



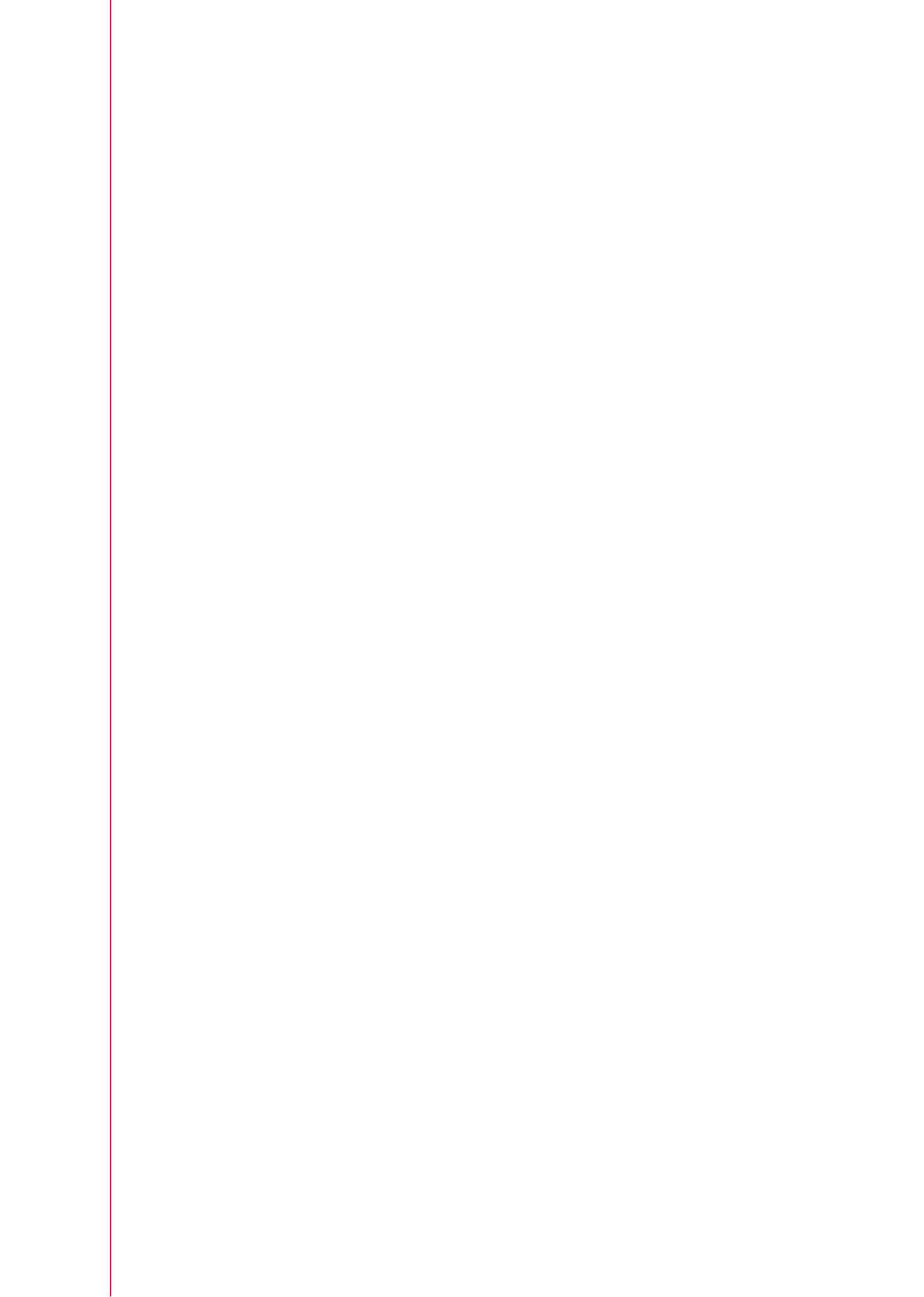
Dispute between BT and each of
Everything Everywhere Limited,
Hutchison 3G UK Limited and Telefónica
UK Ltd relating to BT's Standard
Interconnect Agreement

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Statement and determination

Issue date: 15 August 2013



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Statement and determination concerning a dispute relating to BT's SIA.

Glossary of terms

08x cases: Cases determined by Ofcom concerning BT's tiered rates payable by CPs in respect of calls to 080, 0845 and 0870 numbers.

2003 Act: The Communications Act 2003.

BT: British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006.

BT's comments: Letters from T Fitzakerly (BT) to L Knight (Ofcom) of 2 February 2012 (in response to EE's dispute submission) and 13 February 2012 (in response to H3G's dispute submission).

BT's response: BT's submission in response to the Provisional Conclusions, dated 15 October 2012.

CAT: Competition Appeal Tribunal.

CAT 08x judgment: Judgment of the Competition Appeal Tribunal in proceedings relating to the 08x cases (*BT and Everything Everywhere Limited v Ofcom* [2011] CAT 24).

CAT TRD judgment: Judgment of the Competition Appeal Tribunal in proceedings relating to Termination Rate Disputes (*T-Mobile (UK) Limited v Ofcom* [2008] CAT 12).

CoA: Court of Appeal.

CoA 08x judgment: Judgment of the Court of Appeal in relation to the CAT 08x judgment, *Telefónica O2 UK Ltd and others v British Telecommunications plc* [2012] EWCA Civ 1002.

CP: Communications provider.

CPL: Carrier Price List. A price list published and updated by BT to document the prices associated with BT's wholesale telephony products and services to CPs.

CWW: Cable & Wireless Worldwide plc was acquired by the Vodafone Group on 27 July 2012. CWW registered as an interested party to the Dispute prior Vodafone's acquisition. **CWW's response:** CWW's submission in response to the Provisional Conclusions, dated 15 October 2012. CWW's response was provided separately to Vodafone's response.

Determination: This statement and determination *Dispute between BT and each of Everything Everywhere Limited, Hutchison 3G UK Limited and Telefónica UK Ltd relating to BT's Standard Interconnect Agreement*, issued on 15 August 2013, setting out our resolution to the Dispute.

Dispute: Dispute between BT and each of Everything Everywhere Limited, Hutchison 3G UK Limited and Telefónica UK Ltd relating to BT's Standard Interconnect Agreement.

EE: Everything Everywhere Limited whose registered company number is 02382161, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006.

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EE's dispute submission: EE's submission *Request to Ofcom to resolve a dispute between Everything Everywhere Limited and British Telecommunications concerning paragraph 12 of the Standard Interconnect Agreement*, dated 23 January 2012.

EE's response: EE's submission in response to the Provisional Conclusions, dated 12 October 2012.

Gamma: Gamma Telecom Holdings Limited whose registered company number is 4287779, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006.

H3G: Hutchison 3G UK Limited whose registered company number is 03885486, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006.

H3G's dispute submission: H3G's submission *Request to Ofcom to determine a dispute between Hutchison 3G UK Limited and British Telecommunications plc regarding paragraph 12 of the Standard Interconnect Agreement*, dated 2 February 2012.

H3G's response: H3G's submission in response to the Provisional Conclusions, dated 15 October 2012.

H3G SMP case: *Hutchison 3G UK Limited v Office of Communications (Mobile Call Termination)* [2009] EWCA Civ 683

IVR: IV Response Limited whose registered company number is 4318927, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006.

MNOs / the MNOs: Collectively the mobile network operators EE, H3G and O2.

MNO dispute submissions: Collectively, the dispute submissions of EE, H3G and O2.

MTR: Mobile termination rate. Charge set by a mobile network operator for terminating a call on its network.

NCCN: Network Charge Change Notice. Notice issued by BT to notify operators of changes for BT non-regulated prices with a contractual notice period of 28 days.

O2: Telefónica UK Limited whose registered company number is 01743099, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006.

O2's dispute submission: O2's submission *Request to resolve a dispute between Telefónica UK Ltd and British Telecommunications plc under sections 185 – 191 of the Communications Act 2003*, dated 5 March 2012.

O2's response: O2's submission in response to the Provisional Conclusions, dated 17 October 2012.

OCCN: Operator Charge Change Notice. Notice issued by either BT or a CP to the other, that a change to the CP's charge is being sought.

OCP: Originating CP. A CP with calls being made from its network.

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PECN: Public Electronic Communications Network.

PPM: Pence per minute.

Provisional Conclusions: Ofcom's provisional conclusions set out in *Dispute between BT and each of Everything Everywhere Limited, Hutchison 3G UK Limited and Telefónica UK Ltd relating to BT's Standard Interconnect Agreement*, issued on 28 September 2012 and published on 1 October 2012.

SIA or BT's SIA: BT's Network Charge Change Control Standard Interconnect Agreement. This is BT's Standard Interconnect Agreement and provides the terms and conditions on which calls are connected between the respective PECNs of BT and other CPs.

Sky: British Sky Broadcasting Limited whose registered company number is 2906991, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006.

SMP conditions: Regulatory conditions imposed on specific CP who has been found to have significant market power in a market review conducted by Ofcom.

TalkTalk Group or TTG: TalkTalk Telecom Group plc whose registered company number is 7105891, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006.

TNUK: The Number UK Limited whose registered company number is 4352737, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006.

TNUK's response: TNUK's submission in response to the Provisional Conclusions, dated 15 October 2012.

Verizon / Verizon Enterprise Solutions: Verizon UK Limited, whose registered company number is 2776038, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006.

Verizon's response: Vodafone's submission in response to the Provisional Conclusions, dated 15 October 2012.

Virgin Media: Virgin Media Limited whose registered company number is 2591237, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006.

Vodafone: Vodafone Group Services Limited whose registered company number is 01471587, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006.

Vodafone's response: Vodafone's submission in response to the Provisional Conclusions, dated 17 October 2012.

Section 1

Summary

- 1.1 This statement and determination (the "Determination") sets out our resolution to the dispute (the "Dispute") brought separately by Everything Everywhere Limited ("EE"),¹ Hutchison 3G UK Limited ("H3G")² and Telefónica UK Limited ("O2")³ (collectively the "MNOs") against British Telecommunications plc ("BT").
- 1.2 The Dispute concerns Paragraph 12 of BT's SIA⁴ and the rights this confers on BT to introduce changes to charges for BT services or facilities supplied under BT's SIA, as compared to the rights that Paragraph 13 confers on Communication Providers ("CPs") such as the MNOs to introduce changes to charges for their services supplied under the SIA. Please refer to the Glossary for defined terms.
- 1.3 The SIA provides BT's standard terms for the provision of interconnection for telephony. The SIA sets out the contractual obligations of each party, where a CP connects its public electronic communications network ("PECN") to that of BT's, allowing calls to pass between the different networks. The SIA includes, amongst other things, mechanisms for either party to make changes to charges for these services and facilities.
- 1.4 Under Paragraph 12 of the SIA, BT does not need to obtain a CP's consent to change its charges. BT's new charges can take effect 28 days from notification for unregulated services (and up to 90 days for regulated services). Paragraph 12 does not include a provision for CPs to propose changes to BT's existing charges.
- 1.5 In contrast, under Paragraph 13, CPs may only propose an alteration to a charge to BT. A proposed alteration will not take effect unless BT consents, or if it is endorsed by Ofcom following reference of a dispute. Paragraph 13 does not specify when a CP's new charge becomes effective, however, an implementation period of 56 days is set out in BT's Charge Change Manual.⁵ In addition, Paragraph 13 allows BT to propose variations to a CP's charges.
- 1.6 The MNOs contend that BT's ability to unilaterally change its prices under Paragraph 12, and the absence of an equivalent provision under Paragraph 13, or the ability to propose changes to charges for BT's services, creates an imbalance between the rights of the contracting parties that is unfair and unreasonable.
- 1.7 In referring the Dispute to us, the MNOs have asked us to determine that there should be an amendment to the SIA, such that the imbalance is removed with BT being required to seek agreement of its proposed price changes before they take effect.

¹ EE submission of 23 January 2012 ("EE's dispute submission").

² H3G submission of 2 February 2012 (H3G's dispute submission").

³ O2 submission of 5 March 2012 ("O2's dispute submission").

⁴ BT's Network Charge Change Control Standard Interconnect Agreement, which provides the terms and conditions on which calls are connected between the respective PECNs of BT and other CPs.

⁵ Annex I to *BT / Operator Charge Change Manual* (Issue Number 2), 25 Feb 2010.

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- 1.8 BT considers that the arrangements are justified in practical terms, as BT is the only operator with an end-to-end connectivity obligation⁶ and argues that the current arrangements are supported by many smaller CPs, who rely on BT's transit services for much of their traffic.
- 1.9 We have also had a number of submissions from third parties, including some CPs who argue that the current arrangements should not be changed to reflect the MNOs' proposals as a result of this Dispute.

Ofcom's Provisional Conclusions on the matters in dispute

- 1.10 On 15 October 2012 we published our Provisional Conclusions on the matters in dispute. In this, we considered both the potential benefits and detriments of the current position, taking account of the matters that had been raised by the Parties and interested third parties.
- 1.11 Our provisional view was that, on balance, Paragraphs 12 and 13 of the SIA are fair and reasonable. Accordingly, we did not believe that we should exercise our dispute resolution powers to determine that the terms of the SIA should be changed. Our reasons for this provisional view are set out in further detail in **section 3** below.

Conclusions

- 1.12 We received eight responses to our Provisional Conclusions. Having carefully considered these responses, and based on the assessment set out in this Determination, we have concluded that the existing terms of Paragraphs 12 and 13 of the SIA are fair and reasonable.
- 1.13 On this basis, we do not consider that we should exercise our dispute resolution powers to determine that the terms should be changed.
- 1.14 In reaching our conclusions we were guided by and have taken account of our duties and Community obligations under sections 3 and 4 of the 2003 Act. We consider that our Determination is consistent with those duties.
- 1.15 Our Determination for resolving this Dispute is at **annex 1**.

Structure of the remainder of this document

- 1.16 The introduction and background to this Dispute are set out in **section 2** and the analysis underpinning our provisional reasoning and assessment as set out in the Provisional Conclusions is set out in **section 3**. Our analysis and final conclusions, including consideration of submissions from stakeholders in response to the Provisional Conclusions, is set out in **section 4**. The Determination is at **annex 1**.

⁶ This is an obligation placed on BT requiring that it purchases call termination from other providers of public electronic communications networks (i.e. fixed or mobile telephony providers wanting BT to terminate voice or data calls) on request.

Section 2

Introduction and background

Dispute referred to Ofcom by the MNOs

- 2.1 This Dispute was referred to Ofcom separately by EE, H3G and O2.
- 2.2 On 25 January 2012, Ofcom received a dispute submitted by EE concerning Paragraph 12 of BT's SIA and the rights this confers on BT to introduce changes to charges for BT services or facilities supplied under the SIA, as compared to the rights Paragraph 13 confers on EE to introduce changes to charges for its services supplied under the SIA. In its dispute submission, EE contends that the imbalance between the terms of Paragraph 12 and Paragraph 13 is unfair and unreasonable.⁷
- 2.3 Ofcom subsequently received H3G's dispute submission, dated 2 February 2012. In this, H3G raises similar issues concerning the imbalance between the terms of Paragraph 12 and Paragraph 13 of the SIA and argues that Paragraph 12, as drafted, is "*wholly unfair and unreasonable*".⁸
- 2.4 On 5 March 2012, O2 provided us with its dispute submission, describing the terms of Paragraphs 12 and 13 of the SIA as "*an inherently unfair arrangement*"⁹ following the CAT 08x judgment, and requested that we join it as a party to the Dispute.
- 2.5 In this document, we collectively refer to the three dispute submissions from EE, H3G and O2 as the "MNO dispute submissions".

MNOs' request for Ofcom to make a determination

- 2.6 In light of their view that the imbalance between Paragraphs 12 and 13 of the SIA is not fair and reasonable, the MNOs propose that Ofcom determines that the SIA is amended so that the provisions for BT and CPs to make charge changes are more closely aligned. Specifically, the MNOs propose that the provisions for BT charge changes under Paragraph 12 are amended to reflect the current provisions for CP charge changes under Paragraph 13.¹⁰
 - 2.6.1 EE suggests that amending the terms of paragraphs 12.2 to 12.5 of Paragraph 12, so that they mirror the current equivalent terms of Paragraph 13, is a "fair and reasonable" proposal for addressing the current asymmetry.¹¹
 - 2.6.2 H3G proposes that by amending Paragraph 12 to mirror the terms of Paragraph 13,¹² BT's ability to vary charges would be limited, providing

⁷ Paragraph 3.3 of EE's dispute submission.

⁸ Paragraph 15 of H3G's dispute submission.

⁹ Paragraph 12 of O2's dispute submission.

¹⁰ Paragraph 5.1 of EE's dispute submission; paragraphs 94-96 of H3G's dispute submission; paragraphs 32-33 of O2's dispute submission.

¹¹ Paragraph 3.4 of EE's dispute submission.

¹² We note that H3G has also suggested that alternative remedies could exist, such as Paragraph 12 being amended to apply to both BT and CPs, so that either party can notify a charge change with the presumption that the charge is fair and reasonable. This was set out in a footnote to the letter from X Mooyaart (H3G) to L Knight (Ofcom) dated 24 August 2012, discussed at paragraph 2.41 below. To the extent that we consider remedies in this statement, we factor this alternative into our assessment.

equal rights for CPs to negotiate charges and an equivalent basis for Ofcom to resolve any disputes relating to charges proposed by either BT or other CPs.

- 2.6.3 In O2's view, amending Paragraph 12 so that a BT charge change requires the agreement of other parties to take effect would address both the commercial problems it has experienced since the CAT 08x judgment, and (in O2's view) an inconsistency between the current arrangements and Ofcom's regulatory principles and statutory duties.¹³

Dispute resolution

Ofcom's duty to handle disputes

- 2.7 The statutory provisions in sections 185 to 190 of the 2003 Act, governing Ofcom's dispute resolution jurisdiction, were amended by the Electronic Communications and Wireless Telegraphy Regulations 2011 (SI 2011/1210) (the "2011 Regulations") on 26 May 2011. As the Dispute was referred to Ofcom after 26 May 2011, it has been considered under the amended provisions.
- 2.8 The amended provisions provide that Ofcom has the power to resolve the following types of regulatory disputes referred to it by one or more of the parties:
- 2.8.1 a dispute relating to the provision of network access between different CPs (section 185(1) of the 2003 Act);
- 2.8.2 a dispute relating to the entitlements to network access that a CP is required to provide by or under a condition imposed on him under section 45 of the 2003 Act between that CP and a person who is identified, or is a member of a class identified, in the relevant condition (section 185(1A) of the 2003 Act); and
- 2.8.3 a dispute between CPs, which is not an 'excluded dispute', relating to rights or obligations conferred or imposed by or under a condition set under section 45 of the 2003 Act or any of the enactments relating to the management of the radio spectrum (section 185(2) of the 2003 Act).
- 2.9 Where a dispute appears to satisfy the criteria of both section 185(1) and section 185(1A) of the 2003 Act, it is to be treated for the purposes of both section 186 and section 190 of the 2003 Act, as falling within section 185(1A) of the 2003 Act.¹⁴
- 2.10 Section 186(2) of the 2003 Act provides that where a dispute is referred to Ofcom in accordance with section 185, Ofcom must decide whether or not it is appropriate to handle it. Section 186(3) provides that Ofcom must decide that it is appropriate for it to handle a dispute falling within section 185(1A) or section 185(2) unless there are alternative means available for resolving the dispute. A resolution of the dispute by those means must be consistent with the Community requirements set out in section 4 of the 2003 Act, and those alternative means must be likely to result in a prompt and satisfactory resolution of the dispute.
- 2.11 The 2011 Regulations have amended Ofcom's dispute resolution powers to allow it to exercise discretion as to whether to accept a dispute properly referred to Ofcom for

¹³ Paragraphs 32-33 of O2's submission.

¹⁴ See paragraph 148 of *Telefónica UK Ltd v Ofcom* [2012] CAT 28.

resolution under section 185(1) of the 2003 Act. Section 186(2A) of the 2003 Act provides that in deciding whether or not it is appropriate for Ofcom to handle a dispute falling within section 185(1), it may in particular take into account its priorities and available resources.

Ofcom's powers when determining a dispute

- 2.12 Ofcom's powers in relation to making a dispute determination are limited to those set out in section 190 of the 2003 Act. Except in relation to disputes relating to the management of the radio spectrum, Ofcom's main power is to do one or more of the following:
- 2.12.1 make a declaration setting out the rights and obligations of the parties to the dispute (section 190(2)(a));
 - 2.12.2 give a direction fixing the terms or conditions of transactions between the parties to the dispute (section 190(2)(b));
 - 2.12.3 give a direction imposing an obligation on the parties to enter into a transaction between themselves on the terms and conditions fixed by Ofcom (section 190(2)(c)); and
 - 2.12.4 give a direction requiring the payment of sums by way of adjustment of an underpayment or overpayment, in respect of charges for which amounts have been paid by one party to the dispute, to the other (section 190(2)(d)).
- 2.13 A determination made by Ofcom to resolve a dispute binds all the parties to that dispute (section 190(8)).

Ofcom's duties when determining a dispute

- 2.14 When resolving a dispute under the provisions set out in sections 185 to 191 of the 2003 Act, Ofcom is exercising one of its regulatory functions. As a result, when Ofcom resolves disputes it must do so in a manner which is consistent with both Ofcom's general duties in section 3 of the 2003 Act, and (pursuant to section 4(1)(c) of the 2003 Act) the six Community requirements set out in section 4 of the 2003 Act, which give effect, amongst other things, to the requirements of Article 8 of the Framework Directive.¹⁵
- 2.15 Where a dispute falls within section 185(1) of the 2003 Act, section 190(2A) of the 2003 Act provides that Ofcom must exercise their powers in the way that seems to them most appropriate for the purpose of securing: efficiency, sustainable competition, efficient investment and innovation and the greatest possible benefit for the end-users of public electronic communications services. We do not consider that section 190(2A) of the 2003 Act applies to the Dispute. In any event we consider that our analytical framework and proposed resolution of the Dispute in accordance with our statutory duties is consistent with the objectives set out in section 190(2A) of the 2003 Act.

¹⁵ Directive 2002/21/EC of 7 March 2002.

Accepting the Dispute for resolution

- 2.16 Having considered the submissions from the two original parties bringing disputes (EE and H3G) and subsequent comments made by both parties and BT, we were satisfied that these were disputes between CPs within the meaning of section 185(1A) of the 2003 Act. If that were not the case, we considered that we would have jurisdiction under section 185(1)(a) of the 2003 Act, and that we would exercise our discretion to handle these disputes.
- 2.17 On 14 February 2012 we informed BT and EE of our decision that it was appropriate for us to accept the dispute for resolution in accordance with section 186(3) of the 2003 Act. On 15 February, we published details, including the scope of the Dispute, on our website.
- 2.18 We considered that the principal issues in dispute between H3G and BT, and between O2 and BT, are essentially the same as the issues we were already considering in the dispute between EE and BT. We therefore considered it appropriate to join both H3G and O2 as parties to that existing dispute.¹⁶

The scope of the Dispute

- 2.19 On 15 February 2012 we published details of the Dispute, including the scope, on the Competition and Consumer Enforcement Bulletin part of our website. The scope of the dispute is to determine:

“Whether the operation and/or effect of paragraphs 12 and 13 of BT’s Standard Interconnect Agreement (“SIA”) is such that they constitute fair and reasonable terms or conditions as between the parties to the dispute; and

*Whether, in light of Ofcom’s conclusions on the above question, Ofcom should exercise its powers to give a direction under section 190(2)(b) and/or section 190(2)(c) of the Communications Act 2003”.*¹⁷

- 2.20 On 10 April 2012, we updated our website to further advise that where it appears likely that we may reach conclusions that would have broader industry-wide effects, we would consider at that point whether a separate formal policy consultation on these conclusions is appropriate and where so, it is likely that we would not determine the current dispute until after the conclusion of that exercise.¹⁸

Interested parties

- 2.21 Eight stakeholders have expressed an interest in the outcome of the Dispute:

- CWW;
- Gamma;
- IVR;

¹⁶ Details of accepting H3G and O2 as parties to the disputes can be found at: http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01083/.

¹⁷ See: http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01083/.

¹⁸ *Ibid.*

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- Sky;
- TTG;
- TNUK;
- Virgin Media; and
- Vodafone.

CAT 08x judgment and subsequent appeal

The CAT 08x judgment

- 2.22 On 5 February 2010, Ofcom issued a determination in respect of disputes between BT and each of T-Mobile, Orange, Vodafone and O2. The disputes concerned BT's termination charges for calls to 080 numbers and Ofcom concluded that the tariffs introduced by BT were not fair and reasonable.¹⁹
- 2.23 On 10 August 2010, Ofcom issued a determination in respect of disputes between BT and each of Vodafone, T-Mobile, H3G, O2, Orange and EE. The disputes concerned BT's termination charges for calls to 0845 and 0870 numbers, and Ofcom concluded that the tariffs were not fair and reasonable.²⁰
- 2.24 These two determinations (collectively, the "08x cases") were appealed by BT to the CAT, whilst EE also appealed the 0845/0870 determination.
- 2.25 On 1 August 2011, the CAT handed down its judgment in respect of these appeals.²¹ The CAT concluded that BT was entitled to impose the 08x termination rates, pursuant to Paragraph 12 of the SIA. Underpinning the CAT's decision was that it considered that whilst a charge change under Paragraph 13 must be justified by the proponent of it, there is not the same onus on BT to justify a charge change under Paragraph 12.
- 2.26 In the CAT's view, under the terms of the SIA, BT had a contractual right to impose a charge change, and in the absence of regulatory obligations such as SMP conditions, Ofcom should take these contractual rights into account when resolving a dispute relating to a price increase notified under Paragraph 12. Accordingly, the CAT concluded that BT's rights under Paragraph 12 of the SIA and the absence of other regulation in the area meant that BT should be able to introduce the new prices unless "*it can clearly and distinctly be demonstrated that the introduction of the NCCNs would act as a material disbenefit to consumers*".²²
- 2.27 As part of their dispute submissions, the MNOs argued that any unfairness or unreasonableness arising from the asymmetry in the SIA is exacerbated by this element of the CAT 08x judgment. They believe that it creates a material difference in

¹⁹ *Determination to resolve a dispute between T-Mobile, Vodafone, O2 and Orange about BT's termination charges for 080 calls*, dated 5 February 2010.

²⁰ *Determination to resolve a dispute between BT and each of Vodafone, T-Mobile, H3G, O2, Orange and Everything Everywhere about BT's termination charges for 0845 and 0870 calls*, dated 10 August 2010.

²¹ *BT and Everything Everywhere Limited v Ofcom* [2011] CAT 24 (the "CAT 08x judgment").

²² Paragraph 448 of the CAT 08x judgment.

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the approach to dispute resolution under Paragraphs 12 and 13, with the judgment requiring a comparatively greater burden of proof from CPs disputing a BT charge.²³

- 2.28 The CAT 08x judgment was subsequently appealed to the Court of Appeal by O2 on the one hand, and collectively Vodafone, EE and H3G on the other.²⁴

Exceptional circumstances

- 2.29 On 16 February 2012, BT asked Ofcom if it would suspend its work in relation to the Dispute pending the Court of Appeal judgment in the 08x cases.²⁵
- 2.30 The 2003 Act does not provide us with a formal power to “suspend” our dispute investigations, but requires us to resolve disputes within four months, except in exceptional circumstances. At that time, in line with our guidelines, we did not consider that we were in a position to determine with any certainty whether we were likely to be in a position or not to resolve the Dispute within four months, and we therefore did not consider that exceptional circumstances within the meaning of section 188(5) of the 2003 Act existed at that time.²⁶
- 2.31 On 1 to 3 May 2012 the Court of Appeal heard on an expedited basis appeals brought against the CAT 08x judgment.
- 2.32 By 8 June 2012, we had reached a point in our analysis where we considered we would be unable to issue provisional conclusions prior to a judgment from the Court of Appeal because of the likely impact of such judgment on the issues raised in the Dispute.
- 2.33 We therefore informed all parties (including interested third parties) that we considered that exceptional circumstances existed for the purposes of section 188(5) of the 2003 Act, such that it was appropriate not to issue our provisional conclusions until after the Court of Appeal handed down judgment. We also advised that we would continue to consider the matters in dispute as appropriate, so that we could resolve the dispute as soon as possible following the Court of Appeal's judgment.²⁷

The CoA 08x judgment

- 2.34 On 25 July 2012, the Court of Appeal handed down its judgment overturning the CAT 08x judgment.²⁸ In its judgment, the Court of Appeal disagreed that whilst a charge change under Paragraph 13 must be justified by the proponent of it, there is not the same onus on BT to justify a charge change under Paragraph 12.

²³ See for example: Paragraph 1.9 of EE's dispute submission; Paragraph 15 of H3G's dispute submission; and paragraphs 21-23 of O2's dispute submission.

²⁴ Cases C3/2011/3121, 3124, 3315, 3316 and C3/2012/0692A.

²⁵ Letter from T Fitzakerly (BT) to T Thursby (Ofcom), 16 February 2012. Prior to Ofcom publishing details of this Dispute, [] also provided a submission to Ofcom in which it argues that Ofcom should cite exceptional circumstances pending the Court of Appeal's judgment in the 08x cases.

²⁶ Letter from T Thursby (Ofcom) to T Fitzakerly dated 22 February 2012, copied to each of EE and H3G.

²⁷ An update to this effect was put on our website on 12 June 2012. See:

http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01083/.

²⁸ *Telefónica O2 UK Ltd and others v British Telecommunications plc* [2012] EWCA Civ 1002 (the “CoA 08x judgment”).

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- 2.35 The CoA 08x judgment stated that *“while upholding contractual rights, thereby favouring commercial certainty, can be a relevant consideration for the regulator to bear in mind, neither the actual or previous contractual position, nor any right of BT to impose a change, can be of any overriding significance”*²⁹ (emphasis added) and that *“it is therefore for BT to justify its changes, when challenged”*.³⁰
- 2.36 Furthermore, the Court of Appeal found that Ofcom was entitled to make a policy judgment by concluding that it was right to place greater weight on the potential risk to consumers that Ofcom had identified, than on the potential benefits of allowing BT's new charges to stand.³¹ The CoA 08x judgment concluded that there was no scope for the CAT to overturn Ofcom's decision to reject BT's charge changes on the grounds that Ofcom should only reject BT's charges where it is clearly and distinctly demonstrated that the introduction of the charge changes would act as a material disbenefit to consumers. This is because the Court of Appeal found that *“absent new evidence which shows that the factual basis on which Ofcom proceeded was wrong, or an error of law, the Tribunal ought to respect the policy decisions and matters of judgment involved in Ofcom's decisions”*.³²
- 2.37 The Court of Appeal's judgment in the 08x cases has since been followed by the CAT in its judgment in *Telefónica UK Ltd v Ofcom*³³, in which the CAT noted that *“the weight to be attached to different considerations in forming a value judgment is a matter for Ofcom, as the NRA charged with the duty of resolving disputes, and in the absence of any misdirection by Ofcom the court will normally respect its determination, whether or not the court would itself have balanced the considerations in the same way and reached the same conclusion.”*³⁴

Parties' comments following the CoA 08x judgment

- 2.38 On 31 July 2012, we wrote to each of the parties to the Dispute inviting them to consider the impact of the CoA 08x judgment and their position in respect of the Dispute.
- 2.39 All three of the MNOs advised that they still considered that they were in dispute with BT regarding the provisions of Paragraphs 12 and 13 of the SIA.
- 2.40 EE noted that the Court of Appeal dismissed the CAT's arguments that Ofcom's approach to dispute resolution should be different according to whether the change which is being considered was proposed under Paragraph 12 or Paragraph 13 of the SIA, that there was no burden on BT to justify its charge changes under Paragraph 12 and that the nature of BT's contractual rights under Paragraph 12 point in the direction of allowing BT to introduce the new prices. However, EE did not see a need to change its overall position in relation to the Dispute as a result of the CoA 08x judgment, which it considers may also provide support for many of the concerns raised by EE. Further, EE suggested that in light of BT's application to the Supreme Court for leave to appeal the CoA 08x judgment (see BT's comments below for further details), Ofcom should amend Paragraph 12 of the SIA now, so as to remove any doubt that the views of the CAT in the CAT 08x judgment could be upheld.³⁵

²⁹ Paragraph 74 of the CoA 08x judgment.

³⁰ Paragraph 91 of the CoA 08x judgment.

³¹ Paragraph 104 of the CoA 08x judgment.

³² Paragraph 90 of the CoA 08x judgment.

³³ [2012] CAT 28.

³⁴ *Telefónica UK Ltd v Ofcom* [2012] CAT 28, paragraph 45 .

³⁵ Letter from R Durie (EE) to L Knight (Ofcom), dated 21 August 2012.

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- 2.41 H3G argued that the CoA 08x judgment makes clear that Ofcom's power to resolve the Dispute is unconstrained by the terms of the Dispute and that it is open to Ofcom to amend the terms of the contract (consistent with its dispute resolution powers under the 2003 Act). In H3G's view, the CoA 08x judgment does not address all the issues raised by this Dispute, in particular the effects of BT's ability to impose charge changes under Paragraph 12 without a right for H3G to propose changes to BT's charges or those of third parties that are passed through via BT's transit charges. Further, H3G noted that there remains no equivalent unilateral right to change its own charges under Paragraph 13. Accordingly, H3G argued that the terms of the SIA are still not fair or reasonable.³⁶
- 2.42 O2 considered that the Court of Appeal's position appears to be that the contractual position should still be a factor that Ofcom must take into account in determining a dispute and that the fact that BT is permitted to propose amendments to the prices of the other operator's services, but there is no mechanism for the other operator to propose amendments to the prices of BT's services is "inherently unfair".³⁷
- 2.43 BT commented³⁸ that:
- 2.43.1 In its view, the status of Paragraphs 12 and 13 of the SIA can and should be decided as part of the normal contract review process involving the whole industry, and BT is currently undertaking such a contract review.
- 2.43.2 BT had applied to the Supreme Court for leave to appeal the CoA 08x judgment and should Ofcom wish to proceed with the Dispute, BT's view is that the best course is for Ofcom to await the outcome of the Supreme Court's consideration of BT's appeal application.

Decision to issue Provisional Conclusions

- 2.44 On the basis that we considered that the parties remained in dispute, and in light of our statutory duties to resolve disputes, we considered that it was appropriate for us to continue with our analysis in order to issue the Provisional Conclusions. At the time of issuing the Provisional Conclusions, we noted that should BT's application to the Supreme Court for leave to appeal be granted, we may need to review how we proceed with resolving the Dispute. On 11 September 2012, we wrote to the parties to the Dispute to inform them of our position.

BT's appeal to the Supreme Court and the decision to issue the final Determination

- 2.45 On 13 February 2013 BT was granted leave to appeal the CoA 08x judgment to the Supreme Court. The appeal is listed to be heard in February 2014. We note (i) that BT is not appealing the Court of Appeal's conclusions on the proper interpretation of the SIA, and (ii) that BT is asking the Supreme Court to refer certain questions to the European Court of Justice if it considers there is any doubt as to the correct interpretation of the relevant underlying European law.
- 2.46 Having carefully considered the timing of our final Determination of the Dispute taking into account Ofcom's duty to resolve disputes as soon as possible, including where disputes have not been resolved within the standard four month period (as is the

³⁶ Letter from X Mooyaart (H3G) to L Knight (Ofcom), dated 24 August 2012.

³⁷ Email from L Wardle (O2) to L Knight (Ofcom), dated 24 August 2012.

³⁸ Letter from T Fitzakerly (BT) to L Knight (Ofcom), dated 24 August 2012.

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case here), we have decided that in light of our statutory duties it is appropriate to issue the final Determination to resolve this Dispute.

- 2.47 We recognise that following judgment by the Supreme Court it may be appropriate for Ofcom to give further consideration to the issues covered by or related to this Determination.

Information relied upon in resolving the Dispute

- 2.48 The Provisional Conclusions drew on the key information provided by the parties and interested third parties. In section 3 of this document, we assess whether the operation and/or effect of Paragraphs 12 and 13 of BT's SIA is such that they constitute fair and reasonable terms or conditions as between the parties to the Dispute. This includes consideration of the detail of the MNO dispute submissions and related correspondence provided by both the MNOs and BT, including:

2.48.1 BT's comments on the MNOs' dispute submissions;

2.48.2 Submissions made by interested third parties;

2.48.3 Responses from the MNOs, BT and the eight interested third parties to Ofcom's request for information under section 191 of the 2003 Act dated 28 March 2012, which asked for views (with supporting evidence) concerning the costs / benefits created by, and operation of, the current Paragraph 12 and 13 arrangements;

2.48.4 The CAT 08x judgment and CoA 08x judgment; and

2.48.5 Comments from BT, EE, H3G and O2 concerning their respective positions following the CoA 08x judgment.

- 2.49 Stakeholder responses to the Provisional Conclusions are discussed in section 4 of this Dispute statement and determination.

Section 3

Analysis and provisional conclusions

Analytical Framework

- 3.1 In line with the scope of this Dispute and our statutory duties, we are aiming to establish whether or not the operation and/or effect of Paragraphs 12 and 13 of BT's SIA is such that they constitute fair and reasonable terms or conditions as between the parties to the Dispute. In order to determine this, we have addressed the following questions:
 - 3.1.1 Based on the submissions of the parties, including submissions from interested third parties, is there a contractual asymmetry between BT and other CPs wanting to modify charges? As part of this, we considered the impact of the CoA 08x judgment overturning the CAT 08x judgment. Our provisional assessment of this is set out in Step 1 below.
 - 3.1.2 Where there is a contractual asymmetry, is there evidence that benefits to consumers and/or competition arise from this asymmetry which indicate that the existing arrangements may be justified? Such benefits may concern efficiency gains, practicality and commercial certainty. This includes an assessment of benefits arising both from the operation of each of Paragraphs 12 and 13 in isolation, and the effect of any asymmetry between the two. Our provisional assessment of whether such benefits arise is set out in Step 2 below.
 - 3.1.3 Where there is a contractual asymmetry, is there evidence that detriments to consumers and/or competition arise from this asymmetry? As part of this assessment, we considered whether any such detriments identified are reasonably likely to be constrained by regulatory intervention, in particular our dispute resolution powers. This includes an assessment of detriments arising both from the operation of each of Paragraphs 12 and 13 in isolation, and the effect of any asymmetry between the two. Our provisional assessment of this is set out in Step 3 below.
 - 3.1.4 We then considered whether our analysis of the benefits and detriments identified in Steps 2 and 3 suggests to us that Paragraphs 12 and 13 of the SIA are not fair and reasonable. Our provisional assessment of this is set out in Step 4 below.
- 3.2 On the basis of our provisional assessment in Steps 1 to 4, we also set out in Step 5 whether we think it is appropriate for us to give a direction under section 190(2)(b) and/or section 190(2)(c) of the 2003 Act, having regard to our statutory duties and Community obligations.

Step 1. Assessing contractual asymmetry

BT's SIA

3.3 BT has various reference offers setting out the terms and conditions on which it will supply certain services. Separate reference offers exist for services such as Ethernet, Wholesale Broadband, IPStream, Frame Relay and telephony.³⁹

3.4 The SIA is BT's reference offer for telephony. It is a contractual agreement between BT and a CP, providing the terms and conditions to allow PECNs to connect their network to BT's allowing calls to pass between the different networks.⁴⁰

3.5 BT enters into a separate SIA with each CP wishing to interconnect its PECN with that of BT's. However, in each case the terms and conditions in the SIA are identical. These include Paragraphs 12 and 13, which set out provisions for BT and CPs respectively to change the charges they set each other for their respective wholesale interconnect services.

3.6 Paragraph 12 of the SIA provides as follows:

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

12.2 BT may from time to time vary the charge for a BT service or facility by publication in the Carrier Price List and such new charge shall take effect on the Effective Date, being a date not less than 28 calendar days after the date of such publication, unless a period other than 28 calendar days is expressly specified in a Schedule.⁴¹

...”

3.7 Paragraph 13 of the SIA provides as follows:

“13.1 For an Operator service or facility BT shall pay to the Operator the charge specified from time to time in the Carrier Price List.

13.2 The Operator may from time to time by sending to such person, as BT may notify to the Operator from time to time, a notice in writing in duplicate request a variation to a charge for an Operator service or facility (“Charge Change Notice”). Such notice shall specify the proposed new charge and the date on which it is proposed that the variation is to become effective (“Charge Change Proposal”). BT shall within 4 Working Days of receipt of such notice acknowledge receipt and within a reasonable time notify the Operator in writing of acceptance or rejection of the proposed variation.

13.3 BT may from time to time by sending to such person, as the Operator may notify to BT from time to time, a notice in writing in duplicate request a variation

³⁹ The full list of reference offers is available on BT Wholesale's website:

https://www.btwholesale.com/pages/static/Library/Pricing_and_Contractual_Information/Reference_Offers/index.htm.

⁴⁰ The full title of the SIA is ‘Network Charge Change Control Standard Interconnect Agreement (NCC SIA)’, available on BT Wholesale's website:

https://www.btwholesale.com/pages/static/Library/Pricing_and_Contractual_Information/Telephony_Reference_Offer/index.htm.

⁴¹ Some charges are subject to SMP conditions requiring a 90-day notification period.

to a charge for an Operator service or facility ("Charge Change Notice"). Such notice shall specify the proposed new charge and the date on which it is proposed that the variation is to become effective ("Charge Change Proposal"). The Operator shall within 4 Working Days of receipt of such notice acknowledge receipt and within 14 days of receipt of such notice notify BT in writing of acceptance or rejection of the proposed variation. If the Operator has not accepted the Charge Change Proposal within 14 days of receipt of such notice (or such longer period as may be agreed in writing) the proposed variation shall be deemed to have been rejected.

13.4 If the Party receiving a Charge Change Notice accepts the Charge Change Proposal the parties shall forthwith enter into an agreement to modify the Agreement in accordance with the Charge Change Proposal.

13.5 If the Party receiving a Charge Change Notice rejects the Charge Change Proposal the Parties shall forthwith negotiate in good faith.

13.6 If following rejection of a Charge Change Proposal and negotiation, the Parties agree that the Charge Change Notice requires modification, the Party who sent the Charge Change Notice may send a further Charge Change Notice.

13.7 If following rejection of a Charge Change Proposal and negotiation the Parties fail to reach agreement within 14 days of the rejection of the Charge Change Proposal, either Party may, not later than 1 month after the expiration of such 14 days period, refer the matters in dispute to OFCOM.

...”

3.8 Thus, there are differences in the processes set out in the SIA for BT, on the one hand, and CPs on the other hand, to amend their respective charges. Under Paragraph 12:

- BT does not need to obtain CPs' consent to change its charges.
- For unregulated services, BT's new charges take effect 28 days from notification. Where a charge is regulated, the change takes effect 90 days from notification.
- Paragraph 12 does not include a provision for CPs to propose changes to BT's existing charges.

3.9 In contrast, under Paragraph 13:

- A CP must agree its proposed charge change with BT in order for it to take effect.
- Whilst Paragraph 13 does not specify when a CP's new charge becomes effective, the applicable service level agreement currently in effect requires at least 56 days' notice (irrespective of whether the charge is or is not regulated).⁴²

⁴² The relevant timescales for charge changes notified under Paragraph 13 can be found in the BT service level agreement *BT/Operator Charge Change Manual (issue number 2)*, dated 25 February 2010. Available at:

https://www.btwholesale.com/pages/static/Pricing_and_Contracts/Reference_Offers/Telephony.html. Annex I to this Manual sets out a minimum period of 56 days for implementation of a charge change notified by a CP. Whilst paragraph 1.4 of the SIA states that the Manuals are not legally binding, industry practice is to observe the timescales set out in the BT/Operator Charge Change Manual.

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- Paragraph 13 allows BT to propose variations to a CP's charges, although these require that CP's consent to become effective.

Provisional view on Step 1: Do the existing arrangements create contractual asymmetry?

- 3.10 As set out in paragraphs 3.5 to 3.9 above, Paragraphs 12 and 13 confer different rights on BT as compared with other CPs in terms of their respective ability to impose a charge change of their own and reject a charge change of others. Accordingly, our provisional view was that there is a clear contractual asymmetry between BT and other CPs wanting to modify charges.
- 3.11 As set out in paragraph 2.27 above, the MNOs had submitted that the contractual imbalance in Paragraphs 12 and 13 of the SIA was exacerbated by the findings of the CAT 08x judgment. During the course of our consideration of this Dispute, the CoA 08x judgment has been handed down.
- 3.12 The Court of Appeal found that "*neither the actual or previous contractual position, nor any right of BT to impose a change, can be of any overriding significance*"⁴³ and that "*[i]t is therefore for BT to justify its changes [i.e. to charges under Paragraph 12], when challenged*".⁴⁴ We also noted that the Court of Appeal has not upheld the CAT's requirement to clearly and distinctly demonstrate that the introduction of BT's charge changes would act as a material disbenefit to consumers in order for Ofcom to override BT's charge changes.⁴⁵ Therefore, we considered that the concern of the MNOs that the CAT 08x judgment extends the perceived imbalance in the operation of the SIA is removed by the CoA 08x judgment and it was not necessary for us to consider this issue further.⁴⁶

Step 2. Are there benefits arising from the existing arrangements?

- 3.13 Stakeholders (including the MNOs and BT) identified some benefits from the existing arrangements. In this section we review stakeholders' views on the benefits of both Paragraph 12 and 13 and of the asymmetry between the two.

Benefits arising from Paragraph 12 and 13: stakeholders' views

BT's views

- 3.14 In response to the MNOs' dispute submissions,⁴⁷ BT made the following observations:
- i) Paragraph 12 (as it is currently drafted) is the result of contractual negotiations between BT and the rest of the industry;
 - ii) the provision has been in place for a very long period of time; and

⁴³ CoA 08x judgment, paragraph 74.

⁴⁴ CoA 08x judgment, paragraph 91.

⁴⁵ See CoA 08x judgment, paragraph 92.

⁴⁶ At the time of issuing the Provisional Conclusions, we noted that should BT's application to the Supreme Court for leave to appeal be granted, we may need to review this position. As noted above, on 13 February 2013, the Supreme Court granted BT leave to appeal. The case is listed to be heard in February 2014.

⁴⁷ BT provided responses to EE's dispute submission on 2 February 2012 and to H3G's dispute submission on 13 February 2012.

- iii) any party to the SIA is entitled under the SIA to require a contract review (the most recent of which was due to start on 1 April 2012).⁴⁸
- 3.15 On the latter point, BT noted that Paragraph 12 has been a subject for discussion within the industry and it has never been possible to reach a consensus. BT argues that the current arrangements are supported by many smaller CPs, who rely on transit services for much of their traffic.⁴⁹
- 3.16 BT argued that the arrangements in Paragraphs 12 and 13 are justified in particular because BT is the only operator with an end-to-end connectivity obligation.⁵⁰ BT explained that this means that unlike all other CPs, BT is obliged to purchase interconnect from any other operator, on reasonable terms.⁵¹ BT therefore interconnects with all CPs in the UK and then offers to all those CPs the possibility of being interconnected via transit services with every other UK CP. BT suggests that the current arrangements are justified in light of "*the nature of UK interconnect, its regulation and the BT transit product...[and] what is generally regarded as a commercial norm*".⁵²
- 3.17 BT also suggested that the arrangements in Paragraphs 12 and 13 have a practical benefit. In terms of Paragraph 12, BT argued these arrangements avoid the need for a series of bilateral negotiations between BT and each of the CPs affected by a charge change of BT. If there was a need for such multiple bilateral discussions this would increase transaction costs which could increase the cost of services for consumers. BT also argued that the arrangements under Paragraph 12 balance the opportunity for price innovation with the need for all players to have certainty about the prices in force. In terms of Paragraph 13, BT argued these arrangements promote stability and certainty by ensuring that an existing CP charge remains in effect until such time as any change is agreed with BT. Further, BT suggested, because any subsequent change is by agreement between BT and the CP proposing a change, the likelihood of any subsequent dispute being referred to Ofcom is reduced.⁵³
- 3.18 BT also explained that having accepted a charge change notified under Paragraph 13 by a CP, BT as a transit operator does not subsequently issue a charge change notification to originating operators. BT explained that this is because the transit component cost of the call remains unchanged; the change in cost to the originator reflects the change to the CP terminating component. BT added that the agreed and accepted mechanism to notify originating CPs of transit price changes through BT is to publish the Carrier Price List B1.12, which is updated and issued twice monthly.⁵⁴
- 3.19 Commenting on the MNO dispute submissions requesting that the existing terms of the SIA are modified, BT suggested that removing its rights under Paragraph 12 could (a) lead to delays and extra expense with CPs having an incentive to not agree to a BT charge change, and (b) confusion for transit operators and their customers as a result of different rates applying to a CP's service.⁵⁵

⁴⁸ Page 1 of BT comments of 2 February 2012 and 13 February 2012.

⁴⁹ *Ibid.*

⁵⁰ Page 2-3 of BT comments of 2 February 2012 and Page 2 of BT's comments of 13 February 2012.

⁵¹ Page 1 of information request response from T Fitzakerly (BT) to L Knight (Ofcom) dated 13 April 2012 ("BT's information request response").

⁵² *Ibid.*

⁵³ Page 4 of BT's information request response.

⁵⁴ Page 7 of BT's information request response.

⁵⁵ Page 3 of BT comments.

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- 3.20 On the facility under Paragraph 13 for BT to propose changes to another CP's existing charges, BT argued that this process can help avoid retrospective charge amendments, by enabling it to propose "sustainable" charges to CPs.⁵⁶
- 3.21 Ahead of the next general contract review planned for 1 April 2012,⁵⁷ BT proposed amendments to the SIA, so that other CPs providing SMP services subject to charge controls would have similar rights to BT to issue price changes that take effect immediately, as under Paragraph 12.

MNOs' views

- 3.22 In its dispute submission, O2 suggested that the practical differences in the arrangements in Paragraphs 12 and 13 arose due to BT's unique position as:
- i. the UK's largest fixed provider;
 - ii. the former state monopolist;
 - iii. the UK's sole CP with end to end connectivity obligations;
 - iv. the CP with the vast majority of the UK's transit business; and
 - v. the CP with by far the largest number of interconnected communication providers within the UK.⁵⁸
- 3.23 O2 believes that these arrangements "*existed solely for practical reasons to ensure that BT was able to amend prices of its services without first gaining consent from each of its interconnected partners*".⁵⁹ However, in its response to our information request, O2 said that it does not believe that the arrangements under Paragraphs 12 and 13 provided any discernible direct benefit to it.
- 3.24 EE noted in response to our information request that it is administratively convenient for CPs not to have to authorise a BT charge change notification under the current Paragraph 12 arrangements, although EE considered that this could equally be achieved by CPs not rejecting a proposal within a specified period.⁶⁰
- 3.25 In terms of the Paragraph 13 arrangements, EE noted "*that there should theoretically be some benefit to EE of BT's rights to reject unreasonable third party termination charges, as it might be expected that EE's and BT's interests both as acquirers of the service would be aligned in some circumstances*".⁶¹ However, EE did not think that this benefit had arisen in practice. EE also said that it believes that there is a commercial benefit to it in BT being able to propose changes to the charges for EE's and other CPs' services under Paragraph 13, because these arrangements encourage commercial negotiation, whilst preserving the status quo in the event that no agreement can be reached.⁶²
- 3.26 H3G noted that it benefits from the convenience of the Paragraph 12 arrangements, where BT acts as a transit operator and can reflect H3G's regulated termination rates, proposed by H3G under Paragraph 13, via a BT transit charge change under Paragraph 12. However, H3G added that this is of limited benefit, because, as its

⁵⁶ Page 4 of BT's information request response.

⁵⁷ In the letter from T Fitzakerly (BT) to L Knight (Ofcom), dated 24 August 2012, BT explains that it is currently undertaking the contract review as part of the normal SIA review process.

⁵⁸ Paragraph 21 of O2's dispute submission.

⁵⁹ Paragraph 22 of O2's dispute submission.

⁶⁰ Page 7 of information request response from R Durie (EE) to L Knight (Ofcom) dated 17 April 2012 ("EE's information request response").

⁶¹ Page 10 of EE's information request response.

⁶² Page 11 of EE's information request response.

termination charges are regulated, CPs (including BT) could only sensibly object to a charge change of H3G, if H3G had breached its regulatory obligations.⁶³

Interested third parties' views

- 3.27 The key benefit of the arrangements highlighted by the interested parties appears to concern the certainty associated with BT being able to introduce charge changes under Paragraph 12, as well as BT's ability to receive charge change notifications from terminating CPs issued under Paragraph 13, and then pass these through to originating CPs as part of BT transiting calls across its network.
- 3.28 CWW referred to existing contractual arrangements between CPs having been developed with BT's transit arrangements in mind, and in the transit market it is, in CWW's view, impractical to require that agreement is made between all suppliers and providers in advance of any charge change.⁶⁴
- 3.29 In its response to our request for information, CWW added that the Paragraph 12 arrangements provide certainty, as well as a level playing field for all CPs (in that none can refuse a BT charge change proposal and therefore delay its implementation).⁶⁵
- 3.30 Sky similarly observed that Paragraph 12 provides industry certainty, as well as possible efficiency gains by avoiding the need for "*lengthy cross industry discussions around price changes*".⁶⁶
- 3.31 TNUK supported the current arrangements in respect of the transit market. TNUK offers directory enquiry services, calls to which from end users often transit across BT's network before terminating on the network of the CP hosting TNUK's service. TNUK explained that whilst changes to its charges are notified as a change in the termination rate of its host CP in accordance with the provisions of Paragraph 13, these charges are an input to BT's own transit charges, and therefore any changes to TNUK's rates are thereafter reflected by BT revising its own transit charges under Paragraph 12.⁶⁷ This means that provided BT accepts a Paragraph 13 notice from a CP, that CP's price change will be applied as a Paragraph 12 price change and not require the consent of the whole industry before it can be implemented.
- 3.32 TNUK noted that as such, TNUK is reliant on BT notifying other CPs' charge changes in accordance with the provisions of Paragraph 12 of the SIA.⁶⁸ Accordingly, TNUK is concerned with a change to the SIA that would allow CPs to reject charge changes proposed under Paragraph 12. TNUK suggested that absent the existing Paragraph 12 arrangements, service providers would lose control over a very substantial part of their business, because they would have no commercial freedom to set their charges.

⁶³ Page 5 of information request response from X Mooyaart (H3G) to N Buckley (Ofcom) dated 16 April 2012 ("H3G's information request response").

⁶⁴ Email from J Hornby (CWW) to L Knight (Ofcom), dated 2 March 2012.

⁶⁵ Information request response from N Harding (CWW) to L Knight (Ofcom), dated 13 April 2012 ("CWW's information request response").

⁶⁶ Information request response from A Rosen (Sky) to L Knight (Ofcom), dated 12 April 2012 ("Sky's information request response"). Sky also suggests that there is no reason why this provision should not equally apply to CP charge change notifications. To the extent that we consider remedies in these Provisional Conclusions, we factor this alternative into our assessment.

⁶⁷ Letter from S Grossman (TNUK) to L Knight (Ofcom), dated 2 March 2012 ("TNUK 2 March letter").

⁶⁸ *Ibid.*

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- 3.33 Virgin Media similarly suggested that it benefits from the Paragraph 12 arrangements where BT acts as a transit operator, with BT being able to impose on originating CPs Virgin Media's charge changes notified under Paragraph 13.⁶⁹
- 3.34 [X] also suggested that it benefits from BT's ability to pass through its charge changes by reflecting the new rate, plus BT's transit fee, in BT's carrier price list within 28 days under Paragraph 12. [X] argued that this produces "*significant efficiency savings in terms of the administration of not having to seek, receive and audit prior permission from some 250 Communications Providers ("CPs")*".⁷⁰ [X] further advised that it benefits from these arrangements from "*the regulatory and commercial certainty of our own forward pricing*".⁷¹ that they confer.
- 3.35 Whilst TTG advised that it considers that it is commercially disadvantaged by aspects of the current terms of Paragraphs 12 and 13 of the SIA, TTG also agreed that given BT's position as a key transit operator interconnecting with over 200 CPs, the arrangements offer a practical solution to charge change notifications and on balance, TTG does not object to the current wording.⁷²
- 3.36 In its response to our formal request for information, IVR suggested another benefit of the Paragraph 12 arrangements is that a BT charge change notification offers IVR an opportunity to assess the proposals and where appropriate, react to the BT charge change proposals by amending charges for its own services.⁷³
- 3.37 In relation to the Paragraph 13 arrangements under which BT is able to reject a CP's charges:
- 3.37.1 CWW suggested that these Paragraph 13 arrangements provide a safeguard through BT acting as "*gatekeeper*", by rejecting proposals that are unreasonable or unjustified;⁷⁴
- 3.37.2 [X] also suggested that the Paragraph 13 mechanism could offer BT an efficient means for ensuring that unreasonable charges proposed by other CPs are rejected.⁷⁵ Virgin Media similarly noted that the facility provides BT with the ability to reject other CP charge proposals that may be unfavourable to Virgin Media;⁷⁶ and
- 3.37.3 TTG considered that it has benefited from these arrangements, where BT acts as a "safety net" for any unfair or unreasonable charge increases by CPs that TTG does not directly interconnect with and therefore buys transit services from BT.⁷⁷
- 3.38 Some of the interested parties also view the Paragraph 13 arrangements under which a CP can reject BT's proposals to vary a CP's charge as beneficial. Virgin

⁶⁹ Information request response from A Wileman (Virgin Media) to N Buckley (Ofcom) dated 24 April 2012 ("Virgin Media's information request response").

⁷⁰ [X] information request response.

⁷¹ *Ibid.*

⁷² Letter from R Granberg (TTG) to L Knight (Ofcom), dated 28 March 2012 ("TTG 28 March letter").

⁷³ Information request response from A Martin (IVR) to L Knight (Ofcom), dated 17 April 2012 ("IVR's information request response").

⁷⁴ CWW's information request response.

⁷⁵ [X] information request response.

⁷⁶ Virgin Media's information request response.

⁷⁷ Information request response from R Granberg (TTG) to L Knight (Ofcom), dated 15 April 2012 ("TTG's information request response").

Media says that the arrangements allow a CP to reject any BT proposals that might be considered inappropriate.⁷⁸ TTG said that the process also provides a useful means by which CPs can “ascertain the accuracy of BT's propositions by referring a dispute to Ofcom”, citing the NTS disputes referred to Ofcom over the last 10 years as examples of this.⁷⁹

- 3.39 However, H3G suggested that these Paragraph 13 arrangements can create problems, referring to BT issuing OCCNs to Vodafone and Orange requesting they reduce their MTRs:⁸⁰ H3G explained that it would have benefited from the lower termination rate proposed by BT to the extent that H3G was still routing its mobile traffic via BT's transit service. However, BT's proposals were rejected by Vodafone and Orange and H3G stated that “BT had made it clear that it did not consider itself contractually obliged” to enforce the lower charges under the SIA.⁸¹

Provisional view on Step 2: Are there benefits arising from the existing arrangements?

- 3.40 Taking account of the submissions set out above, our provisional view was that the existing arrangements for BT and other CPs wanting to modify charges appear to create specific and potentially significant benefits for multiple CPs and BT concerning efficiency, certainty and transparency. Whilst it is not possible to accurately assess the likely benefits in terms of reduced transaction costs arising from circumventing the need for not only BT, but all CPs who take BT's services, to dedicate time and resources to negotiating a charge change proposal (and therefore potentially reduced charges to consumers), such avoided costs could be considerable.
- 3.41 We also noted that the practicality conferred by these arrangements is also referred to by the Court of Appeal in its judgment: “It was also suggested that because BT's charges specified in the Carrier Price List apply in relation to many operators, it is logical, sensible and necessary that BT should be able to change the charges payable to it just by serving notice, leaving it to an aggrieved Operator (if there is one) to challenge the notice by way of a dispute. All of that is understandable”.⁸²
- 3.42 We also noted that a potential benefit of the asymmetry, as suggested by stakeholders, would seem to stem from the fact that the combination of Paragraphs 13 and 12 allows BT to accept a CP's charges notified under Paragraph 13 and impose these on the rest of the industry under Paragraph 12, thus giving rise to the practical benefits discussed above. However, on this point we noted BT's comment that it does not amend its own transit rates (i.e. it does not make an amendment to its own charges under Paragraph 12) in order to reflect changes to CP charges made under Paragraph 13, but instead updates its Carrier Price List (“CPL”) twice monthly to advise of changes to CPs' termination rates (see paragraph 3.18 above).⁸³

⁷⁸ Virgin Media's information request response.

⁷⁹ TTG's information request response.

⁸⁰ Details of this are provided in paragraph 3.60 below, as part of the discussion of potential detriments.

⁸¹ Page 9 of H3G's information request response.

⁸² See paragraph 68 of the CoA 08x judgment.

⁸³ A terminating CP will invoice BT for payment of its terminating charges, and in turn BT invoices originating CPs to recover this outpayment, and at the same time recovers its charge for providing transit. An explanation of the flow of payments can be found in slides 13-18 of BT's CPL Guidance Slides *NCC Carrier Price List (CPL) Guidance Slides*, dated 1 June 2012:

https://www.btwholesale.com/pages/static/Carrier_Price_List_Guidance_Slides/index.htm:

Slide 13 explains that BT's transit rates are set in CPL Section B1.02.2. The rates that BT will charge an originating CP for basic voice calls that transit the BT network to another CP combine this transit

Nonetheless, we considered that the *effect* is ultimately the same as that suggested by stakeholders: BT is able to accept a charge change under Paragraph 13 and pass this through to CPs who use BT's transit services, by charging originating CPs to recover outpayments it makes for the revised termination rate.

- 3.43 Overall, the practical benefits described would seem to flow from the provisions of Paragraph 12 in isolation, and not from the asymmetry of the arrangements. In particular, it is not clear that if there was no asymmetry and all CPs were able to notify charges under Paragraph 12 arrangements, the benefits identified would no longer exist. We did not mean to suggest by this that we consider that this renders the asymmetry unfair or unreasonable; only that it was not clear to us that such asymmetry is necessary in order to deliver the above benefits associated with the current arrangements.
- 3.44 In paragraph 3.37 we noted that some stakeholders have described the current arrangements as BT acting as a "gatekeeper" and providing a "safety net", as BT is able to reject a CP's proposed charge changes. Whilst some stakeholders argued that this is a benefit arising from the asymmetry between Paragraphs 12 and 13, we noted that this suggests that it is appropriate for BT and only BT (i.e. no other CP) to have such a role and that BT exercises its role appropriately in the best interests of other CPs and consumers.
- 3.45 We did not agree that BT could be the ultimate arbiter of the reasonableness of a charge. If parties cannot reach agreement then the statutory framework provides that a dispute can be referred to Ofcom to determine whether a charge is fair and reasonable. Therefore, we were not convinced that this necessarily means that the existing asymmetry between Paragraphs 12 and 13 offers benefits to CPs in this regard that would not exist outside of these arrangements. We also noted that there is a risk that BT could unfairly or erroneously reject reasonable charge change proposals of a CP and it is therefore unclear that the arrangements would reduce the likelihood of a dispute referral to Ofcom.
- 3.46 In Step 3 we considered the detriments arising from the existing arrangements and the degree to which CPs can rely on regulatory intervention to potentially overcome these and if not, whether this suggests the asymmetry is therefore unfair or unreasonable.

Step 3. Are there detriments arising from the existing arrangements?

- 3.47 As we have set out in section 2, the MNOs submit that the contractual asymmetry in the SIA creates an unfair and unreasonable imbalance in BT's favour. We considered the question of whether there are actual or potential detriments as a result of the arrangements, and the extent of them, based on the submissions of the MNOs and other stakeholders below. In this section we review stakeholders' views on the detriments of both Paragraphs 12 and 13 and of the asymmetry between the two.

Detriments arising from Paragraphs 12 and 13: stakeholders' views

MNOs' views

BT's ability to adjust its charges without agreement

rate with the outpayment BT makes to the terminating CP, and these are set out in CPL Section B1.12.

- 3.48 The MNOs argued that a detriment created by Paragraph 12 arises from BT's ability to impose charge changes on other CPs without the need to agree or justify its proposals, and that in doing so BT can impose charges that are unfair and unreasonable. EE suggested that "*BT faces no incentive to justify its price changes to CPs or to engage in any form of constructive commercial discussions as to the reasonableness of its charges*"⁸⁴. O2 said that Paragraph 12 "*was necessary to allow reasonable price changes to be introduced without the need for administratively burdensome agreement from all interconnected parties [...] BT has now exploited the dichotomy for its own financial gain*".⁸⁵
- 3.49 Providing specific examples, the MNOs referred to the disputes with BT regarding BT's "ladder" termination charges for calls to non-geographic numbers, where BT has introduced pence-per-minute ("ppm") wholesale charges based on what it considers to be the average retail price that the originating CP levies for calls to these number ranges.⁸⁶
- 3.50 The MNO dispute submissions raised concerns that whilst BT is able to introduce its own charge changes under Paragraph 12 without the need to agree them with other CPs, those CPs are required to agree with BT a charge change notice they propose under Paragraph 13 – giving rise to an imbalance with BT alone having the power of veto over CP charge change proposals. This, in essence, is an asymmetry which the MNOs suggest creates inefficiencies, as BT has no incentive to negotiate its charges with CPs whilst being able to reject the charges proposed by CPs.
- 3.51 H3G referred to BT increasing charges for its own termination services. As an example, H3G referred to BT's connection fee for calls to its Text Direct service which in February 2005 BT proposed to increase from 20p to £3.84 (notified to industry via NCCN 599). H3G advised that this was introduced without any prior industry consultation and a dispute was subsequently brought to Ofcom by NTL and other CPs, resulting in BT revising its position and instead increasing its prices from 20p to 36p per call before Ofcom made a determination.⁸⁷
- 3.52 EE said that to the best of its knowledge, it has never managed to negotiate a commercially agreed outcome with BT in relation to a charge change notified by BT under Paragraph 12, which, EE believes, demonstrates the problems created by Paragraph 12.⁸⁸

⁸⁴ Paragraph 1.8 of EE's dispute submission.

⁸⁵ Page 4 of O2's information request response.

⁸⁶ See the 08x cases referred to in paragraph 2.24 above. A further dispute has been submitted to Ofcom concerning other 08x, and 09, number ranges: See *Dispute between Everything Everywhere and BT regarding termination charges for 0844/3 and 0871/2/3 and 09 calls* opened on 4 April 2012: http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01088/#1.

⁸⁷ Page 5 of H3G's information request response For details of the case, see *Dispute between ntl and BT about BT's charge for its Text Direct service*: http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_847/.

⁸⁸ Page 8 of EE's information request response.

BT as transit operator

- 3.53 The MNOs submitted that BT has no incentive to negotiate prices for interconnection with other terminating CPs (notified to BT under Paragraph 13) as these can be passed onto other CPs using BT's transit service.⁸⁹
- 3.54 As examples, EE pointed to the "ladder" style termination charges imposed by CPs such as CWW, Gamma Telecom and IVR for termination of calls to non-geographic numbers such as those in the 080, 0870, 0845, 0844 and 0871/2/3 ranges. EE described the arrangements as BT acting as a "post-box" in passing on these charges.⁹⁰
- 3.55 EE referred to its experience that BT has "*simply imposed on EE as transit charges under paragraph 12 a large number of third party termination charges that EE has considered to be unreasonable*".⁹¹ EE cited the termination rates that MCom, Cable & Wireless and Stour Marine charged to T-Mobile, which EE was ultimately required to challenge itself by bringing a dispute to Ofcom.
- 3.56 H3G similarly referred to BT's transit ladder charges as an example of detriment to H3G (and other OCPs). H3G argued that as there is no incentive on BT to negotiate the charges proposed to it by other TCPs (except for the specific ladder rung which applies to BT's own originating traffic), BT accepts the charges and imposes them on to H3G and other OCPs via the Paragraph 12 arrangements.⁹²
- 3.57 Like EE and H3G, O2 cited BT acting as a transit provider in respect of ladder pricing as an example of detriment created by Paragraph 12. O2 suggested that a TCP wishing to introduce a scheme such as ladder pricing, has a greater prospect of being able to do this by being able to rely upon BT applying those charges through the Paragraph 12 mechanism and using BT as a transit provider.⁹³
- 3.58 O2 argued that the transit market is consequently distorted because of the attractiveness to TCPs of using BT as a transit provider. O2 argued that this is because of the incentive on BT to accept their schemes and because of BT's ability to impose such schemes on OCPs.

BT's ability to reject charge change proposals

- 3.59 As well as imposing charges, EE also noted that in theory, BT could reject EE's charges for an Ofcom charge controlled service supplied by EE to BT under the SIA (such as EE's currently charge controlled mobile termination rates). EE suggested that this could cause unnecessary cost and inconvenience to EE, but considers that in practice, the detailed and prescriptive nature of these charge controls would appear to reduce the commercial incentive for BT to do this and it is not a problem that EE has faced to date.

⁸⁹ See for example paragraph 2.37 of EE's dispute submission, paragraph 93 of H3G's dispute submission and paragraph 29 of O2's dispute submission.

⁹⁰ Page 8 of EE's information request response.

⁹¹ Page 10 of EE's information request response.

⁹² Page 7 of H3G's information request response.

⁹³ Page 4 of O2's information request response.

- 3.60 EE referred to the mobile operators' proposed blended 2G and 3G rates.⁹⁴ EE stated that BT initially accepted Vodafone and Orange's blended rates under Paragraph 13, but thereafter disputed them (meaning that the higher blended rates remained in force for these operators pending the resolution of the dispute by Ofcom), whereas BT initially rejected T-Mobile and H3G's proposed blended rates under Paragraph 13 (meaning that the lower non-blended rates remained in force for these operators pending the resolution of the dispute by Ofcom). EE argued that Vodafone and Orange were then advantaged by their ability to reject subsequent proposals by BT to lower their rates, leaving T-Mobile and H3G with comparatively lower rates than their competitors, until such time as the matter was resolved by Ofcom.
- 3.61 H3G claimed that it had suffered detriment as a result of BT being slow to accept H3G's proposal for a charge change, on the basis of BT's belief that the H3G proposal may not have complied with the relevant charge control. H3G explains that in this case, the matter was resolved with Ofcom's assistance. H3G also referred to its proposal to increase MTRs being rejected by BT for lack of "sufficient" notice, resulting in the lower MTR remaining applicable to OCPs via BT transit during the relevant period.
- 3.62 H3G additionally noted its understanding that [X]'s proposal (through its host [X]) to BT to reduce its MTR was rejected by BT, resulting in the higher MTR remaining applicable to H3G and other CPs via BT transit during the relevant period.

Administrative burden on CPs

- 3.63 In terms of an ability to address a charge imposed by BT, EE argued that in order to contest a BT charge change, CPs only have the option of submitting a dispute to Ofcom, which they consider is an administrative burden. EE added that this creates a further detriment for CPs, as BT continues to receive the rates of the charge change imposed through Paragraph 12 until such time as it is amended by an Ofcom determination.

Difference in interest rates

- 3.64 EE argued that any repayments BT is required to make to CPs following an Ofcom determination on a charge introduced under Paragraph 12 only incur the 'Ofcom Interest Rate' of LIBOR plus 3/8%, resulting currently in a total interest repayment of less than 1%, an amount which is far lower than the value to either party of having the "cash in hand".⁹⁵ EE said that the potential liability to pay additional interest sums to BT in the event of non-payment under the terms of the SIA⁹⁶ is one reason why it has, in the past, chosen to pay disputed charges pending resolution of the dispute.

⁹⁴ See: *Disputes between T-Mobile and BT, O2 and BT, Hutchison 3G and BT and BT and each of Hutchison 3G, Orange Personal Communications Services and Vodafone relating to call termination rates*: http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_942/.

⁹⁵ See Paragraph 12.7 of the SIA. The same applies in respect of a charge introduced under Paragraph 13 in relation to which a retrospective adjustment (including as a result of an Ofcom determination) is required – see Paragraph 13.13.

⁹⁶ Under the terms of Annex B to the SIA, CPs that withhold payment from BT of disputed charges may be liable to having to repay with interest at the 'Default Interest Rate'. This rate is comparatively higher than the Ofcom Interest Rate.

Asymmetry in notification periods

- 3.65 It was also suggested that the asymmetry in notification periods could create detriments. CPs are required to provide a comparatively longer notification period for charge change proposals (56 days, compared with BT providing 28 days). EE and O2 suggested that the 28 days' notification of a BT charge change is insufficient to allow CPs to respond by adjusting their respective retail rates by the time the new charge takes effect.
- 3.66 EE explained that the insufficient notification period has led to it losing money at the retail level until EE was able to adjust its retail charges, citing BT passing on a series of increased termination charges by TNUK for calls to its 118 118 directory enquiry ("DQ") service between 2008 and 2010.

Interested third parties' views

- 3.67 CWW submitted that NCCN 500 and its successors relating to termination charges for non-geographic numbers (such as NCCN 908) are clear examples of where BT price rises have been introduced and CPs buying these services have no option but to continue to purchase them. In CWW's view, BT had little incentive to engage in dialogue and it took regulatory intervention before BT modified its approach to take account of the differing retail pricing policies in the market.
- 3.68 With reference to the 2007/8 Mobile Termination Rates dispute, CWW raised concerns that Paragraph 12 of the SIA enables BT to apply transit rates retrospectively following a determination by Ofcom.
- 3.69 Like EE, CWW argued that the asymmetry in the SIA creates detriments in respect of the process for challenging a charge change proposal. CWW similarly argued that in order to contest a BT charge change, CPs only have the option of submitting a dispute to Ofcom, which they consider is an administrative burden.
- 3.70 CWW also claimed that BT could refuse to pay a transit fee for accessing the network of CPs for which CWW provides transit. However, CWW advised that "*BT more often than not accepts rate changes that we propose, even if they result in an increase, as we provide justification for the proposed change*".⁹⁷
- 3.71 [X] has suggested that the lack of visibility for third parties, where BT either rejects or accepts a CP's rate, means that third parties are unable to prepare strategies to mitigate the effect of the acceptance / rejection of the charge change proposal.⁹⁸
- 3.72 [X] similarly considered that in terms of detriments, BT's ability to propose changes to a CP's charge is analogous to a CP proposing a charge change under Paragraph 13 – namely, that the change itself creates uncertainty arising from the lack of transparency, leading to [X] accruing a liability it is otherwise unaware of and in relation to which it is unable to mitigate the effect.
- 3.73 TNUK advised that to date, there has been no detriment to it as result of BT's right to reject charge notices issued by other operators. However, TNUK noted that BT *could* choose to reject a notice issued on TNUK's behalf by CWW, which in TNUK's view, could create "*the worst possible scenario*" for TNUK, as it would be unable to set its wholesale charges paid by other operators, and also create the added detriment that

⁹⁷ *Ibid.*

⁹⁸ [X] information request response.

TNUK would not be able to set the charges paid by customers calling from a BT landline.⁹⁹

- 3.74 TNUK also suggested that where it opposes a charge introduced by BT, dispute resolution may not offer a feasible means of redress for service providers. TNUK suggested that service providers are less well-resourced than originating operators, and it may not be economically feasible for them to bring a dispute if its charges are rejected by a large originating operator. Further, TNUK questioned whether it would have the right of recourse, as it has no direct commercial relationship with CPs such as the MNOs.
- 3.75 TTG argued that some detriment exists, as TTG is unable to propose a charge increase for TTG services without BT's explicit consent. Despite this concern, TTG advised that "*on balance, however, TTG believes that paragraph 13 strikes the appropriate balance*" with the suggested benefit that BT's ability to reject charges means it acts as a "safety net".¹⁰⁰
- 3.76 Virgin Media cited specific examples of detriments arising from Paragraph 12 where BT imposes charges for its own termination services:¹⁰¹
- 3.76.1 NCCN 500, where Virgin Media incurred significant additional costs as a result of BT imposing new (higher) charges for the termination of NTS calls on the BT network; and
- 3.76.2 Text Direct, where Virgin Media claims that it incurred significant additional costs as a result of BT imposing new, higher charges.
- 3.77 Virgin Media referred to NTS ladder pricing, where BT accepted charge change notifications from terminating CPs (for example Gamma Telecom), and then imposed those (increased) charges on Virgin Media via the BT transit product.
- 3.78 Virgin Media also suggested that BT's power to reject charge changes could mean that CPs cannot reciprocate in response to a BT charge change. Virgin Media believes that BT's ability to reject a charge change proposal has placed Virgin Media at a commercial disadvantage, citing NCCN 500 as an example where Virgin Media was unable to respond to BT's price increases, which in turn meant that Virgin Media was also unable to apply any constraint on BT.
- 3.79 Virgin Media provided specific examples of detriment, relating to negotiations concerning charges levied by Telewest for geographic call termination, where Telewest issued charge change notifications under Paragraph 13 of the SIA which were rejected by BT. Virgin Media also referred to previous attempts to revise charges relating to NTS calls, stating that there has been "*a long history of BT having rejected such proposals*".¹⁰² In Virgin Media's view, BT rejects proposed charge changes that have resulted in Virgin Media being unable to establish charges that it believes reflect its own specific costs.
- 3.80 Vodafone also noted that the 56 day notification period could lead to delays in CPs accepting a change in Vodafone's termination rates. The example provided refers to CWW not accepting the introduction of a change to Vodafone's termination rate on

⁹⁹ Pages 4 and 5 of TNUK's information request response.

¹⁰⁰ TTG's information request response.

¹⁰¹ Page 6 of Virgin Media's information request response.

¹⁰² Page 7 of Virgin Media's information request response.

the expiry of the 30 day notice period (1 December 2011) unless they received assurances that BT had also accepted the rate, effective on the same date (rather than BT accepting after 56 days, thus leading to different rates applying to each of CWW and BT in the interim). However, Vodafone advised that in this instance all operators were invoiced the new higher rate from 1 December 2011 and Vodafone did not receive any objections to this approach.

- 3.81 In addition, Vodafone also suggested that the CPLs are often updated late, with the effect of operators not having 28 days' notice of a charge change. Vodafone pointed to updates to NCCN 1101 (26 September 2011) "*some 4 days before the pricing became effective*",¹⁰³ as well as to updates to NCCN 1102 (B1.06a V 5.2 issued 05.12.11) in relation to which Vodafone stated that BT did not communicate to it that these new ladders would apply nor did it inform Vodafone where it was positioned on the ladders.

BT's views

- 3.82 BT did not agree that Paragraph 12 gives it an unfettered discretion. BT argued that its rights under Paragraph 12 are not without limits, being constrained by both commercial necessity and legal limitations,¹⁰⁴ and that this was recognised by the CAT at paragraph 251 of the CAT 08x judgment.¹⁰⁵
- 3.83 BT also said that "*as a responsible supplier and purchaser*", where it changes charges under Paragraph 12, or requests changes to CPs' charges under Paragraph 13, it only does so "*when it is commercially fair and reasonable*". In BT's view "*it only makes commercial sense to implement sustainable charges, to avoid unnecessary application of price amendments retrospectively*", advising also that because BT's services often affect a large number of operators, it needs to be consistent in its approach.¹⁰⁶

Provisional view on Step 3: Are there detriments arising from the existing arrangements?

- 3.84 In paragraphs 3.48 to 3.81 above, we noted concerns that stakeholders have raised in relation to the operation of Paragraph 12 and 13 and the imbalance between the two. We discuss these in turn below:
- 3.84.1 BT's ability to adjust its charges without agreement of other CPs under Paragraph 12 (see paragraphs 3.85 to 3.89 below);
 - 3.84.2 BT's ability under Paragraph 12 to apply transit rates retrospectively (see paragraph 3.90 below);
 - 3.84.3 BT's incentives to accept and pass-through charges (see paragraphs 3.91 and 3.92 below);
 - 3.84.4 Distortion of competition in the transit market (see paragraph 3.93 below);
 - 3.84.5 Administrative burden on CPs (see paragraphs 3.94 to 3.96 below);

¹⁰³ Page 5 of Vodafone's information request response.

¹⁰⁴ Page 3 of BT comments of 2 February 2012 and 13 February 2012.

¹⁰⁵ BT referred to paragraph 251 of CAT 08x judgment noting that a charge issued by BT under Paragraph 12 of the SIA that infringed *ex post* competition law "*would be illegal and ineffective. No doubts there are other limits to BT's powers under paragraph 12....*"

¹⁰⁶ Pages 3-4 of BT's information request response.

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- 3.84.6 Difference in interest rates (see paragraph 3.97 below);
- 3.84.7 Transparency of charges (see paragraphs 3.98 and 3.99 below);
- 3.84.8 Difference in notification periods (see paragraphs 3.100 to 3.104 below);
- 3.84.9 BT's ability to reject a charge change notice (see paragraph 3.105 below);
and
- 3.84.10 BT's ability to discriminate between different CPs (see paragraphs 3.106
and 3.107 below).

BT's ability to adjust its charges without agreement

- 3.85 Stakeholders have argued that they are subject to detriments arising from BT being able to introduce charge changes under Paragraph 12. The examples provided by stakeholders describe BT increasing charges for its own termination services, such as in the case of BT's ladder charges for terminating calls to non-geographic numbers, NTS (BT charge change NCCN 500) and BT's Text Direct.
- 3.86 In the case of NTS, we noted that the charge changes proposed by BT through its NCCN 500 were referred to Ofcom as a dispute and as noted by CWW, BT subsequently modified its approach in response to regulatory intervention by Ofcom (in this case, following a determination, as part of which BT was required to make repayments).¹⁰⁷ On this basis, it seemed clear to us that BT's charge changes were able to be constrained by a dispute referral to Ofcom.
- 3.87 In the case of BT increasing its charges for its Text Direct service,¹⁰⁸ BT also revised its position following a dispute being referred to Ofcom. The fact that BT reduced its proposed charge increase significantly, to what would appear to be an acceptable level in the opinion of the other parties to the dispute (based on the fact that they withdrew the dispute), would suggest that the threat of regulatory intervention would appear to have constrained BT's ability to increase its prices under Paragraph 12.
- 3.88 In the case of the ladder charges, we noted that these are charges that are subject to disputes submitted to Ofcom. With respect to the 08x cases, the CoA 08x judgment has concluded that BT's three NCCNs shall not have effect, and shall be treated as never having had effect.¹⁰⁹
- 3.89 We concluded that, therefore, whilst concerns have been raised that BT's ability to impose changes to its own charges without prior agreement can lead to detriments, in practice it would seem that this has been constrained by regulatory intervention or the threat of it.

¹⁰⁷ See *Dispute between Cable & Wireless and BT about BT's NTS call termination charges for ported numbers*: http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_1037/.

¹⁰⁸ See *Dispute between ntl and BT about BT's charge for its Text Direct service* http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_847/.

¹⁰⁹ Other 08x and 09 number ranges are currently subject to a dispute being considered by Ofcom, which has yet to be concluded. See: http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01088/.

BT's ability to apply transit rates retrospectively

- 3.90 In respect of CWW's concerns that Paragraph 12 of the SIA enables BT to apply transit rates retrospectively following a determination by Ofcom, we noted that the concern appears to be BT's ability to apply retrospection under Paragraph 12 to recover monies if they have been subject to a direction by Ofcom. The ability to apply charges retrospectively does flow from Paragraph 12, but whether or not this is detrimental needs to take account of the consideration that if this provision did not apply, BT's position as a transit provider would place it at a disadvantage with losses made in this market being potentially unrecoverable. Further, CPs have the same ability under Paragraph 13.¹¹⁰

BT's incentives to accept and pass-through charges

- 3.91 We noted that as an originating CP, BT may have an incentive to reject unreasonable charges notified under Paragraph 13, but that such an incentive may not exist to the same extent (or at all) where BT passes them on to other CPs that take BT's transit service. As discussed in paragraph 3.42 above, our understanding is that having agreed a CP's proposal to amend their termination rate, BT does not reflect this by changing its own transit charge under Paragraph 12, but instead changes the CP's termination rate listed in the updated CPL. As such, BT is not issuing a notification advising of a change in charges for its own transit services, as would be the case under Paragraph 12. Accordingly, if not relying on a notification under Paragraph 12, BT does not face the risk that a BT charge could be challenged by an originating operator referring a dispute to Ofcom. However, there is the facility for originating CPs to refer a dispute regarding the level of the termination rates to Ofcom, even where that CP does not directly interconnect with the terminating CP.
- 3.92 EE provided such examples, referring to the termination rates that MCom, Cable & Wireless and Stour Marine charged to T-Mobile.¹¹¹ This suggests that where CPs pay BT's transit charges, and these charges are changed to reflect an increase in the termination rate for calls to the network to which BT transits calls, CPs are able to dispute such termination charges. Indeed disputes were brought to us about the termination rates of all the three parties mentioned in this paragraph. We noted that it would therefore seem that the price inputs to BT's transit charges can be constrained by regulatory intervention in much the same way that CPs can raise a dispute for charges set by BT for its own termination services.

Distortion of competition in the transit market

- 3.93 O2 suggested that the transit market could be distorted because of the attractiveness to TCPs of using BT as a transit provider, but we noted that we have not seen evidence to support this. In particular, this is not a concern raised with us by transit operators directly competing with BT.

¹¹⁰ BT's ability stems from Paragraph 12.7, whereas a CP's ability stems from Paragraph 13.13. These paragraphs provide equivalent rights.

¹¹¹ See cases: *Dispute between Stour Marine Ltd and O2 UK Ltd concerning termination rates*. In this case, Stour Marine and T-Mobile used CWW as a transit operator (http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01041/), *Dispute between Mapesbury Communications and T-Mobile about mobile termination rates* (http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01000/), and *Dispute between Cable and Wireless and T-Mobile about termination rates*. It is worth noting that in this example, a direct interconnect relationship existed. (http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01004/).

Administrative burden on CPs

- 3.94 Whilst recognising that a charge notified by BT under Paragraph 12 could be referred to Ofcom as a dispute, stakeholders have suggested that this nonetheless creates an administrative burden. Further, where a dispute is referred to Ofcom, CPs are liable for charges to BT in the interim.
- 3.95 Whilst we noted that raising a dispute requires a commitment of resources by the disputing CP, we made a number of observations. First, all the parties to the current dispute are themselves experienced in the dispute resolution process both as parties who regularly have brought us disputes as well as parties who have been the subject of disputes brought by others. To that extent, there does not appear to be evidence that the administrative burden associated with bringing a dispute has generally prevented CPs from challenging BT's charge changes. Second, it is apparent that even very small providers (such as Stour Marine,¹¹² MCom,¹¹³ TeLNG¹¹⁴ and Rapture TV¹¹⁵) have been able to bring disputes to us even though they may have comparatively limited resources. Third, due to the obligation to resolve disputes within four months, the parties to any such dispute should have a determination within a short period of time. Fourth, BT, as a party subject to any disputes brought in relation to Paragraph 12, faces a commitment of resources in responding to such a dispute. It is not straightforward to measure whether the commitment faced by BT is lesser or greater than that of the disputing party, but we believe that it nonetheless forms part of the incentive on BT to set charges that lower the potential for regulatory intervention.¹¹⁶
- 3.96 We noted TTG's point that the asymmetry in the SIA creates an additional procedural step for CPs, because they have to obtain BT's agreement to the proposed charge before such a change can be applied to other providers via the Paragraph 12 process. However, this additional administrative step does not appear of itself to give rise to concern. Concerns surrounding BT's powers under Paragraph 13 to veto a charge are considered separately below.

Difference in interest rates

- 3.97 In terms of the suggestion that the interest rates payable under the SIA are unfair, we noted that we had not seen evidence to suggest that the interest rate imbalance in practice leads to a detriment to consumers or competition, or that any detriment arising could not be addressed through the dispute resolution procedure. We noted that Ofcom has discretionary powers in dispute resolution capable of addressing

¹¹² *Dispute between Stour Marine Ltd and O2 UK Ltd concerning termination rates* (http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01041/).

¹¹³ *Dispute between Mapesbury Communications and T-Mobile about mobile termination rates* (http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01000/).

¹¹⁴ *Dispute between TeLNG and Gamma about certain interconnection charges* (http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01057/).

¹¹⁵ *Dispute between Rapture TV and Sky about EPG charges* (http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_920/).

¹¹⁶ Whilst the initial onus is on a referring party to provide an evidenced submission to Ofcom, the party proposing the charge change (e.g. BT) has the onus of providing evidenced responses to Ofcom justifying it, as indicated in the CoA 08x judgment discussed at paragraphs 2.34 to 2.36 above. On balance, it is not clear that BT faces any less of a commitment of resources than a disputing party.

such issues. The exercise of those powers would depend on the specific facts and circumstances of the case in question.¹¹⁷

Transparency of charges

- 3.98 We noted that there could be some differences in the transparency of charges. As part of its negotiation and consideration of a CP's charge change proposal submitted under Paragraph 13, BT may have visibility of information supporting that proposal. However, BT need not provide such information to a CP prior to introducing a charge under Paragraph 12. This, in theory, could advantage BT in that it can have information to inform a decision concerning whether or not to reject a charge, whereas a CP does not have access to the equivalent information when assessing the risks / likelihood of successfully disputing a BT charge change. However, we had not seen any evidence indicating that this has resulted in any significant impact on consumers or competition.
- 3.99 [redacted] raised concerns that where BT rejects a charge change proposal of a CP, or where BT proposes a change to a CP's charge, there is no visibility of this provided to third parties. We recognised that third parties such as [redacted] would like visibility of these negotiations and could benefit from them. However, there is no regulatory obligation on BT to reveal these details to third parties and it does not appear to us that it is unfair or unreasonable for BT to keep details of its bilateral commercial negotiations confidential, as these not only protect the commercial interests of BT but also of the party with which it was negotiating. Where a charge change results from these negotiations and [redacted] is directly affected (i.e. by paying a subsequently amended termination charge as part of taking BT's transit product), [redacted] as a third party retains the ability to dispute the terminating CP's charge.

Difference in notice periods

- 3.100 In respect of the notice period for charge changes notified under Paragraph 12, we also considered the concerns raised by stakeholders both in terms of the period being insufficient when it is applied, and that it is not always applied correctly. As part of this, we took account of the responses to our formal requests for information, where we asked CPs to advise us of the standard notice periods they applied to charge changes for services provided to CPs other than BT.
- 3.101 Under Paragraph 12, BT is required to provide 28 days' notice of charge change proposals, other than for certain regulated charges, where the notification period is 90 days. The concern of stakeholders is that the 28-day notice period is insufficient and less than the 56-day notice period for CPs under Paragraph 13. This might raise two concerns: first, that CPs are unable to reflect BT's charge changes in their own retail rates by the time that the BT wholesale charges take effect, and second, that CPs cannot change their competing wholesale charges at the same time as BT (which could be subject to further delay where BT initially rejects a charge change proposal of a CP).
- 3.102 To assess this, we compared this notice period with the information the CPs have provided as to what their usual notice periods are for other CPs (i.e. other than BT) in response to our requests for information. For three of the respondents, the question

¹¹⁷ Since issuing the Provisional Conclusions, we have accepted for resolution a dispute concerning the Of tel Interest Rate contained within BT's SIA. See: http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01108/.

was not applicable as charge changes only concerned notifications to BT. Of the remaining eight CPs, four dealt with notifications on an individual basis with no set period. The remaining four CPs all provided for a notice period of either 30 days or one month. Accordingly, as it would appear that the provision on notice in Paragraph 12 providing for a 28-day notice period is comparable to the commercial practices applied by CPs in their dealings with CPs other than BT, we considered that this requirement is not unfair or unreasonable.

- 3.103 Regarding concerns raised by Vodafone that BT has not always provided the notification required by Paragraph 12, we noted that this would appear to be a concern with BT's adherence to the contractual terms of the SIA, rather than whether these terms are unfair or unreasonable.
- 3.104 Vodafone also considered that CPs being required to provide a comparatively longer notice period (56 days, compared with BT providing 28 days) could create distortions in the related markets. As discussed above, we considered that BT's 28-day notice period is not unfair or unreasonable. In terms of the effect of the asymmetry between Paragraphs 12 and 13, we noted that there is the *potential* for detriments to arise, for example where BT and CPs compete in the same termination market and BT introduces its own charge changes within 28 days, whilst the competing CP is required to provide at least 56 days' notice to BT. This difference in timescales to introduce charge changes could, in theory, distort competition between BT and the CP. However, we noted that there is a lack of clear examples of detriment arising in practice from the difference in notice periods, and in relation to the example provided by Vodafone, there was no material impact as the matter was resolved by industry agreement.

BT's ability to reject a charge change notice

- 3.105 Some concerns were raised regarding BT's ability to reject a CP's charge change notice. In the examples provided, it appeared that regulatory intervention, including the possibility of bringing a dispute, existed and that in those cases brought to Ofcom's attention such intervention addressed the concerns. Where a CP considers that it is prevented from setting charges that reflect its own costs (as argued by Virgin Media above), we noted that it is open to that CP to seek regulatory intervention including bringing a dispute to Ofcom. In other cases, for example the long running issues relating to NCCN 500 and the question of whether it was possible to reciprocate BT price increases, we noted that BT's charge changes were subject to various forms of regulatory intervention.

BT's ability to discriminate between different CPs

- 3.106 EE expressed a concern that BT could discriminate between different CPs in rejecting some charges but not others. This was supported by reference to BT's treatment of MNO blended rate charge changes. We considered that, while it is correct that in that case BT altered its approach to blended charges after it had accepted two CPs' price increases, it is not the case that BT applied a discriminatory approach since as soon as it decided to reject further price increases it also sought price reductions from those providers whose price increases it had previously accepted. Those providers were subsequently able to reject BT's proposals under

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Paragraph 13.3 (and in this example, it does not appear that EE is suggesting that 13.3 is, of itself, unreasonable or unfair).¹¹⁸

3.107 In addition, as EE noted, the issue was referred to Ofcom which determined the matter through the dispute resolution process (subsequently appealed to the CAT and then remitted back to Ofcom for redetermination). More generally, BT is subject to various requirements to not unduly discriminate, both *ex ante* regulation in the form of SMP obligations in some markets and *ex post* regulation where the behaviour is subject to competition law requirements. Our ability to investigate BT's behaviour on this basis places a regulatory constraint in addition to our dispute resolution powers. Accordingly, whilst we noted that Paragraph 13 could provide BT with the ability to discriminate between CPs, we considered in practice there are sufficient regulatory constraints to create a disincentive for BT, and where there is an example of this, it can be and has been addressed through regulatory intervention.

Provisional Conclusion on detriments

3.108 In conclusion, we considered that there are some potential detriments arising from the existing arrangements in the SIA. However, the evidence provided by stakeholders suggested that in practice many of these potential detriments are constrained by the availability of regulatory intervention. This has been noted by the MNOs themselves. For example, H3G advised that whilst the imbalance in the SIA "*always created tension [...] the dispute resolution procedure in Paragraph 26 acted as a material restriction on BT's ability to vary prices under Paragraph 12*".¹¹⁹ O2 similarly suggested that the ability to refer a dispute to Ofcom "*...provided the comfort that Ofcom would determine whether controversial price changes were permitted*".¹²⁰ As regards the remaining potential detriments, such as the difference in notification periods, we concluded that there was a lack of clear examples of detriment arising in practice in the evidence currently available to us.

Step 4. Are Paragraphs 12 and 13 of the SIA fair and reasonable?

3.109 The existing arrangements of Paragraphs 12 and 13 of the SIA have been in place for many years and from the analysis outlined above, appear to confer specific benefits for both CPs and BT concerning efficiency, certainty and a reduction in transaction costs. These predominantly relate to BT's ability to impose charges via Paragraph 12, and we noted that not all of these benefits necessarily rely on an asymmetry in arrangements between Paragraphs 12 and 13. We noted that these benefits extend to a large numbers of CPs, beyond those parties to this Dispute, who could benefit from not having to devote resources to bilateral negotiations with BT concerning proposed charge changes, and not facing risks of their charges not being reflected via BT's transit charges as a result of third parties rejecting a BT charge change. We noted that we are mindful of the need to give due regard to considerations of legal and commercial certainty which may be promoted by upholding contractual rights. We also took into account the finding of the Court of Appeal that "*neither the actual or previous contractual position, nor any right of BT to*

¹¹⁸ In *Blended Rates*, BT subsequently brought a dispute against each of H3G, Orange and Vodafone concerning H3G, Orange and Vodafone's rejection of BT's proposed call termination rates. T-Mobile, O2 and H3G separately also brought disputes against BT, concerning BT's rejection of their respective proposed call termination rates. See:

http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_942/.

¹¹⁹ Paragraphs 48 and 51 of H3G's dispute submission.

¹²⁰ Paragraph 22 of O2's dispute submission.

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*impose a change, can be of any overriding significance” when we resolve a dispute.*¹²¹

- 3.110 We have equally noted that stakeholders have argued that the asymmetry of Paragraphs 12 and 13 has created certain detriments, in particular concerning BT's ability to reject some CP charge change proposals, but accept others and then pass these through to other CPs taking BT's transit services. Whilst we considered that the potential for these detriments to arise exists, we had not seen sufficient evidence that in practice such conduct occurring would not be reasonably likely to be constrained by potential regulatory intervention.
- 3.111 In many cases, it is regulatory intervention (or the threat of it) that has, in practice, acted to address the potential detriments and provide an effective remedy.
- 3.112 On balance we did not consider we had seen sufficient evidence that the terms of Paragraphs 12 and 13 of the SIA create detriments in practice for consumers and competition to lead us to conclude that they are not fair and reasonable. Accordingly, we did not believe that we should exercise our dispute resolution powers to determine that the terms should be changed.
- 3.113 We recognised that the SIA could be amended and still retain a number of the benefits and potentially remove some of the potential detriments identified by stakeholders, however, the actual impact of any such changes is uncertain, in particular given the wider impact on industry any such changes would likely have. We noted that BT has arrangements in place to consider amendments to the SIA by way of industry agreement, through the biennial contract review, and that as part of the latest contract review BT proposed changes to Paragraphs 12 and 13 of the SIA. We considered that, where there is industry-wide agreement that such amendments should be made, they could be implemented through this process. However, we had not seen evidence that any agreement had been reached by industry and we did not therefore rely on such changes to the SIA taking place in reaching the Provisional Conclusions.

Step 5. Is it appropriate for Ofcom to give a direction under section 190(2)(b) and/or section 190(2)(c) of the Communications Act 2003?

- 3.114 In light of our provisional conclusion that Paragraphs 12 and 13 of the SIA are fair and reasonable, and having regard to our statutory duties, we considered that it would not be appropriate for us to make a determination under section 190(2)(b) and/or section 190(2)(c) of the 2003 Act, amending the existing arrangements in the manner requested by the MNOs or otherwise.
- 3.115 As part of our analysis, we considered our general duties in section 3 of the 2003 Act and also the six “Community requirements” set out in section 4 of the 2003 Act, which give effect, among other things, to the requirements of Article 8 of the Framework Directive.¹²² In particular, we had regard to:
- 3.115.1 the duty to further the interests of citizens (i.e. all members of the public in the United Kingdom) in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition (section 3(1));

¹²¹ CoA 08x judgment, paragraph 74.

¹²² Directive 2002/21/EC.

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- 3.115.2 the duty to secure the availability throughout the United Kingdom of a wide range of electronic communications services (section 3(2)(b));
 - 3.115.3 the duty to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; as well as any other principles appearing to Ofcom to represent the best regulatory practice (section 3(3)); and
 - 3.115.4 the duty to promote competition (section 4(3)) and to encourage, to the extent Ofcom considers it appropriate, the provision of network access and service interoperability for the purposes of securing efficiency and sustainable competition in communications markets and the maximum benefit for the customers of communications network and services providers (sections 4(7) and 4(8)).
- 3.116 We considered that our provisional assessment was consistent with these duties, because, as explained above:
- 3.116.1 we had not seen sufficient evidence that detriments in terms of harm to BT's customers, consumers or competition will arise which would justify regulatory intervention in the form of amendment of the SIA; and
 - 3.116.2 we can where appropriate, resolve issues which arise between parties as a result of the asymmetry, including by using our regulatory powers.

Section 4

Analysis and conclusions

Responses to Provisional Conclusions

- 4.1 Ofcom received eight non-confidential responses to the Provisional Conclusions from BT, CWW, EE, H3G, O2, TNUK, Verizon and Vodafone. Ofcom also received one confidential response.
- 4.2 BT, CWW, TNUK, Vodafone and [X] provided responses that in general accepted or supported our provisional view that it would not be appropriate for Ofcom to make a determination amending Paragraphs 12 and 13 of the SIA, although they had comments on certain specific issues. EE, H3G and O2 submitted responses disagreeing with the Provisional Conclusions. Further, EE, H3G and O2 raised concerns with Ofcom's approach to resolving the Dispute. Verizon advised that its response "*is solely focused on Ofcom's provisional conclusion not to open a dispute*",¹²³ however, within its response Verizon appeared to disagree with the provisional view that the SIA should remain unchanged.
- 4.3 In this section, we summarise the key issues raised in the responses to the Provisional Conclusions and, having carefully considered those responses, we set out our analysis and final conclusions.

Analysis of responses to the Provisional Conclusions

- 4.4 We have grouped the responses, and our analysis of them, into the following themes:
- 4.4.1 Ofcom's approach to resolving this Dispute;
 - 4.4.2 Contractual asymmetry;
 - 4.4.3 Operation of SIA for charge changes;
 - 4.4.4 Ofcom's assessment of benefits and detriments;
 - 4.4.5 The impact of regulatory constraints;
 - 4.4.6 Industry negotiations to amend the SIA; and
 - 4.4.7 BT's application to the Supreme Court.

Ofcom's approach to resolving this Dispute

Ofcom's analytical framework

Stakeholder comments

- 4.5 EE and H3G argue that Ofcom erred in its approach to the analytical framework adopted for resolving this Dispute.

¹²³ Page 1 of Verizon's response.

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- 4.6 In EE's view, Ofcom's analytical framework, and thus Ofcom's Provisional Conclusions as a whole, "*fail to give adequate consideration to the fairness and reasonableness of EE's counter-proposal as to what the terms of paragraphs 12 and 13 should be and/or whether any other alternate wording would constitute a solution that better achieves Ofcom's statutory objectives*".¹²⁴
- 4.7 EE also contends that in the CoA 08x judgment, the Court of Appeal is clear "*that there is no place when Ofcom comes to resolve a dispute such as this for any kind of presumption in favour of the contractual status quo*" and therefore in EE's view, the only relevant question for Ofcom to consider is whether or not that contractual status quo represents "*a fair and reasonable state of affairs*".¹²⁵
- 4.8 EE submits that what Ofcom should have done is apply the 'fairness and reasonableness test' originally set out by the CAT in the TRD case¹²⁶ and "*recently validated*" by the Court of Appeal in the CoA 08x judgment¹²⁷. EE submits that this requires Ofcom:
- "to consider in the round what terms of paragraph 12 and 13 of the SIA (whether the alternative wording proposed by EE, the current wording, or some alternative construction) would: best ensure that a fair balance is struck between the interests of the parties; and best achieve Ofcom's statutory objectives. In relation to the latter, it is notable that when exercising its dispute resolution powers Ofcom is required to, inter alia, promote competition, and secure the "maximum benefit for the persons who are customers of communications providers" (Emphasis added by EE).*¹²⁸
- 4.9 EE submits that paragraphs 63 and 74 of the CoA 08x judgment confirm that Ofcom is required to consider whether any alternative wording, including wording which may not have been proposed by either of the parties, best achieves Ofcom's statutory duties when exercising its powers to resolve disputes.¹²⁹ In EE's view, Ofcom's alleged failure to adopt such an approach is "*a material failing in Ofcom's provisional conclusions*".¹³⁰
- 4.10 In particular, EE argues that "*Ofcom has wrongly focused on the issue of whether BT's existing terms risk causing harm to consumers or competition, to the exclusion of other issues, in particular the positive benefits which would flow from altering the terms of paragraphs 12 and 13*".¹³¹ EE argues that Ofcom appears only to have considered whether there is sufficient evidence of detriments arising from the existing arrangements that would lead Ofcom to provisionally conclude that the terms are not

¹²⁴ Page 6 of EE's response.

¹²⁵ Page 16 of EE's response. Note: EE refers to paragraph 47 of the CoA 08x judgment, but we assume that EE is in fact referring to paragraph 74 of the CoA 08x judgment, which reads "[...] *the NRA must be able to sort out a dispute between parties in the relevant market, who may or may not already be in contractual relations with each other. If there is already a contract, the NRA's powers must enable it to override the contractual rights of one party (or even those of both parties). There is no place for any kind of presumption either way as to the position of one party or the other*".

¹²⁶ *T-Mobile (UK) Limited v Ofcom* [2008] CAT 12 ("CAT TRD judgment").

¹²⁷ Page 5 of EE's response.

¹²⁸ Page 6 of EE's response.

¹²⁹ Page 5 for EE's response.

¹³⁰ Page 1 of EE's response.

¹³¹ *Ibid.*

fair and reasonable and that, in doing so, *“Ofcom appears to have entirely misapplied the fairness and reasonableness test in its provisional conclusions”*.¹³²

- 4.11 Further, EE argues that *“Ofcom has also come at least dangerously close to requiring EE to meet a test of overriding a presumption in favour of the current wording of the SIA, by providing clear and distinct evidence of material disbenefit to consumers and/or competition – which is the test set in the CAT 08x judgment that has now been conclusively overruled by the CoA 08x judgment”*.¹³³
- 4.12 EE also argues that, having provisionally determined that it might be possible to amend the SIA and still retain a number of the benefits and potentially remove some of the potential detriments, *“it is incumbent upon Ofcom to determine whether the terms of paragraphs 12 and 13 should be amended”*. EE further argues that: *“To the extent that Ofcom is concerned that the impact of any such changes is uncertain [...] Ofcom is required to gather further information and input from concerned stakeholders so as to be in a position to adequately satisfy itself as to whether the changes are or are not more likely than the current drafting to promote fair competition and maximise the interests of end-users”*.¹³⁴
- 4.13 H3G also believes that Ofcom's assessment based on evidence of detriments is incorrect, stating that: *“We do not accept [...] that Ofcom can or should endorse this inherently unfair and unreasonable contractual asymmetry in the alleged absence of examples of detriment being caused in practice. [...] [T]his element of Ofcom's analytical approach is flawed.”*¹³⁵
- 4.14 H3G further argues that: *“There is an apparent imbalance in the approach Ofcom have taken when assessing respectively the claimed benefits and detriments of the contractual asymmetry under the SIA”*. H3G suggests that Ofcom appears to have given *“significant weight to hypothetical benefits [...] without clear evidence of such benefits arising in practice”* but believes that Ofcom has *“apparently held the existence of practical detriments caused by the current arrangements to a higher evidential threshold”*.¹³⁶

Ofcom's view

- 4.15 EE argues that in resolving this Dispute, Ofcom is obliged to consider whether there are better alternatives to the current arrangements and that Ofcom has therefore applied the wrong test to determine whether or not Paragraphs 12 and 13 of the SIA are fair and reasonable. EE suggests that the approach Ofcom should have taken is that outlined in the CAT TRD judgment, which EE refers to as the *“fairness and reasonableness test”*, and argues that its view that Ofcom must consider whether any alternative wording to the SIA would best achieve Ofcom's statutory duties is supported by the CoA 08x judgment.
- 4.16 The TRD case concerned Ofcom's approach to the determination of a dispute regarding the reasonableness of certain termination charge changes proposed by various mobile phone operators under Paragraph 13 of the SIA. In that case, the CAT said that the test Ofcom should have applied in resolving the dispute:

¹³² Page 6 of EE's response.

¹³³ *Ibid.*

¹³⁴ Page 7 of EE's response.

¹³⁵ Page 3 of H3G's response.

¹³⁶ Page 2 of H3G's response.

“can be expressed as requiring OFCOM to determine what are reasonable terms and conditions as between the parties. The word “reasonable” in this context means two things. First it requires a fair balance to be struck between the interests of the parties to the connectivity agreement. It therefore requires the same kind of adjudication that any arbitrator appointed by the parties to determine a dispute about the reasonable rate would carry out. But secondly, because OFCOM is a regulator bound by its statutory duties and the Community requirements it also means reasonable for the purposes of ensuring that those objectives and requirements are achieved.”¹³⁷

- 4.17 In the CoA 08x judgment, the Court of Appeal referred to the approach of the CAT in the TRD judgment cited above, and explained that: *“the use of this approach [...] should be considered as an appropriate way by which Ofcom ensures that the objectives set out in sections 3 and 4 of the 2003 Act are fulfilled [...]”*. The Court of Appeal also noted that:

“the Tribunal observed that the onus lay on the party proposing the variation to provide to the other party and to Ofcom the justification for changing the previous charges, that Ofcom should first examine the reasons for the change to decide whether they are justified, as being both fair between the parties and reasonable from the point of view of the relevant regulatory objectives. If the reasons do not support the change proposed, it may simply be rejected; conversely if the objections advanced by the other party are unjustified, the change may be upheld. However, because of Ofcom’s role as regulator, they must always consider whether the position arrived at on a consideration of the rival parties’ contentions is one which accords with the regulatory objectives. [...]”¹³⁸

- 4.18 While we recognise that BT has been granted leave to appeal the CoA 08x judgment to the Supreme Court, we consider that the CoA’s position represents the law as it currently stands and that it is appropriate for us to follow this approach when resolving the Dispute.
- 4.19 We disagree with EE’s interpretation of the CoA 08x judgment as to how we are required to approach dispute resolution and with EE’s view that our analytical framework is inconsistent with the approach set out in the CoA 08x judgment or the “fairness and reasonableness test” as set out in the CAT TRD judgment. In particular, we disagree with EE’s apparent suggestion that we are required to consider all potential alternatives to determine the solution which best achieves our statutory objectives and then impose that solution.
- 4.20 For the reasons set out below, Ofcom considers that its analytical framework (set out at paragraphs 3.1 and 3.2 above) to consider whether the terms of Paragraph 12 and 13 of the SIA are fair and reasonable and whether Ofcom should exercise its powers to give a direction requiring an amendment of those terms, is appropriate and consistent with its statutory duties and Community requirements and the judgment of the Court of Appeal in the 08x case.

Our analytical framework

¹³⁷ CAT TRD judgment, paragraph 101.

¹³⁸ CoA 08x judgment, paragraph 61.

- 4.21 Having regard to the scope of the Dispute (as set out at paragraph 2.18 above), essentially, there are in our view two questions which we must answer in resolving the Dispute:
- 4.21.1 firstly, whether the operation and/or effect of Paragraphs 12 and 13 of the SIA is such that they constitute fair and reasonable terms or conditions as between the parties to the dispute in light of our statutory duties; and
 - 4.21.2 secondly, in light of Ofcom's conclusions on the fairness and reasonableness of those terms, whether Ofcom should exercise its powers to require an amendment to the terms of the SIA.
- 4.22 Consistent with this, our analytical framework for resolving this Dispute considers the operation and effect of the existing terms of Paragraphs 12 and 13, based on the evidence available. We have considered both the actual and potential detriments and benefits to competition and consumers that arise from the operation of these provisions. As explained in paragraphs 3.1.1 to 3.1.4 above, we have considered whether our analysis of the benefits and detriments identified suggests to us that Paragraphs 12 and 13 of the SIA are not fair and reasonable. In our Provisional Conclusions, the outcome of this analysis led us to conclude that there was insufficient evidence that Paragraphs 12 and 13 give rise to detriments to consumers and competition such that they are not fair and reasonable.
- 4.23 We consider our analytical framework is appropriate having regard to our statutory duties and Community requirements (as set out in paragraph 3.115 above), for ensuring that our regulatory objectives are achieved.
- 4.24 We do not consider that we are necessarily required to consider (as EE's approach appears to suggest) how possible alternative forms of drafting of the SIA might better/best promote competition between CPs regardless of whether the available evidence indicates the parties, or indeed consumers or competition, are suffering any real harm as a result of the existing contractual arrangements.
- 4.25 We therefore also disagree with EE that, having concluded provisionally that it could be possible to amend the agreement and retain the benefits and potentially remove some of the potential detriments it is necessarily incumbent on us to determine whether the terms of Paragraphs 12 and 13 should be amended. Rather, we consider that we have discretion in this regard, in light of the relevant facts and circumstances. Ofcom has considered whether to require that the SIA should be amended and has concluded that it would not be appropriate to do so, having regard to the available evidence in this case.
- 4.26 We do not consider that we were required to gather further information and input from stakeholders in order to satisfy ourselves as to the likely impact of other potential changes – such an exercise would not in our view have been appropriate or likely to be feasible in the context of the resolution of this Dispute. We have given stakeholders an appropriate opportunity to comment on the terms of Paragraphs 12 and 13 and have obtained further information by way of information requests asking for evidence of detriments and benefits. We consider this was a proportionate approach in this case in light of our views of the operation and effect of the provisions in question, and we have taken into account the responses we received.
- 4.27 Further, we consider that our approach is proportionate on the basis that, as the SIA is BT's standard interconnect agreement for telephony services, should we have

concluded in the context of resolving this Dispute that amendments were appropriate, such changes could have broader industry-wide effects. Accordingly, (as explained at paragraph 2.20) we indicated that in such circumstances we would consider at that point whether a separate formal policy consultation was appropriate. Any such policy consultation would provide all relevant parties with an appropriate opportunity to consider fully the impact of any change having an effect beyond the parties to the Dispute.¹³⁹ Such a type of consultation would have needed to have been separate to this Dispute. However, given our provisional and now final conclusions, we do not consider any such separate policy consultation is necessary.

4.28 We do not agree with EE that in reaching this view we have, contrary to the CoA 08x judgment, given too much weight to the existing contractual rights or that considerations of promoting commercial and legal certainty should not be considered to be relevant in this instance.

4.29 At paragraph 74 of the CoA 08x judgment, the Court of Appeal explains that:

“...The whole point of this aspect of the CRF is that the NRA must be able to sort out a dispute between parties in the relevant market, who may or may not already be in contractual relations with each other. If there is already a contract, the NRA’s powers must enable it to override the contractual rights of one party (or even those of both parties). There is no place for any kind of presumption either way as to the position of one party or the other [...] So, while the previous position under the contract (if there is one) is no doubt relevant (as the Tribunal said in the TRD case), and while upholding contractual rights, thereby favouring commercial certainty, can be a relevant consideration for the regulator to bear in mind, neither the actual or previous contractual position, nor any right of BT to impose a change, can be of any overriding significance [...] [T]he regulator has the power and, where appropriate, the duty to resolve a deadlock whether by deciding in favour of the position taken by one party or the other, or by imposing an intermediate solution.”

4.30 The CoA 08x judgment makes clear that the existing contractual position cannot be of any overriding significance, as we acknowledged when reaching our Provisional Conclusions (see paragraph 3.12). However, the Court of Appeal also expressly accepted that existing contractual rights and upholding commercial certainty can be relevant considerations. Given that this Dispute considers whether, as proposed by the MNOs, the existing contractual terms at issue are fair and reasonable and need to be amended, we consider that it is appropriate for Ofcom to consider whether there are good grounds to require such an amendment. Such an approach is consistent with that set out by the CAT in its TRD judgment.

4.31 We do not consider EE’s assertion that Ofcom “has also come at least dangerously close to requiring EE to meet a test of overriding a presumption in favour of the current wording of the SIA, by providing clear and distinct evidence of material disbenefit to consumers and/or competition” accurately reflects Ofcom’s approach in this Dispute. In respect of H3G’s argument that there “is an apparent imbalance in the approach Ofcom have taken when assessing respectively the claimed benefits and detriments of the contractual asymmetry under the SIA”,¹⁴⁰ we also do not agree

¹³⁹ An update to our website advised of this position. See the update note of 10 April 2012 at: http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01083/.

¹⁴⁰ See paragraph 4.14 above.

that we have applied different thresholds to assessing evidence of benefit and detriments.

- 4.32 In the context of assessing whether the terms of Paragraphs 12 and 13 are fair and reasonable, we have considered the effect (both positive and negative) of these provisions in the round, including the existence of a mechanism for disputes to be brought to Ofcom for resolution, which we consider to be a relevant consideration in this context (for reasons we explain further at paragraphs 4.130 to 4.137 below). We have considered whether the overall effect of these provisions is unfair as between the parties, taking into account our assessment of their benefits and detriments and the recourse that the parties have available to them. We consider that this is an appropriate approach to striking a fair balance between the interests of the parties and what we believe is reasonable for resolving a dispute in line with our regulatory objectives.
- 4.33 This is not the same as setting a “material disbenefit” test of the nature disapproved by the Court of Appeal in the CoA 08x judgment and does not in our view amount to imposing a higher burden of proof as to whether actual or potential detriments would arise compared to actual or potential benefits.
- 4.34 In this case, it is EE and the other MNOs who are seeking to vary the existing contractual arrangements and they should be in a position to explain to us why they believe that the arrangements are unfair and unreasonable and should be amended. We have considered the arguments made to us and the evidence available accordingly. In our provisional and now final conclusions we have judged that the actual or potential detriments identified either (i) appear unlikely to arise on the basis of the available evidence and/or (ii) can be dealt with effectively through regulatory intervention, in particular dispute resolution.

Obligations arising from the Access Directive

Stakeholder comments

- 4.35 EE states that “*BT is under an obligation to negotiate interconnection with other communications providers in Article 4(1) of the Access Directive. Ofcom should have taken this into account in determining the dispute, which relates to the terms of the SIA under which interconnection prices are negotiated (or rather, in the case of paragraph 12, are not negotiated)*”.¹⁴¹
- 4.36 EE further argues that “*Ofcom is under an obligation, under Article 5(1) of the Access Directive and section 4(7) of the Act both to encourage and ensure adequate access and interconnection and to promote efficiency, sustainable competition, efficient investment and innovation and secure maximum benefit for end-users. Ofcom has not considered which of the alternatives would best secure efficiency, and the sustainability of competition. In that regard, as well as for the reasons further explained below, EE considers that it is inappropriate to rely upon the fact that CPs may refer a dispute to Ofcom as a reason for upholding the present form of paragraphs 12 and 13*”.¹⁴²
- 4.37 EE accordingly submits that Ofcom’s failure to take sufficient account of these regulatory obligations undermines the validity of Ofcom’s provisional conclusion at

¹⁴¹ Page 7 of EE’s response.

¹⁴² *Ibid.*

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paragraph 3.114 that it is not appropriate for Ofcom to determine an amendment to the current terms of Paragraphs 12 and 13.¹⁴³

Ofcom's view

4.38 EE appears to be suggesting that the SIA is not compliant with the requirements of Article 4(1) of the Access Directive in that under Paragraph 12 of the SIA BT is not required to "negotiate" interconnection.¹⁴⁴

4.39 We also note that at paragraph 4.7 of its dispute submission, EE argues that BT's "*ability to unilaterally to impose prices for its services*" appears inconsistent with its obligation pursuant to General Condition 1.1 requiring BT to negotiate interconnection.

4.40 Article 4(1) of the Access Directive (as amended) provides:

"Operators of public communications networks shall have a right and, when requested by other undertakings so authorised, an obligation to negotiate interconnection with each other for the purpose of providing publicly available electronic communications services, in order to ensure provision and interoperability of services throughout the Community. Operators shall offer access and interconnection to other undertakings on terms and conditions consistent with obligations imposed by the national regulatory authority pursuant to Articles 5, 6, 7 and 8" (emphasis added).

4.41 Article 5(1) of the Access Directive (as amended) provides:

"National regulatory authorities shall, acting in pursuit of the objectives set out in Article 8 of Directive 2002/21/EC (Framework Directive), encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, and gives the maximum benefit to end-users.

In particular, without prejudice to measures that may be taken regarding undertakings with significant market power in accordance with Article 8, national regulatory authorities shall be able to impose:

(a) to the extent that is necessary to ensure end-to-end connectivity, obligations on undertakings that control access to end-users, including in justified cases the obligation to interconnect their networks where this is not already the case..."

4.42 General Condition 1.1 states that:

"The Communications Provider shall, to the extent requested by another Communications Provider in any part of the European Community, negotiate with that Communications Provider with a view to concluding an agreement (or an amendment to an existing agreement) for Interconnection within a reasonable period."

¹⁴³ *Ibid.*

¹⁴⁴ As also argued by EE at paragraph 4.7 of EE's dispute submission.

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- 4.43 The requirements of Articles 4(1) and 5(1) of the Access Directive are reflected in Ofcom's duties under sections 4(7) and 4(8) of the 2003 Act which provide that Ofcom is required to encourage the provision of network access and interoperability, to such extent as Ofcom consider appropriate for the purpose of securing efficiency and sustainable competition, efficient investment and innovation and the maximum benefit for the persons who are customers of communications providers and persons who make associated facilities.
- 4.44 We do not agree that we have failed to take sufficient account of the requirements of Articles 4(1) and 5(1) of the Access Directive or of section 4(7) of the 2003 Act.¹⁴⁵ In the circumstances described by the MNOs, it does not appear to us that the terms of the SIA have resulted in any failure in the provision and interoperability of services, or failure to negotiate the provision of access to and interconnection with BT's network and those of other CPs. Rather, we are concerned here with a disagreement as to some of the individual terms on which ongoing access is being provided. We have taken account of the above provisions in that context.
- 4.45 For the same reasons we do not agree that we have failed to take sufficient account of the requirements of General Condition 1.1.
- 4.46 Given that Ofcom does not consider that the terms of the SIA have resulted in any failure in the provision and interoperability of services or failure to negotiate access and interconnection, Ofcom disagrees with EE that it should necessarily have considered what alternative wording of the SIA would best secure efficiency and the sustainability of competition for the reasons given in paragraphs 4.21 to 4.25 above.

Breach of SMP conditions

Stakeholder comments

- 4.47 EE describes the contractual asymmetry of Paragraphs 12 and 13 of the SIA as "*prima facie discriminatory*" and as such argues that Ofcom should intervene to protect CPs such as itself from such discrimination.¹⁴⁶
- 4.48 Specifically, EE suggests that the alleged discrimination is a breach of SMP conditions that Ofcom is obliged to consider. EE argues this on the basis that "*paragraphs 12 and 13 form part of BT's reference offer terms for various services supplied by BT in markets in which it has significant market power (SMP) (see §§2.2 to 2.3 of EE's dispute filing), Ofcom is also obliged to consider whether this contractual asymmetry discriminates against EE and other CPs, such as by unfairly favouring to a material extent an activity carried on by BT so as to place at a competitive disadvantage persons competing with BT, in violation of BT's SMP obligations (see §4.10 of EE's dispute filing)*".¹⁴⁷
- 4.49 EE argues that as the terms of the SIA unduly discriminate in favour of BT in violation of BT's SMP conditions,¹⁴⁸ as part of its assessment "*Ofcom must provide evidence as to why it is satisfied in each case that the discrimination is necessary to further the statutory objectives that Ofcom is required to promote, and thus objectively justifiable.*

¹⁴⁵ See also paragraph 3.115.4 above, in which we discuss where we have regard to our duties concerning sections 4(7) and 4(8) of the 2003 Act.

¹⁴⁶ Page 1 EE's response.

¹⁴⁷ Page 8 EE's response.

¹⁴⁸ EE refers to §4.10 of EE's dispute submission. In this EE has argued that the terms of the SIA violate BT's current SMP conditions concerning a requirement to not unduly discriminate.

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Ofcom has failed to do this.¹⁴⁹ EE suggests that “*this level of discrimination cannot be considered to be objectively justifiable unless there is some counter-veiling [sic] benefit to consumers or competition which overrides it*”.¹⁵⁰

Ofcom's view

- 4.50 In resolving this Dispute, we have noted EE's view that the existing provisions constitute discriminatory conduct on the part of BT in breach of SMP conditions, and taken those representations into account when considering how to resolve the Dispute, in light of the scope (set out at paragraph 2.19 above).
- 4.51 As set out in paragraph 3.1 above, our approach to resolving this Dispute has included consideration of whether there is evidence that detriments to consumers and/or competition arise from the contractual asymmetry of Paragraphs 12 and 13 of the SIA.
- 4.52 EE makes reference to *prima facie discrimination* and the requirement for Ofcom to intervene on the basis that this suggests that BT may have breached SMP conditions under which BT is subject to obligations to not unduly discriminate against other CPs. EE refers back to paragraph 4.10 of its original dispute submission, which highlights three markets:
- 4.52.1 wholesale call origination on its fixed narrowband network;
 - 4.52.2 wholesale fixed geographic call termination; and
 - 4.52.3 single transit on fixed public narrowband networks.¹⁵¹
- 4.53 We have considered the possibility (as argued by EE) that the asymmetry between Paragraphs 12 and 13 means that “*BT is violating [BT's] nondiscrimination obligations*”,¹⁵² because the arrangements materially favour BT by enabling it to more easily increase its interconnection prices and prevent increases in interconnection prices by other CPs. We have considered whether there is evidence to suggest that Paragraphs 12 and 13 give rise to actual or potential detriments. In order to inform this assessment, we wrote to the parties to this Dispute and to interested third parties, requesting (amongst other things) “[...] *specific examples explaining how such detriments occurred as a direct result of the arrangements*”. The evidence submitted in response did not, in our view, provide specific current or past examples of discrimination that have arisen as a result of Paragraphs 12 and 13.
- 4.54 We also note that Paragraphs 12 and 13 of the SIA apply to both services subject to SMP conditions and services that are not subject to such conditions.¹⁵³ A list of all the types of services captured by the SIA is at Annex 2 below.
- 4.55 Contrary to what EE has argued (see paragraph 4.49), we disagree that it is for Ofcom to justify the existing terms of Paragraphs 12 and 13 of the SIA. We consider that our approach, which considers whether there is evidence suggesting that the

¹⁴⁹ Page 8 of EE's response.

¹⁵⁰ Page 15 of EE's response.

¹⁵¹ Paragraph 2.2 of EE's dispute submission states that the relevant SMP conditions on BT are: AAA2 in relation to wholesale call origination on the fixed narrowband market; BA2 in relation to wholesale fixed geographic call termination; and AAA(ST)2 in respect of single transit on fixed public narrowband termination.

¹⁵² Paragraph 4.10 of EE's dispute submission.

¹⁵³ This feature of the SIA is noted in paragraph 2.5 of EE's dispute submission.

existing terms are not fair and reasonable, is an appropriate basis on which to resolve this Dispute for the reasons set out at paragraphs 4.21 to 4.34 above. EE's suggested approach would logically require that Ofcom finds that the existing contractual terms are not fair and reasonable unless Ofcom can identify evidence of countervailing benefits to consumers or competition which clearly outweigh the alleged potential detriments. Such an approach risks implying a presumption in favour of regulatory intervention in the absence of evidence of clear benefits to consumers and competition, regardless of the strength of the evidence suggesting an allegation of breach of SMP condition is substantiated or that actual or potential detriments arise as a result.

- 4.56 To adopt such an approach would in our view be inconsistent with Ofcom's regulatory principles of (i) operating with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required, and (ii) striving to ensure its interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome. It could also be an undue fetter on Ofcom's regulatory discretion.

Contractual asymmetry

Stakeholder comments

- 4.57 In paragraph 3.10 of our Provisional Conclusions, our provisional view was that "[...] *there is a clear contractual asymmetry between BT and other CPs wanting to modify charges*". None of the respondents to the Provisional Conclusions disagreed with this view and several, including EE,¹⁵⁴ CWW¹⁵⁵ and TNUK,¹⁵⁶ confirmed their agreement.

Ofcom's view

- 4.58 In terms of the existence of a contractual asymmetry, for the reasons set out in paragraphs 3.6 to 3.10 above, we conclude that there is a clear contractual asymmetry between BT and other CPs wanting to modify charges.

Operation of the SIA for charge changes

Stakeholder comments

- 4.59 TNUK and EE both refer to paragraph 3.18 of the Provisional Conclusions, where we note our understanding that BT does not rely on Paragraph 12 in order to pass-through changes to OCPs' termination rates where it was acting as transit operator.¹⁵⁷
- 4.60 TNUK said that they had "*understood that paragraph 12 was the essential contractual mechanism by which BT was able to ensure that OCPs were obliged to pay the wholesale charges set by TNUK/CWW*" but noted that paragraph 3.18 suggested that "*this may in fact not be the case*". TNUK notes that it sought clarification directly from BT as to the process it adopted and the underlying contractual basis to it. TNUK explains that "*BT confirmed its understanding that although the process was indeed only to update the Carrier Price List rather than to issue a notification under paragraph 12 of the SIA, it is nevertheless paragraph 12 which provides the legal*

¹⁵⁴ Page 3 of EE's response.

¹⁵⁵ Page 1 of CWW's response.

¹⁵⁶ Page 1 of TNUK's response.

¹⁵⁷ Page 2 of TNUK's response and pages 11-12 of EE's response.

*basis for making that update without any additional formal notification. To put it another way, the update to the Carrier Price List would not be possible in the absence of paragraph 12. As a result, the provisions of paragraph 12 may indeed be critical to TNUK after all.*¹⁵⁸

- 4.61 EE argues that if BT does not rely on Paragraph 12 in order to pass-through the charges of other CPs, Ofcom should not consider any detriments or benefits arising from Paragraph 12 in relation to this (see paragraphs 3.18 and 3.42 above). In EE's view *"It is entirely irrelevant that the way in which BT passes on these transit charges through the CPL is similar in effect to what might happen if BT used its powers under paragraph 12. To the extent that Ofcom's provisional conclusion is based on the analysis set out at §3.42, it is therefore patently invalid."*¹⁵⁹
- 4.62 Following TNUK's response, we sought clarification from BT on whether it relies on Paragraph 12 when passing-through a CP's charge change notified under Paragraph 13. BT replied with the following:

*"Having accepted a charge change notified by a terminating CP under Paragraph 13, BT as a transit operator does not subsequently issue a charge change notification to originating operators. Instead, BT notifies originating CPs of Transit Price changes through BT publication in the Carrier Price List, schedule B1.12. BT does this in line with the wording at the beginning of paragraph 12.2 [...] although we do not (in the case of transit) issue a charge change notice under paragraph 12, we derive authority to amend the CPL from the same paragraph 12".*¹⁶⁰

Ofcom's views

- 4.63 This point concerns how changes in CP charges notified under Paragraph 13 are passed on by BT when it is acting as a transit operator. As set out in paragraph 3.18 of the Provisional Conclusions, our understanding based on information provided by BT was that where BT accepts a charge change from a CP under Paragraph 13 of the SIA, BT does not issue a charge change notification altering its transit charge in respect of the originating operator's services. As we set out in paragraph 3.42 of the Provisional Conclusions, this led us to understand that BT did not amend its transit charges under Paragraph 12 of the SIA in order to pass through changes in CP charges notified to BT under Paragraph 13.
- 4.64 BT's explanation that it passes through a CP's charge change when it is acting as a transit operator by updating the CPL in line with the wording at the beginning of Paragraph 12.2 of the SIA (as set out at paragraph 3.6 above) is consistent with BT's advice to TNUK that Paragraph 12 provides the basis for making the update. We therefore consider that our view on this in the Provisional Conclusions was incorrect, and we now understand that BT does rely on Paragraph 12 in order to pass-through changes to OCPs' termination rates where it acts as transit operator.
- 4.65 In respect of consideration of whether Paragraph 12 confers benefits where BT does not rely on its application to pass-through the charges of other CPs, given the clarification from BT that it does in fact rely on Paragraph 12 in such circumstances (see paragraph 4.62 above), the suggested benefits referred to in paragraph 3.42 of

¹⁵⁸ Page 2 of TNUK's response.

¹⁵⁹ Pages 11-12 of EE's response.

¹⁶⁰ Email from T Fitzakerly (BT) to L Knight (Ofcom), dated 3 October 2012.

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the Provisional Conclusions would appear to flow from Paragraph 12 and we consider that these are relevant.

Ofcom's assessment of benefits and detriments

Efficiency gains from existing Paragraph 12 arrangements

Stakeholder comments

- 4.66 H3G and EE both raise doubts over whether the current arrangements in Paragraph 12 generate efficiencies.
- 4.67 H3G asserts that whilst Ofcom has considered the benefits arising from Paragraph 12, it has failed to also consider the “[...] *mirror detriments to multiple CPs on the receiving end of non-negotiated pricing, which may be of equal size or greater than the alleged benefits*”.¹⁶¹
- 4.68 H3G also states that it has seen no evidence that not negotiating a price is efficient.¹⁶²
- 4.69 Further, H3G suggests that Ofcom approving non-negotiated price changes “[...] *appears to come close to Ofcom endorsing unilateral pricing with no countervailing buyer power*”.¹⁶³
- 4.70 EE suggests that Ofcom's reasoning is “self-contradictory” on the basis that Ofcom is saying that a series of bilateral negotiations would increase transaction costs (EE refers to paragraph 3.17 above), yet Ofcom is also saying that the terms of Paragraph 12 do not restrict parties from conducting such negotiations (see paragraph 3.42 above). EE submits that “*With respect, those propositions cannot simultaneously be true*”.¹⁶⁴
- 4.71 EE further points to paragraph 3.17 of the Provisional Conclusions, which refers to BT's argument that Paragraph 13 can provide stability and certainty by ensuring that an existing charge remains in effect until such time as any change is needed, and suggests that this undermines the arguments there are benefits from charges being imposed under Paragraph 12.¹⁶⁵
- 4.72 EE notes that third party CPs can challenge the charges of a terminating CP, even where the parties are not directly interconnected. In EE's view, this means that “*the current wording of the SIA appears to provide no greater certainty to non-directly connected operators regarding the validity of their charge changes than would be the case if the terms of paragraph 12 of the SIA regarding changes to BT's prices mirrored those of paragraph 13*”.¹⁶⁶
- 4.73 BT states that “*the existing para 12 of the SIA has the benefit of balancing the opportunity for price innovation with the need for all players in the market to have a degree of certainty about the prices in force*”.¹⁶⁷

¹⁶¹ Page 2 of H3G's response.

¹⁶² Page 3 of H3G's response.

¹⁶³ *Ibid.*

¹⁶⁴ Page 9 of EE's response.

¹⁶⁵ Page 10 of EE's response.

¹⁶⁶ Page 11 of EE's response.

¹⁶⁷ Page 1 of BT's response.

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- 4.74 In support of alternative wording for the SIA, EE argues that “a *very similar level of administrative efficiency*” could be created where a BT price change is assumed to be accepted, unless a CP objects to the charge within a specified period.¹⁶⁸ EE suggests that BT's negotiations would therefore be limited to CPs who objected to the change, and such negotiations could also be with an industry forum of the objecting parties. EE also argues that as Ofcom's Dispute Resolution Guidelines require parties to conduct good faith negotiations, there is no evidence that such arrangements would be any less efficient than the current arrangements under Paragraph 12.¹⁶⁹
- 4.75 EE further submits that a further efficiency gain is created by allowing a period for such negotiation, as this would reduce the number of disputes that need to be referred to Ofcom in relation to BT price changes.¹⁷⁰
- 4.76 BT considers that EE's suggestion outlined in paragraph 3.24 of the Provisional Conclusions would create delays. In BT's view, “[...] *this would not prevent CPs delaying implementation by refusing consent even though any subsequent referral to Ofcom would clearly result in the refusal being overturned*”.¹⁷¹ BT argues that a concern that there is unlikely to be consent for a BT charge change proposal from all CPs would lead to a greater number of disputes and associated periods of uncertainty. BT asserts that: “*History suggests that this is very likely, even in the event of price reductions*”.¹⁷²
- 4.77 BT also refers to its comments in its response to our information request where it noted that: “*In the last financial year, BT sent out 1156 OCCNs: 356 were signed by the recipient without any prompting from BT and a further 50 CPs signed up following additional reminders and in some cases, further exchanges of correspondence. Roughly 65% of the OCCNs remained unsigned at the end of the year.*”¹⁷³ This, in BT's view, “[...] *highlights the fact that awaiting consent could lead to confusion and uncertainty in the market*”.¹⁷⁴

Ofcom's view

- 4.78 Noting H3G's comment that it has not seen evidence that not negotiating a price is efficient, we make the following observations:
- 4.78.1 We consider that by not having to engage in a series of bilateral negotiations, it is a reasonable assumption that transaction costs are likely to be lowered, and thus the process to arrive at charges offers some efficiency gains;
- 4.78.2 We have not, however, concluded that the outcome of the existing arrangements ultimately leads to more efficient charges as we do not consider that we need to do so; and
- 4.78.3 Instead, and in line with our analytical framework, we have considered whether any detriments arise from the existing arrangements (i.e.

¹⁶⁸ See paragraph 3.24 of the Provisional Conclusions.

¹⁶⁹ Page 10 of EE's response.

¹⁷⁰ Page 10 of EE's response. EE also points to paragraph 3.17 of the Provisional Conclusions, which notes BT's suggestion that negotiating a charge reduces the likelihood of subsequent disputes.

¹⁷¹ Page 2 of BT's response.

¹⁷² *Ibid.*

¹⁷³ Page 4 of BT's information request response.

¹⁷⁴ Page 3 of BT's response.

whether they create inefficiencies) and we have not seen evidence that, where they exist, any detriments (potential or actual) would not be constrained by regulatory intervention or the threat of it.

- 4.79 We disagree that we have endorsed BT's unilateral pricing in the absence of countervailing buyer power, as suggested by H3G. We agree with H3G that in certain markets other CPs may not have sufficient countervailing buyer power to constrain BT's prices. However, as discussed in paragraphs 3.85 to 3.89, we considered that BT's ability to impose charge changes is nonetheless constrained by the threat of (or actual) regulatory intervention. For example, in the case of the tiered termination charges, we determined that BT had to justify the introduction of its charges and the Court of Appeal upheld our decision.
- 4.80 We also disagree that an argument that Paragraph 13 can provide stability and certainty by ensuring that an existing charge remains in effect until such time as any change is agreed undermines the arguments that the ability for BT to impose charges under Paragraph 12 confers benefits. That Paragraph 13 may also provide stability and certainty would not appear to us to undermine any efficiency benefits arising from the operation of Paragraph 12. On the available evidence it is not clear to us whether any benefits relating to stability and certainty provided by the Paragraph 13 arrangements would outweigh any efficiencies achieved by the Paragraph 12 arrangements in terms of BT not having to negotiate individually its charge changes or charge changes where it is acting as a transit operator with each CP. We therefore have not needed to come to a clear conclusion as to the extent of the likely potential benefits of the current Paragraph 12 arrangements as compared to the Paragraph 13 arrangements.
- 4.81 We do not agree with stakeholder arguments that Ofcom has failed to fully consider the detriments arising from BT changing charges via Paragraph 12. As set out in paragraph 3.1.3 of the Provisional Conclusions, we have sought to understand the material impact of BT exercising its rights under Paragraph 12 and considered whether any alleged detriments exist, and whether these detriments (actual or potential) are likely to be constrained by regulatory intervention, or the threat of it. Stakeholder responses to our Provisional Conclusions have not provided any further examples that change our provisional view.
- 4.82 The extent to which CPs can rely on regulatory intervention is discussed in more detail in paragraphs 4.118 to 4.137 below.
- 4.83 Finally, we note EE's view that the current arrangements provide no greater certainty to non-directly connected operators than would be the case where Paragraph 12 mirrored the wording of Paragraph 13. However, we do not consider this to provide justification to amend Paragraph 12 as the proposed amendment does not appear to address a concern that has been raised in the context of this dispute.

BT's market position

Stakeholder comments

- 4.84 H3G argues that Ofcom has failed to take sufficient account of "*BT's dominant position in the market*". In H3G's view, by Ofcom "*focusing solely on practical benefits and detriments, Ofcom risk ignoring the very real threats to competition posed by BT's skewed contractual rights. We are concerned that Ofcom have not adequately*

considered the nature of BT's role in providing interconnection in the UK telecommunications market."¹⁷⁵

- 4.85 CWW suggests that BT's market power in both SMP and non-SMP designated markets is 'preserved' because where an issue arises "[t]ypically the matter of concern is usually spread over a number of CPs thereby diluting the financial materiality of any single issue. Individually CPs are often left with little commercial incentive to pursue the imbalance created by contractual asymmetry, resulting in BT continuing to be the beneficiary".¹⁷⁶
- 4.86 In relation to BT's end-to-end connectivity obligations, BT notes that as part of the 2012 biennial contract review, it has offered to amend Paragraph 13 so that changes to regulated prices could be made without consent. BT notes that whilst this proposal would still leave "a level of asymmetry, in that BT will have the benefit of paragraph 12 for all services, while others only have it for SMP services, [...] this is justified in practical terms because BT is the only operator with an End-to-End obligation".¹⁷⁷
- 4.87 EE argues that the end-to-end connectivity obligation on BT is not relevant to Ofcom's assessment. EE notes that the relevant access-related conditions specifically only require BT to "purchase wholesale narrowband call termination services (fixed and mobile voice, and Narrowband Data)", on the request of another CP. Therefore, EE submits, "BT's end-to-end connectivity obligations are thus of no relevance to the majority of services supplied by BT under the SIA in relation to which BT sets prices under paragraph 12".¹⁷⁸ H3G also does not consider that the contractual rights conferred on BT are justified by BT's end-to-end connectivity obligation.¹⁷⁹
- 4.88 EE also argues that the fact that Paragraphs 12 and 13 of the SIA have been in place for many years is irrelevant to the consideration of the benefits of those paragraphs to consumers and competition. EE suggests that the longevity is directly related to "BT's market power and the difficulty of persuading it to amend the SIA".¹⁸⁰ EE also argues that the usual considerations of promoting legal and commercial certainty by upholding existing contractual rights should not be considered to apply because of "BT's unwillingness" to consider changes to the terms of Paragraphs 12 and 13 proposed by CPs such as EE over a number of years.
- 4.89 H3G similarly submits that "the absence of any change over a prolonged period neatly illustrates the inability of CPs to renegotiate with BT the terms of paragraphs 12 and 13 by way of the SIA general review process" and challenges BT's view that the SIA is the result of contractual negotiations between industry or "somehow represents a normal commercially negotiated agreement".¹⁸¹

Ofcom's view

- 4.90 H3G and CWW argue that BT holds a position of market power to its competitive advantage, which it could exploit and/or consolidate through the asymmetry of Paragraphs 12 and 13 of the SIA.

¹⁷⁵ Page 3 of H3G's response.

¹⁷⁶ Page 2 of CWW's response.

¹⁷⁷ Page 3 of BT's response.

¹⁷⁸ Pages 12-13 of EE's response.

¹⁷⁹ Page 3 of H3G's response.

¹⁸⁰ Page 16 of EE's response.

¹⁸¹ Page 2 of H3G's response.

- 4.91 BT is subject to SMP conditions where it has been found to have significant market power following a market review. These SMP conditions are intended to constrain BT's behaviour in the absence of an effectively competitive market. As noted at paragraph 4.54, Paragraphs 12 and 13 of the SIA apply to both services subject to SMP conditions and services that are not subject to such conditions. Ofcom has sufficient investigation and enforcement mechanisms to deal with instances where BT is suspected of acting anti-competitively, both in violation of its *ex ante* and *ex post* competition obligations (and as explained in paragraphs 4.136 to 4.137, the absence of SMP conditions does not preclude Ofcom from exercising its dispute resolution powers). We consider that these mechanisms are sufficient to deal with any alleged anti-competitive conduct which arises in practice.
- 4.92 CWW's argument also suggests that stakeholders are not always able to rely on regulatory intervention to constrain BT's behaviour. Reliance on regulatory intervention is considered further in paragraphs 4.130 to 4.137 below.
- 4.93 EE suggests that the end-to-end connectivity obligation only concerns BT purchasing termination services of other CPs and not the termination of calls on BT's own network, or the transiting of calls through BT's network for termination on the networks of other CPs.¹⁸²
- 4.94 BT's end-to-end connectivity obligation¹⁸³ requires that where a provider of a PECN reasonably requests in writing BT to purchase wholesale narrowband call termination services (fixed and mobile voice, and Narrowband Data) provided by it, BT shall purchase such services. Further, the obligation requires that the purchase of such services shall occur as soon as reasonably practicable and shall be on reasonable terms and conditions.
- 4.95 The obligation is not an SMP condition, but an access condition reflecting the requirements of Article 5(1) of the Access Directive.¹⁸⁴ Ofcom imposed this obligation for the purpose of securing:
- 4.95.1 efficiency on the part of communications providers and persons making associated facilities available;
 - 4.95.2 sustainable competition between them; and
 - 4.95.3 the greatest possible benefit for the end-users of public electronic communications services.¹⁸⁵
- 4.96 In Ofcom's view, this would be secured by means of the end-to-end obligation on BT because "[...] *the provision of end-to-end connectivity provides the greatest possible benefit by allowing all users to be able to call each other regardless of the network to which the called party is connected*".¹⁸⁶
- 4.97 A large number of CPs relying on the end-to-end connectivity obligation to ensure that BT purchases termination services, also rely on BT providing transit of those calls across its network. In other words, BT providing transit is closely linked to end-to-end connectivity. As noted at paragraph 2.17 of Ofcom's *End-to-end connectivity*

¹⁸² Pages 11-12 of EE's response.

¹⁸³ BT's obligation is set out in Ofcom's statement *End-to-end connectivity*, 13 September 2006. See: http://stakeholders.ofcom.org.uk/binaries/consultations/end_to_end/statement/statement.pdf.

¹⁸⁴ See paragraph 4.41 above.

¹⁸⁵ Paragraph 4.13 of *End-to-end connectivity*, 13 September 2006.

¹⁸⁶ Paragraph 4.14 of *End-to-end connectivity*, 13 September 2006.

statement: "*BT is the single largest provider of transit and the single largest buyer of voice call termination. BT's prominent role in transiting calls also means that direct interconnection between all PECNs may not be essential to secure end-to-end connectivity for other PECNs. Rather, once a PECN has bought transit services from BT the users of that PECN are already able to contact customers on any other network provided that BT itself does buy termination from that network.*"

- 4.98 We therefore consider that BT's end-to-end connectivity obligation may be relevant to potential benefits arising from Paragraphs 12 and 13 of the SIA, for example, where BT purchases termination services from CPs and then passes these through via amendments to its CPL (which is discussed in paragraph 4.65 above).
- 4.99 In respect of EE's point that BT's end-to-end connectivity obligation does not concern the termination of calls on BT's own network, as discussed in paragraphs 3.85 to 3.89, we considered that BT's ability to impose charge changes is constrained by the threat of (or actual) regulatory intervention (see also paragraph 4.79 above).
- 4.100 In the Provisional Conclusions, we did not rely on the longevity of the SIA as a basis for not proposing amendments to the current terms. That Paragraphs 12 and 13 of the SIA have been in place for many years does, however, provide a sustained period from which examples of detriments or benefits arising from those arrangements might be drawn (where such examples exist).
- 4.101 We consider in more detail below the ability for industry to change the terms of the SIA (see paragraphs 4.148 to 4.158).

BT acting as a 'gatekeeper'

Stakeholder comments

- 4.102 H3G disagrees with the view that the dispute process prevents BT from being the ultimate arbiter of interconnection pricing, and considers that BT's position as "gatekeeper" enables it to exercise a considerable amount of pricing power in the interconnection market. In H3G's view, "*BT clearly has the ability to shape the market through its position in interconnection and its ability to manage its own charges and those of others through paragraphs 12 and 13. This ability is only strengthened by the current contractual asymmetries between BT and the other CPs.*"¹⁸⁷
- 4.103 TNUK is a service provider and relies on charge changes being put forward by the CP hosting TNUK's services (see paragraphs 3.31 and 3.32 above). TNUK does not consider that BT should have any ability to negotiate or reject charges, stating that "*[...] it is not the business of BT as a transit provider to interfere with the commercial freedom of other CPs to set their termination charges at whatever rate they choose*".¹⁸⁸
- 4.104 Whilst BT's ability to reject TNUK's charges under Paragraph 13 is a source of concern for TNUK, TNUK also reiterates its previous comments that "*[...] this has never in fact occurred in practice and nor do we have no reason to believe that it will occur in the future. Furthermore, as we have explained above, any potential*

¹⁸⁷ Page 3 of H3G's response.

¹⁸⁸ Page 3 of TNUK's response.

*detriment which might occur could and should be dealt with simply by amendments to paragraph 13 removing BT's right to reject the proposals".*¹⁸⁹

Ofcom's view

- 4.105 As set out in paragraphs 3.44 and 3.45 above, whilst we have noted that some stakeholders have suggested that BT's ability to reject charges might have the potential to confer some benefits, we provisionally concluded that we did not agree that BT could be the ultimate arbiter of the reasonableness of the charge and we were not convinced that this necessarily means that the existing asymmetry between Paragraphs 12 and 13 offers benefits to CPs in this regard that would not exist outside of these arrangements. We also noted that there is a risk that BT could unfairly or erroneously reject reasonable charge change proposals of a CP and it is therefore unclear that the arrangements would reduce the likelihood of a dispute referral to Ofcom.
- 4.106 In paragraphs 3.59 to 3.62 we explained the potential detriments stakeholders identified as arising from BT's ability to reject charges, and in paragraph 3.105 we provisionally concluded that in the examples provided "*it appears that regulatory intervention, including the possibility of bringing a dispute, existed and that in those cases brought to Ofcom's attention such intervention addressed the concerns*". We took the view that any potential detriments would be constrained by regulatory intervention or the threat of it.
- 4.107 We recognise that there is a potential risk that BT could unreasonably reject charge changes where it disagrees with these or only accept the proposals which are in its own commercial interest. However, we do not agree with H3G that in relation to these potential detriments, BT would not be constrained by regulatory intervention or the threat of it. Our consideration of CPs' ability to rely on regulatory intervention is set out in more detail at paragraphs 4.119 to 4.137 below (see discussion on 'Ofcom's reliance on regulatory intervention'). Consideration of BT's market power is discussed in paragraphs 4.84 to 4.101 above.
- 4.108 Overall, therefore, we do not think there are any grounds to change our views set out in paragraphs 3.59 to 3.62 of the Provisional Conclusions.

Asymmetry of notice periods

Stakeholder views

- 4.109 [X] raises concerns that Ofcom's analysis has failed to take account of all available relevant information: "*Ofcom appear to have ignored the body of evidence at its disposal relating to a question asked in the recent Call for Inputs ("CfI") issued by Ofcom as part of the 2013 Wholesale Narrowband Market Review relating to notice periods in the Network Charge Control and the SIA generally. There is an agreement on this accepted by the vast majority of Communications Providers (including parties to this Dispute) which should be evident from the responses to that CfI*".¹⁹⁰

¹⁸⁹ Pages 3 and 4 of TNUK's response.

¹⁹⁰ [X] page 3. Ofcom sought views on whether the appropriate regulatory period for notifying changes to charges, terms and conditions in SMP markets should be reduced from the typical 90 day period currently required in *Fixed Narrowband Market Review and Network Charge Control – Call for Inputs*, 17 May 2012: <http://stakeholders.ofcom.org.uk/binaries/consultations/narrowband-market-review-call/summary/condoc.pdf>, see paragraphs 5.1 to 5.9.

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- 4.110 [X] also considers that Ofcom's analysis is slightly circular as it fails to understand the constraints on CPs setting their own notice periods, stating that "[...] *Ofcom does not note that Communications Providers can give each other no notice or 30 days notice because they are constrained in their interconnect dealings by the regulatory regime and references to regulated prices in the publication of the BT Carrier Price List i.e. the BT notice period defines how we all operate regardless*".¹⁹¹
- 4.111 TNUK notes that notice periods in respect of non-geographic charges are to be considered as part of Ofcom's non-geographic review and TNUK states that it "[...] *look[s] forward to pursuing it within that forum*".¹⁹² However, TNUK argues that the notice provided by CPs should be shortened from 56 to 28 days: "*Whereas the MNOs appear to be proposing that BT's notification period should be lengthened from 28 days to 56 days, TNUK believes that the other CPs' notification period should in fact be shortened from 56 days to 28 days. We note Ofcom's evidence at para 3.102 that this is in line with the notification periods applied between CPs more generally [...] 3 months is already an unreasonably long notice period to implement price changes and that there can be no justification for extending it further*".¹⁹³
- 4.112 BT suggests that the 56-day notice period that CPs are required to provide to BT is an industry-agreed timescale. BT advises that: "*It is not a regulatory notification period but one which is in the NTS SLA [...] BT has never received a formal request to consider a different notification timescale*".¹⁹⁴
- 4.113 With reference to paragraph 3.81 of the Provisional Conclusions (which discusses BT's notice periods), BT states that "[...] *CPs are always given, at least, a month's warning but sometimes we may not be able to publish the full 28 days in the CPL, due to the late return of signed BT Initiated OCCNs to BT, and changes driven by Ofcom determinations e.g. MTRs*".¹⁹⁵

Ofcom's view

- 4.114 In respect of comments concerning Ofcom's Call for Inputs as part of the 2013 Narrowband Market Review relating to notice periods in the Network Charge Control, we note that we asked for views as to whether the appropriate regulatory period for notifying changes to charges in SMP markets should be reduced from the 90-day period currently required.¹⁹⁶ We received several responses which referred to this point. We note, in particular, that UKCTA¹⁹⁷ provided views on the notification periods under the SIA, including to the effect that "*the majority of the industry (including all UKCTA members and BT) are apparently aligned on a reciprocal 56 day notice*" and that UKCTA hoped BT would amend its 28 days' notice period in the SIA "*to reflect 56 days' notice*".¹⁹⁸ Having considered the stakeholder responses to the Call for

¹⁹¹ [X] page 4.

¹⁹² Page 4 of TNUK's response.

¹⁹³ *Ibid.*

¹⁹⁴ Page 2 of BT's response.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Fixed Narrowband Market Review and Network Charge Control – Call for Inputs*, 17 May 2012, paragraph 5.1, <http://stakeholders.ofcom.org.uk/binaries/consultations/narrowband-market-review-call/summary/condoc.pdf>.

¹⁹⁷ UKCTA describes itself as "*a trade association promoting the interests of competitive fixed-line telecommunications companies competing against BT, as well as each other, in the residential and business markets. Its role is to develop and promote the interests of its members to Ofcom and the Government*". Details of membership of UKCTA can be found at www.ukcta.com.

¹⁹⁸ UKCTA's submission of 28 June 2012 can be found at:

<http://stakeholders.ofcom.org.uk/binaries/consultations/narrowband-market-review->

Inputs, in the Narrowband Market Review consultation,¹⁹⁹ Ofcom proposed to shorten the regulatory notification period for charges in the relevant SMP markets from 90 days to 56 days, in view of the fact that most respondents agreed that a 56-day notification period would allow sufficient time for BT's notified price changes to be reflected in retail prices, and, in this way, promote competition by ensuring that CPs could all meet their regulatory obligations without incurring any commercial risk.²⁰⁰ This proposed change does not affect the 28-day contractual notice period in the SIA for BT charge changes which are not subject to the relevant SMP conditions.

- 4.115 [X]’s argument that Ofcom’s analysis is circular, appears to suggest that CPs’ notification periods are set on the basis of timescales required to react to a BT charge change. This does not appear to be related to detriments arising from the asymmetry of the SIA. We noted the potential detriments arising from the asymmetry of notification period in paragraphs 3.65 and 3.66 of the Provisional Conclusions and at paragraphs 3.100 to 3.104 we provided our provisional views on this, setting out in paragraph 3.104 that “*we note that there is a lack of clear examples of detriment arising in practice*”. Stakeholders have not provided further examples of any detriments caused by the existing asymmetry in notification periods in response to the Provisional Conclusions and none were provided in response to the Call for Inputs.
- 4.116 UKCTA’s comments were made in the context of a wider market review as to potential amendments to the SMP condition in the fixed wholesale narrowband markets which imposes the 90-day notification period for regulated charges, and we do not consider that they are directly relevant to the issues in this Dispute. Our decision in this Dispute does not consider whether existing arrangements are the optimum for industry, nor do we consider it appropriate for us to do so in the context of resolving a dispute. We discuss comments more generally on industry negotiations to amend the SIA at paragraphs 4.148 to 4.158.
- 4.117 BT’s comments that “*CPs are always given, at least, a month’s warning but sometimes we may not be able to publish the full 28 days in the CPL*” would appear to be inconsistent with BT’s explanation that BT notifies originating CPs of transit price changes through publication in the CPL under Paragraph 12.2 of the SIA (see paragraph 4.62 above). However, it does not appear that any failure on the part of BT to provide 28 days’ notice for such charges would be connected to the asymmetry between Paragraphs 12 and 13 of the SIA (although this could potentially be a contractual breach of Paragraph 12.2 for CPs to raise with BT) and we therefore do not consider that this is relevant to the issues in Dispute.

Regulatory intervention

- 4.118 A number of respondents argue that Ofcom has placed too much emphasis on the ability for regulatory intervention to act as a constraint on the potential for detriments to arise as a result of the contractual asymmetry (see for example paragraph 3.110

[call/responses/UKCTA.pdf](#). In this, UKCTA also suggests that the 90 days’ notice period under the SMP condition could also be reduced to 56 days if BT were to agree to amend its notice period.

¹⁹⁹ *Review of the fixed narrowband services markets – Consultation on the proposed markets, market power determinations and remedies*, published on 5 February 2013 (the “Narrowband Market Review Consultation”): http://stakeholders.ofcom.org.uk/binaries/consultations/nmr-2013/summary/NMR_Consultation.pdf.

²⁰⁰ See Narrowband Market Review Consultation, paragraphs 5.223-5.225. See also paragraphs 6.155-6.157, 10.103-10.105.

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above) and/or that Ofcom has failed to place sufficient weight on the administrative and economic burdens which CPs face if they wish to bring a dispute.

Ofcom's reliance on regulatory intervention

Stakeholder comments

- 4.119 EE argues that Ofcom should not have relied on the potential counter-acting effect of regulatory intervention and in particular dispute resolution. EE contends that Ofcom's reasoning on this point is inconsistent with Ofcom's position in and the reasoning of the Court of Appeal in the H3G SMP case²⁰¹ where, in EE's view, the Court of Appeal provided clear guidance that Ofcom's dispute resolution powers should be disregarded when assessing SMP.²⁰²
- 4.120 EE also suggests that Ofcom's approach in this Dispute is also inconsistent with Ofcom's approach in its review on *Simplifying non-geographic numbers*²⁰³ where as part of its assessment of how the wholesale level of the market for non-geographic call services operates, Ofcom proposed adopting a 'modified Greenfield' approach.²⁰⁴ By not adopting a modified Greenfield approach in this Dispute, EE argues that Ofcom has "[...] *failed to consider whether more effective alternative options exist than the continuation of the current status quo*" that "[...] *may cause less detriment for consumers and competition than the current wording, and thus better meet Ofcom's statutory objectives. This is a key failing in Ofcom's provisional conclusions*".²⁰⁵
- 4.121 H3G considers that Ofcom has failed to provide adequate reasoning as to why it considers that "[...] *dispute resolution is a sufficient fetter on BT's ability to create distortive and detrimental effects through the use of its enhanced contractual rights*".²⁰⁶
- 4.122 Although H3G puts forward reservations about the reliance on regulatory intervention to constrain behaviour, H3G also notes that "*Ofcom provide no reasoning for which this [threat of disputes] same constraint could not equally apply in the alternative where the SIA was amended*".²⁰⁷
- 4.123 CWW and O2 raise concerns that dispute resolution does not act as an effective constraint because CPs are unable to rely on Ofcom always exercising its discretion to accept a dispute for resolution.
- 4.124 CWW argues that Ofcom's view that regulatory intervention acts as a constraint on BT "*has as its foundation the presumption that Ofcom will always take a dispute submission under consideration. Without this presumption it is far too weak a*

²⁰¹ *Hutchison 3G UK Limited v Office of Communications (Mobile Call Termination)* [2009] EWCA Civ 683, 16 July 2009.

²⁰² Page 2 of EE's response.

²⁰³ *Simplifying Non-geographic Numbers - Detailed proposals on the unbundled tariff and Freephone* 4 April 2012. See: <http://stakeholders.ofcom.org.uk/consultations/simplifying-non-geographic-no/>.

²⁰⁴ The 'modified Greenfield' approach assumes the absence of any regulatory intervention that arises or would arise from a finding of SMP. In line with the Court of Appeal's judgment in H3G SMP case, Ofcom also disregarded the possibility of *ex post* involvement using the dispute resolution powers specified in sections 185-191 of the 2003 Act.

²⁰⁵ Pages 13-15 of EE's response.

²⁰⁶ Page 3 of H3G's response.

²⁰⁷ *Ibid.*

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*constraint, particularly as the CRF now affords Ofcom the ability in many cases to decline to handle disputes”.*²⁰⁸

- 4.125 O2 is concerned that “[...] *that constraint is compromised because Ofcom is no longer effectively required to consider disputes about network access. [...] Ofcom is able to decline to accept a dispute, particularly taking into account priorities and available resources.*” O2 argues that “*Ofcom does not appear to have taken into account the change to the statutory framework [...] Ofcom cannot rely on such a regulatory constraint in coming to a view about these disputes*”.²⁰⁹
- 4.126 Vodafone also states that its view that “*a decision to leave the current provisions of Clause 12 of the SIA unchanged at this time ought not to impede the effective operation of the telecommunications industry*” is predicated on the “critical assumptions” that (i) the CoA 08x judgment “*remains the current state of the law governing the legal framework that Ofcom should adopt when handling disputes between communications providers about the terms of network access and interconnection*”, (ii) “*Ofcom continues to assert jurisdiction over disputes between communications providers about the terms of network access and interconnection under the revised provisions of the regulatory framework governing the communications sector*” and (iii) “*the current regulatory framework is applied purposively by Ofcom so as to enable parties that do not have a direct contractual nexus with each other to be able to generate and refer disputes to Ofcom when the need arises*”.²¹⁰
- 4.127 Other respondents, however, agreed that Ofcom was correct to take into account the availability of regulatory intervention to act as a constraint on potential detriments and that it could act as an effective constraint.
- 4.128 TNUK “[...] *agrees with Ofcom’s broad conclusion that many (if not all) of the detriments identified by the MNOs as arising from the operation of paragraph 12 (and indeed paragraph 13) can be resolved by regulatory intervention (or sometimes even the threat of regulatory intervention)*”.²¹¹ TNUK notes that CPs are able to bring a dispute to Ofcom and such disputes have been brought and resolved in the MNOs’ favour. TNUK asserts that “[*i*]n these circumstances, there can be no convincing argument that the current arrangements lead to enduring adverse consequences for the MNOs”.²¹²
- 4.129 BT notes: “*Ofcom states that the existence of regulation allowing CPs to challenge rates using the dispute regime is sufficient to constrain BT’s behaviour should any changes introduced be found to be unfair and unreasonable. This is entirely appropriate, and we believe does not place an unfair burden on others to raise disputes with BT*”.²¹³

Ofcom’s view

- 4.130 Stakeholders have raised three main issues with Ofcom’s analysis:

²⁰⁸ Page 1 of CWW’s response.

²⁰⁹ Page 2 of O2’s response.

²¹⁰ Pages 1- 2 of Vodafone’s response.

²¹¹ Page 4 of TNUK’s response.

²¹² *Ibid.*

²¹³ Page 2 of BT’s response.

- 4.130.1 firstly, it is incorrect for Ofcom to rely on regulatory intervention as it is not a relevant consideration and is inconsistent with Ofcom's approach elsewhere;
 - 4.130.2 secondly, where Ofcom has considered the effects of regulatory intervention, it has failed to provide adequate reasoning explaining why Ofcom considers it would be an effective constraint; and
 - 4.130.3 thirdly, changes to Ofcom's dispute resolution jurisdiction mean that CPs can no longer rely on regulatory intervention to resolve disputes with BT regarding charge changes to the same extent as previously.
- 4.131 In relation to the first of these issues, we do not agree that in resolving this Dispute we should disregard the effects of potential or actual regulatory intervention. The existence of regulatory intervention, in particular Ofcom's dispute resolution powers, in our view has a significant bearing on whether potential detriments arising from BT's contractual position are likely to be realised. This has been identified by stakeholders themselves where detriments have been highlighted and stakeholders have explained that the issues raised were resolved by regulatory intervention or the threat of it.
- 4.132 EE suggests that Ofcom's approach in this Dispute is inconsistent with its approach elsewhere, citing the H3G SMP case and Ofcom's *Simplifying non-geographic numbers* review. We do not consider that either of these examples is relevant to the current dispute. In the H3G SMP case, Ofcom was considering whether H3G had SMP in the market for mobile call termination. In our review on simplifying non-geographic numbers we looked at the operation of the wholesale non-geographic calls market in the absence of regulation (the so called 'modified Greenfield approach') to assess the need for regulatory intervention. Crucially, in both these examples Ofcom was assessing how competition works in the relevant market as part of a wider market review to consider what regulatory obligations should (or should not) be applied on a forward-looking basis. In this Dispute, we are considering the current SIA arrangements in respect of the issues in dispute referred to us, based on the available evidence; we are not conducting a wider market analysis or assessment of SMP in order to determine whether *ex ante* regulation is warranted. That is beyond the scope and purpose of dispute resolution. Accordingly, we consider that it is appropriate for us to take account of the existence of regulatory intervention when assessing whether the detriments cited by stakeholders are actual or potential. The extent to which we give weight to this factor is an exercise of our discretion and we consider that we have given it appropriate weight in balancing the relevant considerations.
- 4.133 In relation to the second of the issues raised, we do not agree with H3G's suggestion that we have failed to provide adequate reasoning on whether regulatory intervention provides adequate constraints. Where detriments have been raised by stakeholders, we have considered whether regulatory intervention, or the threat of it, has acted to constrain BT's behaviour in the specific examples provided. These are discussed in paragraphs 3.85 to 3.107 of the Provisional Conclusions.
- 4.134 It is conceivable that, as H3G suggests, regulatory intervention could equally constrain BT's behaviour in the alternative (i.e. where SIA Paragraph 12 is amended to reflect the terms of Paragraph 13). However, we do not consider that we need to reach any conclusion on this point in light of our overall determination of this Dispute.

- 4.135 In relation to the third of the issues raised, as explained in paragraphs 2.7 to 2.11, the statutory provisions in sections 185-190 of the 2003 Act, governing Ofcom's dispute resolution jurisdiction, were amended by the 2011 Regulations on 26 May 2011.
- 4.136 The 2011 Regulations amended Ofcom's dispute resolution powers to allow it to exercise discretion as to whether to accept a dispute relating the provision of network access between CPs properly referred to Ofcom for resolution under section 185(1) of the 2003 Act.²¹⁴ Section 186(2A) of the 2003 Act provides that in deciding whether or not it is appropriate for Ofcom to handle a dispute falling within section 185(1), it may in particular take into account its priorities and available resources. It is in relation to this provision that CWW and O2 have raised concerns – namely that this discretionary power means that CPs may not be able to rely on regulatory intervention as it is uncertain that Ofcom will accept a dispute referred to it for resolution.
- 4.137 Whilst Ofcom has a discretion to decide whether to handle a dispute referred under section 185(1) of the 2003 Act, we will continue to consider all dispute submissions made to us in line with our Dispute Resolution Guidelines.²¹⁵ We note that in its recent judgment in *Telefónica UK Ltd v Ofcom*²¹⁶ the CAT held that where a dispute may be capable of satisfying the requirements of both sections 185(1) and 185(1A) of the 2003 Act, it is to be treated as a dispute under section 185(1A) such that Ofcom's discretion whether to handle a dispute is limited as set out above. In making any decision as to whether to handle a dispute where we have wider discretion, we will continue to have close regard to the extent to which the issues raised in the dispute relate to our statutory duties and regulatory objectives.

Administrative / financial burden of raising a dispute with Ofcom

Stakeholder comments

- 4.138 EE considers that Ofcom has not given appropriate weight to the administrative burden “[...] *and disadvantage entailed by having to* [raise a dispute]”. EE believes that Ofcom has incorrectly assessed whether bringing a dispute against BT represents an “insurmountable hurdle” for CPs. Instead, EE, argues, Ofcom should consider “[...] *whether it is a) fair and b) in the best interests of consumers and the promotion of competition to require CPs to have to do this [...], or whether in fact EE's proposal (or some alternative) is actually better suited than the status quo to achieve these aims*”.²¹⁷
- 4.139 Verizon argues that dispute referrals are “*inherently inefficient and costly*”, because it considers that any retrospective payment is only received “*well after the over-charging has occurred*” and any interest awarded is “*well below the cost of capital*”.²¹⁸ Verizon also argues that CPs cannot rely on Ofcom resolving a dispute within four months, referring to the PPC and Ethernet disputes.²¹⁹ [X] says that it and other CPs

²¹⁴ As was the case prior to the 2011 Regulations, Ofcom may only decide that it is not appropriate for it to handle a dispute properly referred to Ofcom under section 185(1A) or 185(2) of the 2003 Act if there are alternative means available for resolving the dispute; a resolution of the dispute by those means would be consistent with the Community requirements set out in section 4 of the 2003 Act, and those means are likely to result in a prompt and satisfactory resolution of the dispute.

²¹⁵ See: <http://stakeholders.ofcom.org.uk/binaries/consultations/dispute-resolution-guidelines/statement/guidelines.pdf>.

²¹⁶ [2012] CAT 28.

²¹⁷ Page 15 of EE's response.

²¹⁸ Pages 1-2 of Verizon's response.

²¹⁹ Page 2 Verizon's response.

have argued in past SIA general contract reviews that *“the OfTel Interest Rate is often below BT’s Weighted Average Cost of Capital”* and *“a moral hazard is presented to BT insofar as the cheapest form of working capital available to the group is to engage in questionable behaviour. Moreover, this differential means that the CP which has been disadvantaged by the activities of another (especially BT based on prior cases) does not fully recover the direct or opportunity costs of that capital being available to them”*.²²⁰

- 4.140 O2 suggests that Ofcom has not considered that there is a lack of threat to BT from regulatory intervention because of the asymmetry concerning the relative cash flows of CPs and BT. O2 argues that *“[...] it is open for BT to set higher charges (which might not be fair and reasonable) and, consequently, benefit from increased cash flows, for a limited period. [...] It is also the case that BT faces no constraint in the frequency and regularity by which it can introduce such charges. Accordingly, there is nothing to stop it introducing a series of price changes to cement a cash flow advantage”*.²²¹
- 4.141 [X] states that: *“Whilst Ofcom correctly states in the Draft Determination that it does have some discretion in directing repayment through its Dispute Resolution process, we cannot recall any time where this was used on the interest rate bar a binary decision whether to direct repayment using the OfTel Interest Rate or no interest at all”*.²²²
- 4.142 BT, in referring to paragraph 3.64 of the Provisional Conclusions (which notes that EE has said that the potential liability to pay additional interest sums to BT in the event of non-payment under the terms of the SIA is one reason why it has, in the past, chosen to pay disputed charges pending resolution of the dispute), submits that *“...EE’s point is well made, but Ofcom should note that [X] EE have refused to pay the amounts in dispute - contrary to the supposition behind their point here.”*²²³

Ofcom’s view

- 4.143 Based on examples provided to us, it would appear that in many cases where CPs consider that a BT charge is unfair, they have brought disputes to Ofcom. This suggests that dispute resolution does not create such an administrative and/or financial burden that it cannot offer a means of constraining BT’s behaviour. Further, as noted in paragraph 3.95 of the Provisional Conclusions, BT, as a party subject to any disputes brought in relation to Paragraph 12, faces a commitment of resources in responding to such a dispute and we believe that this forms part of the incentive on BT to set charges that lower the potential for regulatory intervention.
- 4.144 For the reasons set out above at paragraphs 4.23 to 4.27 we do not consider EE’s argument that Ofcom should not be considering whether or not CPs can bring a dispute, but instead whether this offers the best solution, to be correct. As we have noted at paragraph 3.95 we also consider that it is not straightforward to measure the commitment faced by the party defending a proposed charge change which is disputed, but it nonetheless forms part of the incentive on the party proposing a charge change to set charges that lower the potential for regulatory intervention.

²²⁰ Page 3 of [X]’s response.

²²¹ Pages 2-3 of O2’s response.

²²² Page 3 of [X]’s response.

²²³ Page 3 of BT’s response.

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- 4.145 Verizon and O2 both raise concerns about how CPs' cash flows are impacted, relative to BT's own cash flows, where a dispute is brought to Ofcom. In essence, the concern is that CPs raising a dispute are liable to pay BT what could be an unfair or unreasonable charge until such time as a dispute is resolved by Ofcom. We note that the alternative for a CP is to refuse to pay the BT charge, but that this could leave that CP liable to pay back the charge, plus interest. The reverse is not true where a CP attempts to introduce a charge, as BT can reject this without having to pay the new rate.
- 4.146 We note that CPs may face the prospect of paying a disputed BT charge until such time as that dispute is resolved, whilst the same consideration will not apply to BT if it has exercised its rights under Paragraph 13 of the SIA to reject a CP's charge before it takes effect. However, the evidence we have seen does not lead us to change our view that in practice this does not lead to a detriment to consumers or competition, or that any detriment which did arise could be addressed through the dispute resolution procedure. To the extent that it could give rise to an unfairness against a party in a particular dispute, Ofcom's discretionary powers in dispute resolution, particularly as regards the powers to require repayments, are in our view capable of addressing any imbalance resulting from the arrangements in the SIA in a timely manner.
- 4.147 As regards interest rates, we note that the SIA makes provision for the interests rates that apply in different cases, including under Paragraphs 12 and 13 depending on decisions that parties have made as to whether to make payments to each other or not. As we set out in our Provisional Conclusions, we have powers under our dispute resolution function to address imbalances arising as a result, where we consider that it is appropriate to do so on the facts of any specific case.²²⁴ We have considered past cases on their own facts, and we will continue to do so in future cases.

Industry negotiations to amend the SIA

Stakeholder comments

- 4.148 Several stakeholders commented on the Provisional Conclusions referring to BT's biennial contract review (and that as part of the latest contract review BT has proposed changes to Paragraphs 12 and 13 of the SIA - see paragraph 3.113 above). There was clear disagreement between stakeholders on the effectiveness of BT's contract review process.
- 4.149 In general, BT and [X] both refer positively to the industry contract review process as an appropriate mechanism for reviewing and amending existing terms in the SIA.
- 4.150 BT advises that as part of the review, "*[t]he contract review Para 12/13 working group will look at the issues around the requirement for consent, the ability to reject, notification periods, interest rates and the ability for CPs to propose BT prices*".²²⁵ BT has also advised that it has "*made an offer to the industry group to amend clause 13, to the effect that changes to regulated prices can be made without the need for consent from affected parties*".²²⁶

²²⁴ Note also that we have accepted for resolution a dispute concerning the Ofcom Interest Rate contained within BT's SIA. See: http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01108/.

²²⁵ Page 3 of BT's response.

²²⁶ *Ibid.*

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- 4.151 [X] states that it “[...] especially welcome[s] the recognition that the SIA should change with industry agreement through the established industry review mechanism”. However, [X] expresses concern that BT could rely on Ofcom’s determination in order to avoid changes to the SIA and accordingly, [X] requests that this Determination “[...] makes the need for BT to continue to engage with industry and negotiate in good faith changes to the SIA explicitly clear”.²²⁷
- 4.152 CWW, H3G and Verizon all suggest that the SIA has evolved little from its original form. For example, CWW states that it “[...] is little changed from its original drafting in 1996/7. It neither reflects the deregulation that has occurred nor the framework and market review structure (or the 2011 Communications Act reform) that is in existence today”.²²⁸
- 4.153 CWW, H3G and Verizon submit that the lack of change to the SIA illustrates the inability for industry to be able to negotiate amendments, which in turn arises from BT’s position of strength in the negotiations.
- 4.154 H3G argues that “CPs have little choice but to accept the terms of the SIA as offered to them by BT, without any bilateral negotiation. [...] The absence of any change over a prolonged period neatly illustrates the inability of CPs to renegotiate with BT the terms of paragraphs 12 and 13 by way of the SIA general review process.”²²⁹
- 4.155 Verizon similarly argues that “The terms contained within the SIA simply reflect what BT was able to impose [...] BT’s observation that the provision (clause 12) has been in place for a long period of time simply reflects the fact that despite requests to change the clause, BT has simply refused.”²³⁰ In Verizon’s view, “the review process has been ineffectual for a number of years as BT consistently fails to address seriously industry concerns and refuses to accept any meaningful changes to the contract that might be potentially detrimental to BT’s interests”.²³¹
- 4.156 CWW suggests that BT has no incentive to consent to reciprocal contractual terms.²³² CWW’s belief is that “CPs have generally lost faith in the contract review process” and without an effective review process, the SIA will remain unchanged “[...] which serves only BT and neither industry nor consumers”.²³³

Ofcom’s views

- 4.157 Stakeholders remain split on whether BT’s biennial contract review offers an effective route for amending the terms of the SIA. On the one hand, BT and [X] are supportive of the industry process, whereas CWW, EE, H3G and Verizon all raise concerns about whether industry negotiation can lead to agreed changes to the SIA.
- 4.158 In paragraph 3.113 of our Provisional Conclusions we noted that BT has arrangements in place to consider amendments to the SIA, via the biennial contract review. We also noted that “[...] we have not seen evidence that any agreement has been reached by industry and we have therefore not relied on such changes to the SIA taking place in reaching these provisional conclusions”. This position is unchanged in these final conclusions.

²²⁷ Page 2 of [X]’s response.

²²⁸ Page 2 of CWW’s response.

²²⁹ Page 2 of H3G’s response.

²³⁰ Page 2 of Verizon’s response.

²³¹ *Ibid.*

²³² Page 2 of CWW’s response.

²³³ *Ibid.*

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- 4.159 Nonetheless, we note that as part of the contract review process, BT has proposed changes to Paragraphs 12 and 13 of the SIA and we welcome constructive engagement by BT in this regard.

Comments on proposed remedies

- 4.160 As set out at paragraph 2.6 above, the MNOs had proposed that Paragraph 12 should be amended so that it mirrored Paragraph 13. Some respondents have offered views on specific alternatives to the existing arrangements, and these are considered below.

Stakeholder comments

- 4.161 In respect of its proposal in the context of the biennial contract review to amend Paragraph 13 so that changes to the regulated charges of CPs can be made without the need for consent from the affected parties, BT suggests that such an amendment aligning Paragraph 13 with Paragraph 12 is more preferable than the reverse suggested by the MNOs.²³⁴ BT notes that this proposal would still retain a level of asymmetry, as in BT's case it will also have the ability under Paragraph 12 to continue to impose charge changes for unregulated services without consent, but that *"this is justified in practical terms because BT is the only operator with an End-to-End obligation"*.
- 4.162 BT also states that *"[w]ere BT to be forced to pay any charge proposed by a CP this could lead to confusion in the interconnect market"*.²³⁵ BT argues that requiring a BT charge change to be agreed by each counterparty is likely to result in detriments. In BT's view *"(a) many more CPs would have an incentive not to sign up, leading to delay and extra expense in making changes; and (b) different rates would apply to a CP's services for those that did or did not sign up – leading to a very confused situation for transit operators and their customers, who would not be able to quote end-to-end prices with any degree of certainty"*.²³⁶
- 4.163 TNUK raises concerns that changes to Paragraph 12 could have *"[...] the most profound adverse effect on the proper functioning of the transit market because of BT's unique position within it"*.²³⁷
- 4.164 TNUK argues that amending Paragraph 12 in order to give the MNOs the right to reject a charge change proposed by BT *"would be entirely the wrong approach"*. TNUK reiterates its view that the ability of any provider to maintain control over its own prices is fundamental and should be protected by Ofcom. In TNUK's opinion, this is *"of far greater importance than the right of any provider to be able to reject the prices of others [...] [T]o the extent to which there is any detriment arising from the current arrangements it can (and should) largely be addressed by amendments to paragraph 13, rather than to paragraph 12"*. TNUK goes on to suggest that unlike amendments to Paragraph 12, amendments to Paragraph 13 would not create further additional detriments.²³⁸
- 4.165 EE submits that if Ofcom concludes that Paragraph 12 should not be changed and this is not counterbalanced by any benefits flowing from the asymmetry, it follows that

²³⁴ Page 3 of BT's response.

²³⁵ Page 2 of BT's response.

²³⁶ Page 3 of BT's response.

²³⁷ Page 1 of TNUK's response.

²³⁸ Page 3 of TNUK's response.

the existing asymmetry has to be addressed otherwise “*it would violate Ofcom’s regulatory obligations for it to allow the asymmetry to stand.*” EE suggests that in such circumstances, Paragraph 13 should be amended to mirror the terms of Paragraph 12.²³⁹

- 4.166 EE also claims that it would be “*better that the SIA should explicitly reflect*” BT’s obligation to negotiate interconnection and that it is “inappropriate” for Ofcom to take into account benefits allegedly accruing from a putative restriction of that right to negotiate.²⁴⁰

Ofcom’s view

- 4.167 At paragraphs 3.1 and 3.2 we set out the analytical framework we adopted in our Provisional Conclusion in order to resolve this Dispute. As noted at paragraph 4.21 above, we explain that on the basis of our conclusions as to whether Paragraphs 12 and 13 of the SIA are fair and reasonable, we would then consider whether we think it is appropriate for us to give a direction under section 190(2)(b) and/or section 190(2)(c) of the 2003 Act to require an amendment to the terms of the SIA.
- 4.168 At paragraph 3.112, we provisionally concluded that on balance, we did not consider we have seen sufficient evidence that the terms of Paragraphs 12 and 13 of the SIA create detriments in practice for consumers and competition to lead us to conclude that they are not fair and reasonable. Accordingly, we explained that we provisionally concluded that we should not exercise our dispute resolution powers to determine that the terms should be changed. We therefore did not set out an assessment of changes to the existing arrangements.
- 4.169 For the reasons set out in paragraphs 4.23 to 4.27 above, in accordance with our analytical framework for resolving this Dispute, we do not consider that it is necessary to consider alternatives to the existing arrangements unless we conclude that the existing arrangements are not fair and reasonable (our conclusions are set out at paragraphs 4.170 to 4.173 below).

Final Conclusions

- 4.170 For the reasons set out above we consider that Paragraphs 12 and 13 of the SIA are fair and reasonable, and having regard to our statutory duties, we consider that it is not appropriate for us to make a determination under section 190(2)(b) and/or section 190(2)(c) of the 2003 Act, amending the existing arrangements in the manner requested by the MNOs or otherwise.
- 4.171 In reaching these conclusions, we have considered our general duties in section 3 of the 2003 Act and also the six “Community requirements” set out in section 4 of the 2003 Act, which give effect, among other things, to the requirements of Article 8 of the Framework Directive,²⁴¹ In particular, we have had regard to:
- 4.171.1 the duty to further the interests of citizens (i.e. all members of the public in the United Kingdom) in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition (section 3(1));

²³⁹ Page 12 of EE’s response.

²⁴⁰ Pages 9 and 10 of EE’s response.

²⁴¹ Directive 2002/21/EC.

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- 4.171.2 the duty to secure the availability throughout the United Kingdom of a wide range of electronic communications services (section 3(2)(b));
 - 4.171.3 the duty to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; as well as any other principles appearing to Ofcom to represent the best regulatory practice (section 3(3)); and
 - 4.171.4 the duty to promote competition (section 4(3)) and to encourage, to the extent Ofcom considers it appropriate, the provision of network access and service interoperability for the purposes of securing efficiency and sustainable competition in communications markets, efficient investment and innovation and the maximum benefit for the customers of communications network and services providers (sections 4(7) and 4(8)).
- 4.172 We consider that our conclusions are consistent with these duties, because, as explained above:
- 4.172.1 the evidence we have seen does not suggest to us that the existing provisions of Paragraphs 12 and 13 of the SIA have given rise to detriments in terms of harm to BT's customers, consumers or competition or that they will do so in the future in a manner which would justify regulatory intervention now in the form of amendment of the SIA; and
 - 4.172.2 we can where appropriate, resolve issues which arise between parties as a result of the asymmetry, including by using our regulatory powers.
- 4.173 Our Determination to resolve the Dispute is at Annex 1 to this Statement.

Annex 1

The Determination

Determination under sections 188 and 190 of the Communications Act 2003 ("2003 Act") for resolving a dispute between Everything Everywhere Limited ("EE"), Hutchison 3G UK Limited ("H3G") and Telefónica UK Limited ("O2") (collectively the "MNOs") against British Telecommunications plc ("BT") about Paragraphs 12 and 13 of BT's SIA

WHEREAS—

- (A) section 188(2) of the 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 (and pursuant to section 186(2A) of the 2003 Act, in relation to a dispute falling within section 185(1A), Ofcom must decide that it is appropriate for them to handle the dispute, unless the exceptions in 185(3)(a)-(c) apply), 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 Ofcom must publish so much of its determination as (having regard, in particular, to the need to preserve commercial confidentiality) Ofcom considers 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 in resolving a dispute which may, in accordance with section 190(2) of the 2003 Act, include—
- making a declaration setting out the rights and obligations of the parties to the dispute;
 - giving a direction fixing the terms or conditions of transactions between the parties to the dispute;
 - giving a direction imposing an obligation, enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by Ofcom; and
 - for the purpose of giving effect to a determination by Ofcom of the proper amount of a charge in respect of which amounts have been paid by one of the parties to the dispute to the other, giving a direction, enforceable by the party to whom sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment;
- (C) on 25 January 2012, EE submitted a dispute with BT to Ofcom for resolution, claiming that the terms of Paragraphs 12 and 13 of BT's SIA were unfair and unreasonable and should be amended.
- (D) on 14 February 2012, Ofcom decided that it was appropriate for it to handle this dispute and set the scope of the issues to be resolved in the dispute as follows:

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“Whether the operation and/or effect of paragraphs 12 and 13 of BTs Standard Interconnect Agreement (“SIA”) is such that they constitute fair and reasonable terms or conditions as between the parties to the dispute; and

Whether, in light of Ofcom’s conclusions on the above question, Ofcom should exercise its powers to give a direction under section 190(2)(b) and/or section 190(2)(c) of the Communications Act 2003”.

- (E) on 2 February 2012 and 5 March 2012 respectively, H3G and O2 submitted disputes with BT that had principal issues that we considered to be essentially the same as the issue we were already considering in the dispute between EE and BT. We therefore considered it appropriate to join both H3G and O2 as parties to that existing dispute.
- (F) a non-confidential version of our Provisional Conclusions was sent to the parties on 28 September 2012 and published on Ofcom’s website on 1 October 2012;
- (G) 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; and
- (H) 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.

NOW, therefore, Ofcom makes, for the reasons set out in the accompanying explanatory statement, this Determination for resolving this dispute—

I Declaration of rights and obligations, etc.

1 It is hereby declared that Paragraphs 12 and 13 of BT’s SIA are fair and reasonable.

II Binding nature and effective date

2 This Determination is binding on the MNOs and BT in accordance with section 190(8) of the 2003 Act.

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

III Interpretation

4 For the purpose of interpreting this Determination—

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

5 In this Determination—

- a) “**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

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subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006;

- c) **"BT's SIA"** means BT's Network Charge Change Control Standard Interconnect Agreement;
- d) **"EE"** means Everything Everywhere Limited whose registered company number is 02382161, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006;
- e) **"H3G"** means Hutchison 3G UK Limited whose registered company number is 03885486, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006
- f) **"O2"** means Telefónica UK Limited whose registered company number is 01743099, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006.

Signed by:



Neil Buckley

Director of Investigations

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

Annex 2

Services subject to terms of the SIA

A2.1 The following is a table of services at Annex C to the SIA.

**SCH
NO:**

JOINT SERVICES

01	In-span Interconnect (ISI), Third Party ISI & Interconnect Extension Circuits
02	Operator-Operator Service
03	Reciprocal Transfer of Number Blocks
04	Reciprocal Number Portability
05	Reciprocal Ring Back When Free Service
06	Reciprocal Universal Freephone Service
07	Reciprocal Non-Geographic Number Portability
09	Reciprocal Virtual Call Service
11	Directory Information Supply

BT SERVICES

101	BT Telephony Calls to the BT System
102	BT Transit Calls via the BT System
103	BT Operator to Operator Transit Calls via the BT System
104A	BT International Outgoing Calls to Authorised Overseas Systems via the BT System
105	BT International Incoming Calls from Authorised Overseas Systems via the Operator System handed over to the BT System
106	BT International Incoming Calls from Authorised Overseas Systems via the Operator System handed over to the BT System (including specified Ancillary Services)
108	Operator to Operator Transit Virtual Calls via the BT System
110	BT Free Phone Calls
111	BT Local Call Fee Access Calls
112	BT Premium Rate Service Calls
113	BT Universal Freephone 00800 Calls
116	BT National Call Fee Access Service Calls
118	BT Timeline™ Service
120	National Operator Assistance Service
122	International Operator Assistance Service
129	Directory Enquiry Service for Blind or Disabled Customers.
130	Customer Sited Interconnect
131	Virtual Interconnect Circuits
135	BT Click™ Service Calls
141	Indirect Access Calls to the Operator System
143	Carrier Pre-Selection
152	Supply of BT Phone Books
160	BT Operator to Operator Targeted Transit Calls via the BT System
161	BT Targeted Transit Calls via the BT System

164	BT Ported Mobile Transit Calls via the BT System
165	BT Ported NTS Service Transit Calls or BT Ported 03 UK-wide Number Transit Calls via the BT System
166	BT Northern Ireland to Telecom Eireann Calls via the BT System
167	BT Imported NTS Service Calls and BT Imported 03 UK-wide Number Calls
174	BT SCCP Signalling Transit Service
175	BT GSM Roaming Service
176	Access to Operator Call Mapping from the BT System
177	Number Portability Announcement Service
178	GeoVerse (formerly BT Global Office™ Calls)
180	BT Multi-Media Service Calls
181	BT Ported Telephony Transit Calls via the BT System
182	BT Ported Personal Number Transit Calls via the BT System
184	Indirect Access Transit Calls via the BT System..
194	BT IP Network Calls at Operator DMSUs(BT-allocated Number Block)
199	BT IP Network Transit Calls via the BT System
201	BT VOIP/Multimedia Service Calls
202	BT Virtual Mobile Network Service Calls
204	BT 03 UK-wide Number Calls
210	BT Special Services (higher rate) NTS Calls – 0871, 0872, 0873 (previously BT 0871 NTS Calls)
211	BT Special Services (basic rate) NTS Calls – 0843, 0844 (previously BT 0844 NTS Calls)
218	BT 118 Directory Enquiry (DQ) Service Calls
220	BT TextDirect Service
225	Emergency Service (Fixed Emergency Calls, VOIP originated Emergency Calls, and Mobile Emergency Calls)
230	BT Short Messages to the BT System
231	BT Transit Short Messages via the BT System
240	BT Routed NTS Overflow Calls
241	BT 056 LIECS Call
250	BT 116 European Helpline Service Calls

OPERATOR SERVICES

301	Operator Telephony Calls to the Operator System
303	Operator BT to BT Transit Calls via the Operator System
304	Operator International Outgoing Calls to Authorised Overseas Systems via the Operator System
305	Operator International Incoming Calls from Authorised Overseas Systems via the BT System handed over to the Operator System
306	Operator BT to BT Transit Calls (Ported) via the Operator System
307	Operator International Incoming Calls from Authorised Overseas Systems via the BT System handed over to the Operator System (including specified Ancillary Services)
311	Operator Free Phone Calls (including Payphone Access)
312	Operator Local Call Fee Access Calls
313	Operator Premium Rate Service Calls
314	Operator Personal Numbering Service Calls
315	Operator National Calls
317	144 Access Calls to the BT System
319	Operator Targeted Calls
320	Operator Ring Me Free™ Access Calls to the BT System

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- 321 Operator Free Phone 0800 BT CHARGECARD Access Calls
- 322 Operator FeatureNet Call-In Access Calls to the BT System
(Operator required to provide full CLI)
- 323 Operator Access Calls to the BT Business Overlay Service
(Operator required to provide full CLI)
- 335 Operator Dial-up Internet Service Calls
- 364 Operator Ported Mobile Calls
- 365 Operator Ported NTS Service Calls or Operator Ported 03 UK-wide
Number Calls
- 367 Operator Imported NTS Service Calls and Operator Imported 03 UK-wide
Number Calls
- 380 Operator Multi-Media Service Calls
- 381 Operator Ported Telephony Calls
- 382 Operator Ported Personal Number Calls
- 384 Operator Transited Indirect Access Calls
- 391 Operator IP Network Calls at BT DLEs(Operator-allocated Number Block)
- 392 Operator Groomed IP Network Calls and Operator Groomed
Non-Geographic Calls (excluding Operator Premium Rate Calls)
(within the same Operator-allocated Number Block).
- 394 Operator IP Network Calls at BT DMSUs(Operator-allocated Number
Block).
- 395 Operator Groomed IP Network Calls and Operator Groomed Non-
Geographic Calls
(excluding Operator Premium Rate Calls) at BT DMSUs
(within the same Operator-allocated Number Block)
- 401 Operator VOIP/Multimedia Service Calls.
- 402 Operator Virtual Mobile Network Service Calls
- 403 Operator Corporate Customer Service Calls
- 404 Operator 03 UK-wide Number Calls
- 410 Operator Special Services (higher rate) NTS Calls -
0871,0872,0873(previously Operator 0871 NTS Calls)
- 411 Operator Special Services (basic rate)NTS Calls – 0843, 0844 (previously
Operator 0844 NTS Calls)
- 418 Operator 118 Directory Enquiry(DQ) Service Calls.
- 430 Operator Short Messages to the Operator System
- 441 Operator 056 LIECS Calls

- 509 144 Access Calls to the BT System
- 517 Operator PAS Calls on Non-Geo No Ranges
- 541 Operator Telephony Calls to the Operator System
- 545 Operator International Incoming Calls from Authorised Overseas Systems
via
the BT System handed over to the Operator System
- 546 Operator BT to BT Transit Calls (Ported) via the Operator System
- 549 Operator International Incoming Calls from Authorised Overseas Systems
via the
BT System handed over to the Operator System (including specified
Ancillary Services)
- 552 Operator Telephony Calls to the Operator System (including Mobile Calls)
- 553 Operator International Incoming Calls (including Mobile Calls) from
Authorised
Overseas Systems via the BT System handed over to the Operator
System
(including specified Ancillary Services).