



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

Date: 15 February 2007

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## Section 1

# The Draft Determinations

## 1.1 The Number Dispute

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

#### **WHEREAS—**

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

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

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

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

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

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

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

(E) on 22 July 2003, the Director also published a notification<sup>2</sup> under regulation 4(10) of the Electronic Communications (Universal Service) Regulations 2003<sup>3</sup> entitled ‘*Designation of BT and Kingston as universal service providers, and the specific universal service conditions - A statement and Notification issued by the Director General of Telecommunications on the implementation of the Universal Service Directive*’ setting out his reasons for, in effect, designating BT as a universal service provider and setting the Universal Service Conditions in Annex A thereto, such as Universal Service Condition 7 (“**USC7**”), applicable to BT which, in effect, took effect on 25 July 2003, requiring in paragraph 7.4 that—

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

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

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

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

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

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<sup>1</sup> See at: [http://www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/2003/cond\\_final0703.pdf](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/cond_final0703.pdf)

<sup>2</sup> See at: [http://www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/2003/uso0703.pdf](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/uso0703.pdf)

<sup>3</sup> S.I. 2003/33.

<sup>4</sup> This database is known as ‘OSIS’ (i.e. the Operator Service Information System).

service obligations imposed on BT via USC7 are probably incompatible with the requirements of Chapter II of the Universal Service Directive<sup>5</sup>.

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

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

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

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

**(M)** on 17 August 2006, Ofcom issued for consultation a draft Determination, together with an explanatory statement, to resolve this dispute, which consultation (the "**first consultation**") invited responses on Ofcom's provisional findings by 21 September 2006. Ofcom received comments from the parties to this dispute and other interested parties;

**(N)** on 15 February 2007, following its consideration of responses received to the first consultation, Ofcom issued for further consultation a revised draft Determination, together with an explanatory statement, to resolve this dispute, which consultation invited responses on Ofcom's provisional findings by 7 March 2007;

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

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

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

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

***I Declaration of rights and obligations, etc.***

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

**2** As a result of the declaration in paragraph 1. above, no issue arises with respect to which Ofcom may lawfully make a declaration—

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

by reference to, or under, USC7.

**3** Ofcom further declares, pursuant to section 190(2)(a) of the 2003 Act, that BT has during the Relevant Period been required to make available to The Number only the information specified in the Schedule hereto pursuant to paragraph 19.1, in accordance with the terms of paragraphs 19.3 to 19.4, of GC19 to the extent that such information has been provided by BT as part of the contents of the OSIS database.

**4** As a result of the declaration in paragraph 3 above, Ofcom directs, pursuant to section 190(2)(b) of the 2003 Act, to fix the charges for the transaction between BT and The Number as follows:

- i) for the first period beginning on 25 July 2003 and ending on 31 March 2004, **£6,649**;
- ii) for the second period of 12 months beginning on 1 April 2004 and ending on 31 March 2005, **£5,934**;
- iii) subject to sub-paragraph iv) and paragraph 5 below, for each subsequent consecutive period of 12 months beginning on 1 April and ending on 31 March the first such period beginning on 1 April 2005 and ending on 31 March 2006, **£5,967**;
- iv) where the last subsequent consecutive period referred to in sub-paragraph iii) above is a period of less than 12 months, the sum of **£5,967 adjusted pro rata**

**for the number of days that have elapsed since the end of the previous consecutive period of 12 months.**

**5** For the reasons set out at paragraphs 10.48 to 10.141 of the explanatory statement accompanying this Determination, these charges have been calculated on the basis that the information set out in the Schedule hereto has been (and continue to be) provided by BT as part of the contents of the OSIS database and supplied to the specified number of downstream information providers, including The Number. Therefore, the charges fixed by Ofcom for the purposes of paragraphs 4 iii) and iv) above shall only apply to such information if:

- i) it continues to be provided by BT to The Number as part of the contents of the OSIS database;
- ii) it continues to be so provided to the same specific number of downstream information providers, including The Number, as used in Ofcom's calculations set out in the explanatory statement accompanying this Determination on the same terms, including format.

For the avoidance of doubt, in fixing the charges under paragraphs 4 iv) above, Ofcom is not requiring BT in the future to provide the above-mentioned information to The Number as part of the contents of the OSIS database.

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

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

**7** However, for the reasons set out at paragraphs 10.114 to 10.125 of the explanatory statement accompanying this Determination, Ofcom makes no direction under section 190(2)(d) of the 2003 Act (requiring payment of sums by way of adjustment of an under- or over-payment).

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

**8** Ofcom makes no determination, pursuant to section 190(6)(a) of the 2003 Act, requiring BT to make payments to The Number in respect of any costs and expenses incurred by The Number in consequence of the reference of the dispute to Ofcom, or in connection with it.

**III Binding nature and effective date**

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

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

#### **IV Interpretation**

11 For the purpose of interpreting this Determination—

- a) except as otherwise defined in paragraph 12 below of this Determination, words or expressions used in this Determination (and in the recitals hereto) shall have the same meaning as they have been ascribed in, under or for the purposes of the GC notification;
- b) headings and titles shall be disregarded; and
- c) the Interpretation Act 1978 shall apply as if this Determination were an Act of Parliament.

12 In this Determination—

- a) “**2003 Act**” means the Communications Act 2003 (c.21);
- b) “**BT**” means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989;
- c) “**Director**” means the Director General of Telecommunications as appointed under section 1 of the Telecommunications Act 1984;
- d) “**GC notification**” has the meaning given to it in recital (D) to this Determination;
- e) “**GC19**” means General Condition 19 referred to in recital (D) to this Determination;
- f) “**Ofcom**” means the Office of Communications;
- g) “**Relevant Period**” means the period beginning on 25 July 2003 and ending on the day of the publication of this final Determination;
- h) “**The Number**” means The Number (UK) Limited, whose registered company number is 4352737 and whose registered office is at Sterling House, Malthouse Avenue, Cardiff Gate Business Park, Cardiff F23 8RA;
- i) “**Transitional Provisions**” means sections 408 and 411 of, and Schedule 18 (see, in particular, paragraphs 2 and 7) to, the 2003 Act, the Communications Act 2003 (Commencement No.1) Order 2003 (S.I. 2003/1900 (C. 77)) and the Office of Communications Act 2002 (Commencement No.3) and Communications Act 2003 (Commencement No 2) Order 2003 (S.I. 2003/3142 (C. 125));
- j) “**USC7**” means Universal Service Condition 7 referred to in recital (E) to this Determination.

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



**David Stewart**

**Director of Investigations**

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

{date}

### **Schedule**

#### **A Introduction**

**1** This Schedule specifies the only information that BT—

- (a)** has, during the Relevant Period, been required to make available to The Number in supplying the contents of the OSIS database;
- (b)** shall make available in meeting a reasonable request of it from The Number, pursuant to paragraph 19.1 of GC19.

**2** Paragraph 19.1 of GC19 provides that—

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

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

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

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

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

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

**B The ‘name and address’ of a BT ‘Subscriber’ of a ‘Publicly Available Telephone Service’ (including any other ‘End-User’ assigned a ‘Telephone Number’ originally ‘Allocated’ to BT)**

**4** BT is only required under GC19 to make available to The Number the name and address (each of which has the meaning set out in the explanatory statement accompanying this Determination) of each of BT’s ‘Subscribers’ (including any other ‘End-User’ assigned a

'Telephone Number' originally 'Allocated' to BT) and the 'Telephone Number(s)' assigned to the 'Subscriber' (including such an 'End-User') for its use of 'Publicly Available Telephone Services'.

5 The terms 'Publicly Available Telephone Service' and 'Subscriber' are defined under paragraph 1 of Part 1 of the Schedule to the GC notification, respectively, as follows—

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

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

### **C Relevant 'Telephone Number(s)' assigned to a BT 'Subscriber' of PATS**

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

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

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

7 Therefore, any number which—

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

(c) has not been assigned by BT under its contract with the 'Subscriber' in question for the use of a 'Publicly Available Telephone Service' only,

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

#### **D Directory status information**

**8** In accordance with paragraph 19.4 of GC19, BT shall not carry out its obligations under GC19 in a way that infringes Relevant Data Protection Legislation. In particular, so far as BT has during the Relevant Period made available contents of its OSIS database to The Number specified in this Schedule, BT has been required to indicate which of the following directory status options apply to the directory information provided for each specific Telephone Number—

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

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

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

## 1.2 Conduit Dispute

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

#### **WHEREAS—**

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

**(B)** section 190 of the 2003 Act sets out the scope of Ofcom’s powers in resolving a dispute which may, in accordance with section 190(2) of the 2003 Act, include—

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

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

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

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<sup>6</sup> See at: [http://www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/2003/cond\\_final0703.pdf](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/cond_final0703.pdf)

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

**(E)** on 22 July 2003, the Director also published a notification<sup>7</sup> under regulation 4(10) of the Electronic Communications (Universal Service) Regulations 2003<sup>8</sup> entitled '*Designation of BT and Kingston as universal service providers, and the specific universal service conditions - A statement and Notification issued by the Director General of Telecommunications on the implementation of the Universal Service Directive*' setting out his reasons for, in effect, designating BT as a universal service provider and setting the Universal Service Conditions in Annex A thereto, such as Universal Service Condition 7 ("**USC7**"), applicable to BT which, in effect, took effect on 25 July 2003, requiring in paragraph 7.4 that—

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

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

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

**(H)** under USC7.2-5, BT is required to make available to persons specified in USC7 the database<sup>9</sup> of directory information for all subscribers (including subscribers of other communications providers) that BT is required to maintain under USC7.1. As noted above, USC7.4 regulates the charges that BT may make for the provision of that database, in particular by requiring that those charges be cost oriented. Conduit submitted that BT's charges do not comply with USC7.4;

**(I)** on 13 January 2006, Ofcom decided to handle this dispute. In Ofcom's notification to the parties of that decision, Ofcom noted that USC7 does not properly implements Article 5 of the Universal Service Directive<sup>10</sup> and it is therefore beyond Ofcom's powers and unlawful;

**(J)** on 3 February 2006, Conduit submitted that GC19 as well as USC7 was relevant to the issues in dispute. Among other things, Conduit stated that as well as discussions relating to the provision of the OSIS product, it had specifically requested the Directory Information of BT's subscribers from BT Retail, but that BT had refused to provide the information other than through OSIS;

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<sup>7</sup> See at: [http://www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/2003/uso0703.pdf](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/uso0703.pdf)

<sup>8</sup> S.I. 2003/33.

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

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

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

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

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

**(M)** on 17 August 2006, Ofcom issued for consultation a draft Determination, together with an explanatory statement, to resolve this dispute, which consultation (the "**first consultation**") invited responses on Ofcom's provisional findings by 21 September 2006. Ofcom received comments from the parties to this dispute and other interested parties;

**(N)** on 15 February 2007, following its consideration of responses received to the first consultation, Ofcom issued for further consultation a revised draft Determination, together with an explanatory statement, to resolve this dispute, which consultation invited responses on Ofcom's provisional findings by 7 March 2007;

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

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

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

***I Declaration of rights and obligations, etc.***

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

**2** As a result of the declaration in paragraph 1. above, no issue arises with respect to which Ofcom may lawfully make a declaration—

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

by reference to, or under, USC7.

**3** Ofcom further declares, pursuant to section 190(2)(a) of the 2003 Act, that BT has during the Relevant Period been required to make available to Conduit only the information specified in the Schedule hereto pursuant to paragraph 19.1, in accordance with the terms of paragraphs 19.3 to 19.4, of GC19 to the extent that such information has been provided by BT as part of the contents of the OSIS database.

**4** As a result of the declaration in paragraph 3 above, Ofcom directs, pursuant to section 190(2)(b) of the 2003 Act, to fix the charges for the transaction between BT and Conduit as follows:

- i) for the first period beginning on 25 July 2003 and ending on 31 March 2004, **£6,649**;
- ii) for the second period of 12 months beginning on 1 April 2004 and ending on 31 March 2005, **£5,934**;
- iii) subject to sub-paragraph iv) and paragraph 5 below, for each subsequent consecutive period of 12 months beginning on 1 April and ending on 31 March the first such period beginning on 1 April 2005 and ending on 31 March 2006, **£5,967**;
- iv) where the last subsequent consecutive period referred to in sub-paragraph iii) above is a period of less than 12 months, the sum of **£5,967 adjusted pro rata for the number of days that have elapsed since the end of the previous consecutive period of 12 months.**

**5** For the reasons set out at paragraphs 10.48 to 10.141 of the explanatory statement accompanying this Determination, these charges have been calculated on the basis that the information set out in the Schedule hereto has been (and continue to be) provided by BT as part of the contents of the OSIS database and supplied to the specified number of downstream information providers, including Conduit. Therefore, the charges fixed by Ofcom for the purposes of paragraphs 4 iii) and iv) above shall only apply to such information if:

- i) it continues to be provided by BT to Conduit as part of the contents of the OSIS database;
- ii) it continues to be so provided to the same specific number of downstream information providers, including Conduit, as used in Ofcom's calculations set

out in the explanatory statement accompanying this Determination on the same terms, including format.

For the avoidance of doubt, in fixing the charges under paragraphs 4 iv) above, Ofcom is not requiring BT in the future to provide the above-mentioned information to Conduit as part of the contents of the OSIS database.

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

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

**7** However, for the reasons set out at paragraphs 10.114 to 10.125 of the explanatory statement accompanying this Determination, Ofcom makes no direction under section 190(2)(d) of the 2003 Act (requiring payment of sums by way of adjustment of an under- or over-payment).

## ***II Declaration as to payment of Conduit's costs of bringing dispute***

**8** Ofcom makes no determination, pursuant to section 190(6)(a) of the 2003 Act, requiring BT to make payments to Conduit in respect of any costs and expenses incurred by Conduit in consequence of the reference of the dispute to Ofcom, or in connection with it.

## ***II Binding nature and effective date***

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

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

## ***III Interpretation***

**11** For the purpose of interpreting this Determination—

- (a) except as otherwise defined in paragraph 11 below of this Determination, words or expressions used in this Determination (and in the recitals hereto) shall have the same meaning as they have been ascribed in, under or for the purposes of the GC notification;
- (b) headings and titles shall be disregarded; and
- (c) the Interpretation Act 1978 shall apply as if this Determination were an Act of Parliament.



**12** In this Determination—

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

**13** The Schedule to this Determination shall form part of this Determination.

**David Stewart**

**Director of Investigations**

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

{date}

**Schedule**

**A Introduction**

- 1 This Schedule specifies the only information that BT—
- (a) has, during the Relevant Period, been required to make available to The Number in supplying the contents of the OSIS database;
  - (b) shall make available in meeting a reasonable request of it from The Number, pursuant to paragraph 19.1 of GC19.
- 2 Paragraph 19.1 of GC19 provides that—

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

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

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

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

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

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

**B The ‘name and address’ of a BT ‘Subscriber’ of a ‘Publicly Available Telephone Service’ (including any other ‘End-User’ assigned a ‘Telephone Number’ originally ‘Allocated’ to BT)**

- 4 BT is only required under GC19 to make available to Conduit the name and address (each of which has the meaning set out in the explanatory statement accompanying this Determination) of each of BT’s ‘Subscribers’ (including any other ‘End-User’ assigned a ‘Telephone Number’ originally ‘Allocated’ to BT) and the ‘Telephone Number(s)’ assigned to the ‘Subscriber’ (including such an ‘End-User’) for its use of ‘Publicly Available Telephone Services’.

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

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

*specific facilities for End-Users with disabilities or with special social needs and/or the provision of non-geographic services;*

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

## **C Relevant ‘Telephone Number(s)’ assigned to a BT ‘Subscriber’ of PATS**

**6** The term ‘Telephone Number’ is defined under paragraph 1 of Part 1 of the Schedule to the GC notification as follows—

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

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

**7** Therefore, for the avoidance of any doubt, any number which—

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

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

## **D Directory status information**

**8** In accordance with paragraph 19.4 of GC19, BT shall not carry out its obligations under GC19 in a way that infringes Relevant Data Protection Legislation. In particular, so far as BT has during the Relevant Period made available contents of its OSIS database to Conduit specified in this Schedule, BT has been required to indicate which of the following directory status options apply to the directory information provided for each specific Telephone Number—

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

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

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

## Section 2

# Summary

### Main issues

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

### The August 2006 draft determinations

- 2.7 On 17 August 2006, Ofcom issued for public consultation draft determinations (together with an explanatory statement setting out Ofcom's reasoning) in respect of its provisional views as to the resolution of these two disputes (the “**August 2006 document**”).<sup>11</sup> Comments on these provisional findings were requested by 21 September 2006.
- 2.8 In light of its consideration of responses received, Ofcom has revised certain of its provisional views on how these disputes should be resolved. It is for this reason that Ofcom is issuing further draft Determinations and inviting comments on the revised

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<sup>11</sup> <http://www.ofcom.org.uk/consult/condocs/dqdispute/dqdispute.pdf>

provisional findings from the parties to the disputes and any other interested parties. **Annex 1** to this explanatory statement sets out details as to how to respond to this further consultation, which closes on **7 March 2007**.

## History

- 2.9 The background to these disputes, including the nature of the OSIS database and the parties' businesses and the fuller history of these disputes, is set out in **Section 3** of this explanatory statement. Brief details of the main responses received to the August 2006 document are summarised at **Section 4**.
- 2.10 In August 2002 and July 2000, The Number and Conduit, respectively, entered into licence agreements with BT for their use of, and access to, BT's OSIS database. Under standard terms, BT charged each licensee a combination of fixed annual charges and a "per search" charge for the data needed to provide directory enquiry services to a user. BT's own businesses also paid these charges under internal accounting arrangements.
- 2.11 BT's OSIS database contains directory information of both BT and non-BT customers and BT pays other communications providers ("**CP(s)**")<sup>12</sup> 66 pence per compiled entry in the database to obtain this data.<sup>13</sup>
- 2.12 In June 2003, BT issued notices to The Number and Conduit to terminate their OSIS licences, in the expectation that new licence terms could be agreed. No new licences have yet been agreed. In the meantime, the present licences effectively remain in force by BT granting a series of short term licence extensions.
- 2.13 During negotiations between the parties to each dispute as to the terms of new licences, the European Court of Justice ("**ECJ**") delivered its judgment on 25 November 2004 in Case C-109/03, *KPN Telecom BV v. OPTA* ("**KPN**"). This judgment was a ruling as to what 'relevant information' had, as a minimum, to be supplied to ensure provision of universal service directories and directory enquiry services under a provision of an EC directive that has now been repealed and, so far as is material to these disputes, been replaced by Article 25(2) of the Universal Service Directive ("**USD**").
- 2.14 The Court decided on the facts in that case that 'relevant information' comprised the name, address and telephone number of subscribers who have not expressly objected to being listed in a published directory. The Court further decided that only costs which related to the additional costs of making such data available to the requesting parties could be recovered by *KPN*. As regards data other than 'relevant information', the Court held that, if such data was supplied even though not required by the EC directive, there is no requirement which prevents any additional costs (e.g. for compilation) from being invoiced to requesting parties.

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<sup>12</sup> References throughout this document to a 'communications provider' (a "**CP**") means, unless the context otherwise requires, a person who (within the meaning of section 32(4) of the 2003 Act) provides an electronic communications network or an electronic communications service.

<sup>13</sup> BT has set a 'split charge' for directory information of 23.8p for a 'simple' record and £2.44 for a 'complex' record. New communications providers will be paid these sums, but in practice CPs that signed contracts before these charges were introduced are almost all on the previous terms and will be paid 66p.

## Overview of Ofcom's analysis

- 2.15 The scope of these disputes was set by Ofcom to be:
- (1) Whether BT's charges to The Number and Conduit for supplying directory information ("**BT's charges**") are consistent with BT's obligations under USC7 and/or GC19.
  - (2) Subject to Ofcom's determination in respect of the issues in (1) above:
    - a. What BT's charges should be moving forward; and
    - b. What BT's charges should have been for the period between 25 July 2003 and the date of Ofcom's final determination in relation to these disputes; and what, if any, adjustments should be made to payments made by The Number and Conduit, respectively, to BT in respect of the directory information supplied during this period.
- 2.16 In setting the scope in this way, Ofcom made clear that its assessment of each dispute would need to consider:
- (i) what rights and obligations, if any, were relevant to the dispute in relation to USC7; and
  - (ii) what rights and obligations, if any, were relevant to the dispute in relation to GC19.
- 2.17 **Section 5** summarises the key legal, regulatory and contractual issues relating to these disputes.
- 2.18 **Section 6** then outlines Ofcom's provisional conclusions in relation to USC7. Ofcom has provisionally concluded that USC7 is unlawful. As a result, Ofcom is minded to determine that BT is not required to provide the OSIS database under USC7. No issues can therefore arise in relation to the consistency of BT's charges for OSIS with USC7.
- 2.19 As a result, the main issue to be determined by Ofcom under the scope of these disputes is whether BT's respective charges to The Number and Conduit for supplying certain directory information via the OSIS database are consistent with BT's obligations under GC19.
- 2.20 This requires Ofcom to assess the specific requirements placed on BT by GC19 in respect of BT's provision of information to The Number and Conduit.
- 2.21 **Section 7** deals with a number of preliminary issues in relation to the requirements of GC19 in the context of these disputes. That Section considers a number of points raised in response to the August 2006 document. In summary, Ofcom concludes that:
- (i) BT is a relevant CP and must therefore comply with the terms of GC19;
  - (ii) BT has been required to comply with GC19 for the period since 25 July 2003 relevant to these disputes;

- (iii) The Number and Conduit are both persons, in principle, with 'rights of access' to the information required to be provided, on request, under the terms of GC19; and
- (iv) The Number and Conduit have both, in effect, made a request to BT for information under the terms of GC19 as part of their continuing requests under the licence arrangements for the data within OSIS, and were, therefore, both entitled to receive such information on those terms for the period since 25 July 2003 relevant to these disputes.

2.22 In **Section 8**, Ofcom considers several arguments raised, particularly by The Number and Conduit in their joint response to the August 2006 document, about Ofcom's approach in assessing the specific information BT was required to provide under GC19. In summary, they argue that, in making this assessment, Ofcom has failed to take into account its obligations arising under relevant EU legislation. In particular, they state that Ofcom has ignored some important principles of interpretation arising from EU case law. Our provisional conclusion is that it is not possible legally to interpret the information required by GC19 more broadly than the plain and literal meaning to defined terms for the purposes of GC19.

2.23 In light of this, in **Section 9** Ofcom assesses the data which BT is, and has been, obliged to provide to The Number and Conduit under the requirements of GC19 since 25 July 2003.

2.24 In summary, Ofcom concludes that:

- (i) BT is only required to provide information about the following subscribers:
  - o BT's own subscribers of publicly available telephone services ("**PATS**"); and
  - o subscribers contracting with other CPs for the supply of PATS to the extent that those subscribers have been assigned telephone numbers originally allocated to BT;
- (ii) In relation to the above subscribers, the information that BT must provide – the defined 'Directory Information' within GC19 – consists of the name, address and telephone number *of the subscriber* where:
  - o 'name' consists of those pieces of information about how the subscriber is known which have been provided to BT for the purposes of concluding the contract for PATS;
  - o 'address' consists of those pieces of information about the location at which the PATS is to be supplied (i.e. the installation address) which have been provided to BT for the purposes of concluding the contract for PATS; and
  - o 'telephone number' is the number assigned to the subscriber by BT for their use of the PATS in question.
- (iii) Under the terms of GC19.4, BT is required to provide, along with the 'Directory Information' detailed above, details of a subscriber's chosen directory status (i.e. whether they want their information to be available to users of voice and on-line directory service providers and/or included in a paper directory or whether they want to be ex-directory), including, where necessary, the information that the



subscriber has chosen to withhold part of their address for display within a directory for data protection purposes.

- 2.25 The conclusions above mean that, in Ofcom's provisional view, BT has, under the terms of GC19, only been obliged to provide a sub-set of the data actually provided to The Number and Conduit in the form of OSIS.
- 2.26 In **Section 10** Ofcom considers what requirements fall on BT by virtue of its obligation to provide the sub-set of data (referred to in this document as the "**BT GC19 data set**") on cost oriented terms. Ofcom has provisionally accepted the submission made by The Number (responding to the August 2006 document) that, in order to resolve these disputes, it must set the cost oriented charges for the provision of the BT GC19 data set for the period since 25 July 2003.
- 2.27 In setting a charge, Ofcom has considered the cost information provided by BT in relation to its provision of the OSIS database. Ofcom's provisional view is that, in light of *KPN*, only certain costs can be recovered. Given Ofcom's view that the information that BT must provide under GC19 is information which BT would need to obtain in order to manage the provision of PATS to the subscriber, Ofcom's provisional view is BT should not recover any costs of gathering the information from subscribers in setting a charge for the BT GC19 data set.
- 2.28 As such, BT can only recover the costs of making the BT GC19 data set available to requesting parties. Ofcom has assessed which of the costs BT has incurred in providing OSIS are relevant to its provision of the BT GC19 data set and concluded that only costs associated with transmitting the data to requesting parties, managing the commercial relationship with those parties and allowing new customers access to the data should be recoverable from charges for the BT GC19 data set.
- 2.29 Given this analysis and Ofcom's views that, in the light of the relevant cost drivers, costs should be recovered equally from all requesting DIPs, Ofcom has provisionally fixed the following charges:

**Table 2.1: Provisionally determined charge for the BT GC19 data set**

Period	Charge for BT GC19 data set during period (per DIP)
25 July 2003 – 31 March 2004	£6,649
1 April 2004 – 31 March 2005	£5,934
1 April 2005 – 31 March 2006	£5,967
1 April 2006 onwards	£5,967 <sup>1</sup>

Note: 1. Annual charge applying for each 12 month period starting on 1 April. Charge should be pro-rated for any period of less than 12 months for which data is supplied within OSIS.

- 2.30 These charges will apply moving forward to the extent that the BT GC19 data set continues to be provided as an intergral part of OSIS. If parties request that BT provide the data separately from OSIS (i.e. as a stand alone product), then the cost oriented charge for such a product would need to reflect the actual costs incurred in providing it in this way and would be dependent on the number of parties requesting this separate product. As such, the determined charge need not apply. Furthermore, the determined charges for the BT GC19 data set provided as part of OSIS have been calculated based on a set number of DIPs purchasing OSIS. Should the number of DIPs change, the charges above may be recalculated. However, at all

times, BT must comply with the terms of GC19 in setting charges and the principles established by Ofcom in terms of cost recovery should be followed.

- 2.31 **Section 10** also considers whether there should be any retrospective adjustment to the amounts paid by The Number and Conduit to BT for the provision of data from OSIS.
- 2.32 Ofcom considers that both The Number and Conduit requested and wanted all of the data received from OSIS. As there is no clear and non-arbitrary way for Ofcom to identify the price paid for the notional sub-set of BT GC19 data within OSIS, then there is no clear means for Ofcom to assess whether the parties have overpaid for this data set against the provisional cost oriented charges calculated by Ofcom. Ofcom therefore provisionally considers that it would not be appropriate in the circumstances of the present disputes for Ofcom to adopt any of the approaches considered in **Section 10** to attempt to evaluate overcharging for the BT GC19 data set, since these necessarily involve arbitrary (and therefore potentially unfair) allocations of amounts paid (because implied prices are not identifiable). On that basis, no issues arises as to Ofcom exercising its discretion under section 190(2)(d) of the 2003 Act to require the payment of sums by way of an overpayment (if any).

### Ongoing Ofcom policy review and the continued provision of OSIS

- 2.33 Ofcom recognises that its provisional views for how these disputes should be resolved may potentially affect not only the parties to these disputes, but also a number of other stakeholders, including other OSIS licencees, certain CPs subject to GC19 and, ultimately, UK consumers. Ofcom also recognises that these provisional views raise a number of concerns about the way in which directory information markets function moving forwards.
- 2.34 In particular, stakeholders are likely to be concerned that the regulatory arrangements put in place by Oftel in 2002 to ensure that a single database of directory information was available to downstream DIPs cannot stand without some modification. Stakeholders may also be concerned that the data BT and other CPs are obliged to supply, on request, under GC19 is too narrow in scope compared to the data currently available from OSIS, particularly with regards to business entries (where much more information than 'name', 'address' and 'telephone number' is currently provided), so that Ofcom should seek to put also the latter data on a regulatory footing (as opposed to leaving it purely to commercial arrangements).
- 2.35 However, for reasons explained in this explanatory statement, Ofcom's powers in resolving the present disputes (as referred to Ofcom under section 185(2) of the 2003 Act) are principally to declare the rights and obligations of the parties to these disputes by reference to BT's existing obligations (i.e. its conditions of entitlement) that have been lawfully imposed under section 45 of the 2003 Act, rather than to set, modify, or revoke such conditions, for which separate statutory procedures and tests must be followed.
- 2.36 To address any potential stakeholder concerns arising from our consideration of these disputes, Ofcom has commenced a policy review and, at present, Ofcom expects to issue for public consultation an initial policy paper aimed at canvassing stakeholders' views on the needs for future regulation in this area. Ofcom's primary concern moving forward is to guarantee:
- (i) that UK consumers continue to have access to the relevant 'universal services', that is to say high-quality and affordable directories and DQ services;

- (ii) that, in order to serve the interests of UK consumers, directory DIPs continue to have access to the information necessary to offer such services on the appropriate terms; and
  - (iii) that the delivery of these objectives is achieved in a legally robust manner, and with regulation that is clear and the minimum necessary to achieve these policy objectives.
- 2.37 In the meantime, until Ofcom has consulted with stakeholders on any such appropriate changes and any necessary new regulation is in place, Ofcom expects that BT will continue to supply persons, such as The Number and Conduit, with OSIS data on a commercial basis under their OSIS licences. In providing OSIS to its competitors in the supply of directory information services, BT must, of course, ensure compliance with competition law.
- 2.38 BT has stated to Ofcom that, despite the changes to the regulatory rules which would apply should Ofcom's provisional views on USC7 and GC19 be confirmed, it recognises that demand for OSIS will continue. BT wishes to ensure a smooth transition to any new arrangements – e.g. where DIPs may require provision of the BT GC19 data set separately from OSIS.
- 2.39 To this end, BT has stated that it does not intend to deliberately disrupt the marketplace or raise competition concerns, although it points out that its ability to provide OSIS is dependent on it continuing to receive the current set of directory data from other upstream communications providers. Again, Ofcom believes that other communications providers will continue to meet their own obligations under GC19 and under the contractual arrangements in place with BT. BT also points out that overall demand for OSIS may change if certain DIPs require only the BT GC19 data set and that this may change the economics of the future provision of OSIS. Ofcom will consider this as part of its policy review in this area.

## Section 3

# Background to and history of the disputes

## Introduction

- 3.1 This Section sets out key background relevant to the two disputes concerning the terms of access to certain directory information supplied by BT. It covers background on:
- the provision of directory information services in the UK, covering market liberalisation and the range of services generally on offer (see **paragraphs 3.3 to 3.9**);
  - the 'Operator Service Information System' ("**OSIS**") database supplied to providers of directory information services (see **paragraphs 3.10 to 3.23**);
  - the nature of the businesses of the parties to the disputes and other interested parties (see **paragraphs 3.24 to 3.45**);
  - the history of negotiations between the parties prior to the referral of the disputes to Ofcom for resolution (see **paragraphs 3.46 to 3.57** in relation to The Number/BT dispute and **paragraphs 3.71 to 3.77** in relation to the Conduit/BT dispute);
  - Ofcom's decision to accept the disputes (see **paragraphs 3.58-3.64** in relation to The Number/BT dispute and **paragraphs 3.78-3.81** in relation to the Conduit/BT dispute);
  - the issues considered in including GC19 issues within the scope of the disputes (see **paragraphs 3.65-3.70** in relation to The Number/BT dispute and **paragraphs 3.82 to 3.85** in relation to the Conduit/BT dispute);
  - the finalised scope of the disputes (see **paragraphs 3.86 to 3.87**); and
  - the period of potential claim for retrospective adjustment of over-payments (see **paragraphs 3.88 to 3.90**).
- 3.2 For the avoidance of doubt, **this Section** broadly duplicates Section 3 of the August 2006 document. **Section 4** then summarises the main responses received in response to that document.

## The provision of directory information services in the UK

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

- (ii) **on-line DQ services** where users will submit search requirements via a website in the expectation of receiving the telephone number they are looking for<sup>14</sup>; and
- (iii) **paper directories** of telephone numbers together with other data.

3.4 The services offered can vary within the above categories. However, two main types of searching criteria exist:

- (i) **name-specific searches** – i.e. the user knows the name of the person/business they require the telephone number for. e.g. “Mr R Jones, Acacia Avenue, Bristol”; “Natwest Bank, High Street, Ilford”; and
- (ii) **classified business searches** – i.e. the end-user wants a telephone number for a particular type of business maybe in a particular location. e.g. “Plumber in Muswell Hill”; “taxi firm in Nottingham”; “printers in Belfast”.

### Voice DQ and on-line DQ services

3.5 The voice DQ market was liberalised in December 2002, when services on the new ‘118 XXX’ number range began operating in parallel with the legacy ‘192’ and ‘153’ DQ service access codes. The legacy services ceased operating in August 2003. Prior to the introduction of ‘118 XXX’ numbers, end-users using ‘192’/‘153’ would be routed to the DQ service provider selected by their network provider. BT operated its own voice DQ business and therefore all 192/153 calls made by BT-connected customers would route to the BT-operated voice DQ service. Other voice DQ providers would compete with BT for the wholesale business of the remaining network providers in order to receive the 192/153 calls of their customers.

3.6 The launch of ‘118 XXX’ numbers meant that users could directly select their preferred voice DQ service. This led to a number of new entrants providing voice DQ services in the UK (including The Number and Conduit), and it resulted in an overall reduction in BT's share of voice DQ calls. Most voice DQ providers offer callers a choice of name-specific or classified business searches. Many voice DQ providers will also offer call connection services to customers, which services essentially mean that calls are forwarded to the searched-for number without the need to re-dial. Ofcom published consumer research on voice DQ services in March 2006<sup>15</sup>, which research showed that the average cost for voice DQ services was 54p per call without call connection for a single number request.

3.7 Since 2002, voice DQ volumes have fallen, while growing internet usage has led to the use of on-line DQ services increasing rapidly. On-line DQ services also tend to offer both name-specific and classified business searches to users. On-line DQ services are usually offered free to users, funded by advertising and paid-for classified links.

### Paper directories

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

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<sup>14</sup> Ex-directory records, and those for inclusion only in voice DQ services are excluded from on-line searches.

<sup>15</sup> [http://www.ofcom.org.uk/media/news/2006/03/nr\\_20060327](http://www.ofcom.org.uk/media/news/2006/03/nr_20060327)

part of BT's line rental service. Ofcom understands that BT also provides directories to customers of other CPs.

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

## OSIS

### The data in OSIS

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

**Table 3.1: OSIS data fields**

NO	FIELD NAME	VALUE	EXPLANATION
1	Identifier	CCYY-MM-DD- hh.mm.ss.micros	Unique identifier for each record in specified format.
2	Record type	A C E G J	Categorises record as single or grouped entry Single entry Single entry cross reference Group Entry Group Entry cross reference Group Header
3	Main/Additional indicator	M, A	Identifies the main entry where identical entries exist for the same number – eg husband and wife both listed
4	Cessation date	CCYY-MM-DD	Effective date for cessation where applicable
5	Entry type	1 2 3	Captures the customer's chosen directory status DE – normal directory entry XD/NC – ex-directory no calls DQR – number is available from voice DQ
6	Tariff/customer type	1 2 3	Categorises record according to tariff type Business Not used Residential
7	Merge indicator	Any alphanumeric character	Used to distinguish between different groups with the same header details
8	Priority	A, S, Z	Sortation priority within a grouped entry. Sortation is alphabetical but can be over-ridden – A pushes to top, Z to bottom, S to middle.
9	Telephone number (internal)	e.g. 113=2345678	Formatted telephone number without leading zero and = after exchange code. If ex-directory field will contain asterisks
10	Telephone number (dialable)	e.g. 01132345678	Dialable number including exchange code.
11	Implementation/run date	CCYY-MM-DD	For update records this contains the effective date for the action. For data dump records (load) this contains the date that the data dump was produced from OSIS
12	Exchange code	e.g. 113=234	Relevant exchange code to which number connected, including separator
13	Postcode	e.g. N10 1QX	Standard format postcode May not be present if Partial Address Indicator set
14	Group Tariff Marker	1 3	Business and Mixed Residential
15	Line type	F L M N P R T Z	Type of telephone line: Fax Local rate (084) Mobile Normal Premium (09) Regional National (087) Freecall (080)

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16	Free Chargeable indicator	F, C, space	Indicates whether subscriber is charged for this directory entry: 'C' if entry is to be billed, otherwise 'F' or space for free
17	Indentation level	0, 1, 2, 3, 4	Used to structure grouped entries on OSIS. For single listings field will be null
18	DQ code/PB code	e.g. -01, 545	National phonebook area
19	BCM code	Spaces 9950 9955 9999	Business classification Residential FAX Doctor Business
20	Suppression code		A 64-character string each representing a downstream system
21	Parent identifier		For grouped entries, Identifies the parent record as set out in field 1
22	Typeface	1 4 5	Type of print required in directory entry Normal Bold Superbold
23	Action indicator	D, I or U	What to do with this OSIS record: Delete, insert or update
24	TPS marker		<b>Not used</b>
25	Name	Brown/Smith  Bayliss & Cox	Surname or name of a business/company. Initials contained within the name of a firm or company when followed by another name should be included in the name field. For example "Smith B & Jones"
26	Sub Header	HEAD OFFICE	Additional information that can sub-divide groups on a geographical basis, or by department within company detailed within group.
27	Sub Sub header	Parks Dept	See above
28	Sub Sub Sub header	Southern Branches	See above
29	Title	Dr, Sir, The, etc	Note: relates to professional titles, not Mr, Mrs, Ms
30	Initials/Forename	John, John B., J.B.	
31	Honours	OBE, MBE, KBE	
32	Business suffix	& Co., & Co. Ltd., Bros, Sons	
33	Business description	Coal Merchant, Dental Surgeon	Can be up to three words for standard entries. Up to five words for Special Directory Entries (end user charge applies)
34	Qualifier	Spares Department, Appointments only	Part of group entry. The data in this field will be shown on OSIS before the house number. Used to capture data which cannot be included in other fields
35	Premises/building name or No.	30, 30A, The Manor	
36	Street	Whitehall, Sussex Gdns, etc	
37	Locality	Stanningfield, Bromsgrove, Aston	Local area name if different from that of telephone exchange name
38	Appendix	Stores only	Appears after the locality in OSIS
39	Exchange	Cardiff, Tyneside, Brighton	Exchange name for a given phone number
40	Cross reference	TSB – see also Lloyds TSB	An entry which refers the reader to another entry in OSIS



41	Post Town		Not used
42	Post County		Not used
43	Partial Address Indicator	Y or N	Allows entry to be provided with limited address details for privacy reasons

3.14 As noted from **Table 3.1** above, three fields within OSIS which are, in fact, never used, namely: 'TPS marker', 'Post Town' and 'Post County'. Further, in Ofcom's understanding, not all data fields will be populated for all records. To aid our assessment for the purposes of these disputes (as set out in this explanatory statement), Ofcom has categorised the OSIS data fields into four broad headings:

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

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

**Table 3.2: Ofcom's categorisation of OSIS data fields**

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

### Data record types within OSIS

- 3.16 OSIS records may be either single or grouped entries. Single entries (including most residential entries) link one telephone number to one individual at an individual address. In contrast, grouped entries contain individual records relating to a group of telephone numbers allocated to a person or organisation. For instance, a bank or local authority may have a list of telephone numbers which they want to be published in paper directories and available to the public via on-line and voice DQ services. These numbers will have individual records which will be then be grouped together for ease of reference. BT's own illustration of how 'grouping' works is set out in Annex B to its letter of 13 July 2006 to Ofcom: see **Annex 6** to this explanatory statement.
- 3.17 OSIS records for grouped entries will invariably have more 'identification data fields' set than single entries and, for these entry types, 'group structure data fields' will be set. The extra identification data fields within a grouped entry provide details about the *actual user* of that specific telephone number that distinguish it from other telephone numbers provided to the same organisation, e.g. for a local authority, records within a grouped entry will contain the name of the authority (e.g. "London

Borough of Haringey"; "Winchester City Council"), the department within that authority to which the number connects (e.g. "Housing"; "Education") and possibly the use to which that number is put within the department (e.g. "Rental enquiries"; "24 hour line"; "emergency call-out"). To this end, the organisation can populate any of 6 data fields 'Name', 'Sub header', 'Sub sub header', 'Sub sub sub header', 'Qualifier' and 'Appendix' to distinguish between telephone numbers within a grouped entry.

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

### **BT's provision of OSIS**

- 3.21 By way of an introductory background, a brief summary of how BT provides OSIS is set out below (this is expanded upon further elsewhere in this document, particularly at **Section 10** when BT's activities are assessed in detail):
- (i) BT acquires data from various upstream CPs on terms set out in Schedule 11 of BT's standard form of contractual terms, known as the 'Standard Interconnect Agreement' ("**SIA**"), which includes the charges BT itself pays for the receipt of data. (These contractual arrangements are considered further in **Section 5** of this document.);
  - (ii) BT aggregates all data received to provide access to OSIS. Licensees to OSIS receive twice yearly 'refreshes' of the database via CD-Rom and update files via file transfer 6 days a week containing all amendments, deletions and additions to the records within OSIS.
  - (iii) BT charges OSIS licensees according to Section 2.0 of the BTWDS Price list (see **Annex 5** to this explanatory statement). Amounts are paid to BT based on the use the licensee makes of the OSIS data to provide retail directory information services (e.g. providers of voice DQ services will pay amounts to BT based on the number of searches they make of the OSIS data; providers of paper directories will pay amounts to BT based on the number of paper directories distributed). BT Directories accounts for transfer charges in respect of its own use

of the OSIS data to provide BT's retail directories and voice and on-line DQ services.

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

### The "Customer-defined" nature of OSIS data

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

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

3.23 As stated above, **Section 10** sets out in more detail the specific tasks BT undertakes to provide the OSIS data, including the tasks involved in gathering data from customers. The fact that records are "customer-defined" means BT needs to undertake specific customer-facing activity to ensure the customer's wishes are captured in their OSIS record.

## Nature of businesses of the parties and other interested parties

### Introduction

3.24 To consider these disputes, it is necessary to take into account the nature of the parties' businesses.

### The Number

3.25 The Number provides voice and on-line DQ services to end-users in the UK. Voice DQ services are provided by The Number using a variety of numbers including, most notably, 118118.<sup>16</sup> On-line DQ services are provided on the [www.118118.com](http://www.118118.com) website.

3.26 The Number provides a number of other linked information services alongside its on-line and voice DQ services, such as cinema listings and train times. The Number also offers call connection services to callers to some of its voice DQ services. As part of providing such call connection services, Ofcom understands that The Number utilises its switch to make an outbound call to the requested telephone number using another provider's electronic communications network (within the meaning of section 32 of the 2003 Act) under certain wholesale interconnect arrangements agreed between The Number and such a provider. Pursuant to section 405 (which refers to section 32(4)) of the 2003 Act, Ofcom therefore understands that the outbound call is contractually made under the direction or control of The Number and is ultimately to be regarded as the person providing the call, i.e. the electronic communications service. In these circumstances, The Number is to be regarded as a CP for the purposes of the 2003 Act.

3.27 The Number entered into its current OSIS licence agreement with BT in July 2002.

3.28 The Number is owned by its US parent company, InfoNXX Inc ("**InfoNXX**"), a DQ service provider in the US.

### Conduit

3.29 Conduit operates its own branded voice DQ services in the UK through 118888 and 118848. Conduit also provides on-line DQ services through its web-site [www.118.com](http://www.118.com). Conduit also provides DQ services to certain UK mobile operators on an outsourced basis. As part of its voice DQ services, Conduit provides call connection services. Ofcom understands that Conduit, in providing such call connection services, makes outbound calls to the requested telephone number under similar arrangements to those mentioned above by The Number. Ofcom therefore considers that, for similar reasons, Conduit is also to be regarded as a CP for the purposes of the 2003 Act.

3.30 Conduit entered into the current OSIS licence with BT in July 2000, and has been purchasing the OSIS product from BT since October 1999.

3.31 Conduit is wholly-owned by Irish holding company Kandel Limited ("**Kandel**").

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<sup>16</sup> The Number also uses the following numbers: 118811; 118241; 118359; 118360; 118434; 118442; 118525; 118551; 118661; 118686; 118819; 118275; and 118227.

- 3.32 However, on 12 April 2006, Kandel became a wholly-owned subsidiary of InfoNXX, so that InfoNXX and Kandel ceased to be distinct. In a decision of 21 June 2006, the Office of Fair Trading (“**OFT**”) stated that it did not believe that the merger had resulted or could be expected to result in substantial lessening of competition within a market or markets in the UK. As such, the OFT did not refer the merger to the Competition Commission under section 22(1) of the Enterprise Act 2002<sup>17</sup>.

## **BT**

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

## **Thomson**

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

## **LSSi**

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

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<sup>17</sup> See: <http://www.of.gov.uk/NR/rdonlyres/0C67BEE7-4EBF-49D5-B62F-A743DBE51FA2/0/Infonxx.pdf>

## Kingston Communications

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

## History of dispute between The Number and BT

### The Number's original request to resolve a dispute

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

### History of negotiations between The Number and BT

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

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

- 3.51 Given that view, The Number asked BT to provide cost information to allow it to assess whether BT’s charges were consistent with the principles established in the *KPN* case.
- 3.52 In response, BT stated that it was “actively assessing any implications from the *KPN* case for the licensing of directory data under UK communications law and regulation.”<sup>18</sup> However, BT did not provide cost information to The Number as it stated that it was seeking clarity from Ofcom on the implications of the *KPN* judgment in the UK.
- 3.53 Following several exchanges between the parties, BT stated in a meeting with The Number on 2 August 2005 that it would only provide cost information to Ofcom and that it did not wish to negotiate OSIS charges with 30 or 40 individual OSIS licensees.
- 3.54 In the light of BT’s position, The Number advised BT that it would be referring the matter to Ofcom.
- 3.55 Ofcom received The Number’s dispute referral as noted above on 7 September 2005. At that time, Ofcom did not accept the dispute for resolution (and instead proposed that the dispute would remain unresolved – in an administrative process known as the “enquiry phase” – pending resolution of the issues relating to the potentially *ultra vires* nature of USC7 (discussed below).
- 3.56 On 11 November 2005, The Number wrote to Ofcom requesting that Ofcom accept the dispute and, on 1 December 2005, appealed Ofcom’s decision not to accept the dispute for resolution to the Competition Appeals Tribunal.
- 3.57 On 5 December 2005, Ofcom informed all parties that it accepted that it had erred in not accepting the dispute for resolution, and that it was appropriate for Ofcom to handle the dispute. As noted below, Ofcom also notified the parties that exceptional circumstances applied to this dispute and therefore that Ofcom considered that the four month statutory timetable normally applicable to disputes did not apply (and, given the need to deal with the issues relating to USC7, could not be met). Subsequently, The Number withdrew its appeal.

### **Ofcom’s acceptance of the dispute between The Number and BT**

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

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<sup>18</sup> Letter from BT to The Number, dated 2 June 2006.



as a CP) and the issue under dispute in relation to the provision of OSIS data, to conclude that The Number is a CP in relation to its dispute with BT. Specifically, The Number requires access to directory information from BT in order to identify telephone numbers for its users, which information is also used by The Number to provide its call connection service to users.

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

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

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

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

- 3.69 In its letter dated 8 March 2006, Ofcom informed The Number and BT of its views on the scope of the dispute before it. Ofcom had already taken the view that the parties were in dispute in relation to the charges set by BT for directory information, currently provided via OSIS. Ofcom's view was that, in considering the rights and obligations relevant to the provision of this information, it was appropriate to amend the scope of the dispute so as to consider both the rights and obligations relating to USC7 and those relating to GC19. Ofcom's reasons for taking that view were set out in paragraph 7.50 the August 2006 document.
- 3.70 Comments were invited on the proposed amended scope and the proposed scope was published in the Competition Bulletin. Comments were received by the parties and Ofcom informed the parties of its finalised scope in a letter dated 24 March 2006. This scope is set out at **paragraph 3.86** below.

### History of dispute between Conduit and BT

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

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

#### History of negotiations between Conduit and BT

- 3.74 In its Request, Conduit stated that it originally wrote to BT on 11 May 2005 requesting that BT reduce its charges for access to OSIS and apply these lower rates retrospectively from 1 June 2000<sup>19</sup> to 1 July 2005. Conduit also requested a detailed

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<sup>19</sup> This letter referred to backdating to 1 June 2000, although Conduit subsequently requested backdating to October 1999.

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

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

### **Ofcom's acceptance of dispute between Conduit and BT**

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

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

- 3.82 In its submission dated 3 February 2006, Conduit stated, among other things, that GC19 as well as USC7 was relevant to the issues in dispute. Conduit stated that as well as discussions relating to the provision of the OSIS product, it had specifically requested the directory information of BT's own subscribers from BT Retail (see letter of 3 June 2005 referred to at **paragraph 3.76** above), but that BT had refused to provide the information other than through OSIS.
- 3.83 As such, Conduit claimed that OSIS was the "agreed format" in which BT provided the data under GC19. Conduit went on to submit that the terms of the relevant OSIS licence meant that BT was failing to meet its obligations under GC19, particularly in light of the *KPN* judgment. Conduit stated that Ofcom should determine the extended scope of the dispute and invite further comments from the parties.
- 3.84 On 23 February 2006, BT wrote to Ofcom and challenged Conduit's view that the scope of the dispute should be amended to include reference to GC19 compliance.

In particular, BT stated that its letter of 9 June 2005 to Conduit did not constitute a refusal to supply BT's own subscriber data on a stand alone basis. Rather, BT argued that the letter stated that it was exploring technical and system changes and possible solutions to allow this data to be provided separately and that BT would keep Conduit and Ofcom informed of progress. **Section 7** of this explanatory statement sets out the detail of Ofcom's views on BT's submission.

3.85 On 8 March 2006, Ofcom wrote to Conduit and BT setting out its view that the parties were in dispute over the terms of supply of OSIS data and that in considering this issue it was appropriate to consider BT's obligations under both USC7 and GC19. Comments were invited on a proposed amended scope for the dispute and Ofcom wrote to the parties on 26 March 2006 with its finalised scope for these disputes. This is set out in **paragraph 3.86** below.

### Scope of the Disputes

3.86 Ofcom has set the scope of both disputes as follows:

- (1) Whether BT's charges to The Number and Conduit for supplying directory information ("**BT's charges**") are consistent with BT's obligations under USC7 and/or GC19.
- (2) Subject to Ofcom's determination in respect of the issues in (1) above:
  - a. What BT's charges should be moving forward; and
  - b. What BT's charges should have been for the period between 25 July 2003 and the date of Ofcom's final determination in relation to these disputes, and what, if any, adjustments should be made to payments made by The Number and Conduit, respectively, to BT in respect of the directory information supplied during this period.

3.87 In setting the scope in this way, Ofcom made clear that the assessment of this dispute would need to consider:

- i) what rights and obligations, if any, were relevant to this dispute in relation to USC7 in the light of its preliminary assessment that USC7 was *ultra vires* and in light of comments from the parties; and
- ii) what rights and obligations, if any, were relevant to this dispute in relation to GC19 taking full account, among other things, of the *KPN* judgement.

### Period of potential claim for retrospective adjustment of over-payments

3.88 In their original submissions, both The Number and Conduit requested reimbursement of perceived overpayments for OSIS data back to the dates at which they both began receiving OSIS data, i.e. in the case of The Number, April 2002 and, in the case of Conduit, October 1999.

3.89 As the above-mentioned scope specifies, Ofcom has decided that the relevant period for consideration of any retrospective adjustment of charges in this respect is between 25 July 2003 and the date of Ofcom's final determination in relation to this dispute. In setting the scope in this way, Ofcom clarified that it would not consider and give any direction in respect of any overpayments prior to this period.

- 3.90 This is because the legal basis of Ofcom's jurisdiction to handle this dispute is section 185(2) of the 2003 Act, which applies to disputes relating to rights or obligations conferred or imposed by or under Part 2 of the 2003 Act. In the present case, the relevant obligations imposed on BT under Part 2 of the 2003 Act are BT's obligations under USC7 and GC19, which came into force with effect from 25 July 2003. Ofcom's powers under section 190 of the 2003 Act are therefore limited to the period since 25 July 2003.

### **Confidential information**

- 3.91 During the course of our investigation of the matters for consideration in these disputes, we have received a substantial amount of information (including submissions) from the parties (as well as certain other persons). Ofcom has received such information either by those persons sending it voluntarily (or on our invitation) or in response to formal requests by Ofcom using its statutory powers.
- 3.92 Most of the information has been sent to Ofcom on an alleged confidential or commercially sensitive basis, despite our repeated requests to the parties that they should make, where possible, information (particularly with regard to submissions of a legal nature) available to all other interested parties, and either to send it all on a non-confidential basis or to mark for redaction only such limited material that properly may be regarded as raising confidentiality concerns.
- 3.93 We have made those requests as we have taken the general view in this case that disclosure of information (including, where we consider it appropriate, on our website) is likely to facilitate the resolution of these disputes. In particular, in order to resolve the issues at dispute, Ofcom needs to first set out the parties' positions and views and then assess them to arrive at our determination, which process includes responding to the parties' points in an open and transparent manner, so far as is possible.
- 3.94 In light of this, we have taken a view on information sent to us and marked by the parties as confidential or commercially sensitive information. We have decided that, for above-mentioned reasons, that a certain amount of that information is either not confidential or commercially sensitive in nature or should nonetheless be disclosed in the public version of this explanatory statement for the purpose of facilitating the carrying out of our functions in resolving these disputes, pursuant to our disclosure powers under section 393 of the 2003 Act. As regards such information provided by the parties that we consider either would or might seriously and prejudicially affect their interests, we have excluded that information from this public version and such excisions are indicated in the text of this document by the symbol '⌘'.

## Section 4

# Consultation on the draft determinations

## Introduction

- 4.1 On 17 August 2006, Ofcom issued for public consultation its draft determinations, together with an explanatory statement setting out Ofcom's reasoning, in respect of its provisional views as to the resolution of these two disputes (the "August 2006 document")<sup>20</sup>, which consultation invited responses on Ofcom's provisional findings by 21 September 2006.
- 4.2 The main provisional findings in the August 2006 document were:
- (i) USC7 is *ultra vires* and therefore no issue of whether BT's charges for access to OSIS was consistent with USC7 arises;
  - (ii) GC19 requires BT to provide a defined narrow sub-set of data within OSIS to DIPs such as The Number and Conduit on cost-oriented terms – i.e. the name and address of the subscriber and the 'Telephone Number' assigned for their use of PATS;
  - (iii) given that the DIPs had requested access to the whole of the OSIS database and that Ofcom could not determine within the scope of the dispute(s) what BT's charges for the whole of OSIS should have been – only what the charges for the sub-set of BT GC19 data should have been – no issue of historic overcharging arises;
  - (iv) given Ofcom's views on (iii) above, the resolution of the disputes did not require Ofcom to set an historic charge for the BT GC19 data set.
- 4.3 Responses were received from:
- (i) a joint response of 29 September 2006 from The Number and Conduit;
  - (ii) a response of 29 September 2006 by BT;
  - (iii) a response of 9 October 2006 by Thomson; and
  - (iv) a response of 6 October 2006 by Yell Group plc ("**Yell**"),
- which responses Ofcom has considered carefully.
- 4.4 In light of its consideration of these responses, Ofcom has revised certain of its provisional views on how these disputes should be resolved. It is for this reason that Ofcom is issuing further draft Determinations and inviting comments on the revised provisional findings from the parties to the disputes and any other interested parties. **Annex 1** to this explanatory statement sets out details as to how to respond to this further consultation, which closes on 7 March 2007.

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<sup>20</sup> <http://www.ofcom.org.uk/consult/condocs/dqdispute/dqdispute.pdf>

- 4.5 Ofcom has not set out in this explanatory statement all the submissions made by interested parties during the course of its investigation. Section 4 of the August 2006 document summarised the submissions made prior to the publication of the August 2006 document, whilst detailed points raised on specific areas were also set out in Sections 6 and 7 of that document alongside Ofcom's views on these points. Ofcom does not consider it necessary to repeat those submissions here.
- 4.6 However, this explanatory statement addresses the detailed responses received by Ofcom to the August 2006 document. **This Section** summarises those responses, while subsequent Sections provide more detail on points made in response to the different issues under consideration. Ofcom's views on submissions made are set out in these subsequent Sections ahead of providing detail on our revised provisional conclusions.

### Main (joint) response by The Number and Conduit

- 4.7 Ofcom received a joint response to the August 2006 document from The Number and Conduit on 29 September 2006<sup>21</sup>.
- 4.8 Firstly, The Number argues that USC7 is, in fact, lawful. As such, Ofcom should have determined that BT's charges for OSIS, were not 'cost-oriented' in light of the *KPN* judgment and that The Number and Conduit have overpaid and would therefore be due a refund. Furthermore, Ofcom should fix the charges for OSIS going forward.
- 4.9 Secondly, The Number argues that, given Ofcom's acceptance that The Number and Conduit each made an effective request under GC19, Ofcom has failed to discharge its statutory duty to resolve the disputes by failing to make a direction fixing the charges for the BT GC19 data set within OSIS, as requested by The Number and Conduit. The Number also states that Ofcom has given erroneous reasons for that failure. They therefore argue that Ofcom should fix the charge for this data and thereby determine the total amount of past overpayments by The Number and Conduit, respectively, and require BT to refund these sums.
- 4.10 Thirdly, Ofcom has failed to interpret GC19 correctly in a number of aspects, namely The Number alleges that Ofcom has:
- (i) in the light of the user-oriented objectives and requirements of the USD and the USD's primary aim, to ensure good-quality publicly available electronic communications services are available to consumers;
  - (ii) to ensure full compliance with data protection legislation;
  - (iii) to carry out an Impact Assessment under its statutory duty to do so;
  - (iv) to adopt an approach which is not liable to distort competition in the DQ industry;  
and
  - (v) in line with *KPN* and its duty to interpret national law in light of the wording and purpose of the directive it interprets, to take into account what other information users in the UK require when considering the scope of 'relevant information' in the UK context and should make a determination so as to include that information

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<sup>21</sup> Throughout this document, references to comments made in this joint response are, for simplicity, often related to The Number only.

in the scope of information to be provided under GC19: Ofcom has an opportunity and duty here to include all the information UK subscribers and users need within the scope of 'relevant information' (an approach supported by *KPN*).

- 4.11 Finally, Ofcom's proposal to reject The Number's request for a direction to BT to reimburse The Number's costs and expenses was based on its erroneous understanding of their duty and powers to resolve the disputes. The Number therefore requests Ofcom to reconsider its previous request for costs. Should Ofcom allow The Number's request in this regard, Conduit now requests that Ofcom should also allow its costs for similar reasons.

### **Main response by BT**

- 4.12 BT submitted a response to the August 2006 document on 29 September 2006.
- 4.13 BT welcomes Ofcom's draft Determinations and agrees, in broad terms, with Ofcom's proposed resolution of these disputes and the underlying reasoning.
- 4.14 BT's principal concern relates to Ofcom's interpretation of 'rights of access' under GC19. BT argues that Ofcom's interpretation raises the possibility of third parties acquiring directory information under the guise of it ultimately being used for purposes of the provision of directory services, but it actually ultimately being used for other purposes. BT is concerned that this would raise serious data protection issues and commercial concerns, including the viability of the provision of OSIS information.
- 4.15 BT also identifies a small number of factually inaccurate or misleading statements in the August 2006 document.

### **Main response by Thomson**

- 4.16 Thomson submitted a response to the August 2006 document on 9 October 2006.
- 4.17 Thomson raises five main points:
- (i) Thomson welcomes Ofcom's finding that BT's charges for, at least, the GC19 data set must be cost oriented and non-discriminatory. However, Thomson requests that Ofcom should state clearly that charges for GC19 data may only be based on the incremental cost of making the data available and that usage-based pricing is inconsistent with cost-based pricing.
  - (ii) Thomson welcomes Ofcom's recognition that additional technical information (specifically 'record processing' data) is required to enable DIPs effectively to use the 'basic' data provided by BT under GC19. Thomson also asks that Ofcom require BT (or any other relevant CP) to provide the necessary updates on at least a weekly basis, either as part of its GC19 obligations or as ancillary to them (and on the basis of the principles established in the *KPN* judgment).
  - (iii) Thomson argues that, as it had made a request for GC19 data, it is entitled to recover the excessive charges that it has incurred from BT since 25 July 2003, for the purposes of its complaint brought to Ofcom.
  - (iv) Ofcom should obtain a clear commitment from BT that it secures the continuity of supply of telephone subscriber data until any necessary substitute regime has been put in place. In the meantime, Thomson argues that BT should continue to



supply OSIS data to the DIPs on exactly the same licensing terms as it does at present. Ofcom should monitor any proposed changes to the current terms.

- (v) For the future, Thomson considers that Ofcom should seek to put in place the most efficient system for making basic subscriber data available. According to Thomson, this would require Ofcom to ensure that there is one entity responsible for the centralised consolidation of all subscriber data to be provided to DIPs.

### **Main response by Yell**

4.18 Yell submitted a response to the August 2006 document on 6 October 2006.

4.19 Yell raises four main points:

- (i) Yell asks for clarity on the interim position (that is, until Ofcom has carried out its policy review) under which BT will continue to supply OSIS data;
- (ii) Yell submits that Ofcom should not be excluding the separation of records on living individuals from businesses (and other bodies corporate and unincorporated) from the scope of the GC19 obligation;
- (iii) Yell asks Ofcom to correct certain factual errors in the description of the way OSIS data is used by Yell; and
- (iv) Yell comments on charging principles.

## Section 5

# Summary of legal, regulatory and contractual provisions

## Introduction

- 5.1 **This Section** sets out certain legal, regulatory and contractual provisions relevant to Ofcom's consideration of BT's regulatory obligations in these disputes as set out in **Sections 6 to 10** of this explanatory statement. In particular, the structure of **this Section** is as follows:
- (i) the historical context of the obligations relevant to the present disputes, including Ofcom's understanding of what the ECJ decided in the *KPN* case in respect of the referred questions for its preliminary ruling (see **paragraphs 5.2 to 5.43**);
  - (ii) details of the current EC regulatory framework, particularly measures which are relevant to the present disputes (see **paragraphs 5.44 to 5.86**);
  - (iii) provisions of relevant implementing domestic UK legislation and regulation (see **paragraphs 5.87 to 5.127**);
  - (iv) contractual arrangements relating to the provision of OSIS (see **paragraphs 5.128 to 5.151**).

## Historical context of the relevant obligations

### BT's obligations under the previous UK licensing regime

- 5.2 BT's regulatory obligation to provide directory information about its customers to certain other providers goes back to 1984, at the time BT was granted a licence under the Telecommunications Act 1984 (the "**1984 Act**").
- 5.3 In summary<sup>22</sup>, that obligation had, by 1991, been amended to include a requirement on BT to provide the contents of its electronic database of directory information (i.e. all the names, addresses and telephone numbers on the database which BT used to provide DQ services) in machine readable form to other public telecommunications operators ("**PTOs**") on their request.
- 5.4 That obligation on BT was subsequently amended to also make available such contents on request from persons other than PTOs for the purpose of enabling the provision of directories or DQ services. It remained in force until 24 July 2003, when the licensing regime under the 1984 Act was abolished. BT was required initially to provide such access on reasonable terms, subject to its recovery of fully allocated costs and a reasonable return on capital employed. The nature of this requirement was subsequently amended, so that BT had to supply the contents on fair, cost oriented and non-discriminatory terms.

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<sup>22</sup> Further details of BT's historical obligations were set out in Annex 8 to the August 2006 document.

- 5.5 In effect, the above-mentioned obligation was replaced by imposing a similar requirement on BT under USC7 to make available the contents of its database in machine readable form to any person seeking to provide publicly available directories or DQ services on fair, objective, cost oriented and non-discriminatory terms. (The full terms of USC7 and the reasons given for setting that *ex ante* requirement under the 2003 Act are set out below: see **paragraphs 5.118 to 5.127**)
- 5.6 Separately to its obligation discussed above, BT (as well as certain other licensees) was on request required under its licence (as a result of regulations<sup>23</sup> made in 1998 by the Secretary of State to implement the provisions of the Revised Voice Telephony Directive<sup>24</sup> (“**RVTD**”) to supply only to PTOs “the name, address and telephone number of [BT’s] Subscribers and of any other end-user sub-allocated a telephone number from those telephone numbers” on fair, cost oriented and non-discriminatory terms. On abolition of the licensing regime, this obligation was, in effect, replaced by imposing a similar requirement on CPs (including BT) under GC19. (The full terms of GC19 are set out below: see under **paragraph 5.114**).

### **Article 6(3) of the RVTD and the KPN judgment**

- 5.7 The said abolition of the licensing regime under the 1984 Act was a result of legislative changes in Community law, which measures had to be applied across the Community from 25 July 2003. The key provisions of those new measures relevant to these disputes are discussed below. Prior to that new regime, a dispute arose in the Netherlands between the incumbent (KPN Telecom BV) and two companies seeking to publish telephone directories on CD-ROM and on the Internet in competition with the universal service directory, published by KPN as result of its Dutch statutory duty to do so.
- 5.8 That dispute essentially concerned the extent and pricing of directory information that KPN was required under the provision in Dutch law, which implemented Article 6(3) of the RVTD. The full terms of that Article, as set out under Chapter II (entitled ‘Provision of a defined set of services which may be funded in the context of universal service’) of the RVTD, required that Member States had to ensure the availability of certain ‘directory services’ as follows:

**Article 6**

*Directory Services*

1. The provisions of this Article are subject to the requirements of relevant legislation on the protection of personal data and privacy, such as Directive 95/46/EC and Directive 97/66/EC.

2. Member States shall ensure that:

(a) subscribers have the right to have an entry in publicly available directories and to verify and, if necessary, correct or request removal of that entry;

(b) directories of all subscribers who have not expressed opposition to being listed, including fixed, mobile and personal numbers, are available to users in a form approved by the national regulatory authority, whether printed or electronic, or both, and are updated on a regular basis;

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<sup>23</sup> The Telecommunications (Open Network Provision) (Voice Telephony) Regulations 1998, S.I. 1998/1580.

<sup>24</sup> European Parliament and Council Directive 1998/10/EC

(c) at least one telephone directory enquiry service covering all listed subscribers numbers is available to all users, including users of public pay telephones;

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

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

- 5.9 In relation to such universal service directory services, the 7<sup>th</sup> recital to the RVTD's preamble clarified the following:

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

- 5.10 Following KPN's refusal to provide the companies with information other than basic data of its own subscribers (i.e. name, address, town/city, telephone number and postal code and an indication of whether the number is used exclusively as a fax number) and to supply such data at a price lower than NLG 0.85, the companies complained to the Dutch regulator ("OPTA"). OPTA first decided that KPN was obliged only to provide the basic data, but that KPN was to charge less than NLG 0.005 per entry. KPN as well as the two companies complained against that decision.
- 5.11 In its revised decision, whilst upholding its finding on the charge, OPTA decided that KPN was under an obligation to provide *all the information that it receives ready for use from its subscribers*, including the telephone number of the connection; name and initial letters, possibly company name; full address, including postcode; possible additional entry of the telephone number under a different name; entry as to whether the connection is used (exclusively) as a fax line; additional entry of mobile telephone number(s); additional entry relating to profession and additional entries in other municipalities. As a result, KPN appealed OPTA's decision to the District Court of Rotterdam, which rejected it by judgment of 21 June 2001. KPN then appealed to the Dutch Business Appeal Court, which (in early 2003) referred the following two questions to the European Court of Justice ("ECJ"):

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

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

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

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

- 5.12 On 14 July 2004, Advocate General Poiares Maduro delivered his Opinion and then, on 25 November 2004, the ECJ delivered its judgment.
- 5.13 We set out below full citations of the relevant parts of the *KPN* case, together with Ofcom's understanding<sup>25</sup> of what the ECJ decided in respect of the above-mentioned referred questions. This is because the *KPN* case is central to The Number and Conduit in bringing the present disputes to Ofcom, both with regard to the scope of data to be supplied and the consistency of BT's charges for the supply of OSIS data with its regulatory obligations. In particular, The Number<sup>26</sup> submits that Ofcom has misunderstood the *KPN* case, such as the meaning to be attached to the concept of 'relevant information'. Ofcom responds to specific points made by the parties in response to its consultation on the August 2006 document in **Sections 7 to 9** of this document, particularly as to the application of the *KPN* judgment to domestic UK regulation. We therefore concentrate below on our reading of the *KPN* judgment in order to assist our assessment of BT's GC19 obligations in those Sections.

#### ***KPN*: meaning of 'relevant information'**

- 5.14 The Advocate General proposed in the *KPN* case that the ECJ should determine the question concerning the meaning of 'relevant information' as follows:

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

- 5.15 In contrast, the ECJ actually ruled on that question in summary as follows:

Article 6(3) of Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment must be interpreted as meaning that the words 'relevant information' **refer only to data** relating to subscribers who

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<sup>25</sup> However, Ofcom does not consider it necessary to conclude on its views set out in the August 2006 document in support of stating that the *KPN* judgment is relevant to the application of Article 25 of the USD (which provision has, in effect, replaced Article 6(3) of the RVTD under the new EC regulatory framework). This is because, in light of the parties' submissions (including consultation responses received by Ofcom to the August 2006 document), it appears common ground between the parties that the *KPN* judgment is of such relevance.

<sup>26</sup> In this Section, we refer to The Number and Conduit collectively as "The Number", except where the context otherwise requires.

have not expressly objected to being listed in a published directory and which are **sufficient to enable users of a directory to identify the subscribers they are looking for**. Those data include **in principle the name and address, including postcode, of subscribers, together with any telephone numbers allocated to them by the entity concerned**. However, it is **open to the Member States to provide that other data are to be made available to users where, in light of specific national circumstances, they appear to be necessary in order to identify subscribers**. (Emphasis added)

- 5.16 In Ofcom's view, it appears from the above statements alone that the ECJ did not reach the same interpretation on the meaning of 'relevant information' as that proposed by the Advocate General. This is an important observation in itself because The Number appears to predominantly rely on the Advocate-General's Opinion in support of its submissions that Ofcom should therefore broadly interpret 'relevant information'. In particular, in its consultation response to the August 2006 document, The Number argues:

7.18 It is also worth noting that Ofcom appear to have misunderstood the scope of 'relevant information' in the *KPN* case, and that this has led Ofcom to conclude both that GC19 is consistent with *KPN* (which is an irrelevant consideration even if correct) and that information which is considered necessary to identify subscribers in the national circumstances prevalent in the UK is not a consideration when interpreting GC19.

7.19 For example, it is not the case, as Ofcom state in 7.84, that 'relevant information' was "*limited to*" the name, address and telephone number(s) of subscribers in *KPN*. In paragraph 27 of the A-G's Opinion, the A-G states that 'relevant information' should "*at least*" be name, address and telephone number(s) and that these are "*the minimum records*" users need to identify subscribers. The A-G goes on to say in paragraph 28 (and 56(1)) that Member States should "*take into account (...) when determining relevant information in addition to the minimum records*" (emphasis added) what other information typical users require from a telephone directory. In other words 'relevant information' equals those minimum records *plus* other information UK users traditionally expect to find in a directory, which will vary at a national level, not just the minimum records.

7.20 This argument is specifically referred to and accepted by the ECJ in paragraphs 35 and 36 of the Judgment, and the latter is partially quoted by Ofcom in 7.85. However, having quoted part of paragraph 36, Ofcom go on to reach a conclusion which is simply not supported by that passage at all.

Ofcom reach a conclusion which is simply not supported by *KPN*: they conclude that the ECJ refers to a "*relevant information plus*" option" which the UK has not exercised. It is clear from the passages of the A-G's Opinion referred to by the ECJ that this is not what was meant: the ECJ in fact meant that 'relevant information' included *minimum records plus* other information typical users require from a telephone directory. Such other information was to be determined by Member States (and in this particular dispute, by Ofcom as the UK national regulatory authority)."

- 5.17 In other words, The Number essentially submits that the ECJ accepted the proposed view put forward by the Advocate General and that Ofcom should therefore simply adopt his approach to interpreting the term 'relevant information', such as taking into account what a typical user requires from a telephone directory. Ofcom disagrees with this submission by The Number. It is therefore necessary to consider this matter in more detail below.
- 5.18 Before citing the reasoning given by the Advocate General and the ECJ, respectively, it is first appropriate to turn to the conclusions they actually reached, as cited above, together with their summary views in paragraph 44 of the Opinion and paragraphs 34-36 of the judgment, namely:

[*the Opinion*]

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

[*the ECJ's judgment*]

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

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

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

- 5.19 The above conclusions suggest that, in Ofcom's view, the Advocate General took a somewhat wider view of what is to be regarded as 'relevant information' than did the ECJ. The Advocate General stated that 'relevant information' is "information that is required to be included in a [universal service] telephone directory" (see (1) of his proposed answers to the questions of the Dutch court, at **paragraph 5.14** above). He concluded that it necessarily *includes* the *minimum records* that users of telephone directories *normally need* in order to identify the subscribers of the numbers they are looking for.
- 5.20 In contrast, the ECJ arrived expressly at a strict interpretation.

- 5.21 First, the ECJ decided that 'relevant information' is only data which are *sufficient* to enable users of a directory to identify the subscribers they are looking for. It, however, went on to clarify that the said data means or comprises<sup>27</sup> only the minimum records to which the Advocate General referred (i.e. the name and address, including postcode, of subscribers, together with any telephone numbers allocated to them by the entity concerned). In other words, this is the scope of information *required* by the term 'relevant information' as a matter of Community law. In Ofcom's view, this scope is narrower than "the information that is required to be included in a [universal service] telephone directory" (i.e. the Advocate General's approach).
- 5.22 Secondly, the ECJ decided that Member States could exercise the option, as a matter of domestic law, to extend the meaning of 'relevant information' to other data where, in light of specific national circumstances, they appear to be *necessary* in order to identify subscribers. In other words, the ECJ concurred with the Advocate General only in so far as to make it clear that Community law does not seek complete harmonisation of all the criteria which may appear necessary to identify subscribers. This represents, in Ofcom's view, a material difference in the approach to interpreting this term, as compared to the position argued by The Number.
- 5.23 Put another way, the ECJ has left the door open for each Member State to take its own respective view, as a matter of domestic law and policy making, to extend the scope of 'relevant information' beyond the said minimum records. The implications of such analysis for GC19 will be further considered in this explanatory statement: see, in particular, in **Section 9**. It suffices here to point out that Ofcom rejects The Number's argument suggesting that Ofcom could somehow exercise such a function in resolving these disputes, which have been referred to Ofcom under section 185(2) of the 2003 Act on the basis of BT's (pre-existing) obligations under GC19. Indeed, that suggestion is based on a misunderstanding of Ofcom's respective roles as a regulatory dispute resolver, on the one hand, and as a regulatory policy maker, on the other hand, which distinction is also clearly envisaged by section 190(4) of the 2003 Act itself.
- 5.24 However, particularly in light of The Number's response to the August 2006 document, Ofcom has carefully considered whether the *KPN* judgment should nonetheless be read more broadly than the above-stated conclusions. In particular, Ofcom has considered whether the judgment should be read as requiring, as matter of Community (as opposed to domestic UK) law, that the term 'relevant information' includes not only the said minimum records but also any additional information enabling (or needed by) users of a directory *to identify the subscribers they are looking for*. This is because the latter (emphasised) wording was used both by the Advocate General and the ECJ in arriving at their conclusions.
- 5.25 We have, for a number of reasons, nonetheless reached the view that such an approach would be an incorrect reading of the *KPN* judgment.

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<sup>27</sup> For the avoidance of any doubt, Ofcom appreciates that the ECJ's precise wording (in paragraphs 34 and 36 of the Judgment) is "...Those data *include* in principle...". In Ofcom's view, the word "include" in this context (particularly when read together with the words "in principle" as well as the ECJ's ruling that Member States may exercise the option to extend the scope of data, whilst relying on the same provision as legal basis) is to be taken as an exhaustive explanation of the meaning of 'relevant information'.



- 5.26 To start with, that approach would be inconsistent with the plain reading of the ECJ's conclusions. The ECJ expressly held that the directive did not seek complete harmonisation of all the criteria that may appear necessary to identify subscribers, and that Member States retained competence to determine whether certain 'additional data' ought to be made available in that regard. But, on The Number's approach, the scope of 'relevant information' is totally harmonised, that is to say it becomes a matter entirely determined at Community level by Community law. That approach would entail that Member States do not have any discretion as to whether additional data fall inside or outside the scope of 'relevant information'. Ofcom cannot see how that approach is consistent with the view of the ECJ, because, in effect, it would result in any information which may appear necessary for users of directories to identify subscribers being a harmonised requirement across the Community.
- 5.27 In addition, such a broad construction of the concept of 'relevant information' would be ignoring the ECJ's reasoning for reaching its conclusions. In particular, it would result in favouring the interests of users of a directory, which approach the ECJ expressly rejected when it balanced the various interests at stake (see paragraph 33 of the judgment, cited below). In light of this, we now turn to the reasoning given by the Advocate General and the ECJ, respectively.
- 5.28 Starting with the ECJ, it reached its conclusions in light of the following reasoning:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.29 In contrast, the Advocate General focused in his reasoning on the three approaches to interpreting the concept of 'relevant information', as presented to the ECJ by the main parties. He reached the view that the European Commission's approach was essentially the correct one, namely information needed for the provision of universal directory services, by stating as follows:

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

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

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

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

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

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

25. It also follows from the aim of Directive 98/10/EC that, contrary to what is argued by KPN, 'relevant information' cannot simply be limited to information that is inextricably linked with the provision of voice telephony services. The duty of voice telephony providers to supply 'relevant information' for the provision of a universal directory also entails a duty to gather this information, even if it is not strictly necessary for the provision of voice telephony.<sup>(12)28</sup> Evidently, the duty of providers to gather relevant directory information is without prejudice to any rights of subscribers not to share personal information or to have it barred from publication in universal telephone directories.

26. Given that Directive 98/10/EC does not offer a plain definition and that the concept of universal service is influenced by the evolution of the market and national differences in user demand, it is left to each Member State to define the exact scope of the term 'relevant information' in the light of specific national conditions.<sup>(13)29</sup> However, any interpretation should take the following aspects into account.

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

28. Secondly, as was ascertained above, 'relevant' for the purposes of Article 6(3) means relevant for the provision of a universal service. When determining relevant information in addition to the minimum set of records, Member States should take into account what a typical user requires from a telephone directory which may vary among Member States. In this regard they can take into consideration what users traditionally expect to find in a telephone guide – for example, profession, title, etc. – and, doubtless, a long-standing exclusive provider of telephone guides may have shaped user expectations and desires to a large extent, as the OPTA pointed out in its written submissions. Yet, it cannot automatically be assumed that whatever this provider has published or will publish in its directories must therefore be labelled relevant within the meaning of the Directive. In the Dutch context, this would render the standard for universal directory services and the obligation for every voice telephony provider to collect and supply relevant information entirely dependent on what KPN decides to publish in its telephone guide. Neither the text nor the aim of Article 6 supports such a contingent interpretation.<sup>(14)30</sup>

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<sup>28</sup> This footnote of the Opinion states: 'A similar situation exists in respect of ex-directory information, i.e. the information that someone does not want to be mentioned in a telephone directory. Even though that information is not strictly needed for the provision of voice telephony, telephony providers are under an obligation to maintain a list of their own customers who do not wish to be listed.'

<sup>29</sup> This footnote of the Opinion states: 'See Article 1(1) of Directive 98/10/EC'

<sup>30</sup> This footnote of the Opinion states: 'Another matter is whether the Directive precludes Member States from imposing obligations on providers of voice telephony to supply other subscriber data than those which are necessary to guarantee universal directory service. Although such measures should of course be compatible with the rules of Community law, I conclude that there is nothing in the Directive itself that prevents Member States from imposing such further obligations.'

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

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

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

- 5.30 In summary, when the judgment and the Opinion are compared, Ofcom considers that it is plain that the ECJ arrives at a strict interpretation of the concept “relevant information” after balancing, in its own words, “the various interests at stake” (see paragraph 34).
- 5.31 However, the judgment and the Opinion both make it clear that Member States may rely on the provision in Article 6(3) of the RVTD as a legal basis to provide that “certain additional data” should be made available in a specific national context.
- 5.32 But when they come to consider on what basis ‘certain additional data’ could be required to be made available, the ECJ and the Advocate General appear to suggest different approaches: the ECJ refers to such information which appears to be necessary to enable users of a directory to identify subscribers; whereas the Advocate General refers to information that a typical user requires from a directory, although he makes it clear that that is by no means necessarily defined by whatever has in the past been published in the universal service directory.
- 5.33 Finally, Ofcom notes that the ECJ’s conclusion on the correct interpretation of the concept of ‘relevant information’—as meaning or comprising only the minimum records (i.e. the name and address, including postcode, of subscribers, together with any telephone numbers allocated to them by the entity concerned)—is, in effect, answering the first part of the referred question (see under **paragraph 5.11** above) in the affirmative, that is to say:

“...meaning only the numbers together with the **name, address and postcode of the person to whom the number has been issued** and any entry as to whether the number is used (exclusively) as a fax line published by the organisations concerned...” (Emphasis added)

but the ECJ rejects (implicitly) the second part of that question (unless a Member State exercises the option to extend it to additional necessary data in light of specific national circumstances), namely:

“...**other data** at the disposal of the organisations **such as** an additional entry relating to a **profession, another name**, another municipality or mobile telephone numbers?” (Emphasis added)

- 5.34 The exclusion of information, such as “profession” and “another name”, is an important observation when it comes to Ofcom’s assessment of BT’s GC19 obligations, as discussed in **Section 9** of this document. For example, the reference to “another name” is, in Ofcom’s reading, to be taken as a short hand reference to a possible additional entry of the telephone number under a different name<sup>31</sup>, that is to say an actual user of the subscriber’s telephone number, as opposed to the subscriber himself. In Ofcom’s view, this observation should also be borne in mind when reading the ECJ’s judgment where it repeatedly refers to the term ‘subscribers’ only. Whilst there is no analysis in the judgment (or the Opinion) of that term, Ofcom considers that it must be taken as read as having the meaning set out in Article 2(2)(c) of the RVTD, that is to say:

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

- 5.35 We further note that, following the ECJ’s judgment, the Dutch Business Appeal Court quashed the judgment of the District Court of Rotterdam as well as the revised OPTA decision and upheld KPN’s submission on a narrower meaning of the basic data to be made available. Specifically, as noted from the translation set out in **Annex 7** to this explanatory statement, that Court concluded that KPN was under no obligation other than to provide the data explicitly mentioned by the ECJ in the *KPN* case, that is to say, the name, address, including postcode, and telephone number(s) allocated by KPN which belong to those of its subscribers who have not expressly objected to this. In particular, the Dutch Business Appeal Court took into account that more detailed rules on the scope of data to be made available under the Dutch legislation had not, at the relevant time, been laid down. Nor had any indication been given as to the existence of any specific national circumstances which may make it necessary for additional data to be published in order to identify subscribers. The Court further deduced from paragraph 25, final sentence, of the ECJ’s judgment in *KPN* that the objective of promoting competition could not of itself constitute a basis for extending the scope of the subscriber data to be provided.
- 5.36 In conclusion, in light of the above, Ofcom takes the view that the effect of the ECJ’s judgment is that the ‘relevant information’ is: (1) “name or address, including post code, of subscribers [as defined in the RVTD] together with any telephone numbers allocated to them”; but (2) also includes, where Member States so provide in their specific national circumstances, ‘additional data’ that are necessary to identify subscribers. (We set out in **Section 9** of this explanatory statement our provisional views as to the more detailed meaning attached to the data covered by (1) in the UK as currently prescribed by GC19, including the issue as to whether ‘subscribers’—now in light of the USD as opposed to the RVTD—must as a matter of Community law be interpreted as referring to any electronic communications service (“**ECS**”) that is provided so as to be available for use by members of the public (“**public ECS**”) or whether they refer only to publicly available telephone services (“**PATS**”).
- 5.37 For these reasons, we reject The Number’s submissions on the *KPN* judgment.

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<sup>31</sup> This is clear from reading the Dutch appeal Court’s order for reference, which decision of 8 January 2003 is available in Dutch at <http://zoeken.rechtspraak.nl/ResultPage.aspx> LJN: AF2794, College van Beroep voor het bedrijfsleven, AWB 01/666. In particular, it is clear in light of that order for reference that the first part of the question referred to the ECJ is based on KPN’s submission before the appeal Court and the second part is based on the revised OPTA decision.

### **KPN: meaning of 'cost orientation'**

5.38 In light of the above, we now turn to the issue of cost orientation by citing the relevant parts of the Opinion and the ECJ's judgment.

5.39 The Advocate General proposed in the *KPN* case that the ECJ should determine the meaning of 'cost orientation' as follows:

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

5.40 In contrast, the ECJ actually ruled on that question in summary as follows:

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

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

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

5.41 The Advocate General's reasoning for reaching his conclusion was the following:

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

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

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

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

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

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

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

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

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

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

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

#### 5.42 The ECJ answered this question as follows:

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



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

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

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

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

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

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

5.43 We set out in **Section 10** of this explanatory statement our approach to fixing charges for the purposes of resolving these disputes, in light of our reading of the ECJ's preliminary ruling in *KPN* set out above as to its interpretation of the requirement in Article 6(3) of the RVTD (now in Article 25(2) of the USD) to provide 'relevant information' on cost oriented terms.

## The current EC regulatory framework

### Generally about the framework

5.44 As already noted above, the abolition of the licensing regime under the 1984 Act was a result of legislative changes in Community law, which measures had to be applied across the Community from 25 July 2003. In Annex 6 to the August 2006 document, we set out in detail the legislative and regulatory provisions under both the previous and current EC (as well as UK) framework, which relate to the issues raised in the present disputes. We therefore summarise below the key provisions that are of particular importance for Ofcom's consideration of BT's regulatory obligations in **Sections 6 to 10** of this document.

- 5.45 The said key provisions should, however, be read in light of the summary overview of the current EC framework set out below, starting with a very brief overview of its history to put this framework in its context.
- 5.46 In the late 1980s and during the 1990s, a number of liberalising and harmonising measures were taken by the Community to regulate the provision of telecommunications services (as well as related equipment). These measures resulted in regulation designed, put broadly, to manage the transition of regulation to competition (particularly as regards access to infrastructure issues), on the one hand, and to meet certain general interest objectives (such as ensuring the provision of certain universal services), on the other hand.
- 5.47 In the fast moving telecommunications market characterised by developments in technology and innovation in service offerings, it was recognised that the effectiveness of those measures had to be properly reviewed to enable future competitiveness and economic growth. It was particularly recognised that the large variations in licence regimes across the Community, which was permitted in this previous framework, was nonetheless holding back innovation, competition and the provision of services.
- 5.48 As a result, particularly following the Commission's so-called 1999 Communications Review (COM(1999) 539), a package of directives was adopted in 2002 to establish a harmonised framework for the regulation of electronic communications services ("**ECSSs**"), electronic communications networks ("**ECNs**"), associated facilities and associated services.
- 5.49 This single regulatory framework for all transmission networks and services in the converging telecommunications, media, and information technology sectors was set out in five new EC harmonising directives which are designed to achieve that framework:
- i) Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (the "**Framework Directive**");
  - ii) Directive 2002/19/EC of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (the "**Access Directive**");
  - iii) Directive 2002/20/EC of 7 March 2002 on the authorisation of electronic communications networks and services (the "**Authorisation Directive**", also referred to as the "**AuD**");
  - iv) Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (the Universal Service Directive, referred to as the USD); and
  - v) Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (the "**Privacy Directive**").
- 5.50 Except for the Privacy Directive, these new directives entered into force on 24 April 2003 (the "**specific harmonising directives**"), when they were published in the Official Journal of the European Communities. However, Member States were required to transpose them into domestic law first by 24 July 2003 and to then apply

these measures from 25 July 2003. The Privacy Directive, which was adopted later in 2002, had to be transposed and complied with by 31 October 2003.

- 5.51 In addition, the Commission Directive 2002/77/EC on liberalising competition in the markets for ECNs and ECSs (the “**Competition Directive**”) was adopted in late 2002 to replace and repeal a series of liberalising measures taken since the late 1980s. So far as the liberalisation of directory services is concerned, the Competition Directive retains in its Article 5<sup>32</sup> a provision concerning the liberalisation of directory services in substantially the same terms as in Article 4b of the so-called Services Directive (90/388/EEC, as amended).
- 5.52 In short, in order to create harmonised regulation across the Community and to reducing entry barriers and foster prospects for effective competition to the benefit of consumers, the Framework Directive provides the overall structure for the new regulatory regime and sets out fundamental rules and objectives which read across the specific harmonising directives. In particular, under Article 8 of the Framework Directive, national regulatory authorities (“**NRAs**”), such as Ofcom, are in effect required to take all reasonable measures aimed at achieving three key policy objectives in carrying out the regulatory tasks specified in the specific harmonising directives, namely the promotion of competition, the development of the internal market and the promotion of the interests of the citizens of the European Union. (Article 26 of the Framework Directive also repeals the harmonising measures taken by the Community under the previous framework to regulate the provision of telecommunications services, including the RVTD.)
- 5.53 The Authorisation Directive establishes a new system whereby any person will be generally authorised to provide ECNs and/or ECSs without prior approval. Authorisation systems, such as individual or class licences, involving explicit decisions or administrative acts by NRAs permitted under the previous Licensing Directive<sup>33</sup> are now prohibited.
- 5.54 The effects of the new authorisation regime are considered in **Section 6** of this document. It suffices here to note that, despite the fact that above-mentioned providers must be generally authorised, NRAs may impose on them certain obligations. However, under Article 6 of the Authorisation Directive, such obligations must either fall within the maximum list of conditions specified in the Annex to the Directive or constitute specific obligations permitted under the directives. The latter concern obligations specified either in the Access Directive, e.g. where providers have been designated as having significant market power (“**SMP**”), or obligations imposed on those designated to provide universal service under the USD.
- 5.55 The following conditions, which are set out in the said Annex's maximum list, are particularly relevant for present disputes:

The conditions listed in this Annex provide the maximum list of conditions which may be attached to general authorisations (Part A), rights to use radio frequencies (Part B) and rights to use numbers (Part C) as referred to in Article 6(1) and Article 11(1)(a).

**A. Conditions which may be attached to a general authorisation**

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<sup>32</sup> i.e. “Member States shall ensure that all exclusive and/or special rights with regard to the establishment and provision of directory services on their territory, including both the publication of directories and directory enquiry services, are abolished.”

<sup>33</sup> Directive 97/13/EC of 10 April 1997, OJ L 177, 7.5.1997, p.15.

1. Financial contributions to the funding of universal service in conformity with Directive 2002/22/EC (Universal Service Directive).

...

8. Consumer protection rules specific to the electronic communications sector including conditions in conformity with Directive 2002/22/EC (Universal Service Directive).

### **C. Conditions which may be attached to rights of use for numbers**

4. Obligation to provide public directory subscriber information for the purposes of Articles 5 and 25 of Directive 2002/22/EC (Universal Service Directive).

- 5.56 The Access Directive concerns the regulation of access to, and interconnection of, ECNs and associated facilities. It therefore establishes rights and obligations for operators and for undertakings seeking interconnection or access to their networks or associated facilities. In particular, in Chapter II, it prescribes rights and obligations on operators of public ECNs to negotiate interconnection with each other for the purpose of providing public ECS. That Chapter also sets out in more general terms of the powers and responsibilities of the NRAs with regard to access and interconnection.
- 5.57 In Chapter III, the Access Directive sets out (among other things) types of obligations that may be imposed on operators that have been designated as having SMP on a specific market as a result of a market analysis carried out in accordance with Article 16 of the Framework Directive. Article 16 requires that NRAs carry out an analysis of the relevant markets following the European Commission's adoption<sup>34</sup> under Article 15 of (or any update thereof) its Recommendation on relevant product and services markets identified as having characteristics potentially justifying the imposition of regulatory obligations permitted under the specific harmonising directives. The Commission has not identified the provision of, or access to, directory information on its list of markets in the current Recommendation.
- 5.58 In light of the above, it is appropriate to turn to the relevant provisions of the USD and the Privacy Directive, given their particular importance to the present disputes.

## **The Universal Service Directive (USD)**

### Introduction

- 5.59 To put the provisions particularly relevant in these disputes in their proper context, it is to be noted that the USD is structured in five Chapters, so as to regulate the following:
- (i) Chapter I – sets out scope, aims and definitions;
  - (ii) **Chapter II** – deals with the provision of **defined universal services, including DQ services and directories (Article 5)**, which services are to be provided to all end-users;
  - (iii) Chapter III – deals with the provision of certain retail services, the minimum set of leased lines as well as carrier selection and carrier pre-selection, by undertakings

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<sup>34</sup> The current Recommendation was adopted on 11 February 2003:  
[http://europa.eu.int/information\\_society/policy/ecom/doc/article\\_7/com\\_recom\\_11022003.pdf](http://europa.eu.int/information_society/policy/ecom/doc/article_7/com_recom_11022003.pdf)

having been designated as having SMP in a particular market under domestic law;

(iv) **Chapter IV** – deals with the provision of certain consumer protection matters, such as standards of contract, network integrity, number portability as well as **access to operator assistance, DQ services and directory information (Article 25)**;

(v) Chapter V – deals with (among other things) the provision of additional services falling outside Chapter II that may be regulated under domestic law by virtue of Article 32.

5.60 We set out below the terms of Articles 5, 25 and 32 of the USD as they are of importance to matters considered in these disputes. Before doing so, we set out below the scope and aims of the USD, together with certain terminology that has been defined in the specific harmonising directives.

5.61 As regards the scope and aims of the USD, its Article 1 provides:

1. Within the framework of Directive 2002/21/EC (Framework Directive), this Directive concerns the provision of electronic communications networks and services to end-users. The aim is **to ensure the availability** throughout the Community of good quality publicly available services **through effective competition and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market.**

2. This Directive establishes the rights of end-users and the corresponding obligations on undertakings providing publicly available electronic communications networks and services. With regard to ensuring provision of **universal service** within an environment of open and competitive markets, **this Directive defines the minimum set of services of specified quality to which all end-users have access, at an affordable price in the light of specific national conditions, without distorting competition.** This Directive also sets out obligations with regard to the provision of certain mandatory services such as the retail provision of leased lines. (Emphasis added)

5.62 Article 2 then goes on to make it clear that the definitions, so far as are relevant, in Article 2 of the Framework Directive also apply for the purposes of the USD. This is of importance in relation to our consideration of the provisions relevant to these disputes, as set out throughout this document. In particular, the Framework Directive defines the following terms:

(a) “electronic communications network” means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;

(c) “electronic communications service” means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks;

- (d) “public communications network” means an electronic communications network used wholly or mainly for the provision of publicly available electronic communications services;
- (h) “user” means a legal entity or natural person using or requesting a publicly available electronic communications service;
- (i) “consumer” means any natural person who uses or requests a publicly available electronic communications service for purposes which are outside his or her trade, business or profession;
- (j) “universal service” means the minimum set of services, defined in Directive 2002/22/EC (Universal Service Directive), of specified quality which is available to all users regardless of their geographical location and, in the light of specific national conditions, at an affordable price;
- (k) “subscriber” means any natural person or legal entity who or which is party to a contract with the provider of publicly available electronic communications services for the supply of such services;
- (n) “end-user” means a user not providing public communications networks or publicly available electronic communications services.

5.63 In addition, Article 2 of the USD itself supplements those definitions in the Framework Directive by defining the following terms:

- (b) “public telephone network” means an electronic communications network which is used to provide publicly available telephone services; it supports the transfer between network termination points of speech communications, and also other forms of communication, such as facsimile and data;
- (c) “publicly available telephone service” means a service available to the public for originating and receiving national and international calls and access to emergency services through a number or numbers in a national or international telephone numbering plan, and in addition may, where relevant, include one or more of the following services: the provision of operator assistance, directory enquiry services, directories, provision of public pay phones, provision of service under special terms, provision of special facilities for customers with disabilities or with special social needs and/or the provision of non-geographic services;

5.64 From those definitions alone, an indication is given by the Community legislator that, within the harmonised framework for the regulation of ECSs and electronic communications networks (“**ECNs**”), the regulation should be harmonised in a particular manner with regard to certain subsets of such networks and services, as prescribed in the specific harmonising directives. Put broadly, it is possible to distinguish between the following categories (starting with the widest category):

- (i) ECNs and ECSs;
- (ii) public ECNs and ECSs;
- (iii) public telephone networks and PATS.

5.65 As regards the definition of ‘universal service’, it is made specifically clear (something which is reflected in materially same wording by the 4<sup>th</sup> recital<sup>35</sup> to the USD’s

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<sup>35</sup> i.e. “(4) Ensuring **universal service (that is to say, the provision of a defined minimum set of services to all end-users at an affordable price)** may involve the provision of some services to

preamble as well as by the aims in Article 1(2) of the USD itself, as set out above) that the USD defines the minimum set of (universal) services of specified quality to which all end-users have access, at an affordable price in the light of specific national conditions, without distorting competition. This minimum set is defined in Chapter II of the USD, which main set is set out in Articles 4 to 7 of the USD, namely:

- i) Article 4 specifies a service of specified quality concerning the provision of access at a fixed location;
- ii) Article 5 specifies a service of specified quality concerning the provision of DQ services and directories;
- iii) Article 6 specifies a service of specified quality concerning the provision of public pay telephones; and
- iv) Article 7 specifies a service of specified quality concerning the provision of special measures for disabled users.

### The relevant (harmonising) 'universal service' — Article 5

- 5.66 For the purposes of the present disputes, the relevant *defined* universal service is the one set out in **Article 5 of the USD**, which provides:

*Article 5*

**Directory enquiry services and directories**

1. Member States shall ensure that:

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

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

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

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

- 5.67 We will set out our more detailed views on the meaning of this specific (universal service) obligation in **Section 6** of this document in the context of assessing BT's USC7 obligations. However, in light of the discussion above concerning the broad

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some end-users at prices that depart from those resulting from normal market conditions. However, compensating undertakings designated to provide such services in such circumstances need not result in any distortion of competition, provided that designated undertakings are compensated for the specific net cost involved and provided that the net cost burden is recovered in a competitively neutral way." (Emphasis added)

categories of network and service, we consider it an important observation already here that, as a matter of harmonisation across the Community, the legislator has specifically chosen to limit the term 'subscribers' in Article 5(2) of the USD to subscribers of PATS only. In other words, within the wider regulation of ECSs and ECNs, the Community legislator has singled out a particular service—PATS—which is of particular importance to promote the interests of EU citizens by ensuring that all citizens have access to this specified universal service, which is one of the express policy objectives in Article 8(4)(a) of the Framework Directive. (In **Section 9** of this document, we set out our view on the meaning of the term 'PATS'.) As a result, the requirements concerning directories in Article 5 relate to persons contracting with PATS providers for the supply of such services (as opposed to public ECS).

- 5.68 Further, it is to be noted that Article 5 should be read contextually in the light of a number of related provisions in Chapter II of the USD. To start with, Article 3 of the USD prescribes that Member States have to ensure that the services set out in Chapter II are made available domestically. Specifically, Article 3 provides:

*Article 3*

**Availability of universal service**

1. Member States shall ensure that the services set out in this Chapter are made available at the quality specified to all end-users in their territory, independently of geographical location, and, in the light of specific national conditions, at an affordable price.
2. Member States shall determine the most efficient and appropriate approach for ensuring the implementation of universal service, whilst respecting the principles of objectivity, transparency, non-discrimination and proportionality. They shall seek to minimise market distortions, in particular the provision of services at prices or subject to other terms and conditions which depart from normal commercial conditions, whilst safeguarding the public interest.

- 5.69 Chapter II of the USD then sets out certain provisions to supplement the above-mentioned ones to deal specifically with, put broadly, the following issues:
- (i) the designation of undertakings to provide the universal services (Article 8);
  - (ii) how end-users' affordability of tariffs (which, as seen above, is one of the key characteristics of a universal service) may be achieved by Member States (Article 9) and the related issue as regards their ability to monitor and control their expenditure (Article 10);
  - (iii) the quality of service of designated undertakings (Article 11);
  - (iv) the costing and financing of universal service obligations, including transparency (Articles 12 to 14); and
  - (v) finally, as the concept of universal service is not a static one but is anticipated to evolve over time, the process to review the scope of universal service (Article 15).
- 5.70 For the purposes of Ofcom's assessment of BT's obligations relevant to these disputes (see further in **Section 6** of this document), the following provisions should, in particular, be fully cited:

*Article 8*



### **Designation of undertakings**

1. Member States may designate one or more undertakings to guarantee the provision of universal service as identified in Articles 4, 5, 6 and 7 and, where applicable, Article 9(2) so that the whole of the national territory can be covered. Member States may designate different undertakings or sets of undertakings to provide different elements of universal service and/or to cover different parts of the national territory.
2. When Member States designate undertakings in part or all of the national territory as having universal service obligations, they shall do so using an efficient, objective, transparent and non-discriminatory designation mechanism, whereby no undertaking is a priori excluded from being designated. Such designation methods shall ensure that universal service is provided in a cost-effective manner and may be used as a means of determining the net cost of the universal service obligation in accordance with Article 12.

#### *Article 9*

### **Affordability of tariffs**

1. National regulatory authorities shall monitor the evolution and level of retail tariffs of the services identified in Articles 4, 5, 6 and 7 as falling under the universal service obligations and provided by designated undertakings, in particular in relation to national consumer prices and income.
2. Member States may, in the light of national conditions, require that designated undertakings provide tariff options or packages to consumers which depart from those provided under normal commercial conditions, in particular to ensure that those on low incomes or with special social needs are not prevented from accessing or using the publicly available telephone service.
3. Member States may, besides any provision for designated undertakings to provide special tariff options or to comply with price caps or geographical averaging or other similar schemes, ensure that support is provided to consumers identified as having low incomes or special social needs.
4. Member States may require undertakings with obligations under Articles 4, 5, 6 and 7 to apply common tariffs, including geographical averaging, throughout the territory, in the light of national conditions or to comply with price caps.
5. National regulatory authorities shall ensure that, where a designated undertaking has an obligation to provide special tariff options, common tariffs, including geographical averaging, or to comply with price caps, the conditions are fully transparent and are published and applied in accordance with the principle of non-discrimination. National regulatory authorities may require that specific schemes be modified or withdrawn.

#### *Article 10*

### **Control of expenditure**

1. Member States shall ensure that designated undertakings, in providing facilities and services additional to those referred to in Articles 4, 5, 6, 7 and 9(2), establish terms and conditions in such a way that the subscriber is not obliged to pay for facilities or services which are not necessary or not required for the service requested.
2. Member States shall ensure that designated undertakings with obligations under Articles 4, 5, 6, 7 and 9(2) provide the specific facilities and services set out in Annex I, Part A, in order that subscribers can monitor and control expenditure and avoid unwarranted disconnection of service.

3. Member States shall ensure that the relevant authority is able to waive the requirements of paragraph 2 in all or part of its national territory if it is satisfied that the facility is widely available.

... [Article 11 concerns the quality of service of designated undertakings]

#### Article 12

##### **Costing of universal service obligations**

1. Where national regulatory authorities consider that the provision of universal service as set out in Articles 3 to 10 may represent an unfair burden on undertakings designated to provide universal service, they shall calculate the net costs of its provision.

For that purpose, national regulatory authorities shall:

(a) calculate the net cost of the universal service obligation, taking into account any market benefit which accrues to an undertaking designated to provide universal service, in accordance with Annex IV, Part A; or

(b) make use of the net costs of providing universal service identified by a designation mechanism in accordance with Article 8(2).

2. The accounts and/or other information serving as the basis for the calculation of the net cost of universal service obligations under paragraph 1(a) shall be audited or verified by the national regulatory authority or a body independent of the relevant parties and approved by the national regulatory authority. The results of the cost calculation and the conclusions of the audit shall be publicly available.

#### Article 13

##### **Financing of universal service obligations**

1. Where, on the basis of the net cost calculation referred to in Article 12, national regulatory authorities find that an undertaking is subject to an unfair burden, Member States shall, upon request from a designated undertaking, decide:

(a) to introduce a mechanism to compensate that undertaking for the determined net costs under transparent conditions from public funds; and/or

(b) to share the net cost of universal service obligations between providers of electronic communications networks and services.

2. Where the net cost is shared under paragraph 1(b), Member States shall establish a sharing mechanism administered by the national regulatory authority or a body independent from the beneficiaries under the supervision of the national regulatory authority. Only the net cost, as determined in accordance with Article 12, of the obligations laid down in Articles 3 to 10 may be financed.

3. A sharing mechanism shall respect the principles of transparency, least market distortion, non-discrimination and proportionality, in accordance with the principles of Annex IV, Part B. Member States may choose not to require contributions from undertakings whose national turnover is less than a set limit.

4. Any charges related to the sharing of the cost of universal service obligations shall be unbundled and identified separately for each undertaking. Such charges shall not be imposed or collected from undertakings that are not providing services in the territory of the Member State that has established the sharing mechanism.

... [Article 14 concerns the transparency of net cost calculations]

Article 15

**Review of the scope of universal service**

1. The Commission shall periodically review the scope of universal service, in particular with a view to proposing to the European Parliament and the Council that the scope be changed or redefined. A review shall be carried out, on the first occasion within two years after the date of application referred to in Article 38(1), second subparagraph, and subsequently every three years.

2. This review shall be undertaken in the light of social, economic and technological developments, taking into account, inter alia, mobility and data rates in the light of the prevailing technologies used by the majority of subscribers. The review process shall be undertaken in accordance with Annex V. The Commission shall submit a report to the European Parliament and the Council regarding the outcome of the review.

5.71 To further clarify the meaning and purpose of those provisions, the following recitals of the USD's preamble should, in particular, be noted:

(1) The liberalisation of the telecommunications sector and increasing competition and choice for communications services go hand in hand with parallel action to create a harmonised regulatory framework which secures the delivery of universal service. The concept of universal service should evolve to reflect advances in technology, market developments and changes in user demand. The regulatory framework established for the full liberalisation of the telecommunications market in 1998 in the Community defined the minimum scope of universal service obligations and established rules for its costing and financing.

...

(4) Ensuring universal service (that is to say, the provision of a defined minimum set of services to all end-users at an affordable price) may involve the provision of some services to some end-users at prices that depart from those resulting from normal market conditions. However, compensating undertakings designated to provide such services in such circumstances need not result in any distortion of competition, provided that designated undertakings are compensated for the specific net cost involved and provided that the net cost burden is recovered in a competitively neutral way.

...

(7) Member States should continue to ensure that the services set out in Chapter II are made available with the quality specified to all end-users in their territory, irrespective of their geographical location, and, in the light of specific national conditions, at an affordable price. Member States may, in the context of universal service obligations and in the light of national conditions, take specific measures for consumers in rural or geographically isolated areas to ensure their access to the services set out in the Chapter II and the affordability of those services, as well as ensure under the same conditions this access, in particular for the elderly, the disabled and for people with special social needs. Such measures may also include measures directly targeted at consumers with special social needs providing support to identified consumers, for example by means of specific measures, taken after the examination of individual requests, such as the paying off of debts.

...

(10) Affordable price means a price defined by Member States at national level in the light of specific national conditions, and may involve setting common tariffs irrespective of location or special tariff options to deal with the needs of low-income users. Affordability for individual consumers is related to their ability to monitor and control their expenditure.

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

...

(18) Member States should, where necessary, establish mechanisms for financing the net cost of universal service obligations in cases where it is demonstrated that the obligations can only be provided at a loss or at a net cost which falls outside normal commercial standards. It is important to ensure that the net cost of universal service obligations is properly calculated and that any financing is undertaken with minimum distortion to the market and to undertakings, and is compatible with the provisions of Articles 87 and 88 of the Treaty.

...

(23) The net cost of universal service obligations may be shared between all or certain specified classes of undertaking. Member States should ensure that the sharing mechanism respects the principles of transparency, least market distortion, non-discrimination and proportionality. Least market distortion means that contributions should be recovered in a way that as far as possible minimises the impact of the financial burden falling on end-users, for example by spreading contributions as widely as possible.

...

(25) Communications markets continue to evolve in terms of the services used and the technical means used to deliver them to users. The universal service obligations, which are defined at a Community level, should be periodically reviewed with a view to proposing that the scope be changed or redefined. Such a review should take account of evolving social, commercial and technological conditions and the fact that any change of scope should be subject to the twin test of services that become available to a substantial majority of the population, with a consequent risk of social exclusion for those who can not afford them. Care should be taken in any change of the scope of universal service obligations to ensure that certain technological choices are not artificially promoted above others, that a disproportionate financial burden is not imposed on sector undertakings (thereby endangering market developments and innovation) and that any financing burden does not fall unfairly on consumers with lower incomes. Any change of scope automatically means that any net cost can be financed via the methods permitted in this Directive. Member States are not permitted to impose on market players financial contributions which relate to measures which are not part of universal service obligations. Individual Member States remain free to impose special measures (outside the scope of universal service obligations) and finance them in conformity with Community law but not by means of contributions from market players. (Emphasis added)

### The relevant (harmonising) consumer protection measure — Article 25

5.72 Outside the context of the provision of universal service in Chapter II of the USD is the provision of certain consumer protection matters set out in Chapter IV. (Chapter III, which concern regulatory controls that may be imposed on undertakings with SMP in specific retail markets, is not relevant for the purposes of these disputes.) It is, as part of this context, that Chapter IV of the USD prescribes (in Article 25) three particular end-user rights in relation to directory information, namely:

- (i) PATS subscribers have a right to an entry in a *universal service*<sup>36</sup> directory (Article 25(1));
- (ii) end-users provided with a connection to the public telephone network (which, by its definition, is narrower than simply a publicly available ECN) must be able to access operator assistance services and *universal service* DQ services (Article 25(3)); and
- (iii) end-users in one Member State must not by regulation be prevented from accessing directly the DQ service in another Member State (Article 25(4)).

5.73 To ensure, in particular, that a PATS subscriber's right to an entry in a *universal service* directory is in reality made possible, Article 25(2) provides a mechanism, so that all undertakings which assign telephone numbers 'to subscribers' are required to provide certain directory information (which is referred to as 'relevant information' in that Article). In this respect (as well as in the case of the three above-mentioned end-user rights), the end-user(s) in question are further protected, so that these matters apply subject to compliance with data protection requirements, which we will deal with separately below.

5.74 The above is clear from the plain reading of **Article 25 of the USD**, which provides:

*Article 25*

**Operator assistance and directory enquiry services**

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

5.75 The 35<sup>th</sup> recital to the USD's preamble elaborates on this as follows:

(35) The provision of directory enquiry services and directories is already open to competition. The provisions of this Directive complement the provisions of Directive 97/66/EC by giving subscribers a right to have their personal data included in a printed or electronic directory. All service providers which assign telephone numbers to their subscribers are

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<sup>36</sup> The short hand reference to 'universal service' is used, given the cross-references in Article 25 to Article 5 of the USD.

obliged to make relevant information available in a fair, cost-oriented and non-discriminatory manner.

### Discretionary (non-harmonising) measures — Article 32

5.76 As regards Chapter V of the USD, it suffices to note that Article 32 of the USD makes it plain that the USD does not seek to completely harmonise throughout the Community the regulation as to (end-user) services other than those specifically prescribed. However, in respect of any such 'additional services' that are made publicly available in a particular Member State, Article 32 provides that, apart from the universal services covered by Chapter II of the USD, no compensation mechanism involving specific undertakings may be imposed in respect of them.

5.77 **Article 32 of the USD** reads:

#### *Article 32*

##### **Additional mandatory services**

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

5.78 The 46<sup>th</sup> recital to the USD's preamble provides an indication as to the types of service that the legislative draftsman anticipates might become relevant in this context; it reads:

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

### **The Privacy Directive**

5.79 As mentioned above, the Privacy Directive contains, in addition to the USD, certain provisions of particular importance to the present disputes.

5.80 In particular, as seen from Article 25(5) of the USD, the requirement in Article 25(2) concerning the provision of 'relevant information' is "*subject to the requirements of Community legislation on the protection of personal data and privacy and, in particular, Article 11 of Directive 97/66/EC*". The latter directive (known as the Telecoms Data Protection Directive) has been repealed by the Privacy Directive and references to the Telecoms Data Protection Directive (such as in Article 25(5) of the USD) shall be construed as being made to the Privacy Directive: see Article 19.

5.81 As regards directories, Article 12 of the Privacy Directive provides:

#### *Article 12*

##### **Directories of subscribers**

1. Member States shall ensure that subscribers are informed, free of charge and before they are included in the directory, about the purpose(s) of a printed or electronic directory of subscribers available to the public or obtainable through directory enquiry services, in which their personal data can be included and of any further usage possibilities based on search functions embedded in electronic versions of the directory.

2. Member States shall ensure that subscribers are given the opportunity to determine whether their personal data are included in a public directory, and if so, which, to the extent that such data are relevant for the purpose of the directory as determined by the provider of the directory, and to verify, correct or withdraw such data. Not being included in a public subscriber directory, verifying, correcting or withdrawing personal data from it shall be free of charge.

3. Member States may require that for any purpose of a public directory other than the search of contact details of persons on the basis of their name and, where necessary, a minimum of other identifiers, additional consent be asked of the subscribers.

4. Paragraphs 1 and 2 shall apply to subscribers who are natural persons. Member States shall also ensure, in the framework of Community law and applicable national legislation, that the legitimate interests of subscribers other than natural persons with regard to their entry in public directories are sufficiently protected.

- 5.82 According to Article 2 of the Privacy Directive, the definitions in the Framework Directive shall apply, save as otherwise provided. References in Article 12 of the Privacy Directive, such as to a “subscriber”, shall therefore have the meaning prescribed in the Framework Directive as read in the context they are used, as discussed above in relation to Article 25 of the USD.
- 5.83 Given that this Directive aims to complement the Data Protection Directive (95/46/EC) which applies to natural persons (living individuals) only, it contains certain additional protection of the legitimate interests of subscribers who are legal persons.
- 5.84 In light of the above and the fact that the Privacy Directive offers protection also to *users* (i.e. “any natural person using a publicly available electronic communications service, for private or business purposes, without necessarily having subscribed to this service”: see Article 2(a)), this Directive emphasises in its 13<sup>th</sup> recital that “[t]he contractual relation between a subscriber and a service provider may entail a periodic or a one-off payment for the service provided or to be provided. Prepaid cards are also considered as a contract”.
- 5.85 In other words, the Community legislator has been careful in its terminology to distinguish not only between types of subscriber—natural person or legal entity—but also between subscribers and users. (The latter distinction is used in certain provisions, such as Article 9 of the Privacy Directive concerning the processing of so-called location data with the consent of the users or subscribers.) Contextually, this observation shows that the terminology of Article 12 of the Privacy Directive (and, in particular, its references to “subscribers”) must have been carefully chosen.
- 5.86 The 38<sup>th</sup> and 39<sup>th</sup> recitals to the Privacy Directive’s preamble elaborate on the substantive provisions in Article 12 as follows:

(38) Directories of subscribers to electronic communications services are widely distributed and public. The right to privacy of natural persons and the legitimate interest of legal persons require that subscribers are able to determine whether their personal data are published in a directory and if so, which. Providers of public directories should inform the subscribers to be included in such directories of the purposes of the directory and of any particular usage which

may be made of electronic versions of public directories especially through search functions embedded in the software, such as reverse search functions enabling users of the directory to discover the name and address of the subscriber on the basis of a telephone number only.

(39) The obligation to inform subscribers of the purpose(s) of public directories in which their personal data are to be included should be imposed on the party collecting the data for such inclusion. Where the data may be transmitted to one or more third parties, the subscriber should be informed of this possibility and of the recipient or the categories of possible recipients. Any transmission should be subject to the condition that the data may not be used for other purposes than those for which they were collected. If the party collecting the data from the subscriber or any third party to whom the data have been transmitted wishes to use the data for an additional purpose, the renewed consent of the subscriber is to be obtained either by the initial party collecting the data or by the third party to whom the data have been transmitted.

## The current UK legislation and regulation

### Generally about the UK regime

- 5.87 The requirements of the current package of EC directives discussed above were transposed into UK law mainly by the 2003 Act, the relevant provisions of which entered into force on 25 July 2003. Prior to this date, in 2002, Ofcom was established as a statutory corporation by the Office of Communications Act 2002. On 29 December 2003, Ofcom took over the responsibilities and assumed the powers of the five former regulators it replaced, including the previous telecoms regulator, an officer known as the Director General of Telecommunications (the “DGT” or the “Director”) as appointed by the Secretary of State, whose office was the Office of Telecommunications (“Ofotel”), as created by the 1984 Act.
- 5.88 Pursuant to section 1 of the 2003 Act, a number of functions were either transferred or conferred on Ofcom, including functions conferred on Ofcom by or under the 2003 Act. Ofcom acts in a number of capacities under this new regime, including (so far as is particularly relevant in the present disputes):
- (i) it is a *policy maker* in relation to (among other things) telecommunications matters, which policies are on a law binding and regulatory footing under measures, such as conditions of entitlement;
  - (ii) it is an *enforcer* of (among other things) its conditions of entitlement;
  - (iii) it is a *regulatory dispute resolver* in relation to (among other things) its conditions of entitlement;
  - (iv) it is a *maker of sub-ordinate legislation*, such as regulations (exercisable by statutory instrument) concerning persons designating to provide universal services.
- 5.89 In the carrying out of its functions generally, Ofcom’s principal duties are set out in section 3 of the 2003 Act. Also, Ofcom’s overriding duties, should a conflict arise with those principal duties, are those set out in section 4 of the 2003 Act, where Ofcom carries out its functions under Chapter 1 of Part 2 (which concerns, for instance, the setting of conditions of entitlement) and under Chapter 3 of Part 2 in relation to disputes referred to Ofcom under section 185 of the 2003 Act.
- 5.90 Specifically, sections 3 and 4 of the 2003 Act read as follows:



### **3 General duties of OFCOM**

(1) It shall be the principal duty of OFCOM in carrying out their functions—

(a) to further the interests of citizens in relation to communications matters; and

(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

...

(3) In performing their duties under subsection (1), OFCOM must have regard, in all cases, to—

(a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and

(b) any other principles appearing to OFCOM to represent the best regulatory practice<sup>37</sup>.

(4) OFCOM must also have regard, in performing those duties, to such of the following as appear to them to be relevant in the circumstances—

...

(b) the desirability of promoting competition in relevant markets;

(c) the desirability of promoting and facilitating the development and use of effective forms of self-regulation;

...

(d) the desirability of encouraging the investment and innovation in relevant markets;

...

(k) the opinions of consumers in relevant markets and of members of the public generally;

...

(m) the extent to which, in the circumstances of the case, the furthering or securing of the matters mentioned in subsections (1) and (2) is reasonably practicable.

(5) In performing their duty under this section of furthering the interests of consumers, OFCOM must have regard, in particular, to the interests of those consumers in respect of choice, price, quality of service and value for money.

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<sup>37</sup> In this context, it is to be noted that Ofcom has set out seven 'Regulatory Principles', namely (i) Ofcom will regulate with a clearly articulated and publicly reviewed annual plan, with stated policy objectives; (ii) Ofcom will intervene where there is a specific statutory duty to work towards a public policy goal which markets alone cannot achieve; (iii) Ofcom will operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required; (iv) Ofcom will strive to ensure its interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome; (v) Ofcom will always seek the least intrusive regulatory mechanisms to achieve its policy objectives; (vi) Ofcom will research markets constantly and will aim to remain at the forefront of technological understanding; and (vii) Ofcom will consult widely with all relevant stakeholders and assess the impact of regulatory action before imposing regulation upon a market: see <http://www.ofcom.org.uk/about/sdrp/>

...

(14) In this section—

“citizens” means all members of the public in the United Kingdom;

“communications matters” means the matters in relation to which OFCOM have functions;

“general duties”, in relation to OFCOM, means—

(a) their duties under subsections (1) to (5); and

(b) the duty which, under section 107(5), is to rank equally for the purposes of subsections (6) and (7) with their duties under this section;

(b) “relevant markets” means markets for any of the services, facilities, apparatus or directories in relation to which OFCOM have functions.

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

...

(2) It shall be the duty of OFCOM, in carrying out any of those functions, to act in accordance with the six Community requirements (which give effect, amongst other things, to the requirements of Article 8 of the Framework Directive and are to be read accordingly).

(3) The first Community requirement is a requirement to promote competition—

(a) in relation to the provision of electronic communications networks and electronic communications services;

(b) in relation to the provision and making available of services and facilities that are provided or made available in association with the provision of electronic communications networks or electronic communications services; and

(c) in relation to the supply of directories capable of being used in connection with the use of electronic networks or electronic communications services.

(4) The second Community requirement is a requirement to secure that OFCOM's activities contribute to the development of the European internal market.

(5) The third Community requirement is a requirement to promote the interests of all persons who are citizens of the European Union (within the meaning of Article 17 of the Treaty establishing the European Community).

(6) The fourth Community requirement is a requirement to take account of the desirability of OFCOM's carrying out their functions in a manner which, so far as practicable, does not favour—

(a) one form of electronic communications network, electronic communications service or associated facility; or

(b) one means of providing or making available such a network, service or facility,

over another.

(7) The fifth Community requirement is a requirement to encourage, to such extent as OFCOM consider appropriate for the purpose mentioned in subsection (8), the provision of network access and service interoperability.

(8) That purpose is the purpose of securing—

(a) efficiency and sustainable competition in the markets for electronic communications networks, electronic communications services and associated facilities; and

(b) the maximum benefit for the persons who are customers of communications providers and of persons who make such facilities available.

(9) The sixth Community requirement is a requirement to encourage such compliance set out in subsection (10) as is necessary for—

(a) facilitating service interoperability; and

(b) securing freedom of choice for the customers of communications providers.

5.91 Those duties are supplemented by further specific duties, such as:

(i) the duty to review regulatory burdens (section 6 of the 2003 Act); and

(ii) the duty to carry out impact assessment (section 7 of the 2003 Act), which duty we will discuss further in **Section 8** of this document as The Number has in its consultation response to the August 2006 document argued that Ofcom was under a duty and should have carried out an Impact Assessment in resolving the present disputes.

5.92 Relevant to the issues under consideration in the present disputes is an appreciation of Ofcom's capacity as policy maker, on the one hand, and regulatory dispute resolver, on the other hand. Indeed, this relationship (together with Ofcom's role as an *enforcer* of the regulatory obligations) is specifically recognised in the 2003 Act in the context of Ofcom's dispute resolution functions and powers. In summary, the 2003 Act prescribes that a dispute referred to Ofcom does not prevent:

i) the bringing of any legal proceedings with respect to any of the matters under dispute (section 187(1));

ii) the taking of any enforcement action by Ofcom (section 187(2));

iii) the exercising of its powers in consequence of Ofcom's consideration of any dispute to set, modify or revoke conditions of entitlement (section 190(4)) following statutory processes prescribed in the 2003 Act;

5.93 The latter exercise of powers is of importance when considering arguments made by The Number throughout Ofcom's investigation in the present disputes, which are based on a misunderstanding as to the function fulfilled by Ofcom when resolving disputes.

5.94 Turning specifically to Ofcom's function as policy maker, the licensing regime under the 1984 Act was, in effect, abolished by the new specific harmonising directives. Under UK law, this abolition was achieved by the repeal of the relevant provisions of the 1984 Act as set out in section 147 of the 2003 Act. Nowadays, therefore, everyone is generally authorised to provide ECSs and ECNs in the UK, since there is no longer any prohibition on such provision without a licence. However, that 'general authorisation' regime is subject to any obligations imposed on a person under a

condition of entitlement. In other words, all providers of ECSs and ECNs can therefore enter the UK market as they wish, although they have to comply with any obligations imposed by Ofcom on them.

5.95 As regards the conditions of entitlement, section 45 of the 2003 Act confers powers to set the following types of such conditions:

- (i) a general condition (“**GC**”);
- (ii) a universal service condition (“**USC**”);
- (iii) an access-related condition;
- (iv) a privileged supplier condition; and
- (v) an SMP condition, which can be either an SMP services condition or an SMP apparatus condition.

5.96 For the purposes of the present disputes, Ofcom’s enabling powers to set GCs and USCs are the only relevant ones. Therefore, we are not considering below matters relevant to the setting (or otherwise) of any other condition of entitlement.

5.97 According to section 45(3) of the 2003 Act, a GC may contain only provisions authorised or required by sections 51, 52, 57, 58 or 64 of the 2003 Act, whereas a USC may, according to section 45(4) of the 2003 Act, contain only provisions authorised or required by section 67 of the 2003 Act. (We will set out below further detail as to the permitted subject-matter of those sections relevant to the obligations concerned in the present disputes.)

5.98 Section 46 of the 2003 Act then prescribes the person to such conditions may apply, which reads, so far as material to the present disputes, as follows:

(1) A condition set under section 45 is not to be applied to a person except in accordance with the following provisions of this section.

(2) A general condition may be applied generally—

- (a) to every person providing an electronic communications network or electronic communications service; or
- (b) to every person providing such a network or service of a particular description specified in the condition.

(3) A universal service condition, access-related condition, privileged supplier condition or SMP condition may be applied to a particular person specified in the condition.

...

(5) The particular person to whom a universal service condition is applied—

- (a) except in the case of a condition relating to matters mentioned in subsection (3) of section 66, must be a communications provider designated in accordance with regulations under that section; and
- (b) in that excepted case, must be a communications provider so designated or a person who is not such a provider but who is so designated for the purposes only of conditions relating to those matters.

- 5.99 Importantly, the GCs may therefore apply to anyone who is providing an ECS or ECN, or a particular description of an ECN or ECS specified in the GC in question. Therefore, it is the responsibility of each and every provider to ensure compliance with its GC obligations upon such provision as no individual notification will be given to it by Ofcom that certain obligations apply to it. Failure to comply with such obligations is subject to enforcement action by Ofcom using its statutory processes under the 2003 Act. Accordingly, a provider must consider whether it falls within the definition of a 'Communications Provider', which term is defined separately for each and every GC in order to prescribe a specific person (or class of persons) subject to the obligations in question.
- 5.100 In contrast, the USCs may only apply to a designated universal service provider under section 66 of the 2003 Act, which (so far as is material to the present disputes) reads:

**66 Designation of universal service providers**

- (1) OFCOM may by regulations make provision for the designation of the persons to whom universal service conditions are to be applicable.
- (2) Subject to subsection (3), those regulations are not to authorise the designation of a person other than a communications provider.
- (3) The regulations may provide for a person other than a communications provider to be designated for the purposes only of conditions relating to—
- (a) the supply of directories capable of being used in connection with the use of an electronic communications network or electronic communications service; and
- (b) the making available of directory enquiry facilities capable of being used for purposes connected with the use of such a network or service.
- ...

- 5.101 In respect of the USCs currently in force, BT was, in fact, designated by the DGT as a universal service provider in a notification<sup>38</sup> (the "**USO notification**") under regulation 4(10) of the Electronic Communications (Universal Service) Regulations 2003<sup>39</sup> (the "**Universal Service Regulations**").
- 5.102 These Regulations were made by the Secretary of State under section 2(2) of the European Communities Act 1972. However, the transitional provisions in paragraph 7 of Schedule 18 to the 2003 Act have the effect of treating that designation as a designation in accordance with regulations under section 66, because they provide:

*Pre-commencement proposals relating to universal service matters*

- 7 (1) Where a proposal for the designation of a person as a universal service provider has been confirmed under regulation 4(10) of the Electronic Communications (Universal Service) Regulations 2003 (SI 2003/33), the designation is to have effect after the

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<sup>38</sup> See document entitled 'Designation of BT and Kingston as universal service providers, and the specific universal service conditions - A statement and Notification issued by the Director General of Telecommunications on the implementation of the Universal Service Directive', published by Oftel on 22 July 2003, see at: [http://www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/2003/uso0703.pdf](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/uso0703.pdf)

<sup>39</sup> S.I. 2003/33.

commencement of section 66 of this Act as a designation in accordance with regulations under that section.

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

(3) Where an appeal under regulation 6 of those regulations against a decision under them has been brought but not concluded before the commencement of section 192 of this Act—

(a) that appeal is to be stayed or sisted as from the commencement of the section; but

(b) the appellant is to have a new right of appeal under the section against the decision (as it has effect by virtue of this paragraph) as if—

(i) it were the corresponding decision made by OFCOM under Chapter 1 of Part 2 of this Act; and

(ii) it had been made immediately after the commencement of the section.

(4) Tribunal rules (within the meaning of Chapter 3 of Part 2 of this Act) may, in relation to an appeal stayed or sisted under sub-paragraph (3), make transitional provision for requiring steps taken and things done for the purposes of that appeal to be taken into account, to the extent set out in the rules, in the case of an appeal brought by virtue of paragraph (b) of that sub-paragraph.

5.103 Under section 47 of the 2003 Act, Ofcom can only set conditions where it is satisfied that a condition is:

(a) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;

(b) not such as to discriminate unduly against particular persons or against a particular description of persons;

(c) proportionate to what the condition or modification is intended to achieve; and

(d) in relation to what it is intended to achieve, transparent.

5.104 Section 48 of the 2003 Act sets out the statutory procedure for setting, modifying and revoking conditions of entitlement, such GCs and USCs, which require the publication of notifications for consultation before Ofcom may take such regulatory steps.

5.105 As regards the transposition of the Privacy Directive, its provisions were implemented by the Privacy and Electronic Communications (EC Directive) Regulations 2003<sup>40</sup> (the "**Privacy Regulations**"), which were made by the Secretary of State under section 2(2) of the European Communities Act 1972 on 18 September 2003 and came into force on 11 December 2003.

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<sup>40</sup> S.I. 2003/2426.

- 5.106 In particular, regulation 18 implements the above-mentioned Article 12 of the Privacy Directive concerning directories of subscribers. Regulation 18 provides:

**Directories of subscribers**

18.—(1) This regulation applies in relation to a directory of subscribers, whether in printed or electronic form, which is made available to members of the public or a section of the public, including by means of a directory enquiry service.

(2) The personal data of an individual subscriber shall not be included in a directory unless that subscriber has, free of charge, been—

(a) informed by the collector of the personal data of the purposes of the directory in which his personal data are to be included, and

(b) given the opportunity to determine whether such of his personal data as are considered relevant by the producer of the directory should be included in the directory.

(3) Where personal data of an individual subscriber are to be included in a directory with facilities which enable users of that directory to obtain access to that data solely on the basis of a telephone number—

(a) the information to be provided under paragraph (2)(a) shall include information about those facilities; and

(b) for the purposes of paragraph (2)(b), the express consent of the subscriber to the inclusion of his data in a directory with such facilities must be obtained.

(4) Data relating to a corporate subscriber shall not be included in a directory where that subscriber has advised the producer of the directory that it does not want its data to be included in that directory.

(5) Where the data of an individual subscriber have been included in a directory, that subscriber shall, without charge, be able to verify, correct or withdraw those data at any time.

(6) Where a request has been made under paragraph (5) for data to be withdrawn from or corrected in a directory, that request shall be treated as having no application in relation to an edition of a directory that was produced before the producer of the directory received the request.

(7) For the purposes of paragraph (6), an edition of a directory which is revised after it was first produced shall be treated as a new edition.

(8) In this regulation, “telephone number” has the same meaning as in section 56(5) of the Communications Act 2003 but does not include any number which is used as an internet domain name, an internet address or an address or identifier incorporating either an internet domain name or an internet address, including an electronic mail address.

- 5.107 As regards the meaning of “subscriber”, regulation 2(1) provides a number of associated definitions, starting with that term itself as follows:

“subscriber” means a person who is a party to a contract with a provider of public electronic communications services for the supply of such services;

- 5.108 This term is to be contrasted with “user”, which is separately defined as:

“user” means any individual using a public electronic communications service;

5.109 The term “public electronic communications services”, which is used in both definitions, is defined as simply as having the meaning given in section 151 of the 2003 Act, that is to say any ECS that is provided so as to be available for use by members of the public.

5.110 As seen from regulation 18, a distinction is then drawn between individual and corporate subscribers, which terms are defined as follows:

“corporate subscriber” means a subscriber who is—

- (a) a company within the meaning of section 735(1) of the Companies Act 1985;
- (b) a company incorporated in pursuance of a royal charter or letters patent;
- (c) a partnership in Scotland;
- (d) a corporation sole; or
- (e) any other body corporate or entity which is a legal person distinct from its members;

“individual” means a living individual and includes an unincorporated body of such individuals;

5.111 Further, it is to be noted that regulation 4 explains the relationship between these Regulations and the Data Protection Act 1998 (the “**DPA**”), so that nothing in the Regulations relieves a person of his obligations under the DPA in relation to the processing of personal data, which data (by definition) only relate to living individuals.

### **The relevant general condition — GC19**

5.112 In light of the above overview of the UK regime, we now turn to the detail of the obligations relevant to the present disputes. In Annex 6 to the August 2006 document, we set out in extensive detail the history, including the consultations, concerning the GCs (as well as the USCs) relevant in this context. We therefore summarise the position below.

5.113 On 22 July 2003, shortly before the coming into force of the relevant provisions of the 2003 Act and after two consultations<sup>41</sup>, the DGT relying on his transitional powers published a notification in accordance with section 48(1) of the 2003 Act entitled ‘*Notification setting general conditions under Section 45 of the Communications Act 2003*’<sup>42</sup> (the “**GC notification**”).

5.114 Under that notification, the DGT set a number of GCs, which are contained in Part II of the Schedule to it, that were to take effect on 25 July 2003. They include **GCs 8 and 19**, which are the ones relevant to these disputes:

#### **8. OPERATOR ASSISTANCE, DIRECTORIES AND DIRECTORY ENQUIRY FACILITIES**

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<sup>41</sup> The first consultation document entitled ‘The General Conditions of Entitlement’ was published by Ofcom on 22 May 2002: <http://www.ofcom.org.uk/static/archive/oftel/publications/licensing/2002/enti0502.htm>; the second consultation document was published jointly by the Department of Trade and Industry and Ofcom on 19 March 2003: [http://www.communicationsact.gov.uk/Interim\\_Implementation\\_update.htm](http://www.communicationsact.gov.uk/Interim_Implementation_update.htm)

<sup>42</sup> See at: [http://www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/2003/cond\\_final0703.pdf](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/cond_final0703.pdf)



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

(a) operator assistance services; and

(b) a Directory Enquiry Facility containing Directory Information on all Subscribers in the United Kingdom who have been assigned Telephone Numbers by any Communications Provider, except those Subscribers who have exercised their right to have their Directory Information removed,

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

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

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

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

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

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

...

## 19. PROVISION OF DIRECTORY INFORMATION

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

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

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

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

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

(a) the person who was originally Allocated such Telephone Numbers; or

(b) if different from the above, the person who authorised the use of such Telephone Numbers by it,

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

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

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

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

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

...

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

...

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

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

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

...

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

...

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

...

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

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

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

...

#### Interpretation

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

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

5.116 As regards the definition of ‘Relevant Data Protection Legislation’, this term was subsequently modified<sup>43</sup> on 11 December 2003 by the DGT for the purposes of the GCs and USCs to mean the DPA and the Privacy Regulations.

5.117 As regards to the permitted subject-matter of these GCs and the DGT’s enabling powers under section 45(3) of the 2003 Act:

- i) GC8 contains provisions authorised or required by section 51(1)(a);
- ii) GC19 contains provisions authorised or required by section 58(1)(d),

which sections read:

*General conditions: subject-matter*

#### **51 Matters to which general conditions may relate**

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<sup>43</sup> See at: [http://www.ofcom.org.uk/telecoms/loi/g\\_a\\_regime/gce/rdpl/](http://www.ofcom.org.uk/telecoms/loi/g_a_regime/gce/rdpl/)

(1) Subject to sections 52 to 64, the only conditions that may be set under section 45 as general conditions are conditions falling within one or more of the following paragraphs—

(a) conditions making such provision as OFCOM consider appropriate for protecting the interests of the end-users of public electronic communications services;

...

(2) The power under subsection (1)(a) to set conditions for protecting the interests of the end-users of public electronic communications services includes power to set conditions for that purpose which—

(a) relate to the supply, provision or making available of goods, services or facilities in association with the provision of public electronic communications services; and

(b) give effect to Community obligations to provide protection for such end-users in relation to the supply, provision or making available of those goods, services or facilities.

...

## **58 Conditions about allocation and adoption of numbers**

(1) General conditions may include conditions which—

...

(d) impose requirements on a communications provider in connection with the adoption by him of telephone numbers;

...

(3) The conditions that may be set under subsection (1)(d) include conditions imposing requirements with respect to the provision of information for purposes connected with—

(a) the compilation of directories; and

(b) the provision of directory enquiry facilities.

## **The relevant universal service condition — USC7**

5.118 On 22 July 2003, the DGT relying on his transitional powers published his USO notification setting out his reasons for designating BT as a universal service provider and setting the USCs applicable to BT.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.120 As regards to the permitted subject-matter of USC7 and the DGT's enabling powers under section 45(4) of the 2003 Act, a USC may only contain provisions authorised or required by section 67 of the 2003 Act, which reads:

**67 Subject-matter of universal service conditions**

(1) OFCOM may set any such universal service conditions as they consider appropriate for securing compliance with the obligations set out in the universal service order.

(2) Universal service conditions applied to a person must include a condition requiring him to publish information about his performance in complying with the universal service conditions that apply to him.

(3) A condition set in accordance with subsection (2) must contain provision which—

(a) requires information published in accordance with it to be updated from time to time and published again;

(b) requires information so published to satisfy the requirements that OFCOM consider appropriate for securing that it is adequate; and

(c) requires information so published to be framed by reference to the quality of service parameters, definitions and measurement methods for the time being set out in Annex III to the Universal Service Directive.

(4) A condition set in accordance with that subsection may impose requirements as to—

(a) the times at which information published in accordance with it is to be published; and

(b) the manner in which that information is to be published.

(5) Universal service conditions may impose an obligation on a person to whom they apply to do one or both of the following, if required to do so by OFCOM—

(a) to make facilities available for enabling information published in pursuance of a condition applied to that person under subsection (2) to be independently audited;

(b) to meet the costs of any independent auditing of that information that is required by OFCOM.

(6) The reference in subsection (5) to the independent auditing of information is a reference to its being audited by a qualified auditor—

(a) for accuracy; and

(b) for its usefulness in the making of comparisons with information published by other designated universal service providers.

(7) Universal service conditions may impose performance targets on designated universal service providers with respect to any of the matters in relation to which obligations may be imposed by such conditions.

(8) In setting a universal service condition, OFCOM must have regard to any guidance about matters relating to pricing that is contained in the universal service order.

(9) In this section “qualified auditor” means a person eligible, in accordance with Part 2 of the Companies Act 1989 (c 40), for appointment as a company auditor.

5.121 The reference in section 67(1) to the securing of compliance with the obligations set out in the ‘universal service order’ is, pursuant to section 151(1) of the 2003 Act, a reference to the order for the time being in force under section 65.

5.122 Section 65 of the 2003 Act reads:

*Universal service conditions*

**65 Obligations to be secured by universal service conditions**

(1) The Secretary of State must by order (“the universal service order”) set out the extent to which the things falling within subsection (2) must, for the purpose of securing compliance with Community obligations for the time being in force, be provided, made available or supplied throughout the United Kingdom.

(2) Those things are—

(a) electronic communications networks and electronic communications services;

(b) facilities capable of being made available as part of or in connection with an electronic communications service;

- (c) particular methods of billing for electronic communications services or of accepting payment for them;
  - (d) directories capable of being used in connection with the use of an electronic communications network or electronic communications service; and
  - (e) directory enquiry facilities capable of being used for purposes connected with the use of such a network or service.
- (3) The universal service order may contain guidance about matters relating to the pricing of things that the order says must be provided, made available or supplied.
- (4) Before making or varying the universal service order, the Secretary of State must consult OFCOM and such other persons as he considers appropriate.

5.123 The order for the time being in force since 25 July 2003 under that section is the Electronic Communications (Universal Service) Order 2003<sup>44</sup> (the “**Services Order**”), which reads (so far as is material to these disputes):

#### **Universal service obligations**

3. The extent to which the things falling within section 65(2) of the Act must be provided, made available or supplied throughout the United Kingdom is set out in the Schedule to this Order.

#### **Guidance on the pricing of universal service obligations**

4. The matters set out in the Schedule should be offered at prices that are:

(a) affordable for all end-users; and

(b) uniform throughout the United Kingdom, unless OFCOM have determined that there is clear justification for not doing so.

#### SCHEDULE

Article 3

...

#### **Directories**

2.—(1) At least one comprehensive directory shall be made available to end-users in a form approved by OFCOM, whether printed or electronic, or both, and it shall be updated at least once a year.

(2) This directory shall comprise, subject to the provisions of the Telecommunications (Data Protection and Privacy) Regulations 1999, the details of all subscribers of publicly available telephone services and their telephone numbers, including fixed and mobile telephone numbers.

#### **Directory Enquiry Facilities**

3.—(1) At least one comprehensive telephone directory enquiry facility shall be made available to end-users, including users of public pay telephones.

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<sup>44</sup> S.I. 2003/1904.

(2) This facility shall comprise, subject to the provisions of the Telecommunications (Data Protection and Privacy) Regulations 1999, the details of all subscribers of publicly available telephone services and their telephone numbers, including fixed and mobile telephone numbers.

- 5.124 In other words, the effect of paragraph 7(2) of Schedule 18 to the 2003 Act, read in light of above-mentioned Articles and paragraphs in the Schedule to the Services Order as well as section 408(5) of the 2003 Act, is that the current USCs set by the DGT are to have effect after 29 December 2003 as USCs set by Ofcom under section 45 of this Act and applied to BT.
- 5.125 The 2003 Act then sets out certain provisions that are pertinent to the setting of USCs and which will be considered more carefully in other Sections of this document. These provisions, which are set out in sections 68 to 72 of the 2003 Act, cover tariffs, directories and DQ services as well as financing the obligations imposed under the USCs.
- 5.126 In Chapter 3 of the USO notification, the DGT set out his reasons why the USCs were necessary to ensure the proper implementation of the USD in the UK and why he considered them to be consistent with the Services Order. As regards USC7, he stated:

#### **Supply of directories and databases for provision of directory services**

3.74 Under this condition, BT must keep an up-to-date database and provide directories and the contents of the database to certain other parties. The condition ensures that Articles 5 and 25 of the Universal Service directive are implemented in the UK in an efficient and effective manner, in that BT is required to act as a central dissemination point for the directory information of all subscribers to telephone services in the UK.

3.75 Under Article 5 of the Universal Service directive, all end-users should have access to at least one comprehensive directory and to at least one directory enquiry (DQ) service. Furthermore, under Article 25, providers of publicly available directories or DQ services must also have access to the information required to compile such directories.

3.76 General Condition 8, *Operator assistance, directories and directory enquiry facilities*, requires providers of publicly available telephone services ('PATS') to make a DQ service and directories available to their subscribers. General Condition 19, *Provision of directory information*, requires those communications providers who have been allocated telephone numbers to make available their DQ data to any person seeking to provide a publicly available directory or DQ service.

3.77 However, as the Consultation explained, these general conditions are not sufficient on their own to ensure that the obligations under Articles 5 and 25 of the Universal Service Directive are met efficiently and transparently. Significant duplication of effort would be required for PATS providers to ensure that any end-user could access a comprehensive DQ facility and to supply any end-user upon request with a comprehensive directory.

3.78 The Director is therefore imposing upon BT a specific universal service condition requiring it to provide the contents of its comprehensive DQ database to other DQ providers whether or not they are also providers of PATS. This specific condition also requires BT to provide directories to other communications providers who will be caught by General Condition 8 (but not to those persons who do not have this obligation).

3.79 This condition is the most proportionate and effective way to ensure (as required by Article 25) that providers of publicly available directories or DQ services are in practice able to access the information they need to compile directories and make services available.



3.80 The condition imposes obligations on BT only, because BT is in a unique position in that it already compiles a comprehensive DQ database – known as 'OSIS' – that it makes available to third parties, and it already possesses a significant proportion of the entries in that database as a result of its retail telephony business. It is therefore able to supply this essential input data in an efficient manner that does not involve DQ providers and UK industry as a whole in unnecessary duplication of effort.

3.81 This condition is therefore not unduly discriminatory. Oftel also believes that the condition is transparent.

3.82 The draft condition set out in the Consultation required BT to provide directories, the contents of the database and on-line access, including a search facility, to the database on terms that were fair, objective, cost-oriented and not unduly discriminatory.

3.83 The final version, however, has been amended so that it no longer refers to provision of on-line access to the database. This reflects Oftel's understanding that in fact only four parties make use of the search facility, known as 'Pathfinder', which BT currently provides. Pathfinder is a value-added search facility, which allows more than a simple search on an individual enquiry basis and provides access to a database more sophisticated than the OSIS database.

3.84 In the Consultation, Oftel took the view that smaller communications providers and DQ service providers would be disadvantaged if BT were not required to provide on-line access to its core database, and that this in turn would compromise the interests of end-users.

3.85 Having considered the matter further and, in light of the information about actual usage of Pathfinder, Oftel now takes the view that on-line access to the database is not essential in order to ensure that Articles 5 and 25 of the Universal Service Directive are properly and efficiently implemented.

3.86 The condition still requires BT to provide the contents of the database to third parties; those parties are then able to create their own search engines for the purpose of providing DQ information to their end-users. At the end of 2002, the market for directory enquiries was opened up to a wide range of companies, which are now able to offer new products and services in addition to the basic DQ service. There is no evidence that these new DQ service providers rely upon online access to BT's database in order to provide DQ information, ie that they are not in a position to buy the entire contents of the database and create their own search facility.

3.87 In its response to the Consultation, BT advised that it plans to continue to provide Pathfinder. If BT were to price the service anti-competitively, Oftel could either take action under the Competition Act or initiate a market review.

3.88 Where BT currently provides the service to a third party, BT should not withdraw it until the third party has had a reasonable opportunity to make alternative arrangements, for example, purchase of the OSIS database.

3.89 Oftel believes that the amendment to the condition ensures that it is proportionate and not unduly discriminatory.

3.90 The draft condition referred to the database being updated "*at least once a year*". These words have now been deleted; as BT commented, it is essential that the database is continually updated.

5.127 In Chapter 5 of the USO notification, the DGT dealt with the responses to the USO consultation. In relation to USC7, the DGT stated:

#### **Maintenance and supply of a directory information database and directories**

##### ***Why Oftel is imposing this condition on BT?***

5.41 BT argued that Oftel was exceeding the scope of the EC Directives by requiring it to provide directories, the contents of its subscriber database and online access to the database to certain other parties.

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

*5.43 Oftel's ability to impose the specific condition derives from section 67 of the Act, which allows Ofcom to "set any such universal service conditions as they consider appropriate for securing compliance with the obligations set out in the universal service order". The Universal Service Order requires that comprehensive directories and DQs are available to all end-users and the specific condition ensures that these obligations are met. However, as explained below, Oftel has decided that provision of on-line access to the central database is not necessary for implementation of the Universal Service Directive, and may in fact be disproportionate.*

#### **On-line access, including a search facility**

5.44 BT's key concern was the requirement to provide on-line access, including a search facility, to its database. It advised that the product that it currently provides, known as Pathfinder, is not a simple search engine limited to the OSIS database. Rather, BT has invested resources in creating a sophisticated product which provides access to value added material such as cross-references and special lists.

5.45 On the other hand, a DQ service provider, 118866, commented that on-line access was essential. Whilst larger DQ service providers might be able to use OSIS to build their own subscriber databases, they were unlikely to offer access to those databases to smaller innovative service providers.

*5.46 The requirement to provide the contents of a database is proportionate in that BT already compiles a comprehensive DQ database 'OSIS' that it makes available to third parties, and it already possesses a significant proportion of the entries in that database as a result of its retail telephony business. In order to ensure that all end-users have access to comprehensive and up-to-date directory information, communications providers must be able to obtain information from the central database.*

*5.47 However, having considered BT's response to the Consultation and other information to the effect that there are only four companies who make use of BT's search facility, Pathfinder, and also the fact that BT no longer has a monopoly on the provision of DQ services, Oftel has decided that there is no objective justification for requiring BT to provide on-line access to its database. There appears to be no reason why the four companies cannot simply buy the contents of the OSIS database and create their own search facility. Oftel notes, however, that BT's response advises that it plans to continue to provide Pathfinder.*

*5.48 Where BT provides Pathfinder to a third party, it should continue to do so until the third party has had a reasonable opportunity to make alternative arrangements, for example, purchase of the OSIS database. If BT were to price the service at an anti-competitive level, Oftel may take action under Competition Act or by means of a market review.*

## **Relevant Contractual Arrangements**

### **Introduction**

5.128 The contractual arrangements relating to BT's supply of OSIS data are relevant to our consideration of these disputes. In particular, it is to be noted that there are

potentially two different contractual relationships relevant to BT's eventual supply of directory information via its OSIS database to The Number and Conduit, respectively.

- 5.129 On the one hand, there is an agreement between BT and another person supplying to BT directory information relating to that person's customers to whom it has allocated telephone number(s) (the "**BT Upstream Contract**").
- 5.130 On the other hand, there is an agreement between BT and another person (such as The Number and Conduit, respectively) for a non-exclusive licence in respect of the use by that person of the information provided by BT from its OSIS database. BT and The Number entered into such an agreement on 23 August 2002, which provisions commenced on 30 August 2002 (the "**The Number's Licence**"). BT and Conduit have entered into such agreement, which provisions commenced on 1 July 2000 ("**Conduit's Licence**").
- 5.131 In Ofcom's understanding, both of those agreements (each entitled 'Directory Information Licence Agreement') have been entered into in standard form and, so far as is material to these disputes, we therefore do not need to make a distinction between the two. References below to the licences and licensees are therefore references to The Number's Licence and Conduit's Licence, respectively.

## **The BT Upstream Contract**

### General

- 5.132 The present disputes do not involve any particular BT Upstream Contract. We therefore simply make reference to the standard type of the BT Upstream Contract, as published on BT Wholesale's website.<sup>45</sup>
- 5.133 By way of overview, the standard BT Upstream Contract contains provisions about:
- obligations as to the supply of information (paragraph 2);
  - charges and payment (paragraph 3);
  - BT's ownership and rights of use of the information supplied (paragraph 4);
  - the parties' overriding compliance with statutory and other obligations (paragraph 5);
  - the parties' rights to terminate the agreement with 12 months' prior notice (paragraph 6);
  - obligations to comply with certain restrictions, controls and security arrangements (paragraph 7);
  - review of the agreement clauses, including the referral of disputes arising under the agreement for resolution by the DGT (Of tel) [*sic*];

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<sup>45</sup> The standard type of agreement is set out in Annex C, Schedule 11 (entitled '*Directory Information Supply*') to BT's Standard Interconnection (NCC) Agreement, Issue 3.1 (23/08/01), which is available at: [http://www.btwholesale.com/content/binaries/service\\_and\\_support/contractual\\_information/docs/nsia/nsch11.rtf](http://www.btwholesale.com/content/binaries/service_and_support/contractual_information/docs/nsia/nsch11.rtf)

- the specification of certain 'BTDS Manuals' (Appendix 11.1).

### Supply obligations

5.134 Paragraph 2.1 makes it plain that an 'Operator' (which is defined simply as "the other Party to this Agreement"<sup>46</sup>) shall supply 'Operator Customer Information' to BT Directory Solutions ("BTDS", that is the BT unit responsible for facilitating 'Direct Access' and for inputting 'Operator Customer Information' into the 'BTDS OSIS Database': see paragraph 1) for inclusion in the 'BTDS OSIS Database' to facilitate:

- 2.1.1 the maintenance by BTDS of a UK core directory information database; and
- 2.1.2 the provision of directory information services and of directories.
- 2.1.3 the publication by BT of directories and provision of directory enquiry services which include Operator Customer Information and Industry Customer Information supplied to BTDS, pursuant to Condition 2 of the BT Licence.

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

#### **"BTDS OSIS Database"**

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

#### **"Operator Customer Information"**

information provided relating to persons having a telephone number allocated or sub allocated to the Operator in accordance with the UK national numbering scheme (including information relating to telephone numbers which the Operator has allocated for its own use), including associated Status Information;

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

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

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

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

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<sup>46</sup> See Annex D to BT's Standard Interconnection Agreement to which paragraph 1.1 of the standard BT Upstream Contract refers, available at:

[http://www.btwholesale.com/content/binaries/service\\_and\\_support/contractual\\_information/docs/nsia/nannexd.rtf](http://www.btwholesale.com/content/binaries/service_and_support/contractual_information/docs/nsia/nannexd.rtf)

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

- 'Direct Access' (i.e. "direct on-line inputting by the Operator of Operator Customer Information on to the BTDS OSIS Database via the BT Gateway"<sup>47</sup>);
- 'On-line Batch Access' (i.e. "the provision of Operator Customer Information by the Operator to BTDS online, by the LORS system or any successor thereto, for inputting by BTDS to the BTDS OSIS Database"<sup>48</sup>);
- submission of 'Hard Copy' (i.e. "the submission of Operator Customer Information to BTDS by means of paper, facsimile, or disc, for inputting by BTDS to the BTDS OSIS Database"<sup>49</sup>);
- such other means as may be agreed from time to time by the parties in writing such agreement not to be unreasonably withheld.

### Charges and payment

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

5.140 Section 1<sup>50</sup> of the current BTDS Price List sets out the rates to be paid by the 'Operator' for inclusion of 'Operator Customer Information' in BT's Operator Services Information System (OSIS); Section 3<sup>51</sup> of that List sets out details of network charge change notices and price change notifications relating to the DIU Price List Sections 1.0 and 2.0:

5.141 These Sections are set out in **Annex 5** to this explanatory statement.

### Statutory and other obligations

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

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

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<sup>47</sup> Paragraph 2.5.1, read in light of paragraph 1.

<sup>48</sup> Paragraph 2.5.2, read in light of paragraph 1.

<sup>49</sup> Paragraph 2.5.3, read in light of paragraph 1.

<sup>50</sup> See at: [http://www.btwholesale.com/content/binaries/solutions/directory\\_solutions/library/btdsection1iss721.doc](http://www.btwholesale.com/content/binaries/solutions/directory_solutions/library/btdsection1iss721.doc)

<sup>51</sup> See at: [http://www.btwholesale.com/content/binaries/diusect3\\_62.rtf](http://www.btwholesale.com/content/binaries/diusect3_62.rtf)

## **BT's downstream licence arrangements**

### General

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

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

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

### The Number's and Conduit's rights of use

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

5.146 The Schedule to the licences provide:

<b>SCHEDULE</b>
<b>(Rights)</b>
1. <u>Use and extent of Licence</u>
The Licensee may make available within the Territory, one or more of the following: Business/Residential Customer Alphabetical (A-Z) Products or Services. Classified Products or Services and the extent of the Database and Amendment Information in relation to Residential/Business customer entries and Directory Status Classifications shall be agreed within a Customer Service Plan for the Licensee in accordance with the Guidelines and the Licensee's Rights as agreed above.
2. <u>Location</u>

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

### 3. Copying

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

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

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

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

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

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

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

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

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

1.11 "Database" means the data file of Entries contained in the database system or systems run by or on behalf of BT (currently known as OSIS) used (inter alia) for the production of directory information products and services, which shall be delivered or supplied to the Licensee to the extent set out in the Schedule.

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

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

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

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

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

(a) data updates in respect of Entries;

- (b) proformas containing bulk number change information;
- (c) bulk exchange change information ;
- (d) reasonable information on the mechanisms BT adopts to update the Database.

### Charges to be paid to BT

5.149 Paragraph 7 of the licences provides:

**7. CHARGES AND PAYMENT**

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

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

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

- 7.3.1 the number of Searches made on each type of its Products or Services; and
- 7.3.2 the number of Credits shipped, issued or distributed; and
- 7.3.3 the number of printed directories shipped, issued or distributed

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

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

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

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

7.7 Interest shall be payable on any moneys which are not paid by the due date and shall accrue and be calculated on a daily basis both before and after judgement at the rate of 4%



per annum above the base lending rate from time to time of HSBC Bank plc for the period from the due date for payment until the date on which the monies are actually paid.

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

5.150 Section 2.0<sup>52</sup> of the current BTDS Price List, which is referred to in that paragraph 7, is set out in full at **Annex 5** to this explanatory statement.

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

5.151 Paragraph 4 of the licences provides:

4.1 BT shall:

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

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

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

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<sup>52</sup> See at: [http://www.btwholesale.com/content/binaries/solutions/directory\\_solutions/library/BTDSsection2%20Mar04.rtf](http://www.btwholesale.com/content/binaries/solutions/directory_solutions/library/BTDSsection2%20Mar04.rtf)

## Section 6

# USC7

## Introduction

- 6.1 **This Section** sets out Ofcom's reasoning for its provisional findings with regard to BT's obligations under USC7 in relation to these disputes.
- 6.2 Specifically, the structure of **this Section** is as follows:
- **paragraphs 6.4 to 6.8** contain a summary of Ofcom's provisional findings on the lawfulness of USC7 as set out in the August 2006 document;
  - **paragraphs 6.9 to 6.21** set out the main responses to the August 2006 document received by Ofcom; and
  - **paragraphs 6.22 to 6.69** set out Ofcom's analysis for maintaining that USC7 is unlawful, including its views on the consultation responses.
- 6.3 **Section 12** sets out details of the policy review Ofcom is undertaking to address issues arising from the provisional findings made in these disputes. These will include concerns that, if Ofcom's provisional views are confirmed, then no valid ex ante regulation would exist in relation to the provision of a central aggregated database of subscriber information. **Sections 7 to 10** of this explanatory statement set Ofcom's separate assessment of issues relating to BT's obligations under GC19.

## Ofcom's provisional findings on the lawfulness of USC7

- 6.4 In Section 6 of the August 2006 document, Ofcom set out its preliminary conclusions on the lawfulness of USC7 on which consultation responses were invited.
- 6.5 In summary, Ofcom provisionally concluded that USC7 does not properly implement Article 5 of the USD. Its reasoning (based on leading Counsel's advice) was essentially that (in relation to DQ services) the mechanism in USC7 fails to impose an obligation on any undertaking (and, in particular, on BT as a designated provider) to guarantee that at least one comprehensive DQ service is provided to all end-users. Ofcom explained that this position may be contrasted with other universal service obligations imposed on BT, such as under USC1, which properly implement provisions in Chapter II of the USD, such as Article 4.
- 6.6 As a matter of domestic law, Ofcom explained that a conclusion that USC7 does not implement Article 5 of the USD leads automatically to the conclusion that it is beyond Ofcom's powers and hence unlawful.
- 6.7 Furthermore, Ofcom considered that the particular provision in USC7.4 relating to the regulation of charges was incompatible with the USD or with the provisions of the 2003 Act that implement the USD. In other words, even if the rest of USC7 were compatible with the USD, USC7.4 itself is flawed and *ultra vires*.
- 6.8 In Section 6 of the August 2006 document, Ofcom also set out its provisional views on submissions made by the parties to the disputes (as well as another interested person, i.e. Thomson) during Ofcom's investigation prior to publishing that document. As explained in **Section 4** of this explanatory statement, we therefore do not

consider it necessary to repeat in this document those previous submissions alongside Ofcom's views on them. Rather, we focus below on the more recent responses to the August 2006 document.

## Responses to Ofcom's provisional findings

### Overview

- 6.9 As seen from the summary in **Section 4** of this explanatory statement, Ofcom received four responses on its August 2006 document concerning USC7, namely (i) a joint response of 29 September 2006 from The Number<sup>53</sup> and Conduit; (ii) a response by BT; (iii) a response by Thomson; and (iv) a response by Yell.
- 6.10 As regards the lawfulness of USC7, The Number submits that Ofcom's provisional conclusion is wrong in law. The Number strongly believes USC7 to be lawful and, in summary, it submits that Ofcom's statutory duty under section 3 of the 2003 Act requires it to continue to enforce USC7. Ofcom's views on that response, including on The Number's more detailed submissions, are set out below.
- 6.11 On the other hand, BT agrees with Ofcom's provisional conclusion that USC7 is *ultra vires*. BT does not seek to make any new arguments in this regard, but BT instead relies on its previous submissions.
- 6.12 In its response, Thomson does not object to Ofcom's provisional conclusion, although it previously submitted that USC7 was lawful. Nor does Yell comment on the lawfulness issue. However, both Thomson and Yell make observations on the need, going forwards, to have an entity (such as BT) responsible for the centralised consolidation of all subscriber data to be provided to DIP.

### The 'result argument'

- 6.13 The Number makes a number of detailed points in submitting that Ofcom's analysis on the lawfulness of USC7 is flawed.
- 6.14 In summary, it relies on Community law to argue that USC7 achieves a result required under it (the "**result argument**"), on the one hand, and on domestic UK law to argue that the DGT was (and now Ofcom is) empowered to set USC7 on the basis that it is an 'appropriate' condition for the purpose of securing compliance with the obligations set out in the Services Order (the "**appropriateness argument**"), on the other hand.
- 6.15 Ofcom first turns to the detail of The Number's result argument; the detail of its appropriateness argument is set out separately below.
- 6.16 To start with, The Number refers to paragraph 6.16 of the explanatory statement accompanying the August 2006 document, where Ofcom states:

6.16 In principle, the lawfulness of USC7 has to be examined under both UK and EC law; that is to say, it must:

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<sup>53</sup> For the purposes of referring in **this Section** to their submissions, Ofcom refers to them collectively as "The Number", except where the context otherwise requires.

- fall within the power to set a USC in Sections 65-67 of the 2003 Act, which (as a result of the proper construction of those Sections, particularly s.65(1)) brings one to the question of whether it is required by EC law; and
- (assuming it is permitted by UK law) also be permitted by EC law and in particular by the relevant directives on electronic communications.

6.17 The Number responds that Ofcom is incorrect to state that the lawfulness of USC7 depends on the question whether the condition in question is required by EC law. This is because The Number (at paragraph 3.20 of its response) argues:

3.20...Rather, its lawfulness depends on whether Ofcom/the Director were entitled to conclude that the condition was appropriate in pursuit of a particular result required under EC law. The condition itself need not be "required" by EC law in order to be within Ofcom's powers.

6.18 The Number further submits that Ofcom has mis-read the USD in concluding that USC7 does not implement the relevant EC obligation on the basis that EC law requires "*an enforceable obligation on an undertaking to ensure that all end-users receive DQ services*", and no such obligation is placed on BT. In particular, The Number argues:

- Article 8 does not place any obligation on Member States, but rather provides that Member States "*may*" designate one or more undertakings to guarantee the provision of universal services. It is a provision which grants a *power* to Member States to designate undertakings for the provision of universal services: it does not require Member States to do so;
- the material obligations to provide universal services are those contained in Articles 3 and 5 of the USD, which require Member States to ensure ("*guarantee*") that these services are provided to end users, and they must determine the most efficient and appropriate approach for ensuring that this is achieved. In so doing, they may if they wish designate one or more undertakings to provide some or all elements of the service or services. But the USD does not impose any obligation on Member States as to the methods by which the results in Articles 3 and 5 are to be achieved. On the contrary, any such obligation would be inconsistent with Article 3(2) of the USD, with Article 249 of the EC Treaty (paragraph 3 of which states that "*A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods*"), and with the general principle of subsidiarity;
- Article 5 does not "*require that there be a legally enforceable duty on an undertaking to provide or ensure the provision of Article 5 services*". It merely requires Member States to ensure that a DQ service is provided to end users. The choice of means is clear from Article 3(2). Neither Article 1(2) nor the 4<sup>th</sup> recital add any strength to the construction of Article 5 contended for by Ofcom. Both of these provisions are wholly consistent with an obligation on Member States to ensure that universal services are provided to end users, by whatever means they consider most efficient and appropriate.

6.19 Furthermore, The Number considers that there is nothing in the USD which is inconsistent with the provisions of USC7.4. Ofcom are entitled to regulate prices, with the aim of ensuring that the universal service in question should be provided to end users at an "*affordable price*", as required by Article 3 of the USD. The Number submits in this regard that:

- Articles 12 and 13 of the USD have no relevance to the analysis of Ofcom's powers. They are relevant only where a national regulatory authority considers that the provision of universal service places an unfair burden on designated undertakings. The "broad view" of the construction of Articles 12 and 13 of the USD on which Ofcom rely is incompatible with Article 3(2), and with the principle of subsidiarity;
- sections 68(2)(b) and (c) of the 2003 Act state that USCs may require the use of special tariffs<sup>54</sup> or the fixing of tariffs as specified or described in those conditions. In The Number's view, this is broad enough to cover what has been done in USC7.4.

### The 'appropriateness argument'

6.20 As noted above, The Number's other main submission rests on its view of Ofcom's powers to set USCs under domestic UK law. In particular, The Number submits that the wording of both sections 45 and 67 of the 2003 Act makes it clear that Ofcom has a discretion to set the USCs which it considers 'appropriate' for the purpose of securing that the obligations in the Services Order are complied with.

6.21 As regards the appropriateness, The Number argues (at paragraph 3.6 of its response) that:

3.6 'Appropriate' is a broader term than 'necessary': it permits Ofcom to set USCs which it considers to be suitable for the purpose of securing compliance with the obligations in the universal service order, even if they are not strictly necessary for that purpose or capable of achieving it when considered in isolation: compare *R v Secretary of State for Health, ex parte Pfizer Ltd* [1999] 3 CMLR 875, in which the Administrative Court emphasised that a doctor's statutory duty to render to his patients all "necessary and appropriate" medical services included services "which go beyond those that are needed" by their patients, including, for example, advice on various medical matters or family planning.

## Ofcom's analysis

### Introduction

6.22 The Number strongly relies in its response on the fact that under the third paragraph of Article 249 of the EC Treaty directives (such as the USD), while binding Member States as to the result to be achieved, leave to Member States a choice of form and methods. The Number also refers to Ofcom's obligations to comply with that requirement through the application of Article 10 of the EC Treaty and the principle of 'consistent interpretation' as established by the *Marleasing* and *Von Colson* cases<sup>55</sup>.

6.23 In summary, Ofcom considers that, on proper analysis, the reference to Article 249 of the EC Treaty is of no assistance in this context. In essence, that is because when the USD is read in the context of the new EC regulatory framework as a whole, it will

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<sup>54</sup> The Number specifically argues (at paragraph 3.28 of its response) that: "The definition of "tariff" includes a pricing structure (section 68(8)). Note the breadth of section 68(2) as compared with the narrow wording in 68(3), which deals with terms on which persons, i.e. end users, are supplied with universal services. Section 68(2) clearly, in our view, permits a pricing structure in relation to anything mentioned in section 65(2), which includes the making available of DQ services."

<sup>55</sup> Case C-106/89 *Marleasing SA v. La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135 and Case 14/84 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.

be seen that the mechanism adopted in USC 7 is not a mechanism that is permitted to Member States. In **Section 5** of this document, we set out the relevant provisions of (among other things) the EC framework (which was set out more comprehensively in the August 2006 document), and we will focus below on its application to further address the points that The Number now makes.

### The authorisation regime

- 6.24 Before dealing with the specific provisions under the USD relevant to these specific disputes, it is important to place them in their proper context under the relevant EC directives.
- 6.25 In **Section 5** of this document (see, in particular, **paragraph 5.47**), we have already noted that, under the previous EC regulatory framework, Member States retained a degree of flexibility to require providers of telecommunications to be individually licensed, and to attach various conditions to such licences. This resulted in many differences in national licensing systems across the Community, including burdens imposed on providers.
- 6.26 The new framework specifically seeks to address the issues of differences in licensing regimes and licence conditions, as the following recitals to the preamble of the Authorisation Directive (the “**AuD**”) make clear:
- the AuD’s objective is to create a legal framework to ensure the freedom to provide electronic communications networks and services, subject only to the conditions laid down in this Directive and to any restrictions in conformity with Article 46(1) of the EC Treaty (the 3<sup>rd</sup> recital);
  - the AuD sets out a comprehensive scheme for the authorisation of all electronic communications services and networks, whether they are provided to the public or not, which is important to ensure that providers may benefit from objective, transparent, non-discriminatory and proportionate rights, conditions and procedures (the 4<sup>th</sup> recital);
  - the AuD requires the least onerous authorisation system possible (the 7<sup>th</sup> recital 7), which is to be achieved by “general authorisation” of all electronic communications networks and services without requiring any explicit decision or administrative act (the 8<sup>th</sup> recital);
  - any rights and obligations imposed on undertakings by national regulatory authorities (such as Ofcom) should be set out explicitly in the authorisation in order to ensure a level playing field throughout the Community and to facilitate cross-border negotiation of interconnection between public communications networks (the 9<sup>th</sup> recital);
  - the conditions which may be attached to general authorisations and to the specific rights of use should be limited to what is strictly necessary to ensure compliance with requirements and obligations under Community law and national law in accordance with Community law (the 15<sup>th</sup> recital);
  - specific obligations which may be imposed on providers of electronic communications networks and services in accordance with Community law by virtue of their significant market power should be imposed separately from the general rights and obligations under the general authorisation (the 17<sup>th</sup> recital).

6.27 Those purposes, as expressed in those recitals, are reflected in the substantive provisions of the AuD itself as follows:

- the AuD aims to implement an internal market in ECNs and ECSs through the harmonisation and simplification of authorisation rules and conditions (Article 1(1));
- Member States shall ensure the freedom to provide ECNs and ECSs, subject to the conditions set out in the AuD and they shall not prevent an undertaking from providing electronic communications networks or services, except where this is necessary for the reasons set out in Article 46(1) of the EC Treaty (Article 3(1));
- the provision of ECNs or ECSs may, without prejudice to the specific obligations referred to in Article 6(2) or rights of use referred to in Article 5, only be subject to a general authorisation (Article 3(2));
- by definition, “general authorisation” means a legal framework established by the Member State ensuring rights for the provision of ECNs or ECSs and laying down sector specific obligations that may apply to all or to specific types of ECNs and ECSs, in accordance with the AuD (Article 2(2)(a));
- undertakings providing ECNs or ECSs to the public enjoy a minimum list of rights derived from the general authorisation, including the opportunity to be designated to provide different elements of a universal service and/or to cover different parts of the national territory in accordance with the USD (Article 4(2)(b)).

6.28 Articles 3(2) and 6(2) of the AuD therefore constitute an exception to the general principle under the AuD that undertakings providing ECSs are to be free to do so subject only to conditions laid down in a general authorisation. That exception, as an exception to a general principle, is to be construed strictly.

6.29 For present purposes, therefore, USC 7 is therefore compatible with the new regulatory framework if either (a) it can be regarded as a condition properly laid down in a general authorisation or (b) it falls within Articles 3(2) and 6(2).

#### (a) General authorisation

6.30 As regards conditions attached to a general authorisation, the conditions listed in the Annex to the AuD constitute a maximum list of conditions which may be attached (Article 6(1)). For the present disputes, the only potentially relevant condition on that maximum list appears to be an “[o]bligation to provide public directory subscriber information for the purposes of Articles 5 and 25 of [the USD]” (see condition 4 of Part C of the Annex). Ofcom takes the view that the words for “the purposes of Articles 5” themselves indicate that it is not an obligation to be comprised within an universal service obligation itself. Rather, its intended subject-matter is a separate obligation outside the ‘universal service’ context but to facilitate the provision of (amongst others) universal service directories and DQ services.

6.31 Moreover, the only persons to whom such conditions may apply, as seen from the definition in Article 2(2)(a), are “*all or to specific types of electronic communications networks and services*”. In other words, such conditions are not to be imposed on a particular identified supplier of a network or service (here, BT). On that basis, Ofcom considers that condition 4 of Part C of the Annex would not provide a legal basis for standing by the lawfulness of USC7. The Number has not specifically argued this point, but Ofcom considers, in the unusual circumstances of this case, it incumbent

on itself also to investigate other potential legal bases for upholding the lawfulness of USC7.

### (b) Articles 3(2) and 6(2)

6.32 Article 3(2) provides for a further exception to a provider's Community law freedom to provide services, in that it permits the imposition of obligations set out in Article 6(2) of the AuD. Article 6(2) provides:

2. Specific obligations which may be imposed on providers of electronic communications networks and services under Articles 5(1), 5(2), 6 and 8 of Directive 2002/19/EC (Access Directive) and Articles 16, 17, 18 and 19 of Directive 2002/22/EC (Universal Service Directive) or on those designated to provide universal service under the said Directive shall be legally separate from the rights and obligations under the general authorisation. In order to achieve transparency for undertakings, the criteria and procedures for imposing such specific obligations on individual undertakings shall be referred to in the general authorisation.

6.33 Taking into account the above-mentioned aims of the AuD (as well as the need to interpret the exception in Articles 3(2) and 6(2) strictly), Ofcom considers that Article 6(2) (when read with Article 3(2)) does the following three things:

- first, it provides an exhaustive list of the types of, and on whom, *specific obligations* may be imposed as a matter of Community law, the relevant provision here of which is "...on those designated to provide universal service under the [USD]...";
- secondly, as a matter of Community law, such obligations must be legally separate from the rights and obligations under the general authorisation;
- thirdly, and finally, in order to achieve transparency for undertakings, the criteria and procedures for imposing such specific obligations on individual undertakings shall be referred to in the general authorisation under domestic law.

6.34 In light of the above and The Number's 'result argument', it is necessary to turn in some detail to the relevant provisions of the USD. First, it is necessary to look at the need to designate a provider with regard to the provision of the 'universal services' in Article 5 of the USD in light of specific UK circumstances. Secondly, Ofcom's reasons are set out as to why USC7 cannot be regarded as a "*specific obligation ... on [a person] designated to provide universal service under the [USD]*".

### **The designation mechanism**

6.35 The concept of 'universal service' is essentially about the need to maintain a safety net to ensure that a defined set of basic telecommunication services is always available to all end-users (irrespective of their geographical location) at a determined quality and an affordable price, even if market forces do not provide such set of services. This is reflected in the definition of 'universal service' itself, namely (see Article 2(j) of the Framework Directive):

"...the minimum set of services, defined in Directive 2002/22/EC (Universal Service Directive), of specified quality which is available to all users regardless of their geographical location and, in the light of specific national conditions, at an affordable price;"

6.36 The recitals to the USD's preamble further provide that:



(4) Ensuring universal service (that is to say, the provision of a defined minimum set of services to all end-users at an affordable price) may involve the provision of some services to some end-users at prices that depart from those resulting from normal market conditions. However, compensating undertakings designated to provide such services in such circumstances need not result in any distortion of competition, provided that designated undertakings are compensated for the specific net cost involved and provided that the net cost burden is recovered in a competitively neutral way.

(5) In a competitive market, certain obligations should apply to all undertakings providing publicly available telephone services at fixed locations and others should apply only to undertakings enjoying significant market power or which have been designated as a universal service operator.

...

(7) Member States should continue to ensure that the services set out in Chapter II are made available with the quality specified to all end-users in their territory, irrespective of their geographical location, and, in the light of specific national conditions, at an affordable price...

(9) The provisions of this Directive do not preclude Member States from designating different undertakings to provide the network and service elements of universal service. Designated undertakings providing network elements may be required to ensure such construction and maintenance as are necessary and proportionate to meet all reasonable requests for connection at a fixed location to the public telephone network and for access to publicly available telephone services at a fixed location.

(10) Affordable price means a price defined by Member States at national level in the light of specific national conditions, and may involve setting common tariffs irrespective of location or special tariff options to deal with the needs of low-income users. Affordability for individual consumers is related to their ability to monitor and control their expenditure.

...

(13)...Quality of service standards have been developed for a range of parameters to assess the quality of services received by subscribers and how well undertakings designated with universal service obligations perform in achieving these standards...

(14) The importance of access to and use of the public telephone network at a fixed location is such that it should be available to anyone reasonably requesting it. In accordance with the principle of subsidiarity, it is for Member States to decide on the basis of objective criteria which undertakings have universal service obligations for the purposes of this Directive, where appropriate taking into account the ability and the willingness of undertakings to accept all or part of the universal service obligations. It is important that universal service obligations are fulfilled in the most efficient fashion so that users generally pay prices that correspond to efficient cost provision. It is likewise important that universal service operators maintain the integrity of the network as well as service continuity and quality. The development of greater competition and choice provide more possibilities for all or part of the universal service obligations to be provided by undertakings other than those with significant market power...

(15)... Affordability therefore means giving power to consumers through obligations imposed on undertakings designated as having universal service obligations...

(17) Quality and price are key factors in a competitive market and national regulatory authorities should be able to monitor achieved quality of service for undertakings which have been designated as having universal service obligations...

(18) Member States should, where necessary, establish mechanisms for financing the net cost of universal service obligations in cases where it is demonstrated that the obligations can only be provided at a loss or at a net cost which falls outside normal commercial standards....

(25) Communications markets continue to evolve in terms of the services used and the technical means used to deliver them to users. The universal service obligations, which are defined at a Community level, should be periodically reviewed with a view to proposing that the scope be changed or redefined. Such a review should take account of evolving social, commercial and technological conditions and the fact that any change of scope should be subject to the twin test of services that become available to a substantial majority of the population, with a consequent risk of social exclusion for those who can not afford them...Member States are not permitted to impose on market players financial contributions which relate to measures which are not part of universal service obligations. Individual Member States remain free to impose special measures (outside the scope of universal service obligations) and finance them in conformity with Community law but not by means of contributions from market players.

6.37 Those recitals make a number of things clear, including (so far as is relevant to these disputes) the following:

- universal service obligations comprise a basic set of services that are *defined* in Chapter II of the USD *of a specified quality*;
- the *affordability* of such services forms a fundamental aspect of the need to maintain these obligations and it may involve these services being provided at prices that depart from those resulting from normal market conditions;
- the USD recognises that 'universal service' is a dynamic and evolving concept that must therefore be periodically reviewed;
- such obligations should apply only to undertakings which have been designated as a universal service operator (see, in particular, the 5<sup>th</sup> recital and the analysis of the authorisation regime above);
- where such obligations are imposed, the USD regulates the financing of the net cost of universal service obligations, something which affects Member States' freedom to regulate financing of any special measures imposed that are outside the scope of universal service obligations.

6.38 In other words, the USD is clear, in Ofcom's view, that a Member State (such as the UK) must designate an undertaking as a universal service operator where it decides to impose universal service obligations.

6.39 However, the USD appears silent with regard to the situation where the defined minimum set of basic services is already available throughout the territory in question to all end-users at the determined quality and an affordable price under normal market conditions. In such circumstances, it would follow that there would be no need to impose universal service obligations, nor consequently any need to designate a universal service operator, because the 'result' aimed at by Community law has already been achieved without the need to impose this regulation.

6.40 Whilst the previous EC regulatory framework contained certain express wording that made that point more clearly<sup>56</sup>, the USD contains certain references (such as in the

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<sup>56</sup> The first paragraph of Article 4 of the Revised Voice Telephony Directive (98/10/EC), which dealt with the financing schemes of universal services, provided: "*Where the services set out in this Chapter cannot be commercially provided on the basis of conditions laid down by the Member State, Member States may set up universal service funding schemes for the shared financing of those*

4<sup>th</sup> recital and Article 1(1)<sup>57</sup>) to normal market conditions that may be taken to suggest that the new framework remain unchanged in this regard.

- 6.41 Furthermore, Ofcom notes that the European Commission is seemingly of the view that no universal service obligations (and therefore related designations) are necessary where the provision of the basic set of (universal) services is already being ensured by normal market conditions. For example, in its 11<sup>th</sup> Implementation Report<sup>58</sup>, the Commission reports:

“Designation

If the basic set of services currently within the scope of universal service referred to above is not being provided under normal commercial conditions at an affordable price, Member States may choose to designate one or more undertakings to provide them in all or parts of the national territory. The Member States may also designate different undertakings to provide different elements of the universal service. In doing so, they must ensure that the designation mechanism is efficient, objective, transparent and non-discriminatory and that no undertaking is a priori excluded from the process. The mechanism is thus left to the discretion of the Member States. In the majority of cases the details are either enshrined in national law or in each call for tender. [page 58]

...

Other approaches

Some Member States have decided not to designate a universal service operator on the basis that provision of the service is ensured by normal market conditions. This is the case in Luxembourg and in Germany. Others have taken one or more of the elements out of the set of universal service obligations. For example, Italy does not impose the obligation to provide a directory and a directory enquiry service on a specific undertaking as it considers that there are different services on offer in terms of availability, quality and at an affordable price. Sweden has recently designated the fixed incumbent as the universal service operator only for the ‘access at a fixed location’ element. [page 60]”

- 6.42 In Ofcom's view, it is against the above background that Article 8 of the USD must be interpreted: a Member State's choice is between designating one or more undertakings to guarantee the provision of the minimum set of basic (universal) services or not to so designate (as the provision of such services is already being guaranteed by normal market conditions).

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services, in conformity with Community law and, in particular, with Directive 97/33/EC on Interconnection.

<sup>57</sup> See, in particular, “...The aim is to ensure the availability throughout the Community of good quality publicly available services through effective competition and choice and to deal with circumstances in which the *needs of end-users are not satisfactorily met by the market...*”.

<sup>58</sup> Volume I of Annex to the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions European Electronic Communications Regulation and Markets 2005 (11th Report), COM(2006)68 final, Brussels, 20.2.2006;

[http://europa.eu.int/information\\_society/policy/ecomms/doc/implementation\\_enforcement/annualreports/11threport/sec\\_2006\\_193-vol1.pdf](http://europa.eu.int/information_society/policy/ecomms/doc/implementation_enforcement/annualreports/11threport/sec_2006_193-vol1.pdf)

- 6.43 In July 2003, the Director took, in effect, the view that universal service obligations were required to guarantee the provision of services identified in Article 5 of the USD, albeit through requiring BT to provide access to persons (i.e. intermediaries) wishing to such services to end-users with the basic “raw material” – the OSIS database – that enables them to do this. In short, USC7 requires BT to provide the database at a “wholesale” level, but does not require it to provide services at a “retail” level to end-users.
- 6.44 Accordingly, Ofcom remains of the view set out in the August 2006 document that the UK was required in these circumstances to designate an undertaking for the provision of these services. For those reasons, we also disagree with The Number’s recent submissions in this regard.
- 6.45 We now turn in more detail to the nature of the services to be guaranteed under Article 5 of the USD by way of specific obligations.

### The specific (universal service) obligations

- 6.46 As seen above from (amongst others) the definition of ‘universal service’ itself, Chapter II of the USD defines the basic set of services, which provision must be guaranteed in Member States (whether, as seen above, by designation or by normal market conditions). This position is reinforced in the USD’s scope and aims as set out in Article 1(2) of the USD, as follows:

2...With regard to ensuring provision of universal service within an environment of open and competitive markets, **this Directive defines** the minimum set of services of specified quality to which all end-users have access, at an affordable price in the light of specific national conditions, without distorting competition...(Emphasis added)

- 6.47 Article 3(1) of the USD further repeats this position:

1. Member States shall ensure that **the services set out in this Chapter** are made available at the quality specified to all end-users in their territory, independently of geographical location, and, in the light of specific national conditions, at an affordable price. (Emphasis added)

- 6.48 The defined services relevant to these disputes are those set out in Article 5 of the USD, which provides:

#### Article 5

##### Directory enquiry services and directories

1. Member States shall ensure that:

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

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

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

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

- 6.49 That provision should be read in light of the 11<sup>th</sup> recital to the USD's preamble, namely:

(11) Directory information and a directory enquiry service constitute an essential access tool for publicly available telephone services and form part of the universal service obligation. Users and consumers desire comprehensive directories and a directory enquiry service covering all listed telephone subscribers and their numbers (including fixed and mobile numbers) and want this information to be presented in a non-preferential fashion. Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector(5) ensures the subscribers' right to privacy with regard to the inclusion of their personal information in a public directory.

- 6.50 In light of those provisions, there can be no doubt, in Ofcom's view, as to what is the *minimum* set of (universal) service relevant to these disputes that must be made available, and be made available (among other things) at an affordable price. That is to say, one comprehensive directory and one comprehensive telephone directory enquiry service covering all listed telephone subscribers of PATS and their numbers (including fixed and mobile numbers).

- 6.51 As Ofcom provisionally concluded, USC7 fails to impose an obligation on any undertaking (and, in particular, on BT as a designated provider) to guarantee that Article 5 services are made available. The Number's answer to this is seemingly, by reference to Article 3(2) of the USD, that it suffices that USC7 in practice results in the making available of the Article 5 universal service. In particular, at paragraph 3.17 of its response, The Number submits:

3.17 In short, USC7 ensures that companies which wish to provide comprehensive DQ services to end users can obtain access to the necessary data to do so, at a fair price, which in turn enables them to provide a comprehensive DQ service to end users at an affordable price. The UK thus fulfils its obligations under the USD.

- 6.52 The Number appears to rely on Article 3(2) of the USD also to argue that USC7 secures compliance with Community obligations as set out in the Services Order. In particular, The Number submits:

3.11 By Article 3(2), Member States are required to determine “the most efficient and appropriate approach for ensuring the implementation of universal service, whilst respecting the principles of objectivity, transparency, non-discrimination and proportionality.”

3.12 By Article 5(1)(b), Member States must ensure that at least one comprehensive telephone directory enquiry service is available to all end-users, including users of public pay telephones. This provision read with Article 3(2) requires Member States to ensure that they determine the most efficient and appropriate approach for ensuring the provision of a directory enquiry service to end users.

3.13 The material wording of the universal service order reflects Article 5(1)(b) of the USD, with which it must be consistently construed.

- 6.53 To deal with those submissions, it is appropriate to first turn to the wording of Article 3(2) of the USD, which provides:

2. Member States shall determine the most efficient and appropriate approach for ensuring the implementation of universal service, whilst respecting the principles of objectivity,

transparency, non-discrimination and proportionality. They shall seek to minimise market distortions, in particular the provision of services at prices or subject to other terms and conditions which depart from normal commercial conditions, whilst safeguarding the public interest.

- 6.54 In Ofcom's view, there is nothing in that provision which seeks to open up the scope and nature of the basic minimum set of (universal) services to be comprised within specific (universal) service obligations, such as those defined in Article 5 of the USD. Indeed, the first sentence of that Article 3(2) refers to the most efficient and appropriate approach for ensuring the implementation of *universal service*. By definition, as seen from the analysis above, the concept of 'universal service' is limited to those set out and defined in Chapter II of the USD (such as Article 5). This matter is also supported by taking into account the aims of the authorisation regime discussed above, including the purpose of imposing universal service obligations as expressed in the above-mentioned recitals to the USD's preamble itself.
- 6.55 Ofcom's view in this regard is further supported by provisions such as Articles 15 and 32 of the USD which form part of the overall context. To start with, Article 15 of the USD imposes a requirement on the European Commission to review<sup>59</sup> the scope of universal service, so that the current universal service obligations are periodically reviewed with a view to proposing that the scope be changed or redefined. This suggests, in Ofcom's view, that Article 3(2) of the USD is not a provision intended, as The Number's appears to argue, to provide a mechanism so that the scope and nature of the 'universal services' in Article 5 is to be interpreted flexibly.
- 6.56 Rather, Article 3(2) suggests (when read together with other provisions of the directives, including Article 15 of the USD) that Member States' margin of appreciation in determining "the most efficient and appropriate" approach is limited to whether and how to designate undertakings to guarantee the making available of the defined universal services to end-users (at retail level); it does not permit the imposition of an obligation to provide some other service (such as the supply of data at a wholesale level, as in USC7).
- 6.57 As regards Article 32 of the USD, that provision illustrates the importance of there being a clear boundary for regulatory purposes between services that are within the scope of universal service and those services that are outside of that scope. Article 32 provides:

*Article 32*

**Additional mandatory services**

Member States may decide to make additional services, apart from services within the universal service obligations as defined in Chapter II, publicly available in its own territory but,

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<sup>59</sup> Indeed, in its review of the regulatory framework, the European Commission has already proposed as follows: "[w]ith an increasingly competitive market for the provision of directory inquiry services, and the development of internet-based directories, it is proposed to remove the provision of directories and directory inquiry services from the scope of universal service and leave the market to meet demand for these services"; see Section 6.2 of the Commission Staff Working Document of 28 June 2006 entitled "Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the Review of the EU Regulatory Framework for electronic communications networks and services", COM(2006) 334 final, at:

[http://europa.eu.int/information\\_society/policy/ecom/doc/info\\_centre/public\\_consult/review/staffworkingdocument\\_final.pdf](http://europa.eu.int/information_society/policy/ecom/doc/info_centre/public_consult/review/staffworkingdocument_final.pdf)

in such circumstances, no compensation mechanism involving specific undertakings may be imposed.

- 6.58 The USD's 25<sup>th</sup> recital refers to that provision, stating that: "...*Individual Member States remain free to impose special measures (outside the scope of universal service obligations) and finance them in conformity with Community law but not by means of contributions from market players.*"
- 6.59 Article 32 therefore concerns Member States' discretion to make available additional services, apart from services within the universal service obligations as defined in Chapter II of the USD. In other words, Article 32 does not impose a Community obligation.
- 6.60 Accordingly, The Number's reliance on Article 3(2) of the USD as a matter of Community law does not substantially advance the issue of the validity of USC7. Its argument<sup>60</sup> suggesting that affordability of Article 5 services may be ensured simply on the basis that DQ service providers have access to BT's OSIS database under USC7 at 'fair price' is particularly misconceived for a number of reasons.
- 6.61 First, that argument is seemingly premised on the idea that Article 3(2) of the USD can be invoked, in effect, to redefine the minimum set of basic (universal) services set out in Article 5 where the express provisions of the USD make it clear that:
- the scope of universal service is tightly drawn and must be so interpreted, although it may be reviewed in the future;
  - Member States have discretion to make available additional services outside the scope of specific (universal service) obligations; and
  - The Number's broad and flexible construction contradicts the position under the authorisation regime that the imposition of such specific obligations is an exception to BT's freedom to provide services without regulatory intervention and Article 3(2) should therefore be interpreted strictly.
- 6.62 Secondly, The Number's argument fails because it does not necessarily follow, as it argues, that conferring an obligation on BT to provide DQ service providers with OSIS data at a fair price necessarily leads to the affordability of DQ services as provided to end users.

### **Ofcom's powers to set USCs under the 2003 Act**

- 6.63 Turning to The Number's arguments based on domestic UK law, it is clear to Ofcom that the universal service obligations set out in paragraphs 2 and 3 of the Annex to the Services Order adopts the wording, so far as is material, of Article 5 of the USD, as follows:

#### **Directories**

2. – (1) At least one comprehensive directory shall be made available to end-users in a form approved by OFCOM, whether printed or electronic, or both, and it shall be updated at least once a year.

(2) This directory shall comprise, subject to the provisions of the Telecommunications (Data

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<sup>60</sup> At paragraph 3.17 of The Number's response, as cited above.

Protection and Privacy) Regulations 1999[3], the details of all subscribers of publicly available telephone services and their telephone numbers, including fixed and mobile telephone numbers.

### **Directory Enquiry Facilities**

3. – (1) At least one comprehensive telephone directory enquiry facility shall be made available to end-users, including users of public pay telephones.

(2) This facility shall comprise, subject to the provisions of the Telecommunications (Data Protection and Privacy) Regulations 1999, the details of all subscribers of publicly available telephone services and their telephone numbers, including fixed and mobile telephone numbers.

- 6.64 In Ofcom's view, it is further clear that the 2003 Act confers no power on the Secretary of State to include a provision which is not a Community obligation in an order under section 65(1), and he has (rightly) not done so in relation to imposing Article 32 in the Services Order. It follows that Ofcom has no power to implement Article 32 by way of a USC under section 67 of the 2003 Act as Ofcom's powers under that section are only to be exercised "*for securing compliance with the obligations set out in the universal service order*".
- 6.65 In light of its appropriateness argument, The Number's answer to this appears to be that under the 2003 Act Ofcom is empowered to set USCs "...even if they are not strictly necessary for that purpose or capable of achieving it when considered in isolation: compare *R v Secretary of State for Health, ex parte Pfizer Ltd* [1999] 3 CMLR 875...[the "**Viagra case**"]". The word "appropriate" in section 67(1)<sup>61</sup> of the 2003 Act is central to The Number's argument, as read in light of the *Viagra* case.
- 6.66 Ofcom considers that The Number's argument is wrong in law for a number of reasons.
- 6.67 First, the *Viagra* case is not an authority of any relevance to the construction of the 2003 Act, as read in light of the new EC regulatory framework, in respect of the issues relevant to these disputes. In short, that case concerned the lawfulness of a circular stating that doctors should not prescribe Viagra, while their professional obligations under domestic legislation required that they should render to patients all necessary and appropriate medical services of the type usually provided by general medical practitioners. In other words, the domestic legislation in that case was entirely different in terms of its nature and effect to that relevant to these disputes.
- 6.68 In particular, where Parliament has not granted Ofcom powers, for reasons set out above, to implement Article 32 of the USD by way of a USC under section 67 of the 2003 Act, The Number's appropriateness argument would have the effect of Ofcom acquiring powers not specifically intended by Parliament. This would not accord with the established principle of law that a statutory corporation (such as Ofcom) cannot act outside of the powers granted to it by Parliament.
- 6.69 This is particularly the case where, in Ofcom's view, the reasons for Parliament using the word "appropriate" in this context are clear, namely:

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<sup>61</sup> Section 67(1) of the 2003 Act provides: "OFCOM may set any such universal service conditions as they consider appropriate for securing compliance with the obligations set out in the universal service order."



- in relation to the “things” set out in the Schedule to the Services Order, Ofcom may need within the scope of those things exercise its discretion to specify certain matters in the USCs, such as the data rates that Ofcom considers are sufficient to permit functional Internet access (see paragraph 1(2) of that Schedule) or the availability of more than one comprehensive directory or DQ service (paragraphs 2(1) and 3(1) of that Schedule provide simply that “at least one” of each must be made available) or the intervals for updating a directory (paragraph 3(1) of that Schedule provides simply that it must be updated “at least one a year”);
- in relation to the pricing of universal service obligations, Ofcom has discretion when setting universal service conditions under section 67 of the 2003 Act, but it is required to have regard to the guidance on affordability and uniformity of prices as set out in Article 4 of the Services Order;
- the legislative transposition mechanism adopted in the UK (by the Secretary of State making an order that, in turn, sets the parameters of Ofcom’s obligations under s.67) is one that needs to be sufficiently flexible to deal with any future changes to the provision of universal services under Community law, such as following a review of the scope of universal service under Article 15 of the USD (as discussed above), without the need to amend primary legislation simply for this reason.

## Section 7

# GC19 – Preliminary issues

## Introduction

- 7.1 In Section 7 of the August 2006 document, we dealt with a number of issues in assessing BT's obligations under GC19 by addressing the following essential questions in light of the facts present in these disputes:
- (i) whether (or not) BT is, in principle, a person subject to the requirement under GC19 (see paragraphs 7.12 to 7.18 of the August 2006 document)?
  - (ii) if so, since what date BT has, in principle, been so required (see paragraphs 7.19 to 7.24 of the August 2006 document)?
  - (iii) whether (or not) each of The Number and Conduit has, in principle, 'rights of access' to the information under GC19 (see paragraphs 7.26 to 7.40 of the August 2006 document)?
  - (iv) whether (or not) each of The Number and Conduit has reasonably requested information to be made available by BT under GC19 (see paragraphs 7.41 to 7.72 of the August 2006 document)?
  - (v) what information is BT actually required to make available to each of The Number and Conduit under GC19 (see paragraphs 7.73 to 7.148 of the August 2006 document)?
  - (vi) on what precise basis and terms must BT make such information available under GC19 (see paragraphs 7.149 to 7.166 of the August 2006 document)?
- 7.2 In our understanding, BT is not contesting that, for the purposes of the present disputes, in principle:
- (i) BT is a person subject to the requirement under GC19;
  - (ii) BT has been required to comply with GC19 since 25 July 2003; and
  - (iii) BT is required to provide each of The Number and Conduit as they have 'rights of access'.
- 7.3 However, in its response to the August 2006 document, BT disagrees with Ofcom's provisional conclusions with regard to the first four of above-mentioned issues, which issues are preliminary in nature, in the following main respects:
- (i) it would be wholly unrealistic to expect BT to supply information under GC19 instantly to any person so reasonably requesting as it needs a reasonable period of time to implement Ofcom's final determinations;
  - (ii) as regards 'rights of access', BT is required to provide information falling under GC19 only to a person wishing to provide either a comprehensive directory or comprehensive DQ service;

- (iii) BT has not received a reasonable request of information falling under GC19 from either The Number or Conduit and no disputes have therefore arisen in relation to BT's obligations under this condition for present purposes. BT therefore preserves its position as in the two appeals it has lodged at the Competition Appeal Tribunal.

7.4 On the other hand, BT generally concurs with the scope of information to be provided under GC19 as proposed by Ofcom in the August 2006 document. It nonetheless draws Ofcom's attention to a few issues on this scope. In contrast, The Number<sup>62</sup> strongly objects to Ofcom's proposed scope of data to be made available by BT under GC19. The Number makes a number of submissions in this regard, although The Number makes no submissions on the said preliminary issues. However, while taking issue with Ofcom's view on setting a charge for a fully bundled (OSIS) product, The Number submits that Ofcom has (rightly) concluded that The Number and Conduit have requested, as a matter of fact, a sub-set of data from OSIS that falls within the terms of GC19.

7.5 Given that:

- (i) BT is seemingly prepared to accept some of these preliminary issues only as a matter of principle;
- (ii) BT contests, in effect, Ofcom's jurisdiction to resolve these disputes by reference to its obligations under GC19 as BT claims that neither The Number, nor Conduit, has made any (reasonable) requests thereunder;
- (iii) substantial submissions have been made by the parties on Ofcom's proposed scope of information to be provided under GC19,

we deal with all of these issues also in this explanatory statement.

7.6 For presentational reasons, we have however decided in light of the above to structure this document so that:

- i) **this Section** sets out Ofcom's provisional views as regards the above-mentioned preliminary issues, that is to say (i) BT being a person to whom GC19 applies in the present disputes (see **paragraphs 7.7 to 7.20**); (ii) BT having been required to comply with GC19 since 25 July 2003 (see **paragraphs 7.21 to 7.34**); (iii) The Number and Conduit having 'rights of access' (see **paragraphs 7.35 to 7.65**); and (iv) The Number and Conduit having (reasonably) requested information to be made available by BT under GC19 (see **paragraphs 7.66 to 7.98**);
- ii) **Section 8** deals with arguments raised by The Number in response to the August 2006 document that focus in more general terms on the approach taken by Ofcom in interpreting the data that BT is (and was during the relevant period) obliged to provide to The Number and Conduit under GC19;
- iii) **Section 9** considers what BT's obligations under GC19 comprise in terms of the scope of the data to be made available;

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<sup>62</sup> For the purposes of referring in **this Section** to their submissions, Ofcom refers to The Number and Conduit collectively as "The Number", except where the context otherwise requires.

- iv) **Section 10** then, in light of those previous Sections, deals with the implications for BT's pricing of access to the OSIS database.

## BT being a person required to provide Directory Information

### The relevant terms of GC19

- 7.7 Paragraphs 1 and 5 of GC19 provide:

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

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

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

...

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

- 7.8 Those terms make it clear that, for BT to be required to provide the more specific data discussed in **Section 9** of this document to be made available under GC19 to The Number and Conduit, respectively, it is necessary first to establish that:
- (i) BT is a relevant 'Communications Provider' for the purposes of GC19; and
  - (ii) BT has been required to comply with GC19 in relation to the period to which the present disputes relate.

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

- 7.9 As noted above, BT has not contested that, for the purposes of the present disputes, it is, in principle, a person subject to the requirement under GC19. Nor has BT made any particular submissions on this matter to respond to any points made in Ofcom's detailed analysis as set out in the August 2006 document.
- 7.10 We therefore maintain our previously stated views on this matter, but we set them out below in order to introduce our analysis on the remaining preliminary issues to be considered in **this Section**.
- 7.11 GC19 is an *ex ante* regulatory requirement (that is to say, a condition set under the 2003 Act) in the UK to specifically implement the obligations contained in Article 25(2) of the USD. This is shown from the discussion in **Section 5** of this document. However, in its transposition, GC19 uses certain terminology which differs to that of Article 25(2), such as (which are relevant to this particular issue) *persons providing ECNs or ECSs* (GC19) as opposed to simply *undertakings* (Article 25(2)), on the one hand, and *Allocation* (GC19) as opposed to *assignment* (Article 25(2)), on the other hand. In our view, nothing turns on these differences for the purposes of these disputes. We nonetheless take this opportunity to set them out for clarity.

- 7.12 Starting with the term 'undertakings', it is to be noted that Article 25(2) of the USD provides:

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

(Emphasis added)

- 7.13 In contrast, pursuant to Ofcom's enabling powers under section 46(2)(b) of the 2003 Act, the obligations set out in GC19 apply to a 'Communications Provider', which is specifically defined, pursuant to GC19.5, to apply to a "**person who provides an Electronic Communications Network or an Electronic Communications Service**". Specifically, therefore, GC19 only applies to BT if it is:

- (i) a person;
- (ii) who provides;
- (iii) an ECN or ECS.

- 7.14 As to the word "**person**" includes<sup>63</sup> a body of persons corporate or unincorporated. In light of the reference in Article 25(2) of the USD to 'undertakings', Ofcom takes the view that the word 'person' should be interpreted broadly and that certain guidance provided by the ECJ on the meaning of an 'undertaking' for the purposes of EC competition law is likely to be relevant also in this context. For instance, any entity engaged in an economic activity<sup>64</sup>, regardless of its legal nature, can be interpreted as being an 'undertaking'. It also includes undertakings that form a single economic entity<sup>65</sup>, such as companies or divisions within the same corporate group (e.g. BT Wholesale, BT Retail and Openreach), where a company within that group is not independent in its decision making.

- 7.15 As regards the expression "**(who) provides**", it shall (pursuant to paragraph 2(d) of Part 1 of the Schedule to the GC notification) have the same meaning as that ascribed to the cognate expression "provide" in the 2003 Act<sup>66</sup>. In some cases (but which does not appear to be the case with regard to BT for the purposes of the present disputes), where separate single economic entities are in fact (contractually) involved in the provision of (say) an ECS, it may be necessary to have a closer regard to this expression.

- 7.16 As to the terms **ECN and ECS**, they are defined under paragraph 1 of Part 1 of the Schedule to the GC notification as follows:

"Electronic Communications Network" means—

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<sup>63</sup> See Schedule 1 to the Interpretation Act 1978, which applies pursuant to paragraph 2(d) of Part 1 of the Schedule to the GC notification.

<sup>64</sup> See, for instance, *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, Case C-41/90 [1991] ECR I-1979, which leading case has been upheld by the ECJ most recently in *FENIN v. Commission*, Case C-205/03P (unreported) on 11 July 2006.

<sup>65</sup> See, for instance, *Viho v. Commission*, Case C-73/95 P [1996] ECR I-5457.

<sup>66</sup> See section 405(1), which makes it clear that 'provide' in this context is to be construed in accordance with section 32(4), of the 2003 Act, namely: "references, where one or more persons are employed or engaged to provide the network or service under the direction or control of another person, to the person by whom an electronic communications network or electronic communications service is provided are confined to references to that other person".

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

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

(i) apparatus comprised in the system;

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

(iii) software and stored data;

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

- 7.17 In addition to being “a person who provides an [ECN] or an [ECS]”, GC19.1 requires that such person must also have been “**Allocated Telephone Numbers in accordance with Condition [GC]17**” in order to qualify as a ‘Communications Provider’ for the purposes of meeting any obligations under GC19. Under paragraph 1 of Part 1 of the Schedule to the GC notification, the term ‘Allocation’ is defined as follows:

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

- 7.18 Article 25(2) of the USD uses the term ‘assign’, which according to its literal meaning corresponds to allocating (a Telephone Number) to someone.

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

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

- 7.20 Accordingly, BT (in common with any person providing an ECN or an ECS, who has been ‘Allocated’ ‘Telephone Numbers’ in accordance with GC17) is a relevant ‘Communications Provider’ for the purposes of GC19. We note again that BT has made no submissions to Ofcom throughout its investigation contesting this specific matter.

### **BT having been required to comply with GC19 since 25 July 2003**

- 7.21 As noted above, in its response to the August 2006 document, BT submits that it would be wholly unrealistic to expect BT to supply information under GC19 instantly to any person so reasonably requesting as it needs a reasonable period of time to

implement Ofcom's final determinations. This is because, in BT's view, there are a number of technical and commercial issues that must be resolved before it could supply the information.

- 7.22 In particular, BT points in Annex 5 to its response to the need of it having to first resolve, put broadly, the following issues:
- (i) the part of BT that should be responsible for discharging BT's obligation under GC19;
  - (ii) in light of Ofcom's expectation that BT will continue to provide OSIS data on request, time needed by BT following Ofcom's final determinations to review, develop and test a new version of the Standard Extract Format for OSIS to suppress data not falling under GC19 to meet any future requests for such data only, though BT will need to assess each request on a case-by-case basis, including format and frequency of delivery;
  - (iii) time to finalise a standard contract and price list for the provision of such data, which would need to evolve from time to time to accommodate new requests, as well as negotiating individual requirements by DIPs to meet their respective needs.
- 7.23 Turning to this submission by BT, it may be the case that BT has somewhat misunderstood our position in the August 2006 document, when it refers to Ofcom's expectation that BT should be able to provide data 'immediately' upon reasonable request. We will therefore now turn to clarify this position.
- 7.24 In the August 2006 document, we indeed stated that Ofcom would expect BT to be in a position to meet the requirements of any DIP requesting the separate BT GC19 data set *immediately* (see paragraph 7.228 of that document). However, we made that statement particularly in light of our view (in paragraphs 7.19 to 7.23 of that document) that BT has been required to comply with GC19 since 25 July 2003 and, more specifically, by recognising (at paragraph 7.227) in the context of the type of costs associated with making available the BT GC19 data set that:
- 7.227 The nature of these costs will be dependent on precisely how BT makes available any separate BT GC19 data set. This is not for Ofcom to prescribe at this point. **Any party wanting the separate BT GC19 data set will need to agree with BT the precise format for delivering the data and the frequency with which updates should be provided.** As has been noted, OSIS data is currently updated 6 days a week and provided by file transfer. The BT GC19 data set may be provided less frequently by a different means. **This will depend on the requirements of the DIP(s).** (Emphasis added)
- 7.25 In other words, we recognised that the actual timing for meeting a specific individual request will depend upon what is reasonable in the circumstances of each case. The point is that, on receipt of a reasonable request for GC19 data from a DIP, BT is already under an obligation to meet it on terms which are (among other things) reasonable, which necessarily includes timing of delivery of that data. This is clear from our reasoning set out in the August 2006 document.
- 7.26 Accordingly, BT has been required to comply with its obligations under GC19 since it came into force with effect from 25 July 2003. This matter is plain from the GC notification itself, which provides:

**THEREFORE**

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

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

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

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

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

**DAVID ALBERT EDMONDS**

DIRECTOR GENERAL FOR TELECOMMUNICATIONS

22 JULY 2003

(Emphasis in italics and bold added)

- 7.27 Ofcom therefore clearly has jurisdiction to investigate and determine whether any delay by BT in meeting a particular request (to the extent it has been reasonably made) is reasonable or not. Put another way, it is not inconceivable that, in relation to a particular request, BT would need longer (or, as the case may be, shorter) time to meet the request depending upon what is reasonable in the circumstances, such as the time needed to negotiate individual requirements by the DIP in question for GC19 data. This matter should, however, be distinguished from BT's seemingly wide-sweeping request to have a reasonable period of grace to implement Ofcom's ultimate findings in resolving the present disputes in meeting generally any requests from DIPs that BT either might have already received or may receive going forwards.
- 7.28 Turning to the present disputes, it is to be noted that they are essentially historic in nature. It is therefore to be noted that, in exercising its functions to make a declaration setting out the rights and obligations of the parties to a dispute under section 190(2)(a) of the 2003 Act, as requested by The Number and Conduit, Ofcom is, in the present disputes, exercising a jurisdiction similar to that of the Courts.
- 7.29 In this respect, as we pointed out in the August 2006 document, Ofcom is, in effect, requested to interpret and apply a provision of law (here, GC19) to the relevant facts in order to clarify and explain, where necessary, its meaning and scope as it ought to be, or have been, understood and applied from the moment of its entry into force. (It is further to be noted that, in resolving a dispute under the 2003 Act, Ofcom's intervention as arbiter between the parties is as a regulator, not as a third party arbitrator<sup>67</sup>. Such dispute resolution is therefore a form of regulation and it must, in

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<sup>67</sup> The judgment of the Competition Appeal Tribunal in *Hutchison 3G (UK) Limited v. The Office of Communications*, 29 November 2005, [2005] CAT 39, paragraph 138.



particular, be aimed at achieving the policy objectives of Article 8 of the Framework Directive, as implemented in section 4 of the 2003 Act.)

- 7.30 Ofcom should therefore emphasise again that BT has at all material times been subject to GC19. This is because GC19 is a condition that is applied *generally* either to all persons providing an ECN or ECS; or to all persons providing such a network or service of a particular description specified in the condition, and therefore at all material times has applied to BT in parallel with its apparent obligation under USC7. The fact that BT has, in our view (see further below), in effect discharged its obligations under GC19 in the present disputes by also providing the full OSIS data does not change this position.
- 7.31 Furthermore, at paragraph 8.9 of the second GC consultation (as cited in paragraph A6.111 in Annex 6 to the August 2006 document), Oftel made it clear that the obligations in GCs 8 and 19 are “quite distinct” in a direct response to a suggestion by BT to expressly link GC8 with GC19 (then draft GC22). Also, at paragraph 3.77 of the USO notification (again, as set out in paragraph A6.130 of Annex 6 to the August 2006 document), Oftel made it specifically clear that GCs 8 and 19 “are not sufficient on their own to ensure that the obligations under Articles 5 and 25 of the Universal Service Directive are met efficiently and transparently”.
- 7.32 In other words, the fact that Ofcom is proposing in **Section 6** of this document to determine, in effect, USC7 as being *ultra vires*, for the purposes of declaring what rights and obligations the parties to the present disputes have, is not a matter that has any bearing on the application of GC19. GC19 has been lawfully imposed on (among others) BT since 25 July 2003. Indeed, BT appears to have recognised that it would be subject to the GC19 obligation in resisting the lawfulness of USC7, particularly when it responded to the USO consultation in May 2003 stating that “[s]imilarly, while Article 25 is concerned with the exchange of information between operators this is also satisfied by Condition 22 [now GC19] of the General Conditions”. This also follows from the informal response by staff at the European Commission on which BT relied in that response, as cited fully in Annex 6 to the August 2006 document. More recently, BT has in its discussions with The Number specifically acknowledged “its obligations in the Universal Service Condition and General Condition 19” (see BT’s e-mail of 1 July 2005, cited at **paragraph 7.91** below).
- 7.33 Of course, should The Number or Conduit make a reasonable request to BT for its GC19 data only following Ofcom’s final determinations which would require BT certain time to assess and negotiate the precise terms of such request, Ofcom is not prescribing at this point precisely what comprises a reasonable period for BT to meet that particular request. This will depend on the circumstances, though BT will be subject (as it is at present) to act reasonably under GC19 in meeting such request.
- 7.34 The issue, which has arisen for the purposes of these disputes, is actually whether The Number and/or Conduit has (historically) made a reasonable request to BT for it to make available its ‘Directory Information’ in respect of data supplied under its contractual arrangements with The Number and Conduit, respectively, so as to trigger BT’s obligations under GC19. We turn to that specific matter below, but first we address whether they have ‘rights of access’ to that data in the first place.

## Persons having 'rights of access' to Directory Information

### The Number and Conduit

- 7.35 In summary, we remain of the view, as set out in the August 2006 document, that each of The Number and Conduit has 'right of access' to GC19 data. In other words, they are eligible to make a request to BT for its data and, provided it is a reasonable request, BT is already under an obligation to meet it, as discussed above.
- 7.36 They have such 'rights of access' because GC19.1 provides that BT "...shall meet all reasonable requests from any person to make available the Directory Information of...for the purposes of the provision of Directories and Directory Enquiry Facilities".
- 7.37 It is clear from the respective descriptions of The Number's and Conduit's businesses set out in **Section 3** of this explanatory statement that both The Number and Conduit are in the business of providing 'Directory Enquiry Facilities'. That term is defined under paragraph 1 of Part 1 of the Schedule to the GC notification, as follows:
- "Directory Enquiry Facility" means Directory Information provided by means of a Public Telephone Network;
- 7.38 In addition, for the avoidance of any doubt, it is plainly the case that each of The Number and Conduit is a '**person**' (which term, as seen above, is itself defined broadly in the Interpretation Act 1978).
- 7.39 Nor is there any doubt that each of The Number and Conduit has requested information from BT under their respective licences "**for the purposes of the provision of...Directory Enquiry Facilities**".
- 7.40 Accordingly, in Ofcom's view, both The Number and Conduit have 'rights of access' to certain 'Directory Information' from BT (as well as from any other 'Communications Provider' to whom GC19 applies). Save as to the question considered below as to whether The Number and/or Conduit have, in fact, made requests to BT for 'Directory Information' to be made available under GC19, BT has not contested in these disputes that they have, in principle, such 'rights of access'.

### Intermediaries and business classified directories

#### Ofcom's guidance in the August 2006 document

- 7.41 However, BT has, as part of Ofcom's investigation, queried whether two other categories of person would be entitled to access to Directory Information from BT under GC19, namely:
- (i) intermediate suppliers (such as those persons simply gathering, maintaining, compiling or otherwise operating databases containing 'Directory Information', such as data aggregators), who do not themselves provide either directories or DQ services to end-users; and
  - (ii) business classified directories providers
- 7.42 It is unnecessary for Ofcom to take a definite view on these two issues for the purposes of resolving the present disputes as they simply do not arise on the facts. In the August 2006 document, we nonetheless set out our emerging thinking as to how these issues might be interpreted in another case brought to Ofcom, in case such

guidance would assist other stakeholders in clarifying the rights and obligations related to GC19 so as to avoid any intervention by Ofcom.

- 7.43 Furthermore, the position with regard to business classified directories is not simply an academic one as this matter has implications for the separate complaint brought by Thomson. We therefore consider it appropriate to take this opportunity to provide certain clarity on these matters, even if they do not require resolution for the present disputes. In so doing, we will first summarise our views on them as set out in the August 2006 document and then turn, in particular, to BT's recent response to that document.
- 7.44 In summary, Ofcom's initial views in the August 2006 document were as follows:
- (i) intermediate suppliers: provided that a person would request 'Directory Information' falling within GC19 for the *ultimate purposes* of it being used to provide 'Directories' or 'Directory Enquiry Facilities', Ofcom may consider any refusal to provide such intermediate suppliers access to that information as constituting an unduly restrictive interpretation of GC19<sup>68</sup>; and
  - (ii) business classified directories (e.g. Thomson): in dealing with certain points<sup>69</sup> by BT in its letter dated 6 July 2006 to Ofcom contesting that Thomson has 'rights of access' under GC19, Ofcom's response was that we noted that there is nothing in the USD to suggest that the reference in Article 25(2) of the USD to 'publicly available directory enquiry service and directories' is limited to universal service DQ services and directories covered by Article 5 of the USD.
- 7.45 In dealing in the August 2006 document with BT's more detailed points with regard to business classified directories, we considered in detail BT's first point. Namely, BT argued that the purpose of Article 25(2) is to facilitate only the provision of the universal service directories and DQ services.
- 7.46 According to BT, the 11<sup>th</sup> recital to the USD's preamble sets out three criteria (i.e. a directory must be (i) an essential access tool to PATS; (ii) presented in a non-preferential fashion; and (iii) comprehensive) that are to be satisfied to constitute a universal service directory. BT concluded that classified directories do not satisfy those criteria.
- 7.47 BT further claimed that the fact that Article 25(2) does not refer to Article 5 is not something that alter this position because:
- (i) there is no right in the USD for an end-user to have an entry in a non-universal service directory or DQ service;

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<sup>68</sup> In this regard, we specifically noted in the August 2006 document that, in the *KPN* case, KPN was under a domestic statutory obligation to publish a universal service guide, i.e. directory, but it 'outsourced' the actual publication and distribution of this guide to Telefoongids Media BV. However, it is unclear to Ofcom whether the latter company formed part of KPN's group of companies (say, similar to BT) or whether Telefoongids Media BV was a distinct economic entity from KPN.

<sup>69</sup> Namely, first, GC19 only provides rights to directory information for the purposes of the provision of universal service directories or DQ services; and, secondly, the scope of the *KPN* judgment does not cover the provision of directory data for purposes unrelated to the provision of universal service directories or DQ services.

- (ii) end-user rights and universal service would not be served by reading into Article 25(2) a regulatory requirement to give 'rights of access' to providers of non-universal service directories providers; and
  - (iii) Article 25(2) clearly refers to the same universal service directory as Article 25(1) when it refers to publicly available directory.
- 7.48 As to its second point concerning *KPN*, BT simply referred to paragraph 20 of the ECJ's judgment and paragraph 44 of the Advocate General's Opinion, which refer to the supply of universal service directories.
- 7.49 In the August 2006 document, Ofcom agreed with BT that Article 25(2) certainly intends to facilitate the provision of universal service directories, but that this Article also intends to facilitate the provision of other types of publicly available DQ services and directories. Ofcom therefore did not consider that BT's reliance on the 11<sup>th</sup> recital assisted BT. Nor did we consider that BT's assertions with regard to Article 25(2) not referring to Article 5 as well as its point about Article 25(1) and (2) referring to the same universal service directory were of any merit.
- 7.50 For the avoidance of doubt, Ofcom's view is that there is an interrelationship between the provisions in Articles 5 and 25(1) and (2). Indeed, as discussed in the August 2006 document in the context of making it clear that Article 25(2) is intended to apply to subscribers of PATS only (which matter we deal with in **paragraphs 9.143 to 9.175** of this document), these provisions clearly interrelate so that a mechanism is being provided to ensure that:
- (i) from the viewpoint of the universal service provider(s), they can comply with the obligations under Article 5 to provide universal service directories and DQ services, which must be comprehensive (that is, according to Article 5(2), comprising, subject to relevant data protection legislation, all subscribers of PATS, and not only the PATS subscribers of the universal service provider(s));
  - (ii) from the viewpoint of all subscribers of PATS, they have a right of entry in the universal service directory (that is, "...the public available directory referred to in Article 5(1)(a)"), as required by Article 25(1). (Given that this provision establishes a right for such subscribers, it in effect establishes corresponding obligations of their inclusion in that directory on the undertakings providing them with PATS.); and
  - (iii) from the viewpoint of any persons wishing to provide a publicly available directory or DQ service (particularly, but not exclusively, to facilitate PATS subscribers' inclusion in a universal service directory), they have a right to receive, on making a reasonable request, the relevant information from all undertakings which assign telephone numbers to subscribers (which again, in Ofcom's provisional view, is to be interpreted as subscribers of PATS). (Given that this provision establishes a right for such providers, it in effect establishes corresponding obligations of supplying that information on the said undertakings.)
- 7.51 Ofcom considers that the PATS point is related (but distinct) from the 'rights of access' issue. As regards the latter, the (plural) language of Article 25(2)—"*for the purposes of the provision publicly available directory enquiry services and directories*"—clearly supports our interpretation that publicly available DQ services and directories (other than universal service ones) are also coming within the provision of Article 25(2). Should the EC legislator have intended to provide that 'rights of access' to GC19 data were limited to universal service providers only,

Ofcom considers that alternative wording would have been used, such as similar cross-references to Article 5 to those used in Article 25(1) and (3).

- 7.52 Therefore, in the August 2006 document, we considered that, in assessing whether providers of business classified directories would be entitled to GC19 data, the starting point of any analysis must be the phrase “for the purposes of the provision of Directories and Directory Enquiry Facilities” in GC19.1. Therefore, in Ofcom's view, it is plain from even the definition of a ‘Directory’ that it is irrelevant how the information is presented, arranged or otherwise, such as showing suppliers of goods and services ‘classified’ by reference to the goods or services they supply or advertising. As ‘Subscribers’ of PATS include businesses (and not only living individuals), it follows that a classified directory also falls within the meaning of a ‘Directory’. In any event, Ofcom understands that Thomson local directories incorporate alphabetical listings sections A-Z, which are unclassified. On that basis, we stated that it appears to us that Thomson would have ‘rights of access’ under GC19.
- 7.53 As regards the *KPN* judgment itself, in the August 2006 document, Ofcom did not consider that it somehow provided any support to refuse a provider of classified directories (such as Thomson) ‘rights of access’ to certain information under Article 25(2) of the USD (and therefore, by implication, also under GC19). The facts in *KPN* were that both Denda and Topware requested the information from KPN for the purposes of publishing rival telephone directories on CD-ROM and on the internet. Whilst the ECJ was not specifically asked to rule on this point, it gave its ruling without suggesting that even the provision of an electronic (as opposed to a paper) directory would materially affect the legal analysis. Indeed, the ECJ specifically acknowledged<sup>70</sup> the factual background by pointing out that Denda and Topware produced paper as well as electronic directories and that the information was requested to be used in this regard.
- 7.54 Accordingly, Ofcom considered in the August 2006 document that a person's ‘rights of access’ to certain information under GC19 does not depend on whether or not ‘Directories’ are in any particular form and their nature as classified or unclassified.

#### BT's response to the August 2006 document

- 7.55 In its response, BT makes a number of points to take issue with Ofcom's interpretation on ‘rights of access’. In summary, we understand that BT essentially makes two main arguments in this regard as follows:
- (i) it would be unworkable, together with raising serious data protection and commercial concerns to allow intermediate suppliers access to GC19 data with whom BT has no contractual relationship; and
  - (ii) to allow rights of access for the provision of non-comprehensive directories or non-comprehensive DQ services would be wholly inconsistent with the overall purpose and language of Article 25.

7.56 We now turn to deal with each of these key points.

#### *a) Ofcom's views on BT's response as to ‘rights of access’ & intermediate suppliers*

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<sup>70</sup> §8 of the ECJ's judgment.

- 7.57 Although BT raises various points throughout its response (including Annexes) that seemingly relate to this matter, we understand the real crux of BT's point being as set out in paragraph 16 of its main response, namely:

16. BT will not be in a position to foresee or ensure that directory information will ultimately be used for the provision of directories or DQ services where it receives a request from an intermediary and that intermediary then onward sells the data to another intermediary (and possibly a third). BT will have no contractual relationship with the second intermediary and would be restricted in its ability to ensure that the information is only used for directories and DQ purposes and that the data protection rights of its subscribers are protected. Moreover, third parties may make multiple uses of GC 19 data with only some of these being for the provision of directories or DQ services.

- 7.58 As noted above, we do not consider that we need to resolve this matter conclusively for the purposes of resolving the present disputes. However, we do not consider that BT's point about not having a contractual relationship with (say) a second intermediary is a matter that could not be addressed by employing alternative means. This is not a matter for Ofcom to prescribe at this point, but one such means might be to ensure contractually (in the example given by BT, in its contractual dealings with the first intermediary) that the party undertakes to procure the compliance of relevant regulatory obligations (such as GC19), should it decide to onward sell the data to another intermediary. BT must, of course, ensure that such terms are otherwise fair and non-discriminatory under GC19.3 in the circumstances of each case.
- 7.59 In other words, we remain to be persuaded by BT that this (together with its ancillary points raised in other parts of its response) represents a real concern. BT may wish to explore these issues in Ofcom's policy review: see **Section 12** of this document.

*b) BT's response as to rights of access' & non-comprehensiveness*

- 7.60 This response maintains the position BT took in its 6<sup>th</sup> July letter to Ofcom.
- 7.61 But BT now seeks to support its argument that Ofcom's interpretation is inconsistent with the overall purpose of Article 25 by stating that the principal purpose of Article 25 is to set out "end-user interest and rights", not CPs' interests or rights.
- 7.62 In response to this argument, we remain generally of the view set out in the August 2006 document, particularly as regards the interrelationship between the provisions in Articles 5 and 25(1) and (2) as discussed above. We do not, however, fully understand BT's point about CPs' interests or rights. This is because Ofcom has not suggested that Article 25(2) is aimed at CPs as such. Rather, our view (as the plain language of the Article itself makes it clear) is that 'rights of access' are afforded to providers of publicly available DQ services and directories (which providers may also be CPs, such as The Number and Conduit).
- 7.63 Nor do we accept BT's premise that this provision in Article 25(2) is ambiguous, so as to require any elaborate legal analysis of the overall purpose and meaning of Article 25 in this particular respect.
- 7.64 Furthermore, we do not consider that the legislative history and the transition from Article 6(3) of the RVTD to which BT refers assists its argument and we refer to our above-mentioned views, as summarised from the August 2006 document, on this matter by reference particularly to the *KPN* judgment itself.

### Ofcom's current position

7.65 Having considered BT's responses, we nonetheless remain of the views set out in the August 2006 document with regard to intermediate suppliers and business classified directories (e.g. Thomson).

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

7.66 We dealt with this issue in some detail in the August 2006 document. Given that BT has not substantively advanced its case here in responding to that document, we remain of the views set out in the August 2006 document. We reiterate, however, those views below for ease of reference.

7.67 By way of introduction, GC19.1 only applies if each of The Number and Conduit has made a *reasonable request* to BT for its 'Directory Information'. In other words, BT's obligations under GC19 (including the provision on 'cost oriented' terms) apply only if:

- (i) The Number and/or Conduit have requested information that falls within the meaning of 'Directory Information' for the purposes of GC19; and
- (ii) such request has been made to a reasonable extent.

7.68 As to the former, it is unnecessary to establish fully what falls within and outside the meaning of 'Directory Information' in this particular context. This matter is specifically considered in **Section 9** of this document. It suffices here to note, in broad terms, that BT's OSIS database comprises, at least in part, information that falls within the meaning of 'Directory Information'. However, whatever the precise meaning of 'Directory Information', it is equally clear that the database contains information (among other things) about non-BT subscribers. On that basis alone, it is, in Ofcom's view, clear that the OSIS database contains information that falls outside as well as within BT's obligations under GC19.

7.69 In this context, it is also relevant to note that the present disputes essentially concern BT's charges for the supply to The Number and Conduit of (among other things) 'Business/Residential Customer Alphabetical (A-Z) Products or Services' under the provisions of paragraph 7 of their respective licences, as set out in **Section 5** of this document. It is clear both from the descriptions in the licences, and on the evidence presently before Ofcom relating to information supplied by BT to The Number and Conduit, respectively, pursuant to those licences, that the entries on the OSIS database include 'fields' for name, address and telephone number relating to all residential and business customers (and not just BT's), which entries are comprised in those 'Products or Services'.

7.70 In light of this, Ofcom considers that to the extent that information provided by BT to The Number under its OSIS licence with BT falls within the meaning of 'Directory Information' for the purposes of GC19, BT is required to provide that part of the information under the terms of GC19. The fact that BT has contractually provided a 'bundled' (as opposed to a stand-alone) product or service does not, in Ofcom's view, change that (regulatory) position: The Number and Conduit have nonetheless requested, as a matter of fact, a sub-set of data from OSIS that falls within the terms of GC19. The impact of that bundling on the question of whether or not BT's charges are (and have been) 'cost-oriented' is considered in **Section 10** of this document.

- 7.71 This question of whether or not The Number and Conduit have, in fact, made requests for the purposes of GC19 forms part of the subject-matter of the two recent appeals<sup>71</sup> to the Competition Appeal Tribunal brought against Ofcom for extending the scope of the present disputes to include GC19 issues, as BT submits that no such disputes exist between the parties.
- 7.72 Following the first case management conference in those proceedings, the Competition Appeal Tribunal has decided to postpone the date for serving a defence until a later date. In short, Ofcom considers that those appeals by BT are premature as Ofcom's findings in the present disputes as to their scope are, as part of Ofcom's final determinations in resolving them, appealable to the Tribunal under section 192 of the 2003 Act. However, it is appropriate to deal in this document with certain points made by BT in its appeals.
- 7.73 In its notices of appeal, BT argues that The Number has never made a (reasonable) request to BT for its 'Directory Information', so as to trigger BT's obligations under GC19 for the purposes of this dispute. As regards Conduit, BT makes a similar submission but it specifically points out that, at least until BT's receipt of Conduit's letter of 3 June 2005, Conduit never made any request under GC19 for data only in relation to BT's own subscribers and/or the end-users who have telephone numbers originally allocated to it. BT then makes two particular points in support of its argument.
- 7.74 Before setting out our main views on those two points, we note that, subject to BT's position that The Number and Conduit have never made a request to BT under GC19 in the first place, it has not been suggested by BT that The Number and/or Conduit have somehow made *unreasonable* requests for information under their licences, to the extent that they fall within the provisions of GC19. We are therefore proceeding on the basis that, if we are right with regard to the matters subject to the BT's appeals, the reasonableness of The Number's request is not in itself in dispute between the parties. As a result, we do not need to further consider this matter in this context.
- 7.75 Turning to the issue of whether The Number and/or Conduit have made requests to BT, it is first to be noted that BT confirmed to Ofcom in a meeting on 20 December 2005 that it is, in effect, fulfilling its obligations under GC19 by virtue of its supply of OSIS data, which comprise data about its own subscriber customers. BT, however, also pointed out to Ofcom that there have been technical issues in making the GC19 information available separately. BT has also informed Ofcom that the resolution of those issues had been put on hold in light of the *KPN* case and until further clarity has been provided by Ofcom with regard to the application of that case to UK regulation. In the meantime, it assured Ofcom that persons (such as The Number and Conduit) may still obtain BT's GC19 data via OSIS.
- 7.76 In Ofcom's letters of 8 March 2006 to the parties in the two disputes, we explained in light of particularly those statements by BT that it had 'signalled' to Ofcom and the industry that BT has been discharging its GC19 obligations through its provision of subscriber information via OSIS and BT has not made its own subscriber information available separately from OSIS. As regards similar 'signals' given by BT to the

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<sup>71</sup> *British Telecommunications plc v. The Office of Communications*, Case No: 1063/3/3/06 (re: The Number dispute); *British Telecommunications plc v. The Office of Communications*, Case No: 1064/3/3/06 (re: the Conduit dispute).



industry, it suffices here to cite BT's response of 9 June 2005 itself to Conduit's letter of 3 June 2005, which response (headed "Re: Request for BT subscriber directory information") reads:

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

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

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

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

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

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

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

- 7.78 In its notices of appeal, BT submits that Ofcom has drawn an inappropriate and incorrect conclusion from the sentence emphasised above in Mr Shaw's letter where, according to BT, it is clear from the correspondence as a whole that BT certainly did not take the view either that any obligations under GC19 had arisen, or that its provision of OSIS data had anything to do with GC19. BT claims that the entire correspondence makes clear that BT viewed its obligations under GC19 as separate and distinct from its obligations under USC7. In light of BT's submissions, we have reviewed the relevant correspondence<sup>72</sup>, but we remain of the view that it shows that, in effect (even if BT did not attach the GC19 label to it), BT accepted that it discharges its GC19 obligations through OSIS, although it contested that it had to

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<sup>72</sup> As attached at Annex 14 to the BT appeal in respect of the Conduit dispute.

meet these obligations in relation to Thomson's request of data for classified purposes.

- 7.79 We now turn to the detail of the two particular points made by BT in support of its argument that The Number and Conduit have not made requests to BT for its 'Directory Information', which points further elaborate on certain similar points put by BT to Ofcom during its investigation. (BT makes a number of other points for the purposes of the appeals. If necessary, Ofcom will respond fully to all points made by BT once further directions have been given by the Tribunal in these appeals).
- 7.80 First, BT argues that the licences granted to The Number and Conduit were entered into before GC19 came into force (that is on 23 August 2002 and 1 July 2000, respectively) and BT's supply of data to them under these licences have been made pursuant to the predecessor of USC7, which is a distinct obligation to GC19. Thus, according to BT, BT's licensing and supply of OSIS data before and after the imposition of GC19 and USC7 in July 2003 were done pursuant to (i) obligations under USC7 and its predecessors and/or (ii) purely commercial arrangements, and not (iii) GC19 or any predecessor provision.
- 7.81 Secondly, a relevant request in the context of GC19 must, according to BT, mean a request that refers to, or is plainly referable to, the condition in question. BT argues that this follows, first, as matter of ordinary fairness and common sense. Further, in BT's view, unless a request makes clear to which provision it pertains, the recipient does not know to what obligations it is subject, and hence what is expected of it; nor can it assess whether or not the request is, in that context, reasonable; nor can any meaningful attempt be made to agree the terms on which the data is to be supplied.
- 7.82 The first of those two points by BT appears to be based on the contractual form or description of the 'Business/Residential Customer Alphabetical (A-Z) Products or Services' provided by BT to The Number and Conduit, including the date on which their licences were entered into, respectively. Ofcom does not, however, accept that such form or description is determinative of the true legal effect of the 'Business/Residential Customer Alphabetical (A-Z) Products or Services'<sup>73</sup> in those licences. In substance, as explained above, the licences provide, at least in part, for the supply by BT of information that falls within the meaning of 'Directory Information' for the purposes of GC19.
- 7.83 In Ofcom's view, neither the perception of the parties (at the point the licences were entered into), or even the industry, nor the contractual arrangements between the respective parties to these disputes can serve to defeat, or somehow preclude BT from being required to comply with the express regulatory requirement under GC19 to provide 'Directory Information' on (among other things) cost oriented terms. BT cannot contract out of its regulatory obligations, and The Number and Conduit, respectively, cannot waive their rights to receive 'Directory Information' on cost oriented terms under GC19 by contract. It is therefore wholly untenable for BT to maintain (as it has throughout our investigation and seemingly also in the appeals) that its provision of GC19 data is depending on certain technical issues being resolved and Ofcom's prior clarification on the application of GC19 to it.

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<sup>73</sup> See, for example, the House of Lords in *In Re Spectrum Plus Ltd (In Liquidation)* [2005] 3 WLR 58, para 53.

- 7.84 Support for Ofcom's view in this respect may arguably also be found in the ECJ's judgment in the *KPN* case itself. At paragraph 9, the ECJ states that:

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

- 7.85 In other words, in light of the ECJ's ultimate ruling that 'relevant information' comprised the basic data (as opposed to the additional data also requested by Denda and Topware), the ECJ itself did not attach any importance to the fact that their request for data was more wide-reaching than what KPN was actually required to provide under Article 6(3) of the RVTD (now Article 25(2) of the USD, and hence GC19).
- 7.86 In any event, Ofcom considers that the key point is that The Number and Conduit have since 25 July 2003 had rights to be provided with BT's own subscriber data under GC19. This is undeniably a sub-set of the OSIS data that they both have requested (albeit perhaps under the guise of USC7). Therefore, Ofcom considers that these 'disputes' – which are disputes as to the terms on which OSIS data have been and are to be supplied to The Number and Conduit – necessarily include disputes as to the terms on which BT's own subscriber data have been and are to be supplied to The Number and Conduit, respectively. In other words, even if The Number and/or Conduit had not invoked GC19 as such, it nonetheless remains the case that GC19 regulates the terms on which BT's own subscriber data (which data forms part of the wider OSIS data) has been and are to be supplied. BT's answer to the question put to it by Ofcom on 20 December 2005 – namely, what would BT have said had The Number and/or Conduit asked for GC19 data in July 2003? – was that it would have stated that BT was already supplying them with those data under their respective licences. Accordingly, it is entirely proper for Ofcom to apply GC19 to (that part of) these disputes.
- 7.87 As regards BT's second specific point that requests by The Number and Conduit, respectively, must be requests that refer to, or are plainly referable to, GC19, we do not agree with it for several reasons. First, as discussed above, the parties cannot contract out of their regulatory obligations. Furthermore, at the meeting on 20 December 2005, Ofcom asked BT a specific question as to how BT would respond to a person who requested information only about BT's own subscribers under GC19. BT confirmed to Ofcom that, in addition to it fulfilling in effect its obligations under GC19 via the supply of OSIS data, it had received two or three letters regarding such access in the autumn of 2004 following the *KPN* ruling. BT explained in this context that it had looked to Ofcom for clarity on the appropriate definition of 'relevant information' and cost oriented charges and, in the meantime, all persons requesting any data specifically by reference to GC19 would be receiving its subscriber data via OSIS.
- 7.88 Therefore, Ofcom has not seen any evidence that BT would have treated requests by The Number and/or Conduit's any differently even if such requests were to have referred specifically to GC19. On the basis of BT's response to Ofcom, it would have treated such a request as a request for OSIS data because The Number and Conduit, in fact, required more comprehensive data than simply BT's own subscriber

information. Indeed, in response to The Number's Initial Request, BT explained in its letter of 20 September 2005 that it could not feasibly negotiate with The Number on a bilateral basis and that the application of the ruling in the *KPN* case should be addressed by Ofcom in a formal consultation. This also possibly suggests, in Ofcom's view, that BT would have treated, as a matter of practical reality, a request by express reference to GC19 the same way as it would have treated any other request for its OSIS data. On the information presently before Ofcom, there is nothing to suggest to Ofcom that BT would have meaningfully attempted to negotiate a GC19 request in a different manner.

- 7.89 As to the point about The Number and Conduit making their requests plainly referable to GC19, we further consider that, on the information presently before Ofcom, there can have been little doubt in BT's mind that they were indeed making such references in its negotiations with BT for a new licence to use 'Business/Residential Customer Alphabetical (A-Z) Products or Services'. In this context, we note from The Number's letter dated 29 April 2005 to BT that The Number specifically requested (at page 2) a breakdown of the "cost elements included in BT's charges for the supply of directory information relating to BT subscribers". That letter was followed by a chain of correspondence between the parties during which BT appears to have taken essentially the same approach as it has set out in the above-mentioned letter of 20 September 2005 to Ofcom.
- 7.90 The said correspondence reveals that, to start with, in its response of 2 June 2005 to The Number, BT states that:

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

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

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

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

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

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

- 7.92 As regards Conduit making its request plainly referable to GC19, we consider that its letter of 3 June 2005 to BT ought to have been understood by BT as such a request.

However, in a meeting with Ofcom on 19 May 2006, Conduit confirmed that it would nonetheless have needed the additional data it currently receives from OSIS.

- 7.93 Nor does Ofcom therefore consider that any issue of fairness genuinely arises on the facts in this case. BT is a company with significant regulatory expertise at its disposal. BT also participated actively in the consultations on proposals to impose (among other) obligations under GC19. It is (and has been) fully aware of its obligations under GC19 for some time. Moreover, as shown from the above correspondence, it fully bore those obligations in mind when attempting to negotiate the new licences with The Number and Conduit, respectively. Indeed, if BT on receipt of a request for directory information considered that it could not work out what legal right was being invoked, BT could have simply asked the maker of the request (in these cases, The Number and Conduit, respectively) to clarify its position.
- 7.94 BT's more specific point about its ability to assess whether or not a request is, in the context, reasonable is equally unattractive. If anything, a request under GC19 is more limited than a request for its OSIS data. BT is naturally free to organise its system of supplying such data in a manner of its choosing in discharging its GC19 obligations, but it must in exercising that choice ensure that it complies with all of its regulatory obligations, like any other person subject to meeting a request in respect of its data under GC19.
- 7.95 In any event, we consider that BT's argument to the effect that a request must refer to GC 19 before GC 19 can be considered on a dispute referral under section 185(2) focuses on form rather than substance and is misconceived. BT appears to argue that, because (in particular) The Number did not apply the GC19 label to its request, it cannot now rely on GC19. On this argument, The Number would have to put in a separate request to BT including the words "GC19" and then negotiating again.
- 7.96 The logic of BT's argument is not appropriate and could perhaps lead to absurd outcomes in respect of other obligations that BT has under the 2003 Act, such as an obligation to negotiate interconnection on request under GC1.1 or to provide number portability upon request on reasonable terms under GC18. As to the latter, the Competition Appeal Tribunal recently dismissed an appeal by Media, Marketing and Promotions ("**MMP**") concerning its number portability obligations against a decision by Ofcom, where MMP relied on certain contracts entered into in 2000, by stating<sup>74</sup> that:
- ...We accept the submission of OFCOM that neither the perception of the parties, or even the industry, nor the contractual arrangements between MMP and PTR or between PTR and THUS can serve to defeat, or preclude MMP (or THUS) from complying with the express provisions of the legislation. We accept OFCOM's submissions that MMP cannot contract out of its regulatory obligations and nor could PTR have waived, or otherwise be precluded from relying on, its statutory rights...
- 7.97 Finally, we simply note that BT's position about making a request plainly referable to GC19 would be unsustainable by reference to its own contractual documentation, such as the terms of BT's Upstream Contract. We understand that the standard form contract is silent with regard to GC19, although (as seen from **Section 5** of this explanatory statement) it does contain references to BT's (now repealed) licence conditions. For reasons set out above, in our view, a person requested to supply BT

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<sup>74</sup> *Media Marketing & Promotions v. Office of Communications*, Case No: 1053/3/3/05, [2006] CAT 12, 15 May 2006, §208.

with its directory information under the terms of GC19 could not refuse such a supply simply on the basis that BT's Upstream Contract makes no reference to GC19.

- 7.98 Accordingly, for the above reasons, Ofcom is satisfied that BT has been under an obligation to provide certain information to The Number and Conduit under GC19 since 25 July 2003.

## Section 8

# GC19 – Approach to resolving the disputes

## Introduction

- 8.1 **Section 7** of this explanatory statement has dealt with a number of issues that are preliminary in terms of the applicability of GC19 to these disputes that Ofcom has been asked to resolve. In particular, Ofcom's further provisional views on the four specific preliminary issues covered by that Section, in summary, are:
- (i) BT is a person to whom GC19 applies for the purposes of the present disputes;
  - (ii) BT has been required to comply with GC19 since 25 July 2003;
  - (iii) The Number and Conduit each has 'rights of access' to GC19 data; and
  - (iv) each of The Number and Conduit has reasonably requested BT to supply them with information to be made available under GC19.
- 8.2 Before turning to two key issues before Ofcom—namely, **(i)** the scope of the data falling under GC19: see **Section 9**; and **(ii)** in light of that analysis, the issue of cost orientation and its implications on an historic basis in relation to BT's charges in providing the full contents of its (OSIS) database: see **Section 10**—we next turn to deal with arguments raised by The Number<sup>75</sup> in its response to the August 2006 document that focus in more general terms on the approach taken by Ofcom in interpreting the information that BT is (and was during the relevant period<sup>76</sup>) obliged to provide under GC19. Although these arguments are closely linked with our analysis on the scope of GC19 data considered in **Section 9**, we consider it appropriate to briefly respond to these particular arguments more generally prior to dealing with more detailed matters.
- 8.3 As regards Ofcom's approach in the August 2006 document, The Number generally responds that Ofcom has failed to take into account its obligations arising under relevant EU legislation, in a number of crucial respects, and this has led to misconceptions and erroneous conclusions, particularly on the scope of relevant information. Its views are that Ofcom has ignored some important principles of interpretation arising from the *Marleasing*<sup>77</sup> and *Von Colson*<sup>78</sup> cases.
- 8.4 In summary, The Number argues that Ofcom has "misdirected" itself and adopted an "over-restrictive and, to that extent, erroneous interpretation of the provisions of GC19". In doing so, The Number claims that Ofcom has:

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<sup>75</sup> For the purposes of referring to their submissions, Ofcom refers to The Number and Conduit collectively as "The Number", except where the context otherwise requires.

<sup>76</sup> As seen from **Section 3** of this document, the scope of these disputes for Ofcom's determination relates historically only to the period between 25 July 2003 and the date of Ofcom's final determinations.

<sup>77</sup> Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*.

<sup>78</sup> Case 14/84 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.

- (i) failed to take proper account of the findings in *KPN* (as The Number submits that *KPN* makes it clear that Member States are “free to determine what constitutes relevant information”) and, therefore, Ofcom has also failed to interpret GC19 in the light of, and to give effect to, the user-oriented objectives and requirements of the USD (in particular, by reference to the 7<sup>th</sup>, 11<sup>th</sup>, and 38<sup>th</sup> recitals) and the USD’s primary aim to ensure good-quality publicly available electronic communications services are available to consumers (Article 1(1));
- (ii) failed its duty to further the interests of citizens and consumers in relation to communications matters (section 3(1)(a) of the 2003 Act) and therefore breached its duty to carry out an Impact Assessment under section 7 of the 2003 Act;
- (iii) adopted an approach which is liable to distort competition in the DQ industry; and
- (iv) failed to interpret GC19 in a way which complies fully with data protection legislation.

- 8.5 In the context of its arguments about Ofcom’s approach, The Number seemingly includes additional points concerning Ofcom’s exclusion from GC19 of so-called actual user information as well as services using non-geographic and personal numbers from the BT GC19 data set. The Number also submits that Ofcom has wrongly viewed ‘format’ as a reference to the way in which the data is sent (i.e. electronically), whereas this refers to the structure of what is provided (i.e. the 43 OSIS data fields). We regard these arguments as being specific to matters covered by our analysis of more detailed issues in **Section 9**. Therefore, we will not address them specifically in **this Section**.
- 8.6 Ofcom has considered all of the points made by The Number. In short, we do not believe that it is possible legally to interpret GC19 more broadly than as set out in **Section 9** of this document. We have, however, proposed some adjustments to our provisional conclusions (as set out in the August 2006 document) in this regard. Our revised provisional views still fall short of meeting the outcome advocated by The Number. We therefore remain of the view that this position gives rise to a number of policy issues. Ofcom has therefore embarked on a policy review to assess whether the terms of GC19 should be amended to ensure that a greater level of detail is provided about (among other things) a broader range of subscribers: see **Section 12**, which provides an overview of this policy review.
- 8.7 Nor, in summary, does Ofcom consider that The Number’s above-mentioned four arguments alleging failures in Ofcom’s approach to resolving these disputes are of any merits. We now turn to address each of them in detail.

### **(i) Alleged failure to take account of *KPN* etc.**

#### **The Number’s submissions**

- 8.8 At paragraph 1.4 of its response, The Number summarises its point about consistent interpretation with EC law (and the *Marleasing* doctrine) broadly as follows:

1.4 In line with *KPN* and their duties to interpret national law in light of the wording and purpose of the Directive it interprets, **Ofcom** (the ‘Member State’ in the context of this dispute) **should take into account what other information users in the UK require when considering the scope of ‘relevant information’ in the UK context** and should make a determination so as to include that information in the scope of information to be provided under GC19. Ofcom have an opportunity and duty here to include all the information UK



subscribers and users need within the scope of 'relevant information' (an approach supported by *KPN*).

- 8.9 In its substantive response, The Number states that Ofcom has failed to take into account its obligations arising under relevant EU legislation. In its view, this alleged failure has then resulted in erroneous conclusions on the scope of relevant information BT is obliged to provide. The Number states that Ofcom has a statutory duty under Article 10 of the EC Treaty to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions of the Community.
- 8.10 By this, The Number contends, EU case law requires that Ofcom is required to interpret provisions of national law (here, GC19) in the light of the wording and purpose of the directive they were intended to implement (here, the USD) in order to achieve the result pursued by that directive.
- 8.11 The Number then states that the USD has user-oriented objectives (citing recitals 7<sup>th</sup>, 11<sup>th</sup> and 38<sup>th</sup>) and has the primary aim of ensuring the availability throughout the Community of good-quality public ECS for consumers (Article 1(1)). As such, The Number argues that Ofcom should therefore interpret GC19 in a way which is pro-consumer and pro-user and gives effect to those aims.
- 8.12 Furthermore, The Number states that the requirement to interpret national law in the light of the wording and purpose of the directive applies regardless of whether or not the national law in question is in any way "inconsistent" with the directive (or case law) in question. The Number believes that Ofcom's approach in arguing that GC19 is consistent with the USD is irrelevant and wrong.
- 8.13 In support, The Number cites ECJ's judgments in *Von Colson and Marleasing*.
- 8.14 The Number argues that Ofcom appears to have inferred from *Marleasing* a requirement for inconsistency between GC19 and the USD/*KPN* judgment before GC19 could be more broadly interpreted. The Number then argues that the only requirement is that the national law in question be "open to interpretation". In this context, The Number refers to Ofcom's statement in paragraph 7.20 of the August 2006 document that Ofcom is tasked with interpreting and applying GC19. The Number therefore states that Ofcom should therefore be interpreting GC19 in the light of the wording and the purpose of the USD.
- 8.15 In making these points, The Number also cites various passages from the judgment of the Competition Appeal Tribunal in the *Floe* case<sup>79</sup>, which The Number claims supports its view.
- 8.16 According to The Number, Ofcom should take a purposive approach and have regard to the intention and policy rationale behind GC19 (both the intention of the USD legislative draftsman in drafting Article 25(2) and Ofcom/the Director in drafting GC19).
- 8.17 The Number concludes (at paragraph 7.22 of its response) its submissions as follows:

7.22 Ofcom appear to have looked at the way the UK rules (i.e. GC19) are written and concluded that the scope of relevant information is very limited. In our view, GC19 is not

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<sup>79</sup> *Floe Telecom Limited (in administration) v Ofcom*, [2006] CAT 17, judgment of 31 August 2006.

written nor to be construed in such a restrictive way and it is for Ofcom (the 'Member State' in the context of this dispute) to "take into account" what other information users in the UK require and make a determination so as to include that information in the scope of 'relevant information'. Ofcom have an opportunity here to include all the information subscribers and users need and expect within 'relevant information' and this approach is endorsed by the A-G's Opinion and Judgment in *KPN*.

- 8.18 In this regard, The Number is of the view that the OSIS database contains all the information users, subscribers and DQ providers in the UK have requested and expect to find in a directory and states that "[t]he artificial construction around GC19 which Ofcom have developed will be to the detriment of these stakeholders."

### Ofcom's response

- 8.19 Ofcom is fully aware of its obligations to interpret national law consistently with Community law, as decided by the ECJ on numerous occasions. In particular, we note the ECJ's ruling in *Marleasing*, where it held that:

8...in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 [now Article 249] of the Treaty.

- 8.20 In our understanding, The Number's position (and we do not understand BT taking a contrary view on this particular matter) is essentially that, so far as the meaning of the 'relevant information' is concerned, there is no difference between the RVTD and the USD. Indeed, to the extent that The Number refers to the "user-oriented objectives" of the USD as well as the USD's "primary aim of ensuring the availability throughout the Community of good-quality publicly available electronic communications services for consumers", we do not understand their submissions as suggesting that the RVTD pursued aims that are not equally pursued the USD. In this context, we note, in particular, that the "user-oriented objectives" set out in the recitals to the USD are reflected also in the recitals to the RVTD. As regards the aim of providing good-quality publicly available electronic communications services for consumers, we further note that this is specifically referred to in Article 1(1) of the RVTD.
- 8.21 In light of this, we consider that the ECJ's ruling in *KPN* (which was an interpretation of the concept of 'relevant information' under Article 6(3) of the RVTD) applies equally to the concept of 'relevant information' under Article 25(2) of the USD. In conducting its analysis, it is to be noted that the ECJ interpreted that concept in light of its context and purpose of the directive (see paragraph 16 of the judgment), including taking into account the users of the service at issue (see paragraph 33 of the judgment), to which The Number refers.
- 8.22 We remain of the view that, for reasons set out in **Section 5** of this document, the ECJ arrived at a strict interpretation of the meaning of the concept of 'relevant information'. In effect, the ECJ reached a view that the concept had to be interpreted as containing two separate parts.
- 8.23 Firstly, as a matter of Community law, the concept comprises "in principle" the minimum records specified by the ECJ, namely the "name and address, including post code, of subscribers, together with any telephone numbers allocated to them by the entity concerned". In other words, to be compatible with Community law, national law must, as a minimum, include such information in its corresponding definition of

“relevant information”. Should national law fail to achieve this part, the principle of consistent interpretation (as set out in *Marleasing*) would be relevant.

- 8.24 As further discussed in **Section 9** of this document, Ofcom considers that the information to be made available under GC19 at least meets the minimum records identified by the ECJ. Accordingly, GC19 is compatible with Community law.
- 8.25 As regards the second part of the concept of ‘relevant information’, a proper reading of the ECJ’s judgment reveals, in fact, that Member States have margin of appreciation *to extend* the scope of data to be made available under that concept in light of specific national circumstances by laying down detailed national rules to this effect. The principle of consistent interpretation under Community law is therefore not relevant with regard to this part, that is to say to any issue of extending the scope of data as a matter of domestic law alone beyond the information prescribed “in principle” by the ECJ in *KPN*.
- 8.26 It is relevant to note that the UK has thus far not chosen to extend the scope of the data to be made available under GC19 for the purposes of implementing Article 25(2) of the USD. Detailed national rules have therefore not been laid down to secure that other data should be made available *for the purposes of GC19* on the basis that they are regarded as necessary for the identification of subscribers in light of specific circumstances in the UK. Hence, The Number’s point about Ofcom having an “opportunity” in these disputes to include all the information subscribers and users need and expect within ‘relevant information’ is therefore incorrect. (In fact, the position in these disputes is similar to that found in the Netherlands by the Dutch Business Appeal Court in its judgment of 26 October 2005 following its receipt of the ECJ’s preliminary ruling in the *KPN* case: see **Annex 7** to this explanatory statement for a translation of this judgment for information and **paragraph 5.35** of this explanatory statement for a summary of that Court’s key conclusions in this regard.)
- 8.27 The reason why no such detailed rules to extend the scope of data under GC19 were made is to be found in Ofcom’s policy behind USC7 (as set out in **Section 5** of this document), whereby it was intended that the USC7 obligation should reflect the common practice by (among others) DIPs accessing the OSIS database for the information they needed to provide their services, as opposed to DIPs approaching each CP for its information under GC19. Nor, therefore, did Ofcom indicate the existence of any specific national circumstances making it *necessary* for data other than the minimum records to be published in order to identify subscribers. Rather, the policy aim was to require BT to act as a central dissemination point for the directory information of all subscribers in the UK and, in this way, to ensure that Article 25 was implemented in the UK in an efficient and effective manner.
- 8.28 It is against this background (together with Ofcom’s reaffirmed provisional finding of the unlawfulness of USC7 in **Section 6** of this document) that the analysis set out in **this Section** must be read and appreciated in light of the function that Ofcom fulfils when resolving these regulatory disputes, together with its powers in this respect. The latter is important when considering the submissions made by The Number because it argues, in effect, that Ofcom should now rewrite BT’s substantive obligations under GC19, so that the above-mentioned policy intentions are to be achieved (but now under GC19, as opposed to USC7). In this regard, The Number’s case fundamentally rests on its reading of the *KPN* case, which we understand played an important part in the positions the parties took in their negotiations with BT and it ultimately led them to refer their respective disputes to Ofcom.

- 8.29 Turning to The Number's submission about interpreting national law in the light of the wording and purpose of the Directive "regardless of whether or not the national law in question is in any way "inconsistent" with the Directive (or case law) in question", we consider that this point simply falls away given our conclusion about the compatibility of GC19 with the USD.
- 8.30 As to The Number's references to the *Floe* case, we note that in that case the Competition Appeal Tribunal found that Ofcom had not considered the domestic regulation in the context of the relevant directives. In contrast, as is clear from this document, Ofcom has indeed given careful consideration to the relevant directives in these disputes and, in particular, the *KPN* judgment.

## **(ii) Alleged failure to further relevant interests under section 3 of the 2003 Act and to carry out an Impact Assessment**

### **The Number's submissions**

- 8.31 The Number argues that Ofcom is under a duty to carry out an Impact Assessment under section 7 of the 2003 Act in resolving these disputes. If Ofcom had carried out such an Impact Assessment, The Number refers to Ofcom's own 'Better Policy Making guidelines' of 21 July 2005<sup>80</sup> (the "**IA Guidelines**"), which state that the first stage of such assessment would normally be to define the issue we need to consider and to assess how the interests of citizens or consumers.
- 8.32 As The Number itself acknowledges, the section 7 duty to carry out an Impact Assessment is only applicable on Ofcom proposing to do anything "important" for the purposes of, or in connection with, the carrying out of their functions. To address this issue, The Number states (at paragraph 7.25 of its response) that:

7.25 On any reading of the 300 page draft determination of the dispute, it is clear that Ofcom recognise that the determination is both important and will have a significant impact on those in the DQ industry and on the general public (the finding of unlawfulness in relation to USC7 alone will have a major impact). This is recognised by Ofcom in the inclusion of Section 8 (Implications & Policy Considerations) in which Ofcom refer to matters which are "*likely to concern not only the parties to these disputes, but also other stakeholders*" and which Ofcom will "*urgently address*". Ofcom therefore had a duty to carry out an Impact Assessment in this case.

- 8.33 In response to Ofcom's explanation in paragraph 7.331 of the August 2006 document as to why it has not carried out an Impact Assessment, The Number simply responds (at paragraph 7.26 of its response) that:

7.26 In 7.331, Ofcom note paragraph 4.5 of the Ofcom Better Policy Making Guidelines, which states that Ofcom will not generally carry out an Impact Assessment "where the dispute relates to regulation which has been put in place as a consequence of an Impact Assessment and/or primary or secondary legislation". These Guidelines do not permit Ofcom to step out of their duty to carry out Impact Assessments where proposals are important and, in any event, this clearly is not a typical dispute.

- 8.34 The Number does not, however, go on to clarify what it means by stating that "this clearly is not a typical dispute".

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<sup>80</sup> [http://www.ofcom.org.uk/consult/policy\\_making/guidelines.pdf](http://www.ofcom.org.uk/consult/policy_making/guidelines.pdf)

- 8.35 The Number then claims that Ofcom is factually incorrect in its reasoning for not carrying out an Impact Assessment. The Number cites passages in the August 2006 document to state that Ofcom is not simply *applying* GC19 to the facts in these disputes, but instead it is *interpreting* GC19 and therefore making a number of decisions with policy ramifications. In other words, The Number is seeking to draw a distinction between applying and interpreting GC19.

### Ofcom's response

- 8.36 Section 7(1) of the 2003 sets out the circumstances under which Ofcom is under a duty to carry out Impact Assessments. It provides:

(1) This section applies where—

(a) OFCOM are proposing to do anything for the purposes of, or in connection with, the carrying out of their functions; and

(b) it appears to them that the proposal is important;

but this section does not apply if it appears to OFCOM that the urgency of the matter makes it impracticable or inappropriate for them to comply with the requirements of this section.

- 8.37 As explained in the IA Guidelines, Ofcom believes that Impact Assessments form a key part of best practice *policy-making* and we expect them to be carried out in relation to the great majority of our policy decisions. However, they go on to make it clear that, in some cases, an Impact Assessment will not be required as a general rule. Those cases, according to the IA Guidelines (at paragraph 4.5), include:

4.5...Ofcom will not carry out Impact Assessments when conducting investigations. This is because what is being enforced will have been put in place as a consequence of an Impact Assessment and/or primary or secondary legislation. **Also, when resolving a dispute Ofcom will not generally carry out an Impact Assessment where the dispute relates to regulation which has been put in place as a consequence of an Impact Assessment and/or primary or secondary legislation.** Similarly, Ofcom will not normally carry out an Impact Assessment when publishing guidance relating to how we will undertake such investigations. Such guidance will generally just flesh out how Ofcom will fulfil obligations created following the carrying out of an Impact Assessment. (Emphasis added)

- 8.38 We remain of the view that we are not required to carry out an Impact Assessment in resolving these disputes for the same reasons as cited above in the IA Guidelines. We have already discussed in **Section 5** of this document (see, in particular, **paragraph 5.88** that Ofcom acts in a number of capacities under the 2003 Act, such as policy maker as well as regulatory dispute resolver. Importantly, with regard to the latter (particularly where a dispute has been brought to Ofcom under section 185(2) of the 2003 Act), Ofcom is not policy making: typically, it is instead resolving a dispute by reference to existing (as opposed to proposed) regulation, as in these present disputes.
- 8.39 In this context, we do not consider that The Number's distinction between *applying* GC19 to the facts in these disputes and *interpreting* GC19 is of any merit. In interpreting GC19, Ofcom is, in effect, explaining the meaning of this existing regulation. Therefore, Ofcom considers that it cannot be properly said that it is "proposing to do anything for the purposes of, or in connection with, the carrying out of their functions". We do not consider that it was the intention of Parliament to capture functions such as Ofcom's dispute resolution functions within section 7 of the 2003 Act. Rather, we consider that the types of functions caught by this provision

include, to take an example only, proposals under section 48 of the 2003 Act to set, modify or revoke conditions under section 45 of the 2003 Act.

- 8.40 On that basis, we refute The Number's claim that Ofcom is somehow "stepping out" of its duty to carry out Impact Assessments in resolving these disputes. In any event, should our function to resolve these disputes nonetheless be viewed as an implementation of a proposal for the purposes of section 7 of the 2003 Act, we consider it unnecessary for Ofcom to carry out an Impact Assessment in this context. This is because, in interpreting GC19 (as it currently stands), we are not defining a policy objective that can be usefully assessed against various options. In other words, no issue arises with regard to Ofcom choosing the best (policy) option. For these reasons, as section 7(3) of the 2003 Act makes it clear that the duty to carry out Impact Assessments is not an absolute one, we consider that we have fully complied with our statutory duties.
- 8.41 We further have considered, and acted in accordance with, our general duties set out in section 3 of, and the six Community requirements set out in section 4, of the 2003 Act. Specifically, Ofcom considers that, in interpreting GC19 and applying it to the facts in these disputes, we are acting in accordance with those duties to achieve the objectives of GC19, the setting under section 45 of the 2003 Act of which is a function to which those duties already apply.

### **(iii) Alleged distortion on competition in the DQ industry**

#### **The Number's submissions**

- 8.42 The Number submits that Ofcom's interpretation of GC19 results in a number of potentially anti-competitive consequences. As a result, The Number alleges that Ofcom has adopted an approach which is liable to distort competition in the DQ industry. Specifically, The Number alleges that Ofcom has therefore:
- (i) failed its duty under section 3 of the 2003 Act to further the interests of consumers in relevant markets, where appropriate by promoting competition; and
  - (ii) failed to comply with its obligations under Article 10 of the EC Treaty.
- 8.43 Whilst The Number claims that the wider interpretation of 'relevant information' it advocates should be taken would not allow DIPs to free-ride on BT's investment, the potentially anti-competitive consequences that The Number asserts result from Ofcom's interpretation are:
- (i) the impossibility for 'grouping' information to be derived by DIPs from Ofcom's interpretation (together with the practicality of subscribers being reluctant to repeat countless times the presentation of their entries to numerous DIPs) means that, in fact, there is no competition with BT to begin with as only BT can provide it; and
  - (ii) "[t]he effect of Ofcom's determination, if confirmed, will be to allow BT to control and charge third parties excessive amounts for the vast majority of the information about BT subscribers in OSIS, putting DQ providers at a disadvantage as compared with BT's own DQ service (as a result of the significant internal transfer charge BT makes to reflect BT numbers supplied to OSIS)".

- 8.44 The Number then simply adds (at paragraph 7.38 of its response) before arriving at above-mentioned alleged failures that:

7.38...Ofcom do not address why they have chosen to determine the disputes in an anti-competitive way in the first place. Ofcom had several opportunities in the draft determination to interpret GC19 in a way which would not harm competition, but chose not to...

### Ofcom's response

- 8.45 It is clear from The Number's submissions that they are premised both on its reading of the *KPN* case and that Ofcom therefore has chosen to interpret GC19 in a particular manner. As regards the *KPN* case, we refer to our response to The Number's alleged failure of Ofcom failing to take account of *KPN* earlier in **this Section**.
- 8.46 As to Ofcom having choice in the matter, we disagree that this is the case. As we have explained above, given that GC19 is compatible with the USD, the interpretation is a matter that falls to be considered purely as a matter of domestic national law. To extend the meaning of GC19, therefore, simply by reference to section 3 of the 2003 Act (without first modifying the express wording of GC19) would lead, for instance, to statutory requirements in the 2003 Act (such as consultation under section 48 and, indeed, the need to carry out an Impact Assessment under section 7) being easily circumvented. We therefore do not accept that Ofcom could somehow rely on section 3 to, in effect, modify the meaning of GC19.
- 8.47 In light of the above, there is no need for Ofcom to express a view on the correctness of The Number's assertions in this regard upon which its allegations are based. We nonetheless consider that The Number's points in this regard may be of relevance for the purposes of any changes to the relevant regulation moving forwards, which issue is separately considered in Ofcom's ongoing policy review referred to in **Section 12** of this explanatory statement. We therefore urge The Number to consider making these points in response to Ofcom's policy review consultation, should it wish to maintain them.

### (iv) Alleged failure to comply with data protection legislation

#### The Number's submissions

- 8.48 The Number submits that "[a]nother overriding consideration is data protection legislation". Whilst The Number does not explain what it means by "overriding consideration", it appears to be suggesting that Ofcom should interpret GC19 in light of the Privacy Regulations so as to capture, in principle, whatever the subscriber requests to be presented in directories and DQ services.
- 8.49 Specifically, after referring to certain statements by Ofcom in the August 2006 document, The Number's conclusion (under paragraph 7.43 of its response) is that:

Where individual subscribers give consent for their data to be processed in a certain way (i.e. to be presented in directories/DQ services in a certain way), that information should be passed on. If not, the communications provider in question would be breaching the terms on which consent to process that data was given.

- 8.50 The Number proceeds in its response to give various examples of information that should be included under GC19 on that basis (assuming the subscriber in question has so requested), including:

- (i) telephone number flagged as being a fax number only;
- (ii) noting the profession or occupation of the subscriber (e.g. doctor or dentist);
- (iii) the name of the pub/B&B and not the name of the landlord or landlady;
- (iv) as regards corporate subscribers, a specified PO box instead of the installation address (e.g. for a women's refuge or a call centre); and
- (v) as regards corporate subscribers, data to be grouped or presented in a certain way so that users searching for a division or department within their organisation (a council's household waste facility, for example) can find that number without calling the main switchboard.

8.51 In this context, The Number makes two additional points that seemingly cast doubt on the extent to which a subscriber could rely on the Privacy Regulations to include information. Firstly, The Number (at paragraph 7.46 of its response) states:

7.46 Going forward, BT may choose to continue asking subscribers how they would like their entry presented in directories, in which case those subscribers would be giving consent for the use of their data on those terms and the information should be passed on. ***If BT chooses not to seek this information from its subscribers, or if BT alerts them to the fact that it cannot be guaranteed that DQ providers would pay for the information and present their entries as they require, then the situation might be different.*** (Emphasis added)

8.52 Its second point arises from a brief discussion The Number mentions it has had with a senior official of the Information Commissioner's Office. According to The Number (at paragraph 7.53 of its response), that official expressed the following view:

7.53...whilst he could not be categorical, in circumstances where an individual subscriber has specifically requested that certain personal data be passed on to directory and DQ providers (and has apparently been led to believe this will happen), if there is no good reason not to pass certain information on and the individual suffers, or may potentially suffer, inconvenience as a consequence, then there is likely to be a breach of the fairness provisions. Regulation 18 nevertheless gives rise to the possibility that some personal data the individual wishes to be included may not be considered relevant by the directory producer(s) in question and ***Regulation 18 does not give subscribers a completely unfettered right to determine which information is included in a directory.*** (Emphasis added)

8.53 In other words, Ofcom understands these points by The Number as self-recognition that there are certain limitations under data protection legislation itself as to what information may be included in a directory, even in light of a subscriber request.

### Ofcom's response

8.54 We focus here on responding to The Number's specific wider point about there being an "overriding consideration" under data protection legislation to interpret GC19 more widely. As regards the above-mentioned examples by The Number, we refer to **Section 9** of this document, where the implications of data protection legislation are discussed (see **paragraphs 9.176 to 9.218**) in light of our provisional views as to the scope of data required to be made available under GC19.

8.55 In dealing with The Number's point, it is appropriate to first turn to the terms of GC19. In particular, GC19.4 is the provision which makes reference to data protection legislation. It provides:



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

8.56 We consider that, so far as one is analysing the scope of data specifically required under GC19, the requirements of the relevant data protection legislation are relevant only in so far as the data in question falls within GC19 itself. In other words, such requirements do not function to extend the meaning to be attached to the meaning of 'Directory Information' as used in GC19.1. This is essentially because GC19 would not apply to such more extensive data in the first place and, therefore, the caveat (i.e. "subject to the requirements of Relevant Data Protection Legislation") does not, in Ofcom's view, serve the purpose alleged by The Number.

8.57 Furthermore, we note that our interpretation in this regard is consistent with the view taken by the ECJ in the *KPN* case. The requirement in Article 6(3) of the RVTD—which provision concerned the supply of 'relevant information'—was subject to the requirements of (then) relevant data protection legislation under Community law similarly to that now contained in Article 2595) of the USD. In balancing the various interests at stake, the ECJ held (at paragraph 32 of its judgment) that:

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

8.58 In light of that view, the ECJ nonetheless reached the conclusion previously discussed that the concept of 'relevant information' must be strictly interpreted, so as to comprise "in principle" minimum records only. We therefore consider that there is no support for The Number's argument in this regard also by reference to the ECJ's judgment in *KPN* itself.

8.59 For the avoidance of doubt, we should clarify that, should information about subscribers be supplied by CPs on a pure commercial (as opposed to regulatory) basis to DIPs, requirements of relevant data protection legislation must, so far as applicable, be complied with in this context. In other words, to the extent that any data falls outside the scope of GC19 but it has nonetheless been provided (say, by BT to a DIP under its OSIS arrangements), the parties must ensure that such relevant requirements in the DPA and the Privacy Regulations are being met.

8.60 Accordingly, Ofcom rejects The Number's allegation that it has failed to interpret GC19 in a way which complies fully with data protection legislation.

## Section 9

# GC19 – Scope of data

## Introduction

- 9.1 **Section 5** sets out Ofcom's reading of the ECJ's judgment in the *KPN* case as to what information is principally required to be provided under the Community law concept of 'relevant information' - namely, it comprises only the name and address, including postcode, of subscribers, together with any telephone numbers allocated to them by the entity concerned.
- 9.2 We also read that judgment as making it clear that it would be compliant with Community law for a Member State to determine in light of specific national circumstances that additional data ought to be made available to third parties. However, the content and scope of any additional data is a matter falling within the competence of each Member State and the margin of appreciation to extend the scope of data is a matter solely for national domestic law, subject only to the requirement that the additional data must appear necessary to Member States in order to identify subscribers.
- 9.3 As discussed in **this Section**, it is clear that the scope of data to be made available under GC19 at least meets the minimum records identified by the ECJ. For reasons discussed in **Section 8** (see **paragraphs 8.8 to 8.30**), GC19 is therefore compatible with Community law and, on that basis, we reject The Number's argument alleging a failure on our part to properly interpreting the USD, in particular its alleged failure that we have not taken into account the *KPN* case.
- 9.4 Given this, **this Section** considers the precise information to be made available under GC19 as a matter of statutory interpretation under UK law. The distinction with Community law is an important one. Unlike the position when interpreting UK legislation to construe it so far as possible so as to make it compatible with the Community legislation it was designed to give effect to<sup>81</sup>, Ofcom must therefore use ordinary methods of statutory interpretation recognised under UK law, particularly so as to give a provision (such as GC19) the meaning corresponding to its plain, literal and grammatical meaning and to apply it accordingly.
- 9.5 In summary, we have considered the responses to the August 2006 document and, although we have made a few adjustments to our provisional views in that document about the scope of data, our revised proposals do not extend to include all the data that The Number has argued should be made available under GC19.
- 9.6 We acknowledge, however, that the absence of certain data from GC19 may raise certain policy concerns. In this context, it is important to appreciate that the original policy aim to require BT to act as a central dissemination point for the directory information of all subscribers in the UK and, in this way, to ensure that Article 25 was

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<sup>81</sup> In such circumstances, authorities (such as the House of Lords in *Litster v. Forth Dry Dock & engineering Co Ltd* [1990] 1 AC 546 and *Revenue & Customs Commissioners v. IDT Card Services Ireland Ltd* [2006] EWCA Civ 29) make it clear that, without departing from the fundamental or cardinal features of the legislation, it is possible to read the domestic transposing legislation up (expansively) or down (restrictively) or to read words into the legislation.

implemented in the UK in an efficient and effective manner under USC7 is affected by our views as regards the unlawfulness of USC7. As set out in **Section 12** we have started a policy project to assess the impact of this and other issues. As part of this project we will shortly be publishing an initial consultation document to (among other things) canvass views from stakeholders as to what data should be made available under GC19 on the basis that they appear necessary in order to identify subscribers in light of specific UK circumstances and on whether there should be a single aggregated database in the UK.

9.7 In particular, we consider in **this Section** two questions critical to assessing the specific information which must be provided under the terms of GC19, namely:

- (i) *About whom must the 'Directory Information' be provided?* (In other words, this question relates to the extent to which the individual records within OSIS are covered by GC19 as it applies to BT: as seen in **Section 3**, OSIS itself contains a broad number of individual records each relating to individual telephone numbers and the specific user of each number.)
- (ii) *What specific information is already covered by GC19, particularly by reference to the term 'Directory Information'?* (Again, as seen in **Section 3**, OSIS itself contains 42 potential data fields which can be populated for an individual record. For certain telephone numbers, this can amount to a considerable detail of information about the user of that number and the specific use to which it is put. Ofcom must assess the depth of detail which BT is specifically required to provide under GC19.)

9.8 In **this Section**, we further consider the meaning of GC19 applying subject to the requirements of relevant data protection legislation and the meaning of the 'Directory Information' being supplied under the terms of GC19 in an agreed format. The Number has argued that these requirements should mean that BT provides all the data currently contained within the full OSIS product. We therefore set out our reasons for not accepting The Number's arguments in this regard.

9.9 **Section 10** then goes on to consider the implications for BT's charging, given its obligation under GC19 to make the scope of data to be supplied, as identified in **this Section**, on cost oriented terms.

9.10 Specifically, **this Section** is structured as follows:

- **paragraphs 9.11 to 9.31** introduce the analysis in the remainder of **this Section** concerning the scope of data to be supplied by setting out the relevant terms of GC19 as well as clarifying the two distinct purposes served by the term 'Directory Information';
- **paragraphs 9.32 to 9.84** consider the question about whom 'Directory Information' must be provided, taking into consideration responses received to the August 2006 document;
- **paragraphs 9.85 to 9.175** consider the question about what specific information is, at present, covered by GC19, particularly by reference to the term 'Directory Information' by first considering the meaning of "the name and address of the Subscriber" and then the meaning of "Telephone Number assigned to the Subscriber for their use of [PATTS]", taking into consideration responses received to the August 2006 document;

- **paragraphs 9.176 to 9.218** consider what obligations flow from the requirements of relevant data protection legislation and deal with specific points raised by The Number in its response to the August 2006 document;
- **paragraphs 9.219 to 9.236** consider the implications of the requirement within GC19 to supply 'Directory Information' in an agreed format and deal with The Number's arguments that the "agreed format" is the whole of the current OSIS database; and
- **paragraphs 9.237 to 9.246** set out our concluding remarks, including our provisional assessment as to which of the data actually provided by BT from OSIS is covered by BT's obligations under GC19 in light of Ofcom's interpretation in **this Section**.

## The relevant terms of GC19 and the two purposes of 'Directory Information'

### The plain and unambiguous terms of GC19

- 9.11 To properly identify the scope of data to be supplied under GC19, it is essential to analyse its specific terms. GC19 provides that:

19. PROVISION OF DIRECTORY INFORMATION

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

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

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

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

...

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

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

- 9.12 It is clear that only "*Directory Information*" is required to be made available, on reasonable request, under GC19, whether in relation to a relevant CP's subscribers (GC19.1(a)) or ex-subscribers of such a provider (GC19.1(b)). 'Directory Information' is defined in the GC notification<sup>82</sup> to mean:

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

<sup>82</sup> See as defined under paragraph 1 of Part 1 of the Schedule to the GC notification.

- 9.13 The meaning of the phrases of “*the name and address of the Subscriber*” and of “*the Telephone Number assigned to the Subscriber for their use of [PATs]*”, respectively, are considered in detail in **paragraphs 9.85 to 9.175** below. However, for present purposes, it suffices to conclude that the starting point for Ofcom’s statutory interpretation under purely domestic law is that, in order to fall within GC19 in the first place, the information in question must satisfy the defined term of ‘Directory Information’.
- 9.14 In this context, Ofcom notes its view that The Number’s reliance on the principle of consistent interpretation does not assist its argument in these disputes. As seen from the ECJ’s judgment in the *KPN* case, the wording in the definition of ‘Directory Information’ plainly corresponds, in material respects, to the minimum records identified by the ECJ in interpreting the Community law concept of ‘relevant information’, that is “*the name and address, including postcode, of subscribers, together with any telephone numbers allocated to them by the entity concerned*”.
- 9.15 We therefore consider that, on its natural reading, GC19 is compatible with Community law in this regard. Accordingly, no issue arises with regard to Ofcom having to depart from the natural reading of a provision in order to achieve a result consistent with Community law (i.e. the principle of consistent interpretation from the *Marleasing* case): see also in this regard Ofcom’s response to The Number’s argument about the alleged failure by Ofcom to take proper account of the findings in *KPN*, as set out in **paragraphs 8.8 to 8.30** of **Section 8**.
- 9.16 Before considering the two distinct purposes served by the term ‘Directory Information’, we note Oftel’s statement of purpose in its first consultation document setting out the Director’s initially proposed GCs, which document was published on 22 May 2002 (the “**first GC consultation**”). Although The Number has not specifically sought to rely on that statement in its response to the August 2006 document (given that its submissions largely rest on its reading of the *KPN* case), we have nonetheless revisited the policy rationale behind GC19 to ascertain whether the above-mentioned meaning could potentially lead to some result which cannot reasonably be supposed to have been the intention of the Director in setting GC19 in July 2003.
- 9.17 The relevant statement of purpose, which was cited in Annex 6 to the August 2006 document, is to be found at paragraphs 3.60 and 3.61 of the first GC consultation. The statement makes it clear that this GC (now GC19) was seeking to implement the obligations contained in Article 25(2) of the USD. Its paragraph 3.60 describes, in summary, what the provision seeks to achieve as follows:
- 3.60 This condition requires all communication providers with a numbering allocation to pass on their subscriber directory information to any other provider of publicly available telephone services. ***Its purpose*** is to ensure the ***provision of the most comprehensive directory database(s) from which directory products and services can be provided***. (Emphasis added)
- 9.18 Therefore, at first blush, it would appear that this statement of purpose would be relevant to the interpretation of GC19. However, on reading that statement in light of the more detailed account of the purpose for imposing the obligation under USC7 on BT to supply the contents of its comprehensive OSIS database (see paragraphs 3.74 to 3.90 of the USO notification, as cited in **Section 5**), it is clear to Ofcom that USC7 (as opposed to GC19) was the intended way to achieve the purpose described in paragraph 3.60 of the first GC consultation.

- 9.19 Given the precision with which 'Directory Information' is defined (which was specifically amended by the Director following the second GC consultation so as to clarify that it only refers to telephone numbers assigned to subscribers for their use of PATS), it does not seem to Ofcom reasonable to consider that in drafting the definition, the Director has, inadvertently, omitted to deal with an eventuality that required to be dealt with if the above-mentioned purpose was to be achieved.
- 9.20 Accordingly, Ofcom considers that there is no basis for taking an alternative interpretation by reference to the above-mentioned purported statement of purpose, which was not ultimately reflected under the terms of GC19. In any event, we take the view that a wholesale jettisoning of the grammatical meaning of GC19 (together with its term 'Directory Information') would not be permitted using purposive construction methods recognised by the courts under UK law.

### The two purposes of 'Directory Information'

- 9.21 As noted above, the definition of 'Directory Information' provides that:

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

- 9.22 According to paragraph 1 of Part 1 of the Schedule to the GC notification, the terms 'Directory' and 'Directory Enquiry Facility' are defined, respectively, as follows:

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

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

- 9.23 Therefore, the definition of 'Directory Information' seems, at first blush, to depend on whether one is considering a 'Directory' or a 'Directory Enquiry Facility' in the GC19 context. On that basis, the definition of 'Directory Information' could potentially be construed as requiring the provision of "*the name and address of the Subscriber and the Telephone Number assigned to the Subscriber for their use of Publicly Available Telephone Services*" (which information, as seen above, we consider corresponds to the ECJ's interpretation of the concept of 'relevant information') with regard to a 'Directory' only; while the definition of 'Directory Information' provides that, in the case of a 'Directory Enquiry Facility', the information to be provided is that it "shall be either such a Telephone Number of the Subscriber or information that such a Telephone Number of the Subscriber may not be supplied".
- 9.24 That distinction raises a potential preliminary question as to whether the nature and extent of information to be supplied under GC19 turns on whether one is considering a CP's obligation to meet a reasonable request to supply 'Directory Information' for the purposes of the provision of 'Directories' or 'Directory Enquiry Facilities'. Although it was not a matter raised by the parties in these disputes, Ofcom set out its views on this matter in the August 2006 document: see, in particular, paragraphs 7.93 to 7.97. In summary, we reached the view that "the name and address of the Subscriber and the Telephone Number assigned to the Subscriber for their use of Publicly Available Telephone Services" is information that is required to be supplied for the purposes of GC19 both in relation to 'Directories' and 'Directory Enquiry Facilities'.

- 9.25 Our reasoning in the August 2006 document for that view was that the term 'Directory Information' serves two distinct (but related) purposes.
- 9.26 Specifically, we considered that the term 'Directory Information' is firstly used for the purposes of **GC8** to make clear what type of information must be provided by a particular CP either (i) when an end-user is accessing a 'Directory Enquiry Facility'; or (ii) when supplying, on request, a 'Directory' to any of its subscribers, respectively. (To be clear, the term 'Directory Information' is used universally in the GC notification, given that it is defined in the main definition section of the GC notification; it therefore applies to GCs 8, 15 and 19.) In other words, it is **a term used in this context at the retail (user) end of the supply value chain of directories and DQ services.**
- 9.27 We particularly noted that the reference to 'a *printed* document'—containing, by definition, only "Directory Information on Subscribers of Publicly Available Telephone Services in the [UK]"—provides clarity as regards the 'output', which a CP needs to supply in order to comply with its obligations under GC8 in respect of directories. Also, in relation to a 'Directory Enquiry Facility', similar clarity is provided by GC8 (as read in light of the definition of 'Directory Information'), where it provides that the 'output' of such a service must be "either such a Telephone Number of the Subscriber or information that such a Telephone Number of the Subscriber may not be supplied".
- 9.28 As regards the second purpose served by the term, we considered that it is **a term also used to specify what information must be supplied at a wholesale level by undertakings subject to GC19** to providers of directories or DQ services at a retail level. In particular, we stated that the meaning of 'Directory Information' in this context is not aimed at the 'output' products or services to the retail users (such as a printed document or the provision of simply a telephone number or, as the case may be, that such number has been withheld). Rather, the term 'Directory Information' is in this context intended to focus on the **raw and basic data** that forms part of the input information, which is essential in order to provide those 'output' products or services, that is "the name and address of the Subscriber and the Telephone Number assigned to the Subscriber for their use of Publicly Available Telephone Services".
- 9.29 Except for a comment in footnote 20 to The Number's response to the August 2006 document, we received no other responses on this particular issue. The Number's comment in that footnote is as follows:
- <sup>20</sup> The requirement in Article 25(2), implemented by GC19, is sandwiched between (and supporting at the wholesale level) the provisions relating to the rights of subscribers and end-users. The supply of relevant information at the wholesale level is therefore directly linked to (and supports) the supply of comprehensive publicly available directory enquiry services and directories at the retail level, both in terms of subscribers' rights to have an entry included and end-users rights to access. The quality and scope of information at each level must necessarily be the same (contrary to Ofcom's conclusion in 7.94 to 7.96 where they seem to suggest that 'output' and 'input' information in relation to GC19 and GC8 are not the same).
- 9.30 While noting The Number's comment, Ofcom continues to consider, for reasons set out above, that the term 'Directory Information' serves the two distinct (but related) purposes mentioned above. We therefore proceed on the basis that the information that is required to be supplied for the purposes of GC19 both in relation to 'Directories' and 'Directory Enquiry Facilities' is, subject to the terms of GC19 itself, "the name and address of the Subscriber and the Telephone Number assigned to the Subscriber for their use of Publicly Available Telephone Services".

9.31 We now consider whether GC19 requires BT to make available its 'own' subscriber information only or also aggregated third party (non-BT) subscriber information.

### About whom must BT provide 'Directory information'?

#### Ofcom's provisional findings in the August 2006 document

9.32 In the August 2006 document (see, in particular, paragraphs 7.76 to 7.92), we reached a number of provisional conclusions under this heading. In particular, we concluded that BT's obligations under GC19 do not extend to:

- (i) 'Directory Information' of 'Subscribers' of other CPs, which subscribers are not end-users assigned telephone numbers originally allocated to BT, and 'Directory Information' of any other end-users assigned telephone numbers, but to whom BT did not originally allocate those numbers (collectively referred to hereafter as "**other CPs' GC19 data**");
- (ii) **actual user information**, that is to say, information about the actual user of the telephone number(s) assigned to the subscriber to the extent that in certain circumstances this may differ from information about the subscriber (e.g. a parent may subscribe to the provision of PATS for a child at a separate address; a local council may subscribe to the provision of PATS for a school or a library within its area; a holding company may subscribe to the provision of PATS for a range of subsidiaries; and so on).

9.33 In light of the above conclusions, and given that OSIS contains also other CPs' GC19 data, we rejected the submissions made by the parties to the effect that all of the information contained in OSIS would, in principle, be 'relevant information' or 'basic data' in accordance with the *KPN* case, regardless to whom such information relates. To the extent that OSIS contains other CPs' GC19 data, we concluded that it would fall outside any obligations that BT has under GC19.

9.34 The reasons for those conclusions were analysed under three sub-headings in the August 2006 document, the substance of which we set out again below for ease of reference.

#### BT's subscribers only

9.35 To start with, contrary to BT's position, the other parties have argued that all OSIS data should be made available by BT under GC19, including aggregated third party (non-BT) subscriber information as well as 'grouping' of data.

9.36 However, the plain terms of GC19.1 make it clear that, except for the provision in GC19.1(b) which is considered below (see **paragraphs 9.49 to 9.50**, it concerns only:

...the Directory Information of:

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

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

...

(Emphasis added)



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

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

- 9.38 GC19.1(a) refers to "its Subscribers", making it clear that the 'Directory Information' concerns only a CP's own 'Subscribers'. That point is further apparent from the qualification in GC19.1(a) that it is necessary for the 'Communications Provider' to *assign*<sup>83</sup> certain 'Telephone Number(s)' to "its Subscribers", which assignment in turn depends on the 'Communications Provider' having been allocated the Numbers in accordance with GC17 by Oftel/Ofcom.

- 9.39 These provisions in GC19 about the persons to whom the 'Directory Information' must relate in order to 'trigger' a particular CP's obligations correspond, in Ofcom's view, to the terms of Article 25(2) of the USD. That Article concerns only "*all undertakings which assign telephone numbers to subscribers*". By definition (in the Framework Directive)<sup>84</sup>, the term 'subscriber' means:

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

- 9.40 On the basis of that definition alone, if an entity making available ECSs for use by members of the public (i.e. public available ECSs) would be engaged in an economic activity, such an undertaking is subject to the Article 25(2) requirement where it enters into a contract with an individual or a body of persons corporate or unincorporated for the supply of such services in respect of which it has assigned one or more telephone numbers to that individual or body. (We will, however, consider below the separate issue as to whether public ECS should be qualified to mean PATS in this context.)

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

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

- 9.42 References to the term 'subscribers' are used throughout the judgment (as well as in the Advocate General's Opinion). These references are not accidental but, indeed, reflect the wording of Article 6(3) of the RVTD itself, which uses in material respects the same wording as in Article 25(2) of the USD, namely "*all [organisations] which*

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<sup>83</sup> Paragraph 3.122 of the final GC statement explains that the term 'assign' is used in the sense of sub-allocation from a communications provider to a particular end user.

<sup>84</sup> By virtue of the first paragraph of Article 2 of the USD, the definition of 'subscriber' in Article 2(k) of the Framework Directive applies also to the USD.

*assign telephone numbers to subscribers*". The term 'subscriber' is defined in Article 2(2)l of the RVTD in terms similar to the meaning its corresponding term has for the purposes of the USD, as follows:

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

- 9.43 Given that other terminology (such as a 'user', which is separately defined) is also used in both the RVTD as well as the USD, Ofcom considers that this shows a clear legislative intention to use the more specific meaning of a 'subscriber' for the purposes of Article 6(3) of the RVTD and Article 25(2) of the USD, respectively. Accordingly, it is plain that both the terms of 'Directory Information' and 'relevant information' (in light of the *KPN* case) are limited to the name, address and telephone number(s) *of the subscriber*. No issue, therefore, arises as to the meaning leading to some result which cannot reasonably be supposed to have been the intention of the legislator.
- 9.44 In these circumstances, it would be wrong for Ofcom to nonetheless proceed by substituting some other words for the words in the above-mentioned provisions, particularly where relevant domestic law is designed to implement the directive in question. As regards the latter, there is nothing in the USD (or in the *KPN* case) to suggest that the words "of the subscriber" (in the phrase "name, address and telephone number(s) *of the subscriber*") have to be read more widely than its defined literal meaning. (We refer more generally to our views in **Section 8** of this document dealing with The Number's response alleging that Ofcom has wrongly approached its interpretation. For reasons given, no issue arises in this context about any duty on Ofcom, when interpreting UK legislation designed to give effect to Community legislation, to construe the domestic legislation so far as possible so as to make it compatible with the Community legislation.)
- 9.45 Indeed, given that the ECJ's conclusion (at §34 of its judgment) was that the words 'relevant information' *must* be strictly interpreted (taking into account the various interests at stake), we provisionally concluded in the August 2006 document that it would be at odds with the *KPN* case for Ofcom to take such an interpretative approach. In this context, we also noted that there is nothing to suggest that the UK has exercised a "relevant information plus" option, which the ECJ recognised (at §36) was available to Member States, namely "...it is open to Member States to provide that other data are to be made available to users where, in light of specific national circumstances, they appear to be necessary in order to identify subscribers". On that basis, we did not consider any actual user (as opposed to subscriber) information as falling within GC19.

#### BT's subscribers of PATS only

- 9.46 As noted above, the definition of a 'Subscriber' refers to the supply of 'Public Electronic Communications Services'. However, we provisionally concluded in the August 2006 document that the 'Subscriber' definition must, in the relevant context, be read together with the definition of 'Directory Information' which makes it plain that GC19 concerns only "*the name and address of the Subscriber and the Telephone Number assigned to the **Subscriber** for their use of Publicly Available Telephone Services*".
- 9.47 Ofcom therefore considered it clear that the meaning of a 'Subscriber' has been ascribed a narrower meaning for the purposes of interpreting the meaning of 'Directory Information' itself for the application of GC19. Namely, it concerns *only*

*subscribers of PATS*, which term has been defined under paragraph 1 of Part 1 of the Schedule to the GC notification as meaning:

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

- 9.48 In the August 2006 document, we cross-referred in this context to our analysis in relation to the meaning of 'Telephone Number(s)' for the more precise meaning of PATS. However, in light of the 'subscriber' definition in the Framework Directive, we noted on our own volition that a potential issue arises here as to whether or not the definition of a 'Subscriber' for the purposes of GC19.1(a) should be interpreted more widely, so as to read public ECS (which is a wider term than PATS), in order to properly implement Article 25(2) of the USD. Having considered the arguments, we nonetheless reached the initial view that, for reasons noted above, the narrower (PATS) meaning does accord with the USD's provisions. As a result, the definition of a 'Subscriber' for the purposes of GC19.1(a) should not be interpreted more widely, so as to read public ECS, but instead simply PATS (as a matter of statutory interpretation under purely domestic law).

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

- 9.49 We then noted in the August 2006 document that, pursuant to GC19.1(b), 'Directory Information' falling within GC19 may also relate to "*any other End-User assigned a Telephone Number originally Allocated to the Communications Provider*". The term 'End-User' means in this context:

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

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

- 9.50 We also drew attention to GC19.2, which provides a regulatory mechanism by which certain persons (such as the CP originally allocated the telephone number) may obtain the 'Directory Information' to which GC19.1(b) refers.

#### **Responses to the August 2006 document about other CPs' GC19 data**

- 9.51 The majority of consultation responses to the August 2006 document received by Ofcom appear to generally agree with Ofcom's views on this point.
- 9.52 However, although BT generally concurs with Ofcom's scope of directory information, it makes the following point relating to BT's ex-subscribers:

12. Neither BT nor other CPs is able to provide directory information of end-users whose numbers were originally allocated to them but subsequently ported to another network. Even if this were possible, it would result in duplication of provision – both the provider originally

allocated the number and the provider to whom the end-user is now a subscriber would have to provide the same directory information. This requirement also appears to go beyond what is required to be supplied by CPs under Article 25.2 of the USD.

- 9.53 Thomson no longer expressly rejects that GC19 only requires BT to make available its 'own' directory information, despite its previous submissions specifically arguing that the concept of 'relevant information' under Article 25(2) of the USD includes aggregated third party subscriber information that comprises, in effect, 'Directory Information' also on non-BT subscribers. Rather, Thomson now submits that Ofcom should seek to put in place for the future the most efficient system for the centralised consolidation of all subscriber data to be provided to DIPs (not necessarily by BT, although Thomson argues that BT would be well-placed to perform this role). This suggestion is made also by Yell in almost identical terms.
- 9.54 On the other hand, whilst The Number appears silent in its response concerning the issue of aggregated third party (non-BT) subscriber information, it remains unclear from other parts of its consultation response in which it objects to Ofcom's findings (such as the exclusion of non-PATS subscribers and of actual users) as to whether The Number implicitly rejects the exclusion of such information from GC19. This is particularly the case, given that The Number has throughout Ofcom's investigation maintained that all OSIS data is necessary to identify subscribers without necessarily separating BT subscribers and non-subscribers.

### Ofcom's response

- 9.55 As regards BT's response concerning the requirement under GC19.1(b), it is unclear to Ofcom what BT means by being "unable to comply" with it. Subject to BT providing further clarity on this matter, we note that the mechanism in GC19.2 imposes, in turn, a requirement on a CP to provide the CP originally allocated the telephone number in question by Ofcom (or, as the case may be, by Oftel) with the relevant information, so that the latter can comply with its GC19.1 obligations. We therefore consider that there is no support for BT's assertion. In light of this, we see no relevance of BT's argument as to the duplication of effort in this regard.
- 9.56 Further, as to BT's point about this requirement going beyond what is required to be supplied by CPs under Article 25.2 of the USD, we do not consider that, as a matter of Community law, a Member State is prevented from extending domestic legislation in this regard. In our observations on the *KPN* case in **Section 8**, it is clear from the ECJ's judgment that Member States may go further than what it regards, in principle, as being relevant information.
- 9.57 Given that detailed rules have been laid down in GC19.1(b), we do not accept BT's submission. If so reasonably requested by a person with 'rights of access' under GC19, BT must comply with it. To drop this requirement (as BT requests Ofcom to do) would (among other things) require a prior modification by publishing statutory notifications under section 48 of the 2003 Act, including a separate (policy) consultation. As explained previously, for the purposes of resolving these disputes, Ofcom is exercising a different function with specifically prescribed powers under section 190 of the 2003 Act. We therefore urge BT (as well as Thomson and Yell in respect of their above-mentioned suggestions of a policy nature) to include this suggestion in any comments it chooses to make in responding to the related policy review: see **Section 12** for further details.
- 9.58 Finally, in relation to The Number's contrary view on this issue, Ofcom's view remains as set out in the August 2006 document.

## Responses to the August 2006 document about actual user information

- 9.59 Except for The Number, Ofcom has not received any response to the August 2006 document disagreeing with Ofcom's analysis concerning actual user information.
- 9.60 The Number argues that actual user information (as well as 'Directory Information' of subscribers) falls under GC19, and make the following points:
- (i) Ofcom's reading leads to an inconsistency in that actual users of ex-BT (but not current BT) numbers would be included under GC19 itself;
  - (ii) Ofcom's reading is based on a misunderstanding of the Advocate General's Opinion in the *KPN* case in that actual user information should fall within GC19 as being "what a typical user requires from a directory" and Ofcom must interpret the GC19 consistently with the USD as interpreted by *KPN*;
  - (iii) Ofcom must under data protection legislation ensure that actual user information specified by the subscriber is passed on in order to ensure that data is being processed on the terms of consent to process which were actually given;
  - (iv) Ofcom should utilise the definition of 'Telephone Number', which expressly includes "*data of any description*" used for any of the purposes listed, including data identifying the origin, sender, destination or recipient of an electronic communication. This provision goes beyond the scope of data referable only to the 'Subscriber' and captures data referable to 'actual users' as well as subscribers.

## Ofcom's response

- 9.61 Ofcom's position remains as set out in the August 2006 document. We have considered The Number's arguments carefully, but for reasons set out below, consider that they do not change Ofcom's provisional view or conclusions.

### (i) Actual users of ex-BT (but not current BT) numbers

- 9.62 The Number's argument in this regard is brief. We understand, however, that The Number is suggesting that Ofcom's analysis leads to an inconsistent outcome due to the fact that actual users of ex-BT telephone numbers would fall within GC19.
- 9.63 In response to this point, we disagree with The Number's premise (and, therefore, we consider that no issue of consistency arises) because the term 'Directory Information' governs the precise information to be made available both in relation to a relevant CP's subscribers (GC19.1(a)) and ex-subscribers of such a provider (GC19.1(b)).
- 9.64 In other words, the issue of 'Subscriber' (as the rules are currently laid down for the purposes of GC19) remains critical to the analysis under both of those scenarios. However, given that people become, or cease to be, Subscribers over time, when considering the person about whom a particular piece of information relates, one essentially asks the question as to whether it relates to (as a matter of fact) current or past contractual arrangements between the CP and that person to whom the 'Telephone Number' has been assigned for use of PATS: if the former (i.e. a current customer of that CP), then one is applying GC19.1(a); if the latter (i.e. a past customer of that CP), then GC19.1(b) applies.

- 9.65 This reasoning follows from GC19 itself. In particular, we consider that the word “assigned” is used here in the sense of the CP transferring to its customer legal rights and liabilities for the telephone number’s use of PATS, which links the interpretation back to the term ‘Directory Information’ where it is made expressly clear that the telephone number is “...assigned to the Subscriber...”.
- 9.66 This reading applies in relation to both phrases of “its Subscribers who have been assigned” (GC19.1(a)) and “any other End-User assigned” (GC19.1(b)). Whilst Ofcom accepts that an actual user would fall within the definition of an “End-User” (as cited in **paragraph 9.49** above), this term cannot be read in isolation, so as to avoid taking into account the need for there to be an assignment by the CP to that person. For there to be such assignment, the parties must have, in effect, entered into a contract. However, given that the ‘Subscriber’ definition is drafted in the present tense (i.e. “person who is party to a contract”), we consider that the verbal formula used in GC19.1(b) is intended to make reference to this past subscriber relationship; hence, the prerequisite of the assigned telephone number having been “*originally Allocated to the Communications Provider*”. As regards the latter, Ofcom views the provision as dealing particularly with the subsequent porting of a telephone number originally allocated to, say, BT to another CP.
- 9.67 On that basis, it is apparent that actual users (which expression we are using, as explained above, to make reference to information about the actual user of the telephone number(s) assigned to the subscriber) could not, by definition, fall under either GC19.1(a) or (b). Accordingly, we reject The Number’s assertion that actual users of ex-BT telephone numbers would fall within GC19 upon which its submission is premised.
- 9.68 We acknowledge, however, that the absence of actual user information from GC19 may raise certain concerns from a policy point of view in light of the unlawfulness of USC7. It is clear that such information (e.g. a school or a library, as opposed to the local council, being the contracting party with the CP) appearing in the OSIS database would be made available to DIPs pursuant to BT’s obligations under USC7 and this reality formed part of the original policy aim. Ofcom is therefore seeking to address this particular matter in its policy review: see **Section 12** for further details.

#### (ii) The Advocate General’s Opinion in the *KPN* case

- 9.69 We do not accept The Number’s assertion that we somehow misunderstand the Advocate General’s Opinion in the *KPN* case. We refer, in particular, to **Section 5** of this document (see, in particular, **paragraphs 5.14 to 5.37**), where we set out our understanding of what the ECJ decided in *KPN* in respect of the question concerning the meaning of ‘relevant information’. Specifically, we point out that, in our view, the ECJ did not reach the same interpretation on the meaning of ‘relevant information’ as that proposed by the Advocate General.
- 9.70 We therefore reject The Number’s submission that Ofcom should simply adopt his approach to interpreting the term ‘relevant information’, such as taking into account what a typical user requires from a telephone directory. In contrast, we refer to our reading of the *KPN* judgment (see, again, **Section 5**), particularly in this context with regard to our observation that the ECJ appears to have rejected that “another name” falls within the mandatory part under Community law of the concept of ‘relevant information’. Accordingly, no issue of consistent interpretation with Community law arises in this respect on which this response by The Number is premised.

### (iii) Data protection legislation

- 9.71 In our understanding, The Number repeats its submission regarding what it regards as the “overriding consideration” concerning data protection, albeit specifically with regard to actual user information. We therefore refer to **Section 8** (see **paragraphs 8.54 to 8.60**) for our response to these submissions. We also refer to our more detailed views on the implications of the requirement in GC19.4 that GC19 applies subject to the requirements of ‘Relevant Data Protection Legislation’ (i.e. the DPA and the Privacy Regulations), as set out below (see **paragraphs 9.176 to 9.218**).
- 9.72 In addition, we also note in this context that the requirement in regulation 18(2) of the Privacy Regulations applies to “[t]he personal data of an individual subscriber”. In our view, it follows from a plain and ordinary construction of that phrase (taking into account that the term ‘subscriber’ is defined under regulation 2(1) as the person who is a party to a contract with a provider of public ECS for the supply of such services) that the subject of the data is the (living) person contracting with the provider. The question of whether or not data relate to such a person will be one of fact in each particular case. However, where the actual user (e.g. a member of a family) is not the same person contracting with the provider (e.g. another member of that family), we consider that, by definition, the data relating to:
- (i) the actual user from which that user can be identified is the personal data of that actual user; and
  - (ii) the person contracting (i.e. the subscriber) with the provider from which that subscriber can be identified is the personal data of that subscriber.
- 9.73 Our construction is, in our understanding, supported by the “Legal Guidance” document<sup>85</sup> published by the Information Commissioner, where it specifically acknowledges (under section 2.2.1) as follows:

Data do not have to relate solely to one individual and the same set of data may relate to two or more people and **still be personal data about each of them**. For example, joint tenants of a property or holders of a joint bank account or even **individuals who use the same telephone or e-mail address**. (Emphasis added)

- 9.74 We therefore consider that The Number is wrong in suggesting that the scope of data to be allegedly supplied under GC19 includes actual user information by reference to data protection legislation. The Number’s argument is premised on the actual user information being the subscriber’s information. In this context, we note its response (at paragraph 7.65) to the August 2006 document particularly where The Number states:

7.65 Purely from a data protection point of view, data indicating the extent to which the **subscriber wishes his information** to be included or partially or totally withheld from a directory or DQ service should also be made available under GC19 (as Ofcom correctly state in 7.147). In the case of individual subscribers, if not also corporate subscribers, actual user information specified by the subscriber should be passed on in order to ensure that data is being processed on the terms of consent to process which were actually given. (Emphasis added)

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[http://www.ico.gov.uk/upload/documents/library/data\\_protection/detailed\\_specialist\\_guides/data\\_protection\\_act\\_legal\\_guidance.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/data_protection_act_legal_guidance.pdf)

- 9.75 In contrast, where the data (in fact) relates to personal data of an actual user, the processing of that data is protected under the provisions of the DPA. For example, if CPs were to supply DIPs with actual user information, the data protection requirements would apply to such commercial arrangements under the DPA. No issue arises, however, with regard to data protection under GC19 in those circumstances, because such information does not fall within the scope of it in the first place (see **paragraphs 9.176 to 9.218**).
- 9.76 Accordingly, we do not accept The Number's argument about actual user information having to be passed on under GC19 in order to ensure that data is being processed on the terms of consent to process which were actually given.

#### (iv) Definition of 'Telephone Number'

- 9.77 We understand The Number's submission that Ofcom should "utilise" the definition of 'Telephone Number' as a means (in isolation) to capture data referable to actual users as well as subscribers. In particular, The Number draws Ofcom's attention to the phrase "*data of any description*" in the definition of 'Telephone Number'.
- 9.78 Ofcom understands The Number to be arguing that, for instance, the *name* of an actual user could be said to be data of any description used for identifying the origin, sender, destination or recipient of an electronic communication. (BT makes a similar point in its response by stating that the *name* of a BT exchange would satisfy the definition of a 'Telephone Number' because it considers it being *data of any description* used for identifying the route of an electronic communication.)
- 9.79 We do not accept this construction as a matter purely of domestic law.
- 9.80 To start with, we consider it is necessary first to have regard to the full definition of 'Telephone Number'. It provides<sup>86</sup>:

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

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

- 9.81 In other words, we observe that The Number has omitted in its response a reference to the words "any number" which precede the phrase "including data of any

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<sup>86</sup> Under paragraph 1 of Part 1 of the Schedule to the GC notification.



description". We further note that the purposes listed in (a) to (f) in the above-cited definition relate to an 'Electronic Communication', which is defined as:

"Electronic Communication" means a communication for transmission by means of an Electronic Communications Network;

- 9.82 Therefore, when properly construed, we consider that a relevant number here is one that refers to an identifier of some kind to enable the transmission of such a communication over a network. This corresponds to the dictionary meaning of the word 'number' as set out in The New Shorter Oxford English Dictionary, as follows:

An arithmetical value showing position in a series, esp. for identification, reference, etc., (freq. preceding a numeral, as *number five*, *number thirty-nine*, etc); *spec.* (**a**) that assigned to a particular telephone or group of telephones and used in making connections to it (also *phone number*, *telephone number*);

- 9.83 Accordingly, it could not be said that a *name* of a person (whether an actual user or subscriber) or a BT Exchange (e.g. Erdington Area Telephone Exchange) is a telephone number in the sense it is defined (as well as understood by the ordinary usage of the English language). On that basis, we do not accept The Number's point about "utilising" the definition of 'Telephone Number' to include actual user information as suggested. We will deal below (see **paragraphs 9.115 to 9.175**) more specifically with the types of telephone number that fall within GC19.

- 9.84 In light of the above, we now turn to deal with the question as to what specific information is, at present, covered by GC19, particularly by reference to the term 'Directory Information'. Specifically, we will consider the meaning of, firstly, the name and address of the subscriber and, secondly, the telephone number assigned for its use of PATS.

## The meaning of the name and address of the subscriber

### Ofcom's provisional findings in the August 2006 document

- 9.85 In the August 2006 document, Ofcom considered that, in light of the definition of 'Directory Information', GC19 required BT firstly to provide the name and address of the 'Subscriber'. Ofcom's starting point was to consider the natural and ordinary meaning of the terms 'name' and 'address' in this regard.

- 9.86 To this end, we noted that the word 'name' is defined in The New Shorter Oxford English Dictionary as follows:

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

- 9.87 Ofcom then went on to propose that certain other information should be specifically excluded from the meaning of 'name', including 'Title' and other information which could be attached to any name, such as profession (e.g. R. Smith, Butcher and R. Smith, *Funeral Director*) and department name (e.g. Nationwide Building Society, *Mortgage Department*). Specifically, we referred to the Oxford English Dictionary (OED) meaning of 'title', which provides:

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

- 9.88 On that basis, we provisionally concluded that 'title' is something different to someone's name and it therefore falls outside the literal and ordinary meaning of a 'name'; hence, it would not fall within the scope of data required under GC19. Indeed, as a matter of ordinary English, we considered that someone who acquires another title (for example, because a knighthood is conferred on him, or because she obtains a PhD) is not usually said to have "changed his (or her) name". In addition, we noted in support that the Advocate General in *KPN* regarded "profession, title, etc." as information in addition to the minimum set of records— telephone numbers with the name, address and town/city connected to these numbers—that users of telephone directories need to identify the subscribers of the numbers they are looking for.
- 9.89 We then set out, at Table 7.1 of the August 2006 document, the types of information which we considered on that construction was, in principle, either within or outside of the term 'name'. Paragraphs 7.167 to 7.209 of the August 2006 document then went on to apply these provisional findings by 'mapping' them onto the data fields provided by BT from OSIS. We concluded that only a limited number of these fields were specifically required by BT's obligation to provide the 'name' under GC19.
- 9.90 Similarly, Ofcom considered what specific requirements were placed on BT given its obligation under GC19 to provide the 'address' of the 'Subscriber'. In particular, we relied on the The Oxford English Dictionary meaning of 'address', which provides:
- the details of the place where someone lives or an organization is situated.
- 9.91 Ofcom recognised in the August 2006 document that this meaning could, in certain circumstances, result in a number of different addresses becoming relevant in the GC19 context. This is because certain 'Subscribers' may have more than one address, such as individuals with second homes or multi-location businesses, each of which could be a place where that 'Subscriber' lives (in the case of individuals) or is situated (in the case of businesses).
- 9.92 Evidence gathered by Ofcom during its investigation had shown that for the provision of PATS to a given 'Subscriber', a CP may collect and store some or all of the following different 'addresses':
- (i) the address for the premises at which the fixed telephone line is to be installed ("**installation address**")<sup>87</sup>;
  - (ii) the address to which bills or invoices should be sent ("**billing address**");
  - (iii) the address for general correspondence or marketing, including any PO Box address ("**correspondence address**");
  - (iv) the address for matters relating to the contract of supply of PATS ("**contract address**"); and

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<sup>87</sup> By the term 'installation address', Ofcom refers more specifically to the premises at which the exchange line has been installed for the use of the PATS in question in respect of which the 'Telephone Number(s)' has been assigned; in turn, the term 'exchange line' meaning the apparatus (including any equipment, machinery, or device and any wire or cable and the casing or coating for any wire or cable) comprised in a 'Public Telephone Network' (as defined in the GC notification) and installed for the purpose of connecting a telephone exchange run to a network termination point comprised in network termination and testing apparatus installed for the purpose of providing PATS at the premises at which the network termination and testing apparatus is located.

- (v) in the case of a body of persons corporate or unincorporated, the address of the registered or principal office (“**trading/head office address**”).
- 9.93 There may then be further addresses falling within the natural and ordinary meaning of the word ‘address’ which, though related to the specific ‘Subscriber’, are not related to the provision of the PATS for which the Subscriber has been assigned the relevant telephone number and which are therefore not collected by the CP. We gave the example of a high street bank having numerous locations around the UK at which it is situated. We noted that each of these locations would be an address of the bank within the dictionary definition. Therefore, where the bank subscribes to PATS at one location (say, Slough), the definition of ‘address’ of the subscriber could capture another location at which the bank is situated (say, Keighley) even though that location would have no direct relevance to the provision of PATS.
- 9.94 Ofcom’s provisional view in the August 2006 document was that the requirement on BT as a provider of fixed PATS to ‘Subscribers’ was to provide the ‘address’ in respect of where the relevant PATS was actually supplied (i.e. the installation address). Ofcom excluded all other addresses — that is to say, the billing address, the correspondence address, the contract address, the trading/head office address and any PO Box address — from the scope of GC19 for fixed PATS, whilst acknowledging that, for mobile PATS, the most appropriate address would be that given by the ‘Subscriber’ to the mobile CP for the purposes of entering into the contract of supply. Ofcom then assessed, at paragraphs 7.167 to 7.209 of the August 2006 document, which fields actually provided by OSIS were specifically required to be provided under GC19, given our interpretation of the meaning of ‘address’.

### Responses to the August 2006 document

- 9.95 In its response to the August 2006 document, The Number points out that Ofcom has referred to the Shorter OED definition of ‘name’ to demonstrate that it does not include title, but then used the OED definition of ‘title’ to show that ‘title’ does not include name. The Number argues that Ofcom should stick with the Shorter OED for the definition of ‘title’ as it would mean that ‘title’ can mean “a descriptive or distinctive appellation: **a name** (...)”.
- 9.96 Furthermore, in excluding ‘title’ from ‘name’, The Number argues that Ofcom has misunderstood what the Advocate General is saying at paragraph 28 of his Opinion in *KPN* stating that it is not that ‘title’ is an example of additional data over and above ‘relevant information’, but rather that ‘title’ may come within ‘relevant information’ depending on national circumstances. According to The Number, ‘relevant information’ is made up of the ‘minimum records’, being name, address and telephone number, plus other data (like ‘title’) which users in certain Member States (i.e. users in the UK) expect to find in a directory.
- 9.97 The Number also points out that BT’s letter of 13 July 2006 (attached at Annex 8 to the August 2006 document; now see **Annex 6** of this document) concedes that title, and also honours (field 31), should come within the meaning of ‘name’.
- 9.98 The Number also makes a number of points building on its principal argument – as set out above – that Ofcom has misunderstood *KPN* and has a duty to interpret GC19 in the light of the wording and aims of the USD, i.e. Ofcom should interpret GC19 in a way which would benefit users and not in a way which would cause them “delay, inconvenience and expense.” The Number argues that, under data protection legislation, BT must pass on information in the form agreed with the subscriber.

- 9.99 The Number then sets out a number of examples of information that, if excluded from the GC19 data set, would cause users of directories/directory facilities delay, inconvenience and expense and/or run contrary to the subscriber's specific requirements in respect of their directory entry. These exclusions include:
- (i) "any business service or activity/use description (e.g. carpenter, bookmaker ...)" — The Number reiterates its view that such information is essential to distinguish between like-named businesses and, without it, The Number argues that it would take longer to find the specific number the user is looking for;
  - (ii) information about departments or individuals/positions within a business — The Number believes that for separate numbers assigned to an individual subscriber to be separately identifiable, information beyond a single subscriber name and address will be needed. In The Number's view, all numbers should be supplied and, to be identifiable, need to have something in the 'name' field, which should identify the department, branch or Council facility actually using that number. Any other solution would cause unnecessary delay, inconvenience and expense to users;
  - (iii) different potential 'addresses' of Subscribers — The Number raises as concern that, if the installation address of the subscriber is supplied in the 'address' field for all those numbers and not the installation address where the branch or department is actually located, this will cause significant confusion among users and DQ call centre staff trying to assist those users to identify the branch/department they are looking for. Furthermore, if subscribers specifically request that a trading/head office address or a PO Box is given out and not the installation address, those wishes should be respected. The Number suggests that this is particularly important where a business or organisation does not want to disclose the installation address (e.g. perhaps because the organisation is being targeted by campaigners or because the address is simply a call centre and the business does not want disgruntled customers arriving at the call centre to complain), but does not want the head office or a PO Box address to be given out;
  - (iv) information in the data field 'honours' — The Number points out that this is specifically requested by individual subscribers and states that at least one subscriber has threatened to sue The Number if his title is not given out. The Number again cites that the aims of the USD and the data protection rules, so that such data should be passed on under GC19.
- 9.100 In its response, BT queries the inclusion of 'nickname' within the definition of 'name'. BT states that it does not suppose that Ofcom intended nickname to be collected separately to the contracted forename and surname. It also points out that such data is not currently collected by BT or made available as a separate field of information in OSIS. Therefore, unless Ofcom indicates otherwise, BT will proceed on the basis of nickname being relevant only if it forms part of the forename or surname under which the subscriber enters into the contract for PATS service.
- 9.101 BT agrees that post town could be deemed to be 'relevant information' within the meaning of 'address'. However, it points out that this is not currently collected in the OSIS database and BT is considering ways in which it will be able to provide this information as part of the GC 19 data. It suggests, however, that Ofcom consult with industry as to whether post town is really needed, given that postcodes are provided.

9.102 BT disagrees that post county forms part of 'address'. It points out that PAF does not include county, which is a local government boundary definition not a definition of geography. It therefore proposes that post county is excluded from the GC 19 data set.

### Ofcom's response

9.103 Ofcom's comments on The Number's arguments that Ofcom has misunderstood the KPN case are set out in **paragraphs 8.8 to 8.30** and are not repeated here. Many of The Number's submissions therefore fall away in this regard, because we consider that no issue of compatibility arises. The application of the principle of consistent interpretation under Community law is therefore not relevant in this context.

9.104 For the purposes of resolving these disputes, Ofcom's starting point, as a matter of statutory interpretation under purely domestic law, is to consider the natural and ordinary meaning of the terms 'name' and 'address' as they relate to the subscriber of PATS under the plain meaning rule. Ofcom has considered whether the specific requirements to provide the 'name' and 'address' can nonetheless, as compared to our provisional views in the August 2006 document, be interpreted more flexibly under that construction.

9.105 Ofcom's view remains that, for reasons already discussed above (**paragraphs 9.32 to 9.84**), 'Directory Information' falling under GC19 only relates to the '**name**' and '**address**' of:

- i) **the 'Subscriber'**<sup>88</sup>, that is a person (including, but not limited to, a body of persons corporate or unincorporated) who is a party to a contract with a provider of PATS for the supply of such services (here, BT), to whom relevant 'Telephone Number(s)' (**paragraphs 9.115 to 9.175**) has been assigned by that provider, which 'Telephone Number(s)' has been allocated to that provider by Ofcom (or previously, the DGT) in accordance with GC17 (GC19.1(a)); **and/or**
- ii) "**any other End-User assigned a Telephone Number originally Allocated to the Communications Provider** [here, BT]" (GC19.1(b)).

9.106 Accordingly, Ofcom considers that, for those reasons, actual user information (i.e. information which is different to that of the actual subscriber of the relevant PATS) falls outside GC19. As such, we are only considering here 'name' and 'address' information of the individual or business contracting with BT (or contracting with another CP in the case of GC19.1(b), such as ex-BT subscribers who have ported their numbers to another CP or who have become subscribers of CPs reselling BT's regulated Wholesale Line Rental ("**WLR**")<sup>89</sup>).

9.107 We have, however, been persuaded by The Number's argument to the extent that it suggests that the dictionary meaning is not entirely consistent when comparing the words 'name' and 'title'. It is therefore, in our view, difficult to discern with precision

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<sup>88</sup> As read in light of the definitions of 'Subscriber' and 'Directory Information' under paragraph 1 of Part 1 of the Schedule to the GC notification, as well as the terms of GC19.

<sup>89</sup> WLR resellers contract with BT Wholesale. BT provides the subscriber data of WLR resellers to OSIS as part of the commercial arrangements to take responsibility for 'wholesale' issues on behalf of the WLR resellers; in this case, managing the supply of subscriber data to OSIS. However, WLR resellers will tend to assign telephone numbers to their subscribers which were originally allocated to BT. As such, BT would be required to provide the 'Directory Information' of the WLR reseller subscribers under GC19.1(b). The terms of GC19.2 require, in effect, the WLR reseller to provide "their" GC19 data to BT and any other valid requesting party.

the ordinary usage of the English language in this regard. Ofcom now accepts that The New Shorter OED definition (i.e. “[a] word or combination of words constituting the individual designation by which a person, animal, place, or thing is known, spoken of, etc.) could be said to include certain information previously specified as excluded in Tables 7.1 and 7.2 of the August 2006 document.

- 9.108 For the purposes of resolving these disputes, Ofcom proposes to construe ‘name’ more widely to recognise that the issue as to whether a word (or combination of words) falls within that definition will be a question of fact in each particular case, taking into account the submissions both of The Number and BT. On that basis, Ofcom considers that it is inappropriate for these purposes to exclude, in principle, things such as ‘title’ or ‘honours’ or any of the other identification data set out in Table 7.1 of the August 2006 document. Instead, it seems more appropriate to take as a starting point that ‘name’ could cover any information consistent with the definition in The New Shorter OED. As such, if an individual is known or spoken of as, for instance, Professor R. Smith, OBE rather than just R. Smith, then the ‘name’ should be ‘Professor R. Smith, OBE’ for these purposes.
- 9.109 Such an approach clearly has the advantage of being more flexible than the somewhat restrictive definition of ‘name’ proposed in the August 2006 document. However, this approach has at the same time the disadvantage of lacking certainty on the information that any CP is obliged to provide under GC19 and, more specifically, of what information the CP is obliged to collect. We believe that the majority of subscribers would regard information relating to ‘title’ and ‘honours’ as irrelevant. A review of BT’s directory (i.e. The Phonebook) alone supports that belief.
- 9.110 Therefore, in order to resolve these disputes in a practicable manner, Ofcom considers that the phrase “name of the Subscriber” should be taken as the ‘name’ (within the The New Shorter OED definition) by which the individuals or businesses have identified themselves in entering into the contract with BT for the supply of the relevant PATS. That said, at a minimum, we would expect that an individual’s name would normally comprise a surname together with at least an initial. It is possible, however, that an individual’s name could include titles, honours and possibly other identifiers, where appropriate. Clearly these levels of detail are irrelevant when considering a business name, but for the purposes of concluding a contract we do not believe a business name would normally include things such as business description or department names (exceptions would be where such details were an integral part of the contracting party’s formal name, e.g. “Jones the Butcher”, “Megastore Finance”). It follows that, in Ofcom’s view, the requirement under GC19 on the CP to provide the ‘name’ of the subscriber can extend no further than the requirement to supply the name given by the subscriber in securing the PATS contract.
- 9.111 We note that, in concluding the contractual agreements, BT does allow subscribers to populate fields with both title and honours, where appropriate, though these fields will often be left blank. It therefore seems entirely reasonable to consider these fields as part of the name of the subscriber. Again, to be clear, this does not amount to an obligation on BT to obtain this data, where it has not been supplied by the subscriber for the purposes of entering into its contract with BT for the supply of the relevant PATS.
- 9.112 In a similar way, the “address of the Subscriber” should be that address as supplied by the subscriber in relation to where they want the relevant fixed PATS supplied (i.e. installation address) or – in the case of mobile PATS – the address they supply for the purposes entering into its contract with BT for the supply of the relevant PATS.

- 9.113 However, again, Ofcom sees no benefit in being overly restrictive on what constitutes a legitimate address. A complete address should include, at a minimum, the house/building name or number, street name and full UK postcode. However, we would also expect BT (as well as other CPs) to supply whatever address information was supplied to them by its subscriber in entering into the PATS contract. On that basis, it is clear that, where specific data on, say, 'post county' is not collected for such purposes, then such data need not be collected in order to meet the requirements of GC19. (We consider below — see **paragraphs 9.176 to 9.218** — issues relating to data protection covering whether a PO Box or an address separate to the location address could be considered a legitimate address in certain circumstances.)
- 9.114 Notwithstanding these revised proposals, we consider that it would appear unlikely in practice that information relating to 'business description' and 'department name' or any other description of the use to which an individual number is put will form part of the 'name' or 'address' of the subscriber under GC19. This is because, in most instances, we anticipate that they are unlikely to be relevant pieces of information required by BT (or other CPs) for the purposes of entering into the contract for the supply of PATS. In supplying OSIS in its current form, BT would normally need to specifically ask for such information as it would not typically be collected for the purposes of entering into the contract for the supply of PATS.

## **The meaning of the 'Telephone Number' assigned for its use of PATS**

### **Ofcom's provisional findings in the August 2006 document**

- 9.115 Prior to our publication of the August 2006 document, none of the parties to the disputes had made any submissions as to the types of telephone number that would fall within GC19, despite this provision making plain references to (among other things) the defined term 'Telephone Number'. However, as three broad categories of numbers plainly fall outside GC19 (and therefore affect the parties' claims as to their alleged rights to receive OSIS data on regulated (cost oriented) terms), we considered it necessary to clarify the position in this regard.
- 9.116 We cited, to start with, the definition of 'Telephone Number' as set out under paragraph 1 of Part 1 of the Schedule to the GC notification. Although we have set it out above to deal with The Number's argument concerning actual user information, we consider it helpful to set it out again to introduce the analysis we carried out in the August 2006 document; it provides:

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

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

(b) identifying the origin, or sender, of an Electronic Communication;

(c) identifying the route for an Electronic Communication;

(d) identifying the source from which an Electronic Communication or Electronic Communications Service may be obtained or accessed;

(e) selecting the service that is to be obtained or accessed, or required elements or characteristics of that service; or

(f) identifying the Communications Provider by means of whose network or service an Electronic Communication is to be transmitted, or treated as transmitted;

9.117 In light of that definition and the terms of GC19 itself, we then turned to three broad categories of numbers that we considered fell outside GC19.

#### **Excluded Telephone Numbers: internet domain name or address**

9.118 We explained that the first category of numbers falling outside GC19 relates to internet domain names or internet addresses, including email addresses.

9.119 Specifically, as a result of the Telephone Number Exclusion (Domain Names and Internet Addresses) Order 2003<sup>90</sup>, which is an order of the Secretary of State made pursuant to section 56(7) of the 2003 Act and came into force on 29 December 2003, any number which is used as (a) an internet domain name; (b) an internet address; or (c) an address or identifier incorporating either an internet domain name or an internet address, including an email address, is to be excluded from treatment as a telephone number for the purposes of Chapter 1 of Part 2 of the 2003 Act.

9.120 Given that the definition of 'Telephone Number' is subject to that Order, matters excluded in the Order are therefore outside the meaning of 'Directory Information' for the purposes of GC19.

#### **Excluded Telephone Numbers: non-allocated 'Telephone Numbers'**

9.121 We then pointed out that the second category of numbers falling outside GC19 relates to 'Telephone Numbers' that have not been allocated to BT (as a CP) in accordance with GC17 by Ofcom.

9.122 This exclusion of numbers is made plain from the terms of GC19.1 itself, which provides that GC19 only applies "[w]here the Communications Provider has been Allocated Telephone Numbers in accordance with [General] Condition 17". For the avoidance of any doubt, whilst our focus here was on the significance and meaning of 'Allocated' in accordance with GC17, that wording in GC19.1 also makes it clear by reference to "the Communications Provider" that we are concerned only with numbers allocated to BT, as opposed to numbers allocated to other CPs.

9.123 The Annex<sup>91</sup> to GC17 sets out certain telephone numbers that many CPs use, but which have not been allocated by Ofcom, such as certain access codes, e.g. to emergency services. As such, we considered that these non-allocated telephone numbers also fell outside GC19.

9.124 We also noted that The Number had argued (in particular, in its briefing paper to Ofcom on 'relevant information' of 26 May 2006) in effect that all OSIS data fall within GC19, including "8.d. fields for 'telephone numbers' include: Telephone Number (internal); Telephone Number Dialable; Exchange Code; DQ Code (National geographical area); Exchange".

9.125 In response, Ofcom explained that, in its understanding, the difference between Telephone Number (internal) and Telephone Number (dialable) is in the format in

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<sup>90</sup> S.I. 2003/3281.

<sup>91</sup> The Annex to GC17 was modified on 8 March 2006 to include a new Type A Access Code "101" for access to Non-Emergency Service: see Ofcom's Statement entitled 'National Single Non-Emergency Number - Designating number "101"' at [http://www.ofcom.org.uk/consult/condocs/snen/snen\\_statement.pdf](http://www.ofcom.org.uk/consult/condocs/snen/snen_statement.pdf)



which the numbers are currently presented within OSIS (as set out in **Table 3.1**). Both data fields essentially provide the relevant 'Telephone Number'. The other fields mentioned by The Number were considered by Ofcom to fall under the "record categorisation data fields" heading. This was because these fields essentially provide detail on the telephone exchange to which the line is provided (both by dialling code and exchange name) and the code for the local area paper directory in which the entry will appear and, in Ofcom's understanding, are used to help categorise records so that they can be used in a certain way or so that a broader set of search criteria can be used by DIPs to identify suitable records.

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

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

9.127 The third and final category of numbers that Ofcom considered fell outside GC19 relates to those numbers that have not been assigned by BT to its 'Subscribers' for use in connection with PATS. Prior to our publication of the August 2006 document, The Number had not made any submissions specifically on this point, but its submissions implied an assumption that all telephone numbers fall within GC19. We anticipated in the August 2006 document that the exclusion from GC19 of non-PATS numbers would have the largest impact of the three categories of excluded numbers and we therefore took this opportunity to clarify Ofcom's view on this matter.

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

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

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

9.130 In other words, Ofcom considers that:

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

- 9.131 We pointed out that this construction was not one that Ofcom had taken to the interpretation of PATS simply to resolve the present disputes. Indeed, Ofcom recently reaffirmed this position, in the context of a consultation concerning Voice over Internet Protocol (VoIP) services (the “**VoIP document**”)<sup>92</sup>, and we noted that our position is supported by the European Commission’s Expert Group on Emergency Access (EGEA)<sup>93</sup>. In our view, it followed from the above gating criteria that the public available ECS must under the terms of supply contract in question be (among other things) **a two-way service** (i.e. for originating and receiving national and international calls).
- 9.132 Therefore, to take an example, if the public ECS is to be used with a telephone number for receiving calls only under the supply contract, it would not constitute a PATS. Hence, it would not fall within the meaning of ‘Directory Information’ or, therefore, the ambit of GC19. Services of this type might include some personal numbering services enabling end-users using ‘070’ telephone numbers to be called or otherwise contacted by other persons, but without the ability to make calls themselves. It may also include special services (e.g. freephone) where end-users receive calls only by way of number translation services of ‘virtual’ telephone numbers (e.g. ‘0844’, ‘0845’, ‘0870’ and ‘0871’). The same seemingly applies to premium rate services (e.g. ‘090’ and ‘091’ numbers). In addition, the National Telephone Numbering Plan<sup>94</sup> contains specific restrictions, so that certain ‘Telephone Numbers’ can only be used as a one-way service, such as services comprising ‘National-Dialling-Only Numbers’ (see the Plan at Part B3.1.5).
- 9.133 Ofcom explained, however, that it had considered whether an alternative interpretation should be given to the PATS term in this particular context. This was particularly appropriate to consider as a different (and wider meaning) has been given to the term “PATS” for the purposes of GC18 concerning number portability.
- 9.134 The reasons for taking that wider approach in GC18 are set out in, for instance, the VoIP document. Ofcom’s wider interpretation was recently upheld by the Competition Appeal Tribunal, when the Tribunal accepted that “...for the reasons submitted by OFCOM, that OFCOM was not precluded by the terms of the Universal Service Directive from enacting the wider definition of Publicly Available Telephone Service found in General Condition 18 for the purposes of imposing obligations in respect of number portability”.<sup>95</sup>
- 9.135 In this context, however, there is no analogous basis for a wider interpretation. The definition of PATS under paragraph 1 of Part 1 of the Schedule to the GC notification is clear and unambiguous, requiring the gating criteria to be satisfied in the GC19 context for a service to be a PATS.
- 9.136 Nor did Ofcom consider that the PATS term needs to be interpreted differently, so as to be compatible with Article 25(2) of the USD. The PATS definition in GC19 is plainly compatible with that Article and it does not raise any issues similar to that of Article 30, which provision GC18 (number portability) seeks to implement. We stated that

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<sup>92</sup> See document entitled ‘*Regulation of VoIP Services – Statement and further consultation*’, published by Ofcom on 22 February 2006: <http://www.ofcom.org.uk/consult/condocs/voipregulation/voipregulation.pdf>

<sup>93</sup> See EGEA’s response to Ofcom’s VoIP document in its Working Document entitled ‘*Regulatory Clarification of ECS/PATS and Fixed/non-Fixed*’, EGEA06-08, of 23 May 2006 available at:

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

<sup>94</sup> The National Telephone Numbering Plan, published by Ofcom on 30 March 2006:

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

<sup>95</sup> *Media Marketing & Promotions v. Office of Communications*, Case No 1053/3/3/05, [2006] CAT 12, §243.

this conclusion is supported by an analysis of several provisions in the USD, which make clear references to PATS as meaning a service that meets the gating criteria (as opposed to simply being a public ECS), such as:

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

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

- *Article 5(2) of the USD*

According to Article 5(2) of the USD, the universal service directories themselves must only comprise, subject to certain data protection rights, 'all subscribers of *publicly available telephone services*'. In Ofcom's view, there did not appear any reason consistent with the USD to suggest that the effect of Article 25(2) should be read broadly to, in effect, ensure that users of publicly available directories (other than universal service directories, i.e. Article 5) should have access to more comprehensive information than is available in the universal service directory. It suffices here to recall the point about the provision of directory services being a competitive activity, which point is reflected in the 35<sup>th</sup> recital to the USD's preamble, as cited in **paragraph 5.75** of this document (which was also the case under the RVTD: see its 7<sup>th</sup> recital, as cited in **paragraph 5.9** of this document); indeed, this point was specifically considered by the ECJ in *KPN* in stating that it would be compatible with the liberalisation objectives to refuse to make available to third parties data other than that listed in the directive (see paragraphs 25 to 28 of the judgment).

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

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

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

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

Ofcom took the view that the step to remove the reference to 'personal telephone numbers' was intentional, particularly as the text has otherwise been transferred in its entirety from the previous to the new framework to indicate

users' desirability in terms of directory information. Indeed, the 7<sup>th</sup> recital of the RVTD reflects the reference to 'personal numbers' in Article 6(2)(b) of the RVTD to which Article 6(3) refers, which reference has been removed for the purposes of Articles 5 and 25 of the USD. Again, the legislative draftsman has intentionally, in Ofcom's view, decided to rewrite these provisions by making reference instead to the precisely defined PATS term.

- *The plain and unambiguous meaning of PATS*

Assuming Ofcom was correct to interpret Article 25(2) as referring to subscribers of PATS, we noted that the definition of PATS for the purposes of GC19 reads in material respects the same as in the definition of that term for the purposes of the USD – see Article 2(c) of the USD which reads:

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

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

9.137 Given that Ofcom anticipated that a significant proportion of numbers contained in OSIS relates to non-PATS numbers, we explained that The Number and Conduit would not be entitled to receive this information from BT under the terms of GC19.

## Responses to the August 2006 document

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

9.138 In its response to the August 2006 document, The Number makes a number of substantial submissions on Ofcom's proposed exclusion of 'Telephone Numbers' not assigned for PATS. In particular, The Number disagrees with Ofcom's views with regard to that:

- (i) firstly, a service can only constitute PATS if it is (among other things) a two-way service (i.e. for originating and receiving national and international calls);
- (ii) secondly, the relevant subscribers for the purposes of GC19 are subscribers of PATS, as opposed to subscribers of public ECS.

9.139 In our response set out below, we will fully cite The Number's arguments given in support for disagreeing with Ofcom's view as to only two-way services falling within the definition of PATS; in The Number's view, also one-way services would fall within that definition. In this way, Ofcom will unpick a number of issues that The Number is raising that would otherwise be difficult to encompass in a summary description of the detail set out in its response. Specifically, we will deal with The Number's

asserted true construction of (including the correct approach to interpreting) matters of domestic UK as well as Community law.

- 9.140 As regards the second point (i.e. whether, in any event, the definition of PATS is relevant, or whether the question is instead whether the information relates to the provision of public ECS), The Number's response in this regard focuses on disagreeing with Ofcom's argument that we could derive support for our position from the fact that the USD's legislative draftsman removed a reference to 'personal telephone numbers' in describing what users of directories desire<sup>96</sup>. Although The Number itself acknowledges that such a reference was removed during the legislative process of the USD, Ofcom does not consider it necessary to deal with The Number's detailed response in this regard. This is because, for the purposes of resolving these disputes, Ofcom does not need to rely on this argument for the purposes of interpreting GC19 in the context of the USD. The key point is that the USD makes it clear, in its 11<sup>th</sup> recital, that "[d]irectory information" is to be seen as an "essential access tool for *publicly available telephone services* (emphasis added)", so that under the USD rights concerning the provision of directory information are tied into the definition of 'publicly available telephone services'. In addition to that clearly stated aim, we also refer to the context in light of which Article 25(2) should be read, such as the provisions in Article 25(1) and 5(2) of the USD, which Ofcom referred to in the August 2006 document, making clear references to PATS.
- 9.141 Leaving that issue aside, The Number appears to be relying on the following two arguments in substantiating its views on the relevance of the definition of PATS:
- (i) the definition of 'Subscriber' in the Schedule to the GC notification refers to public ECS, not PATS — as there is no reference in the definition of public ECS to two-way services, one-way services are covered;
  - (ii) regulation 18 of the Privacy Regulations refer to 'subscribers' as defined in regulation 2, which refers to public ECS, not PATS.
- 9.142 In contrast, BT agrees with Ofcom's finding in this regard. However, BT points out that Ofcom's finding may cause some confusion and in particular especially given recent proposals for extended number portability.

## Ofcom's response

- 9.143 As explained above, we consider it useful to here fully cite The Number's arguments given in support for disagreeing with Ofcom about PATS being confined to a two-way service. The Number argues, to start with (at paragraph 7.67 of its response), as follows:

7.67 Leaving aside the issue of whether the definition of Subscriber for the purpose of GC19 should include subscribers of publicly available ECS and not just subscribers of PATS (see paragraphs 7.78 to 7.87 below), we reject Ofcom's view (7.133) that a service can only constitute a PATS if it is (among other things) a two-way service (i.e. for originating and receiving national and international calls). Specifically, we do not agree with Ofcom that the definition of PATS is clear and unambiguous for the purposes of GC19 (7.137). The very reason for review of the definition of PATS for the purposes of GC18, which review Ofcom cite, was the lack of clarity in this regard.

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<sup>96</sup> The Number here seeks to take the reader to the relevant *travaux préparatoires* and to Ofcom's argument in the August 2006 document.

- 9.144 In other words, The Number argues that, firstly, the definition of PATS is unclear and ambiguous for the purposes of GC19. Subject to making a reference to GC18 (dealing with number portability), The Number does not provide any reasoning for holding that view, but it asserts that this is the case. Starting with the latter, we disagree with The Number's assertion that the definition of PATS is unclear and ambiguous for the purposes of GC19. As regards The Number's reference to GC18, we maintain our position as set out in the August 2006 document. However, it is appropriate to clarify why the issues in relation to GC19 are not analogous to GC18.
- 9.145 The background to the definition of PATS for the purposes of GC18 is set out in the VoIP document. The circumstances are entirely different with regard to both the express wording of GC18 and the Community law provision it transposes (i.e. Article 30 of the USD). As regards the former, it was decided by the DGT in 2003 that it was necessary to have a differently worded definition of 'Subscriber' for the purposes of GC18 only in order to properly implement Article 30 of the USD. In short, this was because, whilst that Article provides for number portability rights to "all subscribers of publicly available telephone services", it also makes it clear that such rights are afforded in relation to (among others) 'non-geographic numbers'.
- 9.146 In other words, although the 'subscriber' definition had at first blush a narrower meaning for the purposes of Article 30, it is plain from the Article itself that it applies to 'non-geographic numbers', thereby compelling the conclusion that, despite the general meaning of "subscriber" in the USD, a wider meaning had to be adopted in interpreting that particular Article. On that basis, the DGT decided to adopt a wider definition of 'Subscriber' for the purposes of GC18. (The VoIP document is putting forward certain proposals by Ofcom to narrow the scope of that definition for the purposes of GC18, but we do not consider it relevant to deal with them here as they are irrelevant to these disputes.)
- 9.147 Therefore, as a matter of domestic law as well as Community law, the position is, in our view, entirely different under GC18 to that under GC19:
- i) GC18 already has a wider definition of 'Subscriber' — in contrast, for the purposes of GC19, the **definition of 'Directory Information'** makes it clear that the relevant telephone numbers in this context are only those "***assigned to the Subscriber for their use of Publicly Available Telephone Services***";
  - ii) Article 30 of the USD contains an express provision, relating to 'non-geographic numbers', that demonstrates that the usual definition of PATS, restricting it to two-way services, cannot be applied in this context without modification. That is because the term 'non-geographic number' is specifically defined in Article 2(f) of the USD as meaning "...a number from the national numbering plan that is not a geographic number. It includes inter alia mobile, freephone and premium rate number"; however, the latter two services are one-way services by their very nature. It follows that, as the Competition Appeal Tribunal has accepted in the *Media Marketing & Promotions* case, a modified definition of 'Subscriber', including one-way services, is required to give proper effect to Article 30 and to provisions that implement it. But, in contrast, there is nothing in the terms or context of Article 25(2) that requires any such modified definition for the purposes of GC19, and, for the reasons set out in the August 2006 document and in particular by reference to the 11<sup>th</sup> recital, it is compatible with Article 25(2) of the USD for the above-mentioned definition of 'Directory Information' be limited by reference to the concept of PATS.
- 9.148 The Number then (at paragraph 7.68 of its response) states:

7.68 Further, we cannot see anything in the wording of the current definition of PATS for the purposes of GC19 or indeed the provisions of the USD which would prevent Ofcom from choosing to adopt an interpretation which would include one-way services. Indeed, for example, the current definition of PATS for the purposes of GC19 specifically contemplates that PATS could include, amongst other things, non-geographic services.

9.149 It is not entirely clear to Ofcom what The Number means by referring to that there is nothing to “prevent Ofcom from *choosing to adopt* an interpretation”. It would appear that The Number is relying on the reference to ‘non-geographic services’ in the definition of PATS for the purposes of GC19. As regards this matter, we first refer to our views in the August 2006 document that it is a necessary condition of a service being a PATS that it is a two-way service (a position which is supported by the European Commission: see EGEA’s response to the VoIP document referred to in **paragraph 9.131** above).

9.150 Turning to The Number’s specific reference to the term ‘non-geographic services’, it is appropriate to cite again the full PATS definition in Article 2(c) of the USD (which, in material respects, is the same for the purposes of both the USD and GC19):

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

9.151 In Ofcom’s view, the phrase “*and in addition may, where relevant, include*” does no more than make it clear that the listed ‘services’ in that definition *may* be included, where relevant, *in addition* to the PATS in question. In other words, the listed services *may* be included in the provision of PATS; but just because a particular service falls within the scope of one of the listed (non-mandatory) services does not *necessarily* make it a PATS; whether it is a PATS depends on whether it also fulfils the criteria that are generally necessary to be a PATS such as, in particular in the present case, whether it is a two-way service. That is illustrated by the fact that, for example, one of the listed (non-mandatory) services is the provision of “directories”. That service on its own cannot constitute a PATS. Rather, the provision of a directory is something that is ancillary to the provision of such (PATS) service. Therefore, we consider that The Number’s reference to the inclusion of non-geographic services in the PATS definition is of no assistance and it is not a matter that would assist our construction in this regard.

9.152 Also, given our view that GC19 concerns only telephone numbers assigned to subscribers for their use of PATS (because of the plain meaning of the definition of ‘Directory Information’) under domestic UK law, the issue in this regard is not one of whether (or not) the PATS definition would prevent Ofcom from *choosing* to adopt a different interpretation, as The Number argues. Instead, we are here concerned with the matter as to whether the principle of consistent interpretation requires to be applied, so as to construe domestic UK law so far as possible to make it compliant with Community law. As we consider that domestic law is compliant with Community law, that principle is not of any application in this regard.

9.153 The Number next turns to an argument that it bases on the 38<sup>th</sup> recital to the USD’s preamble. It states (at paragraphs 7.69-7.71 of its response):

7.69 Ofcom should interpret the General Conditions definition of Directory Information in a way which accords with Community obligations and intentions as encompassed in the USD. In this regard Recital 38 to the USD states:

*“Access by end-users to all numbering resources in the Community is a vital pre-condition for a single market. It should include freephone, premium rate and other non-geographic numbers...”*

7.70 The conjunction of originating and receiving calls in the General Conditions definition of PATS does not dictate that the telephone number used for a service available to the public should be one that supports both such call types; the better, user-oriented, interpretation is that the draftsman intended (and succeeded) to capture numbers supporting either originating or receiving calls, or both types. It is this interpretation which should be adopted to be consistent with the USD provisions discussed above.

7.71 Moreover, Ofcom do not seem to be suggesting that they have one interpretation for GC8 and another for GC19. If they are indeed the same, the net effect of this would therefore be that end-users would not be entitled to non-geographic numbers, which account for around 1.6% of BT's total numbers, but 21% of user searches. This would not seem to be compliant with EU policy objectives such as those referred to in Recital 38 USD.

9.154 First, as to its reference to the “conjunction of originating and receiving calls in the General Conditions definition of PATS”, we note from the PATS definition cited above from the USD that it contains the same conjunctive word “and”. In this regard, we refer again to our views in the August 2006 document as to one of the necessary condition for a service being a PATS that it is a two-way service (and, again, a position which is supported by the European Commission). We should further emphasise that taking The Number's interpretation to capture numbers either originating or receiving calls, or both types, is not one without potential wider implications. It could have, for instance, regulatory consequences in other areas, such as those services covered by the VoIP document. Given the said conjunction, it is therefore not apparent to Ofcom what The Number relies on in support to argue that the “draftsman intended (and succeeded)” to achieve a result along the lines of its alleged interpretation, other than The Number's reference to the 38<sup>th</sup> recital to the USD's preamble.

9.155 Turning to that recital, we consider it appropriate first to set it out in full, as follows:

(38) Access by end-users to all numbering resources in the Community is a vital pre-condition for a single market. It should include freephone, premium rate, and other non-geographic numbers, except where the called subscriber has chosen, for commercial reasons, to limit access from certain geographical areas. Tariffs charged to parties calling from outside the Member State concerned need not be the same as for those parties calling from inside that Member State.

9.156 When that recital is read in full (and noting where it appears in the USD's preamble) particularly by reference to the last sentence, we consider that it plain that it seeks to address Article 28 of the USD, which provides:

*Article 28*

**Non-geographic numbers**

Member States shall ensure that end-users from other Member States are able to access non-geographic numbers within their territory where technically and economically feasible, except where a called subscriber has chosen for commercial reasons to limit access by calling parties located in specific geographical areas.

9.157 That provision has been implemented by GC20, as follows:



## 20. NON-GEOGRAPHIC NUMBERS

20.1 Where the Communications Provider Adopts Non-geographic Numbers, it shall ensure, where technically and economically feasible, that End-Users in any part of the European Community outside of the United Kingdom are able to access those Non-geographic Numbers.

20.2 The Communications Provider shall limit access by calling End-Users located in specific geographical areas to Non-geographic Numbers assigned to a Subscriber where that Subscriber has chosen for commercial reasons to limit such access.

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

9.158 In light of the above, we consider that the 38<sup>th</sup> recital, read with its related Article 28 of the USD, does not affect the construction of the definitions 'Directory Information' and PATS. Nor, therefore, do we think that The Number's reference to GC8 is of relevance in this context.

9.159 Furthermore, The Number makes (at paragraphs 7.72-7.73 of its response) the following point:

7.72 In addition, business subscribers (and government) specifically request non-geographic '0845' numbers to be provided in directories in order to provide their customers and consumers with low cost alternatives to more expensive national numbers. Ofcom acknowledge this, saying that:

*"In noting this exclusion, Ofcom acknowledges that the provision of such NTS numbers from OSIS and, subsequently, within directories and via DQ services is of key importance to DIPs and to users of directories and DQ services. As we understand it, businesses with multiple branch locations, such as banks, will often want their published contact number to be an NTS number routing to a central call centre rather than, for instance, a geographic number routing to a specific branch. NTS numbers will account for a significant volume of business numbers within OSIS."*

Again, Ofcom will be failing to discharge their statutory duties if they choose to apply GC19 in a way which maintains this exclusion.

7.73 There is clearly a pro-user argument for these numbers coming within GC19. If alternative interpretations are possible, Ofcom should decide for their inclusion when the alternative would be detrimental to consumers and to competition in telecoms services generally. It is clearly disproportionate to exclude these numbers when the cost of provision would be very low and the benefit to consumers would be very high.

9.160 As regards Ofcom's acknowledgement (from paragraph 7.180 of the August 2006 document) that The Number cites above in its response, we note that the citation is incomplete. Ofcom therefore considers that the final two sentences of that paragraph should be noted to put our acknowledgement in its proper context, as follows:

...However, Ofcom is focussed here on identifying the data which BT is specifically required to provide under GC19. The impact of this is discussed further in **Section 8**.

9.161 In other words, whilst recognising that the absence of certain data from GC19 (here, NTS numbers such as 0800, 0845, etc.) may raise certain policy concerns (now further discussed in **Section 12** of this document), this is not a matter which assists in the construction of domestic UK law. We remain of this view and we do not accept that, in adopting what it considers being the correct construction of the relevant legal provisions, Ofcom would be failing to discharge its statutory duties.

9.162 So far as The Number is relying on its “pro-user argument” in this context, we again refer to our reading of the ECJ’s judgment in *KPN* as set out in this document (see, in particular, **Section 5**). Specifically, we note from paragraph 33 of the judgment that the ECJ concluded before arriving at a strict interpretation that its account of the specific interests of the users of directories, including consumers, did not militate in favour of a broad construction of the concept of ‘relevant information’. In our view, therefore, there is no support for the view that, as a matter of Community law, Ofcom would be required to construe domestic UK law in light of any “pro-user argument”. As regards any effects on the competition in the DQ services in light of our statutory duties, we refer The Number to our response as set out in **Section 8** of this document (see **paragraphs 8.42 to 8.47**). As to The Number’s assertion that the exclusion of these numbers would be detrimental to “competition in telecoms services generally”, while we do not agree with this general assertion, we note that The Number has not provided any evidence to support it.

9.163 The Number then seeks to call into question whether or not “some” 0845 numbers are, in fact, one-way services. It states (at paragraphs 7.74-7.75 of its response):

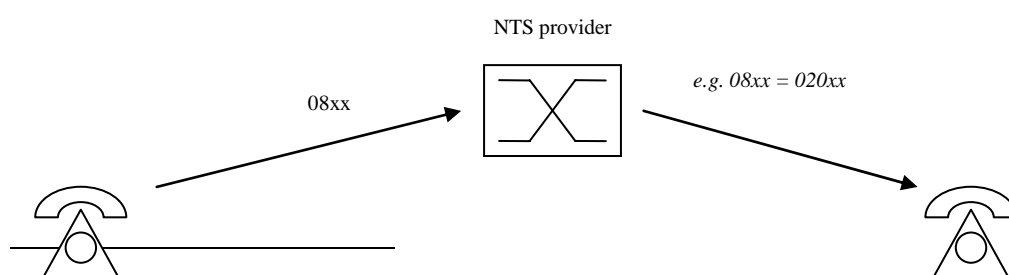
7.74 In any event, we understand that some 0845 numbers are, in fact, two-way. Is it the case then that some are intended to be included, but some are not? We understand there is no technical means of telling what is behind an 0845 number and whether it is one-way or two-way, so, if this decision was intentional, it is not clear how the legislator intended that the decision on inclusion or exclusion for certain 0845 numbers should be made.

7.75 0845 numbers are clearly required by subscribers and are of benefit to users in that they offer low cost alternative numbers to access businesses and government entities. In interpreting GC19 in the light of the user and subscriber-oriented aims of the USD, Ofcom should be including these numbers within the information to be supplied under GC19.

9.164 In responding to this specific point, it is not clear to Ofcom from The Number’s response on what basis it is alleging that “some 0845 numbers are, in fact, two-way”. To address this issue, we consider it appropriate to provide first a brief and general<sup>97</sup> description of our understanding as to how number translation services (“**NTS**”) are normally provided technically and commercially, and then to deal with certain presentational aspects, which might address The Number’s point about the “technical means of telling what is behind an 0845 number”.

9.165 NTS is, broadly speaking, a call forwarding service where a customer purchases a non-geographic (e.g. 0845) number from a NTS provider, who then routes calls to a geographic number (or range of numbers) specified by the customer. This is illustrated below:

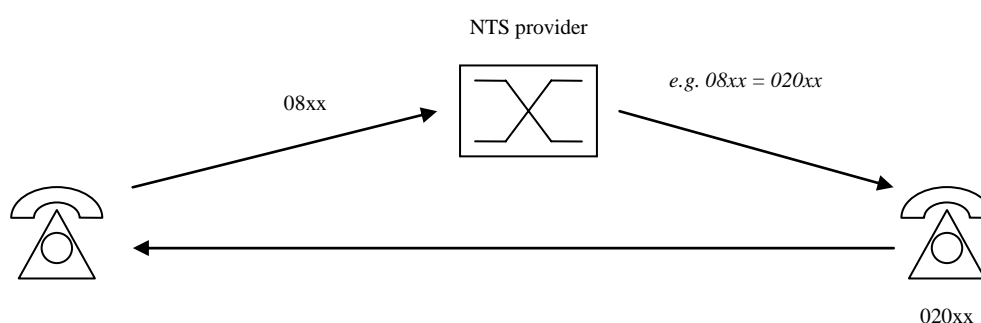
**Figure 9.1: inbound routing of an NTS call to a geographic number**



<sup>97</sup> For a more detailed description about NTS, we refer to other documents published by Ofcom dealing specifically with NTS for a more detailed description, such as the consultation document entitled “Number Translation Services – A Way Forward” (see, in particular, paragraphs 2.4-2.9) published by Ofcom on 28 September 2005: [http://www.ofcom.org.uk/consult/condocs/nts\\_forward/nts\\_way\\_forward.pdf](http://www.ofcom.org.uk/consult/condocs/nts_forward/nts_way_forward.pdf)

- 9.166 As such, the service enables a customer to use a single contact number, the routing of which can be managed by the customer and could correspond to a group of geographic numbers. We understand that NTS providers typically offer the facility to alter the routing according to time of day, call type, busy destination, etc. Different 08 (or 09) numbers can be chosen by the customer according to their revenue sharing preferences.
- 9.167 Commercially, we further understand that a customer would have a contract with the NTS provider for the call forwarding service (i.e. the NTS service) and separately a contract with their telephony provider for the geographic number to which the non-geographic number is mapped (i.e. the PATS, assuming that the above-mentioned gating criteria are satisfied in respect of the service in question). These contracts do not have to be with the same service provider (“SP”).
- 9.168 If a call is made by the customer using the geographic number specified as the destination by the mapping in the NTS provider’s switch, then the call will follow normal call routing – as applied by the customer’s telephony SP – for a geographic number and will not pass through the NTS provider’s switch. This is illustrated below.

**Figure 9.2: outbound routing of calls from a geographic number linked with an NTS number**



- 9.169 As such, the NTS service (together with the non-geographic number assigned for its use) is one-way, since it is only used as an inbound destination, calls to which are then forwarded to a specified geographic number or numbers. In other words, calls cannot be made using the NTS service directly from the non-geographic number and calls made from the geographic number(s) to which the NTS number is mapped will follow normal call routing and will not pass through the NTS call forwarding system. Rather, the geographic number is therefore used for its assigned (PATS) two-way telephony service.
- 9.170 In light of this, we turn to certain presentational aspects of non-geographic numbers used for NTS services, which might address The Number’s point about the “technical means of telling what is behind an 0845 number”.
- 9.171 In our understanding, it is possible for a NTS number to be presented as the calling line identification (“CLI”) when a call is made from a geographic number. (Normally, the CLI is as a facility that enables identification of the number from which a call is being made or to which a return call could be made.) This gives the impression that a

call is being made from a NTS number and is used to persuade those wishing to contact, say, a company to use the NTS number, rather than its geographic number.

- 9.172 However, although the NTS number is presented as the CLI, this is achieved by replacing the default CLI for the call from a geographic number to the NTS number, but it does not require the outbound call to pass through the NTS provider. As such, the presentation of a NTS number as a CLI does not mean that the NTS number is two-way as the call is still originating at a geographic number using the PATS, even though the CLI is of a NTS number. Rather, it is typically a service provided by the SP which provides the geographic number (e.g. the 'Presentation Number' service provided by BT<sup>98</sup>) and it does not involve any contractual relationship with the NTS provider.
- 9.173 Finally, The Number is relying here on the requirements of data protection legislation to argue that Ofcom's interpretation in this regard would be incompatible with them. It argues (at paragraph 7.76 of its response):

7.76 It should also be noted, as set out above, that if individual subscribers have asked for their data to be processed in a certain way, i.e. here they are asking for certain particular numbers to be given out, then not obliging communications providers to pass that data on under GC19 would be incompatible with data protection legislation.

- 9.174 It would appear that The Number is here essentially repeating its "overriding consideration" point that we have considered and responded to in **Section 8** of this document (see **paragraphs 8.48 to 8.60**). Therefore, in light of our views that GC19 does not apply to 'Telephone Numbers' not assigned for PATS, we consider that our response in **Section 8** answers this point also with regard to excluded numbers and data protection legislation.
- 9.175 As regards BT's point about the possibility of Ofcom's finding causing some confusion particularly with reference to Ofcom's recent proposals for extended number portability, Ofcom assumes that BT is referring to Ofcom's proposals to amend the PATS definition for the purposes of GC18, as set out in the VoIP document. It is not clear to Ofcom why BT considers that any confusion would arise for the purposes of GC19. In any event, we note that BT agrees with Ofcom's construction of GC19 in this regard. However, we invite BT to make further submissions about this matter as part of the policy review discussed in **Section 12** of this document.

## Relevant Data Protection Legislation

### Ofcom's provisional findings in the August 2006 document

- 9.176 As set out at paragraphs 7.140 to 7.148 of the August 2006 document, there is a further category of information that may fall within GC19 on the basis that, pursuant to GC19.4, GC19 applies subject to the requirements of 'Relevant Data Protection Legislation'<sup>99</sup>. The background to this is set out again below.

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<sup>98</sup> [http://www.btbroadbandoffice.com/linesandcalls/presentation\\_number](http://www.btbroadbandoffice.com/linesandcalls/presentation_number)

<sup>99</sup> This condition closely reflects the provision in Article 25(5) of the USD, which makes it expressly clear that (among others) Article 25(2) of the USD applies subject to the requirements of Community legislation on the protection of personal data and privacy and, in particular, Article 11 of Directive 97/66/EC. Since 31 October 2003, Directive 97/66/EC has been repealed and references to that Directive shall be construed as being made to the Directive on Privacy and Electronic Communications: see

9.177 The term 'Relevant Data Protection Legislation' was amended on 11 December 2003 for the purposes of (among others) GC19 to mean the DPA and the Privacy Regulations.

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

"personal data" means data which relate to a living individual who can be identified—

(a) from those data, or

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

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

"data" means information which—

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

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

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

(d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

9.179 Although nothing in the Privacy Regulations relieves a person of his obligations under the DPA in relation to the processing of personal data, regulation 18 contains specific provisions relating to directories of subscribers to public ECS, whether in printed or electronic form, which are made available to members of the public or a section of the public, including by means of DQ services.<sup>100</sup>

9.180 In particular, these Regulations further build on requirements in the DPA (such as transparency requirements) offered to living individuals (including an unincorporated body of such individuals), who are subscribers. Such *individual subscribers* have:

(i) a right free of charge not to have personal data included in a directory unless they have been informed by the collector of the personal data of the purposes for the data inclusion as well as an opportunity to determine whether it should be so included (regulation 18(2));

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Article 19. So far as Article 25(s) of the USD is concerned, this is, in effect, therefore a reference to Article 12 of the Privacy Directive, which provision is fully cited in **Section 5** of this document.

<sup>100</sup> The term 'subscriber' is defined under regulation 2(1) as "...a person who is a party to a contract with a provider of public electronic communications for the supply of such services".

- (ii) a right not to be searched in reverse (i.e. their names and/or addresses are generated from a telephone or fax number) unless they have given their prior informed express consent (regulation 18(3)); and
- (iii) the right, without charge, to verify, correct or withdraw data of them included in a directory at any time (regulation 18(5)).

9.181 Under the Privacy Regulations, corporate subscribers also have a right not to be included in a directory where that subscriber has advised the producer of the directory that it does not want its data to be so included (regulation 18(4)). Corporate subscribers do not, however, have the full range of rights otherwise available to individual subscribers under the Privacy Regulations (or the DPA).

9.182 In other words, the Privacy Regulations prescribe, in effect, that the data of a subscriber, whether individual or corporate, should be included in a directory and/or a DQ service only to the extent and in relation to the purpose for which such subscriber has advised the producer of the directory or DQ service<sup>101</sup>. As regards the matter of a subscriber advising the producer, Ofcom understands that as a matter of practical reality such advice is taken by the primary collector of the data, which is normally the subscriber's CP.

9.183 Therefore, as set out below, we consider that certain information should be made available under GC19 in order to comply with the requirements under regulation 18 (and, where applicable, the DPA). In this context, we refer to 'directory status information' as meaning such data which indicates the extent to which the relevant subscriber wishes to be included or partially or totally withheld either from a printed directory or a DQ service.

9.184 The precise nature of how this directory status information is covered within data made available from OSIS was then considered at paragraphs 7.184 to 7.194 of the August 2006 document. For completeness, we set out below much of this analysis.

9.185 BT currently provides its subscribers with the following options in relation to directory entries:

- ordinary listing;
- directory enquiry only listing;
- ex-directory listing;
- no listing; and
- partial address listing.

9.186 The first four options are mutually exclusive, but the 'partial address listing' is used in conjunction with the first three options, so that a subscriber who wishes to have a listing of some kind can, in accordance with the DPA and the Privacy Regulations, specify which of their address data should be included in a directory. Where a subscriber requests a partial address listing, the subscriber will be asked to state which parts of the address are to be omitted from the listing.

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<sup>101</sup> Regulation 18(1), "...applies in relation to a directory of subscribers, whether in printed or electronic form, which is made available to members of the public or a section of the public, including by means of a directory enquiry service."

9.187 In terms of how this information is currently presented in OSIS, the two fields potentially relevant for data protection purposes are 'entry type' and 'partial address indicator' ("PAI"). **Table 9.1** below relates the options set out above to the appropriate entry type in OSIS, together with (according to BT's classifications) a summary of the expectations of the target of a search.

**Table 9.1: Directory entry types**

SUBSCRIBER OPTION	ENTRY TYPE	SUMMARY	NAME	ADDRESS	NUMBER
Ordinary listing	DE – normal directory entry	The target is happy for everything to be known about them	No identification of gender	No restrictions unless PA is set	No restrictions
Directory enquiry only listing	DQR – number available via DQ but not Phone Book	The target wants everything except their number hidden from the enquirer	No more to be revealed than provided by the enquirer	No more to be revealed than provided by the enquirer	No restrictions
Ex-directory listing	XD – ex-directory	The target wants everything hidden from the enquirer except that they exist and don't want their number given out	No more to be revealed than provided by the enquirer	No more to be revealed than provided by the enquirer	Not to be revealed

9.188 Where the subscriber chooses to have no listing, as distinct from an ex-directory listing, no records for that subscriber's telephone numbers will be passed to OSIS.

9.189 Ofcom understands that there is a further breakdown of 'XD' into 'XD/NC' (ex-directory/no calls) and 'XD/CO' (ex-directory/calls offered). The distinction between them is that in the latter case subscribers may be willing to accept a call if they know the identity of the caller, but in any case calls cannot be connected by the DQ provider, and the caller must contact operator services using access code '100' to be connected. In Ofcom's understanding, 'XD/CO' was only ever used for BT subscribers, and the facility is now obsolescent and is being phased out. The default for ex-directory entries is that calls are not offered.

9.190 We note that under regulation 18(2) of the Privacy Regulations an individual subscriber must have been informed about the purposes of the directory in which his personal data are to be included. If, having been informed of the purposes of an ex-directory listing – i.e. that callers to a DQ service will be informed only that the person exists – the subscriber then chooses to have an ex-directory listing, Ofcom considers that, if the information is not provided under GC19 (so far as it falls under its scope),

that purpose cannot be achieved and the processing of the data could be in breach of the protection offered under the legislation.

- 9.191 'Entry type' does not specify whether certain items of personal data are to be omitted from listings, and thus on its own is incapable of fully reflecting the requirements of regulation 18(2)(b). In order to fully meet the data protection requirements, the option must be provided to further exclude information from the records of individual subscribers. There are four address fields which may be omitted: premises/building name/number; street; locality; and postcode. Where any of these are omitted, the data are not provided to OSIS and the fields will be blank.
- 9.192 In Ofcom's understanding, the OSIS 'PAI' field has a dual purpose: first to indicate to OSIS that records provided under GC19 should not be rejected as incomplete because some fields are blank; and secondly, to indicate to DQ providers that subscribers have deliberately withheld some personal data, and that records must not be enhanced with other data, for example from commercially available databases.
- 9.193 For partial address information, the information which the subscriber wishes to withhold does not need to be supplied under GC19. In that case, it would be sufficient simply to exclude this information from the set of information which must be supplied under GC19 on the basis that it is not necessary to identify a subscriber. However, as noted above, the PAI has a further purpose, which is to indicate to DQ providers that the subscriber wishes to have this information withheld from any directory and that records must not be enhanced with any other data.
- 9.194 Given the above, Ofcom was of the view in the August 2006 document that under GC19, BT is also obliged to provide data in the fields 'entry type' and 'partial address indicator' together with any 'Directory Information' supplied in order to ensure compliance with 'Relevant Data Protection Legislation' to which GC19.4 refers.

### Responses to the August 2006 document

- 9.195 In **Section 8** of this document, we have set out (and responded to) The Number's submissions concerned its alleged failure by Ofcom to comply with data protection legislation in arriving at its proposed findings on the scope of data to be supplied under Gc19. We deal with these submissions more specifically below and, therefore, set them out again for ease of reference.
- 9.196 In its response to the August 2006 document, The Number essentially argues that, where individual subscribers give consent for their data to be processed in a certain way (i.e. to be presented in directories/DQ services in a certain way), that information should be passed on. If it is not passed on, then The Number asserts that the relevant CP would be breaching the terms on which the consent to process that data was given.
- 9.197 The Number then cites the following aspects of the August 2006 document:
- i) Ofcom's acknowledgement (paragraph 7.184 of the August 2006 document) that CPs should provide directory status information "in order to ensure that Subscriber data has been provided in line with the advice from the 'Subscriber' in question about how the data could be used in directories and DQ services";
  - ii) Ofcom's statement that directory entries are "customer defined" and that customers are contacted and specifically asked how they want their directory



information to be presented in directories and DQ services, the representation being made that the information will then be passed on and presented in that way.

- 9.198 The Number then questions why Ofcom does not consider that the responses given by those subscribers should be passed on to DQ providers except to the extent that they request partial or total exclusion from directories and DQ services.
- 9.199 The Number further argues that, if a BT subscriber requested that their telephone number should be flagged as a fax number only or that the fact they were a doctor or dentist should be noted on their entry or that the name attaching to a number should be the name of the pub/B&B and not the name of the landlord or landlady, then BT should be obliged under GC19 to pass that information on to directory and DQ providers in order to comply with the specific request of the subscriber and with the terms on which they gave consent for their data to be processed.
- 9.200 The Number then states that directory information about existing BT subscribers which has already been collected in this way should be passed on in order to ensure that the data is processed in accordance with the terms of consent given by those BT subscribers.
- 9.201 Going forward, The Number suggests that BT may choose to continue to ask subscribers how they would like their entry presented in directories, in which case those subscribers would be giving consent for the use of their data on those terms and the information should be passed on. If BT chooses not to seek this information from its subscribers, or if BT alerts them to the fact that it cannot be guaranteed that DQ providers would pay for the information and present their entries as they require, then the situation might be different.
- 9.202 With regard to corporate subscribers, The Number acknowledges that under the Regulations they do not have the same specific rights as individuals, but they do have the right to have certain data withheld and to suppress telephone numbers using the Telephone Preference Scheme in order to prevent nuisance calls. It then argues that if a corporate subscriber asked for its installation address not to be given out (a women's refuge or a call centre, for example), but specified a PO box address instead, that PO box address should be passed on to DQ providers in order fully to give effect to the right to opt out by still enabling the company to receive post.
- 9.203 The Number also argues that a company might ask that its actual telephone number is not given out, but that a national 0800 or 0845 number be given out instead. The Number's view is that, if corporate subscribers have the right to suppress certain numbers, they should be able to specify alternatives so that they are not prevented from doing business by virtue of having exercised their right to avoid nuisance calls.
- 9.204 The Number goes on to suggest that companies often like their data to be grouped or presented in a certain way so that users searching for a division or department within their organisation can find that number without calling the main switchboard. It therefore argues that, if companies have specified that the main number should not be given out, they must instead be able to request that all the numbers for the various divisions or departments should be made available for users to find easily and call instead.
- 9.205 The Number also mentions that it has spoken to a senior official at the Information Commissioner's Office. The Number states that, in his view (whilst noting that he could not be categorical), in circumstances where an individual subscriber has

specifically requested that certain personal data be passed on to directory and DQ providers (and has apparently been led to believe this will happen), if there is no good reason not to pass this information on and the individual suffers, or may potentially suffer, inconvenience as a consequence, then there is likely to be a breach of the fairness provisions. According to The Number, the senior official has noted that regulation 18 gives rise to the possibility that some personal data the individual wishes to be included may not be considered relevant by the directory producer(s) in question and that regulation 18 does not give subscribers a completely unfettered right to determine which information is included in a directory.

- 9.206 The Number therefore believes that, to the extent that subscribers have been led to believe that certain information will appear in their DQ entry, this information should be passed on under GC19. It states that, even though regulation 18 may not give subscribers a completely unfettered right to determine which information is included in a directory, the requirements of UK users and subscribers should in any event be taken into account by Ofcom in order to interpret GC19 in line with the USD.
- 9.207 In its response to the August 2006 document, BT states that it agrees with Ofcom's view that a PO Box does not constitute an address for the purposes of GC 19 data. However, BT notes that PO Box addresses are often used to protect the Subscriber and BT then draws Ofcom's attention to the same women's refuge example as that given by The Number in its response. BT points out that the Partial Address option would not be a viable alternative because this assumes at least some of the subscriber address is published, and, if no address details are available, then it would be impossible for a DIP to search for or locate the correct subscriber.

### Ofcom's response

- 9.208 In addition to our response in **Section 8** to those arguments made as a more general submission by The Number (i.e. its argument about it being an "overriding consideration"), it is important to emphasise the distinction between the data that BT is (and has been) specifically required to provide to requesting parties under the terms of GC19 and the data that BT has provided to parties in the OSIS product, which data we consider falls outside the scope of GC19. For reasons already set out (see, in particular, **Section 7** and **paragraphs 9.237 to 9.246** below), Ofcom maintains the view that the former is a sub-set of the latter.
- 9.209 Turning firstly to The Number's assertion that it is necessary to have regard to the terms on which subscribers consented to the processing of their data for any of it to be used in directories and/or DQ facilities, as appropriate. As pointed out in **Section 8** (see **paragraph 8.59**), Ofcom agrees that the requirements of the data protection legislation must be complied with (together with any particular consent given by a subscriber) to data falling both within and outside GC19. However, to the extent that the data in question falls outside GC19 (as set out provisionally in this document), no issue arises in the first place with regard to BT having to provide such data to The Number. Should BT nonetheless agree to provide such additional data to The Number under a commercial arrangement (which, in our view, it has in part done for the purposes of these disputes), then the said requirements must be complied with to the extent they relate to that part, not by virtue of GC19.4, but instead because of the general application of the DPA and the Privacy Regulations.
- 9.210 Rather, the issue to consider here is what steps BT must take to ensure that, in supplying the defined data set under GC19.1, it is complying with the relevant data protection legislation. As set out in the August 2006 document, this would involve BT ensuring that the (individual) subscriber is given the right for that data set not to be

included in a directory and/or be available on a DQ facility and given the right to verify, correct or withdraw that data. The options currently available for subscribers to choose the different directory entry types in relation to the inclusion of their data on OSIS would appear to be equally relevant to the options customers should have in relation to any GC19.1 data set which may be provided by BT.

- 9.211 The complexity in assessing BT's GC19 obligations historically is that, as we know, BT never provided a separate stand-alone set of data which aligns with the specific requirements of GC19 – it only provided the full OSIS data. The Number's argument is essentially that, as subscribers only explicitly consented to their data being provided from OSIS in a form consistent with the options and level of detail provided by OSIS, then – at least historically – in order for BT to provide GC19 data in a manner compliant with data protection legislation, it was effectively required to provide the defined GC19.1 data alongside *all* other OSIS data fields to the extent that these may be populated in any given record. To do otherwise in forwarding the information to DIPs for use in directories/DQ facilities would, in The Number's view, result in a failure on BT to comply with the said legislation.
- 9.212 As already explained, Ofcom's view is that data protection requirements cannot in themselves be used to extend the scope or nature of identification data which BT is specifically required to provide under GC19. On an historic analysis, it is misleading to suggest that subscribers somehow gave permission for the narrower GC19.1 data to be made available *only* in conjunction with any other additional identification data that the subscriber gave to BT. The fact is that subscribers were never asked any specific questions in relation to its specific GC19 data, as no separate GC19 data set was provided.
- 9.213 Ofcom does not accept that, in a situation where BT were supplying only data it was required to supply by GC19, its data protection obligations could require it to supply more data than GC19 would otherwise require. Rather, such data protection requirements could only limit, and could not extend, the extent of data to be supplied by BT under GC19. Ofcom accepts that, for example, BT might have to seek appropriate consents in order to supply information under GC19. Such consents could, in principle, be conditional on the supply of further data by BT. But BT's supply of such further data would not be under GC19; rather, it would be a supply required by data protection law.
- 9.214 Going forward, we consider that BT (as well as any other CP subject to GC19) remains obliged to ensure compliance with the data protection legislation, should it be reasonably requested to provide a stand-alone product containing only the GC19.1 data to DIPs for use in directories/DQ facilities. However, in such a case, BT is not required, in our view, to allow the subscriber in question to define the detailed terms on which any GC19.1 data should be supplied, so as to require BT only to provide GC19.1 data in conjunction with all other data in OSIS falling outside GC19. In this regard, we refer in particular to the examples provided by The Number concerning indications, such as professional and occupational status of a subscriber, the issue of 'grouping' and so on.
- 9.215 However, on an historical analysis of BT's requirements in this regard, we remain of the view that partial address entries (to the extent that they relate to data falling within GC19) should be provided by BT under GC19.
- 9.216 Finally, we note the comments made by both The Number and BT in relation to whether a PO Box should be provided in certain circumstances. We, of course, acknowledge that the absence of such data from GC19 in the example given by them

may raise certain policy concerns. Indeed, Ofcom considers that this is a particular issue that respondents may wish to address in response to Ofcom's policy review discussed in **Section 12** of this document. In spite of our acknowledgement in this regard, we are for the purposes of these disputes tasked with the function of determining what data is currently required under GC19, which matter is (as seen throughout this document) one of interpreting the legal meaning of the regulation in place.

- 9.217 To that end, we refer to our analysis above (see **paragraphs 9.85 to 9.114**) as to our view on the meaning of the "address of the Subscriber" for the purposes of GC19. Although our revised view is that there is no benefit in being overly restrictive on what constitutes a legitimate address, we have stated that the relevant address would be the address as supplied by subscribers in relation to where they want the relevant fixed PATS supplied.
- 9.218 In contrast, the term 'PO Box' is by the ordinary usage of the English language one that refers to a numbered box in a post office where letters for a person or organisation are kept until called for. Therefore, in our view, it could not be properly said that, as a matter of construction, a PO Box an address is supplied by subscribers in relation to where they want the relevant fixed PATS supplied. As such, it falls outside the scope of data required to be supplied under GC19. However, in light of BT's response that it proposes to make PO Box addresses available in the circumstances it has indicated, we do not, in any event, anticipate that this is a matter likely to raise concerns in practice. Should BT choose to do so, it would be supplying that specific data on commercial (and unregulated) terms. Going forward, as indicated above, there may nonetheless reasons to ensure the supply of this data on a regulatory footing.

## The basis and terms upon which 'Directory Information' must be provided

### Ofcom's provisional findings in the August 2006 document

- 9.219 In the August 2006 document, we pointed out that the plain terms of GC19.3 requires that the supply of 'Directory Information' in accordance with paragraphs 19.1 or 19.2 is done on *terms which are fair, cost-oriented and non-discriminatory, and in a format which is agreed between the CP and the person requesting the information.* (These requirements closely reflect the wording in Article 25(2) of the USD, which requires that the 'relevant information' must be provided *in agreed format on terms which are fair, objective, cost oriented and non-discriminatory.*)
- 9.220 We deal below with the issue of agreed format only; the requirement as to cost oriented charges is considered in the following **Section 10** of this document.
- 9.221 As explained in the August 2006 document (see, in particular, paragraphs 7.161 to 7.166), Ofcom considered that, in the context of GC19, the term 'format' refers to the way in which the data which CPs are required to provide under GC19 is sent and received. This would cover:
- (i) the medium by which the data is made available (analogously to the medium for a sound recording, e.g. DAT, CD formats, etc) – i.e. how will the data be sent/received?; and
  - (ii) related process issues which allow the data to be understood and used by the recipient in the appropriate way – i.e. what will the data look like when received?

- 9.222 In terms of the medium in which the required GC19 data is made available, Ofcom stated that the CP and the person requesting the 'Directory Information' could agree to provide the data in a spreadsheet that the latter might wish to receive by way of hard copy lists sent in the post or electronically as an attachment to an e-mail. Alternatively, that person may wish to receive it downloaded on (say) a CD-ROM, which CD-ROM would need to be delivered in some way to the third party, whether by post, courier or some other form of transport. Another possible medium would be an automatic feed over an electronic communications network directly into the database operated by the person requesting the 'Directory Information'.
- 9.223 In contrast, Ofcom explained that, in its view, the process issues relate to the need for the parties to agree what the actual data will look like when sent by the agreed medium to enable the data to be processed by the recipient. It seemed clear to Ofcom that the parties would want to agree a consistent format for receiving the required data for ease of use by the recipient, particularly as data is likely to be provided on an ongoing basis – i.e. a recipient may receive all a CP's GC19 data following an initial request, but will then require ongoing updates to this data set. In the spreadsheet example, this would typically involve the parties agreeing a consistent structure of the spreadsheet. When sending data by electronic transfer, the parties would need to agree the precise data fields that will make up a record so that the recipient knows how to read any strings of data received.
- 9.224 Critical to this, Ofcom pointed out that it seemed important that along with the actual data which a CP is required to provide under GC19, certain other bits of data will need to be provided to facilitate processing – i.e. what we called 'record processing data'. This may involve having a unique identifier for each record provided and providing information on what the recipient should do with the record to the extent that it could be a completely new entry or could be a deletion of or amendment to an existing entry. In Ofcom's view, this aspect of the 'format' related to the practical way in which the data which the CP is required to provide under GC19 can be sent to the requesting party.
- 9.225 In this regard, Ofcom stated that it would make a clear distinction between record processing data, which is purely aimed at allowing any record received by the agreed medium to be used appropriately, and additional information data about the subscriber and the telephone number beyond that required to be supplied by GC19. Overall, Ofcom considered that the 'format' is about agreeing how the required GC19 data is to be sent from the CP to the recipient.

## **Responses to the August 2006 document**

- 9.226 In its response to the August 2006 document, we note more generally that The Number refers (in support of points it is making other than in the context of 'agreed format') to Ofcom's statement in that document, where it provides that "...the data provided by OSIS is... "customer-defined". That is, the records within OSIS are broadly built to reflect the express wishes of the subscriber of the relevant telephone number about how they wish to appear and be presented in directories and via DQ services."
- 9.227 When responding to the 'agreed format' point, The Number then argues that Ofcom wrongly view 'format' as a reference to the way in which the data is sent (i.e. electronically), whereas this refers to the structure of what is provided (i.e. the 43 OSIS data fields). In particular, The Number rejects Ofcom's view that under GC19.3 "format" refers to the way in which the data is sent and received by reference to the OED definition of format, which provides "a style or manner of arrangement or

procedure .... An arrangement of data etc. for storage or processing by computer". It concludes that OSIS itself is therefore a 'format', whereas the CD-ROM and FTP file transfers are just the method of delivery.

- 9.228 After citing passages of Ofcom's 1998 Interim Statement (as set out in Annex 8 to the August 2006 document), The Number goes on to set out its understanding that the OSIS database was designed to allow 'Phonebook' printing. As such, it says that all the fields within OSIS were related to that activity, which included the need for caption sets/grouping. The Number then argues that when BT opened up its internal OSIS system to give direct feeds to other DQ operators, it was a 'take it or leave it' option, as it was not viable for BT to modify the OSIS system at that time to give custom outputs with less data fields. As such, in The Number's view, OSIS became the 'format' in which it obtained directory data.
- 9.229 As a result of this, The Number, Conduit and other DQ providers built their systems in such a way as to handle OSIS and the various data fields which OSIS contains (which are supplied page by page in rows of entries).
- 9.230 The Number then asserts that, as Ofcom accepts that The Number and Conduit have requested a subset of data from OSIS in making a request for the whole of OSIS and as BT offered no alternative to OSIS in delivering the data, then for the purposes of meeting its GC19 obligations the format required by BT and 'agreed' between the parties for such data was in fact OSIS.

### Ofcom's response

- 9.231 The Number's argument is essentially that, even if the data covered by GC19.1 is only a subset of all the data actually provided from OSIS (which view The Number in any event disputes), then all the data actually provided from OSIS is still covered by the terms of GC19 in that OSIS is the format in which BT has agreed to provide the core GC19.1 data to requesting parties.
- 9.232 In our understanding, the effect of The Number's approach here is to focus solely on the issue of format to the exclusion of other wording in GC19, such as the term 'Directory Information'. In this regard, we refer to our views earlier in **this Section** that we consider it plain that the phrase "*Directory Information of*" is intended to govern what precise information is, on reasonable request, to be made available under GC19. We therefore consider that, on an informed interpretation, The Number's argument is incorrect.
- 9.233 Furthermore, we disagree with The Number that OSIS itself could be properly said to be 'format' alone (whether by reference to the OED definition or otherwise), given that OSIS contains, as a matter of fact, fields populated by certain data. In other words, the *arrangement* of data (to which The Number) refers cannot be properly said to mean the *data itself*. Rather, we consider that one must first properly construe what data falls within the scope of GC19 and, in light of that analysis, then turn to the issue of format. As regards the latter, we remain of the view as set out in the August 2006 document that the term 'format' essentially refers to how the information is provided by BT and what that specific information will look like so that it can be processed in a meaningful way.
- 9.234 Again, a complexity in looking at this historically is that BT has only provided the OSIS product and not a separate GC19 product. As we explain in this document, it appears to Ofcom that The Number neither requested, nor wanted, a stand-alone GC19 product. Rather, it appears that The Number required and used all the data

fields and individual records provided by OSIS. As such, we do not think that it is plausible to claim that the entirety of OSIS comprises the agreed format for the purposes of GC19.1.

- 9.235 Therefore, we consider that questions about the format in which information is sent and received has to be separate to the actual subscriber identification data which is being transmitted. Although we accept that the parties have, in effect, made a request for the more narrow set of data covered by GC19.1 by requesting the broader set of data and records within OSIS, a distinction has to be made between that data which BT is obliged to provide under GC19.1 and that which, in effect, BT provides in addition to its GC19 obligations. BT's provision of data above and beyond that which it is strictly obliged to provide cannot be regulated simply because BT has historically been providing it, at the request of The Number and Conduit among others, in a bundle with the regulated data set.
- 9.236 Again, to be clear, moving forwards, BT would be meeting its obligations under GC19 as currently drafted by providing just the 'Directory Information', as defined, in a manner and form which would be acceptable to requesting parties. If Ofcom was asked to resolve any dispute over such a format, Ofcom could not require BT to provide additional information in relation to the subscriber beyond that specified by GC19.1 by reference to the format. Rather, Ofcom could only assess whether the information which BT was specifically required to provide was being provided in a manner and form which was fair and reasonable given the needs of the requesting party, e.g. whether it was provided in an effective way and updated at appropriate frequencies.

### Ofcom's provisional views on GC19 as applied to BT's supply of OSIS

- 9.237 We have set out in the preceding sub-sections above Ofcom's provisional views as to the precise nature of information to be made available under GC19 as a matter of statutory interpretation under purely domestic law. In light of those provisional views, we now turn to applying them to the facts and information presently before us in relation to BT's supply of the data contained in OSIS to The Number and Conduit, respectively.
- 9.238 In short, we provisionally conclude that the data that BT is obliged to provide under the terms of GC19 is a sub-set of the data that BT actually is supplying (and has supplied) to The Number and Conduit within the OSIS product. Before we deal with this matter in further detail by having regard to the OSIS product, it is appropriate to summarise our provisional views as to the specific information that, at present, falls within GC19, particularly by reference to the term 'Directory Information'. (But we again acknowledge here that the absence of certain data from GC19 may raise certain policy concerns and that these concerns are being addressed separately within the context of the policy review discussed further in **Section 12** of this document.)
- 9.239 First, BT is only required under GC19 to provide 'Directory Information' about any person (private individuals or businesses) who:
- (i) is (at the time of meeting a request under GC19) a party to a contract with BT for the supply of PATS to whom 'Telephone Number(s)' has been assigned by BT (i.e. 'Directory Information' falling with GC19.1(a)); and
  - (ii) is (at the time of meeting a request under GC19) any other 'End-User' assigned a Telephone Number originally 'Allocated' to BT – in Ofcom's provisional view, this

essentially means a person (private individuals or businesses) who previously was a party to a contract with BT for the supply of PATS to whom 'Telephone Number(s)' was assigned by BT (i.e. 'Directory Information' falling with GC19.1(b)),

(for ease of reference, we will be referring to any person falling within (i) or (ii) above as "**relevant BT subscriber**").

9.240 Secondly, the 'Directory Information' falling under GC19 only relates to the 'name' and 'address' of, and the 'Telephone Number' assigned to, the relevant BT subscriber. In particular:

- (i) **the name of the relevant BT subscriber** is the 'name' (within the The New Shorter OED definition) by which the relevant BT subscriber has identified itself in entering into the contract with BT for the supply of the relevant PATS; and
- (ii) **the address of the relevant BT subscriber** is the address as supplied by the relevant BT subscriber in relation to where they want the relevant fixed PATS supplied to it by BT, i.e. the installation address – at a minimum, Ofcom would expect that an address would normally comprise the house/building name or number, street name and full UK postcode.

9.241 Thirdly, for the avoidance of any doubt, BT is not required to make available under GC19 any number which:

- (i) does not satisfy the definition of a 'Telephone Number', including which number is subject to any order of the Secretary of State pursuant to section 56(7) of the 2003 Act (at the time of the publication of this Determination, certain numbers are excluded from that definition under the Telephone Number Exclusion (Domain Names and Internet Addresses) Order 2003, S.I. 2003/3281);
- (ii) has not been allocated in accordance with GC 17 by the Director/Ofcom to BT (in its response to the August 2006 document, BT has noted that it is not directly allocated mobile numbers); or
- (iii) has not been assigned by BT under its contract with the relevant BT subscriber in question for the use of PATS only (which service must, by definition, be (among other things) a two-way service).

9.242 Fourthly, to the extent that the information in question falls within GC19 as set out above, BT must make available certain information under GC19 in order to comply with the requirements under regulation 18 of the Privacy Regulations (and, where applicable, the DPA). In this context, we refer particularly to the directory status information identified in **paragraphs 9.185 to 9.194** above.

9.243 In light of the above, we particularly note by way of overview that the following data contained in OSIS falls, in principle, outside the scope of GC19:

- (i) information about persons who are not relevant BT subscribers, such as (a) subscribers of other CPs who have not been assigned telephone numbers originally allocated to BT; (b) persons who are parties to contracts with BT for the supply of public ECS other than PATS to whom 'Telephone Numbers' has been assigned by BT, such as NTS; and (c) actual users of the relevant telephone numbers assigned by BT to its relevant BT subscribers, where these users are not the same persons as the relevant BT subscribers themselves;



- (ii) information about relevant BT subscribers but which cannot be properly said to comprise only the 'name' and 'address' of, and the 'Telephone Number' assigned to, the relevant BT subscriber, such as (a) information relating to the use to which the PATS is put by the relevant BT subscriber – e.g. department details, hours of availability – as provided in the various sub-header fields; and (b) information falling within the various record categorisation fields within OSIS which identify things such as whether the PATS provided is a business or residential line (see further in **Table 3.2** of this document);
- (iii) information about relevant BT subscribers but which has not been provided by the relevant BT subscriber for the purposes of entering into the contract for the supply of PATS – rather such information has been collected by BT for another purpose, such as creating a directory entry on OSIS.

9.244 On the other hand, we set out in **Table 9.2** below (which a revised version of Table 7.5 of the August 2006 document) the data fields within OSIS which are, in principle, covered by BT's GC19 obligations but insofar as they are not excluded for reasons set out above.

**Table 9.2: Data fields within OSIS which could be covered by GC19**

RESIDENTIAL CUSTOMERS	BUSINESS CUSTOMERS
(9) Telephone number (internal)	(9) Telephone number (internal)
(10) Telephone number (dialable)	(10) Telephone number (dialable)
(13) Postcode	(13) Postcode
(25) Name	(25) Name
(29) Title	(32) Business suffix
(30) Initials/forename	(35) Premises/building name or No.
(31) Honours	(36) Street
(35) Premises/building name or No.	(37) Locality
(36) Street	(5) Entry type
(37) Locality	(43) Partial address indicator
(5) Entry type	
(43) Partial address indicator	

9.245 In other words, unless the data contained in the OSIS fields set out in **Table 9.2** above is excluded for reasons discussed above in relation to each and every individual record, Ofcom provisionally considers that BT was required under GC19 during the relevant period to provide The Number and Conduit with such data. Furthermore, unless the data is so excluded, BT is required under GC19 going forwards to provide The Number and Conduit with such data.

- 9.246 It is to be noted that Ofcom has not as part of this investigation attempted to identify which of the data actually provided to DIPs from OSIS would be data falling within the scope of GC19 and which would be data falling outside of that scope for each and every record. This is because OSIS contains around 25 to 30 million different records and each record could contain up to 42 fields of data. It is nonetheless clear that many of the records and the fields would fall, in principle, outside of the requirements of GC19.
- 9.247 In any event, Ofcom's view is that the highly complex task of breaking down and analysing each and every record is unnecessary for the purposes of resolving these disputes. This is because, as discussed in **Section 10** of this document, our assessment of cost oriented charges for the data falling within GC19 does not require an understanding of the relative volume of data provided from OSIS. Rather, it requires an understanding of the activities involved in obtaining certain pieces of data and providing these to requesting DIPs in order to identify which costs are recoverable.

## Section 10

# GC19 – Cost orientation and charges

## Introduction

- 10.1 The plain terms of GC19.3 require that the supply of 'Directory Information' in accordance with paragraphs 19.1 or 19.2 is done on "*terms which are fair, cost-oriented and non-discriminatory...between the Communications Provider and the person requesting the information*". **Section 7** sets out Ofcom's provisional view that BT has, in supplying The Number and Conduit with certain of the data requested by them via OSIS, been required to comply with those terms.
- 10.2 **Section 9** sets out Ofcom's provisional views on that certain data comprises and, for the purposes of these disputes, we provisionally conclude that the data that BT was obliged to provide under the terms of GC19 was a sub-set of the data that BT actually supplied to The Number and Conduit within the OSIS product.
- 10.3 In referring these disputes, both The Number and Conduit have argued that BT's charges for the full OSIS data are inappropriate, given the above-mentioned terms of GC19 as well as the similar terms of USC7. **Section 6** sets out Ofcom's provisional conclusion that USC7 is *ultra vires* and, as such, no issue of BT's charges being inconsistent with USC7 arises. Therefore, the outstanding issue is whether the charges that The Number and Conduit have paid (and are paying) to BT for the sub-set of data are consistent with the terms of GC19. **This Section** considers that specific issue, together with the claims by The Number and Conduit for retrospective adjustment of alleged overpayments.
- 10.4 Specifically, **this Section** is structured as follows:
- (i) **paragraphs 10.5 to 10.17** summarise our provisional conclusions in the August 2006 document in relation to whether BT's actual charges for access to directory data were consistent with its GC19 requirements;
  - (ii) **paragraphs 10.18 to 10.22** summarise submissions received by Ofcom on this specific matter;
  - (iii) **paragraphs 10.23 to 10.47** assess those submissions and we have been persuaded by them that Ofcom should now fix a charge for the BT GC19 data set only (i.e. that set of data which BT was obliged to provide under GC19 ) and we provisionally fix the charges to be applied since 25 July 2003 for access to the BT GC19 data in order to properly resolve these disputes;
  - (iv) **paragraphs 10.48 to 10.123** set out the detail of how Ofcom has calculated these charges in light of the requirements of GC19 in light of the *KPN* judgment;
  - (v) **paragraphs 10.124 to 10.135** set out our provisional conclusions on whether parties have overpaid for the data in question supplied by BT in light of the claims for retrospective adjustment of alleged overpayments; and
  - (vi) **paragraphs 10.136 to 10.141** set out our comments on charges which should apply moving forward.

## Ofcom's provisional findings in the August 2006 document

- 10.5 Ofcom's provisional views on whether BT's charges for the set of directory entry data provided from OSIS are, and have been, consistent with BT's obligations under GC19 were set out at paragraphs 7.210 to 7.237 of the August 2006 document. We summarise below our (main) provisional conclusions in that document in relation to whether BT's actual charges for access to directory data were consistent with its obligations under GC19.
- 10.6 In light of our provisional conclusions that the data which BT is obliged to provide to The Number and Conduit under GC19 is only a sub-set of the data which BT provides from OSIS (which sub-set matched against the relevant data fields in OSIS), Ofcom presented **the overall OSIS product as comprising four separate notional products** (i.e. categories of information):
- (i) 'Directory Information' of subscribers assigned PATS telephone numbers allocated to BT (the "**BT GC19 data set**"<sup>102</sup>);
  - (ii) Directory entry data of subscribers assigned PATS and non-PATS telephone numbers allocated to BT in addition to "Directory Information" at (i) (the "**BT additional data set**");
  - (iii) 'Directory Information' of subscribers assigned PATS telephone numbers allocated to other CPs (the "**OCP GC19 data set**"); and
  - (iv) Directory entry data of subscribers assigned PATS and non-PATS telephone numbers allocated to other CPs in addition to "Directory Information" at (iii) (the "**OCP additional data set**").
- 10.7 In Ofcom's view, GC19 only required BT to provide notional product (i)—the BT GC19 data set.
- 10.8 However, as already noted in **Section 7**, no separate BT GC19 data set has been available to DIPs. Therefore, in order to receive the BT GC19 data set, both The Number and Conduit paid for, and received, access to the OSIS database (for simplicity, in **this Section**, we will use the term "**OSIS**" to refer to this access, together with associated services).
- 10.9 Against that background, Ofcom then considered whether BT's charges for the OSIS were consistent with its obligations under GC19 to provide the BT GC19 data set on (amongst others) cost-oriented terms.
- 10.10 In assessing that issue, Ofcom's view was that it was not appropriate to seek to determine the charges BT applied in respect of the provision of the notional data sets that are not regulated by GC19 (the "**non-BT GC19 data set**", that is to say, the BT additional data set, the OCP GC19 data set and the OCP additional data set: see (ii) to (iv) in **paragraph 10.6** above). This was because, given Ofcom's provisional finding that USC7 is *ultra vires*, there would be no specific *ex ante* regulatory obligation on BT to provide those products on cost oriented terms. Therefore, Ofcom considered that it neither could, nor should, determine the charges for these products

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<sup>102</sup> The term the 'BT GC19 data set' is used throughout **this Section** according to our provisional conclusions on the scope of data that BT must make available under GC19, as set out in **Section 9** of this explanatory statement.

in resolving these disputes, which have been referred to Ofcom under section 185(2) of the 2003 Act.

- 10.11 Thus, in order to deal with the issue of whether BT's charges for OSIS were consistent with its GC19 obligations, Ofcom considered the following scenarios:
- (i) whether by only providing the aggregated (full) form of OSIS to the parties, BT was requiring them, in effect, to pay for records and data fields in OSIS that they did not require and that this had the effect of inflating the appropriate charges for the regulated BT GC19 data set; or
  - (ii) whether, in fact, the parties demanded and used (full) OSIS, including the BT GC19 data set.
- 10.12 From submissions received and information gathered during the investigation from The Number and Conduit, Ofcom took the provisional view that:
- (i) the parties had received and used the full OSIS data set provided to them;
  - (ii) the parties continued to want to receive the full OSIS data set; and
  - (iii) although Conduit had made an enquiry about the terms on which BT Retail would provide the directory data of its own subscribers (i.e. its letter to Dave Shaw, BT Retail, of 3 June 2005), no party had made a specific request for the BT GC19 data set separate from the OSIS data set (see **paragraph 7.92** where we refer to Conduit's confirmation to Ofcom that Conduit nonetheless needed and, in effect, simultaneously requested the additional data it currently receives from OSIS).
- 10.13 Accordingly, Ofcom provisionally concluded that there was no basis for stating that The Number and Conduit should have only paid an amount for OSIS in respect of the cost-oriented charge of providing the BT GC19 data set. Further, BT's GC19 obligation did not provide a basis for determining the price for the full OSIS data set.
- 10.14 However, the only price actually charged by BT was for the bundle of the above-mentioned four notional data products and so there was, by definition, no stand-alone price for the BT GC19 data set to compare against a cost-oriented charge. There was also no readily identifiable *implicit* price for the BT GC19 data set, given that only a pure bundle – of all notional products (i) to (iv) – was available from OSIS. This situation is in contrast to what would have been the case had the notional products (ii) to (iv) been offered as a separate bundle or each as separate products with associated stand-alone prices.<sup>103</sup> In that case, an implicit price paid for the GC19 data set would in principle be identifiable and so there would have been a basis for assessing how this price paid compared to what the cost-orientated charge should have been.

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<sup>103</sup> Where information on incremental and stand-alone prices is available these can be used to determine boundaries for the implicit price. However, as noted by Oxera in 'Assessing profitability in competition policy analysis: OFT economic discussion paper' (2003, paragraph 6.31): "... *in some cases, the range between these two extremes [i.e. incremental and stand-alone price] can be very wide. In such cases, the revenue allocation may be difficult as there may be few objective reasons to choose an allocation between incremental and stand alone revenues, or indeed a cost-based allocation, without further information about consumers' willingness to pay. **Indeed, in cases of pure bundling, information on stand-alone and incremental prices is not available at all.***" (emphasis added.)

- 10.15 This led Ofcom to provisionally conclude that there was no case for stating that BT's current or historic charges for OSIS are or have been inconsistent with BT's obligations under GC19 and, therefore, no case for retrospective adjustment of the alleged over-payments (by The Number and Conduit) in relation to these charges arose.
- 10.16 Our provisional conclusions in relation to the compliance of BT's OSIS charges with GC19 were not contingent on any analysis of BT's historic costs and revenues of supplying OSIS because, for the reasons set out above, it was not possible to identify what The Number and Conduit had paid for the BT GC19 data set. Consequently, our view was that, in resolving these disputes, Ofcom was not required to state what the regulated charges for the BT GC19 data set within OSIS should have been.
- 10.17 As regards BT's charges moving forward, Ofcom's view was that charges for any BT GC19 data set provided by BT separate from OSIS in the future would need to be set by reference to the specific nature of the product requested, such as the precise format for delivering the data and the frequency within which updates should be provided. But we pointed out that the type of costs associated with making available the BT GC19 data set might typically include:
- (i) costs of establishing and operating the means of transmitting the data from BT to the DIP(s); and
  - (ii) costs of managing the relationship with the DIP(s), including account management, contract management and billing.

## Submissions received

### The Number

- 10.18 In its response to the August 2006 document, The Number<sup>104</sup> argues that Ofcom has failed to discharge its statutory duty under section 188(2) of the 2003 Act to properly resolve the dispute by not determining a charge for the BT GC19 data set. In doing so, The Number notes that:
- (i) Ofcom has accepted that each of The Number and Conduit has, in effect, requested information falling within GC19 for the purposes of these disputes (which observation remains, in our provisional view, correct for the reasons set out in **Section 7** of this explanatory statement);
  - (ii) The Number has submitted that these disputes relate to BT's charges and requested that Ofcom should fix the proper scope of 'relevant information' under GC19 in light of *KPN* and, therefore, give a direction under section 190(2)(b) of the 2003 Act fixing the charges for the BT GC19 data set within OSIS;
  - (iii) Ofcom decided, on 5 December 2005, to handle The Number's dispute, after that BT had refused to hold meaningful commercial negotiations with The Number and there being no alternative means available for resolving the dispute;

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<sup>104</sup> For the purposes of referring **in this Section** to their submissions, Ofcom refers to The Number and Conduit collectively as "The Number", except where the context otherwise requires.

- (iv) Ofcom decided, on 13 January 2006, to handle Conduit's dispute, after that BT had refused to hold meaningful commercial negotiations with Conduit and there being no alternative means available for resolving the dispute;
- (v) Ofcom's duty under section 188(2) of the 2003 Act is to consider these disputes and make a determination for resolving them;
- (vi) Ofcom's "only powers" to resolve a dispute (section 190(1) of the 2003 Act) are those set out in section 190(2) of the 2003 Act;
- (vii) those powers are specific and limited (and do not include) a requirement to first decide whether BT's past charges are consistent with its obligations under GC19, particularly any preliminary requirement which might have the ability to subsequently prevent Ofcom from actually resolving the dispute; and
- (viii) by Ofcom's own admission, in setting the scope of the issues in dispute to be resolved, such resolution require (in accordance with section 190(2)(b) of the 2003 Act) that Ofcom should exercise their power to determine what BT's charges should be going forward (as well as retrospectively).

10.19 Specifically, on the substance of Ofcom's reasoning for not fixing a charge, The Number responds, in summary, as follows:

- (i) BT's past charges were "not inconsistent" with BT's obligations under GC19 and therefore they cannot or are not obliged to fix the charges: The Number argues that such a finding – even if correct – does not discharge Ofcom from its obligation to fix a charge to resolve these disputes.
- (ii) The Number and Conduit have requested and received all of OSIS (no separate BT GC19 data set being available), so it could not lawfully make a determination setting out the proper amount of a charge for the data received: The Number questions whether this view was supported by the facts and whether it was consistent with Ofcom's provisional views that The Number and Conduit have effectively requested a sub-set of OSIS data that falls within the terms of GC19.
- (iii) BT's price for OSIS was for the bundle of notional data products and there was no stand-alone price for the BT GC19 data set against which to compare what a cost-oriented price would look like: The Number argues that such a finding – even if correct – does discharge Ofcom from its obligation to fix a charge to resolve these disputes; it claims that Ofcom should identify a price paid for the BT GC19 data within OSIS and The Number proposes a methodology for this purpose.
- (iv) In setting a charge moving forwards, the costs would depend on how BT will actually make the BT GC19 data set available, so Ofcom should not prescribe relevant costs and therefore charges at this point: The Number argues that this should not be a reason for failing to fix a charge; rather, Ofcom should apply the principles it has identified to fix the charge assuming the supply of the BT GC data set through OSIS by CD-rom followed by FTP file transfer updates 6 days per week.

## Other responses

- 10.20 In its response, **Thomson** stated that BT's charges for its OSIS data had previously been calculated on the basis of BT recovering the total costs of running the OSIS database and had been recovered on a usage-basis. Whilst welcoming Ofcom's provisional views on the application of the principles established in *KPN* to the BT GC19 data set, Thomson also requested that Ofcom clarify that these principles would preclude recovery on a usage-basis.
- 10.21 Thomson also considered that even when data other than the BT GC19 data set is purchased on commercial terms there should be no transfer of additional costs to DIPs:
- (i) to the extent that BT (or another CP) already incurs these costs, either because they are under an obligation to recover that data for another purpose or because they are recompensed for doing so (Thomson gives the example of BT currently being recompensed for supplying the BT Phone Book); or
  - (ii) to the extent that such costs apply to 'record processing' data or other information required for the practical provision of GC19 data to ensure that the DIP can process the GC19 data they have purchased.
- 10.22 **Yell** makes a similar set of comments in its response.

## Ofcom's response

- 10.23 Ofcom has considered the detailed arguments raised by The Number and we set out our response below.

### **The Number: The disputes would be unresolved unless a charge is fixed**

- 10.24 Ofcom accepts The Number's main argument that Ofcom should now fix a charge for the BT GC19 data set only to be applied since 25 July 2003 in order to properly resolve these particular disputes. It is appropriate to do so, given the possibility that the parties could remain in dispute about this specific matter, even in light of our other provisional findings set out in this explanatory statement. We set out below (**paragraphs 10.48 to 10.123**) our approach to fixing these charges, including our provisional findings as to the fixed amounts.
- 10.25 As a result, there is no need to comment on each detailed argument related to this issue made by The Number in its response to the August 2006 document. However, Ofcom will comment below on certain matters to clarify our position.

### **The Number: The actual data requested from BT by the parties**

- 10.26 As seen from **paragraph 10.19** above, The Number challenges the suggestion by Ofcom in the August 2006 document that it (together with Conduit) asked for and received all of OSIS and not a separate GC19 product and the inferences that Ofcom draws from this.
- 10.27 The Number makes several points in this regard, particularly:
- (i) The inconsistency of this position with Ofcom's conclusion that, "as a matter of fact", the parties had requested a sub-set of data from OSIS that falls within the terms of GC19.



- (ii) The fact that requesting GC19 separately would not, according to The Number, have made sense in the historical context in which directory data has been provided by BT. Specifically, The Number points out that, while it would (prior to 25 July 2003 and at the time it entered into the OSIS Licence) have been unable to obtain directory information directly from CPs other than BT as there was no equivalent to GC19 in the old licensing regime, it had the right, to request from BT downloads from OSIS under Condition 82 of its old 1984 Act licence. Despite the introduction of GC19, The Number adds that the existence of USC7 meant that it had no incentive to make use of GC19 to approach other operators for a separate supply of their data.
- (iii) The fact that BT responded to a request by Conduit for a separate stream of BT-only data falling within the terms of GC19 by refusing to provide such data.

10.28 The Number concludes (at paragraph 5.29 of its response) its points by stating that:

5.29 By way of summary, in view of Ofcom's clear acceptance that The Number and Conduit made a valid request for the GC19 data set and that this is therefore the subject of the dispute which requires to be resolved, it is clearly self-contradictory for Ofcom to argue (see 7.328) that simply because The Number and Conduit received and used the full contents of the OSIS database (i.e. more than the minimum they were entitled to receive, and more than BT was obliged to provide, in the context of GC19), somehow no issue arises with respect to which Ofcom may lawfully make a determination. BT cannot be excused from compliance with its regulated obligations in respect of one part of the data just because, in acting to discharge those obligations, it went further and provided additional data, and in circumstances in which it expressly refused to provide the relevant data sought.

- 10.29 As already explained, Ofcom's provisional view is that it should determine a charge for the BT GC19 data set. But, for the avoidance of doubt, Ofcom was not relying on the absence of any specific request for GC19 data on a stand-alone basis to support its position not to fix a charge in the August 2006 document. Indeed, it is important to clarify the significance that Ofcom attaches to the fact that the evidence before it suggests that both The Number and Conduit clearly requested and required the full set of data provided from OSIS.
- 10.30 First, as discussed in more detail in **Section 7**, Ofcom considers that the requests by The Number and Conduit for OSIS data necessarily included requests for the BT GC19 data set as the latter is contained within the former. However, the key issue in assessing in **this Section** whether the parties have paid amounts for data in excess of that permitted by GC19 has to focus on whether or not they only wanted the BT GC19 data set or whether, in fact, they specifically wanted – and subsequently used – the full 'bundled' OSIS product containing both the BT GC 19 data and the other above-mentioned three notional products.
- 10.31 This is because the question that Ofcom must decide by reference to the terms of GC19 is whether the amount each of The Number and Conduit pays (and has paid) for the BT GC19 data set only is (and was) consistent with the cost oriented charge for that data set. However, given that OSIS is and was only ever available as a pure bundle, it is not possible to identify an implicit price paid for the BT GC19 data set to compare to the cost oriented charge for that data set.
- 10.32 However, if either The Number or Conduit had, in fact, only ever wanted and used the BT GC19 data set, but BT had nevertheless provided a bundle comprising that data set together with other data, then it may have been appropriate for Ofcom to consider that – whatever the actual data contained within OSIS – the price paid for OSIS was effectively the price paid to obtain the BT GC19 data set. This is because

it would not be appropriate for BT to bundle additional data alongside the data it was required to provide under GC19 and then charge The Number and Conduit extra for this data, unless they made use of this additional data. But, on the evidence before Ofcom, there is nothing to suggest that this is the case in the present disputes.

- 10.33 In fact, neither The Number, nor Conduit, has disputed in these disputes that they did require and use the additional (non-BT GC19) data set within OSIS which – according to our provisional views – falls outside the scope of BT's obligations under GC19. For the avoidance of doubt, despite its query about the terms on which BT might supply its own subscriber data, we refer again to Conduit's confirmation to Ofcom (see **paragraph 7.92**) that it would nonetheless need the additional data it currently receives from OSIS. In any event, we consider this fact clear from Conduit's (as well as The Number's) submissions to Ofcom in these disputes.
- 10.34 We therefore do not consider the historical context in which directory data has been provided by BT (to which The Numbers refers) is of relevance to that issue.

### **The Number: Unbundling the price paid for GC19 data within OSIS**

- 10.35 As noted above, in its response to the August 2006 document, The Number submits that Ofcom should identify the 'unbundled' price for the BT GC19 data set. The Number suggests that it is the regulator's job to unpick the bundled charges of the regulated operator and that the perceived complexity of that task should not be used as an excuse not to carry out the task. The Number contends that the fact that the two products have been supplied together should not prevent Ofcom from disaggregating the charges in order to satisfy itself that the regulated product has been charged at a 'cost-oriented' price. Furthermore, The Number argues that, in the process, Ofcom should also be satisfied that the unregulated product has been charged at a price which is not excessive and anti-competitive.
- 10.36 In the context of making those submissions, The Number proposes a specific methodology for identifying a separate price paid for the GC19 data. That methodology involves, in effect, the following three steps:
- Step 1:** To calculate the maximum that BT should have charged under competition law for the non-BT GC19 data set within OSIS (i.e. notional products (ii) to (iv) identified by Ofcom in **paragraph 10.6** above).
- Step 2:** To subtract the maximum amount identified under Step 1 from the amount actually paid for OSIS overall (a known amount) in order to calculate the minimum amount that BT was effectively charging for the BT GC19 data set.
- Step 3:** Should the minimum derived charge calculated under Step 2 exceed the calculated cost oriented charge calculated by Ofcom, then, according to The Number, this would identify the minimum amount of any overpayment for the BT GC19 data set.
- 10.37 It is clear from Step 1 above that The Number's proposed methodology is contingent on Ofcom identifying a price ceiling under competition law for the provision of the non-BT GC19 data set. Therefore, in resolving these disputes, it would mean, in effect, that Ofcom would be carrying out (at least, in part) a competition law investigation into BT's charging for the non-BT GC19 data set as an input to determine regulatory disputes (brought under section 185(2) of the 2003 Act) about the charging for the *ex ante* regulated BT GC19 data set.

- 10.38 Moreover, The Number's proposed methodology starts, in effect, from the assumption that the non-BT GC19 data set within OSIS was not excessively priced from a competition law perspective – i.e. The Number's proposal is based on this data being charged at, but not above, the price ceiling for this data set under competition law.
- 10.39 In effect, The Number is proposing that there is an overall price ceiling for BT's provision of OSIS calculated as the sum of:
- (i) the cost oriented charge for the provision of the BT GC19 data set as calculated by Ofcom; and
  - (ii) the price ceiling under competition law for the non-BT GC19 data set within OSIS as calculated by Ofcom.
- 10.40 We note that, under The Number's proposed approach, any total "overcharge" measured against this ceiling for the provision of the pure bundle of OSIS data would, in effect, be wholly allocated to the BT GC19 data set. Therefore, we further note that The Number's proposal necessarily dismisses the possibility that the overcharge may have been related to the provision of the non-BT GC19 data set.
- 10.41 An alternative to The Number's proposal would be to start from the premise that the BT GC19 data set was, in fact, charged at the appropriate cost-oriented level. This charge could then be deducted from the overall OSIS charges to derive an implied charge for the non-BT GC19 data set. It could then be assessed whether this derived charge for the non-BT GC19 data set was, at first blush, excessive in the competition law sense.
- 10.42 Both The Number's premise in its proposed methodology and the said alternative premise start from an *assumption* that there is no overcharging for one of the two defined elements of the bundle – i.e. the BT GC19 data set and the non-BT GC19 data set – and so allocate any overall overcharge in its entirety to the other element. It is unclear to Ofcom that one premise is more valid than the other, or indeed that either premise is valid. Indeed, both of these approaches seem somewhat arbitrary.
- 10.43 Ofcom's position remains that there is no clear, non-arbitrary, way to identify the price which The Number paid for the BT GC19 data set within the pure bundle actually purchased. As such, there is no clear means of assessing whether The Number overpaid for the BT GC19 dataset when compared to the cost-oriented charges identified by Ofcom in resolving the present disputes. However, Ofcom has considered whether it would be appropriate to view any overall "overcharge" identified in relation to the provision of the bundled OSIS product as, at least in part, representing an overcharge for the provision of the GC19 data set. Ofcom's views on this are set out at **paragraphs 10.124 to 10.135** below, where we consider The Number's claim for retrospective adjustment to charges paid by it to BT.

### **The Number: Cost orientation of current BT charges**

- 10.44 Ofcom notes The Number's view that the current OSIS charging methodology is inconsistent with cost-orientation obligations. The Number makes a number of points regarding cost allocation and also the current charges which exist for the provision of GC19 data within OSIS. In particular, The Number claims that, as BT charges on a usage basis for OSIS (including for the BT GC19 data set), there is no correlation or alignment between the charges to DIPs relating to BT GC19 data set and the actual

cost of making that data available to them. As such, The Number believes that BT's charges are therefore very unlikely to have been consistent with GC19.

10.45 Ofcom's views below on charging deal with these specific points.

### Other responses

10.46 Ofcom would make the following comments on the submissions made by Thomson and Yell:

- i) Ofcom's views on an appropriate charging mechanism for recovering costs for the BT GC19 data set are set out below; and
- ii) given Ofcom's provisional view that USC7 is *ultra vires*, Ofcom cannot determine an appropriate cost recovery mechanism for any data provided by BT outside of the scope of GC19.

10.47 However, the comments of Thomson and Yell will be considered as part of the general policy review discussed in **Section 12**. Thomson and Yell (and any other parties) will be invited to make further submissions on these matters.

### Ofcom's approach to fixing the charge for the BT GC19 data set

#### Introduction

10.48 We set out below Ofcom's approach to fixing the appropriate charge for the BT GC19 data set since 25 July 2003. Specifically, the structure of our analysis is as follows:

- (i) **paragraphs 10.49 to 10.55** set out our views as to how the 'cost orientation' requirement is to be properly interpreted in light of the *KPN* judgment;
- (ii) **paragraphs 10.56 to 10.59** set out our methodology for assessing costs incurred within BT to identify the cost ceiling for supplying the BT GC19 data set;
- (iii) **paragraphs 10.60 to 10.65** set out details of the cost information provided by BT in relation to its historic provision of OSIS to requesting DIPs;
- (iv) **paragraphs 10.66 to 10.107** assess which of the above-mentioned costs should be included within the cost ceiling for supplying the BT GC19 data set; and
- (v) **paragraphs 10.108 to 10.123** set out our provisional views on the charging structure which should apply to recover the relevant costs and the charges which should apply for the provision of the BT GC19 data set to The Number and Conduit.

#### Interpretation of cost orientation in light of the *KPN* judgment

10.49 As set out above, GC19.3 requires that, where BT supplies the relevant 'Directory Information' in accordance with paragraphs 19.1 and 19.2, it must do so on terms that are (among other things) "fair, cost-oriented and non-discriminatory". That provision implements the obligation on the UK, imposed by Article 25(2) of the USD, to ensure that undertakings that are required to provide the 'relevant information' do so on terms that are "fair, objective, cost oriented and non-discriminatory". In our view, the obligation on BT to provide the 'Directory Information' on fair, cost-oriented and non-discriminatory terms is to be interpreted in the same way as Article 25(2).

(We do not consider that the absence of the word “objective” in GC19.3 affects that point.)

10.50 In *KPN*, the ECJ had to consider, in answering the second question referred to it, the interpretation of the equivalent part of Article 6(3) of the RVTD (the predecessor to Article 25(2)).

10.51 As seen from the full citation of the judgment in **Section 5** of this document, the ECJ accepted (at paragraph 38 of its judgment), as a matter of fact, that:

38...the compilation of basic data relating to subscribers, that is to say their names, addresses and telephone numbers, is inextricably linked to the telephony service and does not demand any particular effort on the part of the provider of the universal service.

10.52 It went on (at paragraph 39 of its judgment) to agree with the Advocate General that:

39...the costs relating to the compilation, or allocation, of those data [*i.e. names, addresses and telephone numbers*] must in any event be borne by the supplier of a voice telephony service and are already included in the costs and revenue of such a service...

10.53 As a result, the ECJ held (at paragraphs 39 to 40) that:

39...In those circumstances, passing the costs associated with compiling or allocating data on to persons requesting access to them would result in an excessive and unwarranted offset of the costs in question.

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

10.54 Therefore, the key point is that, where costs relating to data “*must in any event be borne*” by the CP as part of its voice telephony business, those costs cannot be taken into account in determining whether charges are cost-oriented. In the words of the Advocate General (at paragraph 51 of his Opinion), costs may be taken into account in that regard, as a result of that obligation, where:

51...a telephone provider can demonstrate that it had to incur specific extra costs in order to be able to fulfil [*that obligation*] and that it would not have incurred those costs in the context of the management of its own customer accounts...

10.55 Where – as in *KPN* – it is as a matter of fact the case that the data required to be supplied would have been compiled and allocated even absent the obligation, then the costs of compilation and allocation cannot be taken into account in determining whether charges are cost-oriented. In such a case, only the costs of making data available can be so taken into account.

### **Methodology followed by Ofcom in setting charges**

10.56 In fixing cost-oriented charges, Ofcom would typically use a long run incremental cost (“**LRIC**”) standard plus a suitable contribution to common costs. However, from the *KPN* judgment, it can be seen that a contribution to costs common with the voice telephony business would not, in this instance, be permissible.

10.57 The stand alone cost (“**SAC**”) of a service consists of its LRIC and all relevant common costs and is usually considered the ceiling for regulated charges. However, given the *KPN* judgment and the exclusion of costs common with the voice telephony

business, an alternative ceiling can be identified in the circumstances to the BT GC19 data set.

- 10.58 **Figure 10.1** below illustrates that the ceiling is restricted to those costs that are incremental to the provision of BT GC19 data set plus costs common between the provision of BT GC19 data set and the provision of the other (non-GC19) data within OSIS.<sup>105</sup> In other words, in order to estimate the ceiling, Ofcom must identify the cost generating activities within BT that fall within categories c and d in **Figure 10.1** below, as these are the only types of cost which would be recoverable from charges from the BT GC19 data set.

**Figure 10.1: Illustration of cost standard for calculation of GC19 charge**

a	Cost <b>a</b> : Incremental cost of voice telephony <i>Not relevant to GC19 charge</i>
b	Cost <b>b</b> : Common costs between voice telephony and GC19 <i>Not relevant to GC19 charge</i>
c	Cost <b>c</b> : Incremental cost of making available GC19 data <i>Relevant to GC19 charge</i>
d	Cost <b>d</b> : Common costs between GC19 and other directory information products <i>Relevant to GC19 charge</i>
e	Cost <b>e</b> : Incremental cost of other directory information products <i>Not relevant to GC19 charge</i>

Note: Size of boxes are not to scale

- 10.59 Once these costs have been identified, Ofcom must then assess a cost-oriented charging structure.

### Cost information available to Ofcom

- 10.60 As part of this investigation, BT has provided detailed cost information relating to its provision of OSIS data since 2003. The starting point for Ofcom's analysis of these costs in line with the methodology outlined above is to understand how BT currently provides data from OSIS and the incurred costs it has identified.
- 10.61 BT operates OSIS as an operationally distinct business ("**BT OSIS**") providing aggregated directory data of both BT subscribers and other CPs. BT OSIS's first step in creating the OSIS product is to collect the required data from BT Retail and from other CPs. BT OSIS pays BT Retail and other CPs for the data provided which, as set out previously, will often include data outside the scope of GC19.
- 10.62 BT then incurs further costs (on top of the costs of obtaining the core data from upstream communications providers) in providing the OSIS product to DIPs. These include the costs of operating and maintaining the separate database system and of making the product commercially available. Costs are driven by activities associated

<sup>105</sup> By definition, the costs found to be common between the BT GC19 data set and non-BT GC19 data set will be those which are not incremental to either product.

with checking the data, identifying and fixing problems, liaising with upstream providers and managing the commercial relationship with the downstream purchasers.

- 10.63 Ofcom has also requested information from BT about its activities and costs in providing data to OSIS – i.e. in actually providing the data about its own subscriber base over the relevant interfaces onto the OSIS system. This has clarified that BT provides directory data about its own subscribers plus directory data about subscribers of CPs reselling BT's regulated WLR product.
- 10.64 To clarify, therefore, the stated end-to-end costs BT incurs in providing OSIS to DIPs include:
- (i) costs to BT, incurred upstream of OSIS, in providing directory data of its own subscribers and subscribers of its WLR service providers to OSIS, including costs of gathering certain information from subscribers;
  - (ii) costs to OSIS of acquiring data from other communications providers (based on outpayments made to those OCPs); and
  - (iii) costs to BT of operating OSIS as a stand-alone business/product provided to DIPs (covering systems costs, development costs and staff costs).
- 10.65 A full breakdown of BT's stated end-to-end costs of providing OSIS is set out in **Annex 4** to this explanatory statement.

### **Assessment of costs recoverable from GC19 charges**

- 10.66 Given the methodology set out above, Ofcom's task is essentially to assess which of the costs provided by BT fall within the identified categories c and d in **Figure 10.1** above.
- 10.67 The costs of acquiring data from other CPs clearly relate to the incremental costs of providing the non-BT GC19 data set from OSIS (i.e. **category e** in **Figure 10.1** above). However, further analysis is needed of the other costs and the activities to which they relate.
- 10.68 As a starting point for this analysis, Ofcom considers that only the following broad activities are relevant when considering the provision of the BT GC19 data set to requesting DIPs:
- (i) activities involved in obtaining the BT GC19 data set from a subscriber (i.e. name, address, telephone number, together with a subscriber's preferred directory status); and
  - (ii) activities involved in providing the information in (i) above to requesting DIPs as a viable commercial offering.
- 10.69 However, that starting point does not imply that the costs of these activities would be recoverable from a cost-oriented GC19 charge.
- 10.70 To recap, as set out in **Section 9**, we consider provisionally that the data covered by GC19 is essentially data which BT compiles in providing its voice telephony service to its subscribers. The data (as defined) reflects that which BT would need in order to actually provide its fixed line services – the name of the contracting party, the

address where the line should be installed and the relevant telephone number assigned by BT to its subscriber for the use of PATS.

- 10.71 On that basis, in line with *KPN*, we do not consider that the costs of “compilation or allocation” of those data – i.e. obtaining that data from subscribers and inputting it onto BT systems – should be taken into account in considering what charges BT could, consistently with the principle of cost-orientation in *KPN*, have made for the supply of GC19 data to DIPs. Costs of these activities can be considered to be, in effect, common between provision of voice telephony and provision of the BT GC19 data set – i.e. **cost category b** in **Figure 10.1** above – and would therefore not be recoverable.
- 10.72 We should record, however, that were other data to fall within the scope of GC19 (either because of any measures we would be considering taking in order to enlarge that scope following our policy review – see **Section 12** – or because a court were to take the view that the scope of the current definition is greater than we consider it to be) and provided it could be shown that a CP (such as BT) would not have collected or allocated this other data absent the GC19 obligation, these additional collection and allocation costs would be incremental to the provision of such GC19 data set and therefore should, in our view, be recoverable costs.
- 10.73 Next, it is necessary to consider what activities are required by BT to provide the BT GC19 data set as a stand-alone product on a viable basis, that is to say, which activities should be considered as falling within the defined cost ceiling for the BT GC19 data set. As noted, BT has provided information relating to the way in which data was actually provided to DIPs – i.e. via OSIS. As set out, the output of OSIS comprises both the BT GC19 data set and other data. However, Ofcom must assess which of the costs of providing OSIS would have been required for the provision of the BT GC19 data set as a stand alone product.
- 10.74 Ofcom’s provisional view is that BT could provide the (separate) BT GC19 data set direct to requesting DIPs in the same way that BT provides data (which will include GC19 data) *to OSIS* direct from its upstream systems.
- 10.75 Ofcom’s provisional view is also that certain costs incurred by BT in providing OSIS as a commercial offering should be considered as *incremental to the provision of the non-BT GC19 data set*. In other words, those costs would not have been incurred had BT not provided the non-BT GC19 data set alongside the BT GC19 data set. We set out below which of the costs stated by BT that we consider provisionally are incremental to the provision of the non-BT GC19 data set and which would still have been incurred providing the BT GC19 data set on a stand-alone basis.

#### BT’s stated costs in obtaining data from subscribers and providing it to OSIS

- 10.76 As mentioned above, Ofcom has required BT to provide details on the activities (and associated costs) it carries out in providing directory data *to OSIS*. BT has stated that these activities relate to specific customer facing activities which capture subscribers’ specific requirements for how they want data (which could be data about the actual subscriber or, where different, the actual user of the telephone number) to be presented within OSIS (and therefore by voice DQ providers and in paper directories). These specific customer facing activities fall broadly into three areas, namely:
- (i) The activity of BT’s employees taking calls on 150, 151, etc (known as the “**15X agents**”): this is the first point of contact between BT and its subscriber, whereby



these agents take orders (or amendments or deletions) for phone lines to capture much of the data for single line directory entries and then input this data onto BT's main records (known as the 'Customer Relationship Management' ("CRM") system, or "CSS"). The agents normally then confirm a subscriber's chosen directory status and, in many cases, create a directory entry onto OSIS.

- (ii) The activity of BT's employees (within its division called BT Directories) dealing with those cases where the 15X agents are unable to process a subscriber's requirements in relation to a directory entry (known as the "**Upstream Data Team**"): these cases include instances where a grouped entry is required. The Upstream Data Team is also involved in processing certain directory entries relating to ported numbers and also relating to subscribers of WLR service providers where specific issues arise<sup>106</sup>.
- (iii) The activity of BT's employees dealing with a subscriber, who wants to create what is known as a 'special directory entry' ("**SDE**") (i.e. the "**Special Directory Entry (SDE) team**"): these employees will specifically liaise with subscribers to understand their requirements and ensure that they are captured on OSIS.

10.77 These activities are considered in more detail below along with Ofcom's assessment of which category these stated costs would fall into.

*(a) Customer Service Channel 15X*

10.78 The cost generating activities under this category relate to the tasks carried out by BT's customer facing 15X agents in creating the directory entry records for input onto OSIS.

10.79 When taking orders for new telephone lines at an installation, a BT Retail sales agent will capture information on the customer (such as the relevant subscriber name, the installation address and, where different, the billing address). This data on the subscriber installation is captured on CSS. A CSS record will relate to a specific installation address to which the relevant PATS are to be provided and contain all telephone numbers at that installation and the name of the subscriber at that installation. In the first instance, BT requires this data to process the order and manage the account appropriately.

10.80 This means that, for some single line entries, the 15X agent will have already captured the identification information needed to create the directory entry in the process of taking the order. However, a subscriber may have specific requirements for their directory entry which do not align with this data set.

10.81 Therefore, before submitting an entry onto OSIS, the 15X agent will ask the customer to confirm their preferred directory status and read back a proposed 'default' directory entry which will pick up various pieces of data already collected from the customer – i.e. the subscriber's name, installation address and telephone number together with other pieces of identification data, such as 'title' and 'honours' which are collected as part of the general account/installation information.

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<sup>106</sup> Ofcom understands that the vast majority of subscriber data provided by WLR service providers to BT is passed on to OSIS without further manual intervention. However, in certain cases the Upstream Data Team will need to recontact the WLR SP to process the information. This is discussed further below.

- 10.82 If the customer is satisfied that the directory entry against that telephone number should appear as set out by the default entry, then the agent will accept this and that entry will be 'auto-generated' from CSS onto OSIS by file transfer. The precise data fields that will be populated for any given auto-generated record will vary according to the specific record. For instance, only a small proportion of residential listings will have data in the 'Title' field (to clarify, this field only relates to professional 'titles') and in the 'Honours' field given that only selected individuals will have such data listed. BT has stated that approximately 70% of all directory listings – which includes 90% of all residential listings – are auto-generated. In all these cases, BT is effectively utilising data already captured for the purposes of providing the customer with PATS and ongoing management of their account.
- 10.83 In providing cost information under this heading, BT has attempted to isolate costs specific to dealing with directory issues with the subscriber. However, in so doing, BT has not attempted to capture costs associated with simply obtaining the subscribers' name or their address. Clearly, obtaining this data would be part of managing customer accounts for the provision of PATS.
- 10.84 In isolating costs, there appear to be two related activities carried out by the 15X agents in dealing with subscriber's directory requirements, namely:
- (i) firstly, the 15X agent is clarifying whether the subscriber wishes to have a directory entry generated onto OSIS – i.e. they are checking the subscriber's chosen directory status; and
  - (ii) secondly, in parallel with that activity, the 15X agent is checking whether the subscriber wishes the 'default' entry to be provided or, whether, in the alternative, it wishes to provide other data or additional data onto OSIS.
- 10.85 In relation to clarifying the directory status of the customer, the Advocate General clearly states in his Opinion in *KPN* (at paragraphs 46 and 47) that costs associated with the maintenance of ex-directory lists fell within the scope of management of the providers' own customers accounts. He is supported in that view by the judgment of the ECJ in Case C-146/00 *Commission v. France* [2001] ECR I-9767, paragraph 68. At paragraph 47 of his Opinion, he states that the maintenance of such lists has to be seen as an activity related to the provision of voice telephony services and not as a separate activity for which costs have to be incurred in order to enable the publication of universal telephone directories, observing that suppliers of voice telephony services will wish to maintain such lists in order to be able to obtain the listing of their customers in directories and hence stimulate the use of their services.
- 10.86 The ECJ did not specifically endorse that point in *KPN* (although its short judgment on the cost-orientation issue is entirely consistent with the Opinion), but Ofcom notes that the point does indeed appear to follow from the ECJ's earlier judgment in the *Commission v. France* case. So although Ofcom accepts that the maintenance of a list of ex-directory customers might well be argued, in the absence of any other discussion of the point at ECJ level, not to be "*inextricably linked to the telephony service*" (paragraph 38 of the judgment in *KPN*), we regard that particular matter as having been determined as a matter of law by the Opinion in *KPN*, applying *Commission v. France*.
- 10.87 Ofcom therefore considers that the costs of part of the activities of Customer Service Channel 15x relating to obtaining the directory status of the subscriber must fall within **cost category b** in **Figure 10.1** above – i.e. common between the costs of provision of voice telephony and provision of BT GC19 data set.

10.88 In relation to activities which relate to allowing a subscriber to provide alternative and/or additional information onto OSIS, Ofcom's view is that these activities are related to the provision of data outside of the scope of GC19 and would fall within **cost category e** in **Figure 10.1** above – i.e. they are incremental to the provision of non-BT GC19 data set within OSIS – and so would not be recoverable from charges for the BT GC19 data set. As previously stated, the data that BT is specifically required to provide under GC19 is data which BT will have gathered in order to manage its customer accounts and no further activity in obtaining this data should be required in order to meet its obligations under GC19.

*(b) Upstream Data Team*

10.89 It follows from the information provided by BT to Ofcom (see **paragraph 10.82** above) that approximately 30% of listings on OSIS are not auto-generated from CSS records. In these cases, further manual intervention is required to ensure the appropriate directory entry is input onto OSIS. Most of the directory listings requiring manual intervention are by the Upstream Data Team. (As already noted above, the Special Data Entry team is used for listings requiring special entries onto OSIS.) The Upstream Data Team also ensures that the overall data relating to BT subscribers on OSIS is accurate and up-to-date.

10.90 The Upstream Data Team operates as a separate team within BT Directories in BT Retail. The purpose of the team's work is to ensure that entries onto OSIS in respect of BT Retail subscribers and the subscribers of WLR Service Providers align with both customer requirements and the requirements of OSIS. In summary, the team does this by:

- (i) liaising directly with the end-user customer (or, as the case may be, the WLR reseller) to identify the specific directory listing requirements of the customer and then either implementing these onto CSS for records to be subsequently auto-generated or inputting the requirements directly onto OSIS; and
- (ii) dealing with problems arising from auto-generated records, including number portability issues and other error reports from OSIS where records have not been accepted – e.g. where a telephone number already exists or unacceptable words have been found in the proposed listing.

10.91 BT has provided Ofcom with a detailed list of the activities of the Upstream Data Team. Broadly, there appear to be two main functions of the team.

10.92 The first function is to allow customers to provide alternative or additional data in their OSIS record – i.e. data outside the scope of GC19 data. For reasons similar to those set out in the assessment of the 15X channel costs, these costs would fall within **cost category e** in **Figure 10.1** above.

10.93 The second function is to manage the passing of accurate and up-to-date data to OSIS by rectifying identified problems and amending entries, where appropriate. The data covered by GC19 is data which BT will have gathered in order to manage its upstream customer accounts. Therefore, even where activity within the Upstream Data Team relates to validating or correcting data that maps precisely onto that required by GC19, e.g. checking the postcode for an installation address, Ofcom's view is that this activity is common between BT's operation of its voice telephony service and the provision of GC19 data. It is implicit that BT must provide accurate information under GC19 in relation to the prescribed scope of data – name, address and telephone number – and, as set out previously, Ofcom's view is that this data will

be the data needed by BT to enter into the contract with its subscriber and manage the provision of PATS. Any activity required to amend this or deal with the quality of the data within the BT GC19 data set must therefore fall within **cost category b** in **Figure 10.1** above.

- 10.94 Ofcom is also of the view that the activities carried out by the Upstream Data Team to deal with the subscriber data of WLR re-sellers would also fall within the above categories. The vast majority of WLR subscriber data is passed to OSIS without intervention by the Upstream Data Team and it appears that intervention is generally only required where additional data beyond that covered by GC19 is supplied or where issues of accuracy arise, as discussed in the previous paragraph. As such, the costs of the Upstream Data Team are not recoverable from the GC19 charge.

*(c) Special Directory Entry team*

- 10.95 Special directory entries (SDEs) allow customers to have additional words in directory entries under field (33) of OSIS (which field is entitled 'Business description') or to have enhanced typeface in paper directories or alternative entries in the same or additional phone books, e.g. where a business may be known by more than one name.
- 10.96 The SDE team processes specific orders for these entries received from other parts of BT. They create orders for SDEs on CSS and create the specific entries on OSIS. This will involve capturing all the directory data for a particular customer as well as the specific SDE fields relating to typeface, 'Business description' and in which directories the entries should appear.
- 10.97 BT charges end-users for SDEs at rates published in Section 1, part 19, sub-part 1 of the BT Retail Price List and the SDE team is responsible for billing for this service. BT has provided Ofcom with details of its revenues from customers for SDEs.
- 10.98 Ofcom's view is that the activities of the SDE team are only required in order to produce specific SDEs for customers. This is because GC19 does not require BT to provide SDEs and only obliges BT to provide requesting DIPs (such as The Number) with a defined set of data about the subscriber which is obtained by BT in entering into the contract and managing the customer account for the provision of PATS. As such, Ofcom provisionally considers the activities of the SDE team as falling outside of the activities required to provide the BT GC19 data set. They would therefore fall within **cost category e** in **Figure 10.1** above.

BT's other stated costs of providing data to OSIS

- 10.99 BT has also provided cost information related to the provision of data to OSIS under the headings 'IT support', 'CSS costs' and 'Central overhead' (see **Annex 4**).
- 10.100 Ofcom understands that 'IT support' costs are directly related to the operation of the Upstream Data Team. As set out above, Ofcom does not believe any of the costs associated with the activities of the Upstream Data Team should be recoverable from charges for the BT GC19 data set. For the same reasons, it follows that the IT support costs associated with this team should also not be recoverable.
- 10.101 Ofcom also understands that the costs within 'CSS costs' and 'Central overhead' represent an allocation of the overall costs of CSS, which supports a number of BT products, and of general overheads. These costs are therefore not incremental to the

provision of the BT GC19 data set. For this reason, Ofcom does not consider that they should be recoverable from the charges for the BT GC19 data set.

### BT's stated costs of providing OSIS to DIPs

10.102 As explained above, in providing OSIS as a commercial offering, BT has (among other things) undertaken activities to manage relationships with upstream CPs, to aggregate the data onto a separate database, to quality control this data and to manage commercial relationships with requesting DIPs (such as The Number).

10.103 **Annex 4** of this explanatory statement provides a full breakdown of all BT's costs of providing the OSIS product. It is to be noted again that, in Ofcom's provisional view, the BT GC19 data set could have been provided on a stand-alone basis direct from BT's upstream system as a file transfer in the same way that BT itself provides auto-generated records onto OSIS. As such, in Ofcom's provisional view, many of the costs of operating OSIS as a separate system are considered to fall outside of the ceiling for the BT GC19 data set as defined in **Figure 10.1** above. These costs include:

- (i) OSIS system costs;
- (ii) labour costs associated with receiving data into OSIS;
- (iii) labour costs of managing upstream CPs;
- (iv) labour costs of OSIS product development;
- (v) labour costs of verifying/checking data received onto OSIS;
- (vi) labour costs of 'grouping' data within OSIS;
- (vii) labour costs of OSIS systems maintenance and data storage; and
- (viii) labour costs of OSIS system administration.

10.104 Ofcom considers provisionally that these costs would not have been incurred in providing a stand-alone BT GC19 data set. Ofcom has provisionally also excluded costs provided by BT relating to depreciation, support team costs (including legal and regulatory costs associated with OSIS) and costs stated by BT in relation to the development of an OSIS replacement system.

10.105 Therefore, in light of above-mentioned excluded costs, Ofcom considers provisionally that only three cost items identified by BT within its costs of operating OSIS would be relevant to the provision of a stand-alone BT GC19 data set product and would therefore be considered as common between the provision of the BT GC19 data set and of the other data on OSIS. These three cost items are:

- (i) **Transmission of data to DIPs.** These are labour costs associated with operating the DIPs' interface with BT to receive data from OSIS. We consider provisionally that these costs would still be incurred should DIPs only have received the BT GC19 data set from BT as this data would still need to be transmitted from BT's systems to the DIP.
- (ii) **Relationship management of downstream DIPs.** These are labour costs of managing the customer accounts for OSIS licencees. Ofcom's provisional view is

that the activities falling within this category would still need to be performed by BT to establish and maintain commercial relationships with DIPs in order to meet its obligations under GC19 in providing a stand-alone BT GC19 data set product.

- (iii) **'Onboarding'**. This activity relates to the one-off costs of signing up new DIPs to the OSIS product. For example, this activity may include credit checking and the entering into formal contracts between the parties. BT has provided Ofcom with a breakdown of these costs to separate out the 'onboarding' of new upstream CPs supplying data to OSIS and the 'onboarding' of new DIPs receiving data from OSIS. Ofcom's provisional view is that the latter activities would be required for BT to supply a commercially viable stand-alone BT GC19 data set product.

### Ofcom's provisional conclusions on costs recoverable from GC19 charges

10.106 From the above assessment, Ofcom has identified the following costs provided by BT as recoverable from the BT GC19 data set.

**Table 10.1: Costs recoverable from the BT GC19 data set**

Activity	2003/04, £	2004/05, £	2005/06, £
Transmitting data	17,781	13,370	13,133
Relationship management of downstream DIPs	313,998	236,109	231,928
Onboarding	7,545	5,673	5,573
<b>Total</b>	<b>339,323</b>	<b>255,152</b>	<b>250,634</b>

10.107 We note that in most cases where Ofcom must set regulated cost-oriented charges, it will have regard to whether a regulated cost of capital employed should be included. However, because of the conclusions in *KPN*, Ofcom's view is that, as a matter of law, allowing for such a return would not be appropriate in this case. In any event, in this case it is not clear what BT's capital employed would be. Although BT's regulatory accounts for 2003/04 and 2004/05 show negative capital employed for 'Directory Information' generally, this covers BT's entire Directory Information business, not the capital employed for just supplying the BT GC19 data set. In the absence of better information, Ofcom's provisional view is that there is no material capital employed in the provision of the BT GC19 data set and so an allowance for the cost of capital employed is not required in this context.

### Fixing the charge for the BT GC19 data set

#### The charging structure

10.108 Ofcom considers provisionally that the principle of cost-orientation dictates that a cost-oriented charging structure is appropriate, in line with the Advocate General's Opinion in *KPN*. Ofcom has therefore taken steps to determine the most appropriate charging structure for the BT GC19 data set, by reference to the drivers of the costs of making available the BT GC19 data set. Our analysis focuses on the characteristics of relevant activities that result in the occurrence of costs.

10.109 Ofcom's provisional assessment of cost drivers is based on the information presently available to it. Ofcom considers that the exact form in which the BT GC19 data set is supplied by CPs in the future may dictate that an alternative charging structure would be more appropriate in future.

10.110 In light of those introductory observations, we turn below to Ofcom's provisional assessment of the relevant cost drivers in relation to each of the three cost items referred to in **paragraph 10.105** above. In summary, the drivers of cost associated with each relevant cost item imply that an appropriate charging structure is one in which costs are divided equally between DIPs. However, it should be noted that, if BT GC19 data set were supplied in a variety of forms in the future (for example, if DIPs receive data at different frequencies or in different formats to one another), it may be appropriate to deviate from a uniform charge for all DIPs.

#### Cost driver for transmission of data to DIPs

10.111 This activity relates to tasks such as scheduling database extracts, and testing the integrity of electronic links and resolving any associated problems.

10.112 Ofcom's provisional assessment, based on available information presently before us, is that the larger part of the costs associated with these activities are likely to vary with the number of DIPs with which an electronic link is maintained. As such, the costs associated with transmission activities are considered to be driven by the number of DIPs.

#### Cost driver for relationship management of downstream DIPs

10.113 This activity relates to tasks such as the billing of DIPs, the management of DIP accounts and the investigation of contractual breaches by DIPs.

10.114 Ofcom's provisional assessment, based on available information presently before us, is that the costs associated with these activities are likely to vary with the number of DIPs to which GC19 data is provided. As such, the costs associated with downstream relationship management activities are considered to be driven predominantly by the number of DIPs.

#### Cost driver for 'onboarding'

10.115 This activity relates to the signing up of new DIPs, including credit checking and the entering into formal contracts between the parties.

10.116 Ofcom's provisional assessment, based on available information presently before us, is that the costs associated with these activities are likely to vary with the number of new DIPs for which these activities are necessary. However, in the interests of simplicity, and taking into account that this cost is relatively minor, Ofcom has apportioned these costs equally across DIPs in calculating a retrospective charge for the BT GC19 data set.

#### The provisionally fixed cost-oriented charge for the BT GC19 data set

10.117 Using the methodology described above, Ofcom has provisionally determined compliant charges for the supply by BT of its BT GC19 data set since 25 July 2003. As indicated above and as set out in Annex 4, Ofcom has set these charges using available cost information for the financial years 2003/04, 2004/05 and 2005/06.

10.118 In fixing that charge, Ofcom has assumed that the number of DIPs purchasing BT's GC19 data would be the same as the number of DIPs which purchased the OSIS data set during those periods. Cost oriented charges are therefore based on dividing the recoverable costs during the relevant period by the number of DIPs purchasing OSIS during that period.

10.119 However, this only produces figures for the financial years 2003/04, 2004/05 and 2005/06. Ofcom is required here to set charges since 25 July 2003, including moving forward. This has required the following further calculations:

- (i) to set the charge for the period 25 July 2003 to 31 March 2004, Ofcom has pro-rated the annual charge calculated following the above methodology, based on the number of relevant days in this period (i.e. 68% of the calculated annual charge for financial year 2003/04); and
- (ii) in the absence of financial data for the period since the end of financial year 2005/06, Ofcom has assumed that the (annualised) cost-oriented charge is unchanged from that calculated for the financial year 2005/06.

10.120 In assuming an unchanged charge for periods after the 2005/06 financial year, Ofcom notes that BT's costs relating to making available GC19 data are broadly flat between the financial years 2004/05 and 2005/06; Ofcom considers it likely that, over this period, any increase in input costs was counterbalanced through efficiency savings. The number of DIPs purchasing data was also relatively stable. In the absence of further information, Ofcom considers it appropriate to assume that this pattern would have continued between the financial years 2005/06 and 2006/07 and that such costs form a reasonable basis for setting charges on a prospective basis.

10.121 However, Ofcom acknowledges that moving forwards, the number of DIPs purchasing the BT GC19 data set may be greater or lesser than that assumed in this analysis, which may have implications for the appropriate level of the charge to each DIP. Similarly, the number and form of transmissions to each DIP could vary in future. Further comments on BT's charges moving forwards are set out below.

10.122 In conclusion, Ofcom presents its provisional view of the appropriate charges which should have applied since 25 July 2003 for the provision of the BT GC19 data set to The Number and Conduit.

**Table 10.2: Provisionally determined charges for the BT GC19 data set**

Period	Charge for BT GC19 data set during period (per DIP)
25 July 2003 – 31 March 2004	£6,649
1 April 2004 – 31 March 2005	£5,934
1 April 2005 – 31 March 2006	£5,967
1 April 2006 onwards	£5,967 <sup>1</sup>

**Note:** 1. Annual charge applying for each 12 month period starting on 1 April. Charge should be pro-rated for any period of less than 12 months for which data is supplied within OSIS.

10.123 The above charges are based on the cost ceiling for supplying the BT GC19 data set. Since this includes costs which may be common with supplying the non-BT GC19 data set, the above charges represent a maximum for the cost-oriented charge for the BT GC19 data set. However, given that all DIPs wanted and used the other components of OSIS (ie the non-BT GC19 data set), even if the charge for the BT GC19 data set allowed a less than full contribution to these common costs, the remainder of the contribution would have come from the other products purchased anyway.



## The claims for retrospective adjustment of alleged overpayments

- 10.124 We have set out above our provisional views on the cost oriented charges to apply for the provision of the BT GC19 data set since 25 July 2003. This deals with the specific request from the The Number and Conduit that Ofcom should exercise its discretion under section 190(2)(d) to issue a direction setting such charges.
- 10.125 However, as Ofcom emphasised in the August 2006 document, the crux of the parties' referrals in this respect was their view that the amounts they had paid and were paying to BT for directory data were inconsistent with BT's requirements under USC7 *as well as* GC19. For reasons set out in **Section 6** of this document, Ofcom remain of the provisional view that USC7 is *ultra vires*. Therefore, this brings Ofcom back to the issue of whether the respective amounts the parties paid to BT were consistent with BT's obligation to provide the BT GC19 data set on (among other things) cost oriented terms.
- 10.126 In considering that issue, a preliminary matter for Ofcom's consideration is whether the parties actually wanted and requested all of the data within OSIS or whether they only wanted and requested the GC19 data set. As set out at **paragraphs 10.35 to 10.43** above (which set out our response to certain points in this regard raised by The Number in response to the August 2006 document), Ofcom's provisional view remains that the parties clearly wanted and requested all of the data within OSIS (albeit, for reasons set out in **Section 7** of this document, in making those requests, each of The Number and Conduit has also reasonably requested BT to supply them with information to be made available under GC19).
- 10.127 As such, the parties paid amounts to BT to receive the "pure bundle" of OSIS data (i.e. a price for all of the notional products (i) to (iv) as defined by Ofcom in **paragraph 10.6** above) based on BT's published charges for OSIS. These charges make no distinction between the charges which applied for the delivery of each of the constituent notional products and, indeed, it seems clear that there was never any specific need to do this given that, in fact, The Number and Conduit wanted everything in OSIS.
- 10.128 On that basis, there is no immediately clear means for Ofcom to identify what price was, in effect, paid by The Number and Conduit for just the BT GC19 data set, which price could then be compared with the cost oriented charge for such data as determined by Ofcom. As a result, there is no clear means to assess whether any issue of historic overpayment for the BT GC19 data set exists. However, Ofcom has considered whether there may be any other means to derive the *implicit price* paid for the BT GC19 data set and assess whether any appropriate case of "overpayment" for that data arises.
- 10.129 As discussed at **paragraphs 10.35 to 10.43** above, The Number proposed a methodology for identifying such an implied price. This was based on Ofcom identifying the price ceiling for the non-BT GC19 data set within OSIS (i.e. notional products (ii) to (iv) as defined by Ofcom in **paragraph 10.6** above) by reference to competition law. The implied historic price for the BT GC19 data set would then be the difference between the total amount paid for OSIS and the said price ceiling for the non-BT GC19 data set. In considering that proposal, Ofcom has posited an alternative formulation of this approach, whereby an implied price for the non-BT GC19 data set could potentially be derived by subtracting the price ceiling for the BT GC19 data set (i.e. the cost oriented charges set by Ofcom above) from the total amount paid for OSIS data. This would lead to two approaches to assessing a possible "overpayment" (if any), namely:

- (i) under The Number's approach, any "overpayment" would be wholly allocated to the purchase of the BT GC19 data set; and
- (ii) under the alternative formulation, any "overpayment" would be wholly allocated to the purchase of the non-BT GC19 data set.

10.130 In Ofcom's view, the choice of either approach is somewhat arbitrary (and therefore potentially unfair in this respect) and there does not appear to be any objective validity for adopting either. A further alternative approach considered by Ofcom would be to identify any overall "overpayment" first based on what was paid for the OSIS data compared with the sum of:

- (i) the price ceiling for the BT GC19 data set (i.e. the charges provisionally determined by Ofcom above); and
- (ii) the price ceiling for the non-BT GC19 data set identified by reference to any appropriate principles of competition law.

10.131 If any overall "overpayment" would be identified on that basis, Ofcom could then consider whether there was an appropriate means for apportioning the "overpayment" between the two broad products. For instance, one option considered by Ofcom would be to assume that the same overall percentage overpayment was applied to each product – i.e. if Ofcom were to identify that the overall OSIS charge was (say) 20% higher than the identified ceiling, then it could be inferred on that approach that the BT GC19 data set was overcharged by the same percentage (in this example, 20%) and the non-BT GC19 data set was overcharged by the same percentage (again, in this example, 20%).<sup>107</sup>

10.132 However, Ofcom's approach to cost analysis has restricted the recoverable costs from the provision of the BT GC19 data set to just three of the cost items incurred by BT in providing the overall OSIS product. None of the costs of operating the OSIS system have been considered recoverable from the BT GC19 data set, while they would, arguably, be recoverable from the provision of the OSIS product as a whole. Furthermore, BT has stated that it incurs considerable additional costs in operating the Upstream Data Team and in purchasing directory data from other CPs. Again, these costs would, arguably, be recoverable from the provision of OSIS as a pure bundle, even though Ofcom does not consider these costs to be relevant to setting a cost oriented charge for the BT GC19 data set. In fact, overall, the costs that Ofcom has identified as recoverable from the BT GC19 data set amount to about 1.5 to 2% of BT's total stated costs for the provision of OSIS. Apportioning the percentage "overpayment" between the products would therefore mean that only a small overall amount of the overpayment would be apportioned to the BT GC19 data set.

10.133 The starting point for that whole exercise would be an assessment of what the price ceiling should be, under competition law, for the non-BT GC19 data set. In Ofcom's view, it does not seem appropriate to conduct such an exercise solely in order to identify any alleged "overpayment" on the BT GC19 data set in order to resolve these disputes. This is particularly so when only a small percentage of any "overpayment" (if any) would be allocated to the BT GC19 data set. The fact is that The Number and Conduit purchased both the BT GC19 data set and the other data in OSIS as a

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<sup>107</sup> For the avoidance of doubt, the figure of 20% is purely hypothetical for illustrative purposes. No overcharge has been calculated.

bundle. Therefore, if any issue of “overpayment” exists, it would seem more appropriate to consider it overall rather than apportion it between products in an arbitrary way (and therefore in a potentially unfair manner).

10.134 In other words, should The Number or Conduit wish to submit a formal complaint to Ofcom that BT has breached competition law in its current charging for OSIS overall, then Ofcom would consider whether a formal investigation under the Competition Act 1998 and/or Article 82 of the EC Treaty is required under its normal processes for competition law investigations, including its relevant guidelines.<sup>108</sup>

10.135 Accordingly, Ofcom provisionally considers for above-mentioned reasons that it would not be appropriate in the circumstances of the present disputes for Ofcom to adopt any of the discussed approaches to attempt to evaluate overcharging for the BT GC19 data set, since these necessarily involve arbitrary (and therefore potentially unfair) allocations of amounts paid (because implied prices are not identifiable). On that basis, no issues arise as to Ofcom exercising its discretion under section 190(2)(d) of the 2003 Act to require the payment of sums by way of an overpayment (if any).

### Charges moving forward

10.136 In **paragraphs 10.48 to 10.123** above, Ofcom has provisionally determined the cost oriented charges for the BT GC19 data set on an annual basis historically during the relevant period of the disputes and which will apply initially on a moving forward basis (i.e. on the day after the publication of the final determination). These charges are based on the BT GC19 data set continuing to be provided as an integral part of OSIS.

10.137 However, for the avoidance of doubt, to the extent that The Number or Conduit continue to want and receive OSIS from BT as a bundled offering, then it is beyond the scope of these disputes for Ofcom to determine what charges for the bundled product should be or what the charges for the non-BT GC19 data set within OSIS should be. On the other hand, should The Number or Conduit (or, as the case may be, any other DIP) moving forward request that BT provides the BT GC19 data set as a separate product from OSIS, then BT must provide that data set on cost oriented and non-discriminatory terms as required by GC19.

10.138 However, it is to be emphasised that, in meeting such a (reasonable) request to provide GC19 data on a stand-alone basis, it may be the case that the actual costs BT incurs – and the cost oriented charge it should set – will vary from those in this explanatory statement. This is because the actual costs will be related to the way in which the stand-alone product is structured and provided, including, for instance, the frequency with which updates are provided and the way in which data is transmitted from BT, and to the number of DIPs purchasing this product. Any party requesting a stand-alone GC19 product would need to discuss with BT in order to agree what such a product would look like. It is possible that the way in which the product is designed means that additional costs to those analysed above become relevant. Equally, in setting a charge BT needs to consider what overall demand for a stand-alone product would be as this may affect the appropriate charging mechanism to ensure cost recovery.

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<sup>108</sup> [http://www.ofcom.org.uk/bulletins/eu\\_directives/guidelines.pdf](http://www.ofcom.org.uk/bulletins/eu_directives/guidelines.pdf)

- 10.139 Furthermore, the charges set by Ofcom are based around assumptions about the specific way in which the BT GC19 data set is currently provided – i.e. as part of OSIS – and the number of DIPs purchasing the data within OSIS.
- 10.140 For these reasons, charges moving forwards may vary from those set out in **Table 10.2** and the draft Determinations clarify that the charges within **Table 10.2** will only be relevant to the extent that the BT GC19 data set:
- (i) continues to be provided by BT as part of the contents of the OSIS database (and not separately from it); and
  - (ii) continues to be provided to the same number of DIPs and on the same terms, including format.
- 10.141 That said, the principles of cost recovery and charging mechanisms set out in the above analysis would nonetheless apply moving forwards, including in situations where DIPs may request a separate BT GC19 data set. In particular, BT should not seek to recover any of the costs of any GC19 product that are common with its provision of voice telephony – i.e. only those costs incurred in addition to its costs of managing its voice telephony customer accounts are relevant. On the BT GC19 data set (as defined in this explanatory statement), this would include only the costs of making available such data to requesting DIPs.

## Section 11

# Provisional conclusions

### USC7: Requested declarations about legal rights and obligations, including directions concerning charges

- 11.1 For reasons set out in **Section 6**, Ofcom has provisionally concluded that USC7 is *ultra vires*.
- 11.2 On that basis, Ofcom proposes to resolve these disputes by declaring, pursuant to section 190(2)(a) of the 2003 Act, that BT has not, during the period beginning on 25 July 2003 and ending on the day of the publication of the final determinations for the purposes of these disputes (the “**Relevant Period**”), been required to make available to The Number and Conduit, respectively, the full contents of BT's OSIS database pursuant to paragraph 7.2(b), in accordance with the terms of paragraphs 7.4 to 7.6, of USC7. However, to the extent that BT has chosen to make available certain information that it is required to supply under GC19 (see further in **Section 7** of this document) as part of the contents of the OSIS database in meeting the respective requests for data by The Number and Conduit, BT has during that period been required to make available to The Number and Conduit such specific information on GC19 terms.
- 11.3 As a result of the above, no issue arises with respect to which Ofcom may lawfully make a declaration:
- (i) pursuant to section 190(2)(a) of the 2003 Act, setting out the proper amount of a charge by BT to The Number and Conduit, respectively, in respect of making available the contents of the OSIS database in machine readable form during the Relevant Period;
  - (ii) pursuant to section 190(2)(b) of the 2003 Act, fixing the terms or conditions (including charges) of BT making available to The Number and Conduit, respectively, the contents of the OSIS database in machine readable form to take effect on the first day after the Relevant Period has come to an end;
  - (iii) pursuant to section 190(2)(l) of the 2003 Act, imposing an obligation, enforceable by either of the parties to the two disputes, to enter into a transaction between themselves on the terms and conditions fixed by Ofcom in relation to BT making available to The Number and Conduit, respectively, the contents of the OSIS database in machine readable form to take effect on the first day after the day of the publication of these determinations,
- by reference to, or under, USC7.
- 11.4 The above-mentioned proposed declarations are set out in each of Ofcom's proposed draft determinations in **Section 1**. In **Section 12**, we set out briefly the steps we plan in ongoing policy review to take in the first instance to ensure that Article 5 of the USD is properly implemented and to formally revoke the wholesale access obligations placed on BT to provide contents of its OSIS database. We also set out in **Section 12** our further plans in addressing issues arising out of these disputes relating to OSIS.

## GC19: Requested declarations about legal rights and obligations, including directions concerning charges

- 11.5 Ofcom proposes to declare, pursuant to section 190(2)(a) of the 2003 Act, that BT has (for reasons set out in **Section 7**) during the Relevant Period been required to make available to The Number and Conduit, respectively, only the information specified in **Section 9** pursuant to paragraph 19.1, in accordance with the terms of paragraphs 19.3 to 19.4, of GC19 to the extent that such information has been provided by BT as part of supplying The Number and Conduit, respectively, with the full contents of the OSIS database.
- 11.6 As a result, Ofcom also proposes, pursuant to section 190(2)(b) of the 2003 Act, to give directions to fix the charges for the transactions between BT and The Number, on the one hand, and BT and Conduit, on the other hand, for the provision of the BT GC19 set as set out in **Table 10.2**.
- 11.7 Ofcom proposes that these charges will apply moving forward in respect of the supply of the BT GC19 data set only if:
- (i) it continues to be provided by BT to The Number and Conduit, respectively, as part of the contents of the OSIS database; and
  - (ii) it continues to be so provided to the same specific number of downstream information providers, including The Number and Conduit, as used in Ofcom's calculations set out in this explanatory statement (see, in particular, **Table A4.6**) on the same terms, including format.
- 11.8 In fixing the charges for the provision of the BT GC19 data set as provided as part of the contents of the OSIS database, Ofcom does not propose to require BT in the future to provide the BT GC19 data set to the parties in this specific way.
- 11.9 To this end, Ofcom also proposes to declare that, pursuant to section 190(2)(a) of the 2003 Act, that in the future, subject to The Number and/or Conduit making a reasonable request to BT for BT GC19 data set to be provided separately from the contents of the OSIS database, BT shall be required to make available to The Number and/or Conduit that data set pursuant to paragraph 19.1, in accordance with the terms of paragraphs 19.3 to 19.4, of GC19. Consistent with GC19, it is open to the parties to negotiate and agree the means and extent, including format, in which that information is to be made available but, for BT's charges in respect of making that information available to be cost oriented in accordance with paragraph 19.4 of GC19, BT shall recover from requesting parties no more than the total sum of:
- i) BT's costs of establishing and operating the means of transmitting that information from BT to The Number; and
  - ii) BT's costs of managing the relationship with The Number, including account management, contract management and billing.
- 11.10 Notwithstanding the above issues, for the reasons set out in **Section 10** of this this explanatory statement, Ofcom does not propose to make a direction under section 190(2)(d) of the 2003 Act (requiring payment of sums by way of adjustment of an under- or over-payment).
- 11.11 The above-mentioned proposed declarations are set out in each of Ofcom's proposed draft determinations in **Section 1** of this document. Again, **Section 12** sets

out Ofcom's plans in the ongoing policy review to consider separately the issues arising from these disputes.

## Requested directions regarding costs in referring the present disputes

### Ofcom's position in the August 2006 document

11.12 In the August 2006 document, we noted that The Number had requested in its Initial Request that, in so far as BT's obligations under **USC7** are concerned, Ofcom should exercise its discretion under section 190(6)(a) of the 2003 Act and direct BT to make payments to The Number in respect of costs and expenses incurred by The Number in consequence of the reference of the dispute to Ofcom. (Prior to the publication of the August 2006 document, Conduit had not made a similar request to Ofcom for its costs and expenses, so we dealt only with The Number's request in that document).

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

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

11.14 The Number made a similar request in its Amended Request for Ofcom to give a direction under section 190(6)(a) of the 2003 Act for the same reasons as set out above in so far as BT's obligations under GC19 are concerned.

11.15 As regards both of these requests, Ofcom noted that it has discretion under section 190(6)(a) of the 2003 Act to require a party to pay another party's costs in bringing a dispute. Specifically, Ofcom noted that its powers in this respect are as follows:

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

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

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

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

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

- 11.17 Ofcom then noted, to start with, that it had never exercised its discretion to award costs under section 190(6)(a) in any regulatory dispute<sup>109</sup> (which remains the position). Nonetheless, Ofcom considered in the August 2006 document The Number's requests carefully, but it decided not to make the direction it has requested for the reasons set out below.
- 11.18 First, Ofcom considered that it should have regard to the fact that The Number had, in effect, been:
- (i) unsuccessful in relation to USC7; and
  - (ii) largely unsuccessful in relation to GC19,
- in referring its dispute to Ofcom in light of its provisional findings set out in the August 2006 document.
- 11.19 Secondly, Ofcom did not consider that the three reasons given by The Number for claiming its costs supported The Number's claim. In particular, Ofcom did not consider that any particular factors were present to suggest that BT has acted unreasonably in its negotiations with The Number leading to its dispute reference to Ofcom so as to suggest that BT should pay The Number's costs. In this context, we noted that Ofcom had in these disputes been asked to determine several issues of law or construction under relevant legislation or regulation. Ofcom also considered that it was also shown from the documentation annexed to The Number's Initial Request (concerning the negotiations) that BT reasonably believed that it had a strong case on the merits throughout the negotiations.
- 11.20 For these reasons, Ofcom did not propose to exercise its discretion under section 190(6)(a) of the 2003 Act to require BT to pay The Number's costs in bringing this dispute.

### **The joint response by The Number and Conduit**

- 11.21 In its joint response to the August 2006 document, The Number requests Ofcom to reconsider its claim to reimbursement of its costs and, should Ofcom make a determination requiring BT to pay some or all of The Number's costs, Conduit now requests that Ofcom should make such a determination in relation to its costs for similar reasons.
- 11.22 Their reasons for making these further requests focus on disagreeing with Ofcom's reasons set out in the August 2006 document (see above) with regard to:
- (i) the level of success that The Number and Conduit have had in referring these disputes for Ofcom's resolution; and
  - (ii) the reasonableness of BT's actions in its negotiations with The Number and Conduit on the issues that Ofcom has been asked by them to resolve.

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<sup>109</sup> The term 'regulatory dispute' is used here because, in its judgment in *Hutchison 3G (UK) Limited v. The Office of Communications*, 29 November 2005, [2005] CAT 39, the Competition Appeal Tribunal has made it clear (at paragraph 138) that Ofcom's intervention as arbiter between the parties is as a regulator, not as a third party resolving a dispute.



- 11.23 Specifically, they now state that, given their belief that their arguments in its joint response will or should result in a reversal by Ofcom of its refusal to fix the appropriate charges for BT's GC19 data, The Number (and Conduit) will have been successful, not unsuccessful. Therefore, as to (i) in **paragraph 11.9** above, Ofcom would be wrong to conclude in this context that they have been largely unsuccessful.
- 11.24 As regards (ii) in **paragraph 11.9** above, The Number submits that it is factually incorrect by Ofcom to suggest that BT was reasonable in its negotiations or indeed that it negotiated at all. The Number adds in this context to conclude its claim for costs, as follows:

8.4 Furthermore, BT steadfastly refused even to discuss the merits of the case with The Number and for Ofcom to suggest that BT reasonably believed that it had a strong case on the merits throughout the so-called negotiations is irrelevant at best. For example, as set out in paragraphs 3.4 and 3.5 of The Number's submission to Ofcom, The Number proposed an exchange of legal opinions, primarily on the impact of the *KPN* case, to facilitate a discussion on the merits with BT. However, although BT's in-house legal function promised a response on exchanging legal opinions would be forthcoming (see email from Christina Gleeson at BT dated 8 July 2005 (tab J in Annex 3 of The Number's submission), neither The Number nor their legal advisers heard anything further from BT.

8.5 Had there been any opportunity for negotiations made available by BT, either the dispute might never need to have been brought to Ofcom or at the very least Ofcom's job and the work required on The Number's part in referring the dispute might have been reduced significantly. Certainly if legal opinions had been exchanged the concerns regarding USC7 might have emerged earlier.

- 11.25 As regards Conduit's claim for costs, it draws attention to BT's letter to Conduit of 5 October 2005 (a copy of which was annexed to Conduit's Request), where BT stated that "*Ofcom is the appropriate body to decide if BT's charges meet all requisite regulatory and legal obligations.*" Conduit therefore submits that BT's approach necessitated Conduit's referral to Ofcom, and the costs that Conduit has incurred as a result.

## **Ofcom's response**

### Ofcom's discretion in awarding costs

- 11.26 Before addressing the arguments by The Number and Conduit in their joint response, it is appropriate for Ofcom to make some observations in relation to its powers to award the claimed costs.
- 11.27 To start with, we consider that section 190(6)(a) of the 2003 Act is flexible so as to empower Ofcom, at its discretion, to:
- i) make no direction; or
  - ii) make any direction it thinks fit,
- to require a party to the dispute making payments to another party to the dispute in respect of costs and expenses incurred by that other party in consequence of the reference of the dispute to OFCOM, or in connection with it.
- 11.28 Further, there is no provision in the 2003 Act prescribing, for instance, that Ofcom should take into account any specific factors in exercising its discretion. Specifically, there is no specific rule that costs should follow the event. In light of this (in the

absence of any such rules), Ofcom considers that it has wide discretion in this regard and will approach this matter on a case-by-case basis in order to determine each dispute in which costs are claimed by having regard to all the circumstances of the particular case. This is also Ofcom's suggested approach in its Draft Enforcement Guidelines<sup>110</sup>, which have yet to be finalised following Ofcom's consultation last year.

- 11.29 For the purposes of resolving these disputes, Ofcom considers that it is appropriate to take of account of the matters that we set out in the August 2006 document. We therefore turn to them in light of the arguments put forward by The Number and Conduit in their joint response.

### Ofcom's provisional views on the arguments by The Number and Conduit

- 11.30 In our understanding, during the negotiations regarding proposed renewal (OSIS) licences between the parties to these disputes, the implications of the *KPN* case were raised by both The Number and Conduit in relation to BT's proposed charges for the (OSIS) data in or around the first six months of 2005. Ofcom considers it clear from both of their respective dispute referrals to Ofcom, including the histories of commercial negotiations set out in those referrals (as well as the annexed documentation), that a significant part of these negotiations then centred around the arguments by The Number and Conduit that BT's charges were excessive and not compliant with the terms of USC7, in light of *KPN*. Indeed, The Number appears to acknowledge in the joint response that this issue was of key importance in the negotiations with BT, particularly as to its "proposed exchange of legal opinions, primarily on the impact of the *KPN* case to facilitate a discussion on the merits with BT". Furthermore, the three reasons given by The Number for claiming its costs, which Ofcom considered in the August 2006 document, appear closely linked to BT's charging in light of the *KPN* case.
- 11.31 It is further clear from their dispute referrals and additional submissions to Ofcom (including the recent joint response) made by The Number and Conduit to date that they make extensive arguments concerning their views on the implications of the *KPN* case on BT's regulatory obligations in the UK, which issues Ofcom is being asked to resolve as part of these disputes.
- 11.32 In contrast, while BT does not appear (on the information before us) to have responded in any detail to such similar arguments by The Number and Conduit in their negotiations, BT has initiated industry-wide discussions about this matter by hosting an industry workshop on 15 July 2005. Furthermore, we consider that BT's submissions to date in these disputes have been appropriately curtailed in responding to the submissions made by The Number and Conduit on the *KPN* case. Indeed, the great majority of arguments covered by their submissions are actually taking issue with Ofcom's provisional views, though BT has expressed its support for some of these views (most notably, the USC7 unlawfulness issue).
- 11.33 As seen from Ofcom's provisional findings in this explanatory statement, we reject the submissions on the *KPN* judgment by The Number and Conduit. We further disagree with The Number and Conduit on a number of additional detailed submissions about matters such as (to give a few examples only):

- (i) the lawfulness of USC7;

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<sup>110</sup> <http://www.ofcom.org.uk/consult/condocs/enforcement/enforcement.pdf>

- (ii) the alleged failure by Ofcom to carry out Impact Assessments under section 7 of the 2003 Act in seeking to resolve these disputes;
  - (iii) alleged failure by Ofcom to comply with data protection legislation and its impact on the scope of data to be made available under GC19;
  - (iv) actual user information;
  - (v) telephone numbers being assigned for PATS for the purposes of GC19;
  - (vi) the meaning of agreed format under GC19 and its implications historically in BT's supply of OSIS.
- 11.34 While we have been persuaded by The Number and Conduit to fix an historic charge for the BT GC19 data set within OSIS, we have not made, for reasons set out in this explanatory statement, a direction requiring retrospective adjustment of the alleged overpayment by The Number and Conduit.
- 11.35 In light of the above, we remain of the view that The Number and Conduit have been largely unsuccessful in referring these disputes to Ofcom and that we should have regard to this fact.
- 11.36 In any event, we consider that neither The Number, nor Conduit, has shown that BT acted unreasonably in its negotiations with them with regard to the implications of the *KPN* case. As explained in the August 2006 document, the conduct of The Number and Conduit in these disputes shows that Ofcom's determination on issues of law or construction under relevant legislation or regulation is fundamental to resolving them. If anything, BT's letter to Conduit of 5 October 2005 (to which the joint response refers) is consistent with that view. We therefore do not think that it is plausible to suggest that an exchange of legal opinions would have led to any meaningful negotiations between the parties. In these circumstances, we further remain of the view that account should be taken of the fact that BT reasonably believed that it had a strong case on the merits throughout the negotiations. In this context, we note that it is unclear from the joint response why The Number simply asserts that this matter "irrelevant at best".
- 11.37 Accordingly, Ofcom proposes in each of Ofcom's draft determinations in **Section 1** not to make any determination, pursuant to section 190(6)(a) of the 2003 Act, requiring BT to make payments to The Number and Conduit in respect of any costs and expenses incurred by them in consequence of the references of these disputes to Ofcom, or in connection with them.

## Section 12

# Policy review and implications

## Introduction

- 12.1 Ofcom recognises that its provisional views as to how to resolve these disputes could affect not only the parties to these disputes, but also a number of other stakeholders, including other OSIS licencees, certain CPs subject to GC19 and, ultimately, UK consumers. Ofcom also recognises that these provisional views raise a number of concerns about the way in which directory information markets function, moving forwards.
- 12.2 In particular, stakeholders are likely to be concerned that the regulatory arrangements put in place by Oftel in 2002 to ensure that a single database of directory information was available to downstream DIPs cannot stand without some modification. Stakeholders may also be concerned that the data BT and other CPs are obliged to supply, on request, under GC19 is too narrow in scope compared to the data currently available from OSIS, particularly with regards to business entries (where much more information than 'name', 'address' and 'telephone number' is currently provided), so that Ofcom should seek to put also the latter data on a regulatory footing (as opposed to leaving it purely to commercial arrangements).
- 12.3 However, for reasons explained in this explanatory statement, Ofcom's powers in resolving the present disputes (as referred to Ofcom under section 185(2) of the 2003 Act) are principally to declare the rights and obligations of the parties to these disputes by reference to BT's existing obligations (i.e. its conditions of entitlement) that have been lawfully imposed under section 45 of the 2003 Act, rather than to set, modify, or revoke such conditions, for which separate statutory procedures and tests must be followed.
- 12.4 To address any potential stakeholder concerns arising from our consideration of these disputes, Ofcom has commenced a policy review and, at present, Ofcom expects to issue for public consultation an initial policy paper aimed at canvassing stakeholders' views on the needs for future regulation in this area. Ofcom's primary concern in moving forward is to guarantee the following:
- i) that UK consumers continue to have access to the relevant 'universal services', that is to say high-quality and affordable directories and DQ services;
  - ii) that, in order to serve the interests of UK consumers, directory DIPs continue to have access to the information necessary to offer such services on the appropriate terms; and
  - iii) that the delivery of these objectives is achieved in a legally robust manner, and with regulation that is clear and the minimum necessary to achieve these policy objectives.

## Ofcom's Policy Review

### Guaranteeing user access to directory information services

- 12.5 Given Ofcom's provisional finding that USC7 is *ultra vires*, Ofcom's policy review will consider the steps that are needed to ensure that the UK is compliant with its

obligations under the USD to ensure that end-users in the UK have access to at least one comprehensive DQ service and at least one comprehensive directory.

- 12.6 The forthcoming consultation paper will invite comments from stakeholders on how Ofcom should assess this issue, including whether or not there is a need to impose universal service obligations (and therefore related designations), taking into account the current normal market conditions in the UK (see further our provisional views in **Section 6** of this explanatory statement) to ascertain whether directories and DQ services fulfil the requirements of the USD with regards to comprehensiveness, affordability, quality and availability.

### **Competition in the supply of directory information services**

- 12.7 If Ofcom's provisional finding that USC7 is *ultra vires* is confirmed, Ofcom would also need to take steps to formally revoke the wholesale access obligations placed on BT to provide the contents of its OSIS database under USC7.
- 12.8 As noted above, we recognise that this is likely to raise stakeholder concerns. Nevertheless, Ofcom remains committed to competition in the supply of a range of directory information services in the UK. Therefore, Ofcom's policy review is also considering:
- i) whether it would be appropriate, in the light of national circumstances, to adopt a wider definition of 'Directory Information' for the purposes of GC19; and
  - ii) whether a central aggregated database of subscriber information remains necessary to ensure high-quality directory and DQ services in the UK.
- 12.9 Ofcom will consult on the detail of these issues in the forthcoming initial policy paper in order to gather initial views from stakeholders ahead of formulating policy proposals in a further consultation.

### **Ongoing provision of data from OSIS**

- 12.10 At present, BT continues to provide OSIS to DIPs on commercial terms. Ofcom expects this situation to continue moving forward, not least because in providing OSIS to its competitors in the supply of directory information services, BT must ensure compliance with competition law.
- 12.11 BT has stated to Ofcom that, despite the changes to the regulatory rules which would apply should Ofcom's provisional views on USC7 and GC19 be confirmed, it recognises that demand for OSIS will continue. BT wishes to ensure a smooth transition to any new arrangements – e.g. where DIPs may require provision of the BT GC19 data set separately from OSIS.
- 12.12 BT has stated that it does not intend to deliberately disrupt the marketplace or raise competition concerns, although it points out that its ability to provide OSIS is dependent on it continuing to receive the current set of directory data from other upstream communications providers. Again, Ofcom believes that other communications providers will continue to meet their own obligations under GC19 and under the contractual arrangements in place with BT. BT also points out that overall demand for OSIS may change if certain DIPs require only the BT GC19 data set and that this may change the economics of the future provision of OSIS. Ofcom will consider this as part of this policy review.

12.13 Furthermore, Ofcom fully expects UK consumers to continue to have access to at least one comprehensive directory as a result of BT's supply of The Phonebook, and to DQ services as a result of relevant CPs' obligations under General Condition 8.

## Annex 1

# Responding to this consultation

## How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made by **5pm on 7 March 2007**. Ofcom strongly urges respondents wishing to specially comment on matters that are covered by Ofcom's policy review (as referred to in **Section 12**) to respond to that separate consultation process. Should Ofcom not respond to any such comments in resolving these specific disputes, this shall not be treated as Ofcom having accepted or rejected (or, as the case may be, having been otherwise influenced by) such views or responses in its forthcoming policy considerations. Nor, unless such comments are specifically made in response to our policy review, shall it be assumed that Ofcom will necessarily take account of such comments in that review.
- A1.2 Ofcom strongly prefers to receive responses as e-mail attachments, in Microsoft Word format, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 2), among other things to indicate whether or not there are confidentiality issues. The cover sheet can be downloaded from the 'Consultations' section of our website.
- A1.3 Please can you send your response to [james.tickel@ofcom.org.uk](mailto:james.tickel@ofcom.org.uk).
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- James Tickel  
Competition Group  
4<sup>th</sup> floor  
Ofcom  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA
- Fax: 020 7783 4103
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Also note that Ofcom will not routinely acknowledge receipt of responses.

## Further information

- A1.6 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact James Tickel on 020 7783 4406 or email [james.tickel@ofcom.org.uk](mailto:james.tickel@ofcom.org.uk).

## Confidentiality

- A1.7 Ofcom thinks it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), ideally on receipt (when respondents confirm on their response cover sheet that this is acceptable).

- A1.8 All comments will be treated as non-confidential unless respondents specify that part or all of the response is confidential and should not be disclosed. Please place any confidential parts of a response in a separate annex, so that non-confidential parts may be published along with the respondent's identity. Please note Ofcom's approach to confidentiality in the resolution of these disputes is as set out in **Section 3** (at **paragraphs 3.91 to 3.95**). Ofcom asks that any claims to confidentiality are supported by an explanation of why you consider the information to be confidential.
- A1.9 Ofcom reserves its power to disclose any information it receives where this is required to carry out its legal requirements. Ofcom will exercise due regard to the confidentiality of information supplied.
- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use, to meet its legal requirements. Ofcom's approach on intellectual property rights is explained further on its website, at [www.ofcom.org.uk/about\\_ofcom/gov\\_accountability/disclaimer](http://www.ofcom.org.uk/about_ofcom/gov_accountability/disclaimer).

### Next steps

- A1.11 Following the end of the consultation period, Ofcom intends to publish a statement after consideration of responses.
- A1.12 Please note that you can register to get automatic notifications of when Ofcom documents are published, at [http://www.ofcom.org.uk/static/subscribe/select\\_list.htm](http://www.ofcom.org.uk/static/subscribe/select_list.htm).

### Ofcom's consultation processes

- A1.13 Ofcom is keen to make responding to consultations easy, and has published some consultation principles (see Annex 2) which it seeks to follow, including on the length of consultations. Ofcom notes that this consultation is in relation to a dispute and therefore a different length of consultation applies (see Ofcom's guidelines on complaints available at [http://www.ofcom.org.uk/bulletins/eu\\_directives/guidelines.pdf](http://www.ofcom.org.uk/bulletins/eu_directives/guidelines.pdf).)
- A1.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at [consult@ofcom.org.uk](mailto:consult@ofcom.org.uk). We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, whose views are less likely to be obtained in a formal consultation.
- A1.15 If you would like to discuss these issues, or Ofcom's consultation processes more generally, you can alternatively contact Vicki Nash, Director, Scotland, who is Ofcom's consultation champion:

Vicki Nash  
Ofcom (Scotland)  
Sutherland House  
149 St. Vincent Street  
Glasgow G2 5NW  
Tel: 0141 229 7401  
Fax: 0141 229 7433  
E-mail: [vicki.nash@ofcom.org.uk](mailto:vicki.nash@ofcom.org.uk)



## Annex 2

# Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

### Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

### During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will normally allow ten weeks for responses to consultations on issues of general interest.

A2.6 There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

### After the consultation

A2.8 We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

## Annex 3

# Consultation response cover sheet

- A3.1 In the interests of transparency, we will publish all consultation responses in full on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), unless a respondent specifies that all or part of their response is confidential. We will also refer to the contents of a response when explaining our decision, without disclosing the specific information that you wish to remain confidential.
- A3.2 We have produced a cover sheet for responses (see below) and would be very grateful if you could send one with your response. This will speed up our processing of responses, and help to maintain confidentiality by allowing you to state very clearly what you don't want to be published. We will keep your completed cover sheets confidential.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their cover sheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses in the form of a Microsoft Word attachment to an email. Our website therefore includes an electronic copy of this cover sheet, which you can download from the 'Consultations' section of our website.
- A3.5 Please put any confidential parts of your response in a separate annex to your response, so that they are clearly identified. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only so that we don't have to edit your response.

## Cover sheet for response to an Ofcom consultation

### BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

### CONFIDENTIALITY

What do you want Ofcom to keep confidential?

Nothing	<input type="checkbox"/>	Name/contact details/job title	<input type="checkbox"/>
Whole response	<input type="checkbox"/>	Organisation	<input type="checkbox"/>
Part of the response	<input type="checkbox"/>	If there is no separate annex, which parts?	

If you want part of your response, your name or your organisation to be confidential, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

### DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response. It can be published in full on Ofcom's website, unless otherwise specified on this cover sheet, and I authorise Ofcom to make use of the information in this response to meet its legal requirements. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

## Annex 4

# Ofcom's calculation of cost oriented charges for the BT GC19 data set

## Introduction

A4.1 **This Annex** provides a more detailed overview of the cost information provided by BT and used by Ofcom in its calculation of cost oriented charges for the BT GC19 data set since 25 July 2003, as set out in **Section 10** of this explanatory statement. It should be read in conjunction with **Section 10** to understand Ofcom's reasoning in identifying recoverable costs and the appropriate cost recovery mechanism.

## BT's OSIS management accounts

A4.2 During Ofcom's investigation, BT provided to Ofcom its management accounts for the running of OSIS for financial years 2003/4, 2004/5 and 2005/6. Following a request from Ofcom, BT disaggregated its management accounts into a number of separate cost items so that Ofcom had a more complete understanding of the activities driving BT's costs. **Table A4.1** below shows this breakdown of costs.

**Table A4.1: BT's stated OSIS management accounts (£p.a.)**

	2003/2004	2004/2005	2005/2006
<b>Payments Made to Upstream Data Providers</b>			
Payments to BT	✂	✂	✂
Payments to other communications providers	✂	✂	✂
<b>Transmission</b>			
Receiving data in to OSIS	✂	✂	✂
Transmitting data from OSIS	17,781	13,370	13,133
<b>System Costs</b>			
Common System Cost for OSIS	✂	✂	✂
Common System Cost for OSIS- Direct Labour	✂	✂	✂
<b>Other OSIS Costs</b>			
Relationship management of upstream CPs	✂	✂	✂
Relationship management of downstream DIPs	313,998	236,109	231,928

Product development	✂	✂	✂
Verification/checking of data received	✂	✂	✂
Central grouping of data received	✂	✂	✂
System Maintenance and general data storage	✂	✂	✂
Data Management - post acceptance of data on OSIS	✂	✂	✂
System Administration	✂	✂	✂
Onboarding	✂	✂	✂
Other activities	✂	✂	✂
<b>Other Costs</b>	✂	✂	✂
Depreciation	✂	✂	✂
Support	✂	✂	✂
Misc.	✂	✂	✂
OSIS Replacement System Costs	✂	✂	✂
<b>Total as reported in BT management accounts</b>	✂	✂	✂

Notes: 1. Breakdown of Systems Costs is not available for the financial year of 2003/4. 'Common systems costs – direct labour' is included in cost line 'Common Systems Costs'

### BT's costs of providing directory data to OSIS

A4.3 As seen from **Table A4.1** above, BT's stated costs include the outpayments it has made to upstream CPs for their directory data, including transfer payments made to BT's own upstream business for the supply of data from BT subscribers and subscribers of WLR resellers. These outpayments reflect the published rates in the BT Directory Solutions Price List as set out in **Annex 5** of this explanatory statement.

A4.4 In addition to that transfer payment data, Ofcom specifically requested that BT also provide to Ofcom information of the actual costs incurred by BT in providing that data to OSIS. These costs are set out in **Table A4.2** below.

**Table A4.2: BT's stated costs of providing directory data to OSIS (in £ per financial year)**

	2003/2004	2004/2005	2005/2006
Customer Service Channel 15x	✕	✕	✕
Upstream Data Team- People Costs	✕	✕	✕
Upstream Data Team- General and Admin Costs	✕	✕	✕
SDE Entry Costs	✕	✕	✕
IT Support	✕	✕	✕
CSS Costs	✕	✕	✕
Central Overhead	✕	✕	✕
<b>Total</b>	✕	✕	✕

**BT's stated 'end-to-end' costs of providing OSIS to DIPs**

A4.5 In Ofcom's provisional view, the stated costs in **Table A4.2** above provide a more appropriate 'end-to-end view' of the costs incurred by BT in providing the OSIS data to DIPs. **Table A4.3** below therefore restates the OSIS management cost information to present this 'end-to-end view' of costs, based on the information supplied by BT to Ofcom.

**Table A4.3: BT's 'end-to-end view' of the costs of providing OSIS to DIPs**

	2003/2004	2004/2005	2005/2006
Providing data to OSIS	✕	✕	✕
Payments to other communications providers	✕	✕	✕
Transmission	✕	✕	✕
Systems costs	✕	✕	✕
Other OSIS costs	✕	✕	✕
Other costs	✕	✕	✕

<b>Total restated OSIS costs</b>	✂	✂	✂
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### Ofcom's provisional assessment of recoverable costs

A4.6 The 'end-to-end view' of costs set out in **Table A4.3** above provides the starting point for Ofcom's provisional assessment of the costs that should be recoverable from the BT GC19 data set. Ofcom's reasoning for the costs which should (and should not) be recoverable is set out in **Section 10** of this explanatory statement (see **paragraphs 10.61 to 10.99**). To recap, Ofcom has identified three cost items which it considers provisionally would be appropriate to recover from the charges for the BT GC19 data set, namely:

- (i) BT's costs of transmitting data from OSIS to the DIPs;
- (ii) BT's costs of managing the customer relationship with the DIPs, including things such as billing;
- (iii) BT's costs of 'onboarding' – that is, activities related to dealing with new requests for access to OSIS from DIPs and ensuring such access is provided.

A4.7 However, the stated BT management costs for OSIS include within the cost item 'onboarding' activities related to dealing with both new DIPs wanting access to OSIS and new CPs supplying data to OSIS. It is only the former activities which Ofcom considers provisionally are relevant for this exercise, so Ofcom has had to identify how these costs should be split between BT's dealings with DIPs, on the one hand, and dealings with CPs, on the other hand.

A4.8 BT also provided to Ofcom a further breakdown of the labour activities involved under each heading. The breakdown of activities under the heading 'onboarding' is set out in **Table A4.4** below.

**Table A4.4: Activities involved in 'onboarding'**

<b>Work area</b>	<b>Specific tasks</b>	<b>FTE Employed</b>
BT Wholesale Commercial Management	Signing up new CPs to Schedule 11 including meetings and calls with the CP.	✂
System Administration	Build CUPIDs and number ranges onto OSIS and LORS2, send out documentation on connectivity and agree data methodologies. Arrange data methodology testing.	✂
Data Compilation	Temporarily process manual orders until other methodologies go live.	✂
Business Performance	Building CUPIDs and number ranges into billing database	✂
Sales	Signing up new Licencees including credit checking, arranging for drafting of contracts	✂

Systems	Providing consultative advice on data methodologies and testing those methodologies with CPs	✂
<b>Totals</b>		✂

A4.9 Ofcom's provisional view is that only the 0.2 FTEs under the heading 'Sales' in **Table A4.4** above are engaged in activities related to dealing with DIPs. Ofcom has therefore taken the view that ✂ % of the 'onboarding' costs in **Table A4.1** above should be considered to be recoverable from BT GC19 data set charges (i.e. based on the ✂ FTEs engaged with DIPs out of a total of ✂ FTEs engaged in 'onboarding' activities overall).

A4.10 Ofcom has therefore identified in **Table A4.5** below the only costs it provisionally considers are recoverable from the BT GC19 data set.

**Table A4.5: Ofcom's provisional view on costs recoverable from provision of BT GC19 data set**

	2003/2004	2004/2005	2005/2006
Transmitting data from OSIS	17,781	13,370	13,133
Onboarding	7,545	5,673	5,573
Relationship management of downstream DIPs	313,998	236,109	231,928
<b>Total recoverable costs</b>	<b>339,323</b>	<b>255,152</b>	<b>250,634</b>

A4.11 Finally, in order to calculate the annual charge to apply during the relevant period under the scope of these disputes, Ofcom has provisionally concluded that the appropriate cost driver for each of three cost items is the number of DIPs (see Ofcom's reasons at **paragraphs 10.100 to 10.113** of this explanatory statement).

A4.12 Accordingly, **Table A4.6** below sets out the relevant number of DIPs purchasing OSIS during the relevant period for purposes of these disputes in order to calculate the per DIP cost oriented annual charge for the BT GC19 data.

**Table A4.6: Ofcom's provisional view on cost oriented annual charges for BT GC19 data set (£ per DIP p.a.)**

	2003/2004	2004/2005	2005/2006
Total recoverable costs	339,323	255,152	250,634
Number of DIPs purchasing OSIS during period	35	43	42
<b>Cost oriented annual charge</b>	<b>9,695</b>	<b>5,934</b>	<b>5,967</b>

A4.13 To fully resolve these disputes, Ofcom has to set the charges applying since 25 July 2003 and moving forward. For the period 25 July 2003 to 31 March 2004, Ofcom has pro-rated the annual charge shown for the full financial year 2003/04 in **Table A4.6**,



based on the number of relevant days in this period (i.e. 68% of the calculated annual charge for financial year 2003/04).

A4.14 Furthermore, in the absence of financial data for the period since the end of financial year 2005/06, Ofcom has assumed that the (annualised) cost-oriented charge is unchanged from that calculated for the financial year 2005/06.

A4.15 The relevant charges are set out in **Table A4.7** below.

**Table A4.7: Provisionally determined charge for the BT GC19 data set**

<b>Period</b>	<b>Charge for BT GC19 data set during period (per DIP)</b>
25 July 2003 – 31 March 2004	£6,649
1 April 2004 – 31 March 2005	£5,934
1 April 2005 – 31 March 2006	£5,967
1 April 2006 onwards	£5,967 <sup>1</sup>

Note: 1. Annual charge applying for each 12 month period starting on 1 April. Charge should be pro-rated for any period of less than 12 months for which data is supplied within OSIS.

**Annex 5****The BT Directory Solutions Price List**

A5.1 This Annex sets out parts 1, 2 and 3 of the current BT Directory Solutions Price List. The price list is available on-line at [www.btwholesale.com](http://www.btwholesale.com)

**Section 1.0**

For terms and conditions applicable to these charges see Schedule 11 (formerly Schedule 150/150a).

The rates to be paid by the Operator for inclusion of Operator Customer Information in BT's Operator Services Information System (OSIS) shall be as follows:

**6. Transaction Charges**

Description	Effective Date	Until	Charge (p)
For each customer entry provided by the Operator via hardcopy	01/10/1997	31/03/2000	108.44
For each customer entry provided by the Operator via hardcopy	01/04/2000		260.00
For each customer entry provided by the Operator via disc or EDI requiring manual processing by BT to input to OSIS	01/01/1999		Nil
For each customer entry provided by the Operator via disc or EDI not requiring manual processing by BT to input to OSIS	01/01/1999		Nil
Deletion	01/10/1997		Nil
For each customer entry input by the Operator using on-line access to OSIS	01/01/1999		Nil
Viewing	01/04/1998		Nil

**7. Data Holding Charge**

Description	Effective Date	Until	Charge
Data Holding Charge	01/10/1997	31/12/1998	31.5200
Data Holding Charge	01/01/1999		Nil

8. **Charges for Direct Access and On-Line Batch Access**

Description	Effective Date	Until	Charge (£)
For each Smart Card (including replacements)	01/04/1998		50.0000

9. **Payments made to OLOs**

Description	Effective Date	Until	Charge (£)
Electronic Payment per transaction	01/04/1999	30/09/2001	0.13905
Electronic Payment per transaction	01/10/2001	Until superseded by paragraph 1.5 below	0.6600

The following OLOs will be paid in accordance with table 1.4

Schedule 11 Operators
Andover Cablevision Ltd
Aggregated Telecom Ltd
Anglia Cable Ltd
Cable & Wireless U.K
Cable and Wireless (Guernsey) Limited
Cable Television Ltd
Cable Thames Valley Ltd
CableTel Cardiff Ltd
CableTel Central Hertfordshire Ltd
CableTel Hertfordshire Ltd
CableTel Herts and Beds Ltd
CableTel Newport
CableTel North Bedfordshire Ltd
CableTel Northern Ireland Ltd
CableTel Surrey and Hampshire Ltd
CableTel West Glamorgan Ltd
Colloquium Ltd
Comtel Coventry Ltd
Diamond Cable (GrimClee) Ltd
Diamond Cable (Leicester) Ltd
Diamond Cable (Lincoln) Ltd
Diamond Cable (Mansfield) Ltd

<b>Schedule 11 Operators</b>
East Coast Cable Ltd
EESCAPE Ltd
Heartland Cablevision UK Ltd
Herts Cable Ltd
Inclarity plc
Jersey Telecom Limited (Formerly States of Jersey Telecommunications)
Kingston Communications (Hull) plc
Lichfield Cable Communications Ltd
Manx Telecom Ltd
Nexus Telecommunications plc
NplusOne Limited
NTL Cambridge Ltd
NTL Darlington Ltd
NTL Glasgow (Paisley & Ren)
NTL Glasgow (Bearsden & Miln)
<b>NTL Glasgow (Gt Glasgow)</b>
NTL Glasgow (Inverclyde & Eastwood)
NTL Glasgow (NW Glasgow & Clydebank)
NTL Group Ltd
NTL Kirklees
NTL Midlands Ltd
NTL Teesside Ltd
NTL Telecom Services Ltd
O2 (UK) Ltd
Opera Telecom Ltd
Oxford Cable Ltd
Patientline UK Ltd
Pipemedia Limited
Stafford Communications Ltd
Starcomm Ltd
Swindon Cable Ltd
T-Mobile (UK) Ltd
Telewest Communications plc
Telstra Europe Ltd (Formerly Telecentric Solutions Ltd)
The Airtime Group Limited (Formerly Torc Europe)
Torch Communications Ltd
Vodafone
Wessex Cable Ltd

10. **Payments made to OLOs**

Description	Effective Date	Until	Charge (£)
Electronic Payment per Simple Data transaction	17/12/2003		0.238
Electronic Payment per Complex Data transaction	17/12/2003		2.44

The following OLOs will be paid in accordance with table 1.5:

Schedule 11 Operators
1 <sup>st</sup> Rate Telecom Limited
4D Telecom Limited
Band-X Ltd
Call Sciences Ltd
Call UK Ltd
Centrica Telecommunications Ltd
COLT Telecommunications
Easynet Group PLC
Eircom U.K Ltd
Energis Communications Ltd
Fibernet UK Limited
FleXtel Limited
Gamma Telecommunications
Global Crossing (UK)
Global One Communications Holding Ltd
IBSC Ltd (Formerly AUCS Communications Services (UK) Ltd)
Interweb Design Ltd
KDDI Europe Limited
London Digital Ltd
Magrathea Telecommunications Ltd
MCI Worldcom Ltd
Medius Networks Ltd
NetKonec Communications PLC
NplusOne Ltd
Opal Telecom Ltd (Formerly Core Telecommunications Ltd)
PNC Telecom Services Ltd
Primus Telecommunications Ltd
Rateflame Limited
Reach Europe Ltd
Redstone Communications Ltd
Singtel (Europe) Limited
Skymaker Limited
Spacotel UK Ltd
Spitfire Network Services Ltd

Schedule 11 Operators
Swiftnet Ltd
Syntec UK Ltd
Telco Global Networks Ltd
Telecom One Ltd
Telxl Limited
Thus plc
Tiscali UK Ltd
Totem Communications Ltd
Tweedwind Ltd
Wavecrest (UK) Ltd
Your Communications Ltd

**Notes:**

- 1) "The Retail Price List contains the relevant information regarding access methods suitable for access to OSIS".
- 2) "The BT Directory Solutions "OSIS Product Manual" guidelines contains documentation with relevant information regarding access methodology and can be found via the URL [www.btwholesale.com/btcontact/library](http://www.btwholesale.com/btcontact/library)
- 3) OCCN dated 22 October 2003 with an effective date of 17 December 2003 refers – these prices shall apply to operators signing after 20 October 2003; and to pre-20 October 2003 operators when agreed or determined.
- 4) The following definitions apply with effect from 17 December 2003:

**Simple Data**

## Means

- (a) Operator Customer Information relating to a telephone number submitted to (BT Wholesale Directory Solutions referred to as BTDS in this document) by means of SFF (Standard File Format) via On-line Batch Access;

or

- (b) Operator Customer Information relating to a telephone number which has been processed manually by the Operator via Direct Access, where that Operator Customer Information has not been "Grouped" by the Operator; and which in either case, consists of a single line entry.

**Complex Data**

## Means

Operator Customer Information relating to a telephone number that has been processed manually by the Operator via Direct Access, where that Operator Customer Information has been "Grouped" by the Operator.

**Grouped**

## Means

Collected together and organised into a hierarchical structure of two or more Entries which relate to the same business or organisation (such business or organisation being a Subscriber of the Operator), and the material modification or cessation of such Entries. Each such Entry must relate to an individual branch, office or department of the same business or organisation within the same "DQ Area". The Entries (except in the case of subscribers known to be sole traders or partnerships) shall not be referenced to the personal names of individual natural persons (save where such person or name is also the name of the business or organisation concerned). This definition relates to BUSINESS GROUPS ONLY.

HEADER – Barclays Bank

ENTRY – 14 High St, 1111 222222

ENTRY – 22 Church St, Yeovil 1212 333333

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Or (Including any of the 3 levels of sub headers)

HEADER – Barclays Bank

S/HEADER – Branches

ENTRY – 14 High St, 1111 222222

ENTRY – 22 Church St, Yeovil 1212 333333

### “DQ Area”

Means

A geographical area defined by BT that may consist of 1 or more exchange number ranges.

In the above definitions the following terms have the meanings set out below:

### Entry

Means

Data associated to one telephone number belonging to a single Subscriber, such Subscriber being a sole trader, partnership, body corporate or statutory body.

### Subscriber

Means

Any natural or legal person who or which is a party to a contract with the Operator for the supply of publicly available telephone services in the United Kingdom, Channel Islands, or the Isle of Man.

### Direct Access

Means

Direct on-line inputting by the Operator of Operator Customer Information on to the BTDS OSIS (Operator Services Information System) Database via the BT Gateway;

### On Line Batch Access

Means

The provision of Operator Customer Information by the Operator to BTDS online, by the LORS system or any successor thereto, for inputting by BTDS to the BTDS OSIS Database;

## Section 2

For terms and conditions applicable to these charges see the Directory Information Licence Agreement

### 11. Annual Charge for BT Wholesale Directory Solutions Licensees

Description	Effective Date	Until	Charge	
			£	p
Annual Charge, in lieu of usage	01-07-2000	-	25,000.00	-
Localised Use Annual Charge, in lieu of usage	11-12-2000	-	2,500.00	-

12. **Charges for Business/Residential Customer Alphabetical (A-Z) Products or Services**

Description	Effective Date	Until	Charge	
			£	p
Alphabetically listed printed telephone directories, per book	01-07-2000	30-09-2001	-	23.00
	01-10-2001	-	-	28.8
Alphabetically listed voice or voice activated Directory Information Services <b>utilising</b> XD & DQR data, per search	01-07-2000	30-09-2001	-	0.61
	01-10-2001	-	-	0.76
Alphabetically listed voice or voice activated Directory Information Services <b>not utilising</b> XD & DQR data, per search	01-10-2001	-	-	0.5
Alphabetically listed other uses <b>not utilising</b> XD & DQR data, per search (Note 1)	01-07-2000	30-09-2001	-	0.30
	01-10-2001	-	-	0.38
Alphabetically listed other uses from a Database containing <b>utilising</b> XD & DQR data, per search (Note 1)	01-10-2001	-	-	0.5

13. **Charges for Business Customer Classified Products or Services**

Description	Effective Date	Until	Charge	
			£	p
Classified listed printed telephone directories, per book	01-07-2000	30-09-2001	-	3.00



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	01-10-2001	-		3.75
Classified voice or voice activated Directory Information Services, per search	01-07-2000	30-09-2001	-	0.15
	01-10-2001	-		0.19
Classified listed other uses, per search (Note 1)	01-07-2000	30-09-2001	-	0.15
	01-10-2001	-		0.19
Classified Annual Usage Cap (Note 2)	01-07-2000	30-09-2001	500,000.00	-
	01-10-2001	-	625,000.00	-

**14. Charges for Audit Files via LORS 1 and LORS 2**

Description	Effective Date	Until	Charge	
			£	p
Audit files via LORS 1 (Note 3) *	01-07-2001	31-10-2003	£120.31	-
Audit files via LORS 2 (Note 3)	01-07-2001	-	£67.17	-

\* NB: Service no longer available. LORS1 has been replaced by LORS2.

**2.5 Charge for Refresh Extracts**

Description	Effective Date	Until	Charge	
			£	p
Refresh Extracts	01-07-2001	-	£217.26	

Notes:

- 1) Including all electronic machine-readable formats (for example Internet applications and single or multiple user applications)
- 2) In any one licence year any licensee shall never pay more than £625,000.00 for usage in classified listed products and services. This cap does not include usage for alphabetical listed products and services, where a licensee is manufacturing or providing both.
- 3) Operators are allowed 1 free Audit File download request per calendar year further downloads are chargeable.

### Section 3

The following details Network Charge Change Notices and Price Change Notifications relating to the DIU Price List Sections 1.0 and 2.0.

#### 3.1 NCCN

Description	NCCN No.	Current Charge	New Charge	Effective Date	% Change
Entries in BTs OSIS –for each customer entry provided by the operator via hard copy	190	108.44	260.00	01/04/2000	<b>140</b>

#### 15. Price Change Notifications

Description	DPCN No.	Current Charge	New Charge	Effective Date	Communicated to Industry
Use of Operator Services Information System (OSIS) Data Under Licence	001	---	TBC (Note 1)	01/05/2000	31/03/2000
Use of Operator Services Information System (OSIS) Data Under Licence	002	---	Please refer to Section 2	01/07/2000	02/06/2000
Use of Operator Services Information System (OSIS) Data Under Licence (Revised)	002b	---	Please refer to Section 2	01/07/2000	27/06/2000
Use of Operator Services Information System (OSIS) Data Under Licence (Revised)	003	---	Please refer to Section 2	11/12/2000	13/11/2000
Charges for Audit Files via LOR 1 and LORS 2	004	---	Please refer to Section 2.4	01/07/2001	31/05/2001
Charges for Ad-hoc refresh Extracts	004	---	Please refer to Section 2.5	01/07/2001	31/05/2001

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Description	DPCN No.	Current Charge	New Charge	Effective Date	Communicated to Industry
<b>Charges for Ad-hoc refresh Extracts</b>	005	---	Please refer to Section 2	01/10/2001	31/08/2001

**Notes:**

- 5) Please note that actual charges for effect from 1 May 2000 cannot be published within this notification due to ongoing discussions within the Industry. The purpose being to give formal notification that those charges finally agreed through discussion and consultation will be effective from 1 May 2000.

## Annex 6

# BT's letter to Ofcom of 13 July 2006



### BY EMAIL AND POST

James Tickel  
Competition Policy Manager  
Ofcom  
Riverside House  
2a Southwark Bridge Road  
London SE1 9HA

13 July 2006

Dear James

**CW/00864/09/05: Dispute between The Number UK Ltd and BT about BT's charges for certain directory information**

**CW/00874/11/05: Dispute between Conduit Enterprises Ltd and BT about BT's charges for certain directory information**

**CW/00883/12/05: Complaint by Thomson Directories Limited about BT's charges for certain directory information**

Dear James

Thank you for forwarding The Number's letter of 6 July 2006 on the meaning of 'relevant information'. We wish to make some comments on the points raised in this letter and the previous letters submitted by The Number, Conduit and Thomson in the hope of providing some clarity around this issue. Please find set out in Annex A some pragmatic proposals on how information, including "relevant information", might be supplied.

Also, for the avoidance of any doubt we would ask Ofcom, in arriving at a draft determination, to take into account the facts and matters included in the Notices of Appeal (Cases 1063/3/3/06 and 1064/3/3/06) we delivered to Ofcom on 8 May 2006.

#### **A. "Relevant information" does not encompass "groupings"**

The fundamental question Ofcom needs to decide is what data falls within the scope of "relevant information" after the KPN judgment. The ECJ in KPN made the following key points relevant to resolution of this question:

- Relevant information refers “only to data . . . which are sufficient to enable users of a directory to identify the subscribers they are looking for.”
- In principle those data include the subscriber's name, address (including post code) and telephone number(s).
- It is within the discretion of Member States to define other data that must be made available where specific national circumstances dictate that they appear “necessary in order to identify subscribers.”

As set out in our letter dated 14 June 2006, BT believes that the following substantive data is necessary to identify an individual subscriber and constitutes “relevant information”:

- Name (including, for example, title, initials/forename, honours, business suffix) (see discussion below and Annex C)
- Address, including post code
- Telephone number

Additionally, we believe that the following substantive data, although not necessary to identify a subscriber and therefore not “relevant information”, could be helpful for directories and directory enquiry (“DQ”) providers to process the above data:

- Directory status
- Partial address indicator
- Tariff (residential or business)
- Exchange code

A key question for Ofcom to decide is what constitutes a “name” for purposes of relevant information. As set out in our 14 July 2006 letter and explained in more detail in Annex A, we believe that in the case of businesses with multiple listings, “name” can include – for purposes of “relevant information” – more than just the generic name of the subscriber company (i.e., Norfolk County Council or Lloyds TSB Bank).

Specifically, in addition to the subscriber's registered/trading/business name (e.g. Norfolk County Council), relevant information could include any relevant branch, division or department (e.g. Education Department; Highway Maintenance; Fire Service) and any possible further qualification (e.g. enquiries only; fax; student grants; surnames A-E; Safety Line).

BT does not believe, however, that “relevant information” can be interpreted so broadly as to include the manner or format in which BT and other communications providers supply this information under General Condition 19 (“GC19”). In this respect, The Number and Conduit appear to argue that “groupings” – specifically, the hierarchical linkages between listings and the structural manner in which it is displayed (see Annex B) – fall within the scope of “relevant information.”

Not surprisingly both The Number and Conduit struggle to support this argument. They concede in their submissions that groupings are not data but rather a method of displaying

data, and that the ECJ “did not consider the many ways in which ‘relevant information’ could be broken down or displayed (e.g by means of different fields or groupings)”<sup>111</sup>. Consequently, The Number and Conduit are left to weakly argue that the current groupings format should be required because changing this format would make the OSIS database “effectively unusable by DQ providers”<sup>112</sup> and “would result in chaos.”<sup>113</sup>

This is a gross exaggeration. So long as the relevant “name” data listed above is supplied to DQ providers, they are perfectly capable of utilising a search engine to identify a listing for purposes of providing DQ services, without any need for the grouping of the data. The current grouping structure is therefore not critical for the provision of DQ services and not within the scope of “relevant information.” Neither are Special Directory Entries (“SDEs”), which by definition are manifestly outside the scope of “relevant information” (see Annex B).

## **B. Erroneous statements by The Number and Conduit**

There are a number of misleading and/or erroneous statements in the submissions by The Number and Conduit which we would like to address:

- (1) It is not possible for The Number to replicate grouping activity because it does not have access to the billing information which links the various different telephone numbers for a single organisation (The Number letter of 26 May 2006, paragraph 26)

BT does not use billing information or any associated billing systems to set up the grouping structure in OSIS. The grouping structure is set up by re-contacting the customer based on the customer’s requirements.

- (2) A DQ operator needs to be supplied with grouped subscriber data in order to provide a “good quality” DQ service (The Number letter of 26 May 2006, paragraph 17) and grouping or ‘structural separation’ needs to be applied to listings to make them searchable (The Number letter of 6 July 2006, at page 2)

These assertions are wholly misleading and misplaced. As noted above, the grouping structure (i.e., J records and the fields in the E records used to link listings to the J records, as opposed to content data fields) is not necessary for DQ operators to accurately identify a subscriber. Groupings relate only to the visual presentation of information alone, and not the data itself. They have no bearing whatsoever on the ability of third parties to run voice DQ services.

In the absence of groupings (and assuming the “name” data described above is provided), The Number and other DQ operators would merely have to make amendments to their search engine in order to have the ability to conduct key word searches (similar to the search engines Google and Yahoo use) and thereby identify a subscriber and its relevant telephone number. They would not have to re-contact subscribers themselves, although they would be free to do so. Another possibility would be to access a third party search engine to manipulate the data.

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<sup>111</sup> Conduit letter of 26 May 2006, page 2.

<sup>112</sup> Conduit letter of 26 May 2006, page 2.

<sup>113</sup> The Number letter of 6 July 2006, page 2.

We would also note that the grouping structure is not necessary to compile A-Z phonebooks. Phonebooks could contain no groups at all, which is roughly the situation in Holland (groups are all paid for in the A-Z section). As Thomson acknowledges in its letter of 5 June 2006 (paragraph 3.3), it does not use BT's "J"-type records and does not consider grouping information to be necessary for the compilation of its own A-Z phonebook.

- (3) The fields and the grouping used by the OSIS database have been determined solely by BT (Conduit letter of 26 May 2006, pages 2-3)

The structure of the SFF and associated fields in OSIS were determined on the basis of industry discussions since 1999 and not, as Conduit alleges, determined solely by BT.

- (4) An upstream provider like BT is likely to be carrying out grouping anyway as part of its voice telephony service and, in any event, BT is already grouping directory data in order to compile the BT Phone Book (The Number letter of 26 May 2006, paragraph 36) and it would be impossible for anyone other than the voice telephony provider or OSIS to group subscriber listings (The Number letter of 6 July 2006, at page 2)

These statements are factually incorrect. BT does not group data as part of its voice telephony service as there is absolutely no reason to do so. Moreover, whether or not BT Directories groups data for purposes of compiling the BT Phone Book is absolutely irrelevant to the question whether BT is obliged to supply grouped data under GC19 or USC7, which are obligations falling on parts of BT upstream from BT Directories.

Additionally, it is possible for others to group subscriber listings. As Thomson states, they are perfectly capable of grouping the data they receive from OSIS and they would do so in the absence of OSIS providing the information in this format. (Thomson letter of 5 June 2006, paragraph 3.3).

- (5) OSIS contains no additional information in the KPN sense (The Number letter of 26 May 2006, paragraphs 4 and 38)

This is factually incorrect. See Annex C for the data fields in OSIS that are "additional information." One particular example of additional information is the 'business descriptor', which The Number (in paragraph 21 of its letter of 26 May 2006) claims is necessary to provide "a good quality DQ service". However, as both The Number in its letter and Conduit on page 3 of its 26 May 2006 letter acknowledge, this OSIS field is not comprehensively populated and not necessarily accurate, and in any case both companies use other sources of information to augment what OSIS provides in this field. Thus, the business descriptor is more akin to a business classification and therefore a commercial activity outside the scope of "relevant information".

- (6) For some listings the grouping structure might be six or seven layers (The Number letter of 6 July 2006, at page 1)

The maximum layers in a grouping structure for a listing are in fact four.

- (7) Without groupings, all Lloyds branches in London would be thrown up by the search (The Number letter of 6 July 2006, at page 1)

This scenario could possibly happen today even with groupings unless the DQ provider's search engine includes other criteria in addition to, for example, "Lloyds" and "London".

Whether or not it happens is wholly dependent on the type of search engine deployed by the DQ provider. Additionally, we would note that the problem of distinguishing between Lloyds Bank and Lloyds Chemist exists with grouping as well as without it.

(8) The priority data field is essential (The Number letter of 6 July 2006, at page 3)

The priority data field is not essential, although helpful. 'Switchboard' or 'Head Office' can always be found using key word searches rather than scrolling through pages of listings.

(9) The upstream providers have arranged for BT 'to discharge their GC19 duties for them' (The Number letter of 6 July 2006, at page 3)

There has been no such arrangement. GC19 and USC7 are distinct obligations (see our Notices of Appeal in the related appeals<sup>114</sup>) and directories and DQ providers have made the decision to obtain directory data via USC7 as opposed to GC19. Absent a reasonable request to upstream providers, no GC19 obligation arises. We are aware of no instances where requests have been received from other upstream providers under GC19.

**[CONFIDENTIAL INFORMATION REDACTED]**

Please let us know if you would like to discuss these issues further.

Yours sincerely

Jeff Ryen  
**Senior Regulatory Counsel, BT Group plc**

cc: Julia Jackson, BT Wholesale

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<b><u>81 Newgate Street</u></b>		

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<sup>114</sup> As noted above, for the avoidance of doubt we would ask Ofcom to take into account the facts and matters included in those Notices of Appeal.



**London**  
**EC1A 7AJ**

**ANNEX A****For How Certain Information Might Be Supplied**

The table in Annex C sets out for each current OSIS field BT's assessment as to what constitutes:

- (a) Substantive data (some of which is within the scope of "relevant information" and some outside. In the case of the latter, this information may be helpful and could usefully be supplied albeit not under GC19)
- (b) Management data (which is outside the scope of "relevant information" but which may be helpful in processing the substantive data and could usefully be supplied albeit not under GC19)
- (c) Additional information (which is outside the scope of "relevant information" and not collected, and should not be supplied)

In taking the view that the scope of "relevant information" is more than just the generic name of a business and does not include "groupings", we have given careful consideration to the ability of voice DQ providers to run an effective service on a lesser amount of information than is currently included in OSIS, and for any third party to produce a phonebook to their own specification beyond that which is required as part of universal service.

Specifically, the large number of additional fields currently within OSIS, which include information as part of the subscriber's name (header fields, qualifier and appendix), could realistically and feasibly be simplified to include three sets or fields of data:

- Registered/Trading/Business name (e.g. Norfolk County Council)
- Specific purpose/function details (e.g. Education Department, Highway Maintenance, Fire Service)
- Qualification (e.g. enquiries only, Fax, Student Grants, surnames A-E, Safety Line)

In proposing three aspects of a "name", BT has taken into account the following:

- Most medium to large businesses are organised to carry out different functions in different departments and have historically wanted these specific purposes to be published. For example, the Repair department in an organisation is recognisably distinct from a Sales department and would clearly have a completely different function.
- The users of the DQ service will want to be provided with a correct number at first enquiry and will neither want to have to re-call the DQ service nor incur additional expense from overly long phone calls (i.e., from being left on hold while being redirected to a correct department within their target organisation).
- CPs want to ensure that their customer's information is readily accessible and DQ service providers want to provide an efficient and accurate service to their customers.

While we have indicated that we do not believe that it is necessary to 'group' data, we do recognise that it is important for sufficient data to be made available to allow the differentiation of one listing from another.

The proposal shown above creates a framework which is sufficient to use as 'fit for purpose' and on which Industry could organise the collection of data upstream.

While currently in OSIS there is a name field and 5 supplementary fields (putting to one side the title, forename/initials, etc), namely Sub Header, Sub Sub Header, Sub Sub Sub Header, Appendix and Qualifier, the fields often contain more data than is necessary to differentiate one listing from another.

For example Lloyds TSB Registrars is listed as:

Lloyds TSB Bank, Departments, Lloyds TSB Registrar, FAX

The reference to Departments is irrelevant in actuality because the end user will be seeking the fax number for Lloyds TSB Registrar. Therefore, provision of three sets or fields of data would be sufficient to identify and provide the number:

Name Field 1	Lloyds TSB Bank (Registered/Trading Business Name)
Name Field 2	Lloyds TSB Registrars (Specific Function)
Name Field 3	Fax (Qualification)

Using another example:

Norfolk County Council, Education Department, Grants for Students, First letter of students surnames, A-C

This example has used all sub headers and a qualifier field but could have been structured as follows to achieve the same aim:

Name Field 1	Norfolk County Council
Name Field 2	Education Grants for Students
Name Field 3	Surnames beginning A-C

BT proposes that the data should be provided as distinct fields to provide clarity for all concerned. It will allow CPs to be clear about the type of information considered 'relevant' and will allow them to ensure they collect and submit the data in the appropriate fields. Additionally, the DQ service providers will have a framework on which to base their services and will be able to develop their search engines accordingly and train their operators in an efficient manner.

**ANNEX B****Groups**

Grouping is the formal structured linkage of directory listings within a database, usually but not always related to a single business. Grouping is about the relationship between records and is distinct from the data fields within a listing, which can exist independently of the need to link or sequence listings.

Grouping forms a hierarchical and logical structure for information and assists in creating a degree of simplicity in the visual presentation of multiple listings for the same business. Grouping is fundamentally:

- the creation of a 'linking reference' from one directory listing to its associated heading record; and
- the prioritisation of listings to create a sequence within each level of the group structure (if a sequence other than alphanumeric is required).

To illustrate the points above, consider the example of a building society and the directory listings which it would normally have published in a directory. Branches of the building society are usually listed under a heading of 'branches', and this heading in turn is listed under the building society name.

Without linking, sequencing or other manual amendment, the listings would be displayed alphabetically as shown below:

Nationwide Building Society 24 hour lost/stolen card reporting	0845 7302010
Nationwide Building Society, 49 Bath Street, Ilkeston	0115 909 0000
Nationwide Building Society, 49 Bath Street, Ilkeston, FAX	0115 909 0206
Nationwide Building Society General Customer Enquiries	0845 7302010
Nationwide Building Society, 33 High Street, Alfreton	01773 723100
Nationwide Building Society, 33 High Street, Alfreton, FAX	01773 723106
Nationwide Building Society, 28 Knifsmith Gate, Chesterfield	01246 340000
Nationwide Building Society, 28 Knifsmith Gate, Chesterfield, FAX	01246 340006
Nationwide Building Society, 31 Market Street, Heanor	01773 720100
Nationwide Building Society, 31 Market Street, Heanor, FAX	01773 720106
Nationwide Building Society, 8 The Square, Beeston	0115 980 0100
Nationwide Building Society, 8 The Square, Beeston, FAX	0115 980 0106

However once the data is grouped (i.e. the relationship and linkages between the listings is defined), the listings can be sequenced automatically and listings of similar purpose (in this case the branches) are 'grouped' together under the heading of branches.

**Nationwide Building Society****24 hour lost/stolen card reporting****0845 7302010****General Customer Enquiries****0845 7302010****Branches****Alfreton**

33 High Street, Alfreton

01773 723100

FAX

01773 723106

**Beeston**

8 The Square, Beeston	0115 980 0100
FAX	0115 980 0106

**Chesterfield**

28 Knivesmith Gate, Chesterfield	01246 340000
FAX	01246 340006

**Heanor**

31 Market Street, Heanor	01773 720100
FAX	01773 720106

**Ilkeston**

49 Bath Street, Ilkeston	0115 909 0000
FAX	0115 909 0206

**Special Directory Entry (SDE)**

SDEs encompass:

- copies of a listing in editions of the Phone Book outside the subscriber's local area.
- entries for the same number under different names within the same edition of the Phone Book.
- enhancements to the typeface of the listing.
- inclusion of additional content beyond "relevant information".

It is BT's view that SDEs are a value-added service and not necessary to identify a subscriber (and therefore not "relevant information"). It is further BT's view that it is within its commercial discretion whether to charge for SDEs. For example, in the case of non-geographic numbers, BT may provide free national coverage for national helplines such as Samaritans, Childline, National Rail Enquiries and NHS Direct, but charge for national coverage for commercial organisations such as HSBC, Hilton Hotels, etc. who gain direct benefit from the SDE itself and can reasonably be expected therefore to pay for this.

## ANNEX C

## OSIS Standard Extract Product Specification

Key –

Substantive Data – within scope of “relevant information” (except where indicated otherwise). Where it is not within the scope of “relevant information” it is still useful and can be supplied, albeit not under GC19

Management Data – not within scope of “relevant information”, but may be helpful to process the substantive data and can be supplied, albeit not under GC19

Additional Data – not within scope of relevant information and not collected, and should not be supplied

<u>No</u>	<u>Field Name</u>	<u>Value</u>	<u>Explanation</u>	<u>Max Length</u>
1	Identifier	CCYY-MM-DD-hh.mm.ss.mic ros	Unique 26-byte identifier in timestamp format. NB: The first two digits (CC) will be subject to calculation via an algorithm for entries input via the on-line client.	26
2	Record Type	A C E G J	Single entry Single entry cross reference Group entry Group entry cross reference Group Header	1
3	Main/Additional Indicator	M, A	Identifies the main entry where multiple entries exist with the same number (A and E records only). An example usage of this is if a husband and wife both wish to have directory entries for their telephone line.	1
4	Cessation Date	CCYY-MM-DD	Effective date for the cessation – date of daily feed run.	10
5	Entry Type/ Directory Type (not ‘relevant information’)	1 2 3 4	DE – normal directory entry XD/NC – Ex-directory no calls DQR – number is not in the phone book, but is available via Directory Enquiries XD/CO – Ex-directory calls offered	1
6	Tariff/Customer Type (not ‘relevant information’)	1 2 3 4	Business Not used Residential Not used	1
7	Merge Indicator	Any Alphanumeric character.	Used to distinguish between different groups with the same header details (J, E and G records only)	1

8	Priority	A, S, Z	Sortation priority within a group (G and E records only) Sortation is alphabetical but can be overridden, 'A' pushes to the top, 'S' to the centre, 'Z' to the bottom.	1
9	Telephone Number (internal)	E.g. 113=2376485	Formatted telephone number without leading 0 .If a record is Ex-Directory this field will contain asterisks in place of the telephone number.	11
10	Telephone Number Dialable	E.g. 01132376485	Dialable telephone number including exchange code e.g. 01132376485 Note that this field may contain text characters preceding the number. If a record is Ex-Directory this field will contain asterisks in place of the telephone number.	45
11	Implementation Date / Run Date	CCYY-MM-DD	For update records this contains the effective date for the action. For data dump records (load) this contains the date that the data dump was produced from OSIS.	10
12	Exchange Code (not 'relevant information')	E.g. 113=237	Exchange code including a separator.	8
13	Postcode	E.g. SW15 2DP	Standard format postcode. <b>May not be present if Partial Address indicator set. (Optional)</b>	8
14	Group Tariff Marker	1 3	Business and Mixed Residential	1
15	Line Type	F L M N P R T Z	Type of line: Fax Local Mobile NORMAL Premium Regional National Freecall <i>NB: This field is not always reliable i.e. A national number could also be a FAX.</i>	1
16	Free Chargeable Indicator	F, C, space	'C' if the entry is to be billed otherwise 'F' or space for Free.	1
17	Indentation Level	0,1,2,3,4	This field will show 0, 1, 2 or 3 for headers and 1, 2, 3 or 4 for group listings. For single listings this field will be null.	1
18	DQ Code / PB Code	E.g. -01, 545	National geographical / Phonebook Area Standard extract does not get PB listings.	3
19	BCM Code	Spaces	Business classification: Residential	4

		9950 9955 9999	FAX Doctor Business	
20	Suppression Code		A 64 character string each representing a downstream system. Only sent if an actual value is set. <i>NB: This field is never set on OSIS</i>	64
21	Parent Identifier		26 byte identifier of parent record in timestamp format (J, E and G records only)	26
22	Typeface	1 4 5	Type of print required in the directory: Normal Bold Superbold	1
23	Action Indicator	D, I or U	Delete, Insert or Update (Data Dump records always Insert).	1
24	TPS Marker		<i>NB: This field is not currently used</i>	1
25	Name Retitled: <b>Name Field 1</b>	Brown / Smith Bayliss & Cox	Surname or name of a business/company. Initials contained within the name of a firm or company when followed by another name should be included in the name field. For example, Smith B & Jones	150
26	Sub Header Retitled: <b>Name Field 2</b>	Head Office	Additional information that can sub divide groups on a geographical basis, or by department within company detailed within the group.	150
27	Sub Sub Header	Parks Dept	See above	150
28	Sub Sub Sub Header	Southern Branches	See above	150
29	Title	Dr, Sir, The, etc	Mode of address.	45
30	Initials / Forename	John, John B, J.B etc.	May contain initials or forename in full or abbreviated form, or a combination of both.	56
31	Honours	OBE, MBE, KCB etc.	May include not only honours but also degrees and other qualifications permitted.	100
32	Business Suffix	& Co, & Co Ltd, Bros, Sons etc.	Part of the entry immediately following the initials field or name field. It indicates a business state.	150
33	Business Description	Coal Merchant, Dental Surgeon, Builder	Contains a description of the business, abbreviated if possible, e.g. 'jeweller would become jwlr'	110



34	Qualifier Retitled: <b>Name Field 3</b>	Spares Dept. Appointments Only, etc.	That part of a group entry which precedes the house number (if present) or which cannot logically be inserted as one of the other fields. In some large groups it is also used to hold locality information. Group Entry Qualifier – Surgery, Appointments only Name of branch- Spares Dept. Locality – Cardiff, Swansea etc.	150
35	Premises / Building Name or No.	30, 30A, The Manor etc.	Any combination of House Number, Name, Suffix, or Flat Number may be present. <i>NB: May not be present if Partial Address indicator set.</i>	200
36	Street	Whitehall, Sussex Gdns, High St etc.	Street Name in its abbreviated form. <i>NB: May not be present if Partial Address indicator set.</i>	56
37	Locality	Stanni ngfield, Bromsgrove, Aston	The locality field should contain the local area name if it is different from that of the telephone exchange concerned. In the past the postal district was also inserted into this field, but this should no longer be the practice, however some old locality information does still exist. <i>NB: May not be present if Partial Address indicator set.</i>	50
38	Appendix	Stores only, 24hr Number, FAX etc.	This is the part of a group entry that appears after the locality and is not suitable for another field. Often used for FAX and helpful information.	254
39	Exchange	Cardiff, Tyneside, Brighton, 0171-764, 01222 etc.	The exchange name for a given telephone number.	30
40	CROSS REFERENCE	TSB – see also Lloyds TSB See our display ad etc.	An entry, which refers the reader to another entry in the directory.	254
41	Post Town		<i>NB: This field is not currently used</i>	50
42	Post County		<i>NB: This field is not currently used</i>	50
43	Partial Address Indicator (not 'relevant information')	Y or N  <i>NB: This field indicates if a customer has chosen to omit part/ all of their address and if Y the address information must not be enhanced without the Customer's permission.</i>	One byte character used to indicate a Partial Address listing.	1

## Annex 7

# The Dutch Business Appeal Court in *KPN*

TIS 1851/06

[http://zoeken.rechtspraak.nl/default.aspx?searchtype=kenmerken&instantie\\_uz=College+van+Beroep+voor+het+Bedrijfsleven](http://zoeken.rechtspraak.nl/default.aspx?searchtype=kenmerken&instantie_uz=College+van+Beroep+voor+het+Bedrijfsleven)

LJN: AU5699, College van Beroep voor het bedrijfsleven, AWB 01/666hb

Print uitspraak

Date of judgment: 26 October 2005  
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Judicial area: Other administrative law  
Type of proceedings: Appeal  
Indication of content: Telecommunications law

Judgment  
College van Beroep voor het bedrijfsleven  
[*Business Appeal Court*]

AWB 01/666                      26 October 2005  
15300 Telecommunications law

### Judgment on the appeal of:

KPN Telecom B.V., The Hague (hereinafter: KPN),  
against the judgment of the Arrondissementsrechtbank te Rotterdam [*Rotterdam District Court*] of 21 June 2001 in the action brought by KPN, Denda Multimedia B.V. and Denda Directory Services B.V. against the Onafhankelijke Post en Telecommunicatie Autoriteit [*Independent Postal and Telecommunications Authority*] (OPTA).

Legal representative of KPN: Mr. B.L.P. van Reeken, *advocaat* in Amsterdam.  
Legal representative of OPTA: Mr. B.F. Drijber, *advocaat* in The Hague.

Further party to the action:  
Denda Multimedia B.V., of Oldenzaal (hereinafter: Denda), represented by: Mr. T.F.W. Overdijk, *advocaat* in Amsterdam.

### 1. Proceedings

With regard to the background and the course of the proceedings, the Appeal Court makes reference to the judgment of 8 January 2003, given in the present case and annexed to this judgment, the substance of which is deemed to be reiterated and read into the present judgment.

In the above-mentioned judgment the Appeal Court made a reference for a preliminary ruling to the Court of Justice of the European Communities (hereinafter: Court of Justice) on questions raised in that judgment and held over any further ruling in the case at issue.

On 25 November 2004 the Court of Justice gave a judgment on this case, under number C-109/03. The Appeal Court forwarded a copy thereof to the parties in letters dated 2 December 2004. A copy of that judgment is also annexed to this judgment.

The OPTA responded to the judgment by fax of 29 December 2004. On 19 January 2005 Denda forwarded its observations by fax. In a letter of 25 January 2005 KPN forwarded its response to the judgment. On 15 June 2005 the Court sat once more to resume its examination of the case, and the parties provided further details of their positions through their legal representatives.

## **2. Basis for the dispute**

Reference is made to the above-mentioned judgment of 8 January 2003 for an account of the legal framework, the facts established and the contested decision.

## **3. Questions referred for a preliminary ruling and response given**

In its judgment of 8 January 2003 the Appeal Court referred the following questions to the Court of Justice:

“1. Is relevant information in Article 6(3) of Directive 98/10/EC (OJ 1998, L101/24) to be interpreted as meaning only the numbers together with the name, address and postcode of the person to whom the number has been issued and any entry as to whether the number is used (exclusively) as a fax line published by the organisations concerned or does ‘relevant information’ also cover other data at the disposal of the organisations such as an additional entry relating to a profession, another name, another municipality or mobile telephone numbers?

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

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

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

In its judgment of 11 [*sic*] November 2004 the Court of Justice, giving its verdict on the questions referred by the Appeal Court, ruled as follows:

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

to users where, in light of specific national circumstances, they appear to be necessary in order to identify subscribers.

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

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

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

#### **4. Detailed positions of the parties**

**4.1** KPN submitted that, with regard to the data to be provided, the Court of Justice ruled that Article 6(3) of the Directive relates only to name, address and telephone number data. The telephone number concerned is only the number issued by the provider of voice telephony and not any numbers known to other providers. Neither the legislator nor the Minister intended to do any more under Article 43 of the *Besluit ONP huurlijnen en telefonie [Decree on rental lines and on ONP telephony]* (BOHT) than to implement the Directive. The OPTA also had no such intention. The fact that it now appears to be doing otherwise is in order to bridge the gap, after the event, which appears to exist between Article 43 BOHT and Article 6(3) of the Directive on the one hand and its interpretation thereof on the other. The legislator in no way considered that data other than the name, address and telephone number data would be necessary, irrespective of which specific national circumstances might make it necessary. The name, address and telephone number data are sufficient to identify subscribers. Additional data do not serve identification purposes but may be included by providers of telephone directories to make their use easier for users. The OPTA has not mentioned any specific national circumstance which explains why additional data should be necessary in the Netherlands in order to identify subscribers. Nor is this necessary for competition on the market in telephone directories. At the hearing KPN stated that there were now six providers of telephone directories and/or subscriber information services which apparently are in a stable position with the user data released for entry.

Regarding the costs to be passed on, KPN asserted that the costs of storing and accessing the data in order to make them available should not be invoiced on the basis of their acquisition but on the basis of their being made available. Arranging the storage and accessibility of the data for entry in a directory does not in any case occur within the framework of the telephony service but within that of making them available for the purposes of subscriber information and directory services.

At the hearing KPN reversed the position which it had adopted in its written response that the costs of the database for entry purposes should be invoiced on the basis of making the subscriber data available. It now has only one fixed cost heading for “software for extractions, capital letters, lower case letters, postcode etc”, which was created in order to make subscriber data available.

**4.2** The OPTA first stated that the Court of Justice uses different terminology from that used in the national proceedings. In its judgment the Court of Justice makes a distinction between “basic data” (or basic entry data) on the one hand and “additional data” on the

other. In the national proceedings the former category is referred to as name, address and telephone number data and the latter category as basic entry data.

With regard to the question of which data KPN should provide, the Court of Justice stated that the data which are sufficient to identify subscribers in principle include the name, address, postcode and assigned telephone number(s). By using the words "in principle" the Court indicated that this is not a closed category. An important addition in this judgment is the fact that Member States remain entitled to lay down whether specified additional data must be made available to third parties in a specific national context. By Member States should also be understood the national regulatory bodies. There is nothing to indicate that the authority to lay down criteria for the provision of additional data must be embodied in formal or substantive legislation. The fact that Article 43 BOHT and Article 21 in conjunction with Article 5 of the *Besluit Universele Dienstverlening [Decision on universal service provision]* (BUD) does not specifically require that a provider of numbers must also provide data other than name, address and telephone number does not therefore mean that the Netherlands, a Member State, has not availed itself of the opportunity offered by the Court of Justice and that the OPTA should not as the national regulatory body have the authority to lay down a requirement to that effect. Whether the national regulatory body has the said authority is a question of national law. Now that the court in Rotterdam has established that the ruling on appeal has a legal basis, the OPTA has that authority. There can be no objection to the fact that in the contested decision the OPTA does not refer to "specific national circumstances" and "the identification of subscribers" since it cannot be expected of the OPTA that it should anticipate the terminology used by the Court of Justice. It appears from the arguments put forward by the Court of Justice that the requirement to provide additional data must be necessary for the identification of subscribers in the light of specific national circumstances. The additional data which is entered in a telephone directory such as that of KPN serve no other purpose than to fully identify the subscriber. In addition, third-party competitors should be able to obtain these data against appropriate remuneration. Competition is possible only if competitors can have access to the same information.

Regarding the question of which costs may be invoiced, the OPTA submitted that KPN must be prevented from being remunerated twice, since it incurs costs only once. The concept of "cost oriented terms" in the Directive must be interpreted to mean that the operator may invoice the marginal costs related to the provision of information only in respect of the provision of the basic data. The costs of storing the data should be paid by KPN since that storage does not specifically take place with a view to making the data available to third parties. The costs of making data accessible may be passed on to third parties provided that those costs are in fact exclusively incurred for making those additional data available and that the costs are transparent and necessary. With regard to the additional data, KPN may further invoice a sum as part of the demonstrable costs of acquiring that information, plus a reasonable percentage as profit.

**4.3** Denda stated both in its written response and at the hearing that it accepted the OPTA's observations. It further asserted that by "identification" should be understood what is necessary in order to be able to find a person in the directory and contact him or her. It pointed out practical problems which could be avoided if only the name, address and telephone number data were provided and it argued that the concept of "numbers with related information" continues to be applied by the list of basic entry data which the OPTA provided in its decision of 4 December 2000, which was contested by KPN.

## **5. Assessment of the dispute**

**5.1** In accordance with the ruling given by the Court of Justice in respect of the first question referred by the Appeal Court concerning the interpretation of Article 6(3) of Directive 98/10/EC, since KPN is one of the organisations referred to therein which assign

telephone numbers, it is required to make available the name, address, including postcode, and telephone number(s) allocated by KPN which belong to those of its subscribers who have not expressly objected to this, to those who intend to publish a universal telephone directory and can therefore make a claim to such information pursuant to Article 43 BOHT.

There is moreover no dispute between the parties with regard to the possible entry of a number which is used (exclusively) as a fax line.

There can be a justification for imposing a requirement to provide data other than the above-mentioned name, address and telephone number information only if this is considered to be necessary for the identification of subscribers in the light of the specific national circumstances.

In Article 21 in conjunction with Article 5 BUD the Netherlands legislator stated that universal telephone directories contain data on subscribers to providers of fixed and mobile public telephony services including their fixed, mobile and personal numbers. More detailed rules on this point, from which the substance of the information to be provided may be deduced, have not been laid down in the Netherlands.

Furthermore, the OPTA has not indicated the existence of specific national circumstances which make it necessary for additional data to be published in order to identify subscribers.

The OPTA has argued that KPN, which has already been publishing telephone directories in the Netherlands for much longer than others, has set a standard in the Netherlands with its telephone directories. Competition is possible only if competitors can have access to the same information as that which KPN is accustomed to include in those directories.

Leaving aside the tenability of this position in the abstract, in the opinion of the Appeal Court this cannot reasonably offer a basis for considering that the provision of additional information is necessary for the identification of subscribers. The Appeal Court further deduces from paragraph 25, final sentence, of the judgment of the Court of Justice that the objective of promoting competition cannot of itself constitute a basis for extending the scope of the subscriber data to be provided.

The above leads to the conclusion that KPN is under no obligation other than to provide the data explicitly mentioned by the Court of Justice, and in doing so the term "address" may also be considered to include the place of residence of the subscriber.

**5.2** With regard to the costs to be invoiced for the provision of the relevant information, the Court of Justice makes a distinction between the requirement on the provider of the universal service to provide data and the additional data which it is not required to make available to third parties. In the case of the first category, only the costs relating to the actual making available of those data may be invoiced.

The Appeal Court concludes from the reference made in the judgment to the Opinion of Advocate General LM Poiares Maduro, for which a somewhat broader justification is given, and specifically point 49 of the Opinion, that the costs of maintaining a database with information on subscribers must be borne by providers of voice telephony services and that those costs have already been accounted for in the costs and revenue of a standard voice telephony service.

With regard to the question, which still divides the parties, of whether KPN's fixed costs heading for "software for extractions, capital letters, lower case letters, postcodes etc" may be included among the costs relating to the actual making available of the data, the Appeal Court considers that this is not the case. With regard to any software relating to the correct

use and entry of capital letters, lower case letters, postcodes etc, it is the case that its availability must be considered to form part of the normal management of a database, so that the relevant costs must be borne by KPN as a provider of voice telephony services.

**5.3** With regard to the second category of data, for which it is the case that the provider of the universal service is not required to make them available to third parties, the basis for determining the price to be paid for them has for the time being been removed.

**5.4** On the basis of the above considerations, KPN's appeal is well founded. The contested judgment of the court should therefore be annulled. The Appeal Court further sees grounds for doing what the court should have done, that is declaring KPN's appeal to be well founded, nullifying the decisions on the complaints under references OPTA/JUZ/2000/202196 and OPTA/JUZ/2000/202908 and charging the OPTA once more with giving a decision on the complaints, taking account of the above considerations.

**5.5** In its notice of appeal, KPN submitted that the court had erroneously passed over its complaints on the admissibility of Denda International v.o.f. and Topware in the OPTA complaint procedure. On this point, the Appeal Court observes that the legal persons referred to did not intervene as parties to the appeal and higher appeal.

Denda International v.o.f. no longer exists and Topware is insolvent.

In the light of the above, and now that the contested judgment has already been nullified for other reasons and the OPTA once more has to decide on the complaints, the Appeal Court will refrain from answering the question of whether they were at that time affected by the decision of 29 September 1999. In preparing its new decision on the complaints, the OPTA will again make a judgment on this point, taking account of the situation which existed at that time.

**5.6** The Appeal Court considers that the conditions are satisfied for an order on costs pursuant to Article 8:75 of the Algemene wet bestuursrecht [General Law on administrative law]. The amount of the costs eligible for payment is established on the basis of the provisions of the Besluit proceskosten bestuursrecht [Decision on costs in administrative law], awarding 1 point in each case for the submission of a notice of appeal and appearance in court at appeal and higher appeal, 2 points for the submission of written observations in the reference to the Court of Justice for a preliminary ruling, 2 points for appearance at the oral hearing at that Court and ½ point for the issue of a detailed statement and appearance at the detailed hearing, at € 2898.00 (9 points at € 322 each).

Denda must bear its own costs.

## **6. Decision**

The Appeal Court:

—annuls the judgment of the court in so far as it was given on the appeal by KPN;

—declares the appeal by KPN against the decision of the OPTA of 4 December 2000, reference OPTA/JUZ/2000/202196, to be well founded;

—annuls that decision;

—charges the OPTA with deciding once more on the complaint concerning its decision of 29 September 1999, taking account of the judgment of the Appeal Court;

—orders the OPTA to pay KPN's costs relating to the processing of the appeal to the court and the higher appeal to the Appeal Court, established at € 2898.00 (in words, two thousand eight hundred and ninety-eight euro);

—rules that the OPTA should remunerate the court registry costs paid by KPN amounting to € 462.85 (in words, four hundred and sixty-two euro and eighty-five cents) in respect of the appeal and higher appeal.

Thus given by Mr. C.J. Borman, Mr. W.E. Doolaad and Mr. H.O. Kerkmeester, in the presence of Mr. B. van Velzen as Registrar, and pronounced in open court on 26 October 2005.

Signed C.J. Borman

Signed Mr. B. van Velzen





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### QUALITY OF TRANSLATION

I/we certify that the attached document (our ref. TIS 1851/06) is a true and accurate translation of the judgment in Dutch supplied to me/us under reference

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LJN: AU5699, College van Beroep voor het bedrijfsleven , AWB 01/666hb

**Translator:**

Signature ..... *Margaret Gibbins* .....

Name in block capitals ..... *MARGARET GIBBINS* .....

Date ..... *14 December 2006* .....

TRANSLATION & INTERPRETING BRANCH  
FOREIGN & COMMONWEALTH OFFICE

## Annex 8

## Glossary

A8.1 This glossary is simply a guide to the shorthand meaning of certain expressions (or abbreviations) as used in this document, without setting out the full meaning any such expressions might have in the law.

<b><u>Expression</u></b>	<b><u>Meaning</u></b>
<b>1984 Act</b>	Telecommunications Act 1984 (Chapter 12)
<b>2003 Act</b>	Communications Act 2003 (Chapter 21)
<b>August 2006 document</b>	Ofcom's consultation document entitled ' <i>Resolution of price disputes concerning supply of certain directory information by British Telecommunications plc to The Number (UK) Ltd and Conduit Enterprises Ltd: Draft Determinations and Explanatory Statement</i> ', published on 17 August 2006
<b>CLI</b>	calling line identification
<b>CP(s)</b>	communications provider(s)
<b>DGT/Director</b>	Director General of Telecommunications
<b>DIPs</b>	directory information providers
<b>DPA</b>	Data Protection Act 1998 (Chapter 29)
<b>DQ services</b>	directory enquiry services
<b>Dutch Business Appeal Court</b>	College van Beroep voor het bedrijfsleven; judgment of 26 October 2005 (see <b>Annex 7</b> of this explanatory statement) following the ECJ's judgment in <i>KPN</i>
<b>ECJ</b>	European Court of Justice
<b>ECN(s)</b>	electronic communications network(s)
<b>ECS(s)</b>	electronic communications service(s)
<b>GC</b>	General Condition
<b>GC notification</b>	A document issued by the DGT entitled ' <i>Notification setting general conditions under Section 45 of the Communications Act 2003</i> ', signed on 22 July 2003
<b>IA Guidelines</b>	Ofcom's document entitled ' <i>Better Policy Making: Ofcom's approach to Impact Assessment</i> ' of 21 July 2005
<b>KPN</b>	Judgment of 25 November 2004 by the ECJ in Case C-109/03, <i>KPN Telecom BV v. OPTA</i>
<b>LRIC</b>	long run incremental cost
<b>Ofcom</b>	Office of Communications
<b>Oftel</b>	Office of Telecommunications
<b>OSIS</b>	BT's database known as the 'Operator Services Information System'

<b>PAI</b>	Partial Address Indicator
<b>PATS</b>	publicly available telephone service(s)
<b>Privacy Directive</b>	Directive on Privacy and Electronic Communications, European Parliament and Council Directive 2002/58/EC of 12 July 2002
<b>Privacy Regulations</b>	The Privacy and Electronic Communications (EC Directives) Regulations 2003, S.I. 2003/2426
<b>PTO(s)</b>	Public Telecommunications Operator(s)
<b>public ECS</b>	any ECS that is provided so as to be available for use by members of the public
<b>RVTD</b>	<i>Revised Voice Telephony Directive</i> , European Parliament and Council Directive 1998/10/EC
<b>SAC</b>	stand alone cost
<b>SDE</b>	special directory entry
<b>Services Directive</b>	Commission Directive 90/388/EEC of 28 June 1990
<b>Services Order</b>	The Electronic Communications (Universal Service) Order 2003, S.I. 2003/1904
<b>SIA</b>	BT's Standard Interconnect Agreement
<b>Universal Service Regulations</b>	The Electronic Communications (Universal Service) Regulations 2003, S.I. 2003/33
<b>USC</b>	Universal Service Condition
<b>USD</b>	<i>Universal Service Directive</i> , European Parliament and Council Directive 2002/22/EC of 7 March 2002
<b>USO notification</b>	Designation of BT and Kingston as universal service providers, and the specific universal service conditions - a statement and Notification issued by the Director General of Telecommunications on the implementation of the Universal Service Directive, July 2003
<b>WLR</b>	Wholesale Line Rental