



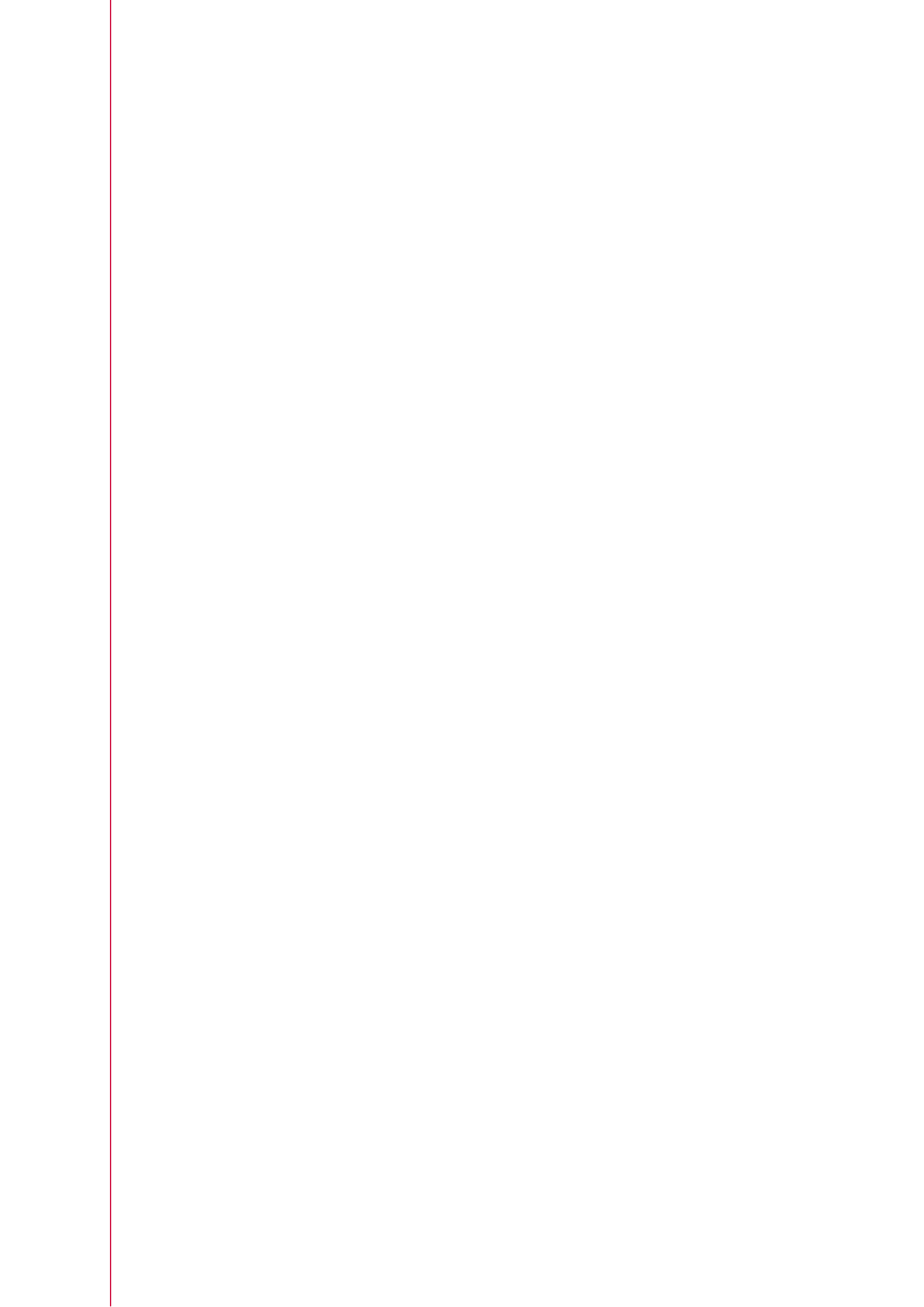
Dispute between BT and each of  
Everything Everywhere Limited,  
Hutchison 3G UK Limited and Telefónica  
UK Ltd relating to BT's Standard  
Interconnect Agreement

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Provisional Conclusions

Issue date: 1 October 2012



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Provisional Conclusions 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).

**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).

**CoA:** Court of Appeal.

**CoA 08x judgment:** Judgment of the Court of Appeal in relation to the CAT 08x judgment, *Telefónica O2 Ltd and others v British Telecommunications plc* [2012] EWCA Civ 1002, 25 July 2012.

**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 whose registered company number is 07029206, 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.

**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.

**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.

**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.

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**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 1743099, 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.

**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.

**PECN:** Public Electronic Communications Network.

**PPM:** Pence per minute.

**Provisional Conclusions:** This document (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*, 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 06534112, 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.

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**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.

## Section 1

# Summary

- 1.1 This document (the “Provisional Conclusions”) sets out for comment the main elements of our provisional reasoning and assessment of the matters in dispute.
- 1.2 This dispute (the “Dispute”) has been brought separately by Everything Everywhere Limited (“EE”),<sup>1</sup> Hutchison 3G UK Limited (“H3G”)<sup>2</sup> and Telefónica UK Limited (“O2”)<sup>3</sup> (collectively the “MNOs”) against British Telecommunications plc (“BT”). It concerns Paragraph 12 of BT's SIA<sup>4</sup> 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.
- 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.<sup>5</sup> 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.

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<sup>1</sup> EE submission of 23 January 2012 (“EE's dispute submission”).

<sup>2</sup> H3G submission of 2 February 2012 (H3G's dispute submission”).

<sup>3</sup> O2 submission of 5 March 2012 (“O2's dispute submission”).

<sup>4</sup> 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.

<sup>5</sup> 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 obligation<sup>6</sup> and advises 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 of the matters in dispute

- 1.10 We have considered both the potential benefits and detriments of the current position, taking account of the matters that respondents have raised.
- 1.11 In our provisional view, on balance we have not seen sufficient evidence that the terms of Paragraphs 12 and 13 of the SIA create detriments in practice for consumers and competition that lead us to conclude that they are not fair and reasonable. Accordingly, we do 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.
- 1.12 We note that when the Dispute was referred to us, the judgment of the Competition Appeal Tribunal ("CAT") relating to Ofcom's determination of the disputes concerning BT's tiered termination rates for calls to 080, 0845 and 0870 numbers (the "08x cases") was in force.<sup>7</sup> This judgment placed emphasis on BT's contractual rights under Paragraph 12 of the SIA.
- 1.13 On 1 to 3 May 2012 the Court of Appeal heard on an expedited basis appeals brought by O2 on the one hand, and collectively Vodafone, EE and H3G on the other, against the CAT's decision relating to the 08x cases.<sup>8</sup>
- 1.14 In light of the analysis that we had conducted in order to resolve the dispute relating to Paragraphs 12 and 13 of BT's SIA and the nature of the arguments put to the Court of Appeal by the parties in the 08x cases, we considered that the Court of Appeal's judgment in the 08x cases was likely to be relevant to the issues raised in this dispute.
- 1.15 Accordingly, on 8 June 2012 we informed the parties (including interested third parties) that we considered that exceptional circumstances existed for the purposes of section 188(5) of the Communications Act 2003 ("2003 Act"), such that it was appropriate not to issue our provisional conclusions until after the Court of Appeal handed down judgment and we had had an opportunity to consider its implications.
- 1.16 On 25 July 2012, the Court of Appeal handed down its judgment (the "CoA 08x judgment").<sup>9</sup> In issuing these Provisional Conclusions, we have taken account of that judgment and in particular the Court of Appeal's view that when Ofcom resolves a

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<sup>6</sup> This is an obligation placed on BT requiring that it must purchase 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).

<sup>7</sup> *BT and Everything Everywhere Limited v Ofcom* [2011] CAT 24.

<sup>8</sup> Cases C3/2011/3121, 3124, 3315, 3316 and C3/2012/0692A.

<sup>9</sup> *Telefónica O2 Ltd and others v British Telecommunications plc* [2012] EWCA Civ 1002, 25 July 2012.



dispute “*neither the actual or previous contractual position, nor any right of BT to impose a change, can be of any overriding significance*”.<sup>10</sup>

- 1.17 We note that BT is currently seeking permission to appeal the CoA 08x judgment to the Supreme Court. In light of our ongoing duty to resolve disputes as quickly as possible, we consider it appropriate to issue these Provisional Conclusions whilst that request for permission to appeal is pending. Should the Supreme Court grant permission to appeal, we may have to review our position pending the disposal of those proceedings.

### Structure of the remainder of this document

- 1.18 The introduction and background to this Dispute are set out in **section 2** and the analysis underpinning our provisional reasoning and assessment is set out in **section 3**.

### Next steps

- 1.19 We have set a period of 10 working days for stakeholders to comment.<sup>11</sup> Accordingly, the Parties and other interested parties have until **5pm on 15 October 2012** to comment on these Provisional Conclusions.
- 1.20 After considering any comments received, and subject to any review of the matter in light of BT's application for permission to appeal the 08x cases to the Supreme Court, Ofcom will make a final determination. Details of how to respond to these Provisional Conclusions are set out in **Annexes 1 and 2**.

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<sup>10</sup> See paragraph 74 of the CoA 08x judgment.

<sup>11</sup> In line with the *Dispute Resolution Guidelines*, 7 June 2011, we have considered whether to set a period of up to 15 working days. Given the nature of this Dispute, we considered 10 working days appropriate.

## 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.
- 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*".<sup>12</sup>
- 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*"<sup>13</sup> 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.<sup>14</sup>
  - 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.<sup>15</sup>
  - 2.6.2 H3G proposes that by amending Paragraph 12 to mirror the terms of Paragraph 13,<sup>16</sup> BT's ability to vary charges would be limited, providing

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<sup>12</sup> Paragraph 15 of H3G's dispute submission.

<sup>13</sup> Paragraph 12 of O2's dispute submission.

<sup>14</sup> Paragraph 5.1 of EE's dispute submission; paragraphs 94-96 of H3G's dispute submission; paragraphs 32-33 of O2's dispute submission.

<sup>15</sup> Paragraph 3.4 of EE's dispute submission.

<sup>16</sup> We note that H3G has also suggested that an 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 2.36 below. To the extent that we consider remedies in these Provisional Conclusions, 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.<sup>17</sup>

## Dispute resolution

### Ofcom's duty to handle disputes

- 2.7 Section 185(1)(a) of the 2003 Act provides (in conjunction with section 185(3)) that in the case of a dispute relating to the provision of network access between different CPs, any one or more of the parties to such a dispute may refer it to Ofcom. Section 185(1A) of the 2003 Act provides (in conjunction with section 185(3)) that in the case of a dispute relating to the provision of network access between a CP and a person who is identified, or is a member of a class identified, in a condition imposed on the CP under section 45 of the 2003 Act, and where the dispute relates to entitlements to network access that the CP is required to provide to that person by or under that condition, any one or more of the parties may refer it to Ofcom.
- 2.8 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) 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.

### Ofcom's powers when determining a dispute

- 2.9 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:
- 2.9.1 make a declaration setting out the rights and obligations of the parties to the dispute (section 190(2)(a));
  - 2.9.2 give a direction fixing the terms or conditions of transactions between the parties to the dispute (section 190(2)(b));
  - 2.9.3 give a direction imposing an obligation to enter into a transaction between themselves on the terms and conditions fixed by Ofcom (section 190(2)(c)); and
  - 2.9.4 give a direction requiring the payment of sums by way of adjustment of an underpayment or overpayment, in respect of charges for which amounts

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<sup>17</sup> Paragraphs 32-33 of O2's submission.

have been paid by one party to the dispute, to the other (section 190(2)(d)).

- 2.10 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**

- 2.11 When resolving a dispute under the provisions set out in sections 185 to 191 of the 2003 Act, Ofcom is exercising one of its 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.<sup>18</sup>

### **Accepting the Dispute for resolution**

- 2.12 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.
- 2.13 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.
- 2.14 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.<sup>19</sup>

### **The scope of the Dispute**

- 2.15 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 BTs Standard Interconnect Agreement ("SIA") is such that they constitute fair and reasonable terms or conditions as between the parties to the dispute; and*

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<sup>18</sup> Directive 2002/21/EC of 7 March 2002.

<sup>19</sup> 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/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01083/).

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*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".<sup>20</sup>*

2.16 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.<sup>21</sup>

## Interested parties

2.17 Eight stakeholders have expressed an interest in the outcome of this dispute:

- CWW;
- Gamma;
- IVR;
- Sky;
- TTG;
- TNUK;
- Virgin Media; and
- Vodafone.

## CAT 08x judgment and subsequent appeal

### The CAT 08x judgment

2.18 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.<sup>22</sup>

2.19 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.<sup>23</sup>

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<sup>20</sup> See: [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_01083/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01083/).

<sup>21</sup> *Ibid.*

<sup>22</sup> *Determination to resolve a dispute between T-Mobile, Vodafone, O2 and Orange about BT's termination charges for 080 calls*, dated 5 February 2010.

<sup>23</sup> *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.

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- 2.20 These two determinations (collectively, the "08x cases") were appealed by BT to the CAT, whilst EE also appealed the 0845/0870 determination.
- 2.21 On 1 August 2011, the CAT handed down its judgment in respect of these appeals.<sup>24</sup> 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.
- 2.22 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*".<sup>25</sup>
- 2.23 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 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.<sup>26</sup>
- 2.24 The CAT's decision was subsequently appealed to the Court of Appeal by Telefonica on the one hand, and collectively Vodafone, EE and H3G on the other, against the CAT 08x judgment.<sup>27</sup>

### Exceptional circumstances

- 2.25 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.<sup>28 29</sup>
- 2.26 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 Disputes 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.<sup>30</sup>
- 2.27 On 1 to 3 May 2012 the Court of Appeal heard on an expedited basis appeals brought against the CAT 08x judgment.

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

<sup>25</sup> Paragraph 448 of the CAT 08x judgment.

<sup>26</sup> 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.

<sup>27</sup> Cases C3/2011/3121, 3124, 3315, 3316 and C3/2012/0692A.

<sup>28</sup> Letter from T Fitzakerly (BT) to T Thursby (Ofcom), 16 February 2012.

<sup>29</sup> Prior to Ofcom's publishing details of this Dispute, [redacted] 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.

<sup>30</sup> Letter from T Thursby (Ofcom) to T Fitzakerly dated 22 February 2012, copied to each of EE and H3G.

- 2.28 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.
- 2.29 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.<sup>31</sup>

### **The CoA 08x judgment**

- 2.30 On 25 July 2012, the Court of Appeal handed down its judgment overturning the CAT 08x judgment.<sup>32</sup> 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.
- 2.31 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*"<sup>33</sup> (emphasis added) and that "[I]t is therefore for BT to justify its changes, when challenged".<sup>34</sup>
- 2.32 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.<sup>35</sup> 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*".<sup>36</sup>

### **Parties' comments on the CoA 08x judgment**

- 2.33 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.
- 2.34 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.

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<sup>31</sup> 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/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01083/).

<sup>32</sup> *Telefónica O2 UK Ltd and others v British Telecommunications plc*, 25 July 2012 [2012] EWCA Civ 1002 (the "CoA 08x judgment")

<sup>33</sup> Paragraph 74 of the CoA 08x judgment.

<sup>34</sup> Paragraph 91 of the CoA 08x judgment.

<sup>35</sup> Paragraph 104 of the CoA 08x judgment.

<sup>36</sup> Paragraph 90 of the CoA 08x judgment.



- 2.35 EE notes 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 does 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 says 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.<sup>37</sup>
- 2.36 H3G says 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). H3G's view is that 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 notes that there remains no equivalent unilateral right to change its own charges under Paragraph 13. Accordingly, H3G argues that the terms of the SIA are still not fair or reasonable.<sup>38</sup>
- 2.37 O2 considers that 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".<sup>39</sup>
- 2.38 BT commented<sup>40</sup> that:
- 2.38.1 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;
- 2.38.2 BT has 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**

- 2.39 On the basis that we consider that the parties remain 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 these Provisional Conclusions. 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.

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<sup>37</sup> Letter from R Durie (EE) to L Knight (Ofcom), dated 21 August 2012.

<sup>38</sup> Letter from X Mooyaart (H3G) to L Knight (Ofcom), dated 24 August 2012.

<sup>39</sup> Email from L Wardle (O2) to L Knight (Ofcom), dated 24 August 2012.

<sup>40</sup> Letter from T Fitzakerly (BT) to L Knight (Ofcom), dated 24 August 2012.



### **Information relied upon in resolving the dispute**

- 2.40 These provisional conclusions draw 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:
- 2.40.1 BT's comments on the MNOs' dispute submissions;
  - 2.40.2 Submissions made by interested third parties;
  - 2.40.3 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;
  - 2.40.4 The CAT 08x judgment and CoA 08x judgment; and
  - 2.40.5 Comments from BT, EE, H3G and O2 concerning their respective positions following the CoA 08x judgment.

## Section 3

# Analysis and provisional conclusions

## Analytical Framework

- 3.1 In line with the scope of this Dispute, 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 consider 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 consider 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 go on to consider 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.<sup>41</sup>

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.<sup>42</sup>

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.<sup>43</sup>

...”

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

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<sup>41</sup> 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](https://www.btwholesale.com/pages/static/Library/Pricing_and_Contractual_Information/Reference_Offers/index.htm).

<sup>42</sup> 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](https://www.btwholesale.com/pages/static/Library/Pricing_and_Contractual_Information/Telephony_Reference_Offer/index.htm).

<sup>43</sup> 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).<sup>44</sup>

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<sup>44</sup> 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](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 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 is that there is a clear contractual asymmetry between BT and other CPs wanting to modify charges.
- 3.11 As set out in paragraph 2.23 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*"<sup>45</sup> and that "*[i]t is therefore for BT to justify its changes [i.e. to charges under Paragraph 12], when challenged*".<sup>46</sup> We also note 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.<sup>47</sup> Therefore, we consider 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 is not necessary for us to consider this issue further in our Provisional Conclusions. Should BT's application to the Supreme Court for leave to appeal be granted, we may need to review this position.

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

- 3.13 Stakeholders (including the MNOs and BT) have 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,<sup>48</sup> 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

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<sup>45</sup> CoA 08x judgment, paragraph 74.

<sup>46</sup> CoA 08x judgment, paragraph 91.

<sup>47</sup> See CoA 08x judgment, paragraph 92.

<sup>48</sup> 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).<sup>49</sup>
- 3.15 On the latter point, BT says 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.<sup>50</sup>
- 3.16 BT argues 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.<sup>51</sup> BT explains that this means that unlike all other CPs, BT is obliged to purchase interconnect from any other operator, on reasonable terms.<sup>52</sup> 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*".<sup>53</sup>
- 3.17 BT also suggests that the arrangements in Paragraphs 12 and 13 have a practical benefit. In terms of Paragraph 12, BT argues 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 argues 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 argues 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 suggests, 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.<sup>54</sup>
- 3.18 BT also explains 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 explains 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 adds 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.<sup>55</sup>
- 3.19 Commenting on the MNO dispute submissions requesting that the existing terms of the SIA are modified, BT suggests 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.<sup>56</sup>

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<sup>49</sup> Page 1 of BT comments of 2 February 2012 and 13 February 2012.

<sup>50</sup> *Ibid.*

<sup>51</sup> Page 2-3 of BT comments of 2 February 2012 and Page 2 of BT's comments of 13 February 2012.

<sup>52</sup> Page 1 of information request response from T Fitzakerly (BT) to L Knight (Ofcom) dated 13 April 2012 ("BT's information request response").

<sup>53</sup> *Ibid.*

<sup>54</sup> Page 4 of BT's information request response.

<sup>55</sup> Page 7 of BT's information request response.

<sup>56</sup> 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 argues that this process can help avoid retrospective charge amendments, by enabling it to propose "sustainable" charges to CPs.<sup>57</sup>
- 3.21 Ahead of the next general contract review planned for 1 April 2012,<sup>58</sup> BT proposed amendments to the SIA, so that other CPs providing SMP services subject to charge controls would have similar rights to BT for issue price changes that take effect immediately, as under Paragraph 12.

### **MNOs' views**

- 3.22 In its dispute submission, O2 suggests 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.<sup>59</sup>
- 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*".<sup>60</sup> However, in its response to our information request, O2 says that it does not believe that the arrangements under Paragraphs 12 and 13 provided any discernible direct benefit to it.
- 3.24 EE notes 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 considers that this could equally be achieved by CPs not rejecting a proposal within a specified period.<sup>61</sup>
- 3.25 In terms of the Paragraph 13 arrangements, EE notes "*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*".<sup>62</sup> However, EE did not think that this benefit had arisen in practice. EE also says 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.<sup>63</sup>
- 3.26 H3G notes that it benefits from the convenience of the Paragraph 12, 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 adds that this is of limited benefit, because, as its termination charges

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<sup>57</sup> Page 4 of BT's information request response.

<sup>58</sup> In the letter from T Fitzakerly (BT) to L Knight (Ofcom), dated 24 August 2012, BT advises that it is currently undertaking the contract review as part of the normal SIA review process.

<sup>59</sup> Paragraph 21 of O2's dispute submission.

<sup>60</sup> Paragraph 22 of O2's dispute submission.

<sup>61</sup> Page 7 of information request response from R Durie (EE) to L Knight (Ofcom) dated 17 April 2012 ("EE's information request response").

<sup>62</sup> Page 10 of EE's information request response.

<sup>63</sup> Page 11 of EE's information request response.

are regulated, CPs (including BT) could only sensibly object to a charge change of H3G, if H3G had breached its regulatory obligations.<sup>64</sup>

### ***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 refers 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.<sup>65</sup>
- 3.29 In its response to our request for information, CWW adds 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).<sup>66</sup>
- 3.30 Sky similarly observes that Paragraph 12 provides industry certainty, as well as possible efficiency gains by avoiding the need for "*lengthy cross industry discussions around price changes*".<sup>67</sup>
- 3.31 TNUK supports 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 has 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.<sup>68</sup> 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 notes that as such, TNUK is reliant on BT notifying other CPs' charge changes in accordance with the provisions of Paragraph 12 of the SIA.<sup>69</sup> Accordingly, TNUK is concerned with a change to the SIA that would allow CPs to reject charge changes proposed under Paragraph 12. TNUK suggests 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.

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<sup>64</sup> Page 5 of information request response from X Mooyaart (H3G) to N Buckley (Ofcom) dated 16 April 2012 ("H3G's information request response").

<sup>65</sup> Email from J Hornby (CWW) to L Knight (Ofcom), dated 2 March 2012.

<sup>66</sup> Information request response from N Harding (CWW) to L Knight (Ofcom), dated 13 April 2012 ("CWW's information request response").

<sup>67</sup> 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.

<sup>68</sup> Letter from S Grossman (TNUK) to L Knight (Ofcom), dated 2 March 2012 ("TNUK 2 March letter").

<sup>69</sup> *Ibid.*



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- 3.33 Virgin Media similarly suggests that the Paragraph 12 arrangements create a benefit with BT as a transit operator, with BT being able to impose on originating CPs Virgin Media's charge changes notified under Paragraph 13.<sup>70</sup>
- 3.34 [X] also suggests 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] argues 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")*".<sup>71</sup> [X] further advises that it benefits from these arrangements from "*the regulatory and commercial certainty of our own forward pricing*"<sup>72</sup> that they confer.
- 3.35 Whilst TTG advises that it considers that it is commercially disadvantaged by aspects of the current terms of Paragraphs 12 and 13 of the SIA, TTG also agrees 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.<sup>73</sup>
- 3.36 In its response to our formal request for information, IVR suggests 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.<sup>74</sup>
- 3.37 In relation to the Paragraph 13 arrangements under which BT is able to reject a CP's charges:
- 3.37.1 CWW suggests that these Paragraph 13 arrangements provide a safeguard through BT acting as "*gatekeeper*", by rejecting proposals that are unreasonable or unjustified.<sup>75</sup>
- 3.37.2 [X] also suggests that the Paragraph 13 mechanism could offer BT an efficient means for ensuring that unreasonable charges proposed by other CPs are rejected.<sup>76</sup> Virgin Media similarly notes that the facility provides BT with the ability to reject other CP charge proposals that may be unfavourable to Virgin Media.<sup>77</sup>
- 3.37.3 TTG believes 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.<sup>78</sup>
- 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

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<sup>70</sup> Information request response from A Wileman (Virgin Media) to N Buckley (Ofcom) dated 24 April 2012 ("Virgin Media's information request response").

<sup>71</sup> [X] information request response.

<sup>72</sup> *Ibid.*

<sup>73</sup> Letter from R Granberg (TTG) to L Knight (Ofcom), dated 28 March 2012 ("TTG 28 March letter").

<sup>74</sup> Information request response from A Martin (IVR) to L Knight (Ofcom), dated 17 April 2012 ("IVR's information request response").

<sup>75</sup> CWW's information request response.

<sup>76</sup> [X] information request response.

<sup>77</sup> Virgin Media's information request response.

<sup>78</sup> 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.<sup>79</sup> TTG says 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.<sup>80</sup>

- 3.39 However, H3G suggests that these Paragraph 13 arrangements can create problem, referring to BT issuing OCCNs to Vodafone and Orange requesting they reduce their MTRs<sup>81</sup>: H3G explains 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 states that BT had made it clear that it did not consider itself contractually obliged to enforce the lower charges under the SIA.

### **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 is 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 note 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*”.<sup>82</sup>
- 3.42 Also, 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 note BT's advice 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).<sup>83</sup> Nonetheless, we consider

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<sup>79</sup> Virgin Media's information request response.

<sup>80</sup> TTG's information request response.

<sup>81</sup> Details of this are provided in paragraph 3.60 below, as part of the discussion of potential detriments.

<sup>82</sup> See paragraph 68 of the CoA 08x judgment.

<sup>83</sup> 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](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

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 Paragraphs 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 do not mean to suggest by this that we consider that this renders the asymmetry unfair or unreasonable; only that it is 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 note 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 argue that this is a benefit arising from the asymmetry between Paragraphs 12 and 13, we note 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 do not agree that BT can 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 are 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 note 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 consider 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 consider 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***

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

- 3.48 The MNOs argue 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 suggests 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*"<sup>84</sup>. O2 says 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*".<sup>85</sup>
- 3.49 Providing specific examples, the MNOs refer 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.<sup>86</sup>
- 3.50 The MNO dispute submissions raise 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 refers to BT increasing charges for its own termination services. As an example, H3G refers 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 advises 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.<sup>87</sup>
- 3.52 EE says 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.<sup>88</sup>

#### *BT as transit operator*

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<sup>84</sup> Paragraph 1.8 of EE's dispute submission.

<sup>85</sup> Page 4 of O2's information request response.

<sup>86</sup> See the 08x cases referred to in 2.20 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](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01088/#1).

<sup>87</sup> 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/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_847/).

<sup>88</sup> Page 8 of EE's information request response.

Provisional Conclusions concerning a dispute relating to BT's SIA.

- 3.53 The MNOs submit 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.<sup>89</sup>
- 3.54 As examples, EE points to the "ladder" style termination charges imposed by CPs such as CWW, Gamma Telecom and IV Response for termination of calls to non-geographic numbers such as those in the 080, 0870, 0845, 0844 and 0871/2/3 ranges. EE describes the arrangements as BT acting as a "post-box" in passing on these charges.
- 3.55 EE refers 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*".<sup>90</sup> EE cites 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 refers to BT's transit ladder charges as an example of detriment to H3G (and other OCPs). H3G argues 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.<sup>91</sup>
- 3.57 Like EE and H3G, O2 cites BT acting as a transit provider in respect of ladder pricing as an example of detriment created by Paragraph 12. O2 suggests 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.<sup>92</sup>
- 3.58 O2 argues that the transit market is consequently distorted, because of the attractiveness to TCPs of using BT as a transit provider. O2 argues 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 notes 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 suggests 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 do this and it is not a problem that EE has faced to date.
- 3.60 EE refers to the mobile operators' proposed blended 2G and 3G rates.<sup>93</sup> EE advises that BT initially accepted Vodafone and Orange's blended rates under Paragraph 13,

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<sup>89</sup> 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.

<sup>90</sup> Page 10 of information request response from R Durie (EE) to L Knight (Ofcom) dated 17 April 2012.

<sup>91</sup> Page 7 of H3G's information request response.

<sup>92</sup> Page 4 of O2's information request response.

<sup>93</sup> 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/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_942/).

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 argues 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 claims that it 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 refers 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 notes 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 argues 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 adds 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 argues 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".<sup>94</sup> 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<sup>95</sup> is one reason why it has, in the past, chosen to pay disputed charges pending resolution of the dispute.

#### *Asymmetry in notification periods*

- 3.65 It has also been 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 believe 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.

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<sup>94</sup> 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.

<sup>95</sup> 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.

- 3.66 EE explains 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 submits 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 raises concerns that Paragraph 12 of the SIA enables BT to apply transit rates retrospectively following a determination by Ofcom.
- 3.69 Like EE, CWW argues that the asymmetry in the SIA creates detriments in respect of the process for challenging a charge change proposal. CWW similarly argues 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 claims that BT could refuse to pay a transit fee for accessing the network of CPs for which CWW provides transit. However, CWW advises 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*".<sup>96</sup>
- 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.<sup>97</sup>
- 3.72 [X] similarly considers 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 advises that to date, there has been no detriment to it as result of BT's rights to reject charge notices issued by other operators. However, TNUK notes 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 TNUK would not be able to set the charges paid by customers calling from a BT landline.<sup>98</sup>
- 3.74 TNUK also suggests that where it opposes a charge introduced by BT, dispute resolution may not offer a feasible means of redress for service providers. TNUK suggests 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 questions whether it would

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<sup>96</sup> *Ibid.*

<sup>97</sup> [X] information request response.

<sup>98</sup> Pages 4 and 5 of TNUK's information request response.



have the right of recourse, as it has no direct commercial relationship with CPs such as the MNOs.

- 3.75 TTG argues 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 advises 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".<sup>99</sup>
- 3.76 Virgin Media cites specific examples of detriments arising from Paragraph 12 where BT imposes charges for its own termination services:<sup>100</sup>
- 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 refers 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 suggests that BT's power to reject 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 provides 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 refers to previous attempts to revise charges relating to NTS calls, stating that there has been "*a long history of BT having rejected such proposals*".<sup>101</sup> 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 notes 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 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 advises 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 suggests that the CPLs are often updated late, with the effect of not giving operators 28 days' notice of a charge change. Vodafone points to

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<sup>99</sup> TTG's information request response.

<sup>100</sup> Page 6 of Virgin Media's information request response.

<sup>101</sup> Virgin Media's information request response.



updates to NCCN 1101 (26 September 2011) "*some 4 days before the pricing became effective*", as well as updates to NCCN 1102 (5 December 2011) (B1.06a V 5.2 issued 05.12.11) where Vodafone states 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 does not agree that Paragraph 12 gives it an unfettered discretion. BT argues that its rights under Paragraph 12 are not without limits, being constrained by both commercial necessity and legal limitations,<sup>102</sup> and that this was recognised by the CAT at paragraph 251 of the CAT 08x judgment.<sup>103</sup>
- 3.83 BT also says 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.<sup>104</sup>

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

- 3.84 In paragraphs 3.48 to 3.81 above, we have 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 3.88 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 to 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);
  - 3.84.6 Difference in interest rates (see paragraph 3.97 below);
  - 3.84.7 Transparency of charges (see paragraphs 3.98 to 3.99 below);
  - 3.84.8 Difference in notification periods (see paragraphs 3.100 to 3.104 below);

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<sup>102</sup> Page 3 of BT comments of 2 February 2012 and 13 February 2012.

<sup>103</sup> BT refers 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....*"

<sup>104</sup> Pages 3-4 of BT's information request response.

Provisional Conclusions concerning a dispute relating to BT's SIA.

- 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 to 3.106 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 note 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).<sup>105</sup> On this basis, it seems 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,<sup>106</sup> 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 note 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.<sup>107</sup>
- 3.89 Therefore, whilst concerns have been raised that BT's ability to impose changes to its own charge 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.

*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, 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

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<sup>105</sup> 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/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_1037/)

<sup>106</sup> 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/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_847/).

<sup>107</sup> 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/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01088/).

this market being potentially unrecoverable. Further, CPs have the same ability under Paragraph 13.<sup>108</sup>

#### *BT's incentives to accept and pass-through charges*

- 3.91 We note 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 provides such examples, referring to the termination rates that MCom, Cable & Wireless and Stour Marine charged to T-Mobile.<sup>109</sup> 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. 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 has suggested that the transit market could be distorted because of the attractiveness to TCPs of using BT as a transit provider, but 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.

#### *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.

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<sup>108</sup> BT's ability stems from Paragraph 12.7, whereas a CP's ability stems from Paragraph 13.13. These paragraphs provide equivalent rights.

<sup>109</sup> 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/](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/](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/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01004/)).

- 3.95 Whilst we note that raising a dispute requires a commitment of resources by the disputing CP, we make a number of observations. First, in the last few years we have dealt with an increasing number of disputes. 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 to 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,<sup>110</sup> MCom,<sup>111</sup> TeLNG<sup>112</sup> and Rapture TV<sup>113</sup>) have been able to bring disputes to us even though they have 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.<sup>114</sup>
- 3.96 We note 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 have 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 note that Ofcom has discretionary powers in dispute resolution capable of addressing such issues. The exercise of those powers would depend on the specific facts and circumstances of the case in question.

#### *Transparency of charges*

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<sup>110</sup> *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/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01041/)).

<sup>111</sup> *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/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01000/)).

<sup>112</sup> *Dispute between TeLNG and Gamma about certain interconnection charges* ([http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw\\_01057/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01057/)).

<sup>113</sup> *Dispute between Rapture TV and Sky about EPG charges* ([http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw\\_920/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_920/)).

<sup>114</sup> 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 2.30 to 2.32 above. On balance, it is not clear that BT faces any less of a commitment of resources than a disputing party.

- 3.98 We note 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 have not seen any evidence indicating that this has resulted in any significant impact on consumers or competition.
- 3.99 [X] raises 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 recognise that third parties such as [X] 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 [X] is directly affected (i.e. by paying a subsequently amended termination charge as part of taking BT's transit product), [X] as a third party retains the ability to dispute the terminating CP's charge.

*Difference in notification periods*

- 3.100 In respect of the notification period for charge changes notified under Paragraph 12, we have 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 have taken account of the responses to our formal requests for information, where we asked CPs to advise us of the standard notification 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' notification 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 days' notification 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 have compared this notification period with the information the CPs have provided as to what their usual notification periods are for other CPs (i.e. other than BT) in response to our requests for information. For three of the respondents, the question 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 provide a notification 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 notification period is comparable to the commercial practices applied by CPs in their dealings with CPs other than BT, we do not consider that this requirement is unfair or unreasonable.
- 3.103 Regarding concerns raised by Vodafone that BT has not always provided the notification required by Paragraph 12, 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 believes that CPs being required to provide a comparatively longer notification period (56 days, compared with BT providing 28 days) could create distortions in the related markets. As discussed above, we do not consider that BT's 28 day notification period is unfair or unreasonable. In terms of the effect of the asymmetry between Paragraphs 12 and 13, we note 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 note that there is a lack of clear examples of detriment arising in practice from the difference in notification 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 have been raised regarding BT's ability to reject a CP's charge change notice. 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. Where a CP considers that it is prevented from setting charges that reflect its own costs (as argued by Virgin Media above), we note 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 note that BT's charge changes were subject to various forms of regulatory intervention.

#### *BT's ability to discriminate between different CPs*

- 3.106 EE expresses a concern that BT could discriminate between different CPs in rejecting some charges but not others. This is supported by reference to BT's treatment of MNO blended rate charge changes. 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 Paragraph 13.3 (and in this example, it does not appear that EE is suggesting that 13.3 is, of itself, unreasonable or unfair).
- 3.107 In addition, as EE notes, 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 note that Paragraph 13 could provide BT with the ability to discriminate between CPs, in practice we believe 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 consider that there are some potential detriments arising from the existing arrangements in the SIA. However, the evidence provided by stakeholders suggests that in practice many of these potential detriments are constrained by the availability of regulatory intervention. This has been noted by the MNOs themselves, where H3G advises 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"*.<sup>115</sup> O2 similarly suggests that the ability to refer a dispute to Ofcom *"...provided the comfort that Ofcom would determine whether controversial price changes were permitted"*.<sup>116</sup> As regards the remaining potential detriments, such as the difference in notification periods, there is 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 note that not all of these benefits necessarily rely on an asymmetry in arrangements between Paragraphs 12 and 13. We note 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 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 take into account the finding of the Court of Appeal that *"neither the actual or previous contractual position, nor any right of BT to impose a change, can be of any overriding significance"* when we resolve a dispute.<sup>117</sup>

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 believe that the potential for these detriments to arise exists, we have 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 do 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 do not believe that we should exercise our dispute resolution powers to determine that the terms should be changed.

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<sup>115</sup> Paragraphs 48 and 51 of H3G's dispute submission.

<sup>116</sup> Paragraph 22 of O2's dispute submission.

<sup>117</sup> CoA 08x judgment, paragraph 74.



3.113 We recognise 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 note 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 has proposed changes to Paragraphs 12 and 13 of the SIA. Where there is industry-wide agreement that such amendments should be made, they could be implemented through this process. However, 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.

**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 consider 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 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,<sup>118</sup> In particular, we have 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 communication and to further the interests of consumers in the relevant markets, where appropriate by promoting competition (section 3(1));

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 consider that our provisional assessment is consistent with these duties, because, as explained above:

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<sup>118</sup> Directive 2002/21/EC.



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- 3.116.1 we have 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.
- 3.117 As we note in paragraph 2.39, these Provisional Conclusions remain subject to any decision of the Supreme Court in light of BT's application for leave to appeal and any subsequent proceedings that may follow that could impact the position set out in this document.

## Annex 1

# Responding to the Provisional Conclusions

## How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 15 October 2012**.
- A1.2 We would be grateful if you could assist us by completing a response cover sheet (see Annex 2), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger responses - particularly those with supporting charts, tables or other data - please email [lawrence.knight@ofcom.org.uk](mailto:lawrence.knight@ofcom.org.uk) attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the Provisional Conclusions document.
- Lawrence Knight  
4<sup>th</sup> Floor  
Competition Group  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA
- Fax: 020 7783 4109
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if you can explain why you hold your views and how Ofcom's proposals would impact on you.

## Further information

- A1.7 If you want to discuss the issues raised in this consultation, or need advice on the appropriate form of response, please contact Lawrence Knight on 020 7981 3411.

## Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by respondents. We will therefore usually publish all responses on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.
- A1.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish

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all responses, including those that are marked as confidential, in order to meet legal obligations.

- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>.

### **Next steps**

- A1.11 Following the end of the period for responses, Ofcom intends to publish a determination by the end of November 2012.
- A1.12 Please note that you can register to receive free mail updates alerting you to the publications of relevant Ofcom documents. For more details please see: [http://www.ofcom.org.uk/static/subscribe/select\\_list.htm](http://www.ofcom.org.uk/static/subscribe/select_list.htm).

## Annex 2

# Provisional Conclusions response cover sheet

- A2.1 In the interests of transparency and good regulatory practice, we will publish all responses in full on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk).
- A2.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A2.3 Publishing responses before the consultation period closes can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A2.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at [www.ofcom.org.uk/consult/](http://www.ofcom.org.uk/consult/).
- A2.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.