it in a format that it is clearly inefficient or onerous. The Universal Service Directive (Article 25) also refers to information being supplied on an 'agreed format', hence this obligation is objectively justified and proportionate in Oftel's view.

3.148 Recital 11 to the Universal Service Directive makes it clear that mobile data is to be included within directories and directory enquiry facilities. Oftel acknowledges the different practical issues associated with the inclusion of mobile data within such facilities, and intends to continue discussions with the industry on this issue.

3.149 Oftel notes that this Condition has undergone some minor amendment as a flow-on from the new definitions of 'Adoption' and 'Allocation' (discussed in relation to Condition 17 above).

A6.118 Oftel made those comments in the light of (among others) the following response¹⁵⁹ made by BT on 16 May 2003 to the second GC consultation:

Comments on Condition 8

¹⁵⁹ See at: <http://www.ofcom.org.uk/static/archive/oftel/publications/responses/2003/enti0503/bt.pdf>

6. At the same time, BT continues to be concerned at a number of aspects of Condition 8 "Operator Assistance, Directories and Directory Enquiry Facilities". Our concerns are outlined below.

7. Under the new regulatory framework, the definition of Telephone Number depends effectively on the Telephone Number Exclusion Order to be issued by the Secretary of State. BT is concerned that the Order might be phrased in such a way that numbers which it is not appropriate to include in Directories, for example private network numbers, could inadvertently be covered by Condition 8 obligations. Even if the Order did not have this effect in its initial form, future changes to the Order could have unintended implications for providers' obligations under Condition 8. In view of this, BT believes that a definition of Telephone Number specific to Condition 8 is needed to restrict the definition to Telephone Numbers which have been allocated to Subscribers for the purpose of their use of Publicly Available Telephone Services.

8. BT notes that in the version of Condition 8 which Oftel proposes should be made under the Bill, Condition 8.3 provides that "Ofcom may direct from time to time that a Directory is available in a particular form". BT believes that the intention of Article 5.1(a) of the Universal Service Directive, insofar as it refers to approval of the form of a Directory, is that the relevant authority should approve the form of the Directory Information contained therein, i.e. the alphabetical listing of subscribers, and not any other aspect of a Directory. We propose that this should be achieved by amending the last sentence of Condition 8.3 to read as follows (suggested changes shown in italics):

"Ofcom may direct from time to time that *the Directory Information contained in* a Directory is available in a particular form".

9. In BT's response¹ to Oftel's March 2003 consultation document "Notification of proposals for the designation of universal service providers", we suggested amendments to the definitions of "Directory" and "Directory Information" in the Schedule to the draft Notification included in the document. If agreed by Oftel, these revised definitions would also need to be incorporated in the general conditions.

10. BT's response to the initial consultation on the general conditions of entitlement requested clarification from Oftel on how it envisages the new requirement to include information on mobile subscribers in local area directories working in practice. Oftel's response in Annex B to the current consultation document does not address this request. However, BT still has major concerns over the implementation of this obligation and would welcome the opportunity to discuss the issue with Oftel.

11. In responses to the initial consultation, BT and other operators argued that providers should have the flexibility to discharge their obligations through the provision of electronic, rather than printed, directories. Oftel rejected this argument on the basis that "such directories are not yet available to all end-users, specifically those that do not have Internet access". BT believes that Oftel/Ofcom should keep this aspect of Condition 8 under review in the light of developing trends in Internet usage.

A6.119 The proposed relevant definitions as well as draft GCs 8 and 22 is set out at Annex B of the final GC statement, as follows:

"Directory" means a printed document containing Directory Information on Subscribers of Publicly Available Telephone Services in the United Kingdom which is made available to members of the public;

"Directory Information" means, in the case of a Directory, the name and address of the Subscriber and the Telephone Number assigned to the Subscriber for their use of Publicly Available Telephone Services and, in the case of a Directory Enquiry Facility, shall be either such a Telephone Number of the Subscriber or information that such a Telephone Number of the Subscriber may not be supplied;

“Directory Enquiry Facility” means Directory Information provided by means of a Public Telephone Network;

...

8. OPERATOR ASSISTANCE, DIRECTORIES AND DIRECTORY ENQUIRY FACILITIES

8.1 The Communications Provider shall ensure that any End-User can access:

(a) operator assistance services; and

(b) a Directory Enquiry Facility containing Directory Information on all Subscribers in the United Kingdom who have been assigned Telephone Numbers by any Communications Provider, except those Subscribers who have exercised their right to have their Directory Information removed,

except where such services or facilities have been rendered inaccessible to a particular End-User by the Communications Provider at the End-User's request or for the purposes of debt management.

8.2 Where the Communications Provider assigns Telephone Numbers to Subscribers, it shall ensure that each of those Subscribers is, on request, supplied with a Directory containing Directory Information on all Subscribers who have been assigned Telephone Numbers in the Subscriber's local area. Directories containing Directory Information for all other Subscribers outside the local area who have been assigned Telephone Numbers by any Communications Provider must be supplied to the Subscriber on request. Any Directories supplied shall not contain Directory Information for those Subscribers who have exercised their right to have their Directory Information removed.

8.3 A Directory may be produced by the Communications Provider, or by another person. Where a Directory is produced by the Communications Provider, the Communications Provider shall ensure that it is updated on a regular basis (at least once a year). The Director may from time to time direct that a Directory is available in a particular form.

8.4 The Communications Provider may charge End-Users a reasonable fee for making available a Directory Enquiry Facility, local Directory and any additional Directories, and may charge its Subscribers a reasonable fee for inclusion of Directory Information in a Directory or as part of a Directory Enquiry Facility.

8.5 This Condition applies subject to the requirements of Relevant Data Protection Legislation.

8.6 For the purposes of this Condition, “Communications Provider” means a person who provides Publicly Available Telephone Services (except Public Pay Telephones).

...

19. PROVISION OF DIRECTORY INFORMATION

19.1 Where the Communications Provider has been Allocated Telephone Numbers in accordance with Condition 17, it shall meet all reasonable requests from any person to make available the Directory Information of:

(a) its Subscribers who have been assigned those Telephone Numbers; and

(b) any other End-User assigned a Telephone Number originally Allocated to the Communications Provider,

for the purposes of the provision of Directories and Directory Enquiry Facilities.

19.2 Where the Communications Provider has been authorised (either directly or indirectly) to use Telephone Numbers Allocated to another person, it shall on request supply to:

(a) the person who was originally Allocated such Telephone Numbers; or

(b) if different from the above, the person who authorised the use of such Telephone Numbers by it,

the Directory Information of the Communications Provider's Subscribers and of any other End-User assigned a Telephone Number from such Telephone Numbers.

19.3 Where the Communications Provider is requested to supply Directory Information in accordance with paragraphs 19.1 or 19.2, it shall do so on terms which are fair, cost-oriented and non-discriminatory, and in a format which is agreed between the Communications Provider and the person requesting the information. The Communications Provider shall comply with any direction made by the Director from time to time with respect to the format to be applied to the information.

19.4 This Condition applies subject to the requirements of Relevant Data Protection Legislation.

19.5 For the purposes of this Condition, "Communications Provider" means a person who provides an Electronic Communications Network or an Electronic Communications Service.

- A6.120 Then, on 22 July 2003, shortly before the coming into force of the relevant provisions of the 2003 Act, the DGT published a notification in accordance with Section 48(1) of the 2003 Act entitled '*Notification setting general conditions under section 45 of the Communications Act 2003*'¹⁶⁰ (the "**GC notification**").
- A6.121 Under that notification, the DGT set a number of GCs which were in contained Part II of the Schedule to it that were to take effect on 25 July 2003. They include GCs 8 and 19, which are the relevant ones to this dispute and read as follows:

8. OPERATOR ASSISTANCE, DIRECTORIES AND DIRECTORY ENQUIRY FACILITIES

8.1 The Communications Provider shall ensure that any End-User can access:

(a) operator assistance services; and

(b) a Directory Enquiry Facility containing Directory Information on all Subscribers in the United Kingdom who have been assigned Telephone Numbers by any Communications Provider, except those Subscribers who have exercised their right to have their Directory Information removed,

except where such services or facilities have been rendered inaccessible to a particular End-User by the Communications Provider at the End-User's request or for the purposes of debt management.

8.2 Where the Communications Provider assigns Telephone Numbers to Subscribers, it shall ensure that each of those Subscribers is, on request, supplied with a Directory

¹⁶⁰ See at: http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/cond_final0703.pdf

containing Directory Information on all Subscribers who have been assigned Telephone Numbers in the Subscriber's local area. Directories containing Directory Information for all other Subscribers outside the local area who have been assigned Telephone Numbers by any Communications Provider must be supplied to the Subscriber on request. Any Directories supplied shall not contain Directory Information for those Subscribers who have exercised their right to have their Directory Information removed.

8.3 A Directory may be produced by the Communications Provider, or by another person. Where a Directory is produced by the Communications Provider, the Communications Provider shall ensure that it is updated on a regular basis (at least once a year). The Director may from time to time direct that a Directory is available in a particular form.

8.4 The Communications Provider may charge End-Users a reasonable fee for making available a Directory Enquiry Facility, local Directory and any additional Directories, and may charge its Subscribers a reasonable fee for inclusion of Directory Information in a Directory or as part of a Directory Enquiry Facility.

8.5 This Condition applies subject to the requirements of Relevant Data Protection Legislation.

8.6 For the purposes of this Condition, "Communications Provider" means a person who provides Publicly Available Telephone Services (except Public Pay Telephones).

...

19. PROVISION OF DIRECTORY INFORMATION

19.1 Where the Communications Provider has been Allocated Telephone Numbers in accordance with Condition 17, it shall meet all reasonable requests from any person to make available the Directory Information of:

- (a) its Subscribers who have been assigned those Telephone Numbers; and
- (b) any other End-User assigned a Telephone Number originally Allocated to the Communications Provider,

for the purposes of the provision of Directories and Directory Enquiry Facilities.

19.2 Where the Communications Provider has been authorised (either directly or indirectly) to use Telephone Numbers Allocated to another person, it shall on request supply to:

- (a) the person who was originally Allocated such Telephone Numbers; or
- (b) if different from the above, the person who authorised the use of such Telephone Numbers by it,

the Directory Information of the Communications Provider's Subscribers and of any other End-User assigned a Telephone Number from such Telephone Numbers.

19.3 Where the Communications Provider is requested to supply Directory Information in accordance with paragraphs 19.1 or 19.2, it shall do so on terms which are fair, cost-oriented and non-discriminatory, and in a format which is agreed between the Communications Provider and the person requesting the information. The Communications Provider shall comply with any direction made by the Director from time to time with respect to the format to be applied to the information.

19.4 This Condition applies subject to the requirements of Relevant Data Protection Legislation.

19.5 For the purposes of this Condition, "Communications Provider" means a person who provides an Electronic Communications Network or an Electronic Communications Service.

A6.122 Part I of the Schedule to the GC notification contains definitions which apply, except in so far as the context otherwise requires, throughout the Schedule. Part I includes the following definitions of particular relevance to GCs 8 and 19 and a general provision dealing with the interpretation of the GCs:

...

"Communications Provider" means, unless the contrary intention appears, a person who provides an Electronic Communications Network or provides an Electronic Communications Service;

...

"Directory" means a printed document containing Directory Information on Subscribers of Publicly Available Telephone Services in the United Kingdom which is made available to members of the public;

"Directory Information" means, in the case of a Directory, the name and address of the Subscriber and the Telephone Number assigned to the Subscriber for their use of Publicly Available Telephone Services and, in the case of a Directory Enquiry Facility, shall be either such a Telephone Number of the Subscriber or information that such a Telephone Number of the Subscriber may not be supplied;

"Directory Enquiry Facility" means Directory Information provided by means of a Public Telephone Network;

...

"Public Electronic Communications Service" means any Electronic Communications Service that is provided so as to be available for use by members of the public;

...

"Relevant Data Protection Legislation" means the Data Protection Act 1998 and the Telecommunications (Data Protection and Privacy) Regulations 1999;

...

"Subscriber" means any person who is party to a contract with a provider of Public Electronic Communications Services for the supply of such services;

"Telephone Number" means, subject to any order of the Secretary of State pursuant to section 56(7) of the Act, any number, including data of any description, that is used (whether or not in connection with telephony) for any one or more of the following purposes:

(a) identifying the destination for, or recipient of, an Electronic Communication;

(b) identifying the origin, or sender, of an Electronic Communication;

(c) identifying the route for an Electronic Communication;

(d) identifying the source from which an Electronic Communication or Electronic Communications Service may be obtained or accessed;

(e) selecting the service that is to be obtained or accessed, or required elements or characteristics of that service; or

(f) identifying the Communications Provider by means of whose network or service an Electronic Communication is to be transmitted, or treated as transmitted;

...

Interpretation

2. For the purpose of interpreting the Conditions in this Schedule:

(a) except in so far as the context otherwise requires, words or expressions shall have the meaning assigned to them in the Schedule and otherwise any word or expression shall have the same meaning as it has in the Act;

(b) headings and titles shall be disregarded;

(c) expressions cognate with those referred to in this Schedule shall be construed accordingly; and

(d) the Interpretation Act 1978 shall apply as if each of the Conditions in this Schedule were an Act of Parliament.

A6.123 As regards the definition of 'Relevant Data Protection Legislation', this term was subsequently modified¹⁶¹ on 11 December 2003 by the DGT for the purposes of the GCs and USCs to mean the Data Protection Act 1998 and the Privacy and Electronic Communications (EC Directive) Regulations 2003. That modification was made on the same day as the Telecoms Data Protection Regulations were revoked, and the Privacy and Electronic Communications (EC Directive) Regulations 2003 came into force (see above).

(3) The relevant USCs

A6.124 On 12 March 2003, the DGT published a consultation document entitled '*Notification of proposals for the designation of universal service providers and the setting of conditions*'¹⁶² (the "**USO consultation**"). That consultation set out the DGT's proposals regarding the provision of universal service in the UK, which specifically invited comments on the terms of the specific conditions, which, together with general conditions already consulted upon, would ensure universal service; and the electronic communications providers upon whom those specific conditions should be imposed (that is BT and, for Hull, Kingston Communications (Hull) plc).

A6.125 In the notification under regulation 4 of the Universal Service Regulations set out at Annex A to the USO consultation, the DGT proposed the following draft USC7 to be applied to BT:

Condition 7: Maintenance and Supply of a Directory Information Database and Directories

7.1 Subject to paragraph 7.5 and 7.6 below, BT shall maintain a database containing Directory Information for all Subscribers who have been allocated Telephone Numbers by any Communications Provider ('the database'). BT shall ensure that the database is updated on a regular basis (at least once a year).

7.2 BT shall, in accordance with paragraphs 7.3 to 7.6 below, and on request, make available:

¹⁶¹ See at: http://www.ofcom.org.uk/telecoms/ioi/g_a_regime/gce/rdpl/

¹⁶² See at: http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/uso0303.htm

(a) to any Communications Provider subject to paragraph 8.2 of General Condition 8 for the purpose of allowing that Communications Provider to comply with that paragraph, such Directories as BT compiles which comply with the requirements of that General Condition;

(b) to any person seeking to provide publicly available Directory Enquiry Facilities and/or Directories, the contents of the database, in machine readable form;

(c) to any person seeking to provide publicly available Directory Enquiry Facilities and/or Directories, on-line access (including a search facility) to the database.

7.3 BT shall supply the items in sub-paragraph (a) to (c) of paragraph 7.2 above at the reasonable request of the person requesting such items. Without prejudice to the generality of the foregoing, BT may refuse to supply such items if:

(a) the person requesting such items does not undertake to process the data or information contained in them in accordance with any Relevant Code of Practice, and/or

(b) BT has reasonable grounds to believe that the person requesting such items will not comply with Relevant Data Protection Legislation.

7.4 BT shall supply the items in sub-paragraph (a) to (c) of paragraph 7.2 above on terms which are fair, objective, cost oriented and not unduly discriminatory, and in a format which is agreed between BT and the person requesting the information. Where no such agreement is reached, the Director may determine the format to be applied to the information in accordance with Chapter 2, Part 3 of the Act.

7.5 In complying with the obligations set out in paragraphs 7.1 to 7.4 above, BT shall:

(a) not unduly discriminate in the treatment of data or information supplied to it by other persons; and

(b) have due regard, in such manner as is appropriate, to any Subscriber who has expressed opposition to inclusion of Directory Information about that Subscriber in a Directory or as part of a Directory Enquiry Facility.

7.6 This Condition applies subject to the requirements of Relevant Data Protection Legislation.

A6.126 The terms 'Directory', 'Directory Information' and 'Directory Enquiry Facility' referred to in that draft USC7 were proposed to have the following meanings:

...

"Directory" means a printed document containing Directory Information which is made available to members of the public;

"Directory Information" means, in the case of a Directory, the name, address and Telephone Number of the Subscriber and, in the case of a Directory Enquiry Facility, may include the Telephone Number only of the Subscriber or information that the Telephone Number of the Subscriber may not be supplied;

"Directory Enquiry Facility" means Directory Information provided by means of a Public Telephone Network;

...

A6.127 Chapter 3 of the USO consultation summarised the proposed specific conditions and explains that they are required in order to meet the obligations set out in the Services Order, which in turn would ensure the provision of universal service as

described by the USD. As regards draft USC7, the DGT explained the reasons for his proposal as follows:

Supply of directories and databases for provision of directory services

3.60 This specific condition is required to ensure that at least one comprehensive directory and one comprehensive directory enquiry facility are available to end-users.

3.61 Under Article 5 of the Universal Service directive, all end-users should have access to at least one comprehensive directory and to at least one directory enquiry (DQ) service. Furthermore, under Article 25, providers of publicly available directories or DQ services must also have access to the information required to compile such directories.

3.62 Oftel's consultation, The general conditions of entitlement (22 May 2002), set out Oftel's intentions for the new general conditions of entitlement, including those related to DQ services. Following this first consultation on the general conditions, Oftel is minded to amend its proposals in relation to the relevant general conditions, which will shortly be subject to further consultation.

3.63 It is proposed that General Condition 8, Operator assistance, directories and directory enquiry facilities, will require providers of publicly available telephone services ('PATS') to make a DQ service and directories available to their subscribers. It is further proposed that General Condition 22, Provision of directory information, will require those communications providers who have been allocated telephone numbers to make available their DQ data to any person seeking to provide a publicly available directory or DQ service.

3.64 However, these general conditions will not be sufficient on their own for ensuring that the obligations under Articles 5 and 25 of the Universal Service Directive are met efficiently and transparently. Whilst they do allow for data to be passed between providers of PATS, significant duplication of effort would be required for such providers to ensure that any end-user can access a comprehensive DQ facility and to supply any end-user upon request with a comprehensive directory.

3.65 Oftel is therefore of the view that BT should have a further universal service condition requiring it to provide access to its (comprehensive) DQ database to other DQ providers whether or not they are also providers of PATS. This specific condition also requires BT to provide directories to other communications providers who will be caught by General Condition 8 (but not to those persons who do not have this obligation).

3.66 In Oftel's view this condition will ensure that Articles 5 and 25 of the Universal Service directive are implemented in the UK in an efficient and effective manner, in that BT will be required to act as a central dissemination point for the directory information of all subscribers to telephone services in the UK.

3.67 The basis upon which BT supplies the matters required under the condition must be fair, objective, cost oriented and not unduly discriminatory. BT competes in the downstream market for DQ services and BT is in a unique position to be able to supply this essential input data in an efficient manner that does not involve DQ providers and UK industry as a whole in unnecessary duplication of effort. In Oftel's view, this is also the most proportionate and effective way to ensure (as required by Article 25) that providers of publicly available directories or DQ services are in practice able to access the information they need to compile directories and make services available.

3.68 It should also be noted that this obligation does not prevent other communications providers from providing their own directories or from setting up their own comprehensive databases. Indeed, the general conditions of entitlement will propose that directory information data must be passed between communications providers seeking to provide publicly available directories and DQ facilities, on terms that are fair, cost-oriented and non-discriminatory.

3.69 The imposition of this condition on BT is objectively justifiable and proportionate in that it is necessary to fulfil the requirements of Articles 5 and 25 of the Universal Service Directive and paragraphs (d) and (e) of the Schedule to the Universal Service Order, namely that at least one comprehensive directory and one comprehensive telephone directory enquiry service shall be made available to end-users. This condition imposes obligations on BT only, because BT is in a unique position in that it already compiles a comprehensive DQ database that it makes available to third parties, and it already possesses a significant proportion of the entries in that database as a result of its retail telephony business which makes it particularly efficient for BT to undertake this activity. This condition is therefore, in Oftel's view, not unduly discriminatory. Oftel also believes that the condition is transparent.

A6.128 On 22 July 2003, as noted above, the DGT published his USO notification setting out his reasons for, in effect, designating BT as a universal service provider and setting the USCs, such as USC7, applicable to BT.

A6.129 USC7, as set out in the notification under regulation 4(10) of the Universal Service Regulations set out in Annex A to the USO notification, reads:

Condition 7: Maintenance and supply of a Directory Information database and Directories

7.1 BT shall maintain a database containing Directory Information for all Subscribers who have been allocated Telephone Numbers by any Communications Provider ('the database'). BT shall ensure that the database is updated on a regular basis.

7.2 BT shall, in accordance with paragraphs 7.3 and 7.4 below, and on request, make available:

(a) to any Communications Provider subject to paragraph 8.2 of General Condition 8 for the purpose of allowing that Communications Provider to comply with that paragraph, such Directories as BT compiles which comply with the requirements of that General Condition;

(b) to any person seeking to provide publicly available Directory Enquiry Facilities and/or Directories, the contents of the database, in machine readable form.

7.3 BT shall supply the items in sub-paragraph (a) and (b) of paragraph 7.2 above at the reasonable request of the person requesting such items. Without prejudice to the generality of the foregoing, BT may refuse to supply such items if:

(a) the person requesting such items does not undertake to process the data or information contained in them in accordance with any Relevant Code of Practice, and/or

(b) BT has reasonable grounds to believe that the person requesting such items will not comply with Relevant Data Protection Legislation.

7.4 BT shall supply the items in sub-paragraph (a) and (b) of paragraph 7.2 above on terms which are fair, objective, cost oriented and not unduly discriminatory, and in a format which is agreed between BT and the person requesting the information. Where no such agreement is reached, the Director may determine the format to be applied to the information in accordance with his dispute resolution functions.

7.5 In complying with the obligations set out in paragraphs 7.1 to 7.4 above, BT shall:

(a) not unduly discriminate in the treatment of data or information supplied to it by other persons; and

(b) have due regard, in such manner as is appropriate, to any Subscriber who has expressed opposition to inclusion of Directory Information about that Subscriber in a Directory or as part of a Directory Enquiry Facility.

7.6 This Universal Service Condition applies subject to the requirements of Relevant Data Protection Legislation.

A6.130 In Chapter 3 of the USO notification, the DGT set out his reasons why the USCs were necessary to ensure the proper implementation of the USD in the UK and why he considered them to be consistent with the Services Order. As regards USC7, he stated:

Supply of directories and databases for provision of directory services

3.74 Under this condition, BT must keep an up-to-date database and provide directories and the contents of the database to certain other parties. The condition ensures that Articles 5 and 25 of the Universal Service directive are implemented in the UK in an efficient and effective manner, in that BT is required to act as a central dissemination point for the directory information of all subscribers to telephone services in the UK.

3.75 Under Article 5 of the Universal Service directive, all end-users should have access to at least one comprehensive directory and to at least one directory enquiry (DQ) service. Furthermore, under Article 25, providers of publicly available directories or DQ services must also have access to the information required to compile such directories.

3.76 General Condition 8, *Operator assistance, directories and directory enquiry facilities*, requires providers of publicly available telephone services ('PATS') to make a DQ service and directories available to their subscribers. General Condition 19, *Provision of directory information*, requires those communications providers who have been allocated telephone numbers to make available their DQ data to any person seeking to provide a publicly available directory or DQ service.

3.77 However, as the Consultation explained, these general conditions are not sufficient on their own to ensure that the obligations under Articles 5 and 25 of the Universal Service Directive are met efficiently and transparently. Significant duplication of effort would be required for PATS providers to ensure that any end-user could access a comprehensive DQ facility and to supply any end-user upon request with a comprehensive directory.

3.78 The Director is therefore imposing upon BT a specific universal service condition requiring it to provide the contents of its comprehensive DQ database to other DQ providers whether or not they are also providers of PATS. This specific condition also requires BT to provide directories to other communications providers who will be caught by General Condition 8 (but not to those persons who do not have this obligation).

3.79 This condition is the most proportionate and effective way to ensure (as required by Article 25) that providers of publicly available directories or DQ services are in practice able to access the information they need to compile directories and make services available.

3.80 The condition imposes obligations on BT only, because BT is in a unique position in that it already compiles a comprehensive DQ database – known as 'OSIS' – that it makes available to third parties, and it already possesses a significant proportion of the entries in that database as a result of its retail telephony business. It is therefore able to supply this essential input data in an efficient manner that does not involve DQ providers and UK industry as a whole in unnecessary duplication of effort.

3.81 This condition is therefore not unduly discriminatory. Oftel also believes that the condition is transparent.

3.82 The draft condition set out in the Consultation required BT to provide directories, the contents of the database and on-line access, including a search facility, to the database on terms that were fair, objective, cost-oriented and not unduly discriminatory.

3.83 The final version, however, has been amended so that it no longer refers to provision of on-line access to the database. This reflects Oftel's understanding that in fact only four parties make use of the search facility, known as 'Pathfinder', which BT currently provides. Pathfinder is a value-added search facility, which allows more than a simple search on an individual enquiry basis and provides access to a database more sophisticated than the OSIS database.

3.84 In the Consultation, Oftel took the view that smaller communications providers and DQ service providers would be disadvantaged if BT were not required to provide on-line access to its core database, and that this in turn would compromise the interests of end-users.

3.85 Having considered the matter further and, in light of the information about actual usage of Pathfinder, Oftel now takes the view that on-line access to the database is not essential in order to ensure that Articles 5 and 25 of the Universal Service Directive are properly and efficiently implemented.

3.86 The condition still requires BT to provide the contents of the database to third parties; those parties are then able to create their own search engines for the purpose of providing DQ information to their end-users. At the end of 2002, the market for directory enquiries was opened up to a wide range of companies, which are now able to offer new products and services in addition to the basic DQ service. There is no evidence that these new DQ service providers rely upon online access to BT's database in order to provide DQ information, ie that they are not in a position to buy the entire contents of the database and create their own search facility.

3.87 In its response to the Consultation, BT advised that it plans to continue to provide Pathfinder. If BT were to price the service anti-competitively, Oftel could either take action under the Competition Act or initiate a market review.

3.88 Where BT currently provides the service to a third party, BT should not withdraw it until the third party has had a reasonable opportunity to make alternative arrangements, for example, purchase of the OSIS database.

3.89 Oftel believes that the amendment to the condition ensures that it is proportionate and not unduly discriminatory.

3.90 The draft condition referred to the database being updated "*at least once a year*". These words have now been deleted; as BT commented, it is essential that the database is continually updated.

A6.131 In Chapter 5 of the USO notification, the DGT dealt with the responses to the USO consultation. In relation to USC7, the DGT stated:

Maintenance and supply of a directory information database and directories

Why Oftel is imposing this condition on BT?

5.41 BT argued that Oftel was exceeding the scope of the EC Directives by requiring it to provide directories, the contents of its subscriber database and online access to the database to certain other parties.

5.42 As explained in Chapter 3, Oftel believes that the condition is required in order that Articles 5 and 25 of the Universal Service Directive are properly implemented. It is the most proportionate and effective way to ensure that providers of publicly available directories or DQ services are in practice able to access the information they need to compile directories and make services available.

5.43 Oftel's ability to impose the specific condition derives from section 67 of the Act, which allows Ofcom to "set any such universal service conditions as they consider appropriate for securing compliance with the obligations set out in the universal service order". The Universal

Service Order requires that comprehensive directories and DQs are available to all end-users and the specific condition ensures that these obligations are met. However, as explained below, Oftel has decided that provision of on-line access to the central database is not necessary for implementation of the Universal Service Directive, and may in fact be disproportionate.

On-line access, including a search facility

5.44 BT's key concern was the requirement to provide on-line access, including a search facility, to its database. It advised that the product that it currently provides, known as Pathfinder, is not a simple search engine limited to the OSIS database. Rather, BT has invested resources in creating a sophisticated product which provides access to value added material such as cross-references and special lists.

5.45 On the other hand, a DQ service provider, 118866, commented that on-line access was essential. Whilst larger DQ service providers might be able to use OSIS to build their own subscriber databases, they were unlikely to offer access to those databases to smaller innovative service providers.

5.46 The requirement to provide the contents of a database is proportionate in that BT already compiles a comprehensive DQ database 'OSIS' that it makes available to third parties, and it already possesses a significant proportion of the entries in that database as a result of its retail telephony business. In order to ensure that all end-users have access to comprehensive and up-to-date directory information, communications providers must be able to obtain information from the central database.

5.47 However, having considered BT's response to the Consultation and other information to the effect that there are only four companies who make use of BT's search facility, Pathfinder, and also the fact that BT no longer has a monopoly on the provision of DQ services, Oftel has decided that there is no objective justification for requiring BT to provide on-line access to its database. There appears to be no reason why the four companies cannot simply buy the contents of the OSIS database and create their own search facility. Oftel notes, however, that BT's response advises that it plans to continue to provide Pathfinder.

5.48 Where BT provides Pathfinder to a third party, it should continue to do so until the third party has had a reasonable opportunity to make alternative arrangements, for example, purchase of the OSIS database. If BT were to price the service at an anti-competitive level, Oftel may take action under Competition Act or by means of a market review.

A6.132 Oftel made those comments in the light of (among others) the following response¹⁶³ made by BT on 2 May 2003 to the USO consultation:

Summary

...

Maintenance and supply of a directory information database and directories

- There is no legal basis under the Directives for Oftel placing an obligation on BT at the wholesale level in respect of its phonebooks and search engine (Pathfinder). BT is however supportive of open access to OSIS – the core database.

...

4] Specific comments on the proposed conditions to be applied to BT.

¹⁶³ See at: <http://www.ofcom.org.uk/static/archive/oftel/publications/responses/2003/uni120303/index.htm>

...

Condition 7: Maintenance and supply of a directory information database and directories

(i) Supply of Directories and databases for provision of directory services.

In paragraph 3.61 Oftel refers to the Universal Service Directive obligations on Member States to ensure that:

- At least one comprehensive directory is available to end users;
- At least one directory enquiry service is available to all end users including users of public pay telephones;
- All undertakings which assign telephone numbers to subscribers meet all reasonable requests to make available for the purpose of the provision of publicly available directory enquiry services and directories the relevant information in an agreed format on terms which are fair, objective, cost orientated and non discriminatory.

In its revised general conditions of entitlement Oftel has addressed these obligations through Conditions 8 and 22. However in paragraph 3.64 Oftel states that it is necessary to go further in order to ensure that the obligations under Article 5 and 25 of the Universal Service Directive are met efficiently and transparently.

Oftel therefore proposes placing a further universal service obligation on BT requiring it to provide access to its comprehensive (DQ) database to other DQ providers whether or not they are also providers of PATS. This specific Condition also requires BT to provide directories to other communications providers who will be caught by General Condition 8. Oftel argues without any supporting evidence that the Condition is objectively justifiable and proportionate and that it is not unduly discriminatory on BT.

There is no basis within the Universal Service Directive for the application of such a Condition. Article 5 of the Universal Service Directive is concerned with obligations at the retail level and this obligation is fulfilled through the requirements that Oftel has set out in the General Conditions. Similarly, while Article 25 is concerned with the exchange of information between operators this is also satisfied by Condition 22 of the General Conditions.

Accordingly BT disagrees that it is proportionate or necessary to go further and to place on BT an obligation at the wholesale level in respect of its search engine and directories. BT believes that by imposing regulation at the wholesale level, and especially for access to Pathfinder, Oftel will be distorting competition.

BT also notes that there is no basis for the imposition of these obligations under the other relevant Directives. There are no relevant markets of this nature defined in the Commissions Guidelines and accordingly Oftel could not undertake a market review in relation to these markets without first initiating the Article 7 procedure.

BT considers that Oftel is bound by the general limitations of the Directives as a package and is not permitted to simply impose regulatory obligations at will. The Framework Directive Art 15 makes clear that any obligations involving ex ante regulation outside the Commission Recommendation have to be undertaken within the Art 7 procedure. Furthermore, there is considerable doubt whether some of the services in Condition 7, specifically phonebooks and access to OSIS, are actually Electronic Communication Services (ECS) within the meaning of the Directives. The Commission Guidelines (paragraph 85) makes clear the limitations of the powers of NRAs to regulate outside these boundaries. If OFTEL believes that it has such powers, it should state them clearly with reasoned legal argument.

BT shows at annex 2 a communication from the European Commission which would appear to endorse our position that provision of access to Pathfinder would require recourse to the

Art 7 procedure (answer to Question 3) and provision of phonebooks is not an ECS (see definitions).

In summary, the obligations at the retail level in the Universal Service Directive cannot be used as a pretext to enable Oftel to impose obligations at the wholesale level when this has not been mandated under the Access and Interconnect Directive (AID) or permitted in the Framework Directive.

Notwithstanding BT's comments above on Oftel's powers to impose Conditions 7.1 and 7.2 BT has the following comments to make on the drafting of those Conditions and a re-worded Condition 7 is attached at annex 3.

(ii) Condition 7

BT presumes that Oftel in Condition 7.1 is referring to OSIS. BT has two basic problems with this Condition which concern coverage (what is meant by 'comprehensive') and frequency of update of the database.

BT believes that as currently drafted, Condition 7.1 may be too broad. OSIS may be considered to be a comprehensive database in so far as it contains information where there is a demonstrable need to provide directory information services as required under current legislation. However, this is much more limited than the all encompassing definition suggested in Condition 7.1 which would imply the entire number range. The exact nature of 'comprehensiveness' in the Universal Service Directive Art 5.1 (a) does not appear to be defined which indicates that a degree of discretion exists in terms of precise coverage.

At a more practical level, BT considers that the nature of 'comprehensiveness' could usefully be considered in terms of the information contained within a data record held on OSIS and how that information is provided to BT for inclusion in OSIS. This issue is also important in facilitating a clear boundary between different service offerings and for example the provision of non-mandatory directory information services. BT proposes that this matter be progressed through industry discussion in the first instance.

Regarding frequency of update, there appears to be some confusion between the requirement at the retail level for update of the Directory at least once a year and of the database itself which of necessity requires continuous updating. We present a suggested modification to 7.1 in annex 3.

a) Provision of Directories

In relation to paragraph (a) of Condition 7.2 BT notes that the current definition of Directory means a printed document containing Directory Information which is made available to members of the Public. The Universal Service Directive Art 5 on the other hand permits such a directory to be in electronic form. BT is addressing the issue of electronic directories in more detail in its response to the revised General Conditions of Entitlement.

As stated above, BT does not believe that there is any legal basis for or any need for an obligation to be imposed on BT to provide other communications providers with its directories – either electronic or paper. By imposing such an obligation on BT, Oftel is effectively distorting the ability for alternative competitive solutions which would naturally arise facilitated by General Conditions 8 and 22. These could include for example different combinations of listings, 'badging' and delivery.

If an obligation along the lines of Condition 7.2 (a) were to be imposed, BT believes that Condition 7.2 (a) must be redrafted in conjunction with definitions in the Schedule in order to ensure that the obligation is proportionate. Our suggested re-draft in annex 3 would restrict the obligation to the provision of the Directory Information (the alpha listing) of BT's phonebooks alone. Note that this would not affect the obligation on PATS providers to provide a directory to consumers.

In addition, BT would also point out that in the consultation document Oftel do not place an obligation on Kingston to make directories available. Kingston has always produced its own directory and BT has never produced a directory for the Kingston region nor has any plans to do so.

b) Provision of OSIS

Notwithstanding BT's comments above on Oftel's powers to require the provision of OSIS, BT accepts that there are good grounds for ensuring that there is a reliable database which is open to all providers of directory services. We have proposed in annex 3 a modest drafting alteration to Condition 7.1 and 7.2.

c) Provision of Pathfinder

BT understands that Oftel's intention is that Condition 7.2 c is meant to refer to the provision of the product that is currently known as Pathfinder.

Pathfinder is not in any sense synonymous with a simple search engine facility limited to the OSIS database; the actual search engine is NDIS to which Pathfinder is the gateway, and its associated database is not OSIS in any case. Pathfinder represents a much more sophisticated product providing access to value added additional entries such as cross references, pseudonyms and special lists. These are value-added services which have been created through BT's own efforts and represent an important source of differentiation between BT's retail service and those provided by its competitors.

BT believes there is no legal or otherwise objectively justifiable basis on which an obligation to provide access at the wholesale level to Pathfinder or any similar product can be justified under the new regulatory framework. While BT plans to continue to offer access to Pathfinder we believe that an obligation to provide access at a controlled price represents unfair regulation, fettering competition and imposing undue control on BT.

Even if Oftel were to conduct a market analysis under the Art 7 procedure, there is no question that access to Pathfinder would not be justified under the criteria set out in the AID and indeed in Oftel's own Access Guidelines. Several DQ Service Providers have entered the market without taking up access to Pathfinder and in any case, the cost of the search engine is modest in the context of the provision of DQ services where call centre and marketing costs predominate.

BT's view is that the creation of a search engine can easily be achieved by either buying in systems or by developing systems in house. Suppliers who are active in this market include Varetis, Northern Telecom and Volt Delta who can develop a system that is scaled to the customer's call volumes.

BT perceives few strategic or other barriers to entry in the provision of DQ services and the widespread introduction following 118XXX introduction demonstrates this to be the case. Regulation of BT in such an innovative market and which is not supported by the Commission would be wholly unacceptable.

...

Annex 2

Communication from the European Commission

Brussels, 15 April 2003

D(2003)

This information is provided on an informal basis and does not necessarily reflect the official position of DG Information Society or the European Commission. The Commission accepts no responsibility or

liability whatsoever with regard to any information or data referred to in this document. Moreover, the Commission is not the final arbiter in matters of interpretation of the new framework. This is ultimately for the courts, and the ECJ in particular, to determine.

Dear Mr. Whitchurch,

Your request to Peter Scott relating to the implementation of Directive 2002/21/EC the Framework Directive (FWD) and Directive 2002/22/EC the Universal Service Directive (USD) under the new framework for electronic communications has been passed to us for reply.

BT's query:

It is our understanding that art. 5 of the Universal Service Directive concerns the availability of a comprehensive directory and comprehensive DQ service to end-users, and that Art. 25 relates to the rights to an entry in a directory, and obligations on all undertakings which assign telephone numbers to make available number information. However, we believe that neither Article confers a power on NRAs to regulate the provision of wholesale services or to do so on the basis of significant market power. We believe that DQ services do not appear to be electronic communication services within the meaning of art. 2 FWD. Further, according to the Commission Guidelines (July 2002) two conditions would need to be satisfied for the imposition of wholesale obligations: The markets should be electronic communications markets and The markets should have such characteristics as to justify ex-ante regulation

Even if these services did fall under Art 2 FWD, NRAs would be obliged to use the Article 7 procedure of the Framework Directive itself and undertake an appropriate market review for SMP equivalent obligations to be imposed. In summary, BT believes that the requirements of the USD to provide services to end-users cannot be used to circumvent the procedures of, and the restrictions in, the rest of the Directives themselves.

Comments

Our remarks address the specific provisions for directory information services under the existing and new regulatory frameworks for electronic communications networks and services. In particular, the relevant provisions of Directive 98/10/EC Voice Telephony Directive and Directive 2002/22/EC Universal Service Directive are analysed. In addition, the relevance of Directive 2002/21/EC Framework Directive is explained.

For purposes of our reply,

'directory information' refers to categories of information that include subscriber name, number, address, customer type, directory status and type of number (e.g., fixed or mobile); directory information is collected by network operators from their customers and is used to provide telephone directories and/or directory information services;

'directory information services' refer to the commercial provision of directory information by means of an electronic communications system; they include both directory enquiry services and on-line directory information services;

'directory enquiry (DQ) services' refer to directory information services that are operator assisted and involve the operator looking up entries on a database;

'wholesale' refers to the provision of services between network operators or service providers.

Relevant articles from existing and new framework:

The relevant articles under the existing and new regulatory frameworks are Articles 3 and 6 of Directive 98/10/EC Voice Telephony Directive (VOD) and Articles 5 and 25 of the Universal Service Directive (USD) and are re-produced in annex.

BT's query may be re-phrased as:

1. Do the provisions of the Framework Directive (FWD) give NRAs the power to regulate wholesale directory information services on the basis of significant market power (SMP)?

2. Are directory information services considered electronic communications services for the purposes of the new regulatory framework?

3. Do the provisions of either the Voice Telephony Directive (VOD) or the Universal Service Directive (USD) provide for NRAs to have the power to regulate the provision of wholesale directory information services or access to wholesale directory information?

Analysis and Answers:

Question 1: Do the provisions of the FWD give NRAs the power to regulate wholesale directory information services on the basis of significant market power (SMP)?

Answer: The provisions of the FWD relate, inter alia, to the designation of undertakings with significant market power (SMP) and the imposition of obligations under the provisions of Articles 14 to 16 FWD. The provision of wholesale directory information services to third parties is **not included** in the Commission's Recommendation on Markets Susceptible of ex ante Regulation³ as one of the markets where such regulation by NRAs may be warranted. Thus, NRAs would first have to seek Commission approval to define a market for wholesale directory information services, in accordance with the procedures in Article 7 FWD, and obtain the Commission's agreement before it could proceed to designate any operator as having significant market power on that defined market. As indicated in the Recommendation on relevant markets, the Commission will use the three criteria set out in section 3.2 of the Explanatory Memorandum to assess whether any such proposed markets could justify ex-ante regulation.

Question 2: Are directory information services considered electronic communications services for purposes of the new regulatory framework?

Answer: Such services may not fall within the definition of an electronic communications service (ECS), but certain aspects of these services are regulated pursuant to the definition of a "publicly available telephone service" as defined in Article 2 of VOD and Article 2 of USD. Article 2 of VOD defines 'publicly available telephone services' as including both fixed telephone services and public mobile telephone services. Fixed public telephone services include

...access to emergency '112' services, the provision of operator assistance, directory services, provision of public pay phones...

Article 2 USD defines "publicly available telephone service" as

a service available to the public for originating and receiving national and international calls and access to emergency services through a number or numbers in a national or international telephone numbering plan, and in addition, may, where relevant, include one or more of the following services: the provision of operator assistance, directory enquiry services, directories, provision of pay phones,...

Therefore, for purposes of our reply, it is not necessary to determine if directory information services fall within the definition of ECS as they are defined as 'publicly available telephone services', with specific regulatory obligations imposed in relation to them, as explained in Question 3.

Question 3: Do the provisions of either or both the VOD or USD provide for NRAs to have the power to regulate either (1) the provision of wholesale directory information services or (2) access to directory information at the wholesale level?

Answer: No as to the former and Yes as to the latter.

There are no provisions in either the VOD or the USD, in relation to directory services, to provide an NRA with powers to regulate the provision of wholesale directory information services. Nor are there any provisions in the FWD, in relation to SMP designation (other than on a case-by-case basis under Article 7 FWD as described above), that would foresee NRAs having the power to impose obligations on operators in relation to wholesale directory information services.

Nonetheless, competition in the directory information services market has been recognised by the Commission as highly beneficial, especially regarding price competition and service innovation.

Both the VOD and USD contain provisions to facilitate access by third parties to directory information at the wholesale level. The provisions of Article 6.3 VOD and Article 25.5 USD relate to the **terms of access** to this information whereby third parties are able to access directory information at the wholesale level in order to provide competitive DQ services and directories.

Under Article 6.3 VOD, Member States are required to ensure that all (emphasis added) undertakings which assign telephone numbers to subscribers must meet **all** reasonable requests for directory information. This information must be provided in a **fair, cost oriented and non-discriminatory manner**. Any operator that assigns numbers must make directory information available to other operators to enable them to provide their own directory enquiry services.

Similarly, under Article 25.2 USD, undertakings that assign telephone numbers must meet **all** reasonable requests to make directory information available in an agreed format, on terms which are fair, **objective**, cost oriented and non-discriminatory for the purposes of the provision [by third parties] of publicly available directory enquiry services and directories. NRAs would have the power to regulate the **access** to wholesale directory information, to ensure that third parties could provide their own DQ services and directories..

These articles also prescribe a minimum level of directory services that should be available for all users. NRAs should be able to regulate to enforce the legal requirement to achieve this minimum standard if needed. Such legal requirement may require all undertakings that assign numbers to make their directory information available to a universal database operator. This obligation flows from the requirement in the USD for a universal directory enquiry service and at least one universal directory, and does not include the commercial provision of directory information.

Conclusion

As a general rule, NRAs are already obliged to ensure that undertakings that assign telephone numbers to subscribers make their directory information available to third parties in an agreed format on fair, cost-oriented and non-discriminatory terms. As of 25 July 2003, NRAs will be obliged to apply a fourth criterion, objective terms of access, "for the purposes of the provision of publicly available directory enquiry services and directories". As a result of both VOD and USD, any operator that assigns numbers must provide its directory information to others in an agreed format to enable them to provide their own directory enquiry services or directories.

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- A6.133 Some 16 months after the above-mentioned relevant GCs and USCs were set by the DGT and came into force, the ECJ handed down its judgment the *KPN* case, as noted above.
- A6.134 Both The Number and Conduit rely on that judgment in referring their respective disputes with BT to Ofcom, particularly with regard to the ECJ's preliminary ruling in respect of the meaning of 'cost oriented' charges in respect of 'relevant information'.

Annex 7

Comparison of relevant RVTD and USD provisions

Introduction

A7.1 This Annex sets out a table below comparing the provisions in Article 6 (and, in part only, Article 9) of the RVTD with Articles 5 and 25 of the USD.

Article(s) in the RVTD	Article(s) in the USD
<p>Article 6</p> <p>1. The provisions of this Article are subject to the requirements of relevant legislation on the protection of personal data and privacy, such as Directive 95/46/EC and Directive 97/66/EC.</p>	<p>Article 25</p> <p>5. Paragraphs 1, 2, 3 and 4 apply subject to the requirements of Community legislation on the protection of personal data and privacy and, in particular, Article 11 of Directive 97/66/EC.</p> <p>Article 5:</p> <p>2. The directories in paragraph 1 shall comprise, subject to the provisions of Article 11 of Directive 97/66/EC, all subscribers of publicly available telephone services.</p>
<p>Article 6</p> <p>2. Member States shall ensure that:</p> <p>(a) subscribers have the right to have an entry in publicly available directories and to verify and, if necessary, correct or request removal of that entry;</p> <p>...</p>	<p>Article 25</p> <p>1. Member States shall ensure that subscribers to publicly available telephone services have the right to have an entry in the publicly available directory referred to in Article 5(1)(a).</p>
<p>Article 6</p> <p>2. Member States shall ensure that:</p> <p>...</p> <p>(b) directories of all subscribers who have not expressed opposition to being listed, including fixed, mobile and personal numbers, are available to users in a form approved by the national regulatory authority, whether printed or electronic, or both, and are updated on a regular basis;</p> <p>...</p>	<p>Article 5</p> <p>1. Member States shall ensure that:</p> <p>(a) at least one comprehensive directory is available to end-users in a form approved by the relevant authority, whether printed or electronic, or both, and is updated on a regular basis, and at least once a year.</p>
<p>Article 6</p> <p>2. Member States shall ensure that:</p> <p>...</p> <p>(c) at least one telephone directory enquiry</p>	<p>Article 5</p> <p>1. Member States shall ensure that:</p> <p>...</p> <p>(b) at least one comprehensive telephone</p>

service covering all listed subscribers' numbers is available to all users, including users of public pay telephones.	directory enquiry service is available to all end-users, including users of public pay telephones.
<p>Article 6</p> <p>3. In order to ensure provision of the services referred to in paragraph 2(b) and 2(c), Member States shall ensure that all organisations which assign telephone numbers to subscribers meet all reasonable requests to make available the relevant information in an agreed format on terms which are fair, cost oriented and non-discriminatory.</p>	<p>Article 25</p> <p>2. Member States shall ensure that all undertakings which assign telephone numbers to subscribers meet all reasonable requests to make available, for the purposes of the provision of publicly available directory enquiry services and directories, the relevant information in an agreed format on terms which are fair, objective, cost oriented and non-discriminatory.</p>
<p>Article 6</p> <p>4. Member States shall ensure that organisations providing the service referred to in paragraph 2(b) and 2(c) follow the principle of non-discrimination in their treatment and presentation of information provided to them.</p>	<p>Article 5</p> <p>3. Member States shall ensure that the undertaking(s) providing the services referred to in paragraph 1 apply the principle of non-discrimination to the treatment of information that has been provided to them by other undertakings.</p>
<p>Article 9</p> <p>Member States shall ensure that all users provided with a connection to the fixed public telephone network can:</p> <p>...</p> <p>(b) access operator assistance services and directory enquiry services in accordance with Article 6.2(c), unless the subscriber decides otherwise;</p> <p>...</p> <p>Member States shall ensure that mobile users can also access the services mentioned in (b) and (c).</p>	<p>Article 25</p> <p>3. Member States shall ensure that all end-users provided with a connection to the public telephone network can access operator assistance services and directory enquiry services in accordance with Article 5(1)(b).</p>
<p>[no corresponding provision]</p>	<p>Article 25</p> <p>4. Member States shall not maintain any regulatory restrictions which prevent end-users in one Member State from accessing directly the directory enquiry service in another Member State.</p>

A7.2 The above table shows, in particular, that the provisions in Article 6 of the RVTD have been substantively retained in the USD, but separated into two different Articles, depending upon whether the subject-matter relates to end-users of an universal service (Article 5) or certain other end-users generally (Article 25)

Annex 8

History of Policy and BT's Obligations

Introduction

- A8.1 **Annex 6** of this document summarises the position under the legal and regulatory framework that existed prior to 25 July 2003. This Annex sets out further detail about the historical background in respect of the regulation and policy concerning the provision of directory information services under the previous framework.
- A8.2 In particular, this Annex sets out the changes to the licensing regime, as well as some of the key issues which have arisen in policy discussions. In light of the focus of this determination, this Annex also sets out some of the key statements on OSIS pricing, in particular in relation to OSIS downloads.

BT's Licence as granted on 22 June 1984

- A8.3 On 22 June 1984, the Secretary of State granted a licence to British Telecommunications under Section 7 of the 1984 Act, which licence was laid before Parliament on 26 June 1984. That licence, a draft text of which had been published on 25 October 1983, included Condition 3, which provided:

DIRECTORY INFORMATION

3.1 The Licensee shall:

- (a) on request by any person in the United Kingdom (other than a public telecommunications operator) to whom it provides voice telephony services by means of any of the switched Applicable Systems, provide to that person by means of any such System used to provide such services to that person a directory information service relating to the switched voice telephony services it provides to any other person by means of either the same Applicable System or any other Applicable System to which it is connected and which is a switched voice telephony system; and
- (b) on the written request of any person in the United Kingdom supply to that person such directories as the Licensee, for the purpose of facilitating the use by others of any switched telecommunication service it provides by means of any of the Applicable Systems, publishes and makes available generally to persons to whom it provides those services.

3.2 Where the Licensee provides switched voice telephony services by means of any Applicable System which is connected to another public telecommunication system in the United Kingdom (the "Other System") by means of which switched voice telephony services are provided it shall:

- (a) to the extent that the operator of the Other System makes available directory information to the Licensee and to those to whom that other operator provides voice telephony services, ensure that those to whom the Licensee provides voice telephony services can obtain by using the Applicable System by means of which those services are provided (whether together or with some other system or not) such directory information as is so available about persons to whom such services are provided by means of that Other System; and
- (b) provide, whether by means of the Applicable Systems or otherwise, the operator of that Other System with directory information about persons to whom the Licensee

provides switched voice telephony services in a form which is sufficient to meet any reasonable request of that operator (having regard in particular to what it is reasonably convenient for the Licensee to provide and to what is not to the commercial disadvantage of the Licensee) for the purpose of enabling that operator to provide directory information about such services provided by means of the Applicable Systems and that Other System when connected together; but the Licensee shall not be obliged to comply with a request made by an operator under this sub-paragraph unless the operator undertakes to use the directory information only for the purpose of providing directory information services to persons to whom he provides switched voice telephony services.

3.3 Where the Licensee provides switched voice telephony services by means of any of the Applicable Systems which is connected to an Authorised Overseas System by means of which such services are provided, then, if a directory information service is provided by means of that Authorised Overseas System in respect of that Authorised Overseas System, the Licensee shall provide to any person to whom it provides switched voice telephony services by means of that Applicable System information as to how that person may avail himself by means of that Application System and that Authorised Overseas System when connected together of the directory information service provided in respect of that Authorised Overseas System and shall take all reasonable steps to secure that that can be done.

3.4 Where the Licensee provides switched voice telephony services by means of any of the Application Systems which is connected to both:

- (a) an Authorised Overseas System by means of which such services are provided; and
- (b) a Connectable System in the United Kingdom by means of which such services are provided which is run under a Licence which does not authorise the connection of that system to a system outside the United Kingdom so as to convey Messages from the United Kingdom to a place outside the United Kingdom

it shall not reasonably refuse to provide to the operator of that Connectable System access to such directory information services relating to the Authorised Overseas System as the Licensee makes available to those to whom it provides voice telephony services.

3.5 The directory information services provided by the Licensee under Condition 3.1(a) and 3.3 and the information made available under Condition 3.2(a) shall include a service or information as the case may be satisfactory to the Director whereby directory information is made available in a form which is appropriate to meet their needs to persons in the Licensed Area who are so blind or otherwise disabled as to be unable to use a telephone directory in a form in which it is generally available to persons to whom the Licensee provides services; and the service so provided to such persons shall from the date on which this Licence enters into force be provided free of charge or, if the Director is satisfied that that is not practicable, the Licensee shall provide, in accordance with arrangements agreed with the Director, appropriate reasonable compensation in respect of charges that are paid.

3.6 The obligations in Conditions 3.1, 3.2 and 3.3 shall not apply when the directory information requested relates to a person who has requested the Licensee or the operator of the connected telecommunication system not to provide such information in relation to him.

3.7 This Condition operates without prejudice to Condition 13.

A8.4 By 1991, BT's licence had been amended so that paragraph 3.2 of Condition was substituted for a new paragraph 3.2 as follows:

3.2 Where the Licensee provides switched voice telephony services by means of any Applicable System which is connected to another public telecommunication system in the United Kingdom (the "Other System") by means of which switched voice telephony services are provided it shall:

- (a) to the extent that the operator of the Other System makes available directory information to the Licensee and to those to whom that other operator provides voice telephony services, ensure that those to whom the Licensee provides voice telephony services can obtain by using the Applicable System by means of which those services are provided (whether together or with some other system or not) such directory information as is so available about persons to whom such services are provided by means of that Other System; and
- (b) supply to the operator of that Other System, whether by providing on-line access to the Licensee's electronic database referred to in paragraph 3.2(c) or by providing directories of the kind referred to in paragraph 3.1(b) or by providing the totality of the contents of that database in machine readable form, directory information about persons to whom the Licensee provides switched voice telephony services, and do so for the purpose of enabling that operator to provide directory information about such services provided by means of the Applicable Systems and that Other System when connected together and to route calls, and do so in a form which is sufficient to meet any reasonable request of that operator, for those purposes having regard in particular to the cost to, and the reasonable convenience of, the Licensee and that operator and to the desirability of that operator being able to use complete and up to date directory information; and
- (c) where the operator of the Other System requests the Licensee pursuant to and in accordance with paragraph 3.2(b) to provide access including on-line access or including the provision of an appropriate storage medium containing the data in machine readable form, to all the names, addresses and telephone numbers on the electronic database which is used by the Licensee to provide by means of the Applicable Systems directory information services to persons to whom the Licensee provides switched voice telephony services then the Licensee shall grant such access on reasonable terms (which may include recovery of fully allocated costs and a reasonable return on capital employed) provided that:
 - (i) the operator of that Other System undertakes to use the directory information only for the purpose of providing directory information services or to route calls;
 - (ii) the Licensee may lawfully provide such information to the operator of the Other System: and
 - (iii) the Licensee shall not be required to do anything in contravention of the Data Protection Act 1984.

Of tel's 1993/4 Policy Review and October 1995 Consultation

- A8.5 On 31 October 1995, Of tel published a consultation document¹⁶⁴ entitled 'Use of Directory Information'. Paragraph 3.9 of that document referred to Of tel's 1993/4 Policy Review, stating:

During 1993/4 Of tel carried out a review of the provision of DQ services. The review sought to establish how best to ensure that PTOs could meet their customers' needs for these services and to gauge views on issues such as the geographical coverage of printed directories; frequency of updates; and the release of PTO customer directory information to non-PTOs to enable them to publish directories or to offer services in competition with BT and the other PTOs. A key question in conducting the review was how Of tel could ensure that PTO customers continued to have access to a complete DQ service and that PTOs were able to compete to provide services on equitable terms.

¹⁶⁴ http://www.ofcom.org.uk/static/archive/oftel/publications/1995_98/competition/dirinfo.htm#Chapter3

A8.6 As a result of that review, Oftel concluded, *inter alia*, that it “should examine BT’s charges for inputting and accessing directory information and for supplying wholesale DQ services and unclassified printed directories to PTOs.” The consultation document stated at paragraph 3.11 that Oftel had carried out an investigation of BT’s charges for assimilating PTO directory information and for supplying wholesale DQ services and unclassified printed directories to PTOs, which had resulted in a new regime providing for these charges to be transparent and to reflect underlying cost, implemented via modifications to BT’s licence under the accounting separation implemented in March 1995.

A8.7 Oftel also set out a number of proposals to open up the market for DQ services. In particular, Oftel suggested that:

- competition should be introduced into the market for directory products and services, including DQ services;
- this could be best achieved by allowing new entities, not necessarily telecommunications operators, to provide directory services; and
- these new operators must be given access to the names, addresses and telephone numbers of all telephone customers, to enable them fairly to compete with BT – customers should not generally be able to refuse to allow their information to be shared; but
- the new operators should be regulated tightly to ensure that they do not misuse customer information or give it to other people who may misuse it.

A8.8 Although that consultation did refer to the issue of OSIS pricing, its particular focus was to consider how competition could emerge in the market for databases holding compiled directory information.

Oftel’s Further Policy Review in September 1997

A8.9 In September 1997, Oftel published a further consultation document¹⁶⁵ entitled ‘Provision of Directory Information Services and Products’. That document aimed to address responses made to Oftel’s October 1995 consultation. Follow-up industry workshops and discussions with interested parties opened up a broader range of issues than those considered in the October 1995 consultation. The September 1997 consultation also set out certain proposals taking account of proposed European legislation at that time affecting the use of residential customers’ directory information and the provision of directory information services.

A8.10 In particular, the September 1997 consultation set out proposals aiming to:

- enable the development of competition in these markets by removing barriers to entry;
- ensure that customers have access to more comprehensive directory information, by looking at how ex-directory levels might be reduced and improving the coverage of different telecommunications services – for example, mobile, fax and pager numbers; and

¹⁶⁵ http://www.ofcom.org.uk/static/archive/oftel/publications/1995_98/consumer/dqchap.htm

- address the privacy concerns of residential customers by giving them more choices about how their directory information is used and setting rules about what can be done with their information.

A8.11 Oftel also examined the issue of charging for directory information, considering there to be a prima facie case that some of the current charging practices, if continued, would have anti-competitive effects. Oftel's initial view was that it would be regarded as anti-competitive or unduly discriminatory if PTOs with market power in directory information offered only a fixed fee and not per look-up charges. It proposed that BT's charges should be fair, reasonable and non-discriminatory; that per look-up charging (or similar) should be offered; and that a price list be published.

Oftel's September 1998 Interim Statement

A8.12 On 25 September 1998, Oftel published a statement¹⁶⁶ entitled 'Provision of Directory Information Services and Products' setting out its conclusions from the September 1997 consultation. In particular, it set out proposed modifications to BT's licence to enable persons without PTO licences to have access to the contents of the directory information database used by BT to publish directories and on-line access to the database used by BT to provide a directory information service. The proposed condition also required that BT provides such items on terms which are fair, cost oriented and non-discriminatory, but that BT would be entitled to refuse to supply these items if the person requesting them did not undertake to comply with data protection legislation and any relevant Codes of Practice issued by the Data Protection Registrar.

A8.13 The text of the proposed modification read as follows:

With effect from 1 January 1999, the following conditions shall be inserted:

X.1 The Licensee shall in accordance with paragraph X.2 below on request by any person make available to him for the purpose of enabling him to provide directories or a directory information service

(a) the contents of the database, in machine readable form, which the Licensee uses to compile directories for the purpose of complying with Condition RVTD 2.7; and

(b) on-line access (including a search facility) to the database which the Licensee uses to provide a Directory Information Service for the purpose of complying with its obligation under Condition RVTD 2.10.

X.2 Paragraphs RVTD 2.20, 2.21, 2.22 and 2.23 shall apply in respect any of the items in sub-paragraph (a) or (b) above as they apply to any of the items in sub-paragraphs (a), (b) or (c) in paragraph RVTD 2.19 but in such application the words "directory information service" in paragraph 2.22 shall be substituted for the words "Directory Information Service" as they appear in that paragraph.

A8.14 Oftel stated that its view remained that the charges should be set by commercial negotiation with a fall-back to Oftel in the case of dispute.

¹⁶⁶ http://www.ofcom.org.uk/static/archive/oftel/publications/1995_98/consumer/dg998.htm

Oftel's May 1999 Final Statement

A8.15 In May 1999, Oftel published a statement¹⁶⁷ entitled 'Statement on Responses to the Oftel Statement on Provision of Directory Information Services and Products published on 25 September 1998' setting out its views on the comments made in relation to Oftel's proposals set out in its September 1998 interim statement. Oftel also set out the final modification to BT's licence that took effect on 1 January 1999, which contained some minor amendments from that set out in September 1998 interim statement, namely Condition 3A that provided that:

DIRECTORIES AND DIRECTORY INFORMATION

3A.1 The Licensee shall in accordance with paragraph 3A.2 below on request by any person other than a public telecommunications operator subject to the obligations under paragraphs RVTD 2.7 and RVTD 2.10 make available to him for the purpose of enabling the provision of directories or a directory information service:

- a. the contents of the database, in machine readable form, which the Licensee uses to compile directories for the purpose of complying with its obligation under paragraph RVTD 2.7; and
- b. on-line access (including a search facility) to the database which the Licensee uses to provide a Directory Information Service for the purpose of complying with its obligation under paragraph RVTD 2.10.

3A.2 Paragraphs RVTD 2.20, 2.21, 2.22 and 2.23 shall apply in respect of any of the items in sub-paragraph (a) or (b) above as they apply to any of the items in sub-paragraph (a), (b) or (c) in paragraph RVTD 2.19 but in such application the words "directory information service" in paragraph 2.22 shall be substituted for the words "Directory Information Service" as they appear in that paragraph.

A8.16 As regards to issues related to OSIS, Oftel concluded that:

Collection of data to be inputted into OSIS

- The mechanism and charges for making directory information available to OSIS should be resolved between BT and organisations providing directory information.
- The mechanism for collecting directory information may change as the nature of directory information develops. It is reasonable to expect there to be a standard industry format for the delivery of this information. This format should be decided by the industry – Oftel would consider it reasonable if the chosen format minimised the costs involved in the transfer of the directory information. BT is currently consulting on this issue.
- In any event, the costs of running OSIS will be recovered through charges for making OSIS downloads available. The level of charges are a matter for commercial negotiation between BT and interested parties. However, these costs must be fair, cost orientated and non-discriminatory. Oftel will only intervene to resolve disputes. The principles that Oftel would follow in such a dispute are set out in the Directory Information Statement.
- BT has recently published proposals changing the charging structure for the inputting of directory information into OSIS. The proposals are as follows:
 - January 1999 – BT stops charging for the inputting of directory information into OSIS, except for data provided on paper;

¹⁶⁷ <http://www.ofcom.org.uk/static/archive/oftel/publications/1999/consumer/dqres599.htm>

- April 1999 – BT begins paying suppliers other than BT for the directory information to be inputted into OSIS;
- Late 1999 / 2000 – BT begins paying BT's retail arm for the directory information to be inputted into OSIS. Oftel has made clear to BT that there would be regulatory concern if the transition to equivalent payments to OLOs and BT retail does not happen as soon as possible.
- Under the RVTD Regulations all PTO licensees who have been allocated numbers by the Director General must supply directory information about their subscribers (and about the end users of any person to whom they have sub-allocated numbers) to PTOs, such as BT, on request. There are corresponding obligations on other licensees and Systemless Service Providers, who have received sub-allocations of numbers, to supply directory information on their subscribers to the person/organisation from whom they received the number sub-allocation or to the licensee who was allocated numbers by the Director General. Information on all allocated numbers should be supplied.

Management of OSIS

- Charges for OSIS downloads may be recovered as indicated under Collection of directory information to be inputted into OSIS above. The provision of directory information from OSIS is a new standard service and so is presumed to be competitive. However, under the NCC regime, if complaints about excessive charging are upheld by Oftel, the price for the service can be determined and brought under a price cap.
- Following the establishment of a working group, BT has presented proposals for greater transparency of accounting and some form of independence for OSIS. This process is ongoing and follows on from BT's changes to the charging structure for the inputting of directory information into OSIS, set out under Collection of directory information to be inputted into OSIS above.
- The changes set out under Collection of directory information to be inputted into OSIS above will provide the transparency of charges and confidence which industry needs where OSIS is the only core database. This does not however preclude the development of competing databases. If competition does emerge in this market this will be because of developments and growth in the markets of Product Databases and downstream directory services and products.

Terms and conditions on which downloads of OSIS are made available

- Oftel's view on the terms and conditions on which downloads are made available is indicated under Collection of directory information to be inputted into OSIS above. No organisation may take a download unless they have given an undertaking to comply with the Code of Practice on the Use of Directory Information and data protection legislation.
- BT has consulted Oftel and the directory information industry on the development of a pricing model. BT's final pricing structure is usage based. Organisations pay for the amount of use that they make of the directory information. Charges are calculated on a real or indicative "per hit" basis.
- Oftel considers that the principle of BT charging a sub-licensing fee where OSIS directory information is passed from BT to BT's licensee and then by the licensee to third parties in an unchanged form, is fair. Where the licensee adds value to such directory information, a sub-licensing fee would not be reasonable. If organisations receiving OSIS downloads were free to sell the OSIS directory information on in unchanged form they could undermine the cost recovery capability of OSIS and the workings of this market.

Requirement on all PTOs to make directory information available

- Oftel does not consider, at the present moment, that it is necessary to modify the licences of all PTOs. Oftel will, however, consider whether there is a need for a review of this matter at a future date.

Costs of access to DAS/Pathfinder

- The position of the safeguard cap on BT for the carriage of calls for directory enquiries, under the NCC regime, is as follows. There is currently a safeguard cap placed on access to DAS. This charge is on a per terminal basis. The introduction of Pathfinder will make this safeguard cap invalid because Pathfinder will charge on a per "look-up" basis. So the charge for Pathfinder will be a new service. The treatment for a new standard service is for it to be presumed competitive and so there will be no control of the charge. As with OSIS, if complaints about excessive charging are upheld by Oftel the price for the service can be determined and brought under a price cap.

- A8.17 The text in the foregoing paragraph (third bullet point) confirmed the statement made in the 1998 Interim Statement that the level of charges was a matter for commercial negotiation, and that Oftel would intervene only to resolve disputes.

The Telecommunications (Licence Modification) (British Telecommunications) Regulations 1999

- A8.18 On 3 September 1999, the Secretary of State made the Telecommunications (Licence Modification) (British Telecommunications plc) Regulations 1999¹⁶⁸. These Regulations amended BT's licence with effect from 27 September 1999. BT's licence was amended as part of the implementation in the Licensing Directive (Directive 97/13/EC), which required that conditions in all telecommunications licences of a similar type should be harmonised, except where objectively justified in particular instances.
- A8.19 In particular, BT's licence was amended so that certain conditions specified in the Telecommunications (Licence Modification) (Standard Schedules) Regulations 1999¹⁶⁹ were included in BT's licence. For instance, the following conditions concerning directory information services were as a result included:

Condition 2

REQUIREMENT TO PROVIDE DIRECTORY SERVICES

2.1 Where the Licensee provides Publicly Available Telephone Services by means of Applicable Systems in the United Kingdom, the Licensee shall, subject to paragraphs 2.4 and 2.7 below, on request by any end-user in the United Kingdom receiving such telephone services at Call Boxes provided by the Licensee or by means of apparatus lawfully connected to the Applicable Systems:

- (a) make available a Directory Information Service; and
- (b) provide directories.

2.2 The Licensee shall ensure that:

- (a) Directory Information concerning each of its Subscribers is included in a publicly available telephone directory, and as part of a Directory Information Service provided to

¹⁶⁸ S.I. 1999/2453.

¹⁶⁹ S.I. 1999/2450.

end-users; and

(b) each of its Subscribers has the right to verify, correct or request removal of such Directory Information relating to that Subscriber.

2.3 The Directory Information Service and directories referred to in paragraphs 2.1 and 2.2 above shall contain Directory Information on all Subscribers who have been allocated telephone numbers, including Subscribers provided with Publicly Available Telephone Services by any person, other than the Licensee, except to the extent that such Subscribers have expressed opposition to inclusion of Directory Information about them.

2.4 The obligation under paragraph 2.1(a) above does not apply to the Licensee:

(a) to the extent that any Subscriber of the Licensee has decided not to receive such services; or

(b) where the Licensee runs a Fixed Public Telephone System by means of which it provides Fixed Publicly Available Telephone Services, where such service incurs a charge to any Subscriber of the Licensee and where due warning has been given to that Subscriber in accordance with a direction made under regulation 34(3) of the Revised Voice Telephony Regulations.

2.5 The obligation in paragraph 2.2 above applies whether or not such directory or Directory Information Service is provided to that Subscriber by the Licensee, or by another person.

2.6 The directories referred to in this Condition may be produced by the Licensee or by another person, and shall be in a form approved by the Director whether printed or electronic or both, and shall be updated on a regular basis.

2.7 The Licensee may charge end-users a reasonable fee for making available the Directory Information Service and directories referred to in paragraph 2.1 above, and may charge its Subscribers a reasonable fee for inclusion of Directory Information in a directory or as part of the Directory Information Service referred to in paragraph 2.2 above.

2.8 Where the Licensee provides switched voice telephony services by means of any of the Applicable Systems which is connected to an Authorised Overseas System by means of which such services are provided then, if a Directory Information Service is provided by means of that Authorised Overseas System in respect of that Authorised Overseas System, the Licensee shall provide to any person to whom it provides switched voice telephony services by means of that Applicable System information as to how that person may avail himself by means of that Applicable System and that Authorised Overseas System when connected together of the Directory Information Service provided and shall take all reasonable steps to secure that that can be done.

2.9 The Directory Information Service provided by the Licensee under paragraph 2.1 and paragraph 2.8 shall include a service or information as the case may be which the Director determines to be satisfactory where the Directory Information is made available in a form which is appropriate to meet their needs to persons who are so blind or otherwise disabled as to be unable to use a telephone directory in a form in which it is generally available to persons to whom the Licensee provides services; and the services so provided to such persons shall from the date on which this Licence enters into force be provided free of charge or, if the Director is satisfied that this is not practicable, the Licensee shall provide, in accordance with the arrangements agreed with the Director, appropriate reasonable compensation in respect of charges that are paid.

2.10 Where the Licensee provides switched voice telephony services by means of any of the Applicable Systems which is connected to both:

(a) an Authorised Overseas System by means of which such services are provided; and

(b) a Connectable System in the United Kingdom by means of which such services are provided which is run under a Licence which does not authorise the connection of that system to a system outside the United Kingdom so as to convey Messages from the United Kingdom to a place outside the United Kingdom,

it shall not unreasonably refuse to provide to the operator of that Connectable System access to such Directory Information Services relating to the Authorised Overseas System as the Licensee makes available to those to whom it provides voice telephony services. However this obligation applies only where the Applicable Systems are connected to other telecommunication systems run under licences granted to persons generally, or to persons of a class, but not to a particular person.

Condition 29

OBLIGATION TO SUPPLY NUMBERING INFORMATION ON REQUEST

29.1 Where the Licensee has been allocated telephone numbers by the Director in accordance with Condition 26.1, the Licensee shall, on request in accordance with paragraph 29.4 below, supply to any public telecommunications operator subject to the obligations corresponding to those set out in Condition 2.1 above, the name, address and telephone number of the Licensee's Subscribers and of any other end-user sub-allocated a telephone number from those telephone numbers, for the purpose of enabling such operator to comply with its obligations corresponding to those set out in Condition 2.1 above.

29.2 Where the Licensee has been sub-allocated telephone numbers whether by a licensee or another person, the Licensee shall on request in accordance with paragraph 29.4 below supply to:

(a) the person who sub-allocated such telephone numbers to the Licensee; or

(b) (if different from 29.2(a) above), the licensee who was allocated such telephone numbers by the Director,

the name, address and telephone number of the Licensee's Subscribers and of any other end-user allocated a telephone number from the telephone numbers sub-allocated to the Licensee.

29.3 The Licensee shall supply any information under paragraph 29.1 or 29.2 for the purpose of enabling the person requesting the information to:

(a) comply with its obligations corresponding to those in Condition 2.1 above; or

(b) meet any request made to that person in accordance with paragraph 29.1 or 29.2, or regulation 10(6) of the Revised Voice Telephony Regulations.

29.4 The Licensee shall supply any information under paragraph 29.1 or 29.2 at the reasonable request of the person requesting the information. Without prejudice to the generality of the foregoing, the Licensee may refuse to supply such information if the person requesting the information does not undertake to Process such data or information in accordance with any relevant Code of Practice, or the Licensee has reasonable grounds to believe that the person requesting the information will not comply with Relevant Data Protection Legislation.

29.5 The Licensee shall supply any information under paragraph 29.1 or 29.2 having due regard, in such manner as is appropriate, to any Subscriber who has expressed opposition to inclusion of Directory Information about that Subscriber in a directory or as part of a Directory Information Service.

29.6 Where the Licensee is requested to supply Directory Information in accordance with paragraph 29.1 or 29.2 above, the Licensee shall do so on terms which are fair, cost oriented and non-discriminatory, and in a format which is agreed between the Licensee and the person requesting the information, or by the Director, where no such agreement is reached.

29.7 Where the Licensee, pursuant to this Condition, supplies to any person, data or information subject to any relevant Code of Practice, the Licensee shall secure that such person undertakes to Process such data or information in accordance with such a Code.

A8.20 In addition, BT's licence was amended so as to include additional conditions applicable to BT only, such as:

Condition 81

SUPPLY OF DIRECTORIES AND DATABASES FOR PROVISION OF DIRECTORY SERVICES

81.1 The Licensee shall in accordance with the following provisions, on request by any public telecommunications operator subject to the obligations in Condition 2 above, make available to that operator for the purpose of enabling such operator to comply with its obligations:

(a) such directories, as the Licensee compiles, in a form approved by the Director, which comply with the requirements of Condition 2.3;

(b) the contents of the database, in machine readable form, which the Licensee uses to compile directories for the purpose of complying with its obligations under Condition 2.1; and

(c) on-line access (including a search facility) to the database which the Licensee uses to provide a Directory Information Service for the purpose of complying with its obligations under Condition 2.1.

81.2 If, following a written representation by the Licensee that the market for provision of any of the items in sub-paragraphs (a) to (c) is competitive, the Director determines that such market is competitive in any specified area of the United Kingdom, the obligation upon the Licensee under paragraph 81.1 will cease to apply with respect to the provision of such item in respect of that specified area.

81.3 The Licensee shall supply the items in sub-paragraphs (a) to (c) of paragraph 81.1 above at the reasonable request of the person requesting such items. Without prejudice to the generality of the foregoing, the Licensee may refuse to supply such items if the person requesting such items does not undertake to Process the data or information contained in them in accordance with any relevant Code of Practice, or the Licensee has reasonable grounds to believe that the person requesting such items will not comply with Relevant Data Protection Legislation.

81.4 The Licensee shall supply the items in sub-paragraphs (b) and (c) in paragraph 81.1 having due regard, in such manner as is appropriate, to any Subscriber who has expressed opposition to inclusion of Directory Information about that Subscriber in a directory or as part of a Directory Information Service provided to end-users.

81.5 Where the Licensee is requested to supply the items in sub-paragraphs (a) to (c) of paragraph 81.1 above, the Licensee shall do so on terms which are fair, cost oriented and not unduly discriminatory, and in a format which is agreed between the Licensee and the person requesting the information, or approved by the Director, where no such agreement is reached.

Condition 82

DIRECTORIES AND DIRECTORY INFORMATION

82.1 The Licensee shall in accordance with the following provisions, on request by any person other than a public telecommunications operator subject to the obligations in Condition 2, make available to him for the purpose of enabling the provision of directories or a directory information service:

- (a) the contents of the database, in machine readable form, which the Licensee uses to compile directories for the purpose of complying with its obligation under Condition 2; and
- (b) on-line access (including a search facility) to the database which the Licensee uses to provide a Directory Information Service for the purpose of complying with its obligation under Condition 2 above.

82.2 If, following a written representation by the Licensee that the market for provision of any of the items in sub-paragraphs (a) and (b) above is competitive, the Director determines that such market is competitive in any specified area of the United Kingdom, the obligation upon the Licensee in paragraph 82.1 above will cease to apply with respect to the provision of such item in respect of that specified area.

82.3 The Licensee shall supply the items in sub-paragraphs (a) and (b) of paragraph 82.1 above at the reasonable request of the person requesting such items. Without prejudice to the generality of the foregoing, the Licensee may refuse to supply such items if the person requesting such items does not undertake to Process the data or information contained in them in accordance with any relevant Code of Practice, or the Licensee has reasonable grounds to believe that the person requesting such items will not comply with Relevant Data Protection Legislation.

82.4 The Licensee shall supply the items in sub-paragraphs (a) and (b) in paragraph 82.1 above having due regard, in such manner as is appropriate, to any Subscriber who has expressed opposition to inclusion of Directory Information about that Subscriber in a directory or as part of a directory information service provided to end-users.

82.5 Where the Licensee is requested to supply the items in sub-paragraphs (a) and (b) of paragraph 82.1 above, the Licensee shall do so on terms which are fair, cost oriented and non-discriminatory, and in a format which is agreed between the Licensee and the person requesting the information, or approved by the Director, where no such agreement is reached.”

BT's Licence as of 24 July 2003

A8.21 Immediately before the new legislative and regulatory framework entered into force on 25 July 2003, BT was subject to the following licence obligations concerning the provision of directory information services:

Condition 2

REQUIREMENT TO PROVIDE DIRECTORY SERVICES

2.1 Where the Licensee provides Publicly Available Telephone Services by means of Applicable Systems in the United Kingdom, the Licensee shall, subject to paragraphs 2.4 and 2.7 below, on request by any end-user in the United Kingdom receiving such telephone services at Call Boxes provided by the Licensee or by means of apparatus lawfully connected to the Applicable Systems:

- (a) make available a Directory Information Service; and
- (b) provide directories.

2.2 The Licensee shall ensure that:

- (a) Directory Information concerning each of its Subscribers is included in a publicly available telephone directory, and as part of a Directory Information Service provided to end-users; and
- (b) each of its Subscribers has the right to verify, correct or request removal of such Directory Information relating to that Subscriber.

2.3 The Directory Information Service and directories referred to in paragraphs 2.1 and 2.2 above shall contain Directory Information on all Subscribers who have been allocated telephone numbers, including Subscribers provided with Publicly Available Telephone Services by any person, other than the Licensee, except to the extent that such Subscribers have expressed opposition to inclusion of Directory Information about them.

2.4 The obligation under paragraph 2.1(a) above does not apply to the Licensee:

- (a) to the extent that any Subscriber of the Licensee has decided not to receive such services; or
- (b) where the Licensee runs a Fixed Public Telephone System by means of which it provides Fixed Publicly Available Telephone Services, where such service incurs a charge to any Subscriber of the Licensee and where due warning of disconnection has been given to that Subscriber in accordance with a direction made under Regulation 34(3) of the Revised Voice Telephony Regulations.

2.5 The obligation in paragraph 2.2 above applies whether or not such directory or Directory Information Service is provided to that Subscriber by the Licensee, or by another person.

2.6 The directories referred to in this Condition may be produced by the Licensee or by another person, and shall be in a form approved by the Director whether printed or electronic or both, and shall be updated on a regular basis.

2.7 The Licensee may charge end-users a reasonable fee for making available the Directory Information Service and directories referred to in paragraph 2.1 above, and may charge its Subscribers a reasonable fee for inclusion of Directory Information in a directory or as part of the Directory Information Service referred to in paragraph 2.2 above.

2.8 Where the Licensee provides switched voice telephony services by means of any of the Applicable Systems which is connected to an Authorised Overseas System by means of which such services are provided then, if a Directory Information Service is provided by means of that Authorised Overseas System in respect of that Authorised Overseas System, the Licensee shall provide to any person to whom it provides switched voice telephony services by means of that Applicable System information as to how that person may avail himself by means of that Applicable System and that Authorised Overseas System when connected together of the Directory Information Service provided and shall take all reasonable steps to secure that that can be done.

2.9¹⁷⁰ Where the Licensee provides switched voice telephony services by means of any of the Applicable Systems which is connected to both:

- (a) an Authorised Overseas System by means of which such services are provided; and

¹⁷⁰ This paragraph was renumbered Condition 2.9 (previously Condition 2.10) by the *Telecommunications (Services for Disabled Persons) Regulations 2000*, SI 2000/2410 (see regulation 3(b)).

(b) a Connectable System in the United Kingdom by means of which such services are provided which is run under a Licence which does not authorise the connection of that system to a system outside the United Kingdom so as to convey Messages from the United Kingdom to a place outside the United Kingdom,

it shall not unreasonably refuse to provide to the operator of that Connectable System access to such Directory Information Services relating to the Authorised Overseas System as the Licensee makes available to those to whom it provides voice telephony services. However this obligation applies only where the Applicable Systems are connected to other telecommunication systems run under licences granted to persons generally, or to persons of a class, but not to a particular person.

...

Condition 25

SERVICES FOR DISABLED PERSONS

...

25.6 With immediate effect:

the Directory Information Service provided by the Licensee under Condition 2.1 and Condition 2.8 shall include a service or information as the case may be which the Director determines to be satisfactory where the Directory Information is made available in a form which is appropriate to meet their needs to persons who are so blind or otherwise disabled as to be unable to use a telephone directory in a form in which it is generally available to persons to whom the Licensee provides services; and the services so provided to such persons shall be provided free of charge; and

following a request to be advised of a Number of a Subscriber by a person who is so blind or otherwise disabled as to be unable to use a telephone directory, the Licensee shall, upon that person's request, then connect the person to the Number so requested.

Condition 29

OBLIGATION TO SUPPLY NUMBERING INFORMATION ON REQUEST

29.1 Where the Licensee has been allocated telephone numbers by the Director in accordance with Condition 26.1, the Licensee shall, on request in accordance with paragraph 29.4 below, supply to any public telecommunications operator subject to the obligations corresponding to those set out in Condition 2.1 above, the name, address and telephone number of the Licensee's Subscribers and of any other end-user sub-allocated a telephone number from those telephone numbers, for the purpose of enabling such operator to comply with its obligations corresponding to those set out in Condition 2.1 above.

29.2 Where the Licensee has been sub-allocated telephone numbers whether by a licensee or another person, the Licensee shall on request in accordance with paragraph 29.4 below supply to:

- (a) the person who sub-allocated such telephone numbers to the Licensee; or
- (b) (if different from 29.2(a) above), the licensee who was allocated such telephone numbers by the Director,

the name, address and telephone number of the Licensee's Subscribers and of any other end-user allocated a telephone number from the telephone numbers sub-allocated to the Licensee.

29.3 The Licensee shall supply any information under paragraph 29.1 or 29.2 for the purpose of enabling the person requesting the information to:

- (a) comply with its obligations corresponding to those in Condition 2.1 above; or
- (b) meet any request made to that person in accordance with paragraph 29.1 or 29.2, or regulation 10(6) of the Revised Voice Telephony Regulations.

29.4 The Licensee shall supply any information under paragraph 29.1 or 29.2 at the reasonable request of the person requesting the information. Without prejudice to the generality of the foregoing, the Licensee may refuse to supply such information if the person requesting the information does not undertake to Process such data or information in accordance with any relevant Code of Practice, or the Licensee has reasonable grounds to believe that the person requesting the information will not comply with Relevant Data Protection Legislation.

29.5 The Licensee shall supply any information under paragraph 29.1 or 29.2 having due regard, in such manner as is appropriate, to any Subscriber who has expressed opposition to inclusion of Directory Information about that Subscriber in a directory or as part of Directory Information Service.

29.6 Where the Licensee is requested to supply Directory Information in accordance with paragraph 29.1 or 29.2 above, the Licensee shall do so on terms which are fair, cost oriented and non-discriminatory, and in a format which is agreed between the Licensee and the person requesting the information, or by the Director, where no such agreement is reached.

29.7 Where the Licensee, pursuant to this Condition, supplies to any person, data or information subject to any relevant Code of Practice, the Licensee shall secure that such person undertakes to Process such data or information in accordance with such a Code.

Condition 81

SUPPLY OF DIRECTORIES AND DATABASES FOR PROVISION OF DIRECTORY SERVICES

81.1 The Licensee shall in accordance with the following provisions, on request by any public telecommunications operator subject to the obligations in Condition 2 above, make available to that operator for the purpose of enabling such operator to comply with its obligations:

- (a) such directories, as the Licensee compiles, in a form approved by the Director, which comply with the requirements of Condition 2.3;
- (b) the contents of the database, in machine readable form, which the Licensee uses to compile directories for the purpose of complying with its obligations under Condition 2.1; and
- (c) on-line access (including a search facility) to the database which the Licensee uses to provide a Directory Information Service for the purpose of complying with its obligations under Condition 2.1.

81.2 If, following a written representation by the Licensee that the market for provision of any of the items in sub-paragraphs (a) to (c) is competitive, the Director determines that such market is competitive in any specified area of the United Kingdom, the obligation upon the Licensee under paragraph 81.1 will cease to apply with respect to the provision of such item in respect of that specified area.

81.3 The Licensee shall supply the items in sub-paragraphs (a) to (c) of paragraph 81.1 above at the reasonable request of the person requesting such items. Without prejudice to the generality of the foregoing, the Licensee may refuse to supply such items if the person requesting such items does not undertake to Process the data or information contained in them in accordance with any relevant Code of Practice, or the Licensee has reasonable grounds to believe that the person requesting such items will not comply with Relevant Data Protection Legislation.

81.4 The Licensee shall supply the items in sub-paragraphs (b) and (c) in paragraph 81.1 having due regard, in such manner as is appropriate, to any Subscriber who has expressed opposition to inclusion of Directory Information about that Subscriber in a directory or as part of a Directory Information Service provided to end-users.

81.5 Where the Licensee is requested to supply the items in sub-paragraphs (a) to (c) of paragraph 81.1 above, the Licensee shall do so on terms which are fair, cost oriented and not unduly discriminatory, and in a format which is agreed between the Licensee and the person requesting the information, or approved by the Director, where no such agreement is reached.

Condition 82

DIRECTORIES AND DIRECTORY INFORMATION

82.1 The Licensee shall in accordance with the following provisions, on request by any person other than a public telecommunications operator subject to the obligations in Condition 2, make available to him for the purpose of enabling the provision of directories or a directory information service:

- (a) the contents of the database, in machine readable form, which the Licensee uses to compile directories for the purpose of complying with its obligation under Condition 2; and
- (b) on-line access (including a search facility) to the database which the Licensee uses to provide a Directory Information Service for the purpose of complying with its obligation under Condition 2 above.

82.2 If, following a written representation by the Licensee that the market for provision of any of the items in sub-paragraphs (a) and (b) above is competitive, the Director determines that such market is competitive in any specified area of the United Kingdom, the obligation upon the Licensee in paragraph 82.1 above will cease to apply with respect to the provision of such item in respect of that specified area.

82.3 The Licensee shall supply the items in sub-paragraphs (a) and (b) of paragraph 82.1 above at the reasonable request of the person requesting such items. Without prejudice to the generality of the foregoing, the Licensee may refuse to supply such items if the person requesting such items does not undertake to Process the data or information contained in them in accordance with any relevant Code of Practice, or the Licensee has reasonable grounds to believe that the person requesting such items will not comply with Relevant Data Protection Legislation.

82.4 The Licensee shall supply the items in sub-paragraphs (a) and (b) in paragraph 82.1 above having due regard, in such manner as is appropriate, to any Subscriber who has expressed opposition to inclusion of Director Information about that Subscriber in a directory or as part of a directory information service provided to end-users.

82.5 Where the Licensee is requested to supply the items in sub-paragraphs (a) and (b) of paragraph 82.1 above, the Licensee shall do so on terms which are fair, cost oriented and non-discriminatory, and in a format which is agreed between the Licensee and the person requesting the information or approved by the Director, where no such agreement is reached.

Annex 9

BT's letter to Ofcom of 13 July 2006



BY EMAIL AND POST

James Tickel
Competition Policy Manager
Ofcom
Riverside House
2a Southwark Bridge Road
London SE1 9HA

13 July 2006

Dear James

CW/00864/09/05: Dispute between The Number UK Ltd and BT about BT's charges for certain directory information

CW/00874/11/05: Dispute between Conduit Enterprises Ltd and BT about BT's charges for certain directory information

CW/00883/12/05: Complaint by Thomson Directories Limited about BT's charges for certain directory information

Dear James

Thank you for forwarding The Number's letter of 6 July 2006 on the meaning of 'relevant information'. We wish to make some comments on the points raised in this letter and the previous letters submitted by The Number, Conduit and Thomson in the hope of providing some clarity around this issue. Please find set out in Annex A some pragmatic proposals on how information, including "relevant information", might be supplied.

Also, for the avoidance of any doubt we would ask Ofcom, in arriving at a draft determination, to take into account the facts and matters included in the Notices of Appeal (Cases 1063/3/3/06 and 1064/3/3/06) we delivered to Ofcom on 8 May 2006.

A. "Relevant information" does not encompass "groupings"

The fundamental question Ofcom needs to decide is what data falls within the scope of "relevant information" after the KPN judgment. The ECJ in KPN made the following key points relevant to resolution of this question:

- Relevant information refers “only to data . . . which are sufficient to enable users of a directory to identify the subscribers they are looking for.”
- In principle those data include the subscriber’s name, address (including post code) and telephone number(s).
- It is within the discretion of Member States to define other data that must be made available where specific national circumstances dictate that they appear “necessary in order to identify subscribers.”

As set out in our letter dated 14 June 2006, BT believes that the following substantive data is necessary to identify an individual subscriber and constitutes “relevant information”:

- Name (including, for example, title, initials/forename, honours, business suffix) (see discussion below and Annex C)
- Address, including post code
- Telephone number

Additionally, we believe that the following substantive data, although not necessary to identify a subscriber and therefore not “relevant information”, could be helpful for directories and directory enquiry (“DQ”) providers to process the above data:

- Directory status
- Partial address indicator
- Tariff (residential or business)
- Exchange code

A key question for Ofcom to decide is what constitutes a “name” for purposes of relevant information. As set out in our 14 July 2006 letter and explained in more detail in Annex A, we believe that in the case of businesses with multiple listings, “name” can include – for purposes of “relevant information” – more than just the generic name of the subscriber company (i.e., Norfolk County Council or Lloyds TSB Bank).

Specifically, in addition to the subscriber’s registered/trading/business name (e.g. Norfolk County Council), relevant information could include any relevant branch, division or department (e.g. Education Department; Highway Maintenance; Fire Service) and any possible further qualification (e.g. enquiries only; fax; student grants; surnames A-E; Safety Line).

BT does not believe, however, that “relevant information” can be interpreted so broadly as to include the manner or format in which BT and other communications providers supply this information under General Condition 19 (“GC19”). In this respect, The Number and Conduit appear to argue that “groupings” – specifically, the hierarchical linkages between listings and the structural manner in which it is displayed (see Annex B) – fall within the scope of “relevant information.”

Not surprisingly both The Number and Conduit struggle to support this argument. They concede in their submissions that groupings are not data but rather a method of displaying

data, and that the ECJ “did not consider the many ways in which ‘relevant information’ could be broken down or displayed (e.g by means of different fields or groupings)”¹⁷¹.

Consequently, The Number and Conduit are left to weakly argue that the current groupings format should be required because changing this format would make the OSIS database “effectively unusable by DQ providers”¹⁷² and “would result in chaos.”¹⁷³

This is a gross exaggeration. So long as the relevant “name” data listed above is supplied to DQ providers, they are perfectly capable of utilising a search engine to identify a listing for purposes of providing DQ services, without any need for the grouping of the data. The current grouping structure is therefore not critical for the provision of DQ services and not within the scope of “relevant information.” Neither are Special Directory Entries (“SDEs”), which by definition are manifestly outside the scope of “relevant information” (see Annex B).

B. Erroneous statements by The Number and Conduit

There are a number of misleading and/or erroneous statements in the submissions by The Number and Conduit which we would like to address:

- (1) It is not possible for The Number to replicate grouping activity because it does not have access to the billing information which links the various different telephone numbers for a single organisation (The Number letter of 26 May 2006, paragraph 26)

BT does not use billing information or any associated billing systems to set up the grouping structure in OSIS. The grouping structure is set up by re-contacting the customer based on the customer’s requirements.

- (2) A DQ operator needs to be supplied with grouped subscriber data in order to provide a “good quality” DQ service (The Number letter of 26 May 2006, paragraph 17) and grouping or ‘structural separation’ needs to be applied to listings to make them searchable (The Number letter of 6 July 2006, at page 2)

These assertions are wholly misleading and misplaced. As noted above, the grouping structure (i.e., J records and the fields in the E records used to link listings to the J records, as opposed to content data fields) is not necessary for DQ operators to accurately identify a subscriber. Groupings relate only to the visual presentation of information alone, and not the data itself. They have no bearing whatsoever on the ability of third parties to run voice DQ services.

In the absence of groupings (and assuming the “name” data described above is provided), The Number and other DQ operators would merely have to make amendments to their search engine in order to have the ability to conduct key word searches (similar to the search engines Google and Yahoo use) and thereby identify a subscriber and its relevant telephone number. They would not have to re-contact subscribers themselves, although they would be free to do so. Another possibility would be to access a third party search engine to manipulate the data.

We would also note that the grouping structure is not necessary to compile A-Z phonebooks. Phonebooks could contain no groups at all, which is roughly the situation in Holland (groups

¹⁷¹ Conduit letter of 26 May 2006, page 2.

¹⁷² Conduit letter of 26 May 2006, page 2.

¹⁷³ The Number letter of 6 July 2006, page 2.

are all paid for in the A-Z section). As Thomson acknowledges in its letter of 5 June 2006 (paragraph 3.3), it does not use BT's "J"-type records and does not consider grouping information to be necessary for the compilation of its own A-Z phonebook.

- (3) The fields and the grouping used by the OSIS database have been determined solely by BT (Conduit letter of 26 May 2006, pages 2-3)

The structure of the SFF and associated fields in OSIS were determined on the basis of industry discussions since 1999 and not, as Conduit alleges, determined solely by BT.

- (4) An upstream provider like BT is likely to be carrying out grouping anyway as part of its voice telephony service and, in any event, BT is already grouping directory data in order to compile the BT Phone Book (The Number letter of 26 May 2006, paragraph 36) and it would be impossible for anyone other than the voice telephony provider or OSIS to group subscriber listings (The Number letter of 6 July 2006, at page 2)

These statements are factually incorrect. BT does not group data as part of its voice telephony service as there is absolutely no reason to do so. Moreover, whether or not BT Directories groups data for purposes of compiling the BT Phone Book is absolutely irrelevant to the question whether BT is obliged to supply grouped data under GC19 or USC7, which are obligations falling on parts of BT upstream from BT Directories.

Additionally, it is possible for others to group subscriber listings. As Thomson states, they perfectly capable of grouping the data they receive from OSIS and they would do so in the absence of OSIS providing the information in this format. (Thomson letter of 5 June 2006, paragraph 3.3).

- (5) OSIS contains no additional information in the KPN sense (The Number letter of 26 May 2006, paragraphs 4 and 38)

This is factually incorrect. See Annex C for the data fields in OSIS that are "additional information." One particular example of additional information is the 'business descriptor', which The Number (in paragraph 21 of its letter of 26 May 2006) claims is necessary to provide "a good quality DQ service". However, as both The Number in its letter and Conduit on page 3 of its 26 May 2006 letter acknowledge, this OSIS field is not comprehensively populated and not necessarily accurate, and in any case both companies use other sources of information to augment what OSIS provides in this field. Thus, the business descriptor is more akin to a business classification and therefore a commercial activity outside the scope of "relevant information".

- (6) For some listings the grouping structure might be six or seven layers (The Number letter of 6 July 2006, at page 1)

The maximum layers in a grouping structure for a listing are in fact four.

- (7) Without groupings, all Lloyds branches in London would be thrown up by the search (The Number letter of 6 July 2006, at page 1)

This scenario could possibly happen today even with groupings unless the DQ provider's search engine includes other criteria in addition to, for example, "Lloyds" and "London". Whether or not it happens is wholly dependent on the type of search engine deployed by the

DQ provider. Additionally, we would note that the problem of distinguishing between Lloyds Bank and Lloyds Chemist exists with grouping as well as without it.

(8) The priority data field is essential (The Number letter of 6 July 2006, at page 3)

The priority data field is not essential, although helpful. 'Switchboard' or 'Head Office' can always be found using key word searches rather than scrolling through pages of listings.

(9) The upstream providers have arranged for BT 'to discharge their GC19 duties for them' (The Number letter of 6 July 2006, at page 3)

There has been no such arrangement. GC19 and USC7 are distinct obligations (see our Notices of Appeal in the related appeals¹⁷⁴) and directories and DQ providers have made the decision to obtain directory data via USC7 as opposed to GC19. Absent a reasonable request to upstream providers, no GC19 obligation arises. We are aware of no instances where requests have been received from other upstream providers under GC19.

[CONFIDENTIAL INFORMATION REDACTED]

Please let us know if you would like to discuss these issues further.

Yours sincerely

Jeff Ryen
Senior Regulatory Counsel, BT Group plc

cc: Julia Jackson, BT Wholesale

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¹⁷⁴ As noted above, for the avoidance of doubt we would ask Ofcom to take into account the facts and matters included in those Notices of Appeal.

ANNEX A**For How Certain Information Might Be Supplied**

The table in Annex C sets out for each current OSIS field BT's assessment as to what constitutes:

- (a) Substantive data (some of which is within the scope of "relevant information" and some outside. In the case of the latter, this information may be helpful and could usefully be supplied albeit not under GC19)
- (b) Management data (which is outside the scope of "relevant information" but which may be helpful in processing the substantive data and could usefully be supplied albeit not under GC19)
- (c) Additional information (which is outside the scope of "relevant information" and not collected, and should not be supplied)

In taking the view that the scope of "relevant information" is more than just the generic name of a business and does not include "groupings", we have given careful consideration to the ability of voice DQ providers to run an effective service on a lesser amount of information than is currently included in OSIS, and for any third party to produce a phonebook to their own specification beyond that which is required as part of universal service.

Specifically, the large number of additional fields currently within OSIS, which include information as part of the subscriber's name (header fields, qualifier and appendix), could realistically and feasibly be simplified to include three sets or fields of data:

- Registered/Trading/Business name (e.g. Norfolk County Council)
- Specific purpose/function details (e.g. Education Department, Highway Maintenance, Fire Service)
- Qualification (e.g. enquiries only, Fax, Student Grants, surnames A-E, Safety Line)

In proposing three aspects of a "name", BT has taken into account the following:

- Most medium to large businesses are organised to carry out different functions in different departments and have historically wanted these specific purposes to be published. For example, the Repair department in an organisation is recognisably distinct from a Sales department and would clearly have a completely different function.
- The users of the DQ service will want to be provided with a correct number at first enquiry and will neither want to have to re-call the DQ service nor incur additional expense from overly long phone calls (i.e., from being left on hold while being redirected to a correct department within their target organisation).
- CPs want to ensure that their customer's information is readily accessible and DQ service providers want to provide an efficient and accurate service to their customers.

While we have indicated that we do not believe that it is necessary to 'group' data, we do recognise that it is important for sufficient data to be made available to allow the differentiation of one listing from another.

The proposal shown above creates a framework which is sufficient to use as 'fit for purpose' and on which Industry could organise the collection of data upstream.

While currently in OSIS there is a name field and 5 supplementary fields (putting to one side the title, forename/initials, etc), namely Sub Header, Sub Sub Header, Sub Sub Sub Header, Appendix and Qualifier, the fields often contain more data than is necessary to differentiate one listing from another.

For example Lloyds TSB Registrars is listed as:

Lloyds TSB Bank, Departments, Lloyds TSB Registrar, FAX

The reference to Departments is irrelevant in actuality because the end user will be seeking the fax number for Lloyds TSB Registrar. Therefore, provision of three sets or fields of data would be sufficient to identify and provide the number:

Name Field 1	Lloyds TSB Bank (Registered/Trading Business Name)
Name Field 2	Lloyds TSB Registrars (Specific Function)
Name Field 3	Fax (Qualification)

Using another example:

Norfolk County Council, Education Department, Grants for Students, First letter of students surnames, A-C

This example has used all sub headers and a qualifier field but could have been structured as follows to achieve the same aim:

Name Field 1	Norfolk County Council
Name Field 2	Education Grants for Students
Name Field 3	Surnames beginning A-C

BT proposes that the data should be provided as distinct fields to provide clarity for all concerned. It will allow CPs to be clear about the type of information considered 'relevant' and will allow them to ensure they collect and submit the data in the appropriate fields. Additionally, the DQ service providers will have a framework on which to base their services and will be able to develop their search engines accordingly and train their operators in an efficient manner.

ANNEX B**Groups**

Grouping is the formal structured linkage of directory listings within a database, usually but not always related to a single business. Grouping is about the relationship between records and is distinct from the data fields within a listing, which can exist independently of the need to link or sequence listings.

Grouping forms a hierarchical and logical structure for information and assists in creating a degree of simplicity in the visual presentation of multiple listings for the same business.

Grouping is fundamentally:

- the creation of a 'linking reference' from one directory listing to its associated heading record; and
- the prioritisation of listings to create a sequence within each level of the group structure (if a sequence other than alphanumeric is required).

To illustrate the points above, consider the example of a building society and the directory listings which it would normally have published in a directory. Branches of the building society are usually listed under a heading of 'branches', and this heading in turn is listed under the building society name.

Without linking, sequencing or other manual amendment, the listings would be displayed alphabetically as shown below:

Nationwide Building Society 24 hour lost/stolen card reporting	0845 7302010
Nationwide Building Society, 49 Bath Street, Ilkeston	0115 909 0000
Nationwide Building Society, 49 Bath Street, Ilkeston, FAX	0115 909 0206
Nationwide Building Society General Customer Enquiries	0845 7302010
Nationwide Building Society, 33 High Street, Alfreton	01773 723100
Nationwide Building Society, 33 High Street, Alfreton, FAX	01773 723106
Nationwide Building Society, 28 Knifsmith Gate, Chesterfield	01246 340000
Nationwide Building Society, 28 Knifsmith Gate, Chesterfield, FAX	01246 340006
Nationwide Building Society, 31 Market Street, Heanor	01773 720100
Nationwide Building Society, 31 Market Street, Heanor, FAX	01773 720106
Nationwide Building Society, 8 The Square, Beeston	0115 980 0100
Nationwide Building Society, 8 The Square, Beeston, FAX	0115 980 0106

However once the data is grouped (i.e. the relationship and linkages between the listings is defined), the listings can be sequenced automatically and listings of similar purpose (in this case the branches) are 'grouped' together under the heading of branches.

Nationwide Building Society

24 hour lost/stolen card reporting **0845 7302010**

General Customer Enquiries **0845 7302010**

Branches**Alfreton**

33 High Street, Alfreton 01773 723100

FAX 01773 723106

Beeston

8 The Square, Beeston	0115 980 0100
FAX	0115 980 0106

Chesterfield

28 Knivesmith Gate, Chesterfield	01246 340000
FAX	01246 340006

Heanor

31 Market Street, Heanor	01773 720100
FAX	01773 720106

Ilkeston

49 Bath Street, Ilkeston	0115 909 0000
FAX	0115 909 0206

Special Directory Entry (SDE)

SDEs encompass:

- copies of a listing in editions of the Phone Book outside the subscriber's local area.
- entries for the same number under different names within the same edition of the Phone Book.
- enhancements to the typeface of the listing.
- inclusion of additional content beyond "relevant information".

It is BT's view that SDEs are a value-added service and not necessary to identify a subscriber (and therefore not "relevant information"). It is further BT's view that it is within its commercial discretion whether to charge for SDEs. For example, in the case of non-geographic numbers, BT may provide free national coverage for national helplines such as Samaritans, Childline, National Rail Enquiries and NHS Direct, but charge for national coverage for commercial organisations such as HSBC, Hilton Hotels, etc. who gain direct benefit from the SDE itself and can reasonably be expected therefore to pay for this.

ANNEX C

OSIS Standard Extract Product Specification

Key -

Substantive Data – within scope of “relevant information” (except where indicated otherwise). Where it is not within the scope of “relevant information” it is still useful and can be supplied, albeit not under GC19

Management Data – not within scope of “relevant information”, but may be helpful to process the substantive data and can be supplied, albeit not under GC19

Additional Data – not within scope of relevant information and not collected, and should not be supplied

<u>No</u>	<u>Field Name</u>	<u>Value</u>	<u>Explanation</u>	<u>Max Length</u>
1	Identifier	CCYY-MM-DD-hh.mm.ss.mic ros	Unique 26-byte identifier in timestamp format. NB: The first two digits (CC) will be subject to calculation via an algorithm for entries input via the on-line client.	26
2	Record Type	A C E G J	Single entry Single entry cross reference Group entry Group entry cross reference Group Header	1
3	Main/Additional Indicator	M, A	Identifies the main entry where multiple entries exist with the same number (A and E records only). An example usage of this is if a husband and wife both wish to have directory entries for their telephone line.	1
4	Cessation Date	CCYY-MM-DD	Effective date for the cessation - date of daily feed run.	10
5	Entry Type/ Directory Type (not ‘relevant information’)	1 2 3 4	DE - normal directory entry XD/NC - Ex-directory no calls DQR - number is not in the phone book, but is available via Directory Enquiries XD/CO - Ex-directory calls offered	1
6	Tariff/Customer Type (not ‘relevant information’)	1 2 3 4	Business Not used Residential Not used	1
7	Merge Indicator	Any Alphanumeric character.	Used to distinguish between different groups with the same header details (J, E and G records only)	1

8	Priority	A, S, Z	Sortation priority within a group (G and E records only) Sortation is alphabetical but can be overridden, 'A' pushes to the top, 'S' to the centre, 'Z' to the bottom.	1
9	Telephone Number (internal)	E.g. 113=2376485	Formatted telephone number without leading 0 .If a record is Ex-Directory this field will contain asterisks in place of the telephone number.	11
10	Telephone Number Dialable	E.g. 01132376485	Dialable telephone number including exchange code e.g. 01132376485 Note that this field may contain text characters preceding the number. If a record is Ex-Directory this field will contain asterisks in place of the telephone number.	45
11	Implementation Date / Run Date	CCYY-MM-DD	For update records this contains the effective date for the action. For data dump records (load) this contains the date that the data dump was produced from OSIS.	10
12	Exchange Code (not 'relevant information')	E.g. 113=237	Exchange code including a separator.	8
13	Postcode	E.g. SW15 2DP	Standard format postcode. May not be present if Partial Address indicator set. (Optional)	8
14	Group Tariff Marker	1 3	Business and Mixed Residential	1
15	Line Type	F L M N P R T Z	Type of line: Fax Local Mobile NORMAL Premium Regional National Freecall <i>NB: This field is not always reliable i.e. A national number could also be a FAX.</i>	1
16	Free Chargeable Indicator	F, C, space	'C' if the entry is to be billed otherwise 'F' or space for Free.	1
17	Indentation Level	0,1,2,3,4	This field will show 0, 1, 2 or 3 for headers and 1, 2, 3 or 4 for group listings. For single listings this field will be null.	1
18	DQ Code / PB Code	E.g. -01, 545	National geographical / Phonebook Area Standard extract does not get PB listings.	3
19	BCM Code	Spaces	Business classification: Residential	4

		9950 9955 9999	FAX Doctor Business	
20	Suppression Code		A 64 character string each representing a downstream system. Only sent if an actual value is set. <i>NB: This field is never set on OSIS</i>	64
21	Parent Identifier		26 byte identifier of parent record in timestamp format (J, E and G records only)	26
22	Typeface	1 4 5	Type of print required in the directory: Normal Bold Superbold	1
23	Action Indicator	D, I or U	Delete, Insert or Update (Data Dump records always Insert).	1
24	TPS Marker		<i>NB: This field is not currently used</i>	1
25	Name Retitled: Name Field 1	Brown / Smith Bayliss & Cox	Surname or name of a business/company. Initials contained within the name of a firm or company when followed by another name should be included in the name field. For example, Smith B & Jones	150
26	Sub Header Retitled: Name Field 2	Head Office	Additional information that can sub divide groups on a geographical basis, or by department within company detailed within the group.	150
27	Sub Sub Header	Parks Dept	See above	150
28	Sub Sub Sub Header	Southern Branches	See above	150
29	Title	Dr, Sir, The, etc	Mode of address.	45
30	Initials / Forename	John, John B, J.B etc.	May contain initials or forename in full or abbreviated form, or a combination of both.	56
31	Honours	OBE, MBE, KCB etc.	May include not only honours but also degrees and other qualifications permitted.	100
32	Business Suffix	& Co, & Co Ltd, Bros, Sons etc.	Part of the entry immediately following the initials field or name field. It indicates a business state.	150
33	Business Description	Coal Merchant, Dental Surgeon, Builder	Contains a description of the business, abbreviated if possible, e.g. 'jeweller would become jwlr'	110

34	Qualifier Retitled: Name Field 3	Spares Dept. Appointments Only, etc.	That part of a group entry which precedes the house number (if present) or which cannot logically be inserted as one of the other fields. In some large groups it is also used to hold locality information. Group Entry Qualifier - Surgery, Appointments only Name of branch- Spares Dept. Locality – Cardiff, Swansea etc.	150
35	Premises / Building Name or No.	30, 30A, The Manor etc.	Any combination of House Number, Name, Suffix, or Flat Number may be present. <i>NB: May not be present if Partial Address indicator set.</i>	200
36	Street	Whitehall, Sussex Gdns, High St etc.	Street Name in its abbreviated form. <i>NB: May not be present if Partial Address indicator set.</i>	56
37	Locality	Stanni ngfield, Bromsgrove, Aston	The locality field should contain the local area name if it is different from that of the telephone exchange concerned. In the past the postal district was also inserted into this field, but this should no longer be the practice, however some old locality information does still exist. <i>NB: May not be present if Partial Address indicator set.</i>	50
38	Appendix	Stores only, 24hr Number, FAX etc.	This is the part of a group entry that appears after the locality and is not suitable for another field. Often used for FAX and helpful information.	254
39	Exchange	Cardiff, Tyneside, Brighton, 0171-764, 01222 etc.	The exchange name for a given telephone number.	30
40	CROSS REFERENCE	TSB - see also Lloyds TSB See our display ad etc.	An entry, which refers the reader to another entry in the directory.	254
41	Post Town		<i>NB: This field is not currently used</i>	50
42	Post County		<i>NB: This field is not currently used</i>	50
43	Partial Address Indicator (not 'relevant information')	Y or N <i>NB: This field indicates if a customer has chosen to omit part/ all of their address and if Y the address information must not be enhanced without the Customer's permission.</i>	One byte character used to indicate a Partial Address listing.	1

Annex 10

Glossary

A10.1 This glossary is simply a guide to the shorthand meaning of certain expressions (or abbreviations) as used in this document, without setting out the full meaning any such expressions might have in the law.

<u>Expression</u>	<u>Meaning</u>
1984 Act	Telecommunications Act 1984
2003 Act	Communications Act 2003 (Chapter 21)
DGT	Director General of Telecommunications
Directive on Privacy and Electronic Communications	European Parliament and Council Directive 2002/58/EC of 12 July 2002
DPA	Data Protection Act 1998
DQ services	directory enquiry services
ECJ	European Court of Justice
GC	General Condition
KPN judgment	Judgment of 25 November 2004 by the ECJ in Case C-109/03, <i>KPN Telecom BV v. OPTA</i>
OSIS	BT's Operator Services Information System
PATS	publicly available telephone service(s)
RVTD	<i>Revised Voice Telephony Directive</i> , European Parliament and Council Directive 1998/10/EC
Services Directive	Commission Directive 90/388/EEC of 28 June 1990
Universal Service Regulations	The Electronic Communications (Universal Service) Regulations 2003, S.I. 2003/33
USC	Universal Service Condition
USC notification	Designation of BT and Kingston as universal service providers, and the specific universal service conditions - a statement and Notification issued by the Director General of Telecommunications on the implementation of the Universal Service Directive, July 2003
USD	<i>Universal Service Directive</i> , European Parliament and Council Directive 2002/22/EC of 7 March 2002