

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

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has been redacted. Redactions are indicated by [X]**

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## Section 1

# Summary

## Introduction

- 1.1 Ofcom has today published two determinations under sections 188 and 190 of the Communications Act 2003 (the “**2003 Act**”) to resolve two disputes. The disputes concern BT's commercial charges for information used by (among others) providers of services known as ‘directory enquiries’. These services allow consumers who are looking, to find a specific telephone number of (say) an acquaintance or business. These services are accessed by consumers dialling telephone numbers beginning with 118.
- 1.2 The first dispute was referred to Ofcom by The Number (UK) Limited (“**The Number**”) on 7 September 2005. The second dispute was referred to Ofcom by Conduit Enterprises Ltd (“**Conduit**”) on 20 December 2005. This document sets out Ofcom's resolution of each of the disputes.
- 1.3 The primary issue in dispute in both cases 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.
- 1.4 BT's OSIS database contains directory information of both BT and non-BT customers and BT pays other communications providers (“**CPs**”) <sup>1</sup> 66 pence per compiled entry in the database to obtain this data.<sup>2</sup>
- 1.5 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. As we understand it, new licences are yet to be agreed. In the meantime, the present licences remain in force by BT granting a series of short term licence extensions.
- 1.6 On 25 November 2004, at a time when the parties were still negotiating the terms of new licences, the European Court of Justice (“**ECJ**”) delivered its judgment in Case C-109/03, *KPN Telecom BV v. OPTA* (“**KPN**”). The ECJ's judgment ruled on 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of universal service directories and directory enquiry services under a provision of an EC directive that has now been repealed but that is materially similar to Article 25(2) of the Universal Service Directive (“**USD**”).
- 1.7 The ECJ decided in light of the facts in that case that ‘relevant information’ comprised only the name, address and telephone number of subscribers (other than those who have asked not to be listed). The ECJ further decided that only costs which related to the additional costs of making such data available to the requesting parties could be

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<sup>1</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>2</sup> BT has set a ‘split charge’ for directory information of 23.8 pence 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 are paid 66 pence.

recovered by *KPN*. The effect of this was to require *KPN* to provide a narrow set of data at a very low price. For any other data, the ECJ held that the charges were unregulated.

- 1.8 The meaning and implications of the *KPN* judgment for the UK regime formed an important part of the parties' negotiations for new licences. They did not agree on a price, and BT refused to provide The Number and Conduit with cost information to demonstrate its compliance with *KPN*. The Number and Conduit then referred these disputes to Ofcom.
- 1.9 The UK regulation relevant to these disputes are:
- (i) Universal Service Condition 7 (“**USC7**”): in short, USC7 requires BT to supply its OSIS database to providers of directory enquiry services, such as those provided by The Number and Conduit.
  - (ii) General Condition 19 (“**GC19**”): this implements Article 25(2) of the USD and separately requires BT (and other CPs) to supply certain directory information for the purposes of the provision of certain services, again such as those provided by The Number and Conduit.
- 1.10 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. The case by The Number and Conduit is essentially that BT's charges for access to OSIS do not comply with these requirements, as read in light of the *KPN* judgment.
- 1.11 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. This complaint is being dealt with separately and we aim to publish our decision in relation to this complaint shortly.

### The scope of the disputes

- 1.12 The scope<sup>3</sup> of these disputes for Ofcom's resolution is:
- (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

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<sup>3</sup> The inclusion under this scope of BT's obligations under GC19 is currently the subject matter of two pending appeals to the Competition Appeal Tribunal, as lodged by BT on 8 May 2006: *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).

made by The Number and Conduit, respectively, to BT in respect of the directory information supplied during this period.

- 1.13 In setting the scope in this way, we made clear that our 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.

## Consultation

- 1.14 The parties have raised many detailed issues (legal as well as economic) with us throughout our investigation, including analysis of cost data provided by BT. The circumstances for making these determinations have also been exceptional, particularly by Ofcom raising with the parties during this process the possibility of USC7 being unlawful.
- 1.15 After amending the scope of these disputes in March 2006, we consulted with, and met with, the parties to consider their views.
- 1.16 Specifically, on 17 August 2006, Ofcom issued for public consultation our first draft determinations (and reasoning) as to how we might resolve these two disputes (the “**August 2006 document**”).<sup>4</sup> We received comments from the parties on 29 September 2006 after agreeing an extension to the initial deadline of 21 September.
- 1.17 Then, on 15 February 2007, we issued a second set of draft determinations (and reasoning) (the “**February 2007 document**”).<sup>5</sup> We received comments from the parties on 13 April 2007 after agreeing an extension to the initial deadline of 7 March.
- 1.18 Following a request by The Number and Conduit on 31 July 2007, The Number (jointly with Conduit) and BT were provided with a non-confidential copy of each other's responses and given an opportunity to make comments on the issues raised in those responses. These comments-on-comments were received from The Number (jointly with Conduit) and BT on 7 September 2007. In addition, Ofcom requested and received further cost information from BT to inform its assessment on the charging issues, with the final and outstanding pieces of information being submitted by BT to Ofcom on 12 October 2007.
- 1.19 We have considered every response about our proposals set out in the February 2007 document in making the determinations set out in **Section 12** to resolve the disputes. Details of the responses and the way in which Ofcom has taken them into consideration are set out in the remainder of this document.

## Ofcom's conclusions

- 1.20 We have concluded that USC7 is unlawful for the reasons set out in **Section 5**. As a result, we have determined that BT is not required to provide access to the OSIS

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<sup>4</sup> See at: <http://www.ofcom.org.uk/consult/condocs/dqdispute/dqdispute.pdf>

<sup>5</sup> See at: [http://www.ofcom.org.uk/consult/condocs/price\\_disputes/](http://www.ofcom.org.uk/consult/condocs/price_disputes/)

database under USC7. No issues can therefore arise in relation to the consistency of BT's charges for OSIS with USC7.

- 1.21 Therefore, the main issue to be determined by us 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.
- 1.22 With regard to GC19, we have concluded for the reasons set out in **Sections 6 to 8** 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.
  - (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.
  - (v) GC19 requires BT to provide information about the following subscribers:
    - BT's own subscribers of publicly available telephone services ("PATS"); and
    - 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.
  - (vi) 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:
    - '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;
    - '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
    - 'telephone number' is the number assigned to the subscriber by BT for their use of the PATS in question.
  - (vii) 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.

- 1.23 These conclusions mean that 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.
- 1.24 In setting charges for GC19 data, we have considered the cost information provided by BT in relation to its provision of the OSIS database as well as BT's submissions in its response to the February 2007 document in relation to cost issues. In light of the ECJ's judgment in *KPN*, we have concluded in **Section 9** that BT can only recover the following costs through its charges for GC19 data:
- (i) **In relation to the GC19 data of subscribers to its voice telephony services**, only the costs of making this data available to requesting parties and not any costs of gathering relevant information from these subscribers; and
  - (ii) **In relation to the GC19 data of the voice telephony customers of other CPs who are using telephone numbers originally allocated to BT<sup>6</sup>**, the costs associated with acquiring and storing this data, as well as the costs of making this data available to requesting parties.
- 1.25 In the February 2007 document, we assessed which of the costs that BT has incurred in providing OSIS are relevant to its provision of the BT GC19 data set. We concluded that only costs associated with transmitting the data to requesting parties, managing the commercial relationship with those parties and allowing new parties access to the data should be recoverable from charges for the BT GC19 data set as we initially considered that these were the only costs associated with making GC19 data available to requesting parties.
- 1.26 However, in light of issues raised by BT in its response to the February 2007 document, which are discussed in **Section 9**, we have revised our assessment of the costs that may be recovered through GC19 charges. In addition to accepting that the costs associated with acquiring and storing the GC19 data of voice telephony customers of other CPs who are using telephone numbers originally allocated to BT (as discussed in **paragraph 1.24**) may be recovered, we have also accepted that certain other costs associated with making data available to requesting parties should be included. These additional cost categories are discussed in more detail in **paragraphs 9.83 to 9.200** and include labour costs and the costs incurred by BT in ensuring that the GC19 data it provides to directory information providers ("DIPs") is used in accordance with contractual arrangements, thereby ensuring that BT complies with its data protection obligations.
- 1.27 We have identified the costs associated with the GC19 data of subscribers of other CPs using numbers originally allocated to BT that are recoverable through charges for GC19 data. These include the costs of acquiring the data from other CPs, the costs of systems for storing and transmitting the data (and of maintaining and administering those systems) and the costs of managing relationships (including billing) with the upstream CPs.
- 1.28 We proposed in the February 2007 document that the relevant cost drivers indicated that costs should be recovered equally from all requesting DIPs. Having identified that several of the additional costs identified are fixed costs (i.e. invariant to the

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<sup>6</sup> These are customers with which BT has no existing contractual relationship and, therefore, about whom BT requires no data for the purposes of its retail voice telephony business.

number of DIPs or downstream usage) and that there is no obvious charge structure that will reflect causation of these costs, we have decided to retain the uniform per DIP charging structure for GC19 data. Ofcom has therefore fixed the following charges for The Number and Conduit.

**Table 1.1: Charges for the BT GC19 data set**

Period	Charge for BT GC19 data set during period (per DIP) <sup>7</sup>
25 July 2003 – 31 March 2004	£24,400 <sup>8</sup>
1 April 2004 – 31 March 2005	£31,500
1 April 2005 – 31 March 2006	£22,200
1 April 2006 – 31 March 2007	£24,900
1 April 2007 – 31 March 2008 and each subsequent consecutive period of 12 months beginning on 1 April and ending on 31 March.	£24,900 <sup>9</sup>

1.29 These charges will apply moving forward regardless of whether the BT GC19 data set continues to be provided as an integral part of OSIS or is provided on a stand-alone basis. The determined charges for the BT GC19 data set have been calculated on the basis of the latest cost information and are based on a set number of DIPs purchasing OSIS. Should the underlying costs or the number of DIPs change, the charges going forward may need to be recalculated by BT. However, at all times, BT must comply with the terms of GC19 in setting charges and the principles established by us in these determinations.

1.30 We have also considered, in light of claims by The Number and Conduit, whether there should be any retrospective adjustment to the amounts paid to BT for the provision of data from OSIS and have considered the allegation made by The Number in its response to the February 2007 document that there has been “double recovery” by BT of certain costs and that these costs should be refunded to DIPs.

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<sup>7</sup> As discussed above, several of the costs identified by us are based on estimates of what it would cost BT to provide its GC19 data. Given this, and in the interests of simplicity, we have rounded the charges to the nearest £100.

<sup>8</sup> This is a partial year charge obtained by pro-rating the annual charge by the number of relevant days (see **Table 9.10** for the per annum charge)

<sup>9</sup> This charge should apply for the 12 month period unless there is a cost-based justification for changing this determined charge, such as any increase or decrease in costs identified in **Table 9.9**. If the charge is changed mid-year, the above specified charge should be pro-rated for any period of less than 12 months for which the GC19 data is supplied.

- 1.31 Ofcom considers that both The Number and Conduit requested and wanted all of the data received from OSIS, which comprises a bundle of both BT GC19 data and non-GC19 data for which a single price is paid for that bundle. Moreover, neither of these elements of the OSIS bundle has been priced separately. Therefore, there is no clear and non-arbitrary way for Ofcom to identify the price actually paid for the notional sub-set of BT GC19 data within OSIS.
- 1.32 In light of this, there is no clear and non-arbitrary means for us to assess whether the parties have overpaid for the GC19 data set as no implicit price for the GC19 data set within the bundle can be clearly identified to compare against the cost oriented charges calculated by Ofcom. We have therefore decided for the reasons given in **Section 9** that we have no compelling evidence of overcharging for the BT GC19 data set.
- 1.33 We further conclude that there has been no double recovery of certain costs through GC19 charges. As a result, we conclude that DIPs are not entitled to a refund as a result of the determined GC19 charges.
- 1.34 Finally, Ofcom has rejected the requests by The Number and Conduit for Ofcom directing BT to make payments to them in respect of their costs and expenses in bringing these disputes to Ofcom. Ofcom's reasons in this regard are set out in **Section 10** of this explanatory statement.
- 1.35 Therefore, we are not requiring BT to repay any money to The Number or Conduit.

### **Ofcom's policy review and consultation**

- 1.36 Resolving these disputes may affect not only the parties to these disputes, but also a number of other stakeholders, including other OSIS licensees, certain CPs subject to GC19 and, ultimately, UK consumers. We also recognise that the resolution of these disputes raises a number of concerns about the way in which directory information markets function moving forwards.
- 1.37 To address any potential stakeholder concerns arising from our consideration of these disputes, we have separately carried out a policy review of these matters and are today also publishing a consultation document to canvass stakeholders' views on the needs for future regulation in this area. **Section 11** summarises the main issues covered by this consultation.
- 1.38 In the meantime, until we have finished consulting with stakeholders on replacing any new regulation in this area, we expect that BT will continue to supply persons, such as The Number and Conduit, with OSIS data on a commercial basis under their OSIS licences. BT has also committed to us that it will do so and that BT does not intend to deliberately disrupt the marketplace or behave in such a way as to raise competition concerns. We consider that assurance to be sufficient for the time being, although if it becomes necessary to take action to address any alleged anti-competitive conduct, we will do so.



## Section 2

# Facts

### Introduction

- 2.1 In dealing with these disputes, we have had to obtain a detailed understanding of the contents of the OSIS database and of its supply to DIPs, in light of how directory information services in the UK are currently being provided to consumers.
- 2.2 **This Section** deals with these facts, together with a brief description of the nature of the businesses of the parties to these disputes and other interested parties.
- 2.3 We then summarise the history of negotiations between the parties prior to the referral of the disputes to Ofcom and our decision to accept the disputes, including the scope of issues for our resolution.

### The provision of directory information services in the UK

- 2.4 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:
- (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>10</sup>; and
  - (iii) **paper directories** of telephone numbers together with other data.
- 2.5 The services offered can vary within these 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 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".

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<sup>10</sup> Ex-directory records, and those for inclusion only in voice DQ services, are excluded from on-line searches.

## Voice DQ and on-line DQ services

- 2.6 Competition in the voice DQ market began 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 in August 2003. Before 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.
- 2.7 The launch of '118 XXX' numbers meant that users could choose their preferred voice DQ service. To exploit this opportunity, a number of new entrants began providing voice DQ services in the UK (including The Number and Conduit). BT's overall market share of voice DQ calls fell. Most voice DQ providers offer callers a choice of name-specific or classified business searches. Many voice DQ providers also offer to forward a caller directly to the searched-for number without the need to re-dial. Ofcom published consumer research on voice DQ services in March 2006<sup>11</sup>, which research showed that the average cost for voice DQ services was 54p per call without call connection for a single number request.
- 2.8 Since 2002, fewer users are taking voice DQ services as 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

- 2.9 BT provides the only comprehensive UK-wide residential plus business 'A to Z' listings paper directory, distributing directories covering 171 different local areas. A local area directory is included as part of BT's line rental service. Ofcom understands that BT also provides directories to customers of other CPs.
- 2.10 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, we understand, are usually distributed free of charge to individuals in that area. Businesses usually receive a free line entry in classified directories, with providers of those directories paid by the businesses which advertise in them, according to the type of entry they select.

## OSIS

- 2.11 OSIS contains 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. More details of the data and structure of OSIS, including BT's acquisition and supply of its contents, can be found in **Annex 4** to this explanatory statement.

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<sup>11</sup> [http://www.ofcom.org.uk/media/news/2006/03/nr\\_20060327](http://www.ofcom.org.uk/media/news/2006/03/nr_20060327)

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

### Introduction

2.12 To consider these disputes, it is necessary to take into account the nature of the parties' businesses. This is particularly because disputes referred to us under section 185(2) of the 2003 Act (as in the present cases) must be disputes between different CPs. The nature of The Number's and Conduit's businesses is also relevant to the issue of 'rights of access', which is considered in **Section 6**.

### The Number

- 2.13 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>12</sup> On-line DQ services are provided on the [www.118118.com](http://www.118118.com) website.
- 2.14 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.
- 2.15 When connecting calls, we understand 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 wholesale interconnect arrangements agreed between The Number and that provider. The Number initiates this call (or arranges under a contract with a third party for it to be made).
- 2.16 Applying section 32(4) of the 2003 Act, we consider that The Number is "providing" that call, i.e. the electronic communications service. In these circumstances, Ofcom considers that The Number is a CP for the purposes of section 185(2) of the 2003 Act.
- 2.17 The Number entered into its current OSIS licence agreement with BT in August 2002. This licence is further considered at **Annex 4** to this explanatory statement.
- 2.18 The Number is owned by its US parent company, InfoNXX Inc ("**InfoNXX**"), a DQ service provider in the US.

### Conduit

2.19 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 wholesale DQ services to some UK mobile operators. As part of its voice DQ services, Conduit offer to connect calls to the requested number. We understand that Conduit makes these 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 section 185(2) of the 2003 Act.

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<sup>12</sup> The Number also uses the following numbers: 118811; 118241; 118359; 118360; 118434; 118442; 118525; 118551; 118661; 118686; 118819; 118275; and 118227.

- 2.20 Conduit entered into the current OSIS licence with BT in July 2000, and has bought access to OSIS from BT since October 1999. **Annex 4** to this explanatory statement also deals with that licence.
- 2.21 Conduit is wholly-owned by Irish holding company Kandel Limited (“**Kandel**”).
- 2.22 However, on 12 April 2006, Kandel became a wholly-owned subsidiary of InfoNXX, so that InfoNXX and Kandel ceased to be distinct.<sup>13</sup>

## **BT**

- 2.23 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 2007, BT's group turnover was £20.2 billion.
- 2.24 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 to connect calls to 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.
- 2.25 As discussed above, BT supplies the OSIS database to licensees on a wholesale basis.

## **Thomson**

- 2.26 Thomson publishes printed classified directories in the UK. It is a wholly-owned subsidiary of SEAT Pagine Gialle SpA (“**SEAT**”).
- 2.27 Thomson publishes 173 classified local directories, covering substantially most of the UK population.
- 2.28 Thomson entered into the current OSIS licence agreement on 1 January 2001.
- 2.29 On 4 November 2005, Thomson complained 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. On 1 March 2006, Thomson submitted a supplementary complaint alleging that that BT was breaching GC19 by failing to provide access to GC19 data on cost oriented terms following a reasonable request for that data. 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**

- 2.30 LSSi provides national databases of telephone listings in the US, Canada, Ireland, France and the UK.

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<sup>13</sup> This merger was cleared by the Office of Fair Trading (“**OFT**”) on 21 June 2006 2002 - see <http://www.offt.gov.uk/NR/rdonlyres/0C67BEE7-4EBF-49D5-B62F-A743DBE51FA2/0/Infonxx.pdf>

- 2.31 LSSi signed the OSIS licence in June 2002.
- 2.32 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.

### **Kingston Communications**

- 2.33 Kingston Communications ("**Kingston**") provides a range of wholesale and retail communications services to business and residential customers.
- 2.34 The Kingston Contact Centre division provides DQ services, not only for the Kingston group, but also for wholesale service providers.
- 2.35 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 the dispute between The Number and BT**

### **The original requests to resolve a dispute**

- 2.36 The Number 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 referred to the *KPN* judgment.
- 2.37 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.
- 2.38 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.
- 2.39 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**

- 2.40 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...”

- 2.41 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.
- 2.42 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>14</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.
- 2.43 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.
- 2.44 In the light of BT’s position, The Number advised BT that it would be referring the matter to Ofcom.
- 2.45 As noted above, Ofcom received The Number’s dispute referral 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 unlawful nature of USC7 (discussed below).
- 2.46 On 11 November 2005, The Number wrote to Ofcom requesting that Ofcom accept the dispute and, on 30 November 2005, appealed Ofcom’s decision not to immediately accept the dispute for resolution to the CAT.<sup>15</sup>
- 2.47 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**

- 2.48 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.

<sup>14</sup> Letter from BT to The Number, dated 2 June 2006.

<sup>15</sup> *The Number (UK) Limited v Office of Communications*, Case No:1057/3/3/05.

- 2.49 As noted above, a dispute referred to Ofcom under section 185(2) of the 2003 Act must be one between different CPs. Ofcom accepted this dispute on the basis that there is sufficient nexus between the provision of call connection services to users (i.e. the specific service in respect of which The Number qualifies as a 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.
- 2.50 We also 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.
- 2.51 However, we stated that we 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 USD.
- 2.52 On 15 December 2005, we 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.
- 2.53 On 13 January 2006, we wrote again to the parties attaching a summary of the legal advice received from Counsel. This confirmed that we had been advised by Counsel that USC7 did not, among other things, properly implement Article 5 of the USD. We 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.
- 2.54 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**

- 2.55 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.
- 2.56 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.
- 2.57 The Number asked us 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.



- 2.58 On 6 March 2006, BT provided comments on The Number's supplementary submission. 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.
- 2.59 In its letter dated 8 March 2006, we informed The Number and BT of our views on the scope of the dispute before us. We 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. Our 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. Our reasons for taking that view were set out in paragraph 7.50 of the August 2006 document.
- 2.60 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 we informed the parties of its finalised scope in a letter dated 24 March 2006. This scope is set out at **paragraph 2.80** below.
- 2.61 As noted in **Section 1**, BT then (on 8 May 2006) lodged an appeal with the CAT against Ofcom's inclusion under this scope of BT's obligations under GC19 in relation to The Number dispute. This appeal is currently pending.

## History of the dispute between Conduit and BT

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

- 2.62 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.
- 2.63 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.
- 2.64 Conduit requested that we 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**

- 2.65 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>16</sup> to 1 July 2005. Conduit also requested a detailed breakdown of costs incurred by BT in managing the OSIS database and a copy of its pricing proposals from 1 July 2005 onwards.
- 2.66 On 26 May 2005, BT responded 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.
- 2.67 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.
- 2.68 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.
- 2.69 As noted above, we received Conduit's dispute referral on 20 December 2005.

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

- 2.70 Ofcom notified the parties on 13 January 2006 of its reasons under section 186 of the 2003 Act that it was appropriate for us to handle the dispute.
- 2.71 We considered 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.
- 2.72 Furthermore, we considered that the parties were in dispute and that the dispute was unlikely to be resolved by alternative means.
- 2.73 That letter also set out details of the legal advice that we had received from our 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**

- 2.74 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

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<sup>16</sup> This letter referred to backdating to 1 June 2000, although Conduit subsequently requested backdating to October 1999.

requested the directory information of BT's own subscribers from BT Retail (see letter of 3 June 2005 referred to at **paragraph 2.67** above), but that BT had refused to provide the information other than through OSIS.

- 2.75 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 we should determine the extended scope of the dispute and invite further comments from the parties.
- 2.76 On 23 February 2006, BT wrote to us 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 6** of this explanatory statement sets out the detail of our views on BT's submission.
- 2.77 On 8 March 2006, we wrote to Conduit and BT setting out our view that the parties were in dispute over the terms of supply of OSIS data, and we intended to consider BT's obligations under both USC7 and GC19. We invited comments on a proposed amended scope for the dispute.
- 2.78 On 26 March 2006, we wrote to the parties setting out our finalised scope for these disputes. This is set out in **paragraph 2.80** below.
- 2.79 As noted in **Section 1**, BT then (on 8 May 2006) lodged an appeal with the CAT against Ofcom's inclusion under this scope of BT's obligations under GC19 also in relation to the Conduit dispute, which proceedings are also currently pending.

## Scope of the Disputes


- 2.80 We have set the scope of issues for Ofcom's resolution in 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.
- 2.81 In setting the scope in this way, we made clear that the assessment of these disputes 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 unlawful 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**

- 2.82 As noted above, 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, August 2002 and, in the case of Conduit, October 1999.
- 2.83 We have 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 our final determination in relation to this dispute. We have not considered any claim in respect of any overpayments before this period.
- 2.84 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 these cases, 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**

- 2.85 During the course of our investigation, we have received a substantial amount of information (including submissions) from the parties (as well as certain other persons). We have received that information either by those persons sending it voluntarily (or on our invitation) or in response to formal requests by Ofcom using its statutory powers.
- 2.86 Most of the information has been sent to Ofcom on an alleged confidential or commercially sensitive basis. We have asked the parties to make information and submissions available on a non-confidential basis, particularly in relation to legal submissions. Our aim was that information (particularly legal submissions) should be available to all other interested parties wherever possible.
- 2.87 We have made those requests as we have taken the general view in this case that disclosure of information is likely to help resolve these disputes. In particular, in order to resolve the disputed issues, we need to first set out the parties' positions and views and then assess them to arrive at our determination, this includes responding to the parties' points in an open and transparent manner, so far as is possible.
- 2.88 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 the reasons above, 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. We have excluded from this public version information provided by the parties that we consider either would or might seriously and prejudicially affect their interests, such excisions are indicated in the text of this document by the symbol '[

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## Section 3

# Main consultation responses

## Introduction

3.1 We are resolving these disputes after conducting two public consultations with interested parties. **This Section** summarises the main responses we received to our consultations, along with our views of the responses to the August 2006 and February 2007 draft determinations.<sup>17</sup> More detailed reasons for our findings are set out in subsequent Sections of this explanatory statement.

## The August 2006 document

### Summary of proposals

3.2 Our main provisional findings in the August 2006 document were:

- (i) USC7 was unlawful and therefore no issue of whether BT's charges for access to OSIS were consistent with USC7 arises.
- (ii) GC19 only required 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 (but not of the actual user) and the 'Telephone Number' assigned for its use of PATS.
- (iii) The Number and Conduit have requested and received access to the whole of the OSIS database. Given that Ofcom could not determine within the scope of these disputes 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 arose.
- (iv) As a result of (iii) above, the resolution of the disputes did not require Ofcom to set an historic charge for the BT GC19 data set.

3.3 Ofcom received four responses to the August 2006 document, namely:

- (i) a joint response of 29 September 2006 from The Number and Conduit<sup>18</sup>;
- (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**").

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<sup>17</sup> While Ofcom has addressed in this explanatory statement the main points received, Ofcom does not consider it necessary to repeat certain other detailed points made by interested parties throughout its investigation. However, to the extent that they are not already specifically addressed in this document, 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 them.

<sup>18</sup> Throughout this document, references to **The Number** are references to comments made by The Number and Conduit or otherwise, unless the context otherwise suggests.

## The Number and Conduit

- 3.4 First, The Number argued that USC7 is lawful. Ofcom should therefore 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. Therefore, The Number submitted that we should fix the charges for OSIS going forward.
- 3.5 Secondly, The Number argued that, given our acceptance that The Number and Conduit each made an effective request under GC19, we had failed to discharge our 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 stated that our reasons for that failure were erroneous. They therefore argued that we 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.
- 3.6 Thirdly, The Number argued that we had not interpreted GC19 correctly in a number of aspects, namely that we had failed:
- (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 our 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. The Number argued that we have an opportunity and duty to include all the information UK subscribers and users need within the scope of 'relevant information' (an approach supported by *KPN*).
- 3.7 Finally, The Number submitted that our proposal not to require BT to reimburse The Number's costs and expenses reflected an erroneous understanding of our duty and powers to resolve the disputes. The Number therefore requested we reconsider its previous request for costs. If we did so, Conduit also requested that we allow its costs for similar reasons.

## BT

- 3.8 BT welcomed our draft determinations and agreed, in broad terms, with Ofcom's proposed resolution of these disputes and our underlying reasoning.
- 3.9 BT was concerned that our interpretation of 'rights of access' under GC19 raised the possibility of third parties acquiring directory information under the guise of it ultimately being used to provide directory services, but it actually ultimately being used for other purposes. BT submitted that this would raise serious data protection

issues and commercial concerns, including the viability of the provision of OSIS information.

- 3.10 BT also identified a small number of factually inaccurate or misleading statements in the August 2006 document.

### **Thomson**

- 3.11 Thomson raised five main points:

- (i) Thomson welcomed our finding that BT's charges for, at least, the GC19 data set must be cost oriented and non-discriminatory. However, Thomson requested that we 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 was inconsistent with cost-based pricing;
- (ii) Thomson welcomed our recognition that additional technical information (specifically 'record processing' data) was required to enable DIPs effectively to use the 'basic' data provided by BT under GC19. Thomson also asked us to 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 argued that, as it had made a request for GC19 data, it was entitled to recover the excessive charges that it has incurred from BT since 25 July 2003, for the purposes of its complaint;
- (iv) We 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 argued that BT should continue to supply OSIS data to the DIPs on exactly the same licensing terms as it does at present. We should monitor any proposed changes to the current terms; and
- (v) Thomson considered that, going forwards, we should seek to put in place the most efficient system for making basic subscriber data available. According to Thomson, this would require us to ensure that there is one entity responsible for the centralised consolidation of all subscriber data to be provided to DIPs.

### **Yell**

- 3.12 Yell raised four main points:

- (i) Yell asked for clarity on the interim position (that is, until we have carried out its policy review) under which BT will continue to supply OSIS data;
- (ii) Yell submitted that we 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 asked us to correct certain factual errors in the description of the way OSIS data is used by Yell; and

- (iv) Yell commented on the charging principles.

## The February 2007 document

### Summary of proposals

- 3.13 In light of our consideration of the responses to the August 2006 document, we amended certain of our views on how these disputes should be resolved.
- 3.14 The most significant change was to accept The Number's submission that we should fix a charge for the provision of the BT GC19 data set for the period since 25 July 2003. We also made some additional changes to our previous views in order to resolve these disputes in a practicable manner, such as the approach to the meaning of the name and address of a subscriber for the purposes of GC19.
- 3.15 We received three responses<sup>19</sup> to the February 2007 document:
  - (i) a joint response of 13 April 2007 from The Number and Conduit;
  - (ii) a response of 13 April 2007 from BT; and
  - (iii) a response of 13 April 2007 from Thomson.

### The Number and Conduit

- 3.16 The Number raised six main points:
  - (i) agreed with our provisional conclusion that The Number and Conduit had, in effect, made a request for the BT GC19 data set by virtue of requesting OSIS data of which that set is a sub-set;
  - (ii) maintained their view that USC7 is lawful and stated that we should apply the findings in *KPN* to OSIS, fix the charges for OSIS going forward and calculate the amount which should be refunded to The Number and Conduit in respect of their overpayment for OSIS to date;
  - (iii) maintained that we had taken an unduly narrow approach to determining the scope of data under GC19 and made a number of points as to why we should consider the background to GC19 and the reasons for why this regulation is there in the first place;
  - (iv) argued that they should be regarded as "successful parties" in terms of the outcome set out in the February 2007 document and, as such, we should award some (if not all) of their costs for bringing these disputes to Ofcom;
  - (v) pointed out that, if we make a final determination that USC7 is unlawful, the policy review should cover the continuity of supply of OSIS to DQ providers and BT's charges for OSIS, both of which should be the subject of *ex ante* regulation along the lines of USC7; and

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<sup>19</sup> As noted in **Section 1**, Ofcom then received comments-on-comments from BT and The Number on 7 September 2007.

- (vi) alleged that BT has recovered the costs associated with collecting and compiling basic information about its subscribers from both its voice telephony products and OSIS licensees and argued that such 'double recovery' is not permitted under *KPN*.

## **BT**

3.17 While BT generally welcomed our proposed conclusions, it disagreed with certain proposals and raised eight main points:

- (i) maintained its previous position that no reasonable requests for GC19 data have been made by The Number and Conduit (as in the two notices of appeal in the pending proceedings before the CAT) and added that it was unclear to BT how we were able to conclude that any disputes have arisen in the first place, given paragraph 10.12 of the February 2007 document stating that The Number and Conduit wanted, received and used the full OSIS data set;
- (ii) maintained its previous position and arguments that only those persons providing directories or DQ services (which must be "comprehensive" according to the meaning previously argued by BT) "directly" to end-users have access under GC19 and BT made a number of specific points on this issue;
- (iii) considered that The Number's response to the August 2006 document on data protection issues are misguided because essentially it failed to appreciate that the provision of GC19 data is limited in use to the provision of publicly available directories and directory enquiry facilities, whereas information which is provided by OSIS is subject to the licence terms, and the personal data is protected accordingly;
- (iv) emphasised that it has not disputed that BT is bound by GC19, but pointed out that it will need to set up a number of contractual arrangements to fulfil and implement its obligations under GC19 and BT made some observations in this regard;
- (v) argued that our provisional conclusions fully support closure of the Thomson complaint with a finding that BT has not breached GC19 in that the "record" establishes that Thomson requested, received, wanted and benefited from all of the OSIS data, including data that went beyond BT's GC19 requirements;
- (vi) as to Ofcom's policy review, BT recognised that OSIS has played an important role in shaping the way in which the industry is organised; BT added that it was therefore content to look at the possibility of acting as an agent for other CPs (as an aggregator acting on behalf of them rather than as an intermediary) in discharging their obligations under GC19, provided BT was able to recover its costs incurred in acting in this way;
- (vii) urged us not to determine a specific GC19 charge on the basis that, firstly, it is not pertinent to resolving the dispute; secondly, BT strongly disagreed with the costs identified by us; thirdly, BT claimed that there are (potentially) substantial costs that have not been identified or assessed by us and it therefore suggested that we could instead



comment on the likely range of the more limited range of costs as an appropriate benchmark for recovery; and

- (viii) contested our provisionally determined charges for the BT GC19 data set and BT made a series of points as to why it believed that we had underestimated the costs of GC19 data.

## Thomson

3.18 Thomson raised six main points:

- (i) welcomed our provisionally determined charge for the BT GC19 data set;
- (ii) considered that our proposal not to attempt to evaluate overcharging for the BT GC19 data set was unsatisfactory, but it pointed out that, even if that would be correct, Thomson was nonetheless entitled to recover the excessive charges that it has incurred from BT since 25 July 2003;
- (iii) emphasised that, as regards the scope of GC19 data, it has not accepted (as implied by us at paragraph 9.53 of the February 2007 document) that GC19 only requires BT to make available its own directory information and that its position remained unchanged in that the concept of "relevant information" under Article 25 should be interpreted to include other CPs' subscriber information;
- (iv) stated that, in light of our application of the cost recovery principles and the 66 pence per record that BT pays to other CPs, we should urge BT to seek immediately to reduce its own costs and to pass the cost savings to its OSIS licensees;
- (v) considered that it is imperative that we obtain a clear commitment from BT that secures the continuity of supply of telephone subscriber data until any necessary substitute regime has been put in place and on the same licensing terms (but at a lower charge to reflect cost-oriented charging) as apply today; and
- (vi) considered that, in order to secure compliance with Article 5 USD, we should as part of its policy review set a new USC on BT to supply The Phone Book and should seek to put in place the most efficient system for making basic subscriber data available, which in its view is most likely to mean that BT remains the entity responsible for the centralised consolidation of subscriber data to be provided to DIPs.

## Overview of Ofcom's response

3.19 Having considered the responses to the February 2007 document (as well as the comments-on-comments), we generally remain of the views set out in the February 2007 document, albeit that the amount of the charge fixed for the BT GC19 data set has changed following additional cost analysis.

3.20 Therefore, except for **Section 9** (concerning cost orientation and charges), our conclusions remain as proposed in the February 2007 document. While our more detailed reasons for our findings are set out subsequent Sections of this explanatory

statement, we briefly summarise below our response to the most recent consultation responses.

- 3.21 As regards **Section 9**, we have responded to BT's submissions concerning costs which BT suggests Ofcom has failed to take account of in the proposed charge for GC19 data, in particular:
- (i) the costs of acquiring data from other CPs relating to numbers originally allocated to BT but subsequently ported from BT to other CPs;
  - (ii) the costs of introducing and maintaining systems to collect, maintain, extract and make available to DIPs data of its ex-subscribers;
  - (iii) the costs of maintaining relationships with upstream CPs, including billing; and
  - (iv) the costs of monitoring and preventing the misuse of GC19 data, so as to fulfil data protection obligations.
- 3.22 The following paragraphs summarise our views on the consultation responses to the February 2007 document.

## USC7

- 3.23 Our view remains that USC7 is unlawful. The Number's further submissions simply maintain its previous arguments that USC7 is not unlawful and provide no reasoning for dismissing our analysis with reference to Articles 3(2) and 6(2) of the Authorisation Directive.
- 3.24 Accordingly, for reasons set out in **Section 5** of this explanatory statement, we conclude that USC7 is unlawful for the purposes of these disputes and therefore we cannot resolve these disputes by reference to the terms of USC7. As a result, in so far as the data supplied by BT to The Number and Conduit from OSIS falls outside GC19 (see, in particular, **Section 8** of this explanatory statement concerning the scope of that data), BT is not required to provide such data on regulatory terms. The implications of this finding as to what The Number and Conduit have paid for the full OSIS data are particularly considered in **Section 9** of this document.
- 3.25 For that reason, we reject the request by The Number and Conduit that we should fix the charges for OSIS going forward and calculate the amount which should be refunded to The Number and Conduit in respect of their (alleged) overpayment for OSIS to date.

## GC19 – rights of access

- 3.26 Ofcom notes that BT again concurs that The Number and Conduit have rights of access under GC19. As regards BT's extensive response on the position with regard to intermediaries and business classified directories, we do not need to reach a definite view on them in order to resolve these disputes as BT acknowledges but address the points made in **paragraph 6.66** of this document.

## GC19 – reasonable request

- 3.27 BT has maintained its position that, in the absence of any request for GC19 data which was separate and apart from a more general request for OSIS data, there can

have been no “dispute” as to the consistency with GC19 of BT's charges for supplying directory information. Our response to that position is set out at **paragraphs 6.67 to 6.105** below, repeating the analysis in the February 2007 document. We also note the points made by The Number on this point set out at **paragraph 3.16** above.

- 3.28 As noted at **paragraph 3.17(i)** above, BT remarked in its response to the February 2007 document that it was unclear how we were able to conclude that there were any disputes in the first place in light of paragraph 10.12 of the February 2007 document. We consider that our finding in dealing with cost oriented charges that The Number and Conduit wanted, received and used the full OSIS data does not impact on the separate issue of whether they have, in effect, also made a request for GC19 data, thus being in dispute as to the charges made by BT for a subset of the OSIS data set. Our reasoning is more fully set out in **paragraphs 6.67 to 6.105** below, repeating paragraphs 7.66 to 7.98 of the February 2007 document.

### **GC19 – scope of data**

- 3.29 We note BT's submission that The Number's response on data protection issues is misguided. As to The Number's points of maintaining its view about the scope of GC19 data, we remain of the views set out in the February 2007 document. We address those points in **Section 8** of this document.

### **GC19 – cost orientation and charges**

- 3.30 For the reasons set out at **paragraph 3.17(vii)** above, BT urged us not to determine a specific charge. BT has suggested that we should, as an alternative, simply comment on the likely range of the relevant cost elements. As outlined at **paragraph 3.17(viii)** above, BT has also set out a series of costs that it considered we had failed to take into consideration when setting the proposed charges for GC19 data.
- 3.31 Our view remains that we should set the charge in order to fulfil our statutory obligations to resolve the dispute (which relates to the level of the charge). We consider that some of the costs identified by BT should be recovered through charges for GC19 data.
- 3.32 In particular, we conclude that BT will incur costs in obtaining data from other CPs on its ex-subscribers who use numbers originally allocated to BT and that it is appropriate to recover these costs through the charge for GC19 data. This is information that BT would not collect through its voice telephony business. There are also costs associated with maintaining relationships with these CPs which are recoverable through charges for GC19 data. Further, we accept that BT will require separate systems to collect, maintain, extract and make available this information to DIPs as its existing systems are designed for dealing with its own customers.
- 3.33 We also accept that the cost that BT incurs in ensuring that the personal data provided to it by its customers is not misused (by monitoring the use of GC19 data by DIPs) is recoverable through charges for GC19 data. BT incurs this cost in complying with its data protection obligations and it would not otherwise be incurred if BT did not make the data available to DIPs.
- 3.34 Our more detailed reasoning on these points and our assessment of other costs proposed by BT for recovery through the GC19 data charge are set out in **Section 9**. The effect of these changes has been to increase the level of costs recoverable through GC19 data charges by around fourfold.

- 3.35 We consider that The Number's allegations of 'double recovery' can be better characterised as an allegation of the over-recovery (or inappropriate recovery) of costs. Considering BT's obligations under GC19, we have not identified any over-recovery of costs by BT through charges for GC19 data. We therefore maintain our view that there is no identifiable overcharge by BT that we should require to be refunded to DIPs. Our detailed reasoning on this point is set out in **Section 9**.

### **Costs in referring the disputes**

- 3.36 We are not making any award of costs. We consider that The Number and Conduit have not put forward any substantially new arguments in support of their renewed application for us to require BT to pay their costs in referring these disputes. Our detailed reasons are set out in **Section 10**.

### **Ofcom's policy review**

- 3.37 All three respondents have made representations regarding Ofcom's policy review.<sup>20</sup>
- 3.38 To the extent that these submissions go beyond what is strictly relevant to the resolution of these disputes, we have not considered them further in this decision. Those views should be reiterated specifically in response to Ofcom's consultation published today (see further at **Section 11** of this document).
- 3.39 As regards Thomson's further call for us to obtain a clear commitment from BT to continue to supply OSIS data, we consider that BT's commitment (as set out at **paragraph 6.66(v)**) should suffice to satisfy DIPs' concerns in this respect. Should BT cease to supply OSIS data prior to the completion of our policy review, we will reconsider this position.

### **The Thomson complaint**

- 3.40 We note that, on the one hand, BT argues (as summarised at **paragraph 3.17** above) that we should close this complaint with a finding of no breach of GC19 on BT's part as Thomson requested, received, wanted and benefited from all of the OSIS data. On the other hand, Thomson submits to the contrary (as summarised at **paragraph 3.18(ii)** above) as it specifically asked BT to supply its own GC19 data separately, meaning that the reasoning in the February 2007 document is applicable to its case.
- 3.41 We do not comment here on the implications of these determinations to Thomson's complaint as we aim to publish our decision in relation to the Thomson complaint shortly.

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<sup>20</sup> For The Number, see **paragraph 3.16(v)** above; for BT, see **paragraph 3.17(vi)** above; for Thomson, see **paragraph 3.18(vi)** above.

## Section 4

# Legal and regulatory framework

## Introduction

- 4.1 These disputes relate primarily to issues of law and regulation. Central to the case put forward by The Number and Conduit is their reading of the *KPN* judgment and its implications for relevant UK regulation. Put broadly, they argue that USC7 requires BT to provide them with access to all OSIS data at cost oriented charges and that BT's current charges do not reflect the *KPN* judgment. In the alternative, they argue a similar case by reference to BT's obligations under GC19.
- 4.2 The purpose of **this Section** is to set out the relevant law and regulation, which are then further considered and applied in **Sections 5 to 9** of this explanatory statement.
- 4.3 We first summarise BT's previous licence obligations to provide OSIS, which have been raised by The Number. For reasons set out below, we find that these obligations provide useful context to BT's current obligations but are not directly relevant to our final decision.
- 4.4 We then set out our views on the ECJ's decision in the *KPN* case. We deal with this case at some length, given the importance placed upon the *KPN* judgment by the parties.
- 4.5 We then consider the relevant provisions of the current EC regulatory framework, (see **paragraphs 4.44 to 4.84**).
- 4.6 Finally, we deal with relevant UK law and regulation (see **paragraphs 4.85 to 4.106**).

## BT's previous licence obligations

- 4.7 BT has been obliged to provide directory information about its customers to certain other providers since 1984, at the time BT was granted a licence under the Telecommunications Act 1984 (the "**1984 Act**").
- 4.8 By 1991, BT was obliged to provide, on request, 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**").<sup>21</sup> 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.
- 4.9 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>21</sup> Further details of BT's historical obligations were set out in Annex 8 to the August 2006 document.

- 4.10 This obligation remained in force until 24 July 2003, when the licensing regime under the 1984 Act was abolished.
- 4.11 Under the new regime, USC7 replaced the previous licence condition. USC7 requires BT 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 4.97 and 4.98** and **Annex 7**.)
- 4.12 Separately, BT (along with other licensees) was required under its licence 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. This obligation was imposed in 1998 by the Secretary of State to implement the provisions of the Revised Voice Telephony Directive<sup>22</sup> (“**RVTD**”).<sup>23</sup>
- 4.13 This obligation also fell away as a result of the new regime taking effect from 25 July 2003 (as will be further discussed below). 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 4.94**.)

## The **KPN** judgment

### Background

- 4.14 In 1997, 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. Those companies sought to compete with KPN's directory, which was published pursuant to universal service obligations imposed under Dutch law.
- 4.15 That dispute concerned the extent and pricing of directory information that KPN was required to make available under a provision in Dutch law that implemented the provision in Article 6(3) of the RVTD. (That provision has since been repealed with the repeal of the RVTD under the current framework but replaced by Article 25(2) of the USD, which is similarly worded to that Article 6(3).<sup>24</sup> In light of submissions made to Ofcom by the parties, it appears common ground<sup>25</sup> between them that the *KPN* judgment is relevant to interpreting Article 25(2).)
- 4.16 Following KPN's refusal to provide the two 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

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<sup>22</sup> European Parliament and Council Directive 1998/10/EC.

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

<sup>24</sup> Article 6 of the RVTD, together with its related 7<sup>th</sup> recital, is set out in **Annex 5**.

<sup>25</sup> Ofcom does not, therefore, 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 interpretation of Article 25(2) of the USD.

0.005 per entry. KPN as well as the two companies complained to OPTA against its decision.

- 4.17 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.
- 4.18 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 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?

(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?

(Emphasis added by Ofcom)

- 4.19 On 14 July 2004, Advocate General Poiares Maduro delivered his Opinion and then, on 25 November 2004, the ECJ delivered its judgment.
- 4.20 All three parties have commented extensively on how they believe the *KPN* judgment should be applied to current domestic UK regulation in their submissions and responses to the August 2006 and February 2007 documents. Ofcom's responses to these specific points are set out in **Sections 6 to 8** of this document.

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

- 4.21 The ECJ reached a stricter interpretation of the meaning of 'relevant information' than that proposed by the Advocate General. Applying the same reasoning, we considered (in our draft determinations) that 'relevant information' principally means the name, address (including postcode) of subscribers, together with any telephone numbers allocated to them. We also recognised that under the *KPN* judgment Member States could require as a matter of domestic law that additional data should be provided in light of specific national circumstances.
- 4.22 The Number has disputed our interpretation of *KPN*. In so doing, it argues that we misunderstood the scope of 'relevant information' which has led us to conclude that

information which is considered necessary to identify subscribers in the national circumstances prevalent in the UK is not a consideration when interpreting GC19, as it currently reads.

- 4.23 The Number argues that the ECJ accepted the proposed view put forward by the Advocate General and that we 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.
- 4.24 In its comments on The Number's response to the February 2007 document, BT supports our conclusion that our reading of the definition of "Directory Information" in GC19 is compatible with *KPN*. BT argues that, irrespective of what the Advocate General may have said, the ECJ in *KPN* has clearly stated that the words 'relevant information' must be strictly interpreted to refer to data relating to subscribers who have not 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*". BT notes that the ECJ defined this as including the name, address and telephone number of the subscriber and that it was clearly left to Member States' discretion to determine whether additional information was required to identify subscribers.
- 4.25 In assessing the meaning of 'relevant information', we have given particular consideration to the reasoning given by the Advocate General and the ECJ in reaching their respective conclusions. We remain of the view that 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, in particular, that 'relevant information' is "*information that is required to be included in a [universal service] telephone directory*". 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.
- 4.26 In contrast, the ECJ arrived expressly at a strict interpretation: "*In light of all of the foregoing considerations concerning the various interests at stake the words 'relevant information' in Article 6(3) of the Directive must be strictly interpreted...*" (at paragraph 34).
- 4.27 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 this data means or comprises<sup>26</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 our 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).
- 4.28 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

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<sup>26</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'.



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 a material difference in the approach to interpreting this term, as compared to the position argued by The Number.

- 4.29 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 minimum records it identified. (The implications of that analysis for GC19 are considered in **Section 8**). We reject The Number's argument suggesting that we could determine the scope as a matter of policy in resolving these disputes, which have been referred to us under section 185(2) of the 2003 Act on the basis of BT's (pre-existing) obligations under GC19. To do so would confuse our respective roles when resolving regulatory disputes, on the one hand, and when setting policy, on the other. This distinction is envisaged by section 190(4) of the 2003 Act.
- 4.30 We conclude, therefore, that the *KPN* judgment should not be read as requiring, as matter of Community (as opposed to domestic UK) law, that the term 'relevant information' includes any additional information enabling (or needed by) users of a directory *to identify the subscribers they are looking for*.
- 4.31 Indeed, we consider that this would be inconsistent with the plain reading of the ECJ's conclusions. The ECJ 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 imply that Member States do not have any discretion as to whether additional data fall inside or outside the scope of 'relevant information'.
- 4.32 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 over other interests (for example, of the CPs). The ECJ expressly rejected this approach when it balanced the various interests at stake (see paragraph 33 of the judgment).
- 4.33 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 (see paragraphs 19 to 30 of the Opinion).
- 4.34 In contrast, the ECJ strictly interprets the concept 'relevant information' after balancing, in its own words, "*the various interests at stake*" (see paragraph 34 of the ECJ's judgment).
- 4.35 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.
- 4.36 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 that information which appears to be necessary to enable users of a directory to identify subscribers. 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).

- 4.37 We note 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). This answers, in effect, the first part of the referred question (see under **paragraph 4.18** 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)

However, 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)

- 4.38 The exclusion of information, such as “*profession*” and “*another name*”, is important to our assessment of BT's GC19 obligations, as discussed in **Section 8**. For example, the reference to “*another name*” is, in our reading, to be taken as a short hand reference to a possible additional entry of the telephone number under a different name<sup>27</sup> (for example, an actual user of the subscriber's telephone number, as opposed to the subscriber). In our 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;”

- 4.39 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 3** 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

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<sup>27</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.

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.

- 4.40 In conclusion, we consider the ECJ's judgment is that the 'relevant information' is:
- (i) "name or address, including post code, of subscribers [as defined in the RVTD] together with any telephone numbers allocated to them"; but
  - (ii) also includes, where Member States so provide in their specific national circumstances, 'additional data' that are necessary to identify subscribers.
- 4.41 We set out in **Section 8** our views in more detail about the data covered by (i) in the UK as currently prescribed by GC19.
- 4.42 For these reasons, we reject The Number's submissions on the *KPN* judgment.

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

- 4.43 We set out in **Section 9** 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* 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**

- 4.44 As already noted above, the current EC regulatory framework took effect 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 provisions of particular importance for Ofcom's consideration of BT's regulatory obligations in **Sections 5 to 9** of this document.
- 4.45 The 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. We will, in particular, consider this wider context when we deal with USC7 and the authorisation regime, as discussed in **Section 5**.
- 4.46 In the late 1980s and during the 1990s, the European Community took a number of liberalising and harmonising measures to regulate the provision of telecommunications services and related equipment. These measures resulted in regulation designed, put broadly, to manage the transition of regulation to competition (including access to infrastructure by competing operators) while also achieving certain general policy objectives (such as universal service).
- 4.47 In a fast-moving telecommunications market, the effectiveness of those measures had to be properly reviewed to enable future competitiveness and economic growth. As a result, following the Commission's 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 ("**ECSS**"),

electronic communications networks (“**ECNs**”), associated facilities and associated services.

- 4.48 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:
- (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 (i.e. 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**”).
- 4.49 This package of 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 by 24 July 2003 and to then apply these measures first from 25 July 2003.<sup>28</sup>
- 4.50 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>29</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).
- 4.51 In short, in order to create further harmonised regulation across the Community and to reduce 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

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<sup>28</sup> The Privacy Directive, which was adopted later in 2002, had to be transposed and complied with by 31 October 2003.

<sup>29</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.”

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.)

4.52 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>30</sup> are now prohibited.

4.53 As noted above, the effects of the new authorisation regime are considered in **Section 5** of this document. It suffices here to note that, despite the fact that 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. Those specific obligations flow either from the Access Directive (e.g. where providers have been designated as having significant market power (“**SMP**”) following a market review), or are obligations imposed on those designated to provide universal service under the USD.

4.54 The following conditions, set out in that Annex, are relevant in this case:

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

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

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

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

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

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

4.55 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.

4.56 The Access Directive also sets out (among other things) types of obligations that may be imposed on operators designated as having SMP with respect to a specific market following market analysis carried out in accordance with Article 16 of the Framework Directive. That Article 16 requires that NRAs carry out an analysis of the relevant

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<sup>30</sup> Directive 97/13/EC of 10 April 1997, OJ L 177, 7.5.1997, p.15.

markets following the European Commission's adoption<sup>31</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.

4.57 We now consider the relevant provisions of the USD and the Privacy Directive, which are at the heart of these disputes.

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

### Introduction

4.58 The USD is structured in five Chapters:

- (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 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.

4.59 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 deal with the scope and aims of the USD, together with certain terminology that has been defined in the specific harmonising directives.

### Scope, aims and important terminology

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

*Article 1*

**Scope and aims**

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<sup>31</sup> The first Recommendation was adopted on 11 February 2003. The second and current Recommendation was published on 13 November 2007.

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.

4.61 Article 2 also provides that the definitions in Article 2 of the Framework Directive also apply for the purposes of the USD. Definitions in the Framework Directive relevant to these disputes are noted below:

(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.

4.62 Article 2 of the USD defines 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;

- 4.63 These definitions suggest that the core concepts of the regulatory framework were intended by the Community legislator to be read consistently within the harmonised framework for the regulation of ECSs and ECNs. 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.
- 4.64 These distinctions are important in analysing Article 25 of the USD, as read in light of *KPN*, which matter we particularly consider in **Section 8**.
- 4.65 The definition of ‘universal service’ sets 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 is also reflected in the materially same wording by the 4<sup>th</sup> recital<sup>32</sup> to the USD as well as by the aims in Article 1(2) of the USD itself. 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:
- (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.

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<sup>32</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 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 by Ofcom)



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

- 4.66 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.

- 4.67 We set out our more detailed views on the meaning of this specific (universal service) obligation in **Section 5** in the context of assessing BT's USC7 obligations. However, we think it is relevant to note 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 8**, we set out our view on the meaning of the term 'PATS'.) As a result, while those benefiting from the 'universal service' in Article 5 are end-users, the prescribed requirements as to the substance of the directories to be made available under this universal service only capture persons contracting with PATS providers for the supply of such services (as opposed to public ECS).

- 4.68 We also consider 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. 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).

4.69 These provisions (together with related recitals) are set out in **Annex 5** to this explanatory statement.

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

4.70 While Chapter II of the USD deals with the provision of universal service, Chapter IV deals with consumer protection.<sup>33</sup> Article 25 (in Chapter IV) prescribes 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>34</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)).

4.71 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 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) also receive the benefit of data protection requirements, which we will deal with separately below.

4.72 **Article 25 of the USD** 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.

<sup>33</sup> 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.

<sup>34</sup> The short hand reference to 'universal service' is used, given the cross-references in Article 25 to Article 5 of the USD.

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.

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

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

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

4.74 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.

4.75 **Article 32 of the USD** 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, in such circumstances, no compensation mechanism involving specific undertakings may be imposed.

4.76 The 46<sup>th</sup> recital to the USD's preamble indicates the types of service that might be relevant:

(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

- 4.77 The Number has sought to rely on data protection legislation in support of an alleged wider scope of data falling within GC19. (BT's obligations under this legislation are also relevant to the issue of cost oriented charges, which we deal with in **Section 9**.)
- 4.78 In particular, as seen from Article 25(5) of the USD above, 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.
- 4.79 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.

- 4.80 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:

(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.

- 4.81 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.
- 4.82 Given that this Directive aims to complement the Data Protection Directive (95/46/EC) which applies to natural persons (living individuals) only, it provides for certain additional protection of the legitimate interests of subscribers who are legal persons (e.g. companies) in Article 12(4) of the Privacy Directive.
- 4.83 In light of the above and the fact that the Privacy Directive offers protection also to *users* outside the directories context<sup>35</sup>, 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".
- 4.84 In other words, the Directive distinguishes 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.)

## The current UK legislation and regulation

### Generally about the UK regime

#### Ofcom's functions, powers and duties

- 4.85 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, we took over the responsibilities and assumed the powers of the five former regulators Ofcom 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 ("**Oftel**"), as created by the 1984 Act.
- 4.86 Pursuant to section 1 of the 2003 Act, a number of functions were either transferred or conferred on us, 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):

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<sup>35</sup> 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).

- (i) we make *policy* 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) we *enforce* (among other things) the conditions of entitlement;
- (iii) we *resolve regulatory disputes* in relation to (among other things) the conditions of entitlement;
- (iv) we *make sub-ordinate legislation*, such as regulations (exercisable by statutory instrument) for the designation of persons to provide universal services.

4.87 In carrying out our functions, our principal duties are set out in section 3 of the 2003 Act. If a conflict arises with those principal duties, our overriding 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.<sup>36</sup>

4.88 The duties in section 3 and 4 of the 2003 Act 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 7** 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.

4.89 Relevant to these disputes (as referred to Ofcom under section 185(2) of the 2003 Act) is the distinction between our roles 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 our 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)); and/or
- (iii) the exercising of its powers in consequence of our consideration of any dispute to set, modify or revoke conditions of entitlement (section 190(4)) following statutory processes prescribed in the 2003 Act.

4.90 The latter exercise of powers is important when considering The Number's arguments, which we consider reflect a misunderstanding as to the function fulfilled by Ofcom when resolving disputes.

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<sup>36</sup> Sections 3 and 4 of the 2003 Act are set out in **Annex 5** to this explanatory statement.

## Brief overview of relevant transposition in UK

- 4.91 The licensing regime under the 1984 Act was abolished by 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.
- 4.92 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.
- 4.93 For the purposes of the present disputes, only Ofcom's powers to set GCs and USCs are relevant. We set out the detail of those enabling powers in **Annex 5** to this explanatory statement, together with background of the process that lead to the transposition of the provisions in Articles 5 and 25 of the USD as the measures contained USC7 as well as GC8 and GC19. However, the terms of those measures as finally adopted, including the UK transposition of Article 12 of the Privacy Directive, are set out below.

## **GC8 and GC19**

- 4.94 GCs 8 and 19 read under their notification<sup>37</sup> (the “**GC notification**”) as follows:

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

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

(a) operator assistance services; and

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

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

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<sup>37</sup> See notification published by the DGT in accordance with section 48(1) of the 2003 Act entitled 'Notification setting general conditions under Section 45 of the Communications Act 2003' on 22 July 2003: [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)

8.2 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.

4.95 Terms used in these GCs have the following meaning<sup>38</sup>:

...

"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;

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<sup>38</sup> See Part I of the Schedule to the GC notification.

- (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.

- 4.96 As regards the definition of 'Relevant Data Protection Legislation', this term was subsequently modified<sup>39</sup> on 11 December 2003 by the DGT for the purposes of the GCs (as well as USC7) to mean the Data Protection Act 1998 (the "DPA") and the Privacy and Electronic Communications (EC Directive) Regulations 2003<sup>40</sup> (the "Privacy Regulations").

## **USC7**

- 4.97 USC7 reads under its notification<sup>41</sup> (the "USO notification"):

#### 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;

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<sup>39</sup> See at: [http://www.ofcom.org.uk/telecoms/ioi/g\\_a\\_regime/gce/rdpl/](http://www.ofcom.org.uk/telecoms/ioi/g_a_regime/gce/rdpl/)

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

<sup>41</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 Ofcom 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)

(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.

4.98 The meaning of the terms used in USC7 corresponds to those used for GCs 8 and 19, as set out above.

## Regulation 18 of the Privacy Regulations

4.99 Article 12 of the Privacy Directive was implemented by regulation 18 of 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.

4.100 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.

4.101 Regulation 2(1) defines ‘subscriber’ as:

“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;

4.102 This term is to be contrasted with “user”, which is defined as:

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

4.103 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.

4.104 Regulation 18 further distinguishes 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;

- 4.105 Finally, it is to be noted that regulation 4 explains the relationship between these Regulations and 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.
- 4.106 We next turn to these regulatory obligations as they are to be applied to the issues at dispute in the present cases, starting with USC7 (in **Section 5**) before dealing with GC19 (in **Sections 6 to 8**).

## Section 5

# USC7

## Introduction

- 5.1 **This Section** sets out the reasons for our findings with regard to BT's obligations under USC7.
- 5.2 **In this Section:**
- **paragraphs 5.4 to 5.9** contain a summary of our provisional findings on the lawfulness of USC7 as set out in the August 2006 document;
  - **paragraphs 5.10 to 5.21** summarise the main responses that Ofcom received to the August 2006 document in relation to the lawfulness of USC7;
  - **paragraphs 5.22 to 5.72** set out Ofcom's analysis for concluding that USC7 is unlawful, including its views on the responses to the August 2006 document; and
  - **paragraphs 5.73 to 5.78** set out the responses to the February 2007 document and Ofcom's reasons for maintaining its views that USC7 is unlawful.
- 5.3 In **Sections 6 to 9**, we assess the detailed issues relating to BT's obligations under GC19. Then, in **Section 11**, we set out details of the policy review Ofcom is undertaking to address issues arising from our findings in these disputes.

## Ofcom's provisional findings on the lawfulness of USC7

- 5.4 In Section 6 of the August 2006 document, we set out our preliminary conclusions on the lawfulness of USC7 and invited responses from the parties.
- 5.0 In summary, we considered (as advised by Leading Counsel) that USC7 does not properly implement Article 5 of the USD. Our concern was that the mechanism in USC7 fails to impose an obligation on any undertaking (e.g. on BT as a designated provider) to guarantee that at least one comprehensive DQ service is provided to all end-users. This position may be contrasted with other universal service obligations imposed on BT, such as under USC1, which properly implement provisions in Chapter II of the USD, such as Article 4.
- 5.1 As a matter of domestic law, we 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.
- 5.2 Furthermore, we 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 unlawful.
- 5.3 In the February 2007 document, we did not consider it necessary to repeat in that document further detail behind these provisional conclusions, together with submissions made by the parties to the disputes (as well as another interested person, i.e. Thomson) during our investigation prior to publishing the August 2006 document, alongside our views on them. Instead, we focused in the February 2007

document on responding to consultation responses received to the August 2006 document, by setting out further clarification in support of our provisional findings in the hope that this would result in common ground.

- 5.4 The Number continues<sup>42</sup> to maintain that USC7 is lawful. Therefore, we set out in **Annex 7** our detailed provisional conclusions, submissions and our views on them. Our conclusions below closely reflect the position we set out in Section 6 of the February 2007 document as we maintain that it represents the appropriate analysis on fundamental issues raised by The Number on the lawfulness of USC7 during our consultation process.

## Responses to the August 2006 document

### Overview

- 5.5 As noted in **Section 3**, we received four responses on the August 2006 document concerning USC7: (i) a joint response of 29 September 2006 from The Number<sup>43</sup> and Conduit; (ii) a response from BT; (iii) a response from Thomson; and (iv) a response from Yell. The Number and Conduit, BT and Thomson also submitted responses to the February 2007 document.
- 5.6 The Number submitted that our provisional conclusion regarding the lawfulness of USC7 was wrong. The Number believes USC7 to be lawful and, in summary, it submitted that Ofcom's statutory duty under section 3 of the 2003 Act requires it to continue to enforce USC7. Our views on that response, including on The Number's more detailed submissions, are set out below.
- 5.7 On the other hand, BT agreed with our provisional conclusion that USC7 is unlawful. BT did not seek to make any new arguments in this regard, but instead relied on its previous submissions. (In its response to the February 2007 document, BT concurred with our finding that USC7 is flawed and unlawful.)
- 5.8 In its response, Thomson did not object to our provisional conclusion, although it previously submitted that USC7 was lawful. (While Thomson corrects our understanding of its position in respect the scope of GC19 data in its response to the February 2007 document, it does not comment further on the lawfulness issue.) Nor did Yell comment on the lawfulness issue. However, both Thomson and Yell made 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 Number's arguments in relation to USC7

- 5.9 The Number has made a number of detailed points in submitting that our analysis on the lawfulness of USC7 is flawed.
- 5.10 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 we are) empowered to set USC7 on the basis

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<sup>42</sup> At paragraph 18 of its response to the February 2007 document, The Number maintains its position that USC7 is lawful for reasons set out in Section 3 of its response to the August 2006 document, which, in turn, refers to previous arguments made by The Number during Ofcom's investigation.

<sup>43</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.

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.

### The 'result argument'

5.11 To start with, The Number refers to paragraph 6.16 of the August 2006 document, where we stated:

6.16 In principle, the lawfulness of USC7 has to be examined under both UK and EC law; that is to say, it must:

- fall within the power to set a USC in Sections 65-67 of the 2003 Act, which (as a result of the proper construction of those Sections, particularly s.65(1)) brings one to the question of whether it is required by EC law; and
- (assuming it is permitted by UK law) also be permitted by EC law and in particular by the relevant directives on electronic communications.

5.12 The Number responds that we are 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.

5.13 The Number further submits that we have 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.

5.14 The Number considers that there is nothing in the USD which is inconsistent with the provisions of USC7.4. It argues that we 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 our 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 we 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>44</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’

5.15 The Number’s other main submission rests on its view of our 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 we have 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.

5.16 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.

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<sup>44</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.”

## Ofcom's analysis

### Introduction

- 5.17 The Number relies 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>45</sup>
- 5.18 In summary, Ofcom considers that, on proper analysis, the reference to Article 249 of the EC Treaty is not relevant here. When the USD is read in the context of the new EC regulatory framework as a whole, it can be seen that the mechanism adopted in USC7 is not a mechanism that is permitted to Member States. Nor, therefore, do we consider that The Number's reliance on the principle of subsidiarity is relevant as the authorisation regime discussed below is a fundamental Community objective<sup>46</sup> in achieving a harmonised regulatory framework.
- 5.19 In **Section 4** (as well as **Annex 5**), we set out the relevant provisions of (among other things) the EC regulatory 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 makes.

### The authorisation regime

- 5.20 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.
- 5.21 We have already noted in **Section 4** that, under the previous EC regulatory framework, Member States could require providers of telecommunications to be individually licensed, and to attach various conditions to those licences. This resulted in many differences in national licensing systems across the Community, including burdens imposed on providers.
- 5.22 The new framework seeks to address differences between licensing regimes and licence conditions, and the new regime, 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 ECNs and ECSs, 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 ECNs and ECSs, whether they are provided to the public or not, which is important to

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<sup>45</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.

<sup>46</sup> See, in particular, the 41<sup>st</sup> recital of the Framework Directive which explains that the Community has adopted this specific objective in accordance with the principle of subsidiarity as set out in Article 5 of the EC Treaty.

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 ECNs and ECSs 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).

5.23 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 ECNs or ECSs, 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)).

5.24 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.

5.25 Therefore, USC7 is 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

5.26 The conditions listed in the Annex to the AuD constitute a maximum list of conditions which may be attached to a general authorisation (Article 6(1)).

5.27 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). The words “*for the purposes of Articles 5...*” indicate that this obligation is not itself a universal service obligation. Rather, we consider its intended subject-matter is to facilitate the provision of (amongst others) universal service directories and DQ services.

5.28 As seen from the definition of ‘general authorisation’ in Article 2(2)(a), the only persons to whom such conditions may apply are “*all or to specific types of electronic communications networks and services*”. In other words, conditions cannot be imposed on an identified supplier of a network or service (here, BT). On that basis, we consider that condition 4 of Part C of the Annex would not provide a legal basis for standing by the lawfulness of USC7.<sup>47</sup>

(b) Articles 3(2) and 6(2)

5.29 In addition, 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.

5.30 Taking into account the aims of the AuD (as well as the need to interpret the exception in Articles 3(2) and 6(2) strictly), we consider that Article 6(2) (when read with Article 3(2)) does 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;

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<sup>47</sup> The Number has not specifically argued this point, but we note it for completeness.

- thirdly, 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.

5.31 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, our reasons are set out as to why USC7 cannot be lawfully regarded as a "*specific obligation ... on [a person] designated to provide universal service under the [USD]*".

### The designation mechanism

5.32 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 them. 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;"

5.33 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.

#### 5.34 Those recitals make a number of things clear:

- 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.

- 5.35 In other words, the USD provides 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.
- 5.36 However, the USD does not deal explicitly with a situation where the defined minimum set of basic services is already available throughout the territory to all end-users at the determined quality and an affordable price under normal market conditions. In those circumstances, there would be no need to impose universal service obligations, nor consequently any need to designate a universal service operator, because the 'result' that the USD aims for has already been achieved.
- 5.37 The previous EC regulatory framework made this point clearly.<sup>48</sup> The USD contains some references (such as in the 4<sup>th</sup> recital and Article 1(1)<sup>49</sup>) to normal market conditions that we think suggest that the new framework remains unchanged in this regard.
- 5.38 Furthermore, the European Commission's view appears to be that no universal service obligations (or 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>50</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]

...

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<sup>48</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 services, in conformity with Community law and, in particular, with Directive 97/33/EC on Interconnection.*" (Emphasis added)

<sup>49</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>50</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)

## 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]"

- 5.39 It is against this 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).
- 5.40 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 offer 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.
- 5.41 Accordingly, we remain of the view set out in the August 2006 document and the February 2007 document that the UK was required in these circumstances to designate an undertaking for the provision of the *specific* services referred to in Article 5 of the USD.<sup>51</sup> For those reasons, we also disagree with The Number's submissions in this regard.
- 5.42 We now consider the nature of the services to be guaranteed under Article 5 of the USD by way of specific obligations.

### The specific (universal service) obligations

- 5.43 As noted above, Chapter II of the USD defines the basic set of services, the provision of which must be guaranteed in Member States (whether 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)

- 5.44 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)

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<sup>51</sup> Ofcom is currently consulting on whether it is now necessary for it to designate an undertaking to provide universal services – see **Section 11** for details.



- 5.45 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.”

- 5.46 That provision should be read in light of the 11<sup>th</sup> recital to the USD's preamble:

(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.

- 5.47 These, in our view, are 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. Those services are at least 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).

- 5.48 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 these Article 5 services are made available.

- 5.49 The Number considers, 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.

- 5.50 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.

5.51 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.

5.52 In our 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, the concept of ‘universal service’ is limited to those set out and defined in Chapter II of the USD (such as Article 5). 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, support this view.

5.53 Were the concept of ‘universal service’ capable of being read flexibly, it would not be necessary to include provisions such as Articles 15 and 32 of the USD. Article 15 of the USD requires the European Commission periodically to review<sup>52</sup> the scope of universal service. This suggests that Article 3(2) of the USD is not a provision intended, as The Number 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.

5.54 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

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<sup>52</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/staffworkdocument\\_final.pdf](http://europa.eu.int/information_society/policy/ecom/doc/info_centre/public_consult/review/staffworkdocument_final.pdf)

how to designate undertakings to guarantee the making available of the defined universal services to end-users (at retail level). On this view, Member States are not able to impose an obligation to provide some *other* service (such as the supply of data at a wholesale level, as in USC7), even if to do so would achieve the result that the USD was intended to achieve.

- 5.55 Article 32 of the USD illustrates the clear boundary contemplated in regulation 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, in such circumstances, no compensation mechanism involving specific undertakings may be imposed.

- 5.56 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.*"
- 5.57 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.
- 5.58 Accordingly, The Number's argument that Article 3(2) of the USD requires the UK to determine the "the most efficient and appropriate approach" to achieving universal service outcomes goes beyond what is permitted under the USD. That "approach" could either be to acknowledge that market conditions achieved a sufficient outcome or to impose an obligation on a designated entity to provide the Article 5 services. It does not extend to an approach that adopts a third choice – that is, to impose an obligation on, say, BT, to provide some other service. We do not agree with The Number's argument<sup>53</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' for the reasons set out below.
- 5.59 First, that argument is 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. We disagree with this view for the reasons set out above.
- 5.60 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.

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<sup>53</sup> At paragraph 3.17 of The Number's response, as cited above.

## Ofcom's powers to set USCs under the 2003 Act

- 5.61 Turning to The Number's arguments based on domestic UK law, it is clear to us 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 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.

- 5.62 It is also 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*".
- 5.63 The Number submits 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>54</sup> of the 2003 Act is central to The Number's argument, as read in light of the *Viagra* case.
- 5.64 We do not agree with The Number for a number of reasons.
- 5.65 First, the *Viagra* case involved entirely different domestic legislation in terms of its nature and effect to that relevant to these disputes. Therefore, we do not think that it is a determinative authority 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

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<sup>54</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.*"

required that they should render to patients all necessary and appropriate medical services of the type usually provided by general medical practitioners.<sup>55</sup>

5.66 Second, The Number's appropriateness argument would have the effect of Ofcom acquiring powers not specifically intended by Parliament (specifically, to implement Article 32 of the USD by way of a USC under section 67 of the 2003 Act). 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.

5.67 This is particularly the case where, in our view, the reasons for Parliament using the word "appropriate" in this context are clear:

- in relation to the "things" set out in the Schedule to the Services Order, we may need (within the scope of those things) to exercise our discretion to specify certain matters in the USCs, such as the data rates that we consider 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, we have 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.

## Responses to the February 2007 document

5.68 The Number continues to maintain its view that USC7 is lawful for the reasons set out in its response to the August 2006 document. The Number therefore states simply that we should apply the findings in *KPN* to OSIS, fix the charges for OSIS going forward and calculate the amount which should be refunded to The Number and Conduit in respect of their overpayment for OSIS to date.

5.69 The Number further states that we should also determine what constitutes 'relevant information' in the UK context, which it argues, on the basis of USC7, is *the entire contents of the OSIS database*. In this context, The Number dismisses Ofcom's analysis with reference to Articles 3(2) and 6(2) of the AuD (at paragraphs 6.24 to 6.33 of the February 2007 document) as "*...this characterisation of universal service*

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<sup>55</sup> In its response to the February 2007 document, BT acknowledges Ofcom's extensive analysis and effort in bringing clarity to, in its view, a complex and sometimes confusing set of regulations, legislation and case law; BT states that it is particularly relieved to note Ofcom's conclusions on the relevance of the *Viagra* case to the present issues.

*is, in our view, incorrect and, in this context, inappropriate. It also has no authority.”* However, The Number does not provide any reasons for why it holds that view.

- 5.70 Given that The Number maintains its previous arguments, we have not been persuaded to change our view for the reasons given above.

## Conclusion

- 5.71 Accordingly, for reasons set out above, we conclude that USC7 is unlawful and therefore Ofcom cannot resolve these disputes by reference to the terms of USC7.
- 5.72 As a result, in so far as the data supplied by BT to The Number and Conduit from OSIS falls outside GC19 (see, in particular, **Section 8** of this explanatory statement concerning the scope of that data), BT is not required to provide such data on regulatory terms. The implications of this finding as to what The Number and Conduit have paid for the full OSIS data are particularly considered in **Section 9** of this document.
- 5.73 For that reason, we also reject The Number's request that we should fix the charges for OSIS going forward and calculate the amount which should be refunded to The Number and Conduit in respect of their (alleged) overpayment for OSIS to date.

## Section 6

# GC19 – Preliminary issues

## Introduction

- 6.1 In Section 7 of the August 2006 document, we assessed BT's obligations under GC19 by addressing six questions:
- (i) is BT a person subject to the requirement under GC19 (see paragraphs 7.12 to 7.18 of the August 2006 document)?
  - (ii) if so, from what date has that requirement applied (see paragraphs 7.19 to 7.24 of the August 2006 document)?
  - (iii) Do each of The Number and Conduit have 'rights of access' to the information under GC19 (see paragraphs 7.26 to 7.40 of the August 2006 document)?
  - (iv) Have each of The Number and Conduit 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 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 basis and terms must BT make such information available under GC19 (see paragraphs 7.149 to 7.166 of the August 2006 document)?
- 6.2 We similarly dealt with these issues in the February 2007 document. Following both consultations, we understand that 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 information to each of The Number and Conduit as they have 'rights of access'.
- 6.3 However, in its responses to both consultations, BT disagrees with Ofcom's provisional conclusions in some respects, arguing that::
- (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 CAT.

- 6.4 BT broadly agrees with the scope of information to be provided under GC19 as proposed by us in the August 2006 document and as revised in the February 2007 document.
- 6.5 The Number<sup>56</sup> objects to our proposed scope of data to be made available by BT under GC19. The Number has made a number of submissions on this subject. The Number agrees with our conclusion 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.
- 6.6 Given that:
- (i) BT accepts some of these preliminary issues only as a matter of principle;
  - (ii) BT contests, in effect, our 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.

- 6.7 We have structured our reasons and conclusions in the following way:
- **this Section** sets out our views on the first four questions noted in **paragraph 6.1**.
  - **Section 7** deals with arguments raised by The Number 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;
  - **Section 8** considers the scope of data that BT is obliged to provide under GC19;
  - **Section 9** deals with the question of what price BT is obliged to charge for access to GC19 data on cost oriented terms.

## **BT being a person required to provide Directory Information**

### **The relevant terms of GC19**

- 6.8 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

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<sup>56</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.



(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.

6.9 Those terms make it clear that, for BT to be required to provide under GC19 the more specific data discussed in **Section 8** of this document to The Number and Conduit, respectively, it is necessary first to establish that:

- (i) BT is a 'Communications Provider' for the purposes of GC19; and
- (ii) BT has been required to comply with GC19 in relation to the period to which these disputes relate.

### **BT is a 'Communications Provider' for the purposes of GC19**

6.10 BT has not contested that it is subject to GC19. In its response to the February 2007 document, BT emphasises now that "*at no point during this investigation has BT disputed that it is bound by GC19*".

6.11 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**.

6.12 GC19 is an *ex ante* regulatory requirement to specifically implement the obligations contained in Article 25(2) of the USD.<sup>57</sup>

6.13 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*".

6.14 The word "**person**" includes a body of persons corporate or unincorporated.<sup>58</sup> 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>59</sup>, regardless of its legal nature, can be interpreted as being an 'undertaking'. It also includes undertakings that form a single economic entity<sup>60</sup>, such as companies or divisions within the same corporate group (e.g. BT

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<sup>57</sup> GC19 uses some terms that differ from Article 25(2), such as *persons providing ECNs or ECSs* (see definition of 'Communications Provider' in GC19.5) as opposed to simply *undertakings* (Article 25(2)) and *Allocation* (GC19) as opposed to *assignment* (Article 25(2)). In our view, nothing turns on these differences for the purposes of these disputes.

<sup>58</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>59</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>60</sup> See, for instance, *Viho v. Commission*, Case C-73/95 P [1996] ECR I-5457.

Wholesale, BT Retail and Openreach), where a company within that group is not independent in its decision making.

- 6.15 The verb “provides” (in this context) needs to be read consistent with section 32(4) of the 2003 Act.<sup>61</sup>
- 6.16 For the purposes of (among others) GC19, the terms of **ECN and ECS** are defined under paragraph 1 of Part 1 of the Schedule to the GC notification as follows:

“Electronic Communications Network” means—

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

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

(i) apparatus comprised in the system;

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

(iii) software and stored data;

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

- 6.17 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*”. 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*];

- 6.18 Article 25(2) of the USD uses the term ‘assign’, which according to its ordinary dictionary meaning corresponds to allocating (a Telephone Number) to someone.
- 6.19 We conclude that:

- (i) **BT is ‘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 2** 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).

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<sup>61</sup> Pursuant to paragraph 2(d) of Part 1 of the Schedule to the GC notification.

6.20 Accordingly, BT is a relevant 'Communications Provider' for the purposes of GC19.

### **BT having been required to comply with GC19 since 25 July 2003**

6.21 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. BT argues that 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. Whilst emphasising that it has not disputed that it is bound by GC19, BT maintains in its response to the February 2007 document that there are some complexities to fulfil and implement its separate obligations under GC19, particularly with regard to contractual arrangements.

6.22 BT has raised the following issues:

- (i) Which part of BT should be responsible for discharging BT's obligation under GC19?;
- (ii) If we expect that BT will continue to provide OSIS data on request – how much time will BT need following our 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? BT notes that it will need to assess each request on a case-by-case basis, including format and frequency of delivery;
- (iii) How much time will be needed 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?

6.23 Our position with respect to BT 'immediately' providing information was clarified in the February 2007 document. We noted 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)

6.24 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.

6.25 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, which is now common ground between the parties, 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)

- 6.26 We could therefore investigate whether any delay by BT in meeting a particular request (to the extent it has been reasonably made) is reasonable or not. If, in a specific case, BT would need more time to meet the request (depending upon what is reasonable in the circumstances), that is permitted under GC19. (An example might be the time needed to negotiate individual requirements of DIPs for GC19 data). This is a distinct issue to the question of how long BT might require to implement our findings in these disputes.
- 6.27 These disputes are essentially historic in nature, and in making 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, we are, in the present disputes, exercising a jurisdiction similar to that of the Courts.
- 6.28 As we pointed out already in the August 2006 document, we are, in effect, being asked to interpret and apply a provision of law (here, GC19) to the relevant facts in order to clarify and explain its meaning (as it ought to be, or have been, understood since it took effect). This is very different to a situation where we are *imposing* any GC19 requirements not already been in existence and in force since 25 July 2003. (We also note 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>62</sup> Our dispute resolution is therefore a form of regulation and it must, in particular, be aimed at achieving the policy objectives of Article 8 of the Framework Directive, as implemented in section 4 of the 2003 Act.)

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<sup>62</sup> The CAT's judgment in *Hutchison 3G (UK) Limited v. The Office of Communications*, 29 November 2005, [2005] CAT 39, paragraph 138.

- 6.29 As noted above, and not disputed by BT, BT has at all material times been subject to GC19. The fact that BT has, in our view, in effect discharged its obligations under GC19 in the present disputes by also providing the full OSIS data does not change this position.
- 6.30 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”.
- 6.31 In other words, the fact that we have concluded that USC7 is unlawful (see **Section 5**) does not affect the application of GC19. BT has recognised for some time that it would be subject to GC19 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 6.89** below).
- 6.32 Of course, should The Number or Conduit make a reasonable request to BT for its GC19-only data following our final determinations, BT may require some time to assess and negotiate the precise terms of such a request. What is reasonable will depend on the circumstances. We make no findings about this question in resolving these disputes.
- 6.33 The issue in these disputes is whether The Number and/or Conduit has (in the past) made a reasonable request to BT for it to make available its ‘Directory Information’, so as to trigger BT’s obligations under GC19. We turn to that specific matter below, but first we address briefly 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

- 6.34 In summary, our view remains (as set out previously in both consultations) 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.
- 6.35 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*”.
- 6.36 It is clear from the respective descriptions of The Number’s and Conduit’s businesses set out in **Section 2** 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;

- 6.37 Each of The Number and Conduit is a ‘**person**’ (which term, as seen above, is itself defined broadly in the Interpretation Act 1978).
- 6.38 On the evidence provided to us, there appears no doubt that The Number and Conduit have each requested information from BT under their respective licences “**for the purposes of the provision of...Directory Enquiry Facilities**”.
- 6.39 Therefore, they both have ‘rights of access’ to certain ‘Directory Information’ from BT. Apart from 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

- 6.40 BT has 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.
- 6.41 We do not need to determine these issues to resolve these disputes. In the August 2006 document, we nonetheless set out our emerging thinking on these issues, to assist other stakeholders in clarifying the rights and obligations related to GC19 (and, perhaps, avoid the need for further disputes to resolve this). In addition, 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.
- 6.42 In summary, our view in the August 2006 document was that, in relation to:
- (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>63</sup>; and

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<sup>63</sup> In this regard, we specifically noted that 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.

- (ii) business classified directories (e.g. Thomson): in dealing with certain points<sup>64</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.
- 6.43 BT argues that the purpose of Article 25(2) is to facilitate only the provision of the universal service directories and DQ services.
- 6.44 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.
- 6.45 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;
  - (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.
- 6.46 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, both of which refer to the supply of universal service directories.
- 6.47 In the August 2006 document, we 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. We did not consider that the 11<sup>th</sup> recital was critical in the way that BT argued. 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 relevant.
- 6.48 Our view was (and remains) that these provisions (Articles 5 and 25(1) and (2)) need to be read together. We consider that these provisions 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

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<sup>64</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.

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) any person wishing to provide a publicly available directory or DQ service (particularly to facilitate PATS subscribers' inclusion in a universal service directory) has a right to receive the relevant information from all undertakings which assign telephone numbers to (PATS) subscribers.

- 6.49 We considered that the PATS point is related (but distinct) from the 'rights of access' issue. The language of Article 25(2)—"for the purposes of the provision publicly available directory enquiry services and directories"— supports our view that publicly available DQ services and directories (other than universal service ones) also fall 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 considered that alternative wording would have been used, such as similar cross-references to Article 5 to those used in Article 25(1) and (3).
- 6.50 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. We do not think it is relevant how the information is presented in a 'Directory' – for example, 'Subscribers' of PATS include businesses (and not only living individuals) and so a classified directory also falls within the meaning of a 'Directory'. In any event, Thomson local directories incorporate alphabetical listings sections A-Z, which are unclassified. On that basis, we considered that Thomson would have 'rights of access' under GC19. (We will, however, conclude on this point specifically with regard to Thomson when we publish our decision in relation to this complaint.)
- 6.51 As regards the *KPN* judgment itself, we did not consider that it provided a basis for a CP 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. The ECJ specifically acknowledged (at paragraph 8) 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.
- 6.52 Accordingly, we considered in the August 2006 document that a person's 'right 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

6.53 In its response to the August 2006 document, BT responded with two main arguments:

- (i) it would be unworkable, together with raising serious data protection and commercial concerns, to allow intermediate suppliers (with whom BT has no contractual relationship) access to GC19 data; 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.

6.54 We now turn to deal with each of these points.

### *a) Ofcom's views on BT's response as to 'rights of access' & intermediate suppliers*

6.55 We understand the crux of BT's point being as set out in paragraph 16 of its main response:

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.

6.56 In the February 2007 document, we did not consider that we needed to resolve this matter to resolve these disputes. We saw BT's point about not having a contractual relationship with (say) a second intermediary as a matter that could be addressed in other ways. For example, (in the example given by BT, in its contractual dealings with the first intermediary), a party could undertake to procure the compliance of relevant regulatory obligations (such as GC19), if it decided 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.

6.57 Therefore, while we appreciated BT's efforts to ensure that DIPs do not misuse data and noted from its response to the February 2007 document that this appears to remain a concern to BT, we maintained the view that other mechanisms (such as contract) were available to procure the compliance with data protection requirements, rather than any such difficulties resulting in rights of access being denied outright.

### *b) BT's response as to rights of access' & non-comprehensiveness*

6.58 We noted that this response maintained the position BT took in its 6<sup>th</sup> July letter to Ofcom.

6.59 But we further noted that BT sought 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.

6.60 BT's submission did not change our view, particularly as regards the interrelationship between the provisions in Articles 5 and 25(1) and (2) as discussed above. We

noted, however, that we did not fully understand BT's point about CPs' interests or rights. This was because we had 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) was (and remains) 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).

- 6.61 Nor did 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.
- 6.62 Furthermore, we did not consider that the legislative history and the transition from Article 6(3) of the RVTD to which BT referred assisted its argument and we referred back to our views on this matter by reference particularly to the *KPN* judgment itself. For reasons set out below, we also considered that BT's reliance in its response to the February 2007 document on the 35<sup>th</sup> recital of the USD's preamble in this context was not relevant because it related to rights of PATS subscribers under Article 25(1), as opposed to Article 25(2) (which GC19 seeks to implement).

### Responses to the February 2007 document

- 6.63 BT maintains its view that only those persons providing directories or DQ services (which must be "comprehensive" according to the meaning previously argued by BT) "directly" to end-users have access under GC19. BT made a number of other points:
- (i) BT disagrees with our view (paragraph 7.51 of the February 2007 document) that the plural language in Article 25(2) supports that non-universal service directories and DQ services fall therein (because the plurality is required to take account of the possibility that multiple designed universal service providers having rights of access);
  - (ii) BT argues that, if non-comprehensive directories and DQ services would have rights of access, wider concerns arise as to how the DIPs use the information, particularly for classified business listings (such as Thomson) where usage is unrelated to the ultimate provision of a directory or DQ service;
  - (iii) BT argues that the USD does not grant rights of access to third parties which are not subscribers, particularly those involved in the commercial production of non-comprehensive directories or DQ services (citing the 35<sup>th</sup> recital<sup>65</sup> to the USD's preamble);
  - (iv) BT disagrees with our emerging thinking on intermediaries' rights of access. BT distinguishes the facts in the *KPN* case by claiming that no concern arises from where an intermediary has been sub-contracted (or outsourced) to provide a directory, whereas a concern does arise from an independent undertaking operating for commercial gain at an intermediate level in the supply chain; and

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<sup>65</sup> i.e. "The provision of directory enquiry services and directories is already open to competition. The provisions of this Directive complement the provisions of Directive 97/66/EC by giving **subscribers** a right to have their personal data included in a printed or electronic directory. All service providers which assign telephone numbers to their subscribers are obliged to make relevant information available in a fair, cost-oriented and non-discriminatory manner." (BT's emphasis)

- (v) BT invites Ofcom to provide guidance on the type of uses<sup>66</sup> which it considers legitimate under GC19 and on a uniform policy of rights of access across industry. BT signals that, meanwhile, it intends to continue (a) its policy of affirming legitimate rights of access under GC19, (b) its OSIS policy of requesting visibility of the products to be produced with the OSIS data, the DIPs' measures to ensure data protection and so forth, and (c) providing the wider set of OSIS data to the extent that it is actually able to provide this information, which is conditional on CPs passing on to BT their information under Schedule 11 of the SIA<sup>67</sup> and for a satisfactory commercial arrangement which will align with our proposals for the charging of GC19 information.

6.64 In its comments on BT's response to the February 2007 document, The Number argues that DIPs should not be restricted in the uses to which they can put GC19 data once they have obtained it from BT – particularly where DIPs have incorporated that data into their own systems, enhanced it and used that enhanced data to provide new and innovative products. The Number highlights that one of the reasons for liberalising DQ services was to encourage the development of a wide range of new and innovative DQ services for consumers. This aim would be jeopardised (they argue) if BT was able to restrict the use to which GC19 data could be put. The Number further notes that, as this would mean that only BT would be in a position to develop new DQ services, potential competition law issues would arise.<sup>68</sup> The Number additionally notes that neither GC19 or Article 25 of the USD require that directories, other than universal service directories, be comprehensive.

### Ofcom's position

6.65 We note that BT again concurs that The Number and Conduit have 'rights of access' under GC19. For reasons set out in **paragraphs 6.34 to 6.39** above, we have therefore concluded they have such 'rights of access'.

6.66 It is not necessary for us to reach a definitive view with regard to intermediaries and business classified directories in order to resolve these disputes, as BT acknowledges in its extensive response on this position. However, we maintain our emerging views as set out in **paragraphs 6.40 to 6.62** of this document. Our observations on BT's more specific points in this regard are:

- (i) as regards the plural language in Article 25(2), BT states that Ofcom's argument is entirely premised on the fact that only a single supplier of universal services may be in existence at the exclusion of such multiple suppliers so as to suggest that this provides no support for Ofcom's argument. The contextual point that Ofcom was making in paragraph 7.51

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<sup>66</sup> In a confidential annex, BT has provided information to make Ofcom appreciate the issues BT has been forced to address over the past few years, including measures it has had to employ to verify whether OSIS data has been used in accordance with the terms of the Directory Information Licence Agreement and to identify unauthorised access to OSIS data, its distribution and use across industry, in order to secure consumer/data protection.

<sup>67</sup> See:

[http://www.btwholesale.com/application?pageid=editorial\\_one\\_column&nodeId=navigation/node/data/Pricing\\_and\\_Contracts/Reference\\_Offers/Telephony/navNode\\_Telephony](http://www.btwholesale.com/application?pageid=editorial_one_column&nodeId=navigation/node/data/Pricing_and_Contracts/Reference_Offers/Telephony/navNode_Telephony)

<sup>68</sup> The Number also raises issues about BT seeking to restrict access to and use of GC19 data on data protection grounds. The Number's comments and Ofcom's response are set out in **Section 9** below – see **paragraphs 9.175 to 9.193**.

of the February 2007 document (as repeated in **paragraph 6.49** above) was that the plural language as read in conjunction with the specific cross-references to Article 5 in Articles 25(1) and (3) provide additional (but not the only) support for Ofcom's interpretation of what the legislative draftsmen intended, which runs contrary to BT's rights of access argument;

- (ii) as to BT's wider concerns about how non-comprehensive directories and DQ services use the information, while Ofcom appreciates BT's efforts to ensure that DIPs do not misuse data contrary to the requirements of relevant data protection legislation, we maintain our views that this is not of itself a reason to deny rights of access and that (as explained in **paragraph 6.57**), for instance, contractual means would appear available to procure the compliance of such requirements;
- (iii) Ofcom considers that the 35<sup>th</sup> recital simply seeks to highlight the right of PATS subscribers in Article 25(1), as opposed to Article 25(2) which GC19 seeks to implement., Ofcom refers to, in particular, **paragraph 6.57** for its view of the interrelationship between the provisions in Articles 5, 25(1) and (2) making it plain that certain third parties other than subscribers do have rights of access;
- (iv) Ofcom was not clear of BT's argument in distinguishing the *KPN* case by referring to KPN outsourcing its publication of the universal telephone guide to Telefoongids Media BV (which Ofcom understands is intended by BT to be a response in relation to paragraph 7.53 of the February 2007 document). Ofcom was making reference to the rival CD-ROM and internet directories by Denda and Topware, but not Telefoongids Media BV: see again **paragraph 6.51** of this document; and
- (v) as to BT's invitation that Ofcom provides guidance on legitimate uses of GC19 data and The Number's comments in relation to BT's alleged attempts to restrict use of GC19 data, Ofcom urges the parties to make these points specifically in response to Ofcom's policy consultation. While Ofcom notes that BT is committed to continuing to provide the wider set of OSIS data, the application of BT's policies to which it draws Ofcom's attention is not a matter that Ofcom considers is appropriate for it to comment upon to resolve these disputes, particularly as we would require further information to understand their operation.

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

### **Ofcom's position and BT's essential case**

- 6.67 We dealt with this issue in both consultations. Having considered the submissions made to us, we remain of the views first set out in the August 2006 document. We reiterate, however, those views below for ease of reference and address the points made in response to the February 2007 document.
- 6.68 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.

- 6.69 The question of what falls within the meaning of 'Directory Information' is discussed in **Section 8**. In broad terms, 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 our view, clear that the OSIS database contains information that falls outside as well as within BT's obligations under GC19.
- 6.70 These disputes 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 OSIS licences.<sup>69</sup> Based on the descriptions in the OSIS licences, and the information actually supplied by BT to The Number and Conduit pursuant to those licences, it is clear 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).
- 6.71 In respect of the information provided to The Number under its OSIS licence that falls within the meaning of 'Directory Information', BT is required to provide that part of the information under the terms of GC19. The fact that The Number and Conduit have asked for, and obtained, a 'bundled' product or service (including both GC19 data and other information falling outside GC19) does not change that (regulatory) position. 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 9** of this document.
- 6.72 (The question of whether or not The Number and Conduit have, in fact, made requests for the purposes of GC19 is raised in BT's two appeals<sup>70</sup> to the CAT brought against Ofcom for extending the scope of the present disputes to include GC19 issues. BT's case<sup>71</sup> is that no disputes as to GC19 exist between the parties since (in BT's view) no requests for GC19 data have been made to BT by either party).<sup>72</sup>
- 6.73 No party has suggested that The Number and/or Conduit might have made *unreasonable* requests for GC19 data under their OSIS licences. We are therefore proceeding on the basis that, if we are right with regard to the question of whether the parties have made a request to BT for GC19 data, the reasonableness of their requests is not in dispute between the parties.

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<sup>69</sup> Those licences are set out in **Annex 4** to this explanatory statement.

<sup>70</sup> See **footnote 3** of this explanatory statement for details of these appeals.

<sup>71</sup> In its notices of appeal, BT argues that The Number has never made a 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 BT.

<sup>72</sup> Following the first case management conference in those proceedings, the CAT decided to postpone the date for serving a defence until a later date. In the meantime, we set out below some observations on BT's case as they go to determining issues of substance in these disputes.

## BT's current discharge of its GC19 obligations

- 6.74 As noted in **Section 3**, BT has in its response to the February 2007 document emphasised that “*at no point during this investigation has BT disputed that it is bound by GC19*”.
- 6.75 BT has confirmed to us in a meeting on 20 December 2005 that it is, in effect, fulfilling its obligations under GC19 by supplying OSIS data, which comprise data about its own subscriber customers. BT has, however, also pointed out to us that there have been technical issues in making the GC19 information available separately. (In its response to the February 2007 document, BT states that, in particular, contractual arrangements would need to be resolved.) BT has also informed us that the resolution of those issues have been put on hold in light of the *KPN* case and until further clarity has been provided by us with regard to the application of that case to UK regulation. In the meantime, it has assured us that persons (such as The Number and Conduit) may still obtain BT's GC19 data via OSIS.
- 6.76 We explained in our letters of 8 March 2006 to the parties that BT had ‘signalled’ to us that it has been discharging its GC19 obligations through its provision of subscriber information via OSIS. This is consistent with BT's response of 9 June 2005 (headed “*Re: Request for BT subscriber directory information*”) to Conduit's letter of 3 June 2005, which response 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.

- 6.77 In its notices of appeal, BT argues that we did not give any particulars in our 8 March 2006 letters as to the manner in which BT has so ‘signalled’ this point to us and the industry. BT claims that the only indication as to what we had in mind appeared from a letter of 16 March 2006 in relation to its investigation of a parallel complaint by Thomson, in which we 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)

- 6.78 In its notices of appeal, BT further submits that we have 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.
- 6.79 In light of BT's submissions, we reviewed the relevant correspondence<sup>73</sup>, but we explained in the February 2007 document that remained of the view that, even read as a whole and including the other material referred to in **paragraphs 6.75 and 6.76** above, it shows that (even if BT did not attach the GC19 label to it) BT stated both to us and to the industry that it has discharged its GC19 obligations, including to The Number and Conduit, through OSIS.

### Summary of BT's two specific points

- 6.80 BT makes two points in support of its case that neither The Number, nor Conduit, has made any request to BT for its 'Directory Information' under GC19<sup>74</sup>:
- (i) First, BT observes that the OSIS licences granted to The Number and Conduit were entered into on 23 August 2002 and 1 July 2000, respectively, which was before GC19 came into force. BT submits that BT's supply of data to them under those licences was originally 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.
  - (ii) Secondly, a relevant request in the context of GC19 must, according to BT, mean a request that refers to, or is plainly referable to, GC19. 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 be made to agree the terms on which the data is to be supplied.

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<sup>73</sup> See correspondence included at tab 14 of the bundle of annexed documents to the BT appeal in respect of the Conduit dispute.

<sup>74</sup> 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 CAT in the appeals.

**BT's 1<sup>st</sup> point: OSIS licences were entered into before GC19 came into force**

- 6.81 GC19 was not in force at the time that the OSIS licences were entered into and, therefore, it cannot have been either parties' intention at that time that the OSIS licences should be the means by which BT discharged that obligation.
- 6.82 However, from July 2003, we consider that the OSIS licences have (to the extent that they cover information falling within the scope of GC19) been the means by which BT has discharged its obligations under GC19. Neither the parties' own description of the OSIS licences<sup>75</sup>, nor the fact that they were entered into before GC19 came into force, can displace the fact that, objectively, they provide (*inter alia*) for the supply by BT of information that falls within the meaning of 'Directory Information' for the purposes of GC19.
- 6.83 Further, neither the view of the parties (at the point the OSIS licences were entered into), nor the contract between the parties affects BT's obligations under GC19. 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. We therefore do not accept BT's view that its provision of GC19 data depends on certain technical (and now, according to BT, contractual) issues being resolved and Ofcom's prior clarification on the application of GC19 to it.
- 6.84 Since 25 July 2003, The Number and Conduit have the right to be provided with BT's own subscriber data under GC19. On the evidence, we find that this GC19 data is a sub-set of the OSIS data. Therefore, these 'disputes' – which are disputes about the terms on which OSIS data have been supplied to The Number and Conduit – necessarily include disputes as to the terms on which BT's own subscriber data have been provided. Even if The Number and/or Conduit had not invoked GC19, it 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 us to apply GC19 to (that part of) these disputes.

**BT's 2<sup>nd</sup> point: Requests have not been made plainly referable to GC19**

- 6.85 We do not agree with BT that requests by The Number and Conduit must be requests that refer to GC19 in order to be effective, because:
- (i) As discussed above, the parties cannot contract out of their regulatory obligations.
  - (ii) At the meeting on 20 December 2005 noted above, we 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 us that, in

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<sup>75</sup> See, for example, the House of Lords in *Street v. Mountford* [1985] AC 809 and *In Re Spectrum Plus Ltd (In Liquidation)* [2005] UKHL 41, where the true legal effect of the agreements labelled by the parties as "tenancy" and "fixed charge", respectively, was ascertained and determined by the Law Lords.



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 us 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.

- 6.86 Therefore, we have not seen any evidence that BT would have treated requests by The Number and/or Conduit any differently even if such requests had referred specifically to GC19. On the basis of BT's response to us, BT 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. 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 us in a formal consultation. That also suggests, in our 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 evidence we have, there is nothing to suggest that BT would have sought to negotiate a GC19 request in a different manner.
- 6.87 In any event, correspondence between BT and The Number in relation to the OSIS licences specifically refers to information falling within the scope of GC19. Thus, 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 us.
- 6.88 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.

- 6.89 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...

- 6.90 Conduit's letter of 3 June 2005 to BT ought to have been understood by BT as being referable (at least in part) to GC19. However, in a meeting with us on 19 May 2006, Conduit confirmed that it would nonetheless have needed the additional data it currently receives from OSIS in order to continue to provide its directory services to customers.
- 6.91 Nor does any issue of fairness arise 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. As shown from the correspondence, it had these obligations in mind when attempting to negotiate the new licences with The Number and Conduit. 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.
- 6.92 We also do not accept BT's concern about its ability to assess whether or not a request is, in the context, reasonable. 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.
- 6.93 BT's argument that a request must refer to GC19 before GC19 can be considered on a dispute referral under section 185(2) focuses on form rather than substance. BT argues 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 begin negotiating again.
- 6.94 We find this argument to be unattractive and formalistic, and we consider that it 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. The CAT 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 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...<sup>76</sup>

6.95 In any event, BT's position about making a request plainly referable to GC19 would be unsustainable by reference to its own contractual documentation (such as BT's Upstream Contract). We understand that the standard form contract is silent with regard to GC19, although (as seen from **Annex 4** to this explanatory statement: see **paragraph A4.22**) it does contain references to BT's (now repealed) licence conditions. For reasons set out above, in our view, if BT requested a CP to supply BT with its directory information under the terms of GC19, the CP could not refuse such a supply simply on the basis that BT's Upstream Contract makes no reference to GC19.

6.96 Finally, additional support for our 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.

6.97 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 does not appear to have attached any importance to the fact (specifically referred to in its judgment) 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).

6.98 Accordingly, for the above reasons, we concluded in the February 2007 document that The Number and Conduit have requested BT to provide certain information to The Number and Conduit under GC19, and that we have power to determine the scope of these disputes so as to include the matters included in that scope in March 2006.

### **Responses to the February 2007 document on existence of GC19 requests**

6.99 In its response to the February 2007 document, BT maintains its previous position that no requests have been made by The Number and Conduit. BT adds that it is unclear how Ofcom is able to conclude that any disputes have arisen in the first place, given paragraph 10.12 of the February 2007 document stating that The Number and Conduit wanted, received and used the full OSIS data set.

6.100 The Number and Conduit agree with our provisional conclusion that that they, in effect, made a request for the BT GC19 data set by virtue of requesting OSIS data of

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<sup>76</sup> *Media Marketing & Promotions v. Office of Communications*, Case No: 1053/3/3/05, [2006] CAT 12, 15 May 2006, §208.

which that set is a sub-set. They maintain the reasons set out in their response of 29 September 2006 to the August 2006 document in this regard, namely<sup>77</sup>:

- The Number and Conduit have always required and in effect requested a supply of BT's own subscriber data;
- GC19 itself does not require that the request should be for directory information to be made available "under GC19": it need merely be a request for information of the kind referenced in GC19;
- An offer of OSIS on the terms contained in the OSIS Licence Agreement was, at the time of The Number and Conduit's entry into that agreement, and continues to be, the only instrument BT uses in order to discharge its regulatory obligations under GC19. No alternatives are or were offered by BT;
- The Number and Conduit made requests at the inception of their relationships with BT, being requests to enter into the only apparent arrangement that would give them access to BT GC19 data, i.e. the OSIS Licence Agreement. They also make requests from time to time or continuously under that agreement for data comprised in OSIS, including BT GC19 data;
- Even if The Number itself did not expressly request a separate supply of BT GC19 data, others have and have been rejected and referred to OSIS (a fact known to The Number). In Conduit's case, BT responded to an inquiry from Conduit in June 2006 for a separate stream of BT-only data falling within the terms of GC19 by refusing to provide such data. BT is obliged to act in a non-discriminatory manner, so The Number would not have been treated any differently;
- As regards negotiations between The Number, Conduit and BT, these related to BT's charges not being cost-oriented in light of KPN, and were not characterised by particular reference either to USC7 or GC19;
- At the inception of the negotiations and subsequently, The Number sought information on costs relating to BT data as distinct from the costs of procurement of other operators' data, which would go to whether or not BT was complying with GC19. The Number was therefore specifically interested in GC19 issues as much as issues relating more broadly to USC7.

6.101 BT additionally argues that our provisional conclusions support closure of the Thomson complaint with a finding that BT has not breached GC19 in that the "record" establishes that Thomson requested, received, wanted and benefited from all of the OSIS data, including data that went beyond BT's GC19 requirements.

## Conclusion

6.102 Ofcom concludes, for reasons set out above, that The Number and Conduit have made requests for GC19 data. We also note The Number's agreement and detailed views (summarised above) for maintaining that requests for the BT GC19 data set have been made by virtue of requesting OSIS data of which that data is a sub-set.

6.103 In its response, BT implicitly suggests that this position contradicts our analysis (at paragraph 10.12 of the February 2007 document), making it "*unclear how Ofcom is able to conclude that any disputes have arisen in the first place*". Our response to

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<sup>77</sup> Paragraph 15 of The Number's response to the February 2007 document.

that point is that – as explained in detail in **paragraphs 6.67 to 6.98** above, repeating paragraphs 7.66 to 7.98 of the February 2007 document – the dispute between each of the other parties and BT as to the charges made for supply of the OSIS data set necessarily included a dispute as to the charges made for a subset of that data set, namely the data set covered by GC19. We consider that no contradiction arises because, essentially, the question of whether or not BT has received such reasonable request is separate to the question as to whether or not BT's charges are (and have been) 'cost oriented' in the event of BT providing the 'bundled' OSIS product (which is considered in **Section 9**).

- 6.104 BT argues that we should close the Thomson complaint with a finding of no breach of GC19 on BT's part as Thomson requested, received, wanted and benefited from all of the OSIS data. Thomson submits to the contrary as it specifically asked BT to supply its own GC19 data separately, meaning that the reasoning in the February 2007 document is applicable to its case.
- 6.105 We will publish our conclusions in relation to the Thomson complaint shortly.

## Section 7

# GC19 – Approach to resolving the disputes

## Introduction

7.1 **Section 6** dealt with a number of preliminary issues, concluding that:

- (i) BT is a person to whom GC19 applies for the purposes of the present disputes (which is common ground);
- (ii) BT has been required to comply with GC19 since 25 July 2003 (which is common ground);
- (iii) The Number and Conduit each has 'rights of access' to GC19 data (which is common ground); and
- (iv) each of The Number and Conduit has reasonably requested BT to supply them with information to be made available under GC19 (which matter remains disputed by BT).

7.2 **Sections 8 and 9** deal with:

- (i) the scope of the data falling under GC19: see **Section 8**;
- (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 9**.

7.3 **This Section** deals with arguments raised by The Number<sup>78</sup> in its response to both consultations concerning our approach to interpreting the information that BT is (and was during the relevant period<sup>79</sup>) obliged to provide under GC19. Although these arguments are closely linked with our analysis on the scope of GC19 data considered in **Section 8**, we consider it appropriate to briefly respond to these "overriding considerations" (as put by The Number) more generally prior to dealing with more detailed matters.

7.4 The Number argues that, in the August 2006 document, we have 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. It also submits that we have ignored some important principles of interpretation arising from the *Marleasing*<sup>80</sup> and *Von Colson*<sup>81</sup> cases.

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<sup>78</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.

<sup>79</sup> 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: see **Section 2**.

<sup>80</sup> Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*.

<sup>81</sup> Case 14/84 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.

- 7.5 In summary, The Number argues that we have “misdirected” ourselves and adopted an “*over-restrictive and, to that extent, erroneous interpretation of the provisions of GC19*”. In doing so, The Number claims that we have:
- (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, we have 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.
- 7.6 The Number includes additional points concerning our exclusion from GC19 of what is termed ‘actual user’ information as well as services using non-geographic and personal numbers from the BT GC19 data set. The Number also submits that we have 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 8**. Therefore, we will not address them specifically in **this Section**.
- 7.7 We have considered all of the points made by The Number in its response to both consultations. In short, we do not believe that it is possible legally to interpret GC19 more broadly than as set out in **Section 8** of this document. We continue to recognise that our conclusions fall short of meeting the outcome advocated by The Number and recognise that this position gives rise to a number of policy issues. We have 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 11**, which provides an overview of this policy review.
- 7.8 In summary, we do not consider that The Number’s four arguments alleging failures in Ofcom’s approach to resolving these disputes change our views, for the reasons set out below. We now turn to address each of them in detail.

### **(i) Alleged failure to take account of *KPN* etc.**

#### **The Number’s submissions**

- 7.9 At paragraph 1.4 of its response to the August 2006 document, The Number summarised 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*).

- 7.10 In its substantive response, The Number states that we have failed to take into account its obligations arising under relevant EU legislation. In its view, this failure has then resulted in erroneous conclusions on the scope of relevant information BT is obliged to provide. The Number stated that we have 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.
- 7.11 By this, The Number contended, EU case law requires us 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.
- 7.12 The Number then stated 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 argued that we should therefore interpret GC19 in a way which is pro-consumer and pro-user and gives effect to those aims.
- 7.13 Furthermore, The Number stated 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 believed that our approach in arguing that GC19 is consistent with the USD is irrelevant and wrong.
- 7.14 In support, The Number cited ECJ's judgments in *Von Colson* and *Marleasing*.
- 7.15 The Number argued that we appear 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 argued that the only requirement is that the national law in question be "open to interpretation". In this context, The Number referred to our statement in paragraph 7.20 of the August 2006 document that we are tasked with interpreting and applying GC19. The Number therefore stated that we should therefore be interpreting GC19 in the light of the wording and the purpose of the USD.
- 7.16 In making these points, The Number also cited various passages from the judgment of the Competition Appeal Tribunal in the *Floe* case<sup>82</sup>, which The Number claimed supports its view.
- 7.17 According to The Number, we 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 Oftel/the Director in drafting GC19).

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<sup>82</sup> *Floe Telecom Limited (in administration) v Ofcom*, [2006] CAT 17, judgment of 31 August 2006.



7.18 The Number concluded (at paragraph 7.22 of its response):

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 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*.

7.19 In this regard, The Number was 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

7.20 We agree with The Number that we ought to interpret national law consistently with Community law, as decided by the ECJ on numerous occasions. In particular, we noted 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.

7.21 We understand The Number's position to be 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 referred 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 did not understand their submissions as suggesting that the RVTD pursued aims that are not pursued by the USD. For example, the "user-oriented objectives" set out in the recitals to the USD are reflected also in the recitals to the RVTD, and the aim of providing good-quality publicly available ECS for consumers is specifically referred to in Article 1(1) of the RVTD.

7.22 In light of this, we considered that the ECJ's ruling in *KPN* (interpreting the term 'relevant information' under Article 6(3) of the RVTD) applies equally to the concept of 'relevant information' under Article 25(2) of the USD. The ECJ interpreted that concept in light of its context and the 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 referred.

7.23 We remained of the view that, for reasons now set out in **Section 4** of this explanatory statement, the ECJ arrived at a strict interpretation of the meaning of the concept of 'relevant information'. (As noted in **Section 3**, The Number continues in its response to the February 2007 document to take issue with this view.) In effect, the ECJ reached a view that the concept had to be interpreted as containing two separate parts.

7.24 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*'.<sup>83</sup> 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.

- 7.25 As further discussed in **Section 8** of this document, we considered 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.
- 7.26 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 in light of specific national circumstances. This can be achieved 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*.
- 7.27 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.
- 7.28 Hence, The Number's point about our having an "opportunity" in these disputes to include all the information subscribers and users need and expect within 'relevant information' was not correct. (In fact, the position in these disputes is closer 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 3** to this explanatory statement for a translation of this judgment for information and **paragraph 4.39** of this explanatory statement for a summary of that Court's key conclusions in this regard.)
- 7.29 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 discussed in **Section 4** 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.
- 7.30 It is against this background (together with our conclusion of the unlawfulness of USC7 in **Section 5** of this document) that the analysis set out in **this Section** must be read and appreciated in light of the function that we fulfil 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 argued, in effect,

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<sup>83</sup> Case C-109/03, *KPN Telecom BV v. OPTA*: [2004] ECR I-11273, paragraph 36.

that we should now rewrite BT's substantive obligations under GC19, so that the these policy intentions are to be achieved (but now under GC19, as opposed to USC7). In this regard, The Number's case fundamentally rested on its reading of the *KPN* case, which we understood played an important part in the positions the parties took in their negotiations with BT and ultimately led them to refer their respective disputes to us.

- 7.31 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 considered in the February 2007 document that this point simply fell away given our conclusion about the compatibility of GC19 with the USD.
- 7.32 As to The Number's references to the *Floe* case, we noted that in that case the CAT found that we had not considered the domestic regulation in the context of the relevant directives. In these disputes we have 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**

- 7.33 The Number argued that we are under a duty to carry out an Impact Assessment under section 7 of the 2003 Act in resolving these disputes. If we had carried out such an Impact Assessment, The Number referred to our 'Better Policy Making guidelines' of 21 July 2005<sup>84</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.
- 7.34 As The Number itself acknowledged, the 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 stated (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.

- 7.35 In response to our explanation in paragraph 7.331 of the August 2006 document as to why it has not carried out an Impact Assessment, The Number simply responded (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*

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<sup>84</sup> See at: [http://www.ofcom.org.uk/consult/policy\\_making/guidelines.pdf](http://www.ofcom.org.uk/consult/policy_making/guidelines.pdf)

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.

- 7.36 The Number did not elaborate further.
- 7.37 The Number then claimed that we are wrong in our reasoning for not carrying out an Impact Assessment. The Number cited passages in the August 2006 document to state that we are 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 sought to draw a distinction between applying and interpreting GC19.

### Ofcom's response

- 7.38 Section 7(1) of the 2003 sets out the circumstances under which we are under a duty to carry out Impact Assessment. 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.

- 7.39 As explained in the IA Guidelines, we said that we believe 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)

- 7.40 In the February 2007 document, we maintained 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 referred to our previous discussion (now see, in particular, **paragraph 4.86** of this explanatory statement) that we act in a number of capacities under the 2003 Act, such as policy maker as well as when resolving regulatory disputes. When resolving regulatory disputes (under section 185(2) of the 2003 Act), Ofcom is not making policy: typically, it is applying existing (as opposed to proposed) regulation to the facts of the case.
- 7.41 In this context, we did not agree with The Number that there was a relevant distinction between *applying* GC19 to the facts in these disputes and *interpreting* GC19 when acting to resolve a dispute. In interpreting GC19, we are, in effect,

explaining the meaning of this existing regulation. Therefore, we considered that it cannot be properly said that we are “*proposing to do anything for the purposes of, or in connection with, the carrying out of their functions*”. We did not consider that it was the intention of Parliament to capture functions such as our dispute resolution functions within section 7 of the 2003 Act. Rather, we considered 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.

- 7.42 On that basis, we refuted The Number's claim that we are somehow “stepping out” of our duty to carry out Impact Assessments in resolving these disputes.
- 7.43 In any event, if resolving these disputes was to be viewed as an implementation of a proposal for the purposes of section 7 of the 2003 Act, we considered it unnecessary to carry out an Impact Assessment. This is because, in interpreting GC19 (as it currently stands) in these disputes, we explained that we were not defining a policy objective that could be usefully assessed against various options. In other words, we said that no issue arose with regard to us 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 considered that we had fully complied with our statutory duties.
- 7.44 We added that we further had 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, we considered that, in interpreting GC19 and applying it to the facts in these disputes, we were 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. We remain of these views.

### **(iii) Alleged distortion on competition in the DQ industry**

#### **The Number's submissions**

- 7.45 The Number submitted that our interpretation of GC19 results in a number of potentially anti-competitive consequences. As a result, The Number alleged that we had adopted an approach which is liable to distort competition in the DQ industry. Specifically, The Number alleged that we had therefore:
- (i) failed our 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 our obligations under Article 10 of the EC Treaty.
- 7.46 Whilst The Number claimed that the wider interpretation of ‘relevant information’ it advocated should be taken would not allow DIPs to free-ride on BT's investment, the potentially anti-competitive consequences that The Number asserted result from our interpretation are:
- (i) the impossibility for ‘grouping’ information to be derived by DIPs from our 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)”.

7.47 The Number then added (at paragraph 7.38 of its response to the August 2006 document) 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

- 7.48 We noted in the February 2007 document that it was clear from The Number’s submissions that they were premised both on its reading of the *KPN* case and that we therefore had chosen to interpret GC19 in a particular manner. As regards the *KPN* case, we referred to our response to The Number’s submissions about our alleged failure to take account of *KPN*, see above in **this Section**.
- 7.49 We disagreed with The Number’s view that we had discretion to choose an approach. Assuming it is consistent with the USD, interpreting GC19 is a matter of domestic national law. To extend the meaning of GC19, therefore, 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 did not accept that we could rely on section 3 to, in effect, modify the meaning of GC19 in these cases.
- 7.50 In light of the above, there was no need for us to express a view on the correctness of The Number’s assertions. We nonetheless considered 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 we noted was separately considered in our ongoing policy review: see **Section 11** of this explanatory statement. We therefore urged The Number to consider making these points in response to our policy review consultation, if it wished.

### (iv) Alleged failure to comply with data protection legislation

#### The Number’s submissions

- 7.51 The Number submitted that “[a]nother overriding consideration is data protection legislation”. Whilst The Number did not explain what it meant by “overriding consideration”, we said that The Number appeared to be suggesting that we 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.
- 7.52 Specifically, after referring to certain statements by us in the August 2006 document, The Number’s conclusion (under paragraph 7.43 of its response) was 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.

- 7.53 In its response to the August 2006 document, The Number gave examples of information that should be included under GC19 on that basis 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.
- 7.54 The Number made two additional points that it considered 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) stated:
- 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)
- 7.55 Its second point arose from a discussion The Number mentioned it had had with a senior official of the Information Commissioner's Office ("ICO"). According to The Number (at paragraph 7.53 of its response), that official had 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)
- 7.56 In other words, we understood 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

- 7.57 In the February 2007 document, we focused 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 examples noted by The Number, we referred to our analysis of the implications of data protection legislation in light of our conclusions as to the scope of data required to be made available under GC19: see now **paragraphs 8.200 to 8.244** of this explanatory statement.



- 7.58 In dealing with The Number's point, we considered it appropriate to first turn to the terms of GC19. In particular, we noted that 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.

- 7.59 In analysing the scope of data covered by GC19, we considered that 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*") did not, in our view, serve the purpose alleged by The Number.
- 7.60 Furthermore, this view 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 25(5) 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)

- 7.61 In light of that view, the ECJ nonetheless reached the conclusion that the concept of 'relevant information' must be strictly interpreted, so as to comprise "in principle" minimum records only. We therefore considered that there was no support for The Number's argument in this regard.
- 7.62 We clarified 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. 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.

### Responses to the February 2007 document on approach to resolving disputes

- 7.63 BT considers that The Number's response to the August 2006 document (as set out in paragraphs 8.48 to 8.53 of the February 2007 document) on data protection issues are misguided because essentially it fails to appreciate that the provision of GC19 data is limited in use to the provision of publicly available directories and DQ services, whereas information which is provided by OSIS is subject to the licence terms, and the personal data is protected accordingly.
- 7.64 The Number appears to maintain in its response to the February 2007 document its arguments set out above in taking issue with our proposed scope of the GC19 data. However, The Number has not raised any new arguments in this regard.



## Conclusion

- 7.65 Having considered The Number's submissions, we conclude for the reasons set out above that we have not misdirected ourselves or otherwise adopted an erroneous approach to resolving these disputes in interpreting relevant provisions of law and regulation, including the *KPN* judgment.

## Section 8

# GC19 – Scope of data

## Introduction

- 8.1 **Section 4** sets out our reading of the ECJ's judgment in the *KPN* case as to what information is required as 'relevant information'. We conclude that it comprises only the name and address, including postcode, of subscribers, together with any telephone numbers allocated to them by the entity concerned.
- 8.2 We also conclude that it would be compliant with the USD for a Member State to determine in light of specific national circumstances that additional data ought to be made available to third parties. Any additional data must appear necessary to Member States in order to identify subscribers. The UK has, to date, not determined that additional data should be made available, though is now consulting on doing so (see **Section 11**).
- 8.3 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 7**, 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.
- 8.4 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. When interpreting UK legislation in line with Community obligations, we will construe it so far as possible so as to make it compatible with the Community legislation it was designed to give effect to.<sup>85</sup> Interpreting UK law where no Community rights/obligations are infringed, we must 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.
- 8.5 In summary, we have considered the responses to both the August 2006 and February 2007 documents about the scope of data under GC19. We conclude that

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<sup>85</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. However, the limitations of that approach was most recently made clear by the House of Lords in *R (on the application of Hurst) v. Commissioner of Police of the Metropolis* [2007] UKHL 13, where Lord Brown makes it clear (at paragraph 52) that "[w]here the Marleasing approach applies, the interpretative effect it produces upon domestic legislation is strictly confined to those cases where, on their particular facts, the application of the domestic legislation in its ordinary meaning would produce a result incompatible with the relevant European Community legislation. In cases where no European Community rights would be infringed, the domestic legislation is to be construed and applied in the ordinary way." For reasons already explained, it is Ofcom's case that no such rights would be infringed as GC19 already requires the provision of the minimum records (but not the additional data) to which the ECJ refers in *KPN*. As a result, GC19 must be construed and applied in the ordinary way as set out in **this Section**.

this scope does not extend to include all the data that The Number has argued should be made available under GC19.

8.6 The absence of certain data from GC19 may raise policy concerns. 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 of the USD was implemented in the UK in an efficient and effective manner. USC7 (that sought to achieve this) is unlawful. As set out in **Section 11** we have started a policy project to assess the impact of this and other issues.

8.7 In **this Section** we consider 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 set out in **Annex 4** to this explanatory statement, 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 **Annex 4**, 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.)

8.8 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 explain why we do not agree.

8.9 **Section 9** 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.

8.10 **This Section** is structured as follows:

- **paragraphs 8.11 to 8.31** 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 8.32 to 8.101** consider the question about whom 'Directory Information' must be provided, taking into consideration responses received to both consultations;
- **paragraphs 8.102 to 8.199** 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 [PATS]", taking into consideration responses received to both consultations;

- **paragraphs 8.200 to 8.244** 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 8.245 to 8.264** 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 8.265 to 8.275** set out our concluding remarks, including our 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

8.11 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)

8.12 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>86</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

<sup>86</sup> See as defined under paragraph 1 of Part 1 of the Schedule to the GC notification.

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)

- 8.13 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 8.102 to 8.199** below. The starting point for our 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’.
- 8.14 As seen from the ECJ’s judgment in the *KPN* case, the wording in the definition of ‘Directory Information’ 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*”.
- 8.15 We consider that, on its ordinary reading, GC19 is compatible with Community law in this regard. No issue arises with regard to us having to depart from the ordinary 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 our response to The Number’s argument about the alleged failure by us to take proper account of the findings in *KPN*, as set out in **paragraphs 7.9 to 7.32 of Section 7**.
- 8.16 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 was published on 22 May 2002 (the “**first GC consultation**”). Although The Number did not seek initially 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 doing so could lead to some result which cannot reasonably be supposed to have been the intention of the Director in setting GC19 in July 2003. In its response to the February 2007 document, The Number is now seeking to rely on this policy rationale, but it disagrees with our conclusions (see **paragraphs 8.62 to 8.64** for details of The Number’s comments and our assessment).
- 8.17 The purpose of GC19, 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:

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)

- 8.18 It would appear initially 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 in that notification 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 set out in **paragraph A5.33** of

**Annex 5** to this explanatory statement), it is clear to us that USC7 (as opposed to GC19) was the intended way to achieve the purpose described in paragraph 3.60 of the first GC consultation.<sup>87</sup>

- 8.19 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 us reasonable to consider that in drafting the definition, the Director has omitted wording to achieve his purpose.
- 8.20 We consider that there is no basis for taking an alternative interpretation, which was not reflected under the adopted terms of GC19. In any event, we take the view that a wholesale rewriting of the literal meaning of GC19 (together with its term 'Directory Information') would not be permitted under UK law.

### The two purposes of 'Directory Information'

- 8.21 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)

- 8.22 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.

- 8.23 The definition of 'Directory Information' initially seems to depend on whether one is considering a 'Directory' or a 'Directory Enquiry Facility' in the GC19 context. On this view, 'Directory Information' could be:
- (i) (in relation to 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*". (This is consistent the ECJ's interpretation of the concept of 'relevant information');
  - (ii) (in relation to 'Directory Information') "*either such a Telephone Number of the Subscriber or information that such a Telephone Number of the Subscriber may not be supplied*".
- 8.24 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

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<sup>87</sup> In its response to the February 2007 document, The Number argues that this assessment cannot be right as USC7 and GC19 are interconnected. However, as The Number has not provided any substantial new reasoning as to why this is the case, Ofcom remains of the view set out here.

the purposes of the provision of 'Directories' or 'Directory Enquiry Facilities'. Although it was not a matter raised by the parties in these disputes, we set out our views on this matter in the August 2006 document.<sup>88</sup> In summary, we concluded 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'.

8.25 Our reasoning in the August 2006 document for that view was that the term 'Directory Information' serves two distinct (but related) purposes.

8.26 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. (The term 'Directory Information' is used universally in the GC notification. It is defined in the main definition section of the GC notification and 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**.

8.27 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*".

8.28 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*".

8.29 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 [sic] entry included and end-users rights to access. The quality and scope of information at each level must

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<sup>88</sup> See, in particular, paragraphs 7.93 to 7.97.

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).

- 8.30 While noting The Number's comment, we continue 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"*.
- 8.31 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

- 8.32 In the August 2006 document (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).
- 8.33 In light of these 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.
- 8.34 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

- 8.35 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.



- 8.36 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 8.49 to 8.50**, 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)

- 8.37 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)

- 8.38 GC19.1(a) also 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>89</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 Ofcom/Ofcom.

- 8.39 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 our 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>90</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)

- 8.40 On the basis of that definition alone, if an entity making available ECSs for use by members of the public (i.e. public 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.)
- 8.41 This analysis accords with the ECJ's judgment in the *KPN* case itself. In its reply (at paragraph 36) to the first question referred to it on the interpretation of Article 6(3) of the RVTD, the ECJ stated:

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<sup>89</sup> Paragraph 3.122 of the final GC statement explains that the term 'assign' is used in the sense of sub-allocation from a CP to a particular end user.

<sup>90</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.

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)

- 8.42 References to the term 'subscribers' are also used throughout the judgment (as well as in the Advocate General's Opinion). These references reflect the wording of Article 6(3) of the RVTD itself, which uses in material respects the same wording as in Article 25(2) of the USD, namely "*all [organisations] which assign telephone numbers to subscribers*". The term 'subscriber' was defined in Article 2(2) of the RVTD in terms similar to the meaning its corresponding term has for the purposes of the USD:

(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;

- 8.43 Given that other terminology (such as a 'user', which is separately defined) is also used in both the RVTD as well as the USD, we see 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. 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.
- 8.44 In these circumstances, it would be wrong for us to nonetheless proceed by substituting some other words for the words in these provisions, particularly where relevant domestic law is designed to implement that directive. 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 7** of this document dealing with The Number's response. As set out above, no issue arises in this context about any duty on us to construe the domestic legislation so far as possible so as to make it compatible with the Community legislation.)
- 8.45 Given that the ECJ's conclusion (at paragraph 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 us to take such an interpretative approach. We also noted that there is nothing to suggest that the UK has exercised a "relevant information plus" option, which the ECJ recognised (at paragraph 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

- 8.46 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***".
- 8.47 We 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:

...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)

- 8.48 In the August 2006 document, we cross-referred to our analysis of 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 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 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

- 8.49 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;

- 8.50 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

- 8.51 The majority of consultation responses to the August 2006 document appeared to generally agree with our views on this point.
- 8.52 However, although BT generally concurred with our view, it made 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.

- 8.53 In the February 2007 document, we noted that, in its response to the August 2006 document, Thomson no longer expressly rejected that GC19 only requires BT to make available its 'own' directory information (its previous submissions had argued 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). Instead, Thomson focused in that response on submitting that we 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 argued that BT would be well-placed to perform this role). This suggestion was made also by Yell in almost identical terms in its response to the August 2006 document. However, in its response to the February 2007 document, Thomson has made it clear that its position has not changed and that it remains of the view that the concept of 'relevant information' under Article 25 should be interpreted to include other CPs' GC19 data.
- 8.54 The Number was silent in its response to the August 2006 document concerning the issue of aggregated third party (non-BT) subscriber information. We noted that it remained unclear from other parts of its response in which it objected to our findings (such as the exclusion of non-PATS subscribers and of actual users) as to whether The Number disagreed with our view on this matter. The Number had throughout our investigation maintained that all OSIS data is necessary to identify subscribers without necessarily separating BT subscribers and non-subscribers. However, The Number has now in its response to the February 2007 document clarified that it "*of course*" does not believe that (save as the names of actual users of BT numbers) third party subscriber information comes within GC19, while The Number appears to be maintaining its views in every other respect as set out in its previous submissions to us. Rather, The Number now appears to be arguing that such third party subscriber information would only need to be supplied by BT under USC7.

### Ofcom's response

- 8.55 It was unclear to us what BT meant by it being "unable to comply" with the requirement under GC19.1(b). Subject to BT providing further clarity on this matter, we noted that the mechanism in GC19.2 imposes, in turn, a requirement on a CP to provide another CP (originally allocated the telephone number in question by us) with

the relevant information, so that the latter can comply with its GC19.1 obligations. We therefore did not accept BT's submission.

- 8.56 We did not consider that, as a matter of Community law, a Member State is prevented from extending domestic legislation. In our observations on the *KPN* case itself, it is clear from the ECJ's judgment that Member States may go further than what it regards, in principle, as being 'relevant information'.
- 8.57 We did not accept BT's submission because the terms of GC19.1(b) impose a specific requirement on BT. If BT is so reasonably requested by a person with 'rights of access' under GC19, it must comply with that reasonable request. To drop this requirement would (among other things) require a prior modification by publishing statutory notifications under section 48 of the 2003 Act, including a separate consultation. As explained previously, for the purposes of resolving these disputes, we are exercising a different function with specifically prescribed powers under section 190 of the 2003 Act. We therefore urged 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 11** for further details.
- 8.58 Finally, in relation to The Number's contrary view, as explained in the February 2007 document our views remained as set out in the August 2006 document. We therefore maintained our views about whom BT must provide 'Directory Information' under GC19.

### **Responses to the February 2007 document about other CPs' GC19 data**

- 8.59 In its response to the February 2007 document, BT clarifies its position making it clear that, whilst not disputing that it was obliged to provide GC19 data, there exist complexities around the implementation of GC19, particularly as a result of the existence of USC7 and historical reliance on OSIS for the provision of information about other CPs' GC19 data.
- 8.60 Specifically, BT notes that, as a result of our interpretation of GC19, it will need to put in place contractual arrangements with 28 CPs for the provision of the specific data under GC19.1(b) and BT will also need to put in place similar arrangements for all WLR operators. BT adds that it, and other CPs, would need to set up dedicated systems to ensure that all information from all potential sources of information are properly assembled and passed to DIPs and would need to put in place contractual relationships relating to this.

### **Conclusion**

- 8.61 We do not believe that the complexities described in BT's response to the February 2007 document affect our resolution of these disputes – specifically, in terms of what data should be included within GC19 and whether CPs should be obliged to make it available. We note, however, BT's comments that there may be cost implications arising from these complexities.

- 8.62 The Number now<sup>91</sup> clarifies that “of course” it does not believe that (save as the names of actual users of BT numbers) third party subscriber information comes within GC19. Otherwise, The Number appears to be maintaining the views set out in its response of 29 September 2006 to the August 2006 document in every other respect.<sup>92</sup>
- 8.63 We therefore maintain our views, as set out in the August 2006 document, about whom BT must provide ‘Directory Information’ under GC19.
- 8.64 We deal with The Number’s views on actual users of BT numbers below in considering some further detailed arguments relied on by The Number in its response to the February 2007 document.

### **Responses to the August 2006 document about actual user information**

- 8.65 Except for The Number, we did not receive any response to the August 2006 document disagreeing with our analysis on this.
- 8.66 The Number argued that actual user information (as well as ‘Directory Information’ of subscribers) falls under GC19, and it made the following four points:
- (i) our reading leads to an inconsistency in that actual users of ex-BT (but not current BT) numbers would be included under GC19 itself;
  - (ii) our 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) we 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) we 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

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<sup>91</sup> In particular, we note that throughout The Number’s response of 13 April 2007 (e.g. paragraphs 2, 9, 15, 16, 18, 40, 48, 51, 52, 55, 62, 64, 77 and 79) to the February 2007 document it maintains and cross-refers to its 29 September response which, in turn, maintains and extends the arguments made in the original submissions from The Number and Conduit. Specifically, as regards third party (non-BT) subscriber information, we note The Number’s arguments at, for instance, paragraphs 2.65 to 2.66 of its Amended Request which submit that BT should only pass on cost oriented charges under the terms of GC19 to The Number in respect of data provided to the OSIS database by other CPs. The Number reiterates this point on a GC19 footing alone at paragraphs 4.2 to 4.7 of its 29 September response and then, at paragraph 4.8 of that response, The Number submits in the alternative that BT is so required under USC7. Like Conduit, The Number has throughout Ofcom’s investigation additionally argued that all of the information contained in OSIS is ‘relevant information’ or, at least, the format agreed between the parties, without separating between BT subscribers and non-BT subscribers.

<sup>92</sup> The Number’s 29 September 2006 response refers, in turn, to The Number’s previous submissions, including its Amended Request.

referable only to the 'Subscriber' and captures data referable to 'actual users' as well as subscribers.

(While The Number appears to be maintaining all of these points in its response to the February 2007 document, it expressly reiterates points (ii) and (iv) above, as discussed further below.)

## Ofcom's response

8.67 We maintained in the February 2007 document the position set out above as to actual user information. Specifically, we responded to The Number's four points as set out below.

### (i) Actual users of ex-BT (but not current BT) numbers

8.68 We understood that The Number was suggesting that our analysis lead to an inconsistent outcome due to the fact that actual users of ex-BT telephone numbers would fall within GC19.

8.69 We disagreed with The Number's premise (and we think 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)).

8.70 We explained that 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 persons become, or cease to be, Subscribers over time, when considering the person about whom a particular piece of information relates, we said that 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.

8.71 We pointed out that this reasoning follows from GC19 itself. In particular, we considered 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*...".

8.72 We said that 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 accepted that an actual user would fall within the definition of an "End-User" (as cited in **paragraph 8.49** above), we said that 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 considered 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, we viewed the provision as dealing particularly with the subsequent porting of a telephone number originally allocated to, say, BT to another CP.

- 8.73 On that basis, it was apparent that 'actual users' (who were not Subscribers) could not, by definition, fall under either GC19.1(a) or (b). Accordingly, we rejected The Number's assertion that actual users of ex-BT telephone numbers would fall within GC19 upon which its submission is premised.
- 8.74 We acknowledged, 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. We said that we are therefore seeking to address this particular matter in our policy review: see **Section 11** for further details.

#### (ii) The Advocate General's Opinion in the *KPN* case

- 8.75 We considered The Number's concern that we had misunderstood the Advocate General's Opinion in the *KPN* case. We do not agree. We referred to our understanding of what the ECJ decided in *KPN* in respect of the question concerning the meaning of 'relevant information', which is repeated in **Section 4** of this explanatory statement (see, in particular, **paragraphs 4.21 to 4.42**). Specifically, we pointed 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 (and we remain of this view).
- 8.76 We therefore rejected The Number's submission that we 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 referred to our reading of the *KPN* judgment, particularly 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 arose in this respect.

#### (iii) Data protection legislation

- 8.77 In responding to the actual user information point, The Number repeated its submission regarding what it called the "*overriding consideration*" concerning data protection. We referred to our analysis as set out in **Section 7** (see **paragraphs 7.51 to 7.62**) for our response to this submission. We also referred 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 now set out below (see **paragraphs 8.200 to 8.244**).
- 8.78 In addition, we also noted 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 followed 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. We said that 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 considered 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.

8.79 We explained that our construction was, in our understanding, supported by the “Legal Guidance” document<sup>93</sup> published by the ICO, 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)

8.80 We therefore considered that The Number was wrong in suggesting that the scope of data to be supplied under GC19 includes actual user information by reference to data protection legislation. The Number's argument was premised on the actual user information being the subscriber's information. We noted its response (at paragraph 7.65) to the August 2006 document, in particular:

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)

8.81 In contrast, where the data (in fact) relates to personal data of an actual user, we took the view that 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. We said that no issue would arise, 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.

8.82 Accordingly, we did 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'

8.83 We understood The Number's submission in that we should “utilise” the definition of ‘Telephone Number’ as a means (in isolation) for us to capture data referable to actual users as well as subscribers. In particular, The Number drew our attention to the phrase “*data of any description*” in the definition of ‘Telephone Number’.

8.84 We further understood 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 made another

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<sup>93</sup> See at:

[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)

point in its response by stating that the *name* of a BT exchange would satisfy the definition of a 'Telephone Number' because it considered it being *data of any description* used for identifying the route of an electronic communication.)

- 8.85 We did not accept this construction as a matter purely of domestic law.
- 8.86 To start with, we considered it is necessary first to have regard to the full definition of 'Telephone Number'<sup>94</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)

- 8.87 We observed that The Number had omitted reference to the words "*any number*" which precede the phrase "*including data of any description*". We further noted 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;

- 8.88 A relevant number is one that refers to an identifier of some kind to enable the transmission of such a communication over a network. We noted that this corresponds to the dictionary meaning of the word 'number' as set out in The New Shorter Oxford English Dictionary (albeit this focuses on telephony connections), 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*);

- 8.89 We said that it could not be said that a *name* of a person (whether an actual user or subscriber) or, as BT argued, 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) because such *name* does not enable transmission or connection of a communication. On that basis, we did not accept The Number's point about "utilising" the definition of 'Telephone Number' to include actual

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<sup>94</sup> Under paragraph 1 of Part 1 of the Schedule to the GC notification.

user information as suggested. (We will deal below (see **paragraphs 8.134 to 8.199**) more specifically with the types of telephone number that fall within GC19.)

## Responses to the February 2007 document about actual user information

8.90 The Number maintains that we have taken an unduly narrow approach to determining the scope of data under GC19. We understand The Number's response as suggesting that this is particularly the case with regard to actual user information. Rather, The Number continues to argue that it is necessary for us to consider the background to GC19 and the reasons why it is there in the first place (by reference, in particular, to the aims of the USD and the interpretation of it in light of the *KPN* judgment) when interpreting what information comes within 'Directory Information' in GC19. In particular, The Number makes the following points:

- (i) at paragraph 28 of the Opinion, which The Number asserts is endorsed by the ECJ (and The Number therefore disagrees with our view at paragraph 9.69 of the February 2007 document as to the differences between the the Opinion and the judgment in this regard), the Advocate General finds that more than just the minimum records must be provided; and
- (ii) at paragraph 34 of the judgment, the ECJ states that the relevant information "include" the minimum records but that this should not be read as "include only" (and The Number therefore disagrees with Ofcom's view at paragraph 5.21 of and footnote 27 of the February 2007 document) as it is a phrase of extension and, in support, The Number makes reference to *Stroud's Judicial Dictionary of Words and Phrases* relying on the authorities of *R v Kershaw* 26 L.J.M.C. 19 and *R v Hermann* 4 Q.B.D. 284.

## Conclusion

- 8.91 We do not agree that we have taken an unduly narrow approach to determining the scope of data under GC19 and we do not accept the points made by The Number in its response to the February 2007 document.
- 8.92 First, as regards The Number's reliance on paragraph 28 of the Advocate General's Opinion, we consider that the ECJ arrives at a stricter interpretation of the concept of "relevant information" than the Opinion for the reasons set out above: see particularly in **Section 4** of this explanatory statement.
- 8.93 Secondly, we maintain our reading of the word "include" in the ECJ's judgment as, in effect, meaning the minimum records only for the reasons already set out: see, again, in **Section 4**. As explained in **Section 4**, we have reached that view by reading the relevant parts of the ECJ's judgment in its proper context and taking into account that the word "include" is used in conjunction with the words "in principle" as well as the ECJ's finding that the concept of "relevant information" is not seeking to completely harmonise the position across the Community, hence the need to read its conclusions at paragraph 36 particularly in light of paragraphs 34 and 35 of the judgment.
- 8.94 We therefore do not think that The Number's reliance on the two authorities cited in *Stroud's Judicial Dictionary* assist. While we do not need to rely on this authority, we note however that this *Dictionary* also makes reference to another authority (*Dilworth v Commissioner of Stamps*) in which the Privy Council assumed that the word "include" as used in the Charitable Gifts Duties Exemption Act 1883 was meant to

introduce an exhaustive definition. Indeed, Lord Watson went on to explain in that case that:

...The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. **But the word "include" is susceptible of another construction**, which may become imperative, if the context of the Act is sufficient to shew that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. **It may be equivalent to "mean and include," and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions...**(Emphasis added)

- 8.95 Separately, BT notes in its response to the February 2007 document that it considers that the interpretation of GC19 remains unclear by reference to such terms as 'End-User', 'Customer' and the word 'originally' in the GC19 context. BT further notes our conclusion that 'actual user information' is not covered by GC19, "*in spite of a commonsense interpretation of End-User being an 'actual user' and even though the definition of [Customer] ... would suggest that they too might be the relevant 'End-User'.*"
- 8.96 In its comments on BT's response to the February 2007 document, The Number suggests that by these comments BT itself believes that 'actual user information' is covered by GC19. Therefore, The Number believes there is common ground between the parties on this matter.
- 8.97 We asked BT to clarify its position on 'actual user information'. In a letter to us of 11 June 2007 BT confirmed that, in its response to the February 2007 document, it was seeking to highlight "*the fact that the use of "End-User" in GC19.2 does not appear to be consistent with the KPN Judgment and its references to "subscribers". BT agrees in principle that GC19 should focus on "subscribers" and that "actual user information" should not be covered. In BT's view this is an issue for the upcoming Policy Review*".
- 8.98 BT is therefore not disputing our interpretation of GC19 in terms of the data that should be supplied. Rather it is arguing that confusion may arise as a result of the way in which certain terms are defined.
- 8.99 We also disagree with BT's suggestion that the use of the term 'End-User' in GC19.2 is not consistent with the *KPN* decision. GC19 seeks to differentiate between the subscribers of a CP that is the subject of the GC19 obligation ('CP1') and those of another CP who are using numbers that were originally allocated to that CP ('CP2'). The situation can become even more complex in relation to GC19.2 where CPs using telephone numbers originally allocated to another CP ('CP2') have themselves ported or transferred those numbers to another CP ('CP3'). The term 'End-User' is therefore used in these circumstances to refer to the subscribers of a CP that is using telephone numbers that were previously allocated to another CP (i.e. subscribers of 'CP2', in the case of GC19.1, or subscribers of 'CP3', in the case of GC19.2).
- 8.100 We therefore maintain our views that GC19 currently excludes actual user information.
- 8.101 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

8.102 In the August 2006 document, we considered that, in light of the definition of 'Directory Information', GC19 requires BT firstly to provide the name and address of the 'Subscriber'. Our starting point was to consider the natural and ordinary meaning of the terms 'name' and 'address' in this regard.

8.103 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.

8.104 We then explained 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)

8.105 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. 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 that the Advocate General himself 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.

8.106 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.

8.107 Similarly, we 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.

8.108 We 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).

8.109 Evidence gathered by us 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>95</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
- (v) in the case of a body of persons corporate or unincorporated, the address of the registered or principal office ("**trading/head office address**").

8.110 We pointed out that 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.

8.111 Our 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). We 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. We 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'.

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<sup>95</sup> By the term 'installation address', Ofcom referred 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.

## Responses to the August 2006 document on subscriber name and address

- 8.112 In its response to the August 2006 document, The Number pointed out that we had referred to the Shorter OED definition of 'name' to demonstrate that it did not include title, but then used the OED definition of 'title' to show that 'title' did not include name. The Number argued 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** (...)".
- 8.113 Furthermore, in excluding 'title' from 'name', The Number argued that we had 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.
- 8.114 The Number also pointed out that BT's letter of 13 July 2006 (attached at Annex 8 to the August 2006 document; and now at **Annex 2** to this explanatory statement) conceded that title, and also honours (field 31), should come within the meaning of 'name'.
- 8.115 The Number also made a number of points building on its principal argument – as set out above – that we had misunderstood *KPN* and has a duty to interpret GC19 in the light of the wording and aims of the USD, i.e. we 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 argued that, under data protection legislation, BT must pass on information in the form agreed with the subscriber.
- 8.116 The Number then set 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 reiterated 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 believed 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 raised 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 suggested 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 pointed out that this is specifically requested by individual subscribers and stated that at least one subscriber has threatened to sue The Number if his title is not given out. The Number again argued the aims of the USD and the data protection rules, so that such data should be passed on under GC19.

8.117 In its response, BT queried our inclusion of 'nickname' within the definition of 'name'. BT stated that it did not suppose that we intended nickname to be collected separately to the contracted forename and surname. It also pointed out that such data is not currently collected by BT or made available as a separate field of information in OSIS. Therefore, unless we indicate otherwise, BT said that it would 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.

8.118 BT further agreed that post town could be deemed to be 'relevant information' within the meaning of 'address'. However, it pointed out that this is not currently collected in the OSIS database but that BT would consider ways in which it would be able to provide this information as part of the GC 19 data. It suggested, however, that we should consult with industry as to whether post town is really needed, given that postcodes are provided.

8.119 BT disagreed, however, that post county forms part of 'address'. It pointed out that PAF does not include county, which is a local government boundary definition but not a definition of geography. It therefore argued that post county should be excluded from the GC 19 data set.

### **Ofcom's response**

8.120 In the February 2007 document, we rejected The Number's arguments that we had misunderstood the *KPN* case. We considered that many of The Number's submissions therefore fall away in this regard, because we considered that no issue of compatibility arose. We said that the application of the principle of consistent interpretation under Community law was therefore not relevant in this context.

8.121 We further reiterated that, for the purposes of resolving these disputes, our 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. We considered whether the specific requirements to provide the 'name' and 'address' could nonetheless, as compared to our provisional views in the August 2006 document, be interpreted more flexibly under that construction.



8.122 But we remained of the view that, for reasons already discussed above (see **paragraphs 8.32 to 8.101**), 'Directory Information' falling under GC19 only relates to the '**name**' and '**address**' of:

- (i) **the 'Subscriber'**<sup>96</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)' (see further at **paragraphs 8.134 to 8.199** below) has been assigned by that provider, which 'Telephone Number(s)' has been allocated to that provider by Ofcom (or previously, the DGT) in accordance with GC17 (GC19.1(a)); **and/or**
- (ii) **"any other End-User assigned a Telephone Number originally Allocated to the Communications Provider** [here, BT]" (GC19.1(b)).

8.123 Accordingly, we considered that, as already noted above, actual user information fell outside GC19. As such, we considered that 'name' and 'address' information was only that of the individual or business actually 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>97</sup>).

8.124 We said, however, that we had been persuaded by The Number's argument to the extent that it suggested that the dictionary meaning was not entirely consistent when comparing the words 'name' and 'title'. It was therefore, in our view, difficult to discern with precision the ordinary usage of the English language in this regard. Ofcom therefore accepted 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 proposed by us as excluded in Tables 7.1 and 7.2 of the August 2006 document.

8.125 As a result, for the purposes of resolving these disputes, we then proposed 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, we considered that it would be 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 seemed 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.

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<sup>96</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>97</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.

- 8.126 We said that such an approach clearly had the advantage of being more flexible than the somewhat restrictive definition of 'name' proposed in the August 2006 document. However, we also noted that this approach had at the same time the disadvantage of lacking certainty on the information that any CP would be obliged to provide under GC19 and, more specifically, of what information the CP would be obliged to collect. We believed, however, 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 supported that belief.
- 8.127 Therefore, in order to resolve these disputes in a practicable manner, we considered 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 said that we would expect that an individual's name would normally comprise a surname together with at least an initial. But we noted the possibility that an individual's name could under this approach include titles, honours and possibly other identifiers, where appropriate. We also noted that clearly these levels of detail are irrelevant when considering a business name. For the purposes of concluding a contract we did 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 followed that, in Ofcom's view, the requirement under GC19 on the CP to provide the 'name' of the subscriber could extend no further than the requirement to supply the name given by the subscriber in securing the PATS contract.
- 8.128 We also noted that, in concluding customer contracts, BT does allow subscribers to populate fields with both title and honours, where appropriate, though these fields will often be left blank. It therefore seemed reasonable to consider these fields as part of the name of the subscriber. We considered that it did 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.
- 8.129 We considered that 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.
- 8.130 However, again, we saw 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 noted our expectation for 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 was clear that, where specific data on (say) 'post county' is not collected for such purposes, there would be no need to collect such data in order to meet the requirements of GC19. (We consider below — see **paragraphs 8.200 to 8.244** — 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.)
- 8.131 Notwithstanding these revised proposals, we considered 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 anticipated 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.

## Conclusion

- 8.132 We did not receive any new responses to the February 2007 document specifically with regard to our revised proposals on the meaning of the name and address of the subscriber.
- 8.133 We therefore maintain our views on this issue as set out in both consultations (as set out above), and revised in the February 2007 document.

## The meaning of the 'Telephone Number' assigned for its use of PATS

### Ofcom's provisional findings in the August 2006 document

- 8.134 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 our position.
- 8.135 We cited the definition of 'Telephone Number' as set out under paragraph 1 of Part 1 of the Schedule to the GC notification:

"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;

- 8.136 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

- 8.137 We explained that the first category of numbers falling outside GC19 relates to internet domain names or internet addresses, including email addresses.

- 8.138 Specifically, as a result of the Telephone Number Exclusion (Domain Names and Internet Addresses) Order 2003<sup>98</sup> (an order of the Secretary of State made pursuant to section 56(7) of the 2003 Act that 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.
- 8.139 Given that the definition of 'Telephone Number' is subject to that Order, we said that 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'

- 8.140 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 us.
- 8.141 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*". 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.
- 8.142 We explained that the Annex 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.
- 8.143 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*".
- 8.144 In response, we explained that, in our understanding, the difference between Telephone Number (internal) and Telephone Number (dialable) is in the format in which the numbers are currently presented within OSIS (as set out in **Table A4.1** in **Annex 4**). Both data fields essentially provide the relevant 'Telephone Number'. The other fields mentioned by The Number were considered by us 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 our 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.

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<sup>98</sup> S.I. 2003/3281.

8.145 However, we said that the examples of Exchange Code and DQ Code are not numbers that have been allocated to BT by Of tel/Of com. In our view, they therefore fell outside GC19, contrary to The Number's submissions.

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

8.146 The third and final category of numbers that we 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 the August 2006 document, The Number had not made submissions 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 clarified our view.

8.147 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 our view, the unambiguous intent is to ensure that only those persons who have contracted with providers for the supply of PATS fall within GC19. Persons who have contracted with providers for the supply of public available ECSs (but which are not PATS) do not fall within GC19.

8.148 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 our 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".

8.149 We considered 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.

8.150 We noted that this interpretation of PATS was not taken simply to resolve the present disputes. We confirmed this position, in the context of our statement on the regulation of Voice over Internet Protocol (VoIP) services (the "**VoIP document**")<sup>99</sup>. We also noted that our position is supported by the European Commission's Expert Group on

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<sup>99</sup> See document entitled '*Regulation of VoIP Services – Statement and publication of statutory notifications under section 48(1) of the Communications Act 2003 modifying General Conditions 14 and 18*', published by Ofcom on 29 March 2007: <http://www.ofcom.org.uk/consult/condocs/voipregulation/voipstatement/>

Emergency Access (EGEA).<sup>100</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).

- 8.151 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. It would not fall within the meaning of 'Directory Information' or 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 appears to apply to premium rate services (e.g. '090' and '091' numbers). In addition, the National Telephone Numbering Plan<sup>101</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).
- 8.152 We explained, however, that we had considered whether an alternative interpretation should be given to the PATS term here. In particular a different (and wider meaning) has been given to the term "PATS" for the purposes of GC18 concerning number portability.
- 8.153 The reasons for taking that wider approach in GC18 are set out in, for instance, the VoIP document. Ofcom's wider interpretation was also upheld by the CAT, when it 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>102</sup>
- 8.154 In this context, however, we explained that 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.
- 8.155 Nor did we consider that the PATS term needs to be interpreted differently, so as to be compatible with Article 25(2) of the USD. We pointed out that 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 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*

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<sup>100</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>101</sup> The National Telephone Numbering Plan, published by Ofcom on 30 March 2006: <http://www.ofcom.org.uk/telecoms/loi/numbers/261701.pdf>

<sup>102</sup> *Media Marketing & Promotions v. Office of Communications*, Case No 1053/3/3/05, [2006] CAT 12, paragraph 243.

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. We considered that it sufficed here to recall that the issue of provision of directory services as a competitive activity (reflected in the 35<sup>th</sup> recital to the USD's preamble, as cited in **Annex 5** of this document which was also the case under the RVTD: see its 7<sup>th</sup> recital, as also cited in **Annex 5**); 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)

We 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 we were 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 our 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 we 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.

- 8.156 Given that we anticipated that a significant proportion of numbers contained in OSIS relate to non-PATS numbers, we explained for those reasons 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 on relevant telephone numbers**

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

- 8.157 In its response to the August 2006 document, The Number made a number of substantial submissions on our proposed exclusion of 'Telephone Numbers' not assigned for PATS:
- (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.
- 8.158 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 disagreed with our view that it was significant that the USD's legislative draftsman removed a reference to 'personal telephone numbers' in describing what users of directories desire.<sup>103</sup> Although The Number acknowledged that such a reference was removed during the legislative process of the USD, we did not consider it necessary to deal with The Number's detailed

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<sup>103</sup> The Number here seeks to take the reader to the relevant *travaux préparatoires* and to Ofcom's argument in the August 2006 document.



response in this regard. This was because, for the purposes of resolving these disputes, we did not need to rely on this argument for the purposes of interpreting GC19 in the context of the USD. The key point was 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 referred 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 we referred to in the August 2006 document, making clear references to PATS.

8.159 We noted that The Number appeared 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.

8.160 In its response to the August 2006 document, BT agreed with our finding in this regard. However, BT pointed out that Ofcom’s finding may cause some confusion, particularly given recent proposals for extended number portability.

### **Ofcom’s response**

8.161 The Number argued, to start with (at paragraph 7.67 of its response to the August 2006 document):

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.

8.162 In other words, The Number argued 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 did not provide any additional reasoning. We disagreed 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 maintained our position as set out in the August 2006 document. However, we considered it appropriate to clarify why the issues in relation to GC19 are not analogous to GC18, as set out below.

8.163 The background to the definition of PATS for the purposes of GC18 is set out in the VoIP document. We stressed that 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'.

8.164 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'. This suggests 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 put forward certain proposals by us to, in fact, narrow the scope of that definition for the purposes of GC18 that were adopted by us in our recent statement of 29 March 2007, but we did not consider it necessary to further deal with them here as they are irrelevant to these disputes.)

8.165 Therefore, as a matter of domestic law as well as Community law, the position was, 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, we said 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"***;
- (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. We said it followed that, as the CAT 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.

8.166 The Number then (at paragraph 7.68 of its response) stated:

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.

8.167 It would appear that The Number was relying on the reference to 'non-geographic services' in the definition of PATS for the purposes of GC19 to argue for us to adopt such an interpretation. We first referred 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 8.150** above).

- 8.168 Turning to The Number's specific reference to the term 'non-geographic services', we considered 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)

- 8.169 In our view, the phrase "*and in addition may, where relevant, include*" did 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 we pointed out that 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 considered that The Number's reference to the inclusion of non-geographic services in the PATS definition is not a matter that would assist our construction in this regard.
- 8.170 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 us from *choosing* to adopt a different interpretation, as The Number argued. We clarified that we were here concerned with whether the principle of consistent interpretation requires us to construe domestic UK law so far as possible to make it compliant with Community law. As we considered that domestic law is compliant with Community law, that principle is not of any application in this regard.
- 8.171 The Number next turned to an argument that it bases on the 38<sup>th</sup> recital to the USD's preamble. It stated (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.

8.172 First, as the reference to the "conjunction of originating and receiving calls in the General Conditions definition of PATS", we noted from the PATS definition cited above from the USD that it contains the same conjunctive word "and". We referred 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 further emphasised that taking The Number's interpretation to capture numbers either originating or receiving calls, or both types, is not one without potential wider implications. We noted that it could have, for instance, regulatory consequences in other areas, such as those services covered by the VoIP document. Given the "and" conjunction, the basis of The Number's support for its argument that the "draftsman intended (and succeeded)" to achieve a result along the lines of its alleged interpretation was not clear, other than The Number's reference to the 38<sup>th</sup> recital to the USD's preamble.

8.173 Turning to that recital:

(38) Access by end-users to all numbering resources in the Community is a vital precondition 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.

8.174 When that recital is read in full in context, we considered it plain that it seeks to address the provision in Article 28 of the USD:

*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.

8.175 We noted that 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.

8.176 In light of the above, we considered that the 38<sup>th</sup> recital (read with Article 28 of the USD), did not affect the construction of the definitions 'Directory Information' and PATS. We did not think that The Number's reference to GC8 was of relevance.

- 8.177 Furthermore, The Number made (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.

- 8.178 As regards our acknowledgement (from paragraph 7.180 of the August 2006 document) that The Number cited above in its response, we noted that its citation was incomplete. Ofcom therefore considered that the final two sentences of that paragraph should be noted to put our acknowledgement in its proper context:

...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**.

- 8.179 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 11** of this document), this was not a matter which assisted in the construction of domestic UK law. We therefore did not accept that, in adopting what we consider as being the correct construction of the relevant legal provisions, we would be failing to discharge our statutory duties.
- 8.180 In response to The Number's "pro-user argument", we again referred to our reading of the ECJ's judgment in *KPN* (see, in particular, **Section 4**).<sup>104</sup> In our view, therefore, there was no support for the view that, as a matter of Community law, we would be required to construe domestic UK law in light of a "pro-user argument". As regards any effects on the competition in the DQ services in light of our statutory duties, we referred The Number to our response as now set out in **Section 7** of this document (see **paragraphs 7.45 to 7.50**). As to The Number's assertion that the exclusion of these numbers would be detrimental to "competition in telecoms services generally", we did not agree with this general assertion, we noted that The Number had not provided any evidence to support it.

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<sup>104</sup> Specifically, we noted 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'.

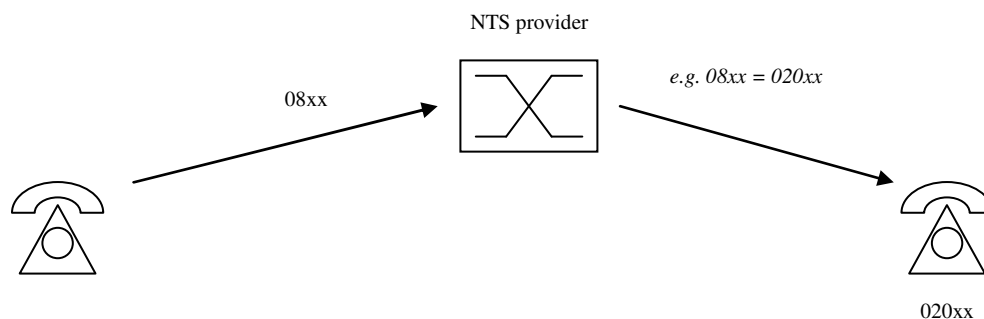
- 8.181 The Number then sought to call into question whether or not “some” 0845 numbers are, in fact, one-way services. It stated (at paragraphs 7.74-7.75 of its response):

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.

- 8.182 In responding to this specific point, it was not clear to us from The Number's response on what basis it was alleging that “some 0845 numbers are, in fact, two-way”. To address this issue, we considered it appropriate to provide first a brief and general description of our understanding as to how number translation services (“NTS”)<sup>105</sup> 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”, as set out below.
- 8.183 We noted that 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 8.1: inbound routing of an NTS call to a geographic number**



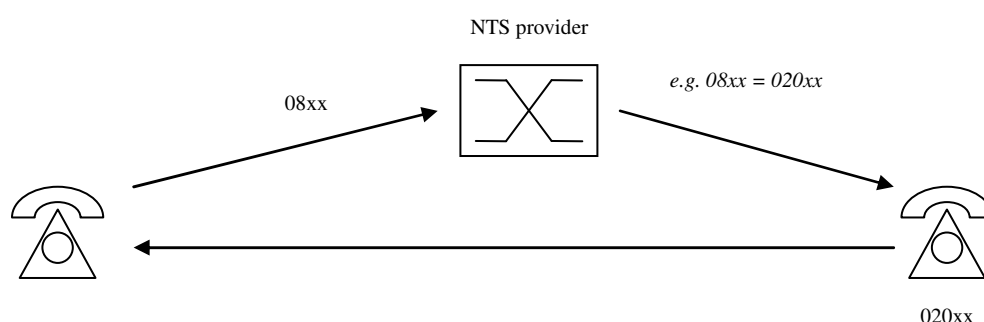
- 8.184 As such, the service enables a customer to use a single contact number, the routing of which can be managed by the customer and could correspond to a group of geographic numbers. We explained that, in our understanding, NTS providers typically offer the facility to alter the routing according 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.

<sup>105</sup> For a more detailed description about NTS, we referred to other documents published by Ofcom dealing specifically with NTS, 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)

8.185 Commercially, we said that we further understood 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, however, have to be with the same service provider (“SP”).

8.186 We noted that, 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 8.2: outbound routing of calls from a geographic number linked with an NTS number**



8.187 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.

8.188 In light of this, we turned 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”.

8.189 We pointed out that, 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.

8.190 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>106</sup>) and it does not involve any contractual relationship with the NTS provider.

- 8.191 Finally, The Number was relying here on the requirements of data protection legislation to argue that our interpretation would be incompatible with them. It argued (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.

- 8.192 We said that it appeared to us that The Number was here repeating its “overriding consideration” point that we had already considered and responded to: see now in **Section 7** of this document (particularly at **paragraphs 7.51 to 7.62**). Therefore, in light of our views that GC19 does not apply to ‘Telephone Numbers’ not assigned for PATS, we considered that our response in **Section 7** answered this point also with regard to excluded numbers and data protection legislation.
- 8.193 As regards BT’s point about the possibility of our finding causing some confusion particularly with reference to our recent proposals for extended number portability, Ofcom assumed that BT was referring to our proposals to amend the PATS definition for the purposes of GC18, as set out in the VoIP document. It was not clear to us why BT considered that any confusion would arise for the purposes of GC19. In any event, we noted that BT agreed with our construction of GC19 in this regard. However, we invited BT to make further submissions about this matter as part of the policy review discussed in **Section 11** of this document.

### **Responses to the February 2007 document on relevant telephone numbers**

- 8.194 In its response to the February 2007 document, The Number continues to argue that the definition of ‘Telephone Number’ is capable of encompassing any other information typical users require from a telephone directory in order to identify the person whose number they are trying to obtain as the phrase “data of any description” would otherwise add nothing to the meaning (and The Number therefore disagrees with our view at paragraphs 9.77 to 9.84 of the February 2007 document and it emphasises that even BT agrees that the name of a BT exchange is included on this basis).
- 8.195 The Number further draws our attention to the recent decision of ARCEP, the French telecommunications regulator, in which it stated that 118 providers were entitled to receive lists of subscribers “and users” of telephone numbers (“listes d’abonnés et d’utilisateurs des numéros”) for the purpose of providing DQ services.

### **Conclusion**

- 8.196 We maintain, for the reasons given in both consultations as out above, our position on the meaning of the ‘Telephone Number’ assigned for its use of PATS.
- 8.197 We conclude that the definition of ‘Telephone Number’ does not encompass any information typical users require from a telephone directory in order to identify the person whose number they are trying to obtain. In contrast to The Number’s

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<sup>106</sup> [http://www.btbroadbandoffice.com/linesandcalls/presentation\\_number](http://www.btbroadbandoffice.com/linesandcalls/presentation_number)



argument (which in our understanding suggests, for example, that an actual user *name* such as Joe Bloggs and his *address* would fall within that definition), we consider that such information would not be data used as an identifier to enable the transmission of a communication over a network, for instance by switching and routing signals to make connections between network termination points. A telephone number itself does not contain any network routing information. It is only when the telephone number is read in conjunction with network routing tables that the route from caller to recipient can be identified.

- 8.198 We disagree with The Number's assertion that the phrase "data of any description" would add nothing to the meaning unless it is construed as The Number suggests. This is because this phrase removes any doubts that, for example, Reseller Identification ("RID") codes<sup>107</sup>, which comprise three (alphabetical) letters, fall within the meaning of "any number" even though they contain no numerals. As such, these codes appear in the list of 'Telephone Numbers' available for use, as set out in the Annex to GC17.
- 8.199 We do not agree that the recent decision of the French telecoms regulator changes our conclusions. As we explained at paragraphs 7.291 to 7.301 of the August 2006 document in response to The Number's submissions on other comparative reviews, our analysis and views on the scope of GC19 are based on the law and interpretation methods under domestic UK law, taking into account the facts in the present disputes. In contrast, it is likely that the national laws in other Member States (such as France<sup>108</sup>) contain material differences and may be based on specific national circumstances, together with any similar decisions by national regulatory authorities being based on facts in the specific cases before them.

## Relevant Data Protection Legislation

### Ofcom's provisional findings in the August 2006 document

- 8.200 At paragraphs 7.140 to 7.148 of the August 2006 document, we considered that there was a further category of information that may fall within GC19 on the basis

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<sup>107</sup> RID codes are used on the BT Gateway to identify who is using WLR, CPS and LLU services. As explained in Ofcom's recent consultation, *Availability of Numbering Resource* (see <http://www.ofcom.org.uk/consult/condocs/numresource/>), Ofcom considers RIDs to fall within the definition of 'Telephone Number' under paragraph 1 of Part 1 of the Schedule to the GC notification.

<sup>108</sup> Indeed, in our understanding, the domestic legislative provision subject the French regulator's decision makes express reference to "users" in addition to "subscribers" as it provides (as translated): "Art. R. 10-7. - Subject to the provisions of [paragraphs] 1, 2, 3 and 5 of Article R. 10, any universal directory in printed or electronic form and any universal service of information [should] give access to the names and first names, the corporate names or company names, the addresses and the telephone numbers of all the subscribers to the telephone service with the public **and of the users** who expressed their agreement. They [should] also give access to mention of the profession of the people who wished it under the conditions envisaged in the fourth subparagraph of Article R. 10-3. Any electronic universal directory gives, moreover, access to the electronic addresses appearing in the lists of subscribers and users.

*Any universal directory reveals the oppositions which the subscribers and the users expressed pursuant to [paragraph] 4 of Article R. 10.*

*Any universal directory comprises easily accessible information for any user relative:*

- with the whole of the rights envisaged to Article R. 10;
- with the right for each person to obtain communication of their personal data and to ask its correction, update or destruction." (Emphasis added)

that, pursuant to GC19.4, GC19 applies subject to the requirements of 'Relevant Data Protection Legislation'.<sup>109</sup> The background to this is set out again below.

- 8.201 As noted in **Section 4** of this explanatory statement, 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.
- 8.202 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;

- 8.203 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>110</sup>
- 8.204 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:

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<sup>109</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 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 4** of this explanatory statement.

<sup>110</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".

- (i) a right free of charge not to have personal data included in a directory unless they have been informed by the collector of the personal data of the purposes for the data inclusion as well as an opportunity to determine whether it should be so included (regulation 18(2));
- (ii) a right not to be searched in reverse (i.e. their names and/or addresses are generated from a telephone or fax number) unless they have given their prior informed express consent (regulation 18(3)); and
- (iii) the right, without charge, to verify, correct or withdraw data of them included in a directory at any time (regulation 18(5)).

8.205 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).

8.206 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>111</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.

8.207 Therefore, as set out below, we considered in the August 2006 document 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 referred 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.

8.208 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.

8.209 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.

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<sup>111</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."

8.210 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.

8.211 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 8.1** 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 8.1: 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

8.212 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.

8.213 We said that, in our understanding, 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 our 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.

- 8.214 We noted 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, we considered that, if the information is not provided under GC19 (so far as it falls under its scope), that purpose could not be achieved and the processing of the data could be in breach of the protection offered under the legislation.
- 8.215 '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.
- 8.216 In our 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.
- 8.217 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.
- 8.218 Given the above, we considered 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 on specific data protection issues**

- 8.219 We responded to The Number's submissions on the alleged failure by us to comply with data protection legislation in arriving at our proposed findings on the scope of data to be supplied under GC19, by referring The Number to our analysis as now set out in **Section 7**. We then dealt with these submissions more specifically as set out below.
- 8.220 In its response to the August 2006 document, The Number argued 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 asserted that the relevant CP would be breaching the terms on which the consent to process that data was given.
- 8.221 The Number then cited the following aspects of the August 2006 document:

- (i) Our 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) Our 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.
- 8.222 The Number then questioned why we did 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.
- 8.223 The Number further argued 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.
- 8.224 The Number then stated 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.
- 8.225 Going forward, The Number suggested 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. The Number said that, 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.
- 8.226 The Number acknowledged corporate subscribers do not have the same specific rights as individuals under the Regulations, 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 argued 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, then the 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.
- 8.227 The Number also argued 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 was 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.
- 8.228 The Number went 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 argued 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.

- 8.229 The Number also mentioned that it has spoken to a senior official at ICO. The Number stated 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 had 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.
- 8.230 The Number therefore believed 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 stated 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 us in order to interpret GC19 in line with the USD.
- 8.231 In its response to the August 2006 document, BT stated that it agreed with our view that a PO Box does not constitute an address for the purposes of GC 19 data. However, BT noted that PO Box addresses are often used to protect the Subscriber and BT then drew our attention to the same women's refuge example as that given by The Number in its response. BT pointed 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

- 8.232 We said in the February 2007 document that, in addition to our response in 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 now, in particular, **Section 6** and **paragraphs 8.245 to 8.264** below), we maintained the view that the former is a sub-set of the latter.
- 8.233 We then turned 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. We agreed 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, we considered that no issue arose 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.

- 8.234 Rather, we said that 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, we said that 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.
- 8.235 Assessing BT's GC19 obligations historically is made more complex because 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 was 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.
- 8.236 However, in our view, data protection requirements could not 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 would be 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.
- 8.237 We did 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. We accepted 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.
- 8.238 Going forward, we considered 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 referred 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.
- 8.239 However, on an historical analysis of BT's requirements in this regard, we remained 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.



- 8.240 Finally, we noted 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, acknowledged that the absence of such data from GC19 in the example given by them may raise certain policy concerns. Indeed, Ofcom considered that this is a particular issue that respondents may wish to address in response to our policy review discussed in **Section 11** of this document. In spite of our acknowledgement in this regard, we pointed out that we were 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.
- 8.241 To that end, we referred to our analysis above (see **paragraphs 8.102 to 8.199**) as to our view on the meaning of the "address of the Subscriber" for the purposes of GC19. Although our revised view was that there was no benefit in being overly restrictive on what constitutes a legitimate address, we stated that the relevant address would be the address as supplied by subscribers in relation to where they want the relevant fixed PATS supplied.
- 8.242 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, we considered that it fell 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 did not, in any event, anticipate that this was 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.

## Conclusion

- 8.243 We did not receive any new responses to the February 2007 document specifically with regard to these issues concerning relevant data protection requirements.
- 8.244 We therefore conclude to maintain our views in both consultations (as set out in **paragraphs 8.200 to 8.242** above).

## The basis and terms upon which 'Directory Information' must be provided

### Ofcom's provisional findings in the August 2006 document

- 8.245 In the August 2006 document, we noted that 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*.)
- 8.246 This sub-section deals with the issue of agreed format only; the requirement as to cost oriented charges is considered in **Section 9** of this document.

8.247 We considered in the August 2006 document (see, in particular, paragraphs 7.161 to 7.166) 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?

8.248 We stated that, in relation to the medium, 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'.

8.249 In contrast, we explained that, in our 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. Parties to an OSIS licence 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. In the spreadsheet example, this may 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.

8.250 We 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 our 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.

8.251 In this regard, we stated that we 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, we 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 on 'agreed format'**

8.252 In its response to the August 2006 document, The Number referred (in support of points it is making other than in the context of 'agreed format') to our 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.”*

- 8.253 When responding to the ‘agreed format’ point, The Number then argued that we 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 rejected our 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 concluded that OSIS itself is therefore a ‘format’, whereas the CD-ROM and FTP file transfers are just the method of delivery.
- 8.254 After citing passages of Oftel’s 1998 Interim Statement (as set out in Annex 8 to the August 2006 document), The Number went on to set out its understanding that the OSIS database was designed to allow ‘Phonebook’ printing. As such, it said that all the fields within OSIS were related to that activity, which included the need for caption sets/grouping. The Number then argued 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.
- 8.255 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).
- 8.256 The Number then asserted that, as we had accepted 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**

- 8.257 We pointed out in the February 2007 document that The Number’s argument was 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 disputed), then all of 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.
- 8.258 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 referred to our views as set out earlier in **this Section** that we considered 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 considered that The Number’s argument was incorrect.
- 8.259 We disagreed with The Number that OSIS itself could be properly said to be a ‘format’, 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 referred) could not be properly said to mean the *data itself*. Rather, we considered that one must first construe what data falls within the scope of GC19 and, in light of that analysis, then

turn to the issue of format. In our view, 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.

- 8.260 A complexity in looking at this historically is that BT has only provided the OSIS product and not a separate GC19 product. It appeared to us that The Number neither requested, nor wanted, solely a stand-alone GC19 product. Rather, it appeared that The Number required and used all the data fields and individual records provided by OSIS. As such, we did not think that it was plausible to claim that the entirety of OSIS comprises the agreed format for the purposes of GC19.1.
- 8.261 Therefore, we considered 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 accepted 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.
- 8.262 Again, to be clear, moving forwards, we noted that BT would be meeting its obligations under GC19 by providing just the 'Directory Information', as defined, in a manner and form which would be acceptable to requesting parties. If we were asked to resolve any dispute over such a format, we 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, we 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.

### **Responses to the February 2007 document on 'agreed format'**

- 8.263 In relation to the 'agreed format' in which directory information must be supplied, The Number maintains the view that 'format' here refers to the entire data structure, i.e. the 43 data fields in OSIS, and not to the method of delivery, i.e. CD-rom or FTP file transfer. It argues that this view is supported by Oftel's 1998 Interim Statement in which Oftel discusses the "Categories and format of information to be supplied", meaning the "*common interface and data structure for the supply of directory information to core databases in the context of the RVTD*".

### **Conclusion**

- 8.264 Having considered the submissions received, we have not changed our views. We therefore maintain the position and views as set out in both consultations with regard to 'agreed format' (see **paragraphs 8.245 to 8.262**).

### **Ofcom's conclusions on GC19 as applied to BT's supply of OSIS**

- 8.265 We have set out above our views as to information to be made available under GC19 as a matter of statutory interpretation under purely domestic law. We now apply them to the facts of this case.

8.266 We 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. The follow paragraphs summarise our conclusions so far as to the data this comprises.

8.267 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 our 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**").

8.268 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, we would expect that an address would normally comprise the house/building name or number, street name and full UK postcode.

8.269 Thirdly, 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 GC17 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).

8.270 Fourthly, BT must make available certain information falling 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 8.207 to 8.218** above.

8.271 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 A4.2** in **Annex 4** to 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.

8.272 On the other hand, we set out in **Table 8.2** 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 8.2: Data fields within OSIS which could be covered by GC19<sup>112</sup>**

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	

8.273 In other words, unless the data contained in the OSIS fields set out in **Table 8.2** above is excluded for reasons discussed above in relation to each and every individual record, we conclude 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.

8.274 We have not sought 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.

8.275 In any event, our 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 9** 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.

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<sup>112</sup> **Table 8.2** sets out the OSIS data fields that, in principle, may contain GC19 data. As discussed at **paragraphs 8.250 and 8.251**, we recognise that data other than that contained in these fields will need to be provided to facilitate processing.

## Section 9

# GC19 – Cost orientation and charges

## Introduction

- 9.1 GC19.3 requires that BT supply 'Directory Information' in accordance with paragraphs 19.1 or 19.2 on "*terms which are fair, cost-oriented and non-discriminatory...between the Communications Provider and the person requesting the information*". **Section 6** sets out our conclusion 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.
- 9.2 **Section 8** sets out our views as to what data falls within the scope of GC19 and, for the purposes of analysing cost oriented charges in **this Section**, it suffices to note that we have concluded 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.
- 9.3 In referring these disputes, both The Number and Conduit have argued that BT's charges for the full OSIS data are inappropriate, given the terms of GC19 as well as the similar terms of USC7. **Section 5** sets out our conclusion that USC7 is unlawful 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.
- 9.4 Specifically, **this Section** is structured as follows:
- (i) **paragraphs 9.5 to 9.17** 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 9.18 to 9.19** summarise The Number's response on our provisional reasoning in the August 2006 document for not fixing a charge;
  - (iii) **paragraphs 9.20 to 9.53** set out our reasons for accepting The Number's argument that we should fix a charge for the BT GC19 data set only (i.e. that set of data which BT was obliged to provide under GC19), including our response to comments received on this changed position as set out in the February 2007 document;
  - (iv) **paragraphs 9.54 to 9.58** set out our views on two specific points raised by Thomson and Yell to the August 2006 document concerning usage based charging and transfer of additional costs to DIPs in respect of data other than the BT GC19 data;
  - (v) **paragraphs 9.59 to 9.200** set out our approach to identifying which cost items may be included in charges for GC19 data (in line with the requirements of GC19 and in light of the *KPN* judgment), addressing the points raised by the parties in relation to the cost assessment and



charges proposed in the February 2007 document and finalising the costs of GC19 data;

- (vi) **paragraphs 9.201 to 9.253** set out our assessment of the level of the cost items that may be recovered through GC19 charges and the charges that should apply for GC19 data;
- (vii) **paragraphs 9.254 to 9.258** set out our conclusions on charges which should apply moving forward; and
- (viii) **paragraphs 9.259 to 9.284** set out our 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 allegations of BT's 'double recovery' of certain costs.

### Ofcom's provisional findings in the August 2006 document

9.5 Our 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.

9.6 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 certain data fields in OSIS<sup>113</sup>), we presented in the August 2006 document **the overall OSIS product as comprising four separate notional products** (i.e. categories of information), namely:

- (i) 'Directory Information' of subscribers assigned PATS telephone numbers allocated to BT (the "**BT GC19 data set**"<sup>114</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**").

9.7 In our view, GC19 only required BT to provide notional product (i) – the BT GC19 data set.

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<sup>113</sup> Ofcom has set out in **paragraph 8.272** the data fields within OSIS which are, in principle, covered by BT's GC19 obligations.

<sup>114</sup> The term the 'BT GC19 data set' is used throughout **this Section** according to our conclusions on the scope of data that BT must make available under GC19, as set out in **Section 8** of this explanatory statement.

- 9.8 However, as already noted in **Section 6**, 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).
- 9.9 Against that background, we then considered in the August 2006 document whether BT's charges for OSIS were consistent with its obligations under GC19 to provide the BT GC19 data set on (amongst others) cost-oriented terms.
- 9.10 In assessing that issue, we did not determine the charges BT applied in respect of the provision of the notional data sets that are not regulated by GC19 (i.e. the “**non-BT GC19 data set**” also referred to as “**other directory information products**”, that is to say, the BT additional data set, the OCP GC19 data set and the OCP additional data set as identified in points (ii)-(iv) in **paragraph 9.6**). This was because, given our provisional (now confirmed) finding that USC7 is unlawful, there would be no specific *ex ante* regulatory obligation on BT to provide those products on cost oriented terms. Therefore, we considered that we neither could, nor should, determine the charges for these products in resolving these disputes, which have been referred to Ofcom under section 185(2)<sup>115</sup> of the 2003 Act.
- 9.11 Thus, in order to deal with the issue of whether BT's charges for OSIS were consistent with its GC19 obligations, we 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.
- 9.12 From submissions received and information gathered during the investigation from The Number and Conduit, we 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 6.90** where we refer to Conduit's confirmation to us that Conduit nonetheless needed and, in effect, simultaneously requested the additional data it currently receives from OSIS).
- 9.13 Accordingly, we provisionally concluded that there was no basis for stating that The Number and Conduit should have only paid an amount for OSIS equal to 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.

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<sup>115</sup> As to the legal basis of Ofcom's jurisdiction to handle these disputes, see explanation at, for instance, **paragraph 2.49** of this explanatory statement.

- 9.14 The only price actually charged by BT was for the bundle of the 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) (see **paragraph 9.6**) – 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>116</sup> In such 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.
- 9.15 This led us 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.
- 9.16 However, 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. This was 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.
- 9.17 Our view was that, in future, 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.

### **The Number's response on Ofcom's provisional view not to fix a charge**

- 9.18 In its response to the August 2006 document, The Number<sup>117</sup> argued that we had failed to discharge our statutory duty under section 188(2) of the 2003 Act to properly

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<sup>116</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.)

<sup>117</sup> For the purposes of referring **in this Section** to their submissions, we refer to The Number and Conduit collectively as "The Number", except where the context otherwise requires.

resolve the dispute by not determining a charge for the BT GC19 data set. In doing so, The Number noted that:

- (i) we 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 view, correct for the reasons set out in **Section 6** of this explanatory statement);
- (ii) The Number has submitted that these disputes relate to BT's charges and requested that we 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) we 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;
- (iv) we 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) our duty under section 188(2) of the 2003 Act is to consider these disputes and make a determination for resolving them;
- (vi) our "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 us from actually resolving the dispute; and
- (viii) by our own admission, in setting the scope of the issues in dispute to be resolved, such resolution would require (in accordance with section 190(2)(b) of the 2003 Act) that we should exercise our power to determine what BT's charges should be going forward (as well as retrospectively).

9.19 Specifically, on the substance of our reasoning for not fixing a charge, The Number responded to Ofcom's provisional view in the August 2006 document by taking issue with Ofcom's reasoning, in summary, as follows:

- (i) *Ofcom's reason that 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 argued that such a finding – even if correct – does not discharge us from our obligation to fix a charge to resolve these disputes.
- (ii) *Ofcom's reason that 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 questioned whether this view was supported by the facts and whether it was consistent with our provisional views that The Number and Conduit have effectively requested a sub-set of OSIS data that falls within the terms of GC19.

- (iii) *Ofcom's reason that 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 argued that such a finding – even if correct – does not discharge us from our obligation to fix a charge to resolve these disputes; it claims that we should identify a price paid for the BT GC19 data within OSIS and The Number proposed a methodology for this purpose.
- (iv) *Ofcom's reason that, 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 argued that this should not be a reason for failing to fix a charge; rather, we should apply the principles identified to fix the charge assuming the supply of the BT GC19 data set through OSIS by CD-ROM followed by FTP file transfer updates 6 days per week.

### **Ofcom's response to The Number's argument about Ofcom not fixing a charge**

- 9.20 We considered The Number's response to the August 2006 document, and agreed that we should fix a charge for the BT GC19 data set only (i.e. that set of data which BT was obliged to provide under GC19).
- 9.21 As a result, Ofcom issued the February 2007 document, which addressed the points made by The Number. Further arguments were raised on these points by the parties in their responses to the February 2007 document. Our reasons for our conclusion that a charge should be fixed for such data, including our views on these responses, are set out below.

### **The Number: The disputes would be unresolved unless a charge is fixed**

- 9.22 In the February 2007 document, we accepted The Number's main argument that we should fix a charge for the BT GC19-only data set to be applied since 25 July 2003 in order to properly resolve these particular disputes. Ofcom considered that 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 conclusions in this explanatory statement. As a result, we concluded that there was no need to comment on each detailed argument related to this issue made by The Number in its response to the August 2006 document. We have, however, commented on certain matters to clarify our position, which are summarised below.
- 9.23 In their responses to the February 2007 document, The Number and Thomson welcome our provisional view to determine a charge for the BT GC19 data set, with The Number arguing that we would neither have resolved the disputes nor discharged our statutory duty had we not set such charges.
- 9.24 In its response to the February 2007 document, BT urges us not to determine a specific GC19 charge, but rather suggests that we could instead comment on the likely range of the more limited range of costs as an appropriate benchmark for recovery, noting that the precise recovery of costs will be further affected by the number of DIPs who choose to take GC19 and any common costs. Its three specific reasons for arguing that we should not determine a charge are:

- (i) BT considers that it is not pertinent to resolving the disputes because:

- as regards the retrospective charge, we are not proposing to determine that retrospective adjustments are due to The Number or Conduit;
- as regards the prospective charge, it is (a) “highly dubious” in terms of its ability to enable BT to recover its costs for the reasons set out in BT’s confidential annex to its response (which are discussed in more detail in **paragraphs 9.83 to 9.200** below)<sup>118</sup>; (b) entirely provisional and based on a number of assumptions; (c) entirely premature based on the mere speculation that the parties may be in dispute about this prospective charge moving forward, which may be subject to an entirely new dispute/complaint; and (d) by advocating a flat fee system of charging for GC19, we have raised other substantive issues which BT and industry will need to address, including the viability of continuing with usage based pricing for OSIS information;

- (ii) BT strongly disputes the costs which we have identified which relate to BT’s own subscribers and the subscribers of WLR operators;
- (iii) BT claims that there are (potentially) substantial costs which neither BT nor we have been able to assess which are legitimately recoverable under GC19, specifically those costs that will be incurred by BT in order to obtain the directory information from other CPs of those subscribers assigned the use of telephone numbers originally allocated to BT.

9.25 BT reiterated these views in its comments on The Number’s response to the February 2007 document. BT added that the setting of a prospective charge was only relevant to the extent that one of the parties has requested GC19 data as a separate product and BT’s position is that there is no evidence that this is the case. In this regard, BT suggests that parties cannot be in dispute about the price of something that has not been requested and that it would therefore be premature and unnecessary for us to set charges going forward, particularly due to the uncertainty about charges that will be levied by other CPs for GC19.2 data.

9.26 In our view, the need to determine a particular level of charges follows on from our decision as to the issues to be resolved in the dispute. Our decision as to the scope<sup>119</sup> of the dispute was that it included, so far as is relevant:

- (1) Whether BT’s charges to [The Number/Conduit] for supplying directory information ... are consistent with BT’s obligations under ... GC19; and
- (2) Subject to Ofcom’s determination in respect of the issues in (1) above: -  
  - ...
  - (b) What BT’s charges should have been for the period between 25th July 2003 and the date of Ofcom’s final determination in relation to this dispute ...

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<sup>118</sup> Essentially, BT argues that Ofcom has failed to take into consideration all the incremental activities of providing GC19 data and that the charge proposed in the February 2007 document therefore fails to allow BT to recover its costs. Discussion of the additional activities identified by BT, such as data control and data verification, takes place at **paragraphs 9.83 to 9.200**.

<sup>119</sup> See the scope as more fully set out at **paragraphs 2.80 and 2.81** of this explanatory statement.

- 9.27 Part (1) of the scope therefore involves a consideration of whether BT's charges for supplying directory information were consistent with its obligations under (*inter alia*) GC19. Part (2)(b) of the scope requires us to determine what BT's charges should have been between 25th July 2003 and the date of this determination; that involves more than simply commenting on the likely range of the relevant cost elements, but requires a statement of what the charges should have been. Similarly, part (2)(a) of the scope requires us to determine what "*BT's charges should be moving forward*".
- 9.28 Further, we disagree with BT that the parties have not requested GC19 data. In this regard, we refer to our conclusion in **Section 6**. The fact that GC19 data is provided as part of a bundle with other directory information does not detract from the fact that BT must set its OSIS charges on the basis that the implicit charges for the GC19 data element of the bundle must be provided on the basis of the charges set by us, albeit that BT can set what implicit charges it likes for the remainder of the bundle (subject to any other relevant obligations – for example, competition law).
- 9.29 As to the point that there is to be no retrospective adjustment, we can find nothing in our dispute resolution powers that allows us to refuse to determine a dispute on the basis that no retrospective adjustment will be made once the charge is determined. It does not seem helpful for us to speculate on the extent to which determination of the charge may or may not be of commercial or other benefit to the parties seeking resolution of the dispute.
- 9.30 In relation to the "prospective charge", other than the point addressed in **paragraph 9.29**, BT's objections are essentially that it disagrees with the way in which that charge has been calculated by us, especially given the uncertainties about the cost levels of a stand-alone GC19 product, objections which are dealt with at **paragraphs 9.83 to 9.200** below. We do not accept that it is premature to resolve a dispute as to the level of charges by specifying future as well as past charge levels; the contrary position would lead to uncertainty in the industry and the likelihood of further pricing disputes.
- 9.31 As to BT's other submissions on the point, they are essentially criticisms of the conclusions reached by us on the level of charges, and are dealt with below. Our fundamental position is that we have a duty to resolve the dispute referred to us, even if assessment of the correct level of charges is difficult.
- 9.32 We set out below (**paragraphs 9.59 to 9.253**) our approach to fixing the charges for GC19 data, including our conclusions as to the fixed amounts.

### **The Number: The actual data requested from BT by the parties**

- 9.33 As seen from **paragraph 9.19** above, The Number challenges the suggestion by us 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 we draw from this.
- 9.34 The Number makes several points:
- (i) The inconsistency of this position with our 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.

- 9.35 The Number concludes (at paragraph 5.29 of its response to the August 2006 document) 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.

- 9.36 As already explained, we changed our view following The Number's response. Although we were persuaded (and have concluded) that we should determine a charge for the BT GC19 data set, it is to be noted, for the avoidance of doubt, that we were not relying on the absence of any specific request for GC19 data on a stand-alone basis to support our position not to fix a charge in the August 2006 document. We think it is significant that the evidence before us suggests that both The Number and Conduit clearly requested and required the full set of data provided from OSIS.
- 9.37 First, as discussed in more detail in **Section 6**, we consider 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 GC19 data and the other three notional products discussed in **paragraph 9.6**. Therefore, there is no contradiction. Our conclusion is that, whilst The Number and Conduit requested the BT GC19 data set, they also wanted and used other data included in OSIS.
- 9.38 This is because the question that we 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 clearly to identify an implicit price paid for the BT GC19 data set to compare to the cost oriented charge for that data set.<sup>120</sup>

- 9.39 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 us 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 valued this additional data in some way. But, on the evidence before us, there is nothing to suggest that this is the case in the present disputes.
- 9.40 In fact, neither The Number nor Conduit has disputed here that they did require and use the additional (non-BT GC19) data set within OSIS which – according to our views – falls outside the scope of BT's obligations under GC19. For the avoidance of doubt, despite Conduit's query about the terms on which BT might supply its own subscriber data, we refer again to Conduit's confirmation to us (see **paragraph 6.90**) 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 us in these disputes.
- 9.41 We therefore do not consider the historical context in which directory data has been provided by BT (to which The Number refers) alters our conclusions.

### **The Number: Unbundling the price paid for GC19 data within OSIS**

- 9.42 As noted above, in its response to the August 2006 document, The Number submitted that we 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 us from disaggregating the charges in order to satisfy itself that that the regulated product has been charged at a 'cost-oriented' price. Furthermore, The Number argues that, in the process, we should also be satisfied that the unregulated product has been charged at a price which is not excessive and anti-competitive.
- 9.43 In the context of making those submissions, The Number proposed 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 us in **paragraph 9.6** 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.

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<sup>120</sup> Ofcom's more detailed reasoning on this point can be found in its assessment of The Number's allegations of double recovery – see **paragraphs 9.259 to 9.284**.

- Step 3:** Should the minimum derived charge calculated under Step 2 exceed the cost oriented charge calculated by us, then, according to The Number, this would identify the minimum amount of any overpayment for the BT GC19 data set.
- 9.44 It is clear from Step 1 above that The Number's proposed methodology is contingent on us 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 we 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.
- 9.45 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.
- 9.46 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 us; and
  - (ii) the price ceiling under competition law for the non-BT GC19 data set within OSIS as calculated by us.
- 9.47 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. 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.
- 9.48 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.
- 9.49 Both The Number's premise in its proposed methodology and the alternative described above 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 us that one premise is more valid than the other, or indeed that either premise is valid. Indeed, both of these approaches seem somewhat arbitrary.
- 9.50 Our 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. In its response to the February 2007 document, The Number put forward a further argument that BT had 'double recovered' certain costs. We have considered this argument at **paragraphs 9.275 to 9.284** below and have rejected The Number's arguments. 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 us in resolving the present disputes.

- 9.51 We have also 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. Our views on this are set out at **paragraphs 9.259 to 9.274** 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**

- 9.52 The Number views the current OSIS charging methodology as being 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.
- 9.53 Our views below on charging deal with these specific points.

### **Other responses to the August 2006 document**

#### **Responses**

- 9.54 In its response to the August 2006 document, 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 our provisional views on the application of the principles established in *KPN* to the BT GC19 data set, Thomson also requested that we clarify that these principles would preclude recovery on a usage-basis.
- 9.55 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 to the extent that:
- (i) 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) 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.
- 9.56 Yell made a similar set of comments in its response to the August 2006 document.

#### **Ofcom's views**

- 9.57 Firstly, our views on an appropriate charging mechanism (including the appropriateness of usage based charging) for recovering costs for the BT GC19 data set are set out in **paragraphs 9.241 to 9.253** below.

- 9.58 Secondly, as regards any transfer of additional costs to DIPs in respect of data other than the BT GC19 data, we consider that we cannot, as part of resolving these disputes, determine an appropriate cost recovery mechanism for any data provided by BT outside of the scope of GC19, particularly in light of our conclusion in **Section 5** that USC7 is unlawful.

## Ofcom's approach to fixing the charge for the BT GC19 data set

### Introduction

- 9.59 We set out below our approach to fixing the appropriate charge for the BT GC19 data since 25 July 2003. Specifically, the structure of our analysis is as follows:
- (i) **paragraphs 9.60 to 9.66** set out our views as to how the 'cost orientation' requirement is to be properly interpreted in light of the *KPN* judgment;
  - (ii) **paragraphs 9.67 to 9.76** set out our methodology for assessing costs incurred within BT to identify the costs for supplying the BT GC19 data set;
  - (iii) **paragraphs 9.77 to 9.82** set out details of the cost information provided by BT in relation to its historic provision of OSIS to requesting DIPs;
  - (iv) **paragraphs 9.83 to 9.200** assess which of the above-mentioned costs should be included within the costs for supplying the BT GC19 data set;
  - (v) **paragraphs 9.201 to 9.240** assess the level of the costs which are included in the costs of BT's GC19 data; and
  - (vi) **paragraphs 9.241 to 9.258** set out our conclusions 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

- 9.60 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 and we have not received submissions to the contrary from any party.)
- 9.61 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)).
- 9.62 As seen from the full citation of the judgment in **Annex 6** 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.

9.63 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...

9.64 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.

9.65 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...

9.66 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 assessing costs and setting charges

9.67 In fixing cost-oriented charges, we 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.

9.68 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, since it includes the entirety of the common costs (relevant to the service). However, given the *KPN* judgment and the exclusion of costs common with the voice telephony business, an alternative ceiling (the “**adjusted ceiling**”) can be identified in the circumstances of the BT GC19 data set, *i.e.* including none of the costs common with voice telephony, but the entirety of the costs common with other services.

9.69 In general, when we set a regulated charge on a LRIC+ basis, we typically include a proportion of the relevant common costs but not the entirety of such costs. This is because we usually take the view that it is reasonable for the common costs also to be recovered in part from the other services with which the costs are common. There are sometimes exceptions to this typical approach. One such exception is relevant to

the GC19 charge and has been explained above, i.e. that costs common between the GC19 data set and voice telephony should be recovered in their entirety from voice telephony and none through the GC19 charge. As regards the costs common between the GC19 data set and other directory information products in OSIS, i.e. **cost category d in Figure 9.1** below, if a proportion of these were apportioned to the costs recoverable through the GC19 charge, we would obtain the “**apportioned cost**” of the GC19 data set. Therefore, the difference between the adjusted ceiling and the apportioned cost for the GC19 data set is that the adjusted ceiling includes all of the costs common with other directory information products, whereas the apportioned cost only includes a proportion of these common costs.

- 9.70 For the purpose of this determination we have first calculated the adjusted ceiling costs of BT's GC19 data and then apportioned the relevant common costs to derive the apportioned cost (see **paragraphs 9.237 to 9.240**). The costs have been apportioned on the basis of information provided by BT since February 2007 and enable more reasonable charges for BT's GC19 data to be specified.
- 9.71 **Figure 9.1** below illustrates that the adjusted ceiling is restricted to those costs that are incremental to the provision of BT GC19 data set plus costs common between the provision of the BT GC19 data set and the provision of the other (non-GC19) data within OSIS.<sup>121</sup> In other words, in order to estimate the adjusted ceiling, we must identify the cost generating activities within BT that fall within **cost categories c and d in Figure 9.1** below, as these are the only types of cost which would be recoverable from charges from the BT GC19 data set.
- 9.72 **Figure 9.1** is an updated version of that included in the February 2007 document and provides a fuller description of the relevant cost categories. The equivalent Figure in the February 2007 document set out the five cost categories that Ofcom had identified at the time in relation to the GC19 product. We have now included two additional columns to highlight the other products to which the cost categories identified are common.
- 9.73 We have also identified two further cost categories that we believe should be included in **Figure 9.1**. ‘**Cost f**’, which reflects costs that are common between voice telephony, GC19 and other directory information products has been included as we have identified that some costs are common between the three product types. ‘**Cost g**’ has been included to reflect the possibility that there may be some costs that are common between voice telephony and other directory information products (but not the BT GC19 product).
- 9.74 Neither **cost category f**, nor **cost category g**, may be recovered through GC19 charges as they are common with voice telephony (and in the case of cost g there is no commonality with BT GC19 products). These costs may, however, be recovered through charges for other directory information products.

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<sup>121</sup> By definition, the costs found to be common between the BT GC19 data set and non-BT GC19 data set will be costs which are not incremental to either product.

**Figure 9.1: Illustration of cost standard for calculation of GC19 charge**

	BT voice telephony	BT GC19 – product (i)	Other directory information products – products (ii) to (iv)	
Cost a				Incremental cost of voice telephony <i>Not relevant to GC19 charge</i>
Cost b				Common costs between voice telephony and GC19 <i>Not relevant to GC19 charge</i>
Cost c				Incremental cost of making available GC19 data <i>Relevant to GC19 charge</i>
Cost d				Common costs between GC19 and other directory information products <i>Relevant to GC19 charge</i>
Cost e				Incremental cost of other directory information products <i>Not relevant to GC19 charge</i>
Cost f				Common costs between voice telephony, GC19 and other directory information products <i>Not relevant to GC19 charge</i>
Cost g				Common costs between voice telephony and other directory information products <i>Not relevant to GC19 charge</i>

**Notes:**

Shaded boxes illustrate the service(s) to which the cost category is relevant.  
Size of boxes is not to scale.

- 9.75 In the following paragraphs, we identify the relevant costs, explain how we calculate costs and charges and we assess a cost-oriented charging structure.
- 9.76 The Number commented in its submission on BT's response to the February 2007 document that "Ofcom's method for calculating the charges appears to be consistent with the KPN principle that telephony providers should not be able to 'double recover' from DIPs any costs relating to the collection and compilation of basic subscriber information".<sup>122</sup> Although BT disagrees with our view to set any charges (see **paragraphs 9.24 to 9.25** above) and the exclusion of certain cost items from its assessment of GC19 costs, BT has not disagreed with the methodology that we have used in calculating costs relevant to GC19 data. Therefore, we consider that it is common ground between the parties that the methodology used by us is itself correct and appropriate for the purposes of resolving these disputes. (As regards The Number's specific point about "double recovery" of costs, we refer to our consideration of this matter at **paragraphs 9.275 to 9.284** below.)

**Cost information available to Ofcom**

- 9.77 As part of this investigation, BT has provided detailed cost information relating to its provision of OSIS data since 2003. The starting point for our analysis of these costs,

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<sup>122</sup> The Number further noted in its response to the February 2007 document that the charges proposed in the February 2007 document were broadly in line with those arrived at by other European regulators when applying the KPN judgment in their countries, indicating that they were likely to be at the correct level. Ofcom would emphasise that, while the final charges determined by Ofcom are higher than those proposed in the February 2007 document, it has used the same methodology outlined above to calculate the charges.



in line with the methodology outlined above, is to understand how BT currently provides data from OSIS and the incurred costs it has identified.

- 9.78 BT operates OSIS as an operationally distinct business (“**BT OSIS**”) providing aggregated directory data of both BT subscribers and other CPs. Therefore, BT OSIS’s first step in creating the OSIS product is to collect the required data from BT Retail and from other CPs.
- 9.79 Ofcom 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). In response, BT has clarified that, in addition to providing directory data about its own subscribers, it also provides directory data about the subscribers of CPs reselling BT’s regulated WLR product. Thus, 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.
- 9.80 BT has also clarified that it incurs further costs (on top of the costs of obtaining the core data from upstream CPs) 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. We note already here that these costs are driven by activities associated with checking the data, identifying and fixing problems, liaising with upstream providers and managing the commercial relationship with the downstream purchasers.<sup>123</sup>
- 9.81 Accordingly, we accept that, put broadly, the 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 CPs (based on outpayments made to those CPs); 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).
- 9.82 A summary breakdown of the end-to-end costs that BT has claimed it incurs as a result of providing OSIS is set out in **paragraph 9.206** of this explanatory statement. We have then analysed the costs identified by BT and assessed which of them we consider relevant to GC19.

### **Assessment of costs recoverable from GC19 charges**

- 9.83 Given the methodology set out above, our task here is essentially to assess which of the costs provided by BT fall within the identified **cost categories c and d** in **Figure 9.1** above.
- 9.84 Our provisional view in the February 2007 document was that the costs of acquiring data from other CPs related to the incremental costs of providing the non-BT GC19

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<sup>123</sup> At **paragraphs 9.241 to 9.253**, we set out Ofcom’s views specifically with regard to cost drivers.



data set from OSIS (i.e. **cost category e** in **Figure 9.1** above). Although we maintain the view that the large majority of costs of acquiring data from other CPs are incremental to the provision of the non-BT GC19 data set from OSIS, we accept (for the reasons set out at **paragraphs 9.130 to 9.139** below) certain arguments made by BT in its response to the February 2007 document relevant to this issue. We consider that the costs to BT of acquiring basic directory information relating to ex-BT subscribers, whose numbers were originally allocated to BT, are incremental to the provision of BT GC19 data (i.e. that they fall within **cost category c**) and are therefore relevant for recovery through charges for BT's GC19 data set.

9.85 Since our latest consultation, we have further analysed those incremental (as well as other) costs incurred by BT in its supply of the BT GC19 data set and the activities to which they relate. As a starting point for this analysis, we consider 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 GC19 data set from subscribers of BT's voice telephony service who use numbers originally allocated to BT (i.e. name, address, telephone number, together with a subscriber's preferred directory status<sup>124</sup>);
- (ii) as noted in **paragraph 9.84** above, we now also consider that activities involved in obtaining and managing GC19 data from the current CPs of subscribers using numbers originally allocated to BT are also relevant to the provision of the BT GC19 data set; and
- (iii) activities involved in providing the information in (i) and (ii) above to requesting DIPs as a viable commercial offering.

9.86 However, following *KPN*, this starting point does not imply that the costs of these activities would all be recoverable from a cost-oriented GC19 charge.

9.87 To recap, as set out in **Section 8**, we have concluded that the data covered by GC19 is essentially data which BT compiles in providing its voice telephony service to its subscribers.<sup>125</sup> The data (as defined) reflects that which BT would need in order to actually provide its fixed line voice telephony 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.

9.88 On that basis, in line with *KPN*, we do not consider that the costs of “compilation or allocation” of current BT GC19 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

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<sup>124</sup> It should be noted that activities associated with identifying a subscriber's preferred directory status are not unique to GC19 data, but are also relevant to the non-GC19 data set as the directory status of every subscriber will be obtained regardless of whether they have a directory entry and whether that directory entry contains GC19 and/or non-GC19 data.

<sup>125</sup> This is with the exception of data which is supplied by other CPs to BT under GC19.2, and which would otherwise not be held by BT. Ofcom's consideration of these data is set out in **paragraphs 9.130 to 9.139** below.

provision of the BT GC19 data set – i.e. **cost category b** in **Figure 9.1** above – and would therefore not be recoverable.

- 9.89 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 adjusted 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 (referred to as 'non-BT GC19 data'). However, we 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.
- 9.90 Our provisional view in consultation was 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. However, we now accept that, by consequence of the requirement on BT to collect GC19 data relating to its ex-subscribers (who continue to use numbers originally allocated to BT) from a number of CPs, it requires systems it would not otherwise operate in the absence of the provision of directory information products. This matter is discussed further in **paragraphs 9.153 to 9.160**.
- 9.91 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. Certain costs are common between the non-BT GC19 data set and the GC19 data set.

### **BT's stated costs in obtaining data from subscribers and providing it to OSIS**

- 9.92 BT has provided details on the activities it carries out (and the associated costs) in providing directory data *to OSIS*. BT has stated that these activities relate to particular 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).
- 9.93 In the February 2007 document, we identified that these specific customer facing activities fall broadly into three areas. In light of BT's response to the February 2007 document, we now consider that a fourth category of cost is relevant for consideration in respect of obtaining data from subscribers. The four categories identified by us are:
- 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 for phone lines (or make amendments to or deletions of those orders) 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.
  - 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.<sup>126</sup> 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>127</sup>

- 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.
- The costs associated with the acquisition of data from other CPs, where that data relates to numbers originally allocated to BT but subsequently ported from BT to other CPs. The terms of GC19.1(b) require that, in such instances, it is BT's responsibility to make these data available to DIPs. GC19.3 further requires that this data should be supplied by other CPs to BT on cost-oriented terms, and in turn made available by BT to DIPs also on cost-oriented terms.

9.94 These activities are considered in more detail below, along with our assessment of which cost category these stated costs fall into.

### Customer Service Channel 15X

9.95 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.

9.96 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.

9.97 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.

9.98 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 –

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<sup>126</sup> 'Grouped' entries occur where a subscriber has a number of different telephone numbers and has requested that they be listed together in a directory e.g. a local council may request that the telephone numbers of all its different departments be listed together. The details of the way in which the subscriber wishes the numbers to be displayed, including the headings to be used against each number, are included within fields in OSIS.

<sup>127</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 service provider to process the information. This is discussed further below.

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.

- 9.99 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.
- 9.100 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 subscriber's name or their address. Clearly, obtaining this data would be part of managing customer accounts for the provision of PATS.
- 9.101 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, the subscriber wishes to provide other data or additional data onto OSIS.

*(i) Directory status*

- 9.102 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, the Advocate General 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.
- 9.103 In the February 2007 document, we therefore regarded this matter as having been determined as a matter of law by the Opinion in *KPN*, applying *Commission v. France*. As a result, our provisional view was that the costs of part of this activity fell within **cost category b** in **Figure 9.1** (i.e. common between the costs of provision of voice telephony and provision of BT GC19 data set) and, as such, these common

costs were not relevant to the GC19 charge. In its response, The Number agreed with our provisional view.

- 9.104 However, in its comments on The Number's response to the February 2007 document, BT argues that both we and the Advocate General in the *KPN* case have misinterpreted the ECJ's decision in *Commission v. France* as the question faced by the court in that case was entirely different to that considered in *KPN* and is therefore distinguishable on the facts. BT notes that the question faced by the ECJ in *Commission v. France* was whether the costs of compiling and maintaining a list of subscribers who do not wish to be included in the universal service directory should be included in the net cost of universal service provision. By contrast, BT says that the ECJ in *KPN* was considering whether these and other costs should be included in the charge for provision of relevant directory information. BT therefore argues that the ECJ's decision in *Commission v. France* (where it holds that the cost of maintaining an ex-directory list should not be included in the net cost of universal service provision because it did not have any bearing on the costs or revenues derived from creating a universal service directory) cannot be interpreted as finding as a matter of law that maintenance of an ex-directory list or (enquiring about a subscriber's directory status) is "inextricably linked" to the provision of voice telephony services and not recoverable from GC19 charges.
- 9.105 In response to BT's arguments, we firstly point out that, while our assessment of this point in the February 2007 document was mainly based on the Advocate General's Opinion in the *KPN* case, the ECJ's short judgment in *KPN* on this issue is consistent with the Opinion. Indeed, the ECJ itself in *KPN* (at paragraph 31) referred back to its previous judgment in *Commission v France*, when dealing with the concept of 'relevant information'. Although the ECJ noted that *Commission v France* was a finding "in another context", it saw no need to distinguish between these two cases.
- 9.106 In fact, the ECJ's express adoption in *KPN* of its own principle in *Commission v. France* suggests, in our view, that the ECJ in *KPN* thereby accepted also the specific implications flowing from that principle as stated in *Commission v. France*. Namely, the ECJ decided in the latter (at paragraph 68) that "...Every service provider will, therefore, have its own ex-directory list, the maintenance of which falls within the scope of the management of its own customer accounts, rather than within the scope of the universal service...".
- 9.107 We regard this matter as having been determined as a matter of law by the Opinion in *KPN*, applying *Commission v. France*. We further maintain, however, that in the absence of any other discussion of the point at ECJ level it could well be argued that the maintenance of a list of ex-directory customers is not to be "inextricably linked to the telephony service" (paragraph 38 of the judgment in *KPN*).
- 9.108 In particular, we appreciate that there may be some force in BT's point about the value (if any) attaching to a CP's telephony business in simply checking a subscriber's chosen directory status. Furthermore, we consider that the activity to which the principle in *Commission v France* applies—the maintenance of an ex-directory list—should be interpreted narrowly so as not necessarily applying to other potential related activities where it can be demonstrated that specific extra costs have been incurred that would not otherwise been incurred in the context of the management of customer accounts, but for obligations to supply DIPs under GC19.

- 9.109 In this regard, we have carefully analysed BT's activities relating to data control. For reasons set out in **paragraphs 9.175 to 9.193**, we have reached the view that these activities would not be carried out as part of BT's voice telephony business<sup>128</sup> and, moreover, are activities by their very nature that BT carries out for the purposes of supplying the data to DIPs in light of its obligations under GC19. As such, the costs associated with data control are relevant to the GC19 charge.
- 9.110 As regards the appropriate cost category for the directory status activity, we now consider that this particular activity of Customer Service Channel 15X, for the purpose of deriving the GC19 charge, falls within **cost category f** in **Figure 9.1**, as opposed to **cost category b**. This is because, as noted above, **Figure 9.1** has been revised to provide a more complete illustration of the cost recovery principles followed by us. In light of this more complete picture of the possible combinations of incremental and common costs, we now consider that this particular activity of Customer Service Channel 15X falls within **cost category f** in **Figure 9.1**. That is, the activity of establishing the directory status of customers is relevant to both products (i) and (ii) – i.e. is common between BT's GC19 data and other directory information products – as well as with the provision of voice telephony services.
- 9.111 The activity is common with other directory information because it would not be possible to supply on a stand-alone basis the other directory information of BT subscribers (i.e. the BT additional data set) without BT knowing the directory status<sup>129</sup> of those subscribers. A customer's chosen directory status will relate to their entire directory record and not just specific data within it and the directory status will need to be identified for each subscriber. Any of the main fields typically associated with GC19 (i.e. those containing information about the name, address, postcode and telephone number) may contain GC19 data or non-GC19 data. For example, (i) the field name may contain details of the subscriber or of the actual user of the number (to the extent that they are different); (ii) the address and postcode field may contain details of the address at which the telephone number is connected or it may contain an alternative address that the subscriber wishes to have included in the directory; and (iii) the telephone number may be a geographic or a non-geographic number. Any directory entry may therefore contain some GC19 data and some non-GC19 data. The directory status of the subscriber, however, covers all the data contained in the directory entry regardless of whether it is GC19 or non-GC19 data.
- 9.112 Given our conclusion that the costs associated with checking the directory status of a subscriber are **category f** costs and therefore common with voice telephony, these costs are not recoverable through charges for the BT GC19 data set.

*(ii) Subscriber alternative or additional data*

- 9.113 In relation to activities allowing a subscriber to provide alternative and/or additional information onto OSIS, referred to in **paragraph 9.101** above, our 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 9.1** above – i.e. they are incremental to the provision of non-BT GC19 data set within OSIS – and so would not be recoverable

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<sup>128</sup> We consider that this conclusion is consistent with the Opinion in *KPN*. In particular, we note from paragraph (48) of the Opinion that the Advocate General regarded the activity of maintaining ex-directory lists as one that would *stimulate* the use of the voice telephony services themselves.

<sup>129</sup> Directory status covers more than just whether a subscriber wishes to be included in a directory or whether they wish to be completely ex-directory. Subscribers can also choose to be excluded from published directories but have their number provided via voice DQ services.

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.

- 9.114 Were other data to fall within the scope of GC19<sup>130</sup> and provided it could be shown that a CP (such as BT) would not have collected or collated this other data absent the GC19 obligation, these additional collection and allocation costs would be incremental to the provision of such GC19 data set. Any such costs therefore should, in our view, be recoverable costs.

### Upstream Data Team

- 9.115 It follows from the information provided by BT (see **paragraph 9.99** 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 handled by the Upstream Data Team (“**UDT**”). (As already noted above, the SDE team is used for listings requiring special entries onto OSIS.) The UDT also ensures that the overall data relating to BT subscribers on OSIS is accurate and up-to-date.
- 9.116 The UDT operates as a separate team within BT Directories in BT Retail. The purpose of the team’s work is to ensure that OSIS entries 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.
- 9.117 BT has provided us with a detailed list of the activities of the UDT. Broadly, there appear to be two main functions of the team.
- 9.118 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 the incremental cost of other directory information – i.e. **cost category e** in **Figure 9.1** above.
- 9.119 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

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<sup>130</sup> This might be either because of any measures we would be considering taking in order to enlarge that scope following our policy review – see **Section 11** – or because a court were to take the view that the scope of the current definition is greater than we consider it to be.

upstream customer accounts. Therefore, in the February 2007 document, even where activity within the UDT relates to validating or correcting data that maps precisely onto that required by GC19 (e.g. checking the postcode for an installation address), our provisional view was 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. As set out previously, our 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. We therefore provisionally concluded that any activity required to amend this or deal with the quality of the data within the BT GC19 data set was considered to fall within **cost category b**.

9.120 However, BT argues in its comments on The Number's response to the February 2007 document that we have incorrectly classified the UDT costs described above. BT clarifies that the errors that are checked by the UDT are not errors with a subscriber's name, address or telephone number as listed in that subscriber's telephony account information, but rather problems highlighted by OSIS error reports. BT has now clarified that these reports are generated when listings are not accepted by OSIS and can occur for a variety of reasons, including where:

- (i) a mismatch has occurred between data sent to OSIS and the data that already exists on OSIS;
- (ii) a porting problem has occurred; or
- (iii) words in a directory listing require further checking (e.g. they may be unsuitable for a directory listing or may indicate a particular sensitivity, such as "Women's refuge").

9.121 BT argues that any corrections made by the UDT are relevant to the directory entry only and confirms that no amendments are made to voice telephony customer accounts as a result. BT therefore believes that these costs are solely associated with managing the directory entry and are incremental to the process of supplying GC19 data and/or non-GC19 data.

9.122 In light of BT's submission above, it appears to us that some of the activities undertaken by the UDT in rectifying problems identified by OSIS through error reports and amending entries are not activities which contribute to BT's voice telephony business. The error reports relate to the suitability of the data for inclusion in OSIS, rather than any inaccuracies in the data needed to run a voice telephony service. This is reflected by BT's confirmation that any amendments to the OSIS record are not passed back to the voice telephony business. As such, the cost associated with these activities falls outside the stand alone cost of voice telephony as they are not caused in the provision of BT's voice telephony business (either individually or in combination with other services). The costs in question would therefore, by definition, fall outside **cost category b**, contrary to our provisional view based on our understanding at the time of the February 2007 document.

9.123 This leaves the question therefore as to whether the costs in question are appropriately considered to be incremental to either BT's GC19 data, other directory information, or common to both. BT has argued that the corrections made by the UDT relate to name, address and telephony number as well as the non-GC19 data set and should therefore be included in BT's GC19 charges. We are not, however, persuaded by this argument.



- 9.124 In order for the costs in question to be recoverable from BT's GC19 charges, the costs would have to be characterised as **cost category c** (i.e. incremental to BT GC19 data) or **cost category d** costs (common between BT GC19 data and non-BT GC19 data). In this regard, BT has not provided us with any evidence that this cost (or some part of it) is a pure fixed and common cost between BT GC19 data and other non-BT GC19 data, nor has it identified what, if any, element is incremental to either BT GC19 data or non-BT GC19 data. We do not, therefore, consider that BT has demonstrated that it will incur these costs as a result of its GC19 obligations, as opposed to its decision to make available OSIS, and that it should therefore be entitled to recover these costs through charges for GC19 data. It seems to us that, given the simplicity of GC19 data compared to non-GC19 data and the examples identified above by BT<sup>131</sup>, the incidence of corrections to entries appears likely to be significantly higher for entries containing non-GC19 data. We would therefore anticipate that the frequency with which BT will need to rectify BT GC19 entries is likely to be minimal compared with more detailed OSIS entries. We have therefore classified these costs as **category e** costs.
- 9.125 Finally, we have reached a similar conclusion in relation to the activities carried out by the UDT to deal with the subscriber data of WLR re-sellers. BT has not demonstrated that it will incur these costs as a result of its GC19 obligations. The vast majority of WLR subscriber data is passed to OSIS without intervention by the UDT and we therefore consider that intervention is only likely to be required where additional data beyond that covered by GC19 is supplied. As such, the costs of the UDT are not recoverable from the GC19 charge. We have, therefore, concluded that the activities carried out by the UDT to deal with the subscriber data of WLR re-sellers would also fall within **cost category e**.

### Special Directory Entry team

- 9.126 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.
- 9.127 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, the specific SDE fields relating to typeface and 'Business description', and in which directories the entries should appear.
- 9.128 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.
- 9.129 Our view is that the activities of the SDE team are only required in order to produce specific SDEs for customers and therefore do not undertake activities relevant to GC19. 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

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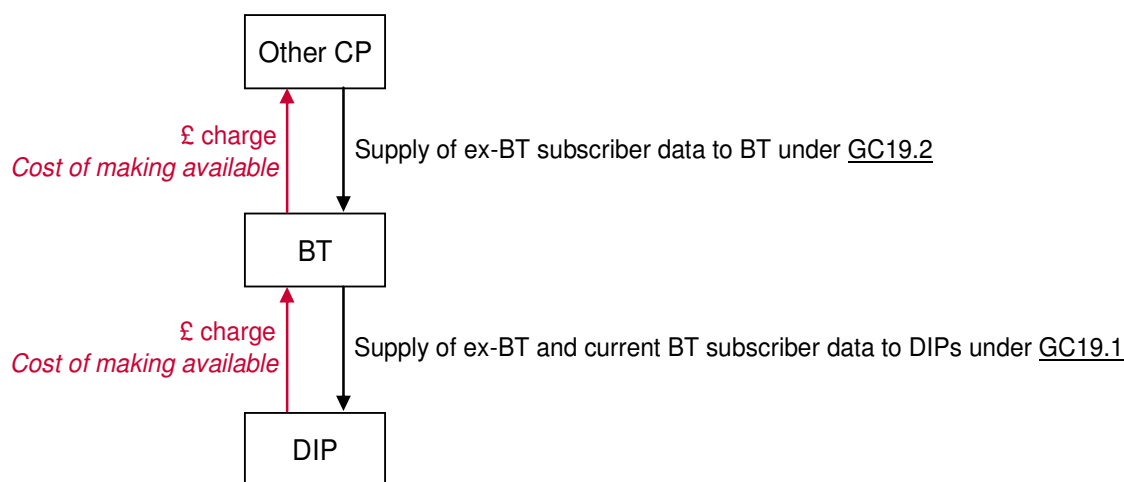
<sup>131</sup> The information covered by GC19 is relatively simple, comprising just the name, address (including postcode) and telephone number of the subscriber. By contrast, non-GC19 data may be far more complex and could include company departments and the way in which the entry should be structured in a directory.

the subscriber which is obtained by BT in entering into the contract and managing the customer account for the provision of PATS. As such, we consider the activities of the SDE team as falling outside of the activities required to provide the BT GC19 data set. They therefore fall within **cost category e** in **Figure 9.1** above.

### Acquisition of data by BT under GC19.2

9.130 BT identified in its response to the February 2007 document that it will incur costs in acquiring GC19 data from other CPs, where that data relates to numbers originally allocated to BT, but subsequently ported from BT to other CPs. Under GC19.2, this data about ex-subscriber numbers transferred from BT is required to be supplied by other CPs to BT on cost-oriented terms, and then to be made available by BT to DIPs, pursuant to GC19.1(b). BT argued that it should be entitled to recover the cost of this data acquisition through charges made to DIPs for GC19 data. This flow of transactions is illustrated in **Figure 9.2** below.

**Figure 9.2: Illustration of BT's acquisition of ex-subscriber data from other CPs**



9.131 The Number has argued in its comments on BT's response to the February 2007 document that the costs associated with collecting data on ex-BT subscribers (including WLR subscribers) should not be recovered through charges for GC19 data as they relate to the collection and compilation of basic data about BT subscribers (as defined by us). The Number refers us to the findings in *KPN* that such costs cannot be passed on to DIPs.

9.132 Having considered submissions by BT and The Number, we now accept that this category of cost is relevant to BT making data available under GC19.

9.133 The Advocate General made it clear in his opinion in the *KPN* case that, whilst the cost of collecting and maintaining a database of information about its subscribers is included in the cost of a CP's normal telephony service (and hence was not recoverable through charges for directory information products), the situation would be different "if a telephone provider can demonstrate that it had to incur specific extra costs in order to fulfil its obligation to collect and supply relevant directory information...and that it would not have incurred those costs in the context of the management of its own customer accounts".<sup>132</sup>

<sup>132</sup> See paragraph 51 of the Advocate General's Opinion in the *KPN* case.

- 9.134 The terms of GC19 make it clear that it is the responsibility of the CP (here, BT) to which numbers have been originally allocated to make available GC19 data in relation to those numbers. However, this is not information that BT would normally collect as part of its voice telephony business as the users of the numbers are no longer customers of its own voice telephony service. We therefore consider that it would not be appropriate to recover the costs of collecting this information through BT's charges for its voice telephony services as it has nothing to do with BT's provision of these services. We have therefore concluded that these costs may be recovered through its charges for GC19 data (i.e. the data falls within **cost category c** in **Figure 9.1** above).
- 9.135 GC19.3 directs that CPs supplying data to BT under GC19.2 should do so on cost-oriented terms. It follows from the analysis in **Sections 4 to 8** on how Article 25(2) has been implemented in the UK, and the interpretation of *KPN*, that CPs are entitled to recover only the costs of making these data available to the CP to whom the number was originally allocated (and from which the number was subsequently ported). As such, similar principles of cost recovery apply to such CPs under GC19.2 as to BT under GC19.1. We consider that BT, in turn, is entitled to recover these costs in its supply of the BT GC19 data set to DIPs. On this basis, we have included the associated cost of data acquisition in our revised calculation of costs for recovery.
- 9.136 BT stated in its response to the February 2007 document that it has found it extremely difficult at this stage to assess the likely charges made by other CPs for the provision of data under GC19.2. We acknowledge the difficulty in quantifying the costs of other CPs in supplying data to BT under GC19.2, but we have sought to estimate other CPs' cost of supply, using BT's own cost of supply as the best available proxy for this cost information. We consider that this cost is, with adjustments, a reasonable proxy for a CP's cost of making GC19 data available to BT. (BT's costs of making available GC19 data to DIPs are set out in **paragraphs 9.140 to 9.240** below.)
- 9.137 The total costs incurred by other CPs in making data available to BT under GC19.2 are considered by us to be substantially lower than BT's total cost of making data available to DIPs. For example, our understanding from other CPs is that their upstream customer relationship management systems are able to automatically generate simple OSIS entries, significantly limiting the level of manual intervention required to supply data to BT. Manual intervention is required to create more complex OSIS entries, but is not necessary for the simple entries required by the terms of GC19, as defined herein.
- 9.138 Our judgement is therefore that the technical process required to make available data to BT under GC19.2 is limited to the transfer of those data from the other CP to BT. Our view is that the only costs relevant to making data available under GC19.2 are likely to relate to transmitting data, downstream relationship management and downstream onboarding. Our estimate of the costs incurred by BT in acquiring data under GC19.2, using BT's own costs per downstream customer (for transmission, relationship management and onboarding) as a proxy for charges per CP and multiplying up by the number of CPs supplying data to BT under GC19.2, is presented in **Table 9.9** below.
- 9.139 The figures in **Table 9.9** are estimates, based on the available information. Going forward, in the eventuality that other CPs' costs of supply are higher or lower than those estimated, Ofcom would expect a respectively higher or lower cost to be passed on by BT through GC19 charges.

## BT's other stated costs of providing data to OSIS

- 9.140 BT has also provided us with cost information that relates to the provision of data to OSIS under the headings 'IT support', 'CSS costs' and 'Central overhead' (see **Table 9.4**).
- 9.141 We understand that 'IT support' costs are directly related to the operation of the UDT. As set out above, we consider that the costs associated with the activities of the UDT are more appropriately recoverable from charges for the non-BT GC19 data set and that any costs associated with the GC19 data set will be negligible. For the same reasons, it follows that the IT support costs associated with this team can be classified as falling within **cost category e** and should also not be recoverable through charges for GC19 data.
- 9.142 We also understand 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 fall within **cost category f** and are, therefore, common with voice telephony. For this reason, we do 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

- 9.143 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).
- 9.144 A full breakdown of all BT's costs of providing the OSIS product can be found in **Table 9.5**. Our provisional view in the February 2007 document was that the BT GC19 data set could be 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, we provisionally concluded that many of the costs of operating OSIS as a separate system fell outside of the adjusted ceiling for the BT GC19 data set as defined in **Figure 9.1** above. We also excluded costs provided by BT relating to other categories of labour costs, 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.
- 9.145 Therefore, we provisionally considered 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. These three cost items were:
- (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 that these costs would still be incurred should DIPs only receive 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 licensees. 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 product.

- (iii) **'Onboarding' of DIPs.** 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 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. Only the latter activities would be required for BT to supply a commercially viable stand-alone BT GC19 data product.

- 9.146 The relevance of these three cost items to the provision of the BT GC19 data set was not challenged in responses to the February 2007 document. However, in its response to the February 2007 document, BT argued that our provisional assessment had resulted in an underestimate of the costs relevant to making available BT GC19 data, and that additional cost items are relevant for recovery through charges for BT GC19 data. BT also notified us of a number of changes to the information it had previously provided. The points raised by BT are summarised in **paragraph 9.151**.
- 9.147 The Number states in its comments on BT's response to the February 2007 document that, without visibility of the specific costs, it is impossible for it to comment on whether the costs have been underestimated or not. The Number further questioned why BT's contracts with DIPs need to deal with 'Audit Rights' when GC19 charges are not to be usage based and why contracts need to deal with 'End User Terms' as, aside from rules about requiring certain information from callers before giving out numbers, there is no need for BT to determine the terms on which The Number deals with customers.
- 9.148 The Number further argues that BT has overstated the complexity of contracting with DIPs in saying that DIP contracts will have to align BT's terms restricting use of data with the terms on restricting use that WLR operators and other upstream providers place on their data. The Number believes that WLR and other upstream operators should not be restricting DIPs' use of GC19 data so the contractual situation is likely to be much simpler than BT claims.
- 9.149 We have further analysed each cost item considered to be relevant by BT, and the reasoning provided. We also issued BT with a fourth information request on 16 May 2007. This was followed up by a series of further requests in relation to data provided by BT in response to the 16 May request. Information provided in response to these requests has been used by us in coming to a revised assessment of the relevant costs. We have also taken into consideration the comments made by The Number and BT in relation to the responses to the February 2007 document. This assessment of the costs relevant for recovery through charges for GC19 data is set out in **paragraphs 9.150 to 9.240** below.

### **Adjustments to costs**

- 9.150 In its response to the February 2007 document, BT identified a number of inaccuracies in the cost data that it had previously submitted to us. Those adjustments result in changes to the costs of making available GC19 data. In addition, during the course of communications following the receipt of BT's response, BT identified a number of further inaccuracies in the data it had submitted.
- 9.151 The adjustments identified by BT and our views on those proposed adjustments are:

- (i) the number of 'full time equivalents' ("**FTEs**") carrying out activities relevant to OSIS was substantially revised by BT, in large part as a result of it identifying that agency staff working for Directory Solutions had been inconsistently categorised in BT's previous submissions. BT indicated that for one year the costs of agency staff had been double-counted in both its labour costs and 'other costs' figures, and advised that these costs should therefore be removed from the latter category, which we accept. BT also suggested that, for one financial year, in which agency staff costs had *only* been included within 'other costs', the costs should be reallocated to specific activity categories. We accept that, for this financial year, it is more appropriate to allocate these agency staff costs to the activity categories in which these staff were engaged from day to day. BT provided us with information from Directory Solutions payroll and the breakdown of work carried out by Directory Solutions staff to support its revisions. We accept these revised FTE figures and cost totals as corrections of data previously provided by BT. The FTE breakdowns now therefore consistently reflect activities carried out by agency staff and their associated cost;
- (ii) costs associated with the OSIS Replacement System and OSIS development had previously been included within 'Other Costs', but have been separated out into separate categories in BT's response. We note this revised presentation of information by BT;
- (iii) BT indicated that certain activities had previously been wrongly classified and should be included within 'Relationship management'. We accept that 'handling helpdesk calls from suppliers' is indeed closely associated with 'Relationship management of upstream CPs', since it relates to the process of acquiring data from other CPs. However, we consider that 'owning and updating manuals and other documentation, describing product specification/functionality and overseeing operational policy for BT Wholesale Directory Solutions' is more closely associated with 'Product development', its original activity category, and so should not be recovered through GC19 charges. This is because the task seems most closely related to the design and specification of OSIS, rather than ongoing relationship management; and
- (iv) BT indicated that certain IT resources previously categorised within 'Common systems costs for OSIS – direct labour' are more appropriately attributed to the individual activities to which they are relevant – we accept this re-allocation on the basis that it is appropriate to allocate IT-related headcount to the tasks in which they are engaged from day to day. This has led to a small increase (of on average a little over half an FTE per year) in the FTE headcount for GC19 purposes.

9.152 In addition, BT has provided updated cost and revenue data for the financial year 2006/07. We have consequently based our revised charge for 2006/07 on actual cost data rather than projected cost.

### **Systems costs**

9.153 BT stated in its response to the February 2007 document that it considers that the systems BT operates in its voice telephony business are insufficient to fulfil BT's GC19 obligations, and that additional systems are required, the costs of which are appropriate for recovery through charges for GC19 data.

- 9.154 The first reason provided by BT is that it requires a database on which to collect, maintain and extract the data of its ex-subscribers that are using numbers originally allocated to BT. The terms of GC19.1(b) require BT to obtain and make available basic directory information from a variety of other CPs to which ex-BT subscribers have switched. BT has stated that its current upstream systems are not suitable for this purpose because their primary purpose is to enable the billing of customers. BT has stated that the inclusion of non-BT subscribers' details in these systems would risk bills being erroneously generated and sent to non-BT subscribers as the billing systems are designed to send bills to every customer entered in the system.
- 9.155 Secondly, BT has stated that a system is required in order to make GC19 data available to DIPs in different formats and at different frequencies as agreed with DIPs. BT argues that its existing systems have been optimally designed to carry out their specific functions – such as the billing of customers – and that these systems are not designed for making available data in the different formats and at the different frequencies that DIPs require.
- 9.156 Finally, BT has advised that a customer relationship management system is required in respect of BT's relationships with DIPs. BT argues that these systems requirements are additional to those required for its voice telephony operations and as such the costs of them should be recoverable through GC19 charges.
- 9.157 Addressing the first of BT's reasons, our provisional view in the February 2007 document was that BT could receive GC19 data and make it available using its existing upstream systems, in the same way that it has historically made its subscriber data available to OSIS. We have revised this view in light of the arguments made by BT that these systems are not suitable for storing data relating to those who are not currently subscribers of BT's voice telephony services. We now accept that BT's GC19.1(b) responsibility to collect, aggregate and make available data from ex-subscribers who still use numbers originally allocated to BT means that it requires systems that it would not otherwise operate as part of its voice telephony business.<sup>133</sup> BT currently stores and makes available directory information data on its ex-subscribers via its OSIS and LORS systems, which are not used for billing and marketing (unlike its retail telephony systems). Given that the GC19 data set in question is significantly narrower in scope than OSIS and, in particular, that all entries exist in simple and standard form, the systems necessary for the GC19.1(b) data set would be of reduced complexity and functionality as compared to OSIS.
- 9.158 In relation to the second of BT's reasons, we consider that the systems required to make GC19 data available to DIPs are necessary to ensure that the DIPs receive the data in a format that is acceptable to them. We have therefore concluded that these costs are appropriate for recovery through charges for GC19 data. BT currently uses its OSIS system for this function and, as already noted, we consider that the systems necessary for GC19 data would be of reduced complexity and functionality due to the reduced complexity of GC19 data.
- 9.159 In relation to the third of BT's reasons, we similarly believe that the costs of the customer relationship management system are also relevant to making data available to DIPs. BT would not need to maintain a relationship with DIPs if it was not

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<sup>133</sup> It should be noted that Ofcom remains of the view that BT does not require additional systems to receive and store GC19 data relating to its existing voice telephony subscribers and has not taken into consideration systems costs associated with these subscribers when setting GC19 charges.

providing them with directory information. The customer relationship management system is used for maintaining up-to-date contact details of DIPs and logging issues raised by DIPs and their resolution. BT currently uses a system supplied by Siebel for this function and we consider that the customer relationship management systems required for GC19 data are likely to be similar, if not the same, in terms of the functionality required as for OSIS data. The number of DIPs would potentially be similar in relation to GC19 data as for OSIS data and the functionality of the system (i.e. logging queries and their resolution) would be the same.

- 9.160 Our assessment of the costs identified by BT for the systems required to provide GC19 data is discussed in **paragraphs 9.222 to 9.229**, with the total cost of this activity set out in **Table 9.9**.

### Receiving data into BT's systems

- 9.161 BT stated in its response to the February 2007 document that it considers the costs associated with receiving data into its systems to be a relevant activity to GC19. BT has indicated that this activity largely relates to the manual input of entries onto its systems, undertaken by BT on behalf of other CPs. BT considers this activity to be relevant to making available GC19 data by consequence of the collection of data from other CPs under GC19.2, and the incumbent requirement to integrate this data with GC19 data for BT's own subscribers.
- 9.162 The Number argues in its comments on BT's response to the February 2007 document that costs of activities associated with data processing should only be recoverable through charges for GC19 data to the extent that they directly related to the supply of that data to DIPs.
- 9.163 We do not accept that this category of cost is relevant to BT making data available under GC19. The manual input of GC19 data onto BT's systems is considered not to be relevant to basic directory information supplied by other CPs to BT: this data is already held on the systems of the supplying CP, and can therefore be supplied to BT in digital form. We have already allowed BT to recover the systems-related cost of receiving and storing this data through the costs described in **paragraphs 9.153 to 9.160** above. Under GC19.3, BT is able to agree the format in which subscriber data is passed to it by supplying CPs. We therefore consider that the level of activity undertaken by BT in respect of the receipt of GC19 data should be negligible. This cost item has therefore not been included in our estimate of the costs of making available GC19 data.

### System maintenance and general data storage

- 9.164 BT stated in its response to the February 2007 document that it incurs costs in system maintenance and general data storage in the process of making available GC19 data. BT has indicated that this activity relates to tasks such as database housekeeping, investigating system failures and managing IT suppliers. These costs are incurred as a result of the need for data management systems for the supply of GC19 data which, as noted above, are required as a consequence of the aggregation of data from a variety of supplying CPs. BT has argued that these costs are directly related to the need to maintain reliable systems.
- 9.165 As noted above, we accept that BT requires additional systems (i.e. systems that are not used in BT's voice telephony operations) in order to discharge its GC19 obligations. We also accept that the related activities, such as routine maintenance and system support, are necessary in order to resolve data problems and ensure the



smooth functioning of these systems. However, we consider that only a small proportion of the activity currently undertaken in the operation of OSIS is relevant for recovery through charges for GC19. This is because BT is entitled to recover only those costs that are driven by its requirement to hold data from other CPs supplying data to BT under GC19.2. BT has indicated that the large bulk of system maintenance and data storage costs incurred in the operation of OSIS arise from BT's own subscriber data, which it would hold in the absence of the GC19 obligation (and for which the associated costs are therefore not recoverable through charges for GC19 data). Our calculation of the costs incurred by BT in system maintenance and general data storage in relation to GC19 data, which is based on confidential information provided by BT, is discussed in **paragraphs 9.214 to 9.216** and presented in **Table 9.9** below.

### **System administration**

- 9.166 BT stated in its response to the February 2007 document that it expects to incur costs in system administration in the making available of GC19 data. BT has indicated that this activity relates to tasks such as receiving and escalating problem reports and managing system downtime and systems access with CPs supplying data under GC19.2. These costs are incurred as a result of the need for data management systems for the supply of GC19 data, as noted above.
- 9.167 As previously discussed, we accept that BT requires additional systems (i.e. systems that are not used in BT's voice telephony operations) in order to discharge its GC19 obligations. We also accept that related administration activities, such as the control of access to and the extraction of data from these systems, are relevant to making available GC19 data. However, BT has indicated that only a small proportion of the activity undertaken in the operation of OSIS is relevant to GC19, such that the cost associated with GC19 is correspondingly lower. It is likely that the need to manage system access by other CPs will be substantially reduced (relative to OSIS) given the reduced quantity of data being supplied to BT and the highly automated process of making available basic directory information in standard format. Our calculation of the costs incurred by BT in system administration, which is based on confidential information provide by BT, is discussed in **paragraphs 9.217 to 9.219** and presented in **Table 9.9** below.

### **Relationship management of upstream CPs (including billing)**

- 9.168 BT stated in its response to the February 2007 document that it considers the relationship management of upstream CPs to be an activity relevant to GC19. BT argued that these costs are incurred as a result of the collection of data from other CPs under GC19.2, and the associated need to manage the contractual and operational relationship with the supplying CPs. BT has indicated that this activity largely relates to billing, and also includes tasks such as resolving contractual issues and handling helpdesk calls from suppliers.
- 9.169 The Number argues in its comments on BT's response to the February 2007 document that as a result of the *KPN* decision, the management of these contracts is not a cost category that is permitted to be passed on to DIPs. The Number argues that the upstream contractual relationships relate to the collection of data, which is an activity that BT is already doing in the context of providing communications services to its customers.

9.170 BT has a duty under GC19.1(b) to acquire data from other CPs for subscribers using numbers originally allocated to BT and subsequently ported to other CPs.<sup>134</sup> BT incurs an associated labour cost in the management of relationships with supplying CPs, largely in the administration of payments and the resolution of contractual issues. Even though BT has existing contractual relationships with other CPs as a result of its telecoms operations, it employs additional staff in order to handle issues relating specifically to directory enquiries. The associated costs of these staff are therefore independently incurred and relevant for recovery through charges for GC19 data. It should be noted that these costs relate only to the relationship management of upstream CPs in relation to the collection of GC19.1(b) data and not data that BT collects during the course of its voice telephony business. Our calculation of the costs incurred by BT in relationship management of upstream CPs is discussed in **paragraphs 9.210 to 9.212** and presented in **Table 9.9** below.

### **Onboarding of CPs**

9.171 BT stated in its response to the February 2007 document that it considers the “onboarding” of CPs is relevant to BT making data available under GC19 (“onboarding” refers to providing consultative advice on data methodologies to new CPs, and also includes data methodology testing and processing manual orders). BT stated that these costs are incurred as a result of the supply of data by other CPs under GC19.2, and the associated need to establish relationships with supplying CPs.

9.172 BT is under a duty to acquire data from other CPs for numbers originally allocated to BT and subsequently ported to other CPs, and will incur costs in managing relationships with these CPs. However, our assessment is that the onboarding of CPs is not relevant to BT making data available under GC19. This is because the tasks are largely related to advising new CPs on the complex data entries associated with OSIS, and are therefore not relevant to the very simple and consistent data entries associated with GC19. BT's breakdown of tasks indicated that the process of establishing contractual relationships with CPs for the supply of data, which may be considered relevant to BT's requirement to acquire data under GC19.1(b), generates negligible cost. This cost item has therefore not been included in Ofcom's estimate of the costs of making available GC19 data.

### **Data verification**

9.173 BT stated in its response to the February 2007 document that it incurs a cost in verifying data supplied to BT by other CPs under GC19.2. BT considers that costs are incurred in the receipt, checking and management of this data, and that they are necessary to ensure that data made available by other CPs does not harm the integrity of BT's GC19 data set. BT claimed that the cost is relevant for recovery as, absent the GC19 obligation, BT would not need to verify data relating to the current customers of other CPs whose numbers were originally allocated to BT.

9.174 The verification of basic subscriber data is first and foremost the duty of the CP with whom the telephony subscriber is contracted. The maintenance of basic subscriber records that are full and accurate is an intrinsic part of the provision of a telephony

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<sup>134</sup> As discussed at **paragraphs 9.130 to 9.139** above, this is not data that BT collects in the course of providing communications services to its customers as the subscribers in question are no longer subscribers of BT's voice telephony services.

service by a CP to its customers. We would expect that such data that is provided to BT is correct and accurate, and it is the responsibility of the CP to ensure that this data does not harm the integrity of data supplied to DIPs. Moreover, given that GC19 data is relatively basic, comprising only the name, address (including postcode) and telephone number of the subscriber, we would anticipate that the frequency that BT will need to reject GC19 entries as a result of them being obviously incorrect or incomplete is likely to be negligible, particularly when compared to the more detailed OSIS data entries. This cost item has therefore not been included in our assessment of the costs of making available GC19 data.

## Data control

9.175 BT stated in its response to the February 2007 document that it has incurred and expects to incur costs in relation to the prevention of misuse of GC19 data. These costs relate to seeding and auditing programmes<sup>135</sup>, carried out by third parties, through which BT monitors the usage of data by DIPs. BT considers that these activities are necessary to prevent unauthorised usage of data by DIPs and to ensure that BT fulfils its data protection obligations to its customers. BT argues that, consequently, data control is relevant to making available GC19 data as a stand-alone product.

9.176 BT, among other parties, has a responsibility to ensure that the GC19 data it has collected from customers or which it handles is not used in such a way that contravenes data protection legislation, as it is a 'data controller' of that data for the purposes of the DPA. The term 'data controller' is defined in section 1 of the DPA as meaning:

*"...subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed,"*<sup>136</sup>

9.177 Individuals' names, addresses and telephone numbers (i.e. the subscriber information falling within GC19) fall within the definition of 'personal data' under section 1 of the DPA as they are "*...data which relate to a living individual who can be identified—*

*(a) from those data;*

*(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 persons in respect of the individual;"*

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<sup>135</sup> It should be noted that the 'Audit Rights' included in BT's contracts with DIPs (as questioned by The Number in its comments on BT's response to the February 2007 document – see **paragraph 9.147** above) relate to BT's right to audit how DIPs are using GC19 data and not the number of times that they search the data.

<sup>136</sup> Section 1(4) of the DPA states: "*Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.*"

- 9.178 As a data controller, BT is obliged to comply with the data protection principles set out in Schedule 1 to the DPA when processing personal data and, in particular, the second data protection principle, which specifies that:

*“Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.”*

- 9.179 BT's standard terms of agreement for telephony services advise customers of the manner in which BT will use their personal data:

*“We will put one number (and your details) in the appropriate BT Phone Book and make it available from our Directory Enquiries Service unless you tell us not to.”<sup>137</sup>*

BT is additionally required, by GC19, to make this information available to DIPs. These are, therefore, the specified purposes for which BT may process the personal data provided by customers (or supplied to it by other CPs).

- 9.180 The seventh data protection principle imposes a further obligation on data controllers to ensure that:

*“Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.”*

- 9.181 There is no standard set of security measures that is required for compliance with the seventh data protection principle. It is therefore left to the data controller to take the measures that it considers reasonable and appropriate to fulfil its obligations under that principle. Accordingly, there is no direct obligation on BT to actively monitor how GC19 data is used by DIPs. However, this does not mean that BT is not entitled to take such measures to ensure that it fulfils its data protection obligations under the seventh data protection principle if it deems these to be appropriate.

- 9.182 The appropriateness of the measures taken will depend on the circumstances and, in particular, on the harm that might result from unlawful processing of the personal data in question. BT has held a number of discussions with the ICO in relation to data protection issues and has provided us with details of these discussions. BT has additionally supplied information to us of various uses of data that it has identified which it believes to be in breach of data protection legislation, including situations where address information about subscribers who have chosen to have restricted listings was made available and where the information was used for marketing purposes.

- 9.183 It would appear that BT seeks to fulfil its obligations under the seventh data protection principle in relation to OSIS (which includes GC19 data) by including terms in its licence agreements with DIPs as to how they may use the data supplied by BT and provides BT with the right to audit licensees' use of the data. As part of this

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<sup>137</sup> Details of the Terms and Conditions for BT Telephony Services (residential customers) are available from BT's website at:  
[http://www.productsandservices.bt.com/consumerProducts/dynamicmodules/pagecontentfooter/pageContentFooterPopup.jsp?pagecontentfooter\\_popupid=13408](http://www.productsandservices.bt.com/consumerProducts/dynamicmodules/pagecontentfooter/pageContentFooterPopup.jsp?pagecontentfooter_popupid=13408)

activity, BT has seeded data<sup>138</sup> into the directory information that it provides to DIPs to assist its auditing and enable it to identify which DIPs, if any, have used the data contrary to the terms of the agreement with BT.

- 9.184 The Number has argued in its comments on BT's response to the February 2007 document that adherence to data protection legislation is policed by the ICO and that it is not for BT to monitor and police DIPs' use of GC19 data. The Number believes that it should be sufficient for BT to obtain confirmation from DIPs that they intend to comply with data protection legislation prior to supplying them with GC19 data and that data control costs should not therefore be recoverable through charges for GC19 data. The Number notes that information about companies is not covered by data protection legislation and that most businesses welcome the prospect of being included in other classified directories in addition to BT's.
- 9.185 The Number also raised concerns in its comments on BT's response to the February 2007 document about BT's comments on rights of access and the use to which GC19 may be put, including the inclusion of contract terms relating to usage restrictions put on data by WLR and other upstream providers. The Number suggested that allowing BT (and other CPs) to restrict the use to which GC19 data can be put risked preventing DIPs from developing a wider range of new and innovative DQ services for consumers. The Number argued that this would be contrary to Ofcom's obligations under section 4(3)(c) of the 2003 Act to promote competition in relation to the supply of directories capable of being used in connection with the use of electronic communications networks and services.
- 9.186 We consider that the seeding and auditing activity carried out by BT in relation to its directory data serves two purposes:
- (i) Firstly, it helps BT to fulfil its **data protection obligations** by ensuring that the data it has obtained from individuals is used for the purposes to which they have specified the data may be put.
  - (ii) Secondly, it helps BT to identify whether the data provided to DIPs is being used for the purposes for which DIPs are entitled to require BT to provide that information under **GC19**.
- 9.187 We recognise that we have an obligation under section 4(3)(c) of the 2003 Act to promote competition in relation to the supply of directories, but would also point out that we have duties under section 3 of the 2003 Act to further the interests of citizens in relation to communications matters and under section 4(5) of the Act to promote the interests of all persons who are citizens of the European Union. We consider that in fulfilling these duties we must have regard to the uses to which these persons have allowed their personal data to be put. In any event, as the DPA gives effect in UK law to Directive 95/46/EC, we consider that the broader policy objective under that section 4(3)(c) in fulfilling Community obligations does not override the more specific requirements under the DPA.<sup>139</sup>

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<sup>138</sup> 'Seeding' is the process by which BT inserts 'dummy' (made up) listings into the data set provided to individual DIPs, so that each data set is unique. By monitoring the calls and literature sent to the dummy telephone number and address, BT is able to identify whether the DIP might be misusing the data set.

<sup>139</sup> In this context, Ofcom notes that Article 1(2) of the Framework Directive specifically provides that this Directive as well as the Specific Directives are without prejudice to obligations imposed by national

- 9.188 Whilst we agree with The Number that it is the responsibility of the ICO to police data protection legislation, we recognise that BT has a responsibility to its subscribers to ensure that the data that they have provided to BT for the purposes of inclusion in a telephone directory and for directory enquiry purposes is not used for other purposes. Failure to take steps to ensure this data is not misused may result in complaints about BT to the ICO. On this basis, the seeding of GC19 records relating to individuals and auditing of DIPs' use of this GC19 data appear to Ofcom to fall within the range of measures that BT might be expected to take to comply with its data protection obligations.
- 9.189 Aside from BT's obligations under data protection legislation, BT is required to make GC19 data available to DIPs on cost oriented terms in order that those DIPs can make directory information services available to UK consumers. It is therefore not unreasonable for BT to seek to impose some usage restrictions on GC19 data, where those restrictions are designed to prevent the data from being used in a manner not envisaged by GC19 (i.e. where the GC19 data is not being used for the purposes of providing directories and DQ services), provided that those restrictions do not go beyond this aim.
- 9.190 We agree with The Number that unnecessary usage restrictions may reduce innovation and raise competition concerns. However, innovation is only permitted to the extent that the use of the data complies with the requirements of GC19 and the purposes that it sets out for which data must be provided, i.e. the provision of directories and DQ services. If The Number or any other DIP has concerns that specific contractual provisions (including those included in BT's contracts as a result of contractual provisions between BT and upstream CPs) are hampering their ability to design innovative directory products, they are free to raise this as an issue with us.
- 9.191 We therefore accept that BT's carrying out of data control activities are, in principle, reasonable and appropriate given the possible consequences of failure to comply with the DPA and the understandable desire of BT to ensure that the information is only made available to those who are entitled to that information. This is particularly the case in light of the fact that at least some of the uses identified by BT's monitoring appear to fall outside the scope of uses envisaged by GC19 and for which the data was originally provided by individuals.
- 9.192 As noted at **paragraph 9.109**, these data control activities are activities that BT would not carry out as part of its voice telephony business as they are only necessary because BT is obliged to make the information available to other parties. This reasoning applies equally to non-BT GC19 data as well as GC19 data (to the extent to which that data relates to living individuals) and the data control activities will be common across both data sets. We therefore conclude that data control costs fall within **cost category d**. As such, we consider data control to be a relevant activity to ensure that GC19 data is made available in compliance with the DPA, and that it is therefore a cost associated with the communication of GC19 data to third parties and recoverable through the charges for GC19 data.
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law in accordance with Community law or by Community law in respect of services provided using electronic communications networks and services.

9.193 We have used BT's historic programme costs in order to quantify the costs associated with data control activities. These figures differ somewhat from BT's projections of future costs. Our approach has been to base our quantification of cost on BT's actual past costs, on the basis that such figures represent sounder evidence than BT's estimates of future costs. However, in the event that future data control costs are higher or lower than those estimated, and provided that those costs are proportionate to the risks associated with the distribution of BT's GC19 data, we would expect a respectively higher or lower cost to be passed on by BT through GC19 charges. Our estimate of the costs incurred by BT in data control is presented in **Table 9.9** below.

### **Additional labour costs**

9.194 BT stated in its response that it considers the FTE headcount totals used in our calculations to exclude some additional labour-related costs. These costs include, for example, FTEs covering for sickness, maternity leave, job handover, taking minutes in meetings, handling complaints, administration and reading. BT indicated that these labour-related costs should be reallocated to the task areas that are the beneficiaries of these additional FTEs, increasing the costs for recovery through charges for GC19 data.

9.195 We accept BT's suggestion that the provisional headcount totals included in the February 2007 document do not take account of the full scope of labour-related costs. We accept that it is relevant to take account of the costs associated with, for example, headcount managing performance and attendance issues and covering for the leave entitlements of Directory Solutions staff engaged in tasks relevant to making available GC19 data. We have therefore included the additional labour-related costs set out in **Table 9.7** below in the assessment of relevant costs in **Table 9.9** below.

### **Other costs**

9.196 BT stated in its response to the February 2007 document that it considers that certain other support costs incurred in the operation of OSIS are also relevant to making GC19 data available. These costs relate to expenses such as legal, human resources, accommodation and training. BT considers that it would not be able to fulfil its GC19 obligation without incurring these costs.

9.197 The support costs cited by BT are in part relevant to its supply of GC19 data, as these are necessary support costs, largely incurred in relation to the individuals employed within Directory Solutions. However, in consideration of these 'other costs', our primary concern was to establish whether these costs should be characterised as central overheads that are common with the provision of voice telephony services, and therefore whether they would not be recoverable through charges for GC19 data.

9.198 In response to the information request sent to it by us on 16 May 2007, BT stated that the costs provided in its management accounts (of which the data provided to us are an extract) do not include any management support costs other than those directly incurred within the unit, and therefore that they do not incorporate general overheads. We therefore consider that the support costs cited by BT are not common with its voice telephony activities.

9.199 In accordance with our approach to cost recovery set out in **paragraphs 9.67 to 9.76**, we have therefore included an element of these costs in our assessment of the costs of making available GC19 data in **Table 9.9** below.

## Ofcom's conclusions on costs recoverable from GC19 charges

9.200 **Table 9.3** below summarises our conclusions on which of the cost categories identified by BT are within the adjusted ceiling cost of making available GC19 data. We have identified twelve cost categories as being recoverable, in part or in full, through charges for the BT GC19 data set.

**Table 9.3: Cost categories recoverable from the BT GC19 data set**

Cost category	Relevance of cost to GC19		
	Not relevant	Relevant in part	Relevant in full
<b>Systems costs</b>			
Systems costs		✓	
<b>Labour costs</b>			
Receiving data in to OSIS	✓		
Transmitting data from OSIS			✓
Relationship management of upstream CPs (including billing)		✓	
Relationship management of downstream DIPs (including billing)			✓
Product development	✓		
Verification/checking of data received - prior to and during processing	✓		
Central grouping of data received	✓		
System maintenance and general data storage		✓	
Data management - post acceptance of data on OSIS	✓		
System administration		✓	
Onboarding - DIPs			✓
Onboarding - CPs	✓		
<b>Data control costs</b>			
Data control			✓
<b>Data collection costs</b>			
Data acquisition from other CPs		✓	
BT customer service channel 15X	✓		
BT upstream data team – people costs	✓		
BT upstream data team – general & admin costs	✓		
SDE entry costs	✓		
IT support	✓		
CSS costs	✓		
Central overhead	✓		



<b>Other costs</b>			
Depreciation		✓	
Support		✓	
Miscellaneous		✓	
OSIS replacement system costs	✓		

## Calculating GC19 costs

9.201 We have used BT's OSIS costs as a starting point for our analysis of the level of each of the cost categories identified as being recoverable through charges for GC19 data.

### BT's costs of providing directory data to OSIS

9.202 BT has provided cost data showing 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 1** of this explanatory statement.

9.203 In addition to that transfer payment data, we specifically requested that BT also provide to us information of the actual costs incurred by BT upstream in providing subscriber data to OSIS. These costs are set out in **Table 9.4** below.

**Table 9.4: BT's stated costs of providing directory data to OSIS<sup>140</sup>**

	2003/04	2004/05	2005/06
Customer Service Channel 15X	£[X]	£[X]	£[X]
Upstream Data Team - People Costs	£[X]	£[X]	£[X]
Upstream Data Team - General & Admin Costs	£[X]	£[X]	£[X]
SDE Entry Costs	£[X]	£[X]	£[X]
IT Support	£[X]	£[X]	£[X]
CSS Costs	£[X]	£[X]	£[X]
Central Overhead	£[X]	£[X]	£[X]
<b>Total</b>	<b>£[X]</b>	<b>£[X]</b>	<b>£[X]</b>

### BT's OSIS management accounts

9.204 During Ofcom's investigation, BT provided to us management accounting information for the running of OSIS for financial years 2003/04, 2004/05, 2005/06 and 2006/07. Following a request from us, BT disaggregated its management accounts into a number of separate cost items so that we had a more complete understanding of the activities driving BT's costs. **Table 9.5** below shows this breakdown of costs.

9.205 As we relate at **paragraphs 9.150 to 9.152**, the financial data provided by BT differs from that BT provided to us prior to the February 2007 document.

<sup>140</sup> We did not obtain details of BT's costs of providing directory data to OSIS for 2006/07 as it is not relevant to our assessment of costs and charges for BT's GC19 data.

**Table 9.5: BT's stated OSIS management accounts**

	2003/04, £	2004/05, £	2005/06, £	2006/07, £
<b>Systems Costs</b>				
Systems Costs	[X]	[X]	[X]	[X]
<b>Labour Costs</b>				
Receiving data in to OSIS	[X]	[X]	[X]	[X]
Transmitting data from OSIS	[X]	[X]	[X]	[X]
Relationship management of upstream CPs (including billing)	[X]	[X]	[X]	[X]
Relationship management of downstream DIPs (including billing)	[X]	[X]	[X]	[X]
Product development	[X]	[X]	[X]	[X]
Verification/checking of data received - prior to and during processing	[X]	[X]	[X]	[X]
Central grouping of data received	[X]	[X]	[X]	[X]
System Maintenance and general data storage	[X]	[X]	[X]	[X]
Data Management - post acceptance of data on OSIS	[X]	[X]	[X]	[X]
System Administration	[X]	[X]	[X]	[X]
Onboarding	[X]	[X]	[X]	[X]
WLR data management	[X]	[X]	[X]	[X]
<b>Data control costs</b>				
Data control	[X]	[X]	[X]	[X]
<b>Other Costs</b>				
Depreciation	[X]	[X]	[X]	[X]
Support	[X]	[X]	[X]	[X]
Misc.	[X]	[X]	[X]	[X]
OSIS replacement system costs	[X]	[X]	[X]	[X]
<b>Total costs</b>	[X]	[X]	[X]	[X]

**BT's stated 'end-to-end' costs of providing OSIS to DIPs**

9.206 In our view, the stated costs in **Table 9.5**, together with payments made to other CPs and the costs in **Table 9.4** above, provide the most appropriate 'end-to-end' view of the costs incurred by BT in providing the OSIS data to DIPs. **Table 9.6** 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 us.

**Table 9.6: BT's end-to-end view of the costs of providing OSIS to DIPs**

	2003/04	2004/05	2005/06
Providing data to OSIS	£[X]	£[X]	£[X]
Payments to other communications providers	£[X]	£[X]	£[X]
OSIS Systems costs	£[X]	£[X]	£[X]
OSIS Labour costs	£[X]	£[X]	£[X]
Data control costs	£[X]	£[X]	£[X]
Other OSIS costs	£[X]	£[X]	£[X]
<b>Total restated OSIS costs</b>	<b>£[X]</b>	<b>£[X]</b>	<b>£[X]</b>

## **Ofcom's assessment of recoverable costs**

9.207 We assessed the cost estimates provided by BT in relation to the twelve cost categories identified by us in **Table 9.3** as being recoverable (in full or in part) through charges for GC19 data. In light of this assessment, we have undertaken certain adjustments to some of these costs to derive our estimate of relevant cost for the supply of BT's GC19 data. These adjustments are described below.

### Data acquisition (under GC19.2)

9.208 We concluded in **paragraph 9.136** that certain of BT's own costs appear to be a reasonable proxy for the charges that it is likely to face from CPs for data under GC19.2. We have, therefore, multiplied BT's own cost per downstream customer (of transmission, relationship management and onboarding) by the number of CPs that supply GC19.2 data to BT (28 CPs) to derive the total cost of this activity.

### Transmitting data from OSIS

9.209 No adjustments were made to the cost estimate provided by BT, other than those set out in **paragraph 9.234**.

### Relationship management of upstream CPs (including billing)

9.210 BT informed us that these costs relate primarily to the administration involved in the billing of BT by CPs. As such, we consider that these costs are relevant to the supply of GC19 data due to the terms of GC19.2.

9.211 BT indicated that certain training costs, which related to the production of training materials and the organisation of training sessions, are not relevant to the supply of GC19 data. The related costs have therefore been excluded from our calculations.

9.212 Further adjustments were made to the cost estimate provided by BT, as set out in **paragraph 9.234**.

### Relationship management of downstream DIPs (including billing)

9.213 No adjustments were made to the cost estimate provided by BT, other than those set out in **paragraphs 9.234**.

### System Maintenance and general data storage

9.214 BT argued that all tasks undertaken in this activity category are relevant to GC19, but indicated that the cost associated with the stand-alone GC19 product was substantially lower than the full OSIS cost. The GC19 adjusted ceiling cost has been calculated by multiplying the OSIS cost by the ratio of the quantity of other CP listings on BT number ranges (i.e. numbers allocated to BT but subsequently ported to other CPs) to the total quantity of listings on OSIS. (This multiplier is used to derive the quantity of data BT only holds by consequence of the supply of data by other CPs under GC19.2.)

9.215 We consider that one task within this activity category, related to the processing of manual data compilation orders, is not relevant to the supply of GC19 data. Since

GC19 data entries amount to relatively simple files that can be automatically transferred to BT's downstream systems, manual intervention should not be required.

- 9.216 In addition, a number of other adjustments were made to the cost estimate provided by BT, as set out in **paragraphs 9.234**.

### System Administration

- 9.217 BT argued that the majority of tasks undertaken in this activity category are relevant to GC19, but indicated that the cost associated with the stand-alone GC19 product was substantially lower than the full OSIS cost. As such, an adjustment has been made to derive the adjusted ceiling cost. This factor is the same as that set out in relation to System Maintenance above.

- 9.218 BT also indicated that certain training costs, which relate to the training environment on OSIS, are not relevant to the supply of GC19 data. The related costs have therefore been excluded from our calculations.

- 9.219 In addition, a number of other adjustments were made to the cost estimate provided by BT, as set out in **paragraphs 9.234**.

### Onboarding - DIPs

- 9.220 In its response to the February 2007 document, BT separated the 'Onboarding' activity category into activities relating to upstream and downstream onboarding: 'Onboarding – CPs' and 'Onboarding – DIPs' respectively. This recategorisation tallied with our previous separation of tasks as illustrated in the February 2007 document.

- 9.221 No adjustments were made to the cost estimate provided by BT, other than those set out in **paragraphs 9.234**.

### Systems Costs

- 9.222 We have sought details from BT of the costs associated with the systems necessary to collect, aggregate and make available GC19.1(b) data. BT has confirmed to us that, as it currently does not provide GC19 data (including GC19.1(b) data) separately but rather as part of OSIS, it does not have details of the specific systems costs that it would need to incur if it were to make GC19 data available through a stand-alone system. On the basis of its systems costs associated with the OSIS data set, details of which it has provided to Ofcom, BT has estimated that the cost of systems necessary for dealing with GC19.1(b) data and making GC19 data available would amount to around £[redacted] and that the costs of the system associated with customer relationship management amount to around £[redacted]<sup>141</sup>. BT has been unable to substantiate these estimates but has based them on its understanding of the systems required to operate a less complex data set than that included in OSIS.

- 9.223 We have considered different ways in which we could validate BT's estimate of the costs that would be associated with putting in place the systems described above.

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<sup>141</sup> This figure is the cost associated with Siebel, the customer relationship management system operated by BT in respect of the management of relationships with DIPs for all GC19 data.

We have spoken to our own internal IT team and our external IT suppliers and have also spoken to several IT consultants.

- 9.224 The easier of the two estimates for us to validate has been the customer relationship management systems costs. We ourselves use a system supplied by Siebel for managing our contacts and complaint handling so we have been able to compare BT's cost estimate with our own ongoing costs of running the system, taking into account any variances in the use of the systems. In light of this assessment, we are satisfied that BT's cost estimate of £[><] per annum for Siebel costs appears to be reasonable and that BT is entitled to recover these costs through charges for GC19 data.
- 9.225 Validating BT's systems cost estimates for collecting and making available GC19.1(b) data has, however, proved more difficult. The systems required by BT are complicated in that they need to be able to link to the systems of upstream CPs that are sending it data and also with the downstream DIPs to whom the data is transferred, as well as storing the data. The systems are therefore of a bespoke nature and without comprehensive details of the exact nature of the upstream and downstream systems to which they are required to be linked, any attempt to obtain quotes from IT suppliers for a comparable system (i.e. a bottom-up approach) would not be informative. We have therefore assessed the validity of BT's cost estimates on the basis of comparing the functionality required by the GC19.1(b) systems with those of the OSIS and LORS systems.
- 9.226 On the basis of our discussions with our internal IT team and our external IT suppliers, we understand that there are three main cost drivers for systems of this nature:
- (i) the cost of having a system (regardless of the volume of data within it) capable of linking with the systems of upstream CPs and downstream DIPs;
  - (ii) the number of records stored in the system; and
  - (iii) the number of fields in the records and their complexity.
- 9.227 There is likely to be little difference in systems requirements between the systems required for GC19.1(b) data and those of the current OSIS systems. BT is likely to need to obtain GC19.1(b) data from a similar number of CPs (around 28) as from which it currently gathers data for OSIS and provide that information to (potentially) the same number of downstream DIPs (approximately 40). The cost to BT of having a system capable of linking with those of CPs and DIPs in relation to GC19.1(b) data is therefore likely to be broadly similar to that of the current OSIS system.
- 9.228 The GC19.1(b) systems will, however, not be required to hold the same volume of data. The number of records that the system will need to hold will be substantially lower than those held within OSIS, given that GC19.1(b) comprises only data relating to ex-BT subscribers using numbers originally allocated to BT, in contrast with OSIS which may potentially hold data on all subscribers of telephony services in the UK. Additionally, the GC19.1(b) systems will require fewer fields than the OSIS systems as only around 30% of the OSIS fields contain data that may be considered to be GC19 data (see **Table 8.2** in **paragraph 8.272** above).
- 9.229 Having regard to the amount paid by BT to its IT supplier for OSIS systems, we consider that the estimate provided by BT for the cost of systems necessary to provide BT GC19 data on a stand-alone basis (which is significantly lower than the

OSIS systems cost) appears to be reasonable. We have therefore included this figure in our calculation of the adjusted ceiling cost for the BT GC19 data set, as set out in **Table 9.8**.

### Data control

- 9.230 BT provided us with its forward-looking view of costs for its data control programme. Our approach has been to base our estimate of the adjusted ceiling cost for GC19 on BT's actual compliance programme for the years 2003/04 to 2006/07. These costs relate to BT's licensing and auditing activities, as well as (for later years) data seeding and product check programmes.
- 9.231 As we discuss further at **paragraph 9.247**, we have determined a per-DIP charge for GC19 data. This does not preclude, and is intended not to preclude, usage-based charging in the future. However, for the purpose of determining a cost-oriented charge within a per-DIP charge structure, we have adjusted BT's stated auditing costs to reflect the fact that the monitoring of usage levels is not relevant for GC19 data. We have therefore reduced the auditing costs by identifying the proportion of auditing activity that relates specifically to monitoring usage levels and reducing the total auditing costs by this proportion. This is a relatively small adjustment as the bulk of BT's auditing activity relates to other activities such as ensuring that the data is being used for the purposes set out in GC19 (i.e. for the provision of directories or directory enquiry facilities) and that the use of the data is consistent with data protection legislation.

### Other costs

- 9.232 For support and miscellaneous costs, we consider that the costs under consideration are likely to be predominantly driven by the number of FTEs. As a result it is possible to calculate the amount of such costs which are relevant to GC19 data. We have derived, for each year in the period under analysis, the ratio of 'FTEs relevant to GC19' to 'FTEs engaged in providing OSIS'. We have applied this ratio to the 'other costs' total provided by BT (which relates to its provision of OSIS) to derive the quantity of such costs relevant to GC19.
- 9.233 For depreciation costs, BT indicated that the costs relevant to GC19 are around one-third less than those incurred in providing the wider OSIS product. We have therefore included this adjusted quantity of cost in our calculation of the cost relevant to recover through charges for GC19 data. For the financial year 2006/07, BT indicated that the majority of its depreciation charge for the year related to the OSIS Replacement System, which we do not consider relevant to GC19. Therefore, to ensure that we only include legitimately recoverable costs, for 2006/07 we have assumed that the depreciation cost relevant to GC19 is unchanged from that for 2005/06.

### Other changes to costs

- 9.234 In addition to the changes outlined above to the twelve cost categories identified by us as being relevant for GC19 purposes, we have also made amendments to certain labour costs:
- (i) **Additional labour costs:** The headcount figures relevant to the above labour categories have been adjusted to include additional labour costs that we consider are relevant to the supply of the GC19 data product. We have concluded that each of the tasks displayed in **Table 9.7** below may be relevant

to BT's supply of its GC19 data where they are in support of activity categories that are relevant to GC19. Our approach has been to calculate the cost associated with the additional FTEs accounted for by these additional labour costs. We have then allocated this cost across labour cost categories within OSIS. Only those additional labour costs that were allocated to activity categories that we consider to be relevant to GC19 have been included in our charge calculation.

**Table 9.7: Additional labour costs relevant to GC19**

Work area	Specific tasks
People Development	Substitution and handovers for other roles, managing performance and attendance issues, conducting and attending one-to-ones and team meetings, preparing, writing, attending, and counselling annual and quarterly performance reviews.
Other legitimate time taken by OSIS related people.	Annual, sick, maternity, parental, special leave and time off in lieu.
Regular Commitments (Individuals)	Admin (including mandatory training) and reading
Processes and Procedures*	Reviewing currency and content, administering, writing, managing, publishing, and removing processes, procedures, Industry manuals and documentation.

\* These tasks are only required to provide support in certain activity areas. For example, the work area 'Processes and Procedures' is only relevant to 'relationship management of upstream CPs' and 'relationship management of DIPs'. These tasks are only included within our cost calculations where we consider the activity area they are required to support is relevant to GC19.

- (ii) **Systems-related labour costs:** BT has indicated that certain costs that had originally been reported to us as non-labour systems costs are, in fact, systems-related *labour* costs. These costs relate to internal and external IT staff engaged in the provision of OSIS. Certain of these IT staffing costs fall within the adjusted ceiling cost of GC19, so these costs have also been included in Ofcom's calculations. The associated costs have only been included in the activities in **Table 9.8** for which they are relevant.

### Summary of identified adjusted ceiling costs

9.235 We have therefore identified in **Table 9.8** below the adjusted ceiling costs that we consider would be recoverable from the BT GC19 data set.

**Table 9.8: Ofcom's view on adjusted ceiling costs recoverable from provision of BT GC19 data set**

Cost category	2003/04, £	2004/05, £	2005/06, £	2006/07, £
Systems Costs	[X]	[X]	[X]	[X]
Transmitting data	[X]	[X]	[X]	[X]
Relationship management of upstream CPs	[X]	[X]	[X]	[X]
Relationship management of DIPs	[X]	[X]	[X]	[X]
System Maintenance and general data storage	[X]	[X]	[X]	[X]
System Administration	[X]	[X]	[X]	[X]

Onboarding - DIPs	[X]	[X]	[X]	[X]
Data control	[X]	[X]	[X]	[X]
Other costs	[X]	[X]	[X]	[X]
Data acquisition (under GC19.2)	[X]	[X]	[X]	[X]
<b>Total recoverable costs</b>	<b>[X]</b>	<b>[X]</b>	<b>[X]</b>	<b>[X]</b>

Note: Individual cost items are presented rounded to the nearest £1, but are not rounded in our calculations. Therefore, individual items as presented here may not sum to the total.

9.236 We note that, in most cases where we set regulated cost-oriented charges, we will have regard to whether a cost of capital employed should be included. In this case, it is not clear what BT's capital employed would be. Although BT's regulatory accounting system shows negative capital employed for the 'Directory Information' product group for 2003/04 and 2004/05, 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, our view is that overall there is not likely to be significant positive capital employed in the provision of the BT GC19 data set, and therefore an allowance for the cost of capital employed has not been made.

### Apportioned costs

9.237 In the February 2007 document, we presented our view of the adjusted ceiling for costs incurred by BT in making available GC19 data, and from this figure derived a charge ceiling for BT's GC19 data. We acknowledged that this charge ceiling was the maximum figure that BT would be entitled to charge, as it includes full recovery of common costs between the BT GC19 data set and other directory information products.<sup>142</sup> However, our expectation would be that BT's actual charge for GC19 data would be lower than this ceiling, anticipating that contributions to common costs would be made by charges for other directory information products as well as charges for the BT GC19 dataset.

9.238 In its response to the February 2007 document, BT presented its view of the relevant costs of its GC19 data and additionally provided 'apportioned costs' for its GC19 data, which included an allocation of common costs between its data products. In order to more accurately identify the costs that BT may recover through its charges for GC19 data, we have therefore taken the decision to apply the methodology identified by BT to the common costs identified above.

9.239 Because of their nature, there is no uniquely 'correct' way in which to allocate common costs (i.e. they are not causally related to a given product which shares them). In setting charges for a given product (including regulated charges) there are a number of methods which might be reasonable to calculate the contribution to costs which are common with other products. BT's approach in this case has been to split costs identified within OSIS on the basis of apportionment factors that vary between categories of cost. For the following reasons we have therefore applied BT's apportionment methodology for those categories of cost deemed relevant to the provision of GC19 data:

- (i) We recognise that common costs can be recovered in a variety of ways;

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<sup>142</sup> See paragraph 10.123 of the February 2007 document



- (ii) It would be unusual to set regulated charges in which a given product contributed to all costs which it shared in common with other products;
- (iii) In the absence of a clearly more reasonable apportionment methodology, we have, in the circumstances, used BT's apportionment methodology (but only for those costs we have identified as recoverable).

9.240 In applying this methodology to obtain apportioned costs, we have proceeded as follows:

- (i) for those costs associated with activities we consider relevant to the provision of GC19 data, and where BT has explicitly presented an apportionment factor, we have applied this factor to the cost associated with the particular activities in question; and
- (ii) for those costs associated with activities we consider relevant to the provision of GC19 data, and where BT has not explicitly presented an apportionment factor but has instead presented its estimates of adjusted ceiling costs and apportioned costs, we obtained apportioned costs by calculating the ratio of apportioned costs to adjusted ceiling costs implicit in BT's cost estimates and applying this to our view of the appropriate adjusted ceiling cost in question.

**Table 9.9: Ofcom's view on apportioned costs recoverable from provision of BT GC19 data set**

<b>Cost category</b>	<b>2003/04, £</b>	<b>2004/05, £</b>	<b>2005/06, £</b>	<b>2006/07, £</b>
Systems Costs	41,974	41,974	41,974	41,974
Transmitting data	45,025	27,066	17,863	16,298
Relationship management of upstream CPs	92,511	86,538	52,483	66,599
Relationship management of DIPs	438,481	413,864	312,926	368,750
System Maintenance and general data storage	35,400	39,485	21,596	6,426
System Administration	6,934	4,251	3,871	4,572
Onboarding - DIPs	18,007	16,441	7,486	8,891
Data control	70,229	303,278	181,246	239,622
Other costs	103,009	122,346	95,009	61,493
Data acquisition (under GC19.2)	401,211	297,822	220,272	256,518
<b>Total recoverable costs</b>	<b>1,252,783</b>	<b>1,353,065</b>	<b>954,727</b>	<b>1,071,143</b>

Note: Individual cost items are presented rounded to the nearest £1, but are not rounded in our calculations. Therefore, individual items as presented here may not sum to the total.

## Fixing the charge for the BT GC19 data set

### The charging structure

9.241 The principle of cost orientation dictates that a cost-oriented charging structure is appropriate (to the extent possible), in line with the Advocate General's Opinion and the ECJ in *KPN*. We have 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.

9.242 We set out below the relevant cost drivers in relation to each of the relevant cost items identified in **Table 9.9** above. It should be noted that, if the BT GC19 data set is supplied in a variety of forms in the future (for example, if DIPs receive data at different frequencies or in different formats from one another), it may be appropriate to deviate from the charge structure specified.

### Cost drivers

9.243 In the February 2007 document, we identified three cost items – transmission of data to DIPs, relationship management of downstream DIPs and onboarding – that we considered could be recovered through charges for GC19 data. We identified that, in the case of costs associated with the transmission of data to DIPs and the relationship management of DIPs, the costs were likely to be driven predominantly by the number of DIPs. In relation to onboarding costs, we identified that the costs were likely to vary with the number of new DIPs for which the activities were necessary. In the interests of simplicity and on the basis that this cost is relatively minor, we proposed that the onboarding cost be apportioned equally across DIPs as well.

9.244 As noted above, we now consider it relevant to include additional costs for recovery through BT's GC19 charge. Most of these additional costs are fixed costs that are invariant both to the number of DIPs to which GC19 data are supplied and to the volume of data that are supplied to DIPs. We believe that the relevant cost drivers for the additional costs are as follows:

- (i) Data acquisition costs – these costs are dependent on the costs incurred by other CPs in making data available to BT and are therefore driven by the number of CPs from which BT acquires data.
- (ii) Systems costs – these are largely driven by the minimum system size providing the capability to link with upstream CP and downstream DIP systems, the number of records in the system, and the number and complexity of fields in these records.
- (iii) Systems maintenance and data storage costs – these are likely to be partly related to the minimum system size and partly a cost driven by the volume of GC19 data entries.
- (iv) System administration costs – these are likely to be driven by the size of the system used.
- (v) Upstream CP relationship management costs – these costs are likely to be driven by the number of CPs supplying data to BT.
- (vi) Data control costs – these costs are likely to be driven by the number of DIPs as they relate to the monitoring of how DIPs use GC19 data.
- (vii) Other costs – for the most part, these costs are likely to be driven by the number of FTEs engaged in activity relevant to GC19 (and in relation to whom these support activities are provided).

9.245 There is no obvious structure of charges to DIPs that will reflect cost causation for the above cost items which are fixed in relation to the number of DIPs or DIP usage. The approach to cost recovery set out by us in **paragraphs 9.67 to 9.76** does not relate to the design of the charging structure through which these fixed costs are recovered by BT.

9.246 Therefore, in respect of the recovery of these fixed costs, a number of charging structures would be compatible with our stated cost recovery principles. Potentially compatible structures may include both per DIP charging and usage-based charging. Each of these options has associated advantages and disadvantages. For example:

- While a uniform per DIP charge has the advantage of being simple to calculate and apply, per DIP charges transfer volume risk from the seller to the buyer (i.e. DIPs). Moreover, if the number of DIPs requesting GC19 data is low, the per DIP charge could be considerable and potentially act as a deterrent to entry.
- Whereas usage based charges mean that large users (who are likely to correspondingly value access to the data more) contribute more to the recovery of fixed costs and do not transfer volume risk to DIPs, usage based charges transfer volume risk to the seller and additionally require metering of usage which is likely to add to costs. Furthermore, they could have a greater impact on downstream prices by creating a (perceived) marginal cost of data usage.

9.247 The advantages and disadvantages outlined above are illustrative only. Given that some of the additional GC19 costs now considered relevant are fixed (see **paragraph 9.244**), there are a number of issues around the appropriate structure of charges which might be debated. Previously, as noted in **paragraph 9.243** above, the costs identified as relevant were considered by us to vary with the number of DIPs. It was not, therefore, necessary to trade-off the advantages and disadvantages of different charging structures. In the interests of concluding these disputes and because there does not appear to be a uniquely correct choice of charging structure, we have retained the simplest structure available: a uniform per-DIP charge. Nevertheless, we explicitly do not seek to preclude other charging structures for the future provision of GC19 data, nor indeed for OSIS.

### The cost-oriented charge for the BT GC19 data set

9.248 Using the methodology described above, we have determined charges for the supply by BT of its BT GC19 data set since 25 July 2003 as set out in **Table 9.10** below. As indicated above and as set out in **paragraphs 9.201 to 9.240**, we have set these charges using available cost information for the financial years 2003/04, 2004/05, 2005/06 and 2006/07. In fixing these charges, we have 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.

**Table 9.10: Ofcom's view on cost oriented annual charges for BT GC19 data set (£ per DIP p.a.)**

	2003/04	2004/05	2005/06	2006/07
Total recoverable costs	£1,252,783	£1,353,065	£954,727	£1,071,143
Number of DIPs purchasing OSIS during period	35	43	43	43
<b>Cost oriented annual charge<sup>143</sup></b>	<b>£35,800<sup>144</sup></b>	<b>£31,500</b>	<b>£22,200</b>	<b>£24,900</b>

<sup>143</sup> As discussed above, several of the costs identified by us are based on estimates of what it would cost BT to provide its GC19 data. Given this, and in the interests of simplicity, we have rounded the charges to the nearest £100.

<sup>144</sup> This charge has been calculated for the whole 12 month period. Given the need to identify the charge that should apply from 25 July 2003, this needs to be pro-rated. This is done in **Table 9.11**.

- 9.249 However, this only produces figures for the financial years 2003/04, 2004/05, 2005/06 and 2006/07. We are 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, we have 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 2006/07, we have set the (annual) cost-oriented charge for following years equal to that calculated for the financial year 2006/07.
- 9.250 In the February 2007 document we set charges going forward at the same level as charges for the preceding year for which data was available. For the reasons set out below, we consider it reasonable to continue with this approach to setting future charges.
- 9.251 Between 2003/04 and 2004/05 and between 2005/06 and 2006/07, recoverable costs increased. These two instances of year-on-year increases, particularly for the most recent year for which data is available, might suggest setting a higher charge for 2007/08 than the previous year were it not against a background of overall lower costs at the end of the period than at the start (2006/07 recoverable costs are lower than 2003/04 costs). Similarly costs per DIP have declined overall, but increased in the most recent year for which data is available (despite the number of DIPs remaining the same). We have therefore concluded that, on balance, it is reasonable to set the same charge for 2007/08 as for 2006/07.
- 9.252 Moving forward, 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.
- 9.253 In conclusion, **Table 9.11** below presents appropriate charges since 25 July 2003 for the provision of the BT GC19 data set to The Number and Conduit.

**Table 9.11: Charges for the BT GC19 data set**

Period	Charge for BT GC19 data set during period (per DIP) <sup>145</sup>
25 July 2003 – 31 March 2004	£24,400
1 April 2004 – 31 March 2005	£31,500
1 April 2005 – 31 March 2006	£22,200
1 April 2006 – 31 March 2007	£24,900

<sup>145</sup> As discussed above, several of the costs identified by us are based on estimates of what it would cost BT to provide its GC19 data. Given this, and in the interests of simplicity, we have rounded the charges to the nearest £100.

1 April 2007 - 31 March 2008 and each subsequent consecutive period of 12 months beginning on 1 April and ending on 31 March	£24,900 <sup>146</sup>
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## Charges moving forward

- 9.254 In **Table 9.11** above, we have 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 going forwards (i.e. on the day after the publication of this final determination).
- 9.255 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 of BT GC19 data and non-BT GC19 data, then it is beyond the scope of these disputes for us to determine what the charges for the bundled product should be or what the charges for the non-BT GC19 data set within OSIS should be.
- 9.256 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.
- 9.257 The charges set by us in **Table 9.11** reflect the costs identified by us at this point and assumptions about the number of DIPs currently purchasing the data within OSIS and the frequency that data is provided to them. For this reason, charges moving forwards may vary from those set out in **Table 9.11** if the costs change or the assumptions prove incorrect in future.
- 9.258 That said, the principles of cost recovery 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 and which are otherwise within the charges identified herein are relevant.

## The claims for retrospective adjustment of alleged overpayments

- 9.259 We have set out above our conclusions 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 Number and Conduit that we should exercise our discretion under section 190(2)(d) to issue a direction setting such charges.
- 9.260 However, as we 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 5** of this document, we remain of

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<sup>146</sup> This charge should apply for the 12 month period unless there is a cost-based justification for changing this determined charge, such as any increase or decrease in costs identified in **Table 9.9**. If the charge is changed mid-year, the above specified charge should be pro-rated for any period of less than 12 months for which the GC19 data is supplied.

the view that USC7 is unlawful. Therefore, this brings us 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.

- 9.261 In considering that issue, a preliminary matter for our 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 9.37 to 9.41** above, we consider that the parties wanted and requested all of the data within OSIS.<sup>147</sup>
- 9.262 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 us in **paragraph 9.6** 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 more in OSIS than just the GC19 data set.
- 9.263 On that basis, there is no means for us to identify what implicit price was actually 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 us. As a result, there is no clear means to assess whether any issue of historic overpayment for the BT GC19 data set exists. However, we have considered whether there may be any other means to derive the implicit price paid for the BT GC19 data set and assess whether any meaningful case of "overpayment" for that data arises.
- 9.264 As discussed at **paragraphs 9.42 to 9.51** above, The Number proposed a methodology for identifying such an implied price in its response to the August 2006 document. This was based on our identifying the price ceiling for the non-BT GC19 data set within OSIS (i.e. notional products (ii) to (iv) as defined by us in **paragraph 9.6** 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 in the February 2007 document, we 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 cost oriented charges set by us 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.
- 9.265 In our 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 us would be

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<sup>147</sup> Albeit, for reasons set out in **Section 6**, 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, which information is a sub-set of OSIS.

to identify any overall "overpayment" first based on what was paid for the OSIS data compared with the sum of:

- (i) the price for the BT GC19 data set (i.e. the charges 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.

9.266 If any overall "overpayment" would be identified on that basis, we could then consider whether there was an appropriate means for apportioning the "overpayment" between the two broad products. For instance, one option considered by us would be to assume that the same overall percentage overpayment was applied to each product – i.e. if we were to identify that the overall OSIS charge was (say) 20% higher than the identified overall 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>148</sup>

9.267 The starting point for the above exercise would be an assessment of what the price ceiling should be, under competition law, for the non-BT GC19 data set. In our 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 apportionment of the "overpayment" is also arbitrary - as for the "overpayment" scenarios considered above, it lacks objective validity. Furthermore, the fact is that The Number and Conduit purchased both the BT GC19 data set and the other data in OSIS. 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).

9.268 In other words, should The Number or Conduit wish to submit a formal complaint to us (or another competition authority) that BT has breached competition law in its current charging for OSIS overall, then we could consider it. In Ofcom's case, whether a formal investigation under the Competition Act 1998 and/or Article 82 of the EC Treaty is required would be determined under our normal processes for competition law investigations, including our relevant guidelines.<sup>149</sup>

9.269 Accordingly, we have not adopted 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 clearly identifiable). On that basis, no issues arise as to us exercising our discretion under section 190(2)(d) of the 2003 Act to require the payment of sums by way of an overpayment (if any).

9.270 Thomson considers that our decision that it would not be appropriate to attempt to evaluate overcharging for the BT GC19 data set (as set out at **paragraphs 9.42 to 9.51** above) is unsatisfactory but it points out that, even if that would be correct, Thomson is nonetheless entitled to recover the excessive charges that it has incurred from BT since 25 July 2003. Specifically, Thomson points out that:

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<sup>148</sup> For the avoidance of doubt, the figure of 10% is purely hypothetical for illustrative purposes. No overcharge has been calculated.

<sup>149</sup> [http://www.ofcom.org.uk/bulletins/eu\\_directives/guidelines.pdf](http://www.ofcom.org.uk/bulletins/eu_directives/guidelines.pdf)



- (a) it would be neither unreasonable nor arbitrary to apportion the price actually paid for the OSIS data between the BT GC19 data set and the other data on the basis of the volume of data elements supplied; and
- (b) Our reasoning of The Number wanting and receiving all of the OSIS data (i.e. the full bundle) is not applicable to Thomson as it specifically asked BT to supply its own number data separately, hence BT did not give it a choice between GC19 and USC7 data and therefore the GC19 data was paid for at the same price as USC7 data.

9.271 Thomson further argues that in light of our application of the cost recovery principles and the 66 pence per record that BT pays to other CPs, we should require BT to act immediately to reduce its own costs by requiring each of the CPs that supplies it with subscriber information to properly assess their own costs of providing that information. The cost savings should then be passed on to OSIS licensees.

9.272 We disagree with Thomson's view that apportioning the price actually paid for OSIS between GC19 data and non-GC19 data on the basis of the volume of data elements supplied is a reasonable and non-arbitrary apportionment method. This methodology calculates an average price per data element. But we do not have evidence to suggest that this was the basis on which BT set its price for the OSIS bundle. Furthermore, the methodology implies that DIPs value each data element equally, which seems to us to be an arbitrary assumption. We do not have a clear reason to suppose that, if fields containing BT GC19 data account for x% of data fields in OSIS, that they should also account for x% of the value of OSIS. The value of a data element would seem likely to vary depending on the data element in question – for example, name may well be more important than title, and different DIPs are likely to value data elements differently (especially depending on the nature of the downstream product they supply). Our view remains that no clear and non-arbitrary method is available for determining in these disputes the price paid for the BT GC19 and non-BT GC19 data sets.

9.273 The question of whether Thomson specifically asked BT for the supply of GC19-only data and any implications that this might have in relation to Thomson's claims for a refund are not part of the dispute that we are resolving here, but rather are relevant to the separate complaint that Thomson submitted and which we are in the process of investigating. We expect to publish our conclusions in relation to Thomson's complaint shortly.

9.274 We have considered Thomson's comments about the cost to BT of obtaining information from other CPs and factored them into our assessment of BT's GC19 costs (see **paragraphs 9.130 to 9.139** above). Our conclusions only apply to GC19 data and that, in light of our conclusions about USC7, there is no obligation on other CPs to provide non-GC19 data to BT or for them to charge for the provision of this information on a cost-oriented basis.<sup>150</sup>

### **Allegation of 'double recovery' of costs**

9.275 In its response to the February 2007 document, The Number further alleges that BT has recovered all or part of the costs associated with collecting and compiling basic

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<sup>150</sup> This is with the exception of data supplied by CPs to BT under GC19.2, where this data relates to numbers originally allocated to BT and subsequently ported to other CPs.



information about its subscribers from OSIS licensees when it has already recovered those costs from its subscribers. The Number argues that the *KPN* judgment makes clear that this 'double recovery' of costs is not permitted and that OSIS licensees should be entitled to a refund.

9.276 We identified in the February 2007 document<sup>151</sup> that costs associated with collecting and compiling GC19 information on BT's subscribers fall within **cost category b** (i.e. common costs between voice telephony and GC19) and should therefore not be recovered through the charges for GC19 data. In addition, as **category b costs** are only common between voice telephony and BT's GC19 data set, and not other directory information products, cost recovery principles suggested that these costs should not be recovered from charges for other directory information products either.

9.277 In the February 2007 document, two activities were considered as falling within **cost category b**, namely:

- (i) Customer Service Channel 15x relating to obtaining the directory status of subscribers (see paragraph 10.87 of the February 2007 document);
- (ii) Upstream Data Team activities relating to rectifying problems and amending entries where appropriate to ensure the passing of accurate data to OSIS (see paragraph 10.93 of the February 2007 document).

9.278 The Number argues that to the extent that any of these **category b costs** have been passed on by BT to OSIS licensees, these costs must represent a "double recovery" and should not have been passed on. We should therefore quantify the magnitude of these costs and the appropriate amount refunded to OSIS licensees.

9.279 In addressing The Number's overcharge argument in relation to **category b costs**, we consider that The Number's reasoning is essentially premised on three steps, all of which must be satisfied. We characterise those steps as being:

- (i) The set of **category b costs** must not be empty<sup>152</sup> and some **category b costs** must have been allocated to OSIS through BT's accounting systems (this follows from our meaning of **category b costs** as read in light of *KPN*, see **Figure 9.1**);
- (ii) Any **category b costs** must have been taken into account by BT in setting charges for OSIS;
- (iii) It can reasonably be inferred that the implicit price for GC19 data within the pure OSIS bundle has included some contribution to **category b costs**. (**Category b costs** are not in the stand-alone cost of other directory information products (i.e. products (ii) to (iv) discussed in **paragraph 9.6**). Therefore, if they have been taken into account when setting charges for the pure OSIS bundle, this must only have been because they are relevant (but for *KPN*<sup>153</sup>) to BT GC19 data.)

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<sup>151</sup> See paragraph 10.71 of the February 2007 document

<sup>152</sup> In the February 2007 document, we provisionally concluded that part of the Customer Service Channel 15X costs and UDT costs fell within **category b**.

<sup>153</sup> The OSIS product was developed, and its cost structure determined, before the ruling in *KPN* case. The *KPN* case clarifies that costs common with voice telephony products should not be recovered through charges for the directory information of a CP's subscribers. Absent the *KPN*

- 9.280 Arguably there might also be a fourth step necessary for The Number's reasoning to hold, namely that there are no offsetting effects such as either BT failing to include costs relevant to GC19 or other directory information when setting OSIS charges, or a shortfall in OSIS revenues compared to OSIS costs. However, in respect of the latter at least, analogously to the problem of allocating a general overcharge for OSIS between BT GC19 data and other directory information products (see **paragraphs 9.42 to 9.51** above), there would be the problem of having to rely on an arbitrary (and therefore potentially unfair) allocation of amounts (under-) paid.
- 9.281 With regard to step (i) the analysis at **paragraphs 9.83 to 9.200** above reveals that in respect of the costs which BT has posted in its management accounts to OSIS, none of these are common between only voice telephony and BT GC19 data – i.e. there are no costs which can be appropriately characterised as **category b costs**. Therefore, step (i) in **paragraph 9.279** fails.
- 9.282 While the reasoning in step (iii) is of superficial appeal, it fails to draw a distinction between what was actually charged for BT's GC19 data and what should have been charged. Identification of cost categories relevant to a particular product allow (under cost-orientation principles) specification of what charges should have been for that product. However, the identification of cost categories does not allow one to identify what was actually charged. We agree with The Number that, even if **category b costs** were non-zero, BT should not have recovered such costs from its charges for BT GC19 data. However, as argued at **paragraph 9.14** above when a product is only available as part of a pure bundle (as BT's GC19 data was as part of the OSIS bundle), then there is typically no readily identifiable actual (implicit) price for that product. Therefore, step (iii) in **paragraph 9.279** also fails.
- 9.283 To conclude, we consider that at least two of the steps necessary for The Number's allegation of overcharge in respect of **category b costs** do not hold and that there is therefore no evidence that BT has "double recovered" or "inappropriately recovered" costs through its charges for GC19 data.
- 9.284 Therefore, we are not requiring BT to repay any money to The Number or Conduit.

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decision, economic principles of cost recovery suggest that it is reasonable to share the recovery of common costs between the products to which they are common.

## Section 10

# Award of costs

## Background

- 10.1 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, we should exercise our 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 us. (Prior to the publication of the August 2006 document, Conduit had not made a similar request to us for its costs and expenses, so we dealt only with The Number's request in that document).
- 10.2 In support of its request, The Number considered that we should give such direction taking into account the reasons why it had to refer the dispute to us, namely, in The Number's view, BT had refused:
- to provide it with cost information;
  - to discuss with it the implications of the *KPN* judgment for BT's charging;
  - to engage in negotiations with it at all on BT's charging.
- 10.3 The Number made a similar request in its Amended Request for us 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.

## Requested directions regarding costs in referring the present disputes

### Ofcom's position in the August 2006 document

- 10.4 We have 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, we noted that our 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.

- 10.5 We have never exercised our discretion to award costs under section 190(6)(a) in any regulatory dispute. Nonetheless, we considered in the August 2006 document The Number's requests carefully, but we decided not to make the direction The Number has requested for the reasons set out below.
- 10.6 First, we considered that we 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 us in light of its provisional findings set out in the August 2006 document.

- 10.7 Second, we did not consider that the three reasons given by The Number for claiming its costs supported The Number's claim. In particular, we 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 referral to us so as to suggest that BT should pay The Number's costs. In this context, we noted that we had in these disputes been asked to determine several issues of law or construction under relevant legislation or regulation. We 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.
- 10.8 For these reasons, we did not propose to exercise our 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**

- 10.9 In its joint response to the August 2006 document, The Number requested us to reconsider its claim to reimbursement of its costs and, should we make a determination requiring BT to pay some or all of The Number's costs, Conduit at this point also requested that we should make such a determination in relation to its costs for similar reasons.
- 10.10 Their reasons for making these further requests focus on disagreeing with our 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 resolution; and
  - (ii) the reasonableness of BT's actions in its negotiations with The Number and Conduit on the issues that we had been asked by them to resolve.
- 10.11 Specifically, they stated that, given their belief that their arguments in the joint response will or should result in a reversal by us 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 10.10** above, we would be wrong to conclude in this context that they have been largely unsuccessful.
- 10.12 The Number also submitted that it is factually incorrect by us 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.

10.13 As regards Conduit's claim for costs, it drew 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 submitted that BT's approach necessitated Conduit's referral to us, and the costs that Conduit has incurred as a result.

## **Ofcom's response**

### Ofcom's discretion in awarding costs

10.14 In the February 2007 document, we responded by emphasising our discretion to award costs.

10.15 Specifically, section 190(6)(a) of the 2003 Act is flexible so as to empower us, at our discretion, to:

- make no direction; or
- make any direction we think fit,

to require one party to the dispute to make payments to another party to the dispute in respect of costs and expenses incurred.

10.16 We noted there is no provision in the 2003 Act prescribing, for instance, that we should take into account any specific factors in exercising its discretion. There is no specific rule that costs should follow the event. In light of this (in the absence of any such rules), we consider that we have 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 our suggested approach in our Draft Enforcement Guidelines.<sup>154</sup>

10.17 For the purposes of resolving these disputes, we consider that it is appropriate to take 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 views on the arguments by The Number and Conduit

10.18 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

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<sup>154</sup> See at: <http://www.ofcom.org.uk/consult/condocs/enforcement/enforcement.pdf>

for the (OSIS) data in or around the first six months of 2005. We consider it clear from both of their respective dispute referrals to us, 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 we considered in the August 2006 document, appear closely linked to BT's charging in light of the *KPN* case.

- 10.19 It is further clear from the dispute referrals and additional submissions 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.
- 10.20 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 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.
- 10.21 In the February 2007 document, we noted that we disagreed with the submissions on the *KPN* judgment by The Number and Conduit. We further disagreed 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;
  - (ii) the alleged failure by us to carry out Impact Assessments under section 7 of the 2003 Act in seeking to resolve these disputes;
  - (iii) alleged failure by us 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.
- 10.22 While we had been persuaded by The Number and Conduit to fix an historic charge for the BT GC19 data set within OSIS, we have not made a direction requiring retrospective adjustment of the alleged overpayment by The Number and Conduit.
- 10.23 Given this, we said that we remained of the view that The Number and Conduit have been largely unsuccessful in referring these disputes to us and that we should have regard to this fact.
- 10.24 In any event, we considered that neither The Number, nor Conduit, had 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 our 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 did not think that it was plausible to suggest that an exchange of legal opinions would have led to any meaningful negotiations between the parties. In these circumstances, we further remained 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 considered that it was unclear from the joint response why The Number simply asserted that this matter is "irrelevant at best".

## Responses to the February 2007 document

10.25 The Number and Conduit maintain that they are "successful parties" and, as such, we should award some (if not) all of their costs for bringing these disputes to us. They make two points:

- (i) while The Number acknowledges that BT may have believed it had a good case on the merits, the expense of referring the disputes to us could have been avoided if BT had put its case to The Number to debate the issues as opposed to showing an unwillingness to negotiate in any meaningful way;
- (ii) in light of our revised provisional view to fix the charge for the BT GC19 data set, The Number argues that it has not been unsuccessful in bringing these disputes (whether or not we would now further revise our view to direct BT to repay an amount equivalent to "Cost b" (see **Section 9**)).

10.26 By contrast, BT argues in its comments on The Number's response to the February 2007 document that, in addition to the fact that there is no evidence that it acted unreasonably in its negotiations with the parties, it would further be inappropriate to award costs in the current disputes given the number of new legal interpretations and decisions that are likely to be made by us in its decision.

## Ofcom's response

10.27 We consider that The Number and Conduit have not put forward any substantially new arguments in support of their renewed application of our awarding their costs in referring these disputes. We therefore maintain our view that it is not appropriate to so exercise our discretion for reasons set out in **paragraphs 10.14 to 10.24**.

10.28 As regards the two specific points, we consider that:

- (i) the suggestion by The Number and Conduit that the expense of referring the disputes could have been avoided is simply not credible, nor supported by the events, including (a) The Number and/or Conduit have had the opportunity to negotiate with BT during the course of our investigation so as to avoid the need for us to resolve these disputes; (b) The Number's statements<sup>155</sup> throughout our investigation as to challenging our final determinations before the CAT; and (c) their

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<sup>155</sup> For instance, in paragraphs 6 and 73 of The Number's response of 13 April 2007 and in paragraph 9.3 of The Number's response of 29 September 2006.

continued disagreement with our analysis and views on matters, such as the unlawfulness of USC7 and the scope of GC19 data;

- (ii) the suggestion by The Number that we have not given any other reasons why costs should not be awarded to them as “successful parties” is incorrect, because from above-mentioned reasons it is clear that we have taken into account (among other things) the fixing of an historic charge (**paragraph 10.22**) in concluding that The Number has largely been unsuccessful in the issues that it referred to us.

## Conclusions

- 10.29 We have decided 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 referral of these disputes to us, or in connection with them.



## Section 11

# Policy review

## Introduction

- 11.1 We recognise that our conclusions in resolving these disputes could affect not only the parties to these disputes, but also a number of other stakeholders, including other OSIS licensees, CPs subject to GC19 and, ultimately, UK consumers. We also recognise that these views raise a number of concerns about the way in which directory information markets function, moving forwards.
- 11.2 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 we should seek to put also the latter data on a regulatory footing (as opposed to leaving it purely to commercial arrangements).
- 11.3 However, for reasons explained in this explanatory statement, our 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.
- 11.4 To address any such potential concerns, we have separately carried out a policy review of these matters and are today publishing a consultation document to canvass stakeholders' views on the needs for future regulation in this area. This consultation covers, in summary, the following main issues:
- (i) the proposed revocation of USC7 in light of our conclusions that it is unlawful;
  - (ii) whether it is necessary to replace USC7 or whether USD obligations as regards directory services are being met under normal market conditions, including a consideration of the requirements under GC8;
  - (iii) proposals to amend GC19, including whether, in light of national circumstances, it is appropriate to expand the definition of 'Directory Information' to include non-geographic numbers and how subscribers wish their information to be presented; and
  - (iv) the most appropriate approach to ensure that DIPs are able to continue to provide comprehensive directory services.

## Ofcom's Policy Review

### USC7

- 11.5 Given our conclusion that USC7 is unlawful, our policy consultation begins the statutory process to revoke formally the wholesale access obligations placed on BT to provide the contents of its OSIS database under USC7. The consultation further considers what steps, if any, 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.
- 11.6 Our consultation invites comments from stakeholders on how we 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 commercial conditions in the UK to ascertain whether directories and DQ services already fulfil the requirements of the USD with regards to comprehensiveness, affordability, quality and availability.

### Competition in the supply of directory information services

- 11.7 As noted above, we recognise that the revocation of USC7 may raise stakeholder concerns. Nevertheless, we remain committed to promoting competition in the supply of a range of directory information services in the UK. Therefore, our consultation also considers:
- (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.
- 11.8 We additionally consult on whether it remains necessary to maintain the obligation in GC8 on CPs to provide a printed telephone directory to their subscribers.

### Ongoing provision of data from OSIS

- 11.9 At present, BT continues to provide OSIS to DIPs on commercial terms. We expect 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.
- 11.10 BT has stated to us 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 states that it 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.
- 11.11 BT has stated that it does not intend to deliberately disrupt the marketplace or behave in such a way as to 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 CPs. Again, we believe that other CPs 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. We will consider this as part of this policy review.

- 11.12 Furthermore, we expect 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 GC 8.

### Responses to the February 2007 document

- 11.13 The Number pointed out that, if we make a final determination that USC7 is unlawful (and this finding is not successfully challenged), our policy review should, in particular, cover: (i) the continuity of supply of OSIS to DQ providers, and (ii) BT's charges for OSIS, both of which should be the subject of *ex ante* regulation along the lines of USC7.
- 11.14 Similarly, Thomson considers that it is imperative for us to obtain a clear commitment from BT that secures the continuity of supply of telephone subscriber data until any necessary substitute regime has been put in place and on the same licensing terms (but at a lower charge to reflect cost-oriented charging) as apply today.
- 11.15 As part of our policy review, Thomson considers that, in order to secure compliance with Article 5 USD, we should set a universal service condition on BT to supply The Phone Book and should seek to put in place the most efficient system for making basic subscriber data available, which in its view is most likely to mean that BT remains the entity responsible for the centralised consolidation of subscriber data to be provided to DIPs.
- 11.16 BT recognises that OSIS has played an important role in shaping the way in which the industry is organised. It is therefore content to look at the possibility of acting as an agent for other CPs (as an aggregator acting on behalf of them rather than as an intermediary) in discharging their obligations under GC19, provided BT was able to recover its costs incurred in acting in this way.

### Ofcom's response

- 11.17 All three respondents have made representations to us regarding our policy review.<sup>156</sup>
- 11.18 If respondents remain of the views put to us, we urge them to make (and reiterate) these views specifically in response to our policy consultation published today as we consider that it is not necessary to give those views any further consideration to resolve these particular disputes.
- 11.19 As regards to Thomson's further call for Ofcom obtaining a clear commitment from BT to continue to supply OSIS data, we consider that BT's commitment (as summarised at **paragraph 6.66(v)** above) should suffice to satisfy DIPs' concerns in this respect. Should circumstances change, we will consider whether further action (for example, enforcement action under the 2003 Act or competition law) is needed.

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<sup>156</sup> For The Number, see **paragraph 3.16** above; for BT, see **paragraph 3.17** above; for Thomson, see **paragraph 3.18** above.

## Section 12

# Determinations

## 12.1 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>157</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>158</sup> under regulation 4(10) of the Electronic Communications (Universal Service) Regulations 2003<sup>159</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>160</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>157</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>158</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>159</sup> S.I. 2003/33.

<sup>160</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>161</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 on 29 September after agreeing an extension to the initial deadline;

**(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 but which deadline was on the parties' request extended until 13 April 2007. Ofcom received comments from the parties to this dispute and other interested parties;

**(O)** in order to resolve this dispute, Ofcom has considered (among other things) the responses and information provided by interested 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;

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<sup>161</sup> Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002.

**(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 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:

- (ii) for the first period beginning on 25 July 2003 and ending on 31 March 2004, **£24,400**;
- (iii) for the second period of 12 months beginning on 1 April 2004 and ending on 31 March 2005, **£31,500**;
- (iv) for the third period of 12 months beginning on 1 April 2005 and ending on 31 March 2006, **£22,200**;

- (v) for the fourth period of 12 months beginning on 1 April 2006 and ending on 31 March 2007, **£24,900**;
- (vi) subject to sub-paragraph (vi) 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 2007 and ending on 31 March 2008, **£24,900**<sup>162</sup>;
- (vii) where the last subsequent consecutive period referred to in sub-paragraph (v) above is a period of less than 12 months, the sum of **£24,900 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 9.59 to 9.258** 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 supplied by BT to the specified number of downstream information providers, including The Number. Therefore, the charges fixed by Ofcom for the purposes of paragraphs 4 (v) and (vi) above shall only apply to such information if:

- (i) the underlying costs remain the same; and
- (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 (v) and (vi) 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:

- (i) in relation to GC19.1(a), no more than the total sum of BT's transmission costs<sup>163</sup>; and
- (ii) in relation to GC19.1(b), no more than the total sum of BT's costs associated with acquiring and storing data, as well as transmission costs.

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<sup>162</sup> This charge should apply for a 12 month period unless there is a cost-based justification for changing this determined charge, such as any increase or decrease in costs identified in **Table 9.9**. The charge should be pro-rated for any period of less than 12 months for which data is supplied.

<sup>163</sup> 'Transmission costs' mean the costs of the categories 'Transmitting data', 'Relationship management of DIPs', 'Onboarding – DIPs', 'Data Control' and 'Other costs' identified in **Table 9.9**.



7 However, for the reasons set out at **paragraphs 9.259 to 9.284** 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**

**Competition Policy Director**

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

7 March 2008

### 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;”*

## 12.2 Conduit Dispute

### Determination under sections 188 and 190 of the Communications Act 2003 (“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>164</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>164</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>165</sup> under regulation 4(10) of the Electronic Communications (Universal Service) Regulations 2003<sup>166</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>167</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>168</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>165</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>166</sup> S.I. 2003/33.

<sup>167</sup> This database is known as 'OSIS' (i.e. the Operator Service Information System).

<sup>168</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 on 29 September after agreeing an extension to the initial deadline;

**(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 but which deadline was on the parties' request extended until 13 April 2007. Ofcom received comments from the parties to this dispute and other interested parties;

**(O)** in order to resolve this dispute, Ofcom has considered (among other things) the responses and information provided by interested 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 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, **£24,400**;
- (ii) for the second period of 12 months beginning on 1 April 2004 and ending on 31 March 2005, **£31,500**;
- (iii) for the third period of 12 months beginning on 1 April 2005 and ending on 31 March 2006, **£22,200**;
- (iv) for the fourth period of 12 months beginning on 1 April 2006 and ending on 31 March 2007, **£24,900**;
- (v) subject to sub-paragraph (vi) 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 2007 and ending on 31 March 2008, **£24,900<sup>169</sup>**;
- (vi) where the last subsequent consecutive period referred to in sub-paragraph (v) above is a period of less than 12 months, the sum of **£24,900 adjusted pro**

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<sup>169</sup> This charge should apply for a 12 month period unless there is a cost-based justification for changing this determined charge, such as any increase or decrease in costs identified in **Table 9.9**. The charge should be pro-rated for any period of less than 12 months for which data is supplied.



**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 9.59 to 9.258** 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 supplied by BT to the specified number of downstream information providers, including Conduit. Therefore, the charges fixed by Ofcom for the purposes of paragraphs 4 (v) and (vi) above shall only apply to such information if:

- i) the underlying costs remain the same; and
- 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 (v) and (vi) 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:

- i) in relation to GC19.1(a), no more than the total sum of BT's transmission costs<sup>170</sup>; and
- ii) in relation to GC19.1(b), no more than the total sum of BT's costs associated with acquiring and storing data, as well as transmission costs.

**7** However, for the reasons set out at **paragraphs 9.259 to 9.284** 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***

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<sup>170</sup> 'Transmission costs' mean the costs of 'Transmitting data', 'Relationship management of DIPs', 'Onboarding – DIPs', 'Data Control' and 'Other costs' identified in **Table 9.9**.

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**

**Competition Policy Director**

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

7 March 2008

### **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;*"

## Annex 1

## The BT Directory Solutions Price List

A1.1 This Annex sets out Sections 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)

BT Directory Solutions  
PRICE LIST  
Section 1

## ENTRIES IN BT'S OPERATOR SERVICES INFORMATION SYSTEM (OSIS)

For terms and conditions applicable to these charges see Schedule 11 (formerly Schedule 150/150a).

The rates to be paid by the Operator for inclusion of Operator Customer Information in BT's Operator Services Information System (OSIS) shall be as follows:

## 1.1 Transaction Charges

Description	Effective Date	Until	Charge (p)
For each customer entry provided by the Operator via hardcopy	01/10/1997	31/03/2000	108.44
For each customer entry provided by the Operator via hardcopy	01/04/2000		260.00
For each customer entry provided by the Operator via disc or EDI requiring manual processing by BT to input to OSIS	01/01/1999		Nil
For each customer entry provided by the Operator via disc or EDI not requiring manual processing by BT to input to OSIS	01/01/1999		Nil
Deletion	01/10/1997		Nil
For each customer entry input by the Operator using on-line access to OSIS	01/01/1999		Nil
Viewing	01/04/1998		Nil

## 1.2 Data Holding Charge

Description	Effective Date	Until	Charge
Data Holding Charge	01/10/1997	31/12/1998	31.5200
Data Holding Charge	01/01/1999		Nil

## 1.3 Charges for Direct Access and On-Line Batch Access

Description	Effective Date	Until	Charge (£)
For each Smart Card (including replacements)	01/04/1998		50.0000

## 1.4 Payments made to OLOs

Description	Effective Date	Until	Charge (£)
Electronic Payment per transaction	01/04/1999	30/09/2001	0.13905
Electronic Payment per transaction	01/10/2001	Until superseded by paragraph 1.5 below	0.6600

The following OLOs will be paid in accordance with table 1.4

Schedule 11 Operators
Andover Cablevision Ltd
Aggregated Telecom Ltd
Anglia Cable Ltd
Cable & Wireless U.K
Cable and Wireless (Guernsey) Limited
Cable Television Ltd
Cable Thames Valley Ltd

Schedule 11 Operators
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
East Coast Cable Ltd
EESCAPE Ltd
Heartland Cablevision UK Ltd
Herts Cable Ltd
Inclarity plc
Jersey Telecom Limited (Formerly States of Jersey Telecommunications)
Kingston Communications (Hull) plc
Lichfield Cable Communications Ltd
Manx Telecom Ltd
Nexus Telecommunications plc
NPlusOne Limited
NTL Cambridge Ltd
NTL Darlington Ltd
NTL Glasgow (Paisley & Ren)
NTL Glasgow (Bearsden & Miln)
NTL Glasgow (Gt Glasgow)
NTL Glasgow (Inverclyde & Eastwood)
NTL Glasgow (NW Glasgow & Clydebank)
NTL Group Ltd
NTL Kirklees
NTL Midlands Ltd
NTL Teesside Ltd
NTL Telecom Services Ltd
O2 (UK) Ltd
Opera Telecom Ltd
Oxford Cable Ltd
Patientline UK Ltd
Pipemedia Limited
Stafford Communications Ltd
Starcomm Ltd
Swindon Cable Ltd
T-Mobile (UK) Ltd
Telewest Communications plc
Telstra Europe Ltd (Formerly Telecentric Solutions Ltd)
The Airtime Group Limited (Formerly Torc Europe)
Torch Communications Ltd
Vodafone
Wessex Cable Ltd

## 1.5 Payments made to OLOs

Description	Effective Date	Until	Charge (£)
Electronic Payment per Simple Data transaction	17/12/2003		0.238
Electronic Payment per Complex Data transaction	17/12/2003		2.44

The following OLOs will be paid in accordance with table 1.5:

Schedule 11 Operators
1 <sup>st</sup> Rate Telecom Limited
4D Telecom Limited
24 Seven Communications Ltd
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
Obit Telecom
Opal Telecom Ltd (Formerly Core Telecommunications Ltd)
PNC Telecom Services Ltd
Primus Telecommunications Ltd
Qicom
Rateflame Limited
Reach Europe Ltd
Redstone Communications Ltd
Singtel (Europe) Limited
Skymaker Limited
Spacetel UK Ltd
Spitfire Network Services Ltd
Swiftnet Ltd
Syntec UK Ltd
Telco Global Networks Ltd
Telecom One Ltd
Telxl Limited
Thus plc
Tiscali UK Ltd
Totem Communications Ltd



Schedule 11 Operators
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

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:

BT Directory Solutions

PRICE LIST

Section 1

**ENTRIES IN BT'S OPERATOR SERVICES INFORMATION SYSTEM (OSIS)**

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**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;

BT Wholesale Directory Solutions  
(BTWDS) PRICE LIST  
Section 2.0

2 March 2004

**USE OF OPERATOR SERVICES INFORMATION SYSTEM (OSIS) DATA UNDER LICENCE**

For terms and conditions applicable to these charges see the Directory Information Licence Agreement

**2.1 Annual Charge for BT Wholesale Directory Solutions Licensees**

Description	Effective Date	Until	Charge	
			£	p
Annual Charge, in lieu of usage	01-07-2000	-	25,000.00	-
Localised Use Annual Charge, in lieu of usage	11-12-2000	-	2,500.00	-

**2.2 Charges for Business/Residential Customer Alphabetical (A-Z) Products or Services**

Description	Effective Date	Until	Charge	
			£	p
Alphabetically listed printed telephone directories, per book	01-07-2000	30-09-2001	-	23.00
	01-10-2001	-	-	28.8
Alphabetically listed voice or voice activated Directory Information Services <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

**2.3 Charges for Business Customer Classified Products or Services**

Description	Effective Date	Until	Charge	
			£	p
Classified listed printed telephone directories, per book	01-07-2000	30-09-2001	-	3.00
	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	-

## USE OF OPERATOR SERVICES INFORMATION SYSTEM (OSIS) DATA UNDER LICENCE

## 2.4 Charges for Audit Files via LORS 1 and LORS 2

Description	Effective Date	Until	Charge	
			£	p
Audit files via LORS 1 (Note 3) *	01-07-2001	31-10-2003	£120.31	-
Audit files via LORS 2 (Note 3)	01-07-2001	-	£67.17	-

\* NB: Service no longer available. LORS1 has been replaced by LORS2.

## 2.5 Charge for Refresh Extracts

Description	Effective Date	Until	Charge	
			£	p
Refresh Extracts	01-07-2001	-	£217.26	

## Notes:

- 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.

NETWORK CHARGE CHANGE NOTICE AND PRICE CHANGE  
NOTIFICATIONS

The following details Network Charge Change Notices and Price Change Notifications relating to the DIU Price List Sections 1.0 and 2.0.

## 3.1 NCCN

Description	NCCN No.	Current Charge	New Charge	Effective Date	% Change
Entries in BTs OSIS –for each customer entry provided by the operator via hard copy	190	108.44	260.00	01/04/2000	140

## 3.2 Price Change Notifications

Description	DPCN No.	Current Charge	New Charge	Effective Date	Communicated to Industry
Use of Operator Services Information System (OSIS) Data Under Licence	001	---	TBC (Note 1)	01/05/2000	31/03/2000
Use of Operator Services Information System (OSIS) Data Under Licence	002	---	Please refer to Section 2	01/07/2000	02/06/2000
Use of Operator Services Information System (OSIS) Data Under Licence (Revised)	002b	---	Please refer to Section 2	01/07/2000	27/06/2000
Use of Operator Services Information System (OSIS) Data Under Licence (Revised)	003	---	Please refer to Section 2	11/12/2000	13/11/2000
Charges for Audit Files via LOR 1 and LORS 2	004	---	Please refer to Section 2.4	01/07/2001	31/05/2001
Charges for Ad-hoc refresh Extracts	004	---	Please refer to Section 2.5	01/07/2001	31/05/2001
Charges for Ad-hoc refresh Extracts	005	---	Please refer to Section 2	01/10/2001	31/08/2001

## Notes:

- 1) 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 2

# 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>171</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>172</sup> and “would result in chaos.”<sup>173</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>171</sup> Conduit letter of 26 May 2006, page 2.

<sup>172</sup> Conduit letter of 26 May 2006, page 2.

<sup>173</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>174</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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<sup>174</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.

## 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 Knifsmith 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.micross	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	Stanningfield, 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 3

# 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  
Date of publication: 7 November 2006  
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. Doolaard 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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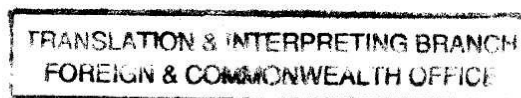
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**Translator:**

Signature ..... *Margaret Gibbins* .....

Name in block capitals ..... *MARGARET GIBBINS* .....

Date ..... *14 December 2006* .....



## Annex 4

# BT's OSIS database

### The data in OSIS

- A4.1 BT provides the OSIS database to 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.
- A4.2 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 (a part of BT Retail that 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.
- A4.3 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. BT’s own more detailed explanation of grouping is set out at Annex B to its letter of 13 July 2006, as set out in **Annex 2** to this explanatory statement.
- A4.4 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 A4.1** below:

**Table A4.1: 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)

Final determinations on BT's charges for directory information

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

A4.5 As noted from **Table A4.1** above, three fields within OSIS are 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.

A4.6 **Table A4.2** lists the data fields within OSIS under each of these headings.

**Table A4.2: 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

- A4.7 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 2** to this explanatory statement.
- A4.8 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.

- A4.9 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.
- A4.10 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.
- A4.11 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

- A4.12 A brief summary of how BT provides OSIS is set out below (this is expanded upon further elsewhere in this explanatory statement, particularly at **Section 9** 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 set out below.)
  - (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 six 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 1** 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. (These downstream licence arrangements are set out below.)
- (v) In Ofcom's understanding, OSIS licensees include:
  - providers of voice DQ services;
  - providers of on-line DQ services;
  - providers of paper A to Z listings directories;
  - providers of classified directories;
  - 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

A4.13 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.

A4.14 As stated above, **Section 9** 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.

## Overview of OSIS related contractual arrangements

- A4.15 The contractual arrangements relating to BT's supply of OSIS data provide relevant background 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.
- A4.16 To start with, 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**").
- A4.17 Then, there is also 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**").
- A4.18 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.
- A4.19 We set out below further detail of each of above-mentioned two arrangements.

## The BT Upstream Contract

### General

- A4.20 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>175</sup>
- A4.21 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);

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<sup>175</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 parties' rights to terminate the agreement with 12 months' prior notice (paragraph 6);
- obligations to comply with certain restrictions, controls and security arrangements (paragraph 7);
- review of the agreement clauses, including the referral of disputes arising under the agreement for resolution by the DGT (OfTel) [*sic*];
- the specification of certain 'BTDS Manuals' (Appendix 11.1).

### Supply obligations

A4.22 Paragraph 2.1 makes it plain that an 'Operator' (which is defined simply as "the other Party to this Agreement"<sup>176</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.

A4.23 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;

A4.24 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);

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<sup>176</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)

- 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'.

A4.25 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.

A4.26 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>177</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>178</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>179</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

A4.27 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.

A4.28 Section 1<sup>180</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>181</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.

A4.29 These Sections are set out in **Annex 1** to this explanatory statement.

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<sup>177</sup> Paragraph 2.5.1, read in light of paragraph 1.

<sup>178</sup> Paragraph 2.5.2, read in light of paragraph 1.

<sup>179</sup> Paragraph 2.5.3, read in light of paragraph 1.

<sup>180</sup> See at:

[http://www.btwholesale.com/content/binaries/solutions/directory\\_solutions/library/btdsection1iss721.d](http://www.btwholesale.com/content/binaries/solutions/directory_solutions/library/btdsection1iss721.d)

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<sup>181</sup> See at: [http://www.btwholesale.com/content/binaries/diusect3\\_62.rtf](http://www.btwholesale.com/content/binaries/diusect3_62.rtf)

## Statutory and other obligations

A4.30 Finally, paragraph 5.1 of the BT Upstream Contract provides:

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

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

### General

A4.31 The present disputes relate to BT's regulatory obligations under USC7 and GC19. Both The Number's Licence and the Conduit's Licence are therefore relevant to these disputes so far as they include terms or conditions on which transactions between the parties have purportedly entered into for the purpose of complying with those obligations.

A4.32 We set out below 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 respective Licences in light of BT's regulatory obligations. Before dealing with the charging provisions, we set out what the charges relate to under these Licences.

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

A4.33 Each Schedule to The Number's Licence and the Conduit's Licence provides:

#### **SCHEDULE**

##### **(Rights)**

#### 1. Use and extent of Licence

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

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

Classified Products or Services

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

#### 2. Location

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

#### 3. Copying

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

- A4.34 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.

- A4.35 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

A4.36 Paragraph 7 of each 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.

A4.37 Section 2.0<sup>182</sup> of the current BTDS Price List, which is referred to in that paragraph 7, is set out in full at **Annex 1** to this explanatory statement.

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

A4.38 In return for the payments mentioned above, BT is required to provide to The Number and Conduit, respectively, the information set out in paragraph 4 of each of the Licences as follows:

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>182</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)



## Annex 5

# Other legislative background

A5.1 In **this Annex**, we set out in particular certain legislative provisions that provide background to other more relevant provisions referred in this explanatory statement. Some of the provisions cited below have either been relied upon the parties or are provisions to which we have referred in analysing relevant issues.

A5.2 The structure of **this Annex** is as follows:

- Article 6 of the RVTD;
- Chapter II of the USD (excluding Articles 4 to 7) together with relevant recitals;
- Ofcom's statutory duties; and
- domestic enabling powers for the setting USCs and GCs, including the background to the setting of GCs 8 and 19 as well as USC7.

## Article 6 of the RVTD

A5.3 Article 6 of the RVTD (and, in particular, Article 6(3) which was the subject-matter of the *KPN* case) provides:

**Article 6**  
*Directory Services*

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

2. Member States shall ensure that:

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

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

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

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

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

A5.4 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;

## The USD

### Recitals

A5.5 We set out below recitals of the USD that provide additional background to the corresponding transposing legislation and regulation in the UK, as discussed in this explanatory statement.

(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.

...

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

...

(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.

## Chapter II of the USD (excluding Articles 4 to 7)

A5.6 Our provisional findings on the lawfulness of USC7 in the August 2006 document made reference to a number of provisions in Chapter II of the USD, to which in particular The Number and Conduit have responded to in their responses. These provisions are set out below in full.

### *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.

...

### *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*

#### **Quality of service of designated undertakings**

1. National regulatory authorities shall ensure that all designated undertakings with obligations under Articles 4, 5, 6, 7 and 9(2) publish adequate and up-to-date information concerning their performance in the provision of universal service, based on the quality of service parameters, definitions and measurement methods set out in Annex III. The published information shall also be supplied to the national regulatory authority.
2. National regulatory authorities may specify, inter alia, additional quality of service standards, where relevant parameters have been developed, to assess the performance of undertakings in the provision of services to disabled end-users and disabled consumers. National regulatory authorities shall ensure that information concerning the performance of undertakings in relation to these parameters is also published and made available to the national regulatory authority.

3. National regulatory authorities may, in addition, specify the content, form and manner of information to be published, in order to ensure that end-users and consumers have access to comprehensive, comparable and user-friendly information.

4. National regulatory authorities shall be able to set performance targets for those undertakings with universal service obligations at least under Article 4. In so doing, national regulatory authorities shall take account of views of interested parties, in particular as referred to in Article 33.

5. Member States shall ensure that national regulatory authorities are able to monitor compliance with these performance targets by designated undertakings.

6. Persistent failure by an undertaking to meet performance targets may result in specific measures being taken in accordance with Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (1). National regulatory authorities shall be able to order independent audits or similar reviews of the performance data, paid for by the undertaking concerned, in order to ensure the accuracy and comparability of the data made available by undertakings with universal service obligations.

#### *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*

### **Transparency**

1. Where a mechanism for sharing the net cost of universal service obligations as referred to in Article 13 is established, national regulatory authorities shall ensure that the principles for cost sharing, and details of the mechanism used, are publicly available.

2. Subject to Community and national rules on business confidentiality, national regulatory authorities shall ensure that an annual report is published giving the calculated cost of universal service obligations, identifying the contributions made by all the undertakings involved, and identifying any market benefits, that may have accrued to the undertaking(s) designated to provide universal service, where a fund is actually in place and working.

#### *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.

...

## **Ofcom's statutory duties**

A5.7 Under section 3(1) of the 2003 Act, our principal duty, in carrying out our functions, is to further the interests of citizens and to further the interests of consumers in markets for any of the services, facilities, apparatus or directories in relation to which we have functions, where appropriate by promoting competition. It provides:

#### *General duties in carrying out functions*

### **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.

A5.8 Section 3(14) defines terms used in section 3(1) as follows:

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

A5.9 In discharging our principal duty, we are required to secure a number of specific objectives set out in section 3(2) of the 2003 Act, none of which appear particularly relevant to these disputes: only one (in section 3(2)(b)) deals with ECS<sup>183</sup>, with the remainder focusing on spectrum use (in section 3(2)(a) and television and radio services (sections 3(2)(c) to (f)).

A5.10 Section 3(3) of the 2003 Act goes on to require that we apply certain regulatory principles in all cases. Specifically, in performing its principal duty, we must have regard to the principles under which regulatory activity should be transparent, accountable, proportionate, consistent and targeted only where such action is needed, as well as to any other principles appearing to us to be best regulatory practice. In this regard, our own regulatory principles<sup>184</sup> make it clear that we will operate with a bias against intervention but with a willingness to intervene firmly, promptly and effectively where required; and, further, that we will intervene where there is a specific statutory duty to work towards a public policy goal that markets alone cannot achieve. If a case for intervention can be made, we are committed to choosing the least intrusive means.

A5.11 In performing these duties, we will also have regard to the interest of consumers in respect of choice, price, quality of service and value for money: see section 3(5). Pursuant to section 3(4) of the 2003 Act, we may also, where it appears to us to be relevant, have regard to (among other things):

- (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;

<sup>183</sup> i.e. “(b) the availability throughout the United Kingdom of a wide range of electronic communications services;”

<sup>184</sup> <http://www.ofcom.org.uk/about/sdrp/>



...

(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.

A5.12 However, there is no hierarchy in the legislation between the two components of the principal duty in section 3(1), or between the objectives in section 3(2), or between the matters in section 3(4), of the 2003 Act. Rather, Parliament has recognised that our duties require us to pursue a range of objectives while taking a variety of matters into consideration and that this was likely to present us with a need to resolve conflicts between these duties and matters. Therefore, we are given a wide measure of discretion in such circumstances within an overall framework set out in the 2003 Act.

A5.13 As regards our overriding duties in section 4 when fulfilling a specific Community obligation, they are:

**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.

## Domestic enabling powers for the setting USCs and GCs

### Permitted or required subject-matter of obligations

A5.14 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.)

A5.15 In addition, under section 47 of the 2003 Act, we can only set conditions where we are 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.

A5.16 Section 48 of the 2003 Act then 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 we may take such regulatory steps.

### The persons to whom the obligations may apply

A5.17 Section 46 of the 2003 Act prescribes the person to USCs and GCs may apply, which reads, so far as relevant, 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.

A5.18 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 us that certain obligations apply to it. Failure to comply with such obligations is subject to enforcement action by us using our 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.

A5.19 By contrast, USCs may only apply to a designated universal service provider under section 66 of the 2003 Act, which (so far as is relevant here) 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.
- ...

A5.20 In respect of the USCs currently in force, BT was, in fact, designated by the DGT as a universal service provider in the USO notification under regulation 4(10) of the Electronic Communications (Universal Service) Regulations 2003<sup>185</sup> (the “**Universal Service Regulations**”).

A5.21 These Regulations were made by the Secretary of State under section 2(2) of the European Communities Act 1972. However, the transitional provisions in paragraph 7 of Schedule 18 to the 2003 Act have the effect of treating that designation as a designation in accordance with regulations under section 66, because they provide:

*Pre-commencement proposals relating to universal service matters*

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

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

(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.

## **Background to the setting of GCs 8 and 19**

A5.22 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.

A5.23 The finally adopted terms of GCs 8 and 19, as set out in **Section 4** of this explanatory statement, followed two consultations by the DGT relying on his anticipatory and transitional powers. They are contained in Part II of the Schedule to the GC notification that took effect on 25 July 2003.

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<sup>185</sup> S.I. 2003/33.

A5.24 As regards to the permitted subject-matter of these GCs and the DGT's enabling powers under section 45(3) of the 2003 Act:

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

which sections read:

*General conditions: subject-matter*

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

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

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

...

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

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

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

(3) The power to set general conditions in relation to a description of electronic communications network or electronic communications service does not include power—

(a) to set conditions that are made applicable according to the identity of the provider of a network or service; or

(b) to set conditions that differ according to the identity of the provider of the networks or services to which they relate.

...

**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.

A5.25 Details of the two stage consultation process on the proposed texts of these GCs, including amendments to them made following consultation, were more fully set out at Annex 6 to the August 2006 document. However, so far as GC19 is concerned, we should note that the DGT provided particularly the following reasoning for its imposition:

- in the first consultation<sup>186</sup>:

3.60 This condition requires all communication providers with a numbering allocation to pass on their subscriber directory information to any other provider of publicly available telephone services. Its purpose is to ensure the provision of the most comprehensive directory database(s) from which directory products and services can be provided.

3.61 This condition is required to implement the obligations contained in Article 25(2) of the Universal Service Directive, and falls within condition 4 of Part C of the Annex to the Authorisation Directive. OFCOM will be entitled to set this condition under clause 44(1)(d) and (3) of the Communications Bill.

- in the second consultation<sup>187</sup>:

22. Provision of Directory Information (clause 45(1)(d) and (3))

22.1 This condition has undergone minor amendment following the first consultation in the interests of transparency. The first paragraph has been changed so as to require information to be passed to any person reasonably requesting it for the purpose of the provision of publicly available directories and directory enquiry facilities. In Oftel's view, this wording more accurately reflects the intention of Article 25(2) of the USD. Oftel has also clarified Ofcom's direction making power with respect to the format of information in paragraph 20.4, although this will not appear in the SI regime due to the prohibition against legislative subdelegation.

*Responses*

22.2 The Operators Group have queried the operation of Condition 22.1 where a customer is supplied with a wholesale line rental product from BT in that it appears that the obligation would be on BT to supply the information, not the customer's telephony provider.

*Oftel view*

22.3 Oftel is of the view that the provision of a wholesale line rental product from BT incorporates a sub-allocation of a telephone number for the purposes of this condition. Hence the provider purchasing the wholesale line rental product from BT will be obliged to pass the directory information of its subscribers to BT under paragraph 22.2 of the condition.

- in the final statement<sup>188</sup>:

**Condition 19: Provision of Directory Information (clause 55(1)(d) and (3))**

3.145 This Condition was previously numbered 22, but has been renumbered following consultation.

<sup>186</sup> See the DGT's consultation document entitled 'The General Conditions of Entitlement' published on 22 May 2002: <http://www.ofcom.org.uk/static/archive/oftel/publications/licensing/2002/enti0502.htm>

<sup>187</sup> See the consultation document issued jointly by the Department of Trade and Industry and Oftel on 19 March 2003: [http://www.communicationsact.gov.uk/Interim\\_Implementation\\_update.htm](http://www.communicationsact.gov.uk/Interim_Implementation_update.htm)

<sup>188</sup> See the DGT's Final Statement entitled 'The General Conditions of Entitlement' published on 9 July 2003: <http://www.ofcom.org.uk/static/archive/oftel/publications/licensing/2003/cond0703.htm>

### **Responses**

3.146 The Operator's Group were of the view that it is onerous to require the communications provider to have to agree the format in which the information is to be supplied with the person requesting such information on each occasion, and suggested that the relevant text be deleted. They have also sought further guidance on the application of this Condition to mobile communications providers.

### **Oftel's comments**

3.147 In Oftel's view, it is entirely reasonable and justified to expect communications providers to agree on the format of the data (with the person requesting the data). Oftel notes that the Director will be able to direct the format of the data, so communications providers should be reassured that any person requesting the data will not be able to demand it in a format that it is clearly inefficient or onerous. The Universal Service Directive (Article 25) also refers to information being supplied on an 'agreed format', hence this obligation is objectively justified and proportionate in Oftel's view.

3.148 Recital 11 to the Universal Service Directive makes it clear that mobile data is to be included within directories and directory enquiry facilities. Oftel acknowledges the different practical issues associated with the inclusion of mobile data within such facilities, and intends to continue discussions with the industry on this issue.

3.149 Oftel notes that this Condition has undergone some minor amendment as a flow-on from the new definitions of 'Adoption' and 'Allocation' (discussed in relation to Condition 17 above).

## **Background to the setting of USC7**

A5.26 On 22 July 2003, the DGT, in 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. The terms of USC7 are as set out in **Section 4** of this explanatory statement.

A5.27 As regards to the permitted subject-matter of USC7 according to 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.

A5.28 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.

A5.29 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.

A5.30 The order for the time being in force since 25 July 2003 under that section is the Electronic Communications (Universal Service) Order 2003<sup>189</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.

(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

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<sup>189</sup> S.I. 2003/1904.

telephone services and their telephone numbers, including fixed and mobile telephone numbers.

- A5.31 In other words, the effect of paragraph 7(2) of Schedule 18 to the 2003 Act referred to in **paragraph A5.21** above, as read in light of above-mentioned 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 us under section 45 of this Act and applied to BT.
- A5.32 The 2003 Act then sets out certain provisions that are pertinent to the setting of USCs, which are set out in sections 68 to 72 of the 2003 Act, covering issues of tariffs, directories and DQ services as well as financing the obligations imposed under the USCs. They reflect the Articles under Chapter II of the USD discussed above, but we do not consider it necessary to set them out below.
- A5.33 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.

A5.34 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.*

## Annex 6

# Extracts from *KPN*

## Meaning of 'relevant information'

### The Advocate General's Opinion

A6.1 In his main conclusion at the end of the Opinion, the Advocate General proposed in *KPN* that the ECJ should determine the question concerning the meaning of 'relevant information' as follows:

In light of the foregoing considerations I therefore propose that the Court should reply to the College van Beroep voor het Bedrijfsleven in the following terms:

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.

A6.2 He reached that view after providing the following reasoning<sup>190</sup>:

#### III – Assessment

*A – Which information is 'relevant' within the meaning of Article 6(3) of Directive 98/10/EC?*

18. By its first question, the referring court asks which information is 'relevant' within the meaning of Article 6(3) of the Directive at issue.

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,

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<sup>190</sup> For ease of reference, we set out in this **Annex 6** extracts of both the Opinion and the ECJ's judgment, particularly as The Number has (at footnote 12 of its response to the February 2007 document) pointed out that the texts, as published on <http://curia.europa.eu/en/index.htm>, have been renumbered in further versions of them. While Ofcom has therefore reproduced these extracts for clarity in its cross-referencing to *KPN*, we should note that (i) only the versions published in the "Reports of Cases before the Court of Justice and the Court of First Instance" or the "Official Journal of the European Union" are authentic; and (ii) certain parts of this information and texts might be protected under intellectual property law (in particular by copyright) and readers of this explanatory statement should ensure that when using the provided information in any way they comply with all relevant legislation.

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)191</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

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<sup>191</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.'

information' in the light of specific national conditions. <sup>(13)</sup><sup>192</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)</sup><sup>193</sup>

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.

...

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

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<sup>192</sup> This footnote of the Opinion states: 'See Article 1(1) of Directive 98/10/EC'.

<sup>193</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.'

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

A6.3 In contrast to the Advocate General's main conclusion (see **paragraph A6.1** above), the ECJ stated as follows in its formal ruling to the referred first question:

On those grounds, the Court (First Chamber) rules 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.

A6.4 The ECJ reached this conclusion in light of its following reasons:

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'.

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.

## Meaning of 'cost orientation'

### The Advocate General's Opinion

A6.5 The Advocate General proposed that the ECJ should determine the question concerning the meaning of 'cost orientation', in summary, as follows:

In light of the foregoing considerations I therefore propose that the Court should reply to the *College van Beroep voor het Bedrijfsleven* in the following terms:

...

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.

A6.6 The Advocate General's reasoning for reaching his conclusion was as follows:

*B – The calculation of the tariff for telephone subscriber information*

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.

## The ECJ's judgment

A6.7 The ECJ's formal ruling to the referred second question was as follows:

On those grounds, the Court (First Chamber) rules as follows:

...

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.

A6.8 Its reasons were 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.

## Annex 7

# Further detail on the lawfulness of USC7

## Introduction

A7.1 **This Annex** provides further detail behind Ofcom's provisional conclusions as summarised in **Section 5** of this explanatory statement. It essentially repeats the substance as set out in the August 2006 document and is structured as follows:

- first, our initial analysis of the unlawfulness of USC7 in support of our provisional conclusions which we have now confirmed with the further clarification given in the February 2007 document, as set out in **Section 5** of this explanatory statement;
- secondly, our views on submissions made by the parties to these disputes (as well as another interested person, i.e. Thomson) on this matter during our investigation prior to publishing the August 2006 document.

## Ofcom's initial analysis of USC7

### Background

A7.2 On 13 January 2006, we decided in the light of the unusual circumstances of this case that it would be appropriate on this occasion to disclose to the parties to the two disputes a summary of legal advice from its Leading Counsel in respect of the lawfulness of USC7.

A7.3 We emphasised, however, to the parties that the fact that we shared this advice with the parties at that stage should not be taken as a determination (or draft determination) in itself by us to resolve the disputes. We repeat the detail of this advice below (the summary of which is set out in **Section 5** of this explanatory statement), but we emphasise that it is not our usual practice to disclose our legal advice externally and the fact that it is set out again below should not be taken as a change of that practice going forward.

### Article 5 and the terms of USC7

A7.4 **Section 4** of this explanatory statement sets out the terms of both Article 5 of the USD and USC7. To recap, USC7 was imposed by the DGT in July 2003 and, in summary, provides:

- USC7.1 requires BT to maintain a database with directory information for all subscribers who have been allocated a telephone number by any CP (in practice, the data that would be required by any supplier of DQ services);<sup>194</sup>
- USC7.2(b) requires the contents of that database to be made available to any supplier of DQ services (not to end-users), subject to the data protection law qualifications in USC7.3;

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<sup>194</sup> All CPs who allocate numbers to subscribers have to supply that information to BT (or anyone else wishing to supply directories or DQ services) under GC19, implementing in this respect Article 25(2) of the USD.

- USC7.4 requires charges made by BT for making the database available to suppliers to be fair, objective, cost oriented and not unduly discriminatory;
- USC7.6 imposes duties of non-discrimination and (in essence) ensuring that information may be excluded at the wish of the subscriber.

A7.5 It is plain from USC7 therefore that it does not impose any obligation on BT (or any other undertaking) to provide, or secure the provision of, a DQ service to any end-users (or all end-users) – rather, it imposes on BT the obligation to provide, on non-discriminatory and regulated terms, persons wishing to supply DQ services to end-users with the basic “raw material” – the database – that enables them to do this. In short, it requires BT to provide the database at a “wholesale” level, but does not require it to provide services at a “retail” level to end-users.

A7.6 When he explained the reasoning behind this structure, the DGT said:

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

A7.7 The reasoning behind this statement was that, as a matter of fact, there are and have always been a number of persons able and willing to provide comprehensive DQ services to all end-users. Moreover, GCs 8 and 6, applicable to all CPs in the UK, require them to allow their end-users (or users of pay phones) access to all DQ services; we consider that GCs 8 and 6 fully and properly implement in this respect Article 25(3) of the USD.

A7.8 Therefore, as a matter of practical reality, a situation has been brought about in which all UK end-users have access through their respective CPs to comprehensive DQ services. The provisions of USC7 play a key part in achieving that result. This does not, however, answer the question of whether this point is sufficient in law as a basis for USC7.

### **Lawfulness of USC7**

A7.9 In principle, the lawfulness of USC7 has to be examined under both UK and EC law; that is to say, it must:

- fall within the power to set a USC in sections 65-67 of the 2003 Act, which (as a result of the proper construction of those sections, particularly section 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.

A7.10 As regards the question as to whether USC7 implements a Community obligation (that is, sections 65-67 of the 2003 Act), we consider that the effect of sections 67(1) and 65(1) of the 2003 Act is that USCs may be imposed only in order to secure compliance with Community obligations and, in particular and for present purposes, the obligation in Article 5(1)(b) of the USD.

A7.11 Taking that point, we would note in particular that:

- section 67(1) provides that “*OFCOM may set any such [USCs] as they consider appropriate for securing compliance with the obligations set out in the universal service order.*”;
- in turn, section 65(1) provides that the Secretary of State must, in a universal service order, set out “*the extent to which the things falling within subsection (2) must, for the purpose of securing compliance with Community obligations for the time being in force, be provided, made available or supplied throughout the United Kingdom.*”; and
- the current Services Order identifies<sup>195</sup>, as the “things” to be made available in order to comply with a Community obligation, the same “things” (with immaterial differences in wording) as are set out in, inter alia, Article 5(1)(b) of the USD, that is to say it provides that “*at least one comprehensive telephone directory enquiry facility shall be made available to all end-users, including users of public pay telephones*”.

- A7.12 Under the 2003 Act, therefore, we can impose USC7 if and only if USC7 is appropriate to secure compliance with the obligation on Member States in Article 5(1). If it is not, then as a matter of UK law it is unlawful even if it may otherwise be permissible as a matter of EC law.
- A7.13 To start with, Article 8 of the USD refers to the designation of one or more undertakings to “*guarantee*” the provision of the universal services set out in (*inter alia*) Article 5(1). The natural legal reading of “*guarantee*” in this context is that there are one or more undertakings which are, between them, under a legal duty to ensure that Article 5(1) services are available to all end-users. Therefore, Article 8 plainly requires that the Article 5 services should be achieved by designating one or more undertakings to guarantee that all end-users receive comprehensive DQ services. But USC7 fails to achieve this; neither BT nor any other undertaking is under any obligation either to provide or to guarantee the provision of Article 5 services.
- A7.14 Put another way, the USD is implemented correctly in this respect only if there is an enforceable obligation on an undertaking to make sure that all end-users receive DQ services. But there is plainly no such obligation on BT (or any other undertaking).
- A7.15 The view that implementation of Article 5 requires that there be a legally enforceable duty on an undertaking to provide or ensure the provision of Article 5 services is strengthened by the language of the USD. In particular, Article 1(2) refers to a “*minimum set of services of specified quality to which all end-users have access*”; similar language is used in the 4<sup>th</sup> recital. That language plainly suggests that the USD requires the imposition of a legal obligation on the designated undertaking to ensure that those services are provided.
- A7.16 In this context, it is also to be noted that the DGT’s reasoning (as cited under **paragraph A7.6** above) suggests that the main reason for choosing this means of implementing Article 5 was that it was hoped to create competition between a number of suppliers of DQ services. However, this strongly suggests that the DGT’s prime objective in imposing USC7 was the generation of competition as between DQ service providers rather than the implementation of the USD.

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<sup>195</sup> In paragraphs 2 and 3 of the Schedule to the Services Order.



- A7.17 The DGT's reasoning cited above also raises the issue as to whether USC7 may, in part, be seen as implementing Article 25(2) of the USD. However, the obligation in Article 25(2) to supply 'relevant information' extends only to data relating to the provider's own subscribers, and not to other subscriber data that the provider might happen to have by reason of, for example, its being the designated provider of a universal DQ service under Article 5 of the USD. That interpretation is supported by the ECJ's view (at paragraph 34) in *KPN* that a strict approach has to be adopted to the construction of the term 'relevant information'. Therefore, as USC7.1 requires BT to maintain a database with directory information for all subscribers who have been allocated a telephone number by any CP, it cannot be said that this provision implements Article 25(2) of the USD.
- A7.18 As regards the question of the consistency of the obligations in USC7 with the relevant directives, the USD does not contemplate that the obligations placed on designated undertakings might require them to supply services at a "wholesale" level, that is to say, to other CPs or other non-end-users (collectively referred to as "**intermediaries**"). This can be seen most clearly in the provisions in the USD relating to cost recovery schemes (Article 12 and Annex IV). Those provisions are conspicuously silent on how payments made by intermediaries for such supplies are to be treated – a silence which points to the conclusion that the USD does not contemplate that universal service obligations will require supplies to intermediaries.
- A7.19 Any suggestion that an obligation to supply an intermediary might be acceptable as part of a universal service obligation that also included a requirement to supply (or guarantee supply to) end-users would run into a further difficulty when one comes to consider the cost recovery provisions (that is, Articles 12 and 13) of the USD.
- A7.20 It seems to be plain from both Case C-146/00 *Commission v. France* and the *KPN* case that the ECJ takes the view that the only costs recoverable under the cost recovery provisions (in what is now the USD) are those costs which are closely and necessarily linked to universal service obligations. That, in turn, means that the universal service obligations imposed by Member States need to be tightly confined to what is necessary to implement the USD.
- A7.21 Accordingly, not only are the provisions of USC7 without basis in domestic law (because they do not implement obligations under Chapter II of the USD), but they are also inconsistent with the USD.

### **The Financing Provision in USC7.4**

- A7.22 Even if the rest of USC7 were soundly based, there is a further difficulty with USC7.4 which means that this obligation falls away in any event. However, to deal with the latter, the analysis set out below proceeds on the (false) assumption that USC7 in general terms implements Article 5 of the USD and, further, that USC7.4 is an essential part of the scheme of USC7 in that the obligation on BT to supply the database at a "wholesale" level becomes nugatory if there are no restrictions upon its terms and charges for such supply. If that would be right, then USC7.4 regulates, in effect, charges levied by BT in order to recover the costs of discharging its universal service obligation<sup>196</sup>.

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<sup>196</sup> It being assumed for present purposes that BT's obligations under USC7 are part of its universal service obligation; if they are not then USC7 (including USC7.4) is unlawful in any event.

- A7.23 To consider the lawfulness of that arrangement, it is appropriate to first summarise the substance of the financing provisions in Chapter II of the USD, which are cited fully in **Annex 5** of this explanatory statement.
- A7.24 As might have been predicted from the reference in Article 3(1) to the provision of the Chapter II (universal) services to end-users “*at an affordable price*”, the USD contains provisions for the control of the price at which the designated undertakings make such services available. Article 9 therefore provides for the monitoring by Member States of the “*evolution and level of retail tariffs*”, in particular “*by reference to national consumer prices and income*”. It also provides that Member States may require the provision of Chapter II services “*to consumers*” at tariffs departing from normal commercial conditions, in particular to ensure their availability to those on low incomes or with special social needs. (In that light, it seems plain that Article 9 is dealing with *retail* pricing to end-users or consumers, and has no applicability to *wholesale* tariffs.)
- A7.25 Article 10 goes on to reinforce Article 9 by providing, among other matters, that Member States must ensure that designated undertakings cannot require the subscriber to take additional unnecessary services as a condition of supply of Chapter II services; this provision deals with the possibility that designated undertakings might seek to recover losses incurred supplying Chapter II services at non-commercial rates by requiring subscribers to purchase additional, profitable services as a condition of supply.
- A7.26 The imposition of a requirement to provide Chapter II services, particularly at non-commercial tariffs or on a basis involving geographical averaging or price caps<sup>197</sup>, could impose an unfair burden on designated undertakings. Articles 12 and 13 contain provisions that allow Member States to relieve that unfair burden by calculating the net costs of the provision of the Chapter II service in question; a detailed mechanism for doing that is set out in Article 12 and in Annex IV and Article 8(2). Article 13 then allows Member States to make arrangements either to compensate the designated undertaking for that net cost from public funds or to share that net cost, in accordance with the general principles set out in paragraphs (2) and (3), amongst providers of electronic communications services.
- A7.27 Articles 12 and 13 of the USD are implemented by sections 70 to 72 of the 2003 Act. Section 70 provides that we may from time to time review the extent of the financial burden imposed; under sub-section (3) the financial burden is to be assessed on the basis of the net cost of compliance after taking into account benefits accruing to the undertaking from its designation and the application to it of universal service conditions. Section 71 then sets up a mechanism by which we may, if we consider that the financial burden imposed is unfair on the undertaking concerned, require that other CPs make a contribution; the contribution scheme must be drawn up in accordance with regulations made by us under section 71.
- A7.28 In the light of the above summary of the financing provisions, it is to be noted, by way of a preliminary observation, that the USD is completely silent on how to treat payments made by non-end-users in respect of the performance of universal service obligations. This rather suggests that the assumption here – that the USD contemplates the performance of universal service obligations by making supplies to non-end-users (see **paragraph A7.22** above) – is in fact false.

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<sup>197</sup> See Article 9(4).

A7.29 Leaving that aside, to make sense of the USD on that (false) basis, three approaches are, in principle, possible in regard to Articles 12 and 13:

(v) **Very narrow view.** This view is that Articles 12 and 13 preclude Member States from setting up a sharing mechanism based on compulsory contributions by all CPs<sup>198</sup> to the costs of complying with universal service obligations (“**USO costs**”) outside the Art 12/13 mechanism, but leaves them free to regulate charges made to non-end-users for the provision of goods or services for matters which fall within the universal service obligations.

(vi) **Narrow view.** This view is that Articles 12 and 13 preclude Member States from regulating, outside the Art 12/13 mechanism, the extent to which CPs contribute to USO costs.

(vii) **Broad view.** This view is that Articles 12 and 13 preclude Member States from regulating, outside the Article 12 and 13 mechanism, the extent to which anyone other than end-users contributes to USO costs.

A7.30 There are a number of reasons why we consider that the broad view is the correct one.

A7.31 First, any provisions as to the extent to which anyone other than end-users contributes to USO costs is a “compensation mechanism” in that the aim is to provide for the recovery of USO costs.

A7.32 Secondly, the USD plainly precludes any compensation mechanism outside Articles 12 and 13. Thus, the 4<sup>th</sup> recital expresses a general concern that compensation mechanisms may result in a distortion of competition, and then expresses the view that this should not result if certain conditions are met – those conditions plainly refer to the mechanism in Articles 12 and 13. The concern that any compensation mechanism needs to meet certain criteria is also expressed in the 18<sup>th</sup> and 23<sup>rd</sup> recitals; again, it is clear that those recitals point to the mechanism in Articles 12 and 13 as the mechanism that satisfies those criteria.

A7.33 On the basis of the broad view, there is no doubt that USC7.4 is precluded, as it plainly regulates the extent to which intermediaries contribute to USO costs. Accordingly, even were the rest of USC7 to be defensible, USC7.4 would nonetheless be found to be flawed.

## Article 32 of the USD

A7.34 Finally, it should also be considered whether Article 32 of the USD would provide legal basis for imposing USC7, particularly in the light of the *KPN* judgment.

A7.35 However, there are a number of reasons why Article 32 does not provide a sound and proper legal basis for imposing USC7.

A7.36 To start with, Article 32 concerns Member States’ discretion to make available additional services, apart from services within the universal service obligations as defined in Chapter II of the USD. In other words, Article 32 does not impose a Community obligation. As explained above, the 2003 Act confers no power on the

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<sup>198</sup> Subject to the possibility of a minimum turnover threshold (Article 13(3)).

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 we have no power to implement Article 32 by way of a USC under section 67 of the 2003 Act. Therefore, as a matter of domestic law, USC7 is unlawful even if it may otherwise be permissible as a matter of EC law.

A7.37 Although strictly irrelevant to the present issue concerning the validity of USC7, one might seek to argue that Article 32 obligations could possibly be imposed as consumer protection measures using point 8 of Part A of the Annex to the Authorisation Directive (although this route was not in fact chosen). If so, the domestic enabling powers are arguably already in place under section 51(1)(a) of the 2003 Act to impose such obligations by way of a GC. However, given that a GC may only be applied generally either to all providers or a specified class of providers<sup>199</sup>, it would in any event appear impossible to impose an obligation similar to that of USC7 in the form of a GC on BT only – so that this argument cannot provide a legal basis for USC7. Article 32 of the USD cannot therefore provide a sufficient legal basis for USC7.

A7.38 In any event, Article 32 of the USD is clear on its face that it precludes a financing provision; for reasons set out above, that prohibition precludes provisions such as those contained in USC7.4.

## Directories

A7.39 Since the present disputes relate to DQ services, the provisions of USC7 do not need to be specifically considered by us to the extent that it seeks to implement Article 5(1)(a) concerning comprehensive directories.

A7.40 However, in essence, our view is that the implementation here suffers from the same defects as noted above in relation to DQ services, that is to say that under USC7 there is no requirement on BT (or any other undertaking) to supply all end-users with directories but rather to supply other CPs with directories.

A7.41 In addition, the same problems discussed above concerning the financing provision in USC7.4 apply equally in this context.

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

A7.42 In our letters of 13 January 2006 to the parties in the present disputes, we set out the main conclusions of our Leading Counsel's advice, as set out in **Section 5** of this explanatory statement, and enclosed a briefing note (i.e. the 'Summary') of that more detailed advice, as set out above. In the letters, we specifically invited the parties to comment on that advice. (A similar letter was sent to Thomson, which was also invited to make such comments.) We subsequently sent a copy of the Counsel's advice in full to all parties, following a request from Conduit.

A7.43 The account below summarises the comments we received on our Leading Counsel's advice and our views on those comments, as set out in the August 2006 document.

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<sup>199</sup> Section 46(2) of the 2003 Act.

## The Number: No need for designated provider to provide the ultimate end-user

- A7.44 In the Annex to its letter dated 3 February 2006, The Number set out the reasons why it considered that our Leading Counsel was wrong to conclude that USC7 does not properly implement Article 5 of the USD and is therefore unlawful. The Number disagreed with Leading Counsel's view that the mechanism in USC7 fails to impose an obligation on any undertaking (and, in particular, on BT as a designated provider) and thereby fails to 'guarantee' that at least one comprehensive DQ service is provided to all end-users.
- A7.45 The Number supported Oftel's reasoning at the time of imposing the obligations that GC8 and GC19 were insufficient to ensure that the obligations under Articles 5 and 25 of the USD were met efficiently and transparently, in particular to avoid significant duplication of efforts.
- A7.46 However, we maintained the view set out by our Leading Counsel above. We stated that, as at the time USC7 was imposed, Article 5 of the USD requires that at least one undertaking 'guarantee' that at least one comprehensive DQ service is available to all end-users. USC7 does not achieve that guarantee. Article 5 of the USD does not, however, provide a basis for a universal service obligation to compile and supply to providers of DQ services a comprehensive database of all subscribers, which is what USC7 seeks to do. The fact that USC7 may provide a means by which, in practice, end-users are able to access comprehensive DQ services does not affect the point that it fails to achieve the required guaranteed service and further imposes a "wholesale" supply obligation not found in Article 5 of the USD.
- A7.47 The Number disputed the propositions by us set out in **paragraph A7.46** above.
- A7.48 First, with regard to the 'guarantee' in Article 8(1) of the USD, The Number argued that it is not the designated undertaking(s) who must guarantee the provision of the universal service. In this context, The Number recognised that (in the English text of the USD) it could be seen as ambiguous as to whether it is the designated undertakings guaranteeing the provision of the universal service or the measures taken by the Member State (i.e. designation of certain undertakings) which will guarantee the provision of the universal service. However, it submitted that the true meaning derived from Articles 3(1), 4(10), 5(1) and 6(1)—which require Member States to 'ensure' that certain universal services are provided—of Article 8(1) of the USD is that Member States are to be enabled to designate undertakings 'in order to' guarantee the provision of the universal service. To support that conclusion, The Number referred to the 13<sup>th</sup> recital to the USD's preamble which refers to "*suitable measures in order to guarantee*", which proposition it considered are supported by the French and Portuguese texts of the USD.
- A7.49 We responded, however, that the purpose of Article 8(1) of the USD is that the designated undertakings should indeed guarantee provision of universal services (rather than that they are designated in order to fulfil the Member States obligation to ensure their provision); that purpose is reflected in the natural reading of the English version.
- A7.50 As to The Number's point about the French and Portuguese texts of the USD, we considered that the French language version is inconclusive on the point ("*Les États membres peuvent désigner une ou plusieurs entreprises afin de garantir la fourniture du service universel*"), but both the Spanish and German versions of Article 8(1) of the USD clearly support the natural English construction ("*Los Estados miembros podrán designar una o más **empresas que garanticen** la prestación del servicio*").

*universal*"; "Die Mitgliedstaaten können ein oder mehrere **Unternehmen** benennen, **die die Erbringung des Universaldienstes... gewährleisten**", in both cases making it clear, by the use of a relative pronoun after the word meaning "undertakings", that it is the designated undertakings that must guarantee the universal service. Article 5 of the USD therefore requires<sup>200</sup> there to be an undertaking which guarantees the supply the universal service at issue (i.e. a comprehensive DQ service) to end-users; but it is plain that no such obligation is, in fact, imposed on BT by USC7.

A7.51 However, even if The Number were right in its construction of Article 8(1) so that it was not necessary for an undertaking to have the responsibility of guaranteeing the provision of the universal service but rather that it was for the Member State to guarantee its provision (which, for the avoidance of doubt, is not accepted by us), the fact remains that USC7 does not provide any 'guarantee' that the universal service will be provided. Even if BT fully complies with its obligations under USC7, no service is provided to end-users unless BT (or other undertakings) *choose* to make that service available – and there is no mechanism by which we (or any other body) can require any person to provide those services if no-one chooses to do so. In our view, that made it impossible to see how USC7 could be said to achieve a 'guarantee' of such provision.

A7.52 The Number disagreed with the proposition that there is nothing in the USD which contemplates the provision of a universal service at a wholesale level rather than to end-users. Rather, it submitted that there is nothing in the USD which either requires or precludes a designation for the provision of the universal service at the wholesale level. To support this argument, The Number stated that the provision by BT of the OSIS database at the wholesale level represents an 'element' of the universal service within the meaning of Article 8(1) of the USD, which makes plain reference to 'different elements' being provided by different designated undertakings.

A7.53 In response, we stated that our view based on our Leading Counsel's advice was correct in concluding that there is nothing in the USD which contemplates the provision of a universal service at a wholesale level rather than to end-users, for the reasons that had already been given (and now also in light of the clarification on how this analysis is consistent with the authorisation regime, as set out in **Section 5** of this explanatory statement).

A7.54 As to The Number's reliance on the phrase 'different elements' in Article 8(1), we considered that it was misplaced in this context. Specifically, in this regard, we noted, firstly, that Article 8(1) provides:

1. Member States may designate one or more undertakings to guarantee the provision of universal service as identified in Articles 4, 5, 6 and 7 and, where applicable, Article 9(2) so that the whole of the national territory can be covered. Member States may designate different undertakings or sets of undertakings to provide different elements of universal service and/or to cover different parts of the national territory.

A7.55 Also relevant is the 9<sup>th</sup> recital, which provides that:

(9) The provisions of this Directive do not preclude Member States from designating different undertakings to provide the network and service elements of universal service. Designated

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<sup>200</sup> As explained in **Section 5** of this explanatory statement, Ofcom then clarified in the February 2007 document that this requirement applies, unless the provision of the basic set of (universal) services is already supplied by normal market conditions.

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.

- A7.56 In our view, the purpose of the reference to 'different elements' in that Article (as well as in that recital) is to allow different undertakings to be designated to provide different universal services (e.g. that one undertaking may be designated to provide a comprehensive directory to all end-users and another may be designated to make available to all end-users a comprehensive DQ service). In any event, the contention that a universal service may be broken up into different elements with each different element being supplied by a different undertaking does not address the point that 'wholesale' provision is not an 'element' of a universal service at all: *universal service* is, by definition, a service to end-users and does not include any wholesale supply.
- A7.57 The Number further disagreed with the proposition that Articles 9 and 10 and Annex IV support Leading Counsel's advice that the designation of BT to provide the universal service at anything other than the retail level is inconsistent with the USD and therefore unlawful. In The Number's view, whilst these Articles deal with retail pricing and end-user issues, their existence does not in itself *preclude* a designation at the wholesale level or *require* a designation at the retail level. It argued that what these Articles do is to provide for the situation where a designated undertaking is providing services at a retail level. The fact that provision at the wholesale level is not provided for in the same way is not to be taken to mean that it is not possible or permitted to designate for provision at a wholesale level or to regulate the cost and pricing of that provision.
- A7.58 However, we responded by saying that it took the view that those provisions, taken together with the absence of any positive indication whatsoever that the USD contemplates the provision of universal service at anything other than the retail level, support our Leading Counsel's advice.

### **The Number & Thomson: Broad discretion for most efficient approach**

- A7.59 In the Annex to its letter dated 3 February 2006, The Number made an alternative submission in the event that Article 8(1) would not permit an undertaking to be designated to provide an element of the universal service at the wholesale level. The Number argued that USC7 is, in any event, permitted under the broad discretion given to Member States under Articles 3(2) of the USD to determine the most efficient and appropriate approach for ensuring that the universal service is available to end-users at affordable prices.
- A7.60 The Number submitted that this broad discretion reflects Article 249 of the EC Treaty, which states that "*A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods*".
- A7.61 In The Number's view, the discretion for the DGT/Ofcom to set USCs is equally broad. Although The Number agreed with Leading Counsel's advice that the effect of sections 67(1) and 65(1) of the 2003 Act is that such conditions may be imposed only in order to secure compliance with Community obligations, it submitted that the advice wrongly fails to emphasise the very broad discretion left to the DGT/Ofcom in this respect by section 67(1), which states that "*Ofcom may set any such universal service conditions as they consider appropriate for securing compliance with the obligations set out in the universal service order*" (emphasis added). In its view, in

determining the *form and methods* necessary to secure compliance with the obligation in Article 5(1) of the USD, the UK was entitled to decide that an element of the universal service could be secured by requiring BT to perform certain functions under USC7, namely the maintenance and supply of a comprehensive database of UK directory information to persons seeking to provide directory enquiry services.

- A7.62 The Number further argued that the requirement in Article 5(1) can be met in more than one way and there is certainly no prohibition in terms in the USD on the wholesale supply provided for in USC7 or on Oftel's scheme generally. As a result, it contended that the advice wrongly concludes that the designation of an undertaking to provide the universal service to end-users is mandated by the USD and is therefore the only way to achieve the result required by Article 5(1). In The Number's view, the only thing mandated by Article 5 is that the *universal service is ultimately provided*. The way in which it is provided is left entirely to the Member States' discretion, and in fact Oftel chose under GC8 to require every CP assigning telephone numbers to provide access to a comprehensive directory enquiry facility to end-users, rather than designating one undertaking to do so.
- A7.63 In light of the above, The Number concluded that the *combined effect* of USC7 and GC8 and GC19 is that the comprehensive directory and directory enquiry service are provided to end-users in the most effective manner as determined by Oftel. USC7 is therefore a necessary component in the legal framework designed overall to secure compliance with Article 5(1) of the USD and achieve the required result. It also pointed out that, in implementing a directive, a Member State is entitled to rely in whole or in part on pre-existing legislation or provisions enacted without reference to the directive provided that the overall legal context ensures full application of the directive in a sufficiently clear and precise manner. In support of this statement, The Number relies on *Commission v. The Netherlands, Case C-190/90*<sup>201</sup>. The Number argued that the DGT/Oftel was therefore entitled to rely on GC8, on the wording of Condition 82 in BT's previous licence under the 1984 Act, and on the fact that BT already compiled a comprehensive database of UK directory information which it was required to provide to persons seeking to provide DQ services.
- A7.64 For reasons already set out above (and as further clarified in the February 2007 document, as confirmed in **Section 5** of this explanatory document), we did not accept this argument by The Number.
- A7.65 First, we did not think our analysis was assisted by reference to Article 249 of the EC Treaty. The result to be achieved in this particular respect under Article 5 of the USD is as set out in the advice, that is to say an enforceable obligation on a designated universal service provider to make available the 'things' (to use the terminology in the Services Order) under that Article directly to all end-users (as opposed to intermediaries). As already explained, this specific result has not been achieved by way of implementing measures in the UK (see also Article 38 of the USD in this respect). Clearly, the UK has exercised its discretion as to form and methods by transposing the provisions of the USD under a combination of UK primary and secondary legislation (including the Services Order), which are in themselves compatible with the USD insofar as they confer appropriate powers and duties upon the DGT/Ofcom in order to allow universal service conditions to be imposed that achieve the result required by the USD. However, that does not alter the conclusion that USC7 does not achieve that result.

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<sup>201</sup> [1992] ECR I-3265.



A7.66 Secondly, as regards to The Number's reference to 'appropriate' under section 67(1) of the 2003 Act, our view was that the end result of the 'appropriate' measure must be to secure compliance with the obligations set out in the Services Order. We did not consider that USC7 secures compliance with the Services Order or with the USD. Furthermore, we did not see that *Commission v. The Netherlands*, Case C-190/90 supports the point that The Number was making. Indeed, if anything, that case reinforces our opinion in that individuals must be able to rely on their rights under a directive transposed into the domestic legal framework (whether existing or new) before the national courts.<sup>202</sup> In other words, if there is no enforceable obligation on BT under USC7 to make available to end-users (say) a DQ service, then such end-users cannot rely on their 'rights' before national courts in order to secure that universal services are provided to them as end-users.

A7.67 In this context, we noted that Thomson in its letter dated 5 June 2006 to us appeared to be making a similar point to The Number with regard to the combined effect of USC7 and GC8, albeit by reference to directories. In particular, Thomson challenged Leading Counsel's advice that the implementation of Article 5(1)(a) of the USD suffers from the same defects as noted in relation to DQ services. Thomson argued as follows:

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

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

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

A7.68 However, we did not consider Thomson's argument to be of relevance. Neither Leading Counsel, nor Ofcom, has suggested that a 'single' provider has to be designated for the supply of comprehensive directories and note that Article 8(1) of the USD anticipates that "*one or more undertakings*" could indeed be designated. As mentioned above, the point is that BT has no enforceable obligation in its capacity as a universal service provider to provide Article 5(1)(a) directories. Nor did we see the distinction that Thomson appeared to be making between providing a directory and making it available. We also noted that the literal and ordinary meaning of the word 'provide' (using the Shorter Oxford English Dictionary) is "*supply or furnish for use; make available; yield, afford*".

A7.69 As regards the issue of combined effect and practical reality, we referred to our views on the arguments made by The Number, which are equally applicable to directories under Article 5 of the USD, as they essentially repeat points already made. On Thomson's point about the consistency of USC7.2 with the *KPN* principles, we did not accept this point. A requirement on BT to provide the contents of its OSIS

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<sup>202</sup> See, for instance, paragraph 17 of the ECJ's judgment.

database is plainly wider than a requirement to provide 'relevant information' under Article 25 of the USD.

### **The Number & Thomson: Ability to regulate price at the wholesale level**

- A7.70 In the Annex to its letter dated 3 February 2006, The Number also took issue with Leading Counsel's advice when it concludes that, even if the rest of USC7 is defensible, USC7.4 is flawed because it regulates the extent to which intermediaries contribute to USO costs and is therefore a compensatory mechanism outside Articles 12 and 13 of the USD.
- A7.71 The Number argued that all the costs of OSIS are necessarily covered in the fees paid by OSIS licensees and there is, as a consequence, no net cost and no deficit or under-recovery by BT which would necessitate a mechanism by which intermediaries are required to contribute to that particular aspect of the universal service. The Number therefore concluded that Articles 12 and 13 never come into play.
- A7.72 We did not accept this argument. Among other things, the purpose and effect of USC7.4 is to regulate the amount that DQ service providers have to contribute to the costs of the provision by BT of (what is assumed for these purposes to be) a universal service obligation imposed upon it. For the reasons given above, the USD does not permit such regulation outside the scope of the specific provision of Articles 12 and 13.
- A7.73 Furthermore, The Number made assumptions as to the OSIS fees covering BT's costs of its compliance with USC7. Although we did not think this matter addressed the points in Leading Counsel's advice, we noted that no such assumptions could be made until a review of BT's financial burden has been carried out by us under section 70 of the 2003 Act.
- A7.74 In its letter dated 5 June 2006, Thomson also challenged our Leading Counsel's advice that USC7.4 is unlawful. In particular, Thomson claims that Article 25 envisages the supply of aggregated data and must be interpreted in accordance with *KPN* principles. According to Thomson, the principles set out by the ECJ in the *KPN* judgment fully support the obligation to supply aggregated information in circumstances – such as BT's – where the universal service provider independently collects that information under a distinct regulatory obligation. Thomson concluded that USC7.4 does nothing more than to reflect the wording of Article 25(2), which states that relevant information is to be provided on "terms which are fair, objective, cost oriented and non-discriminatory".
- A7.75 We did not accept this argument. Specifically, we did not consider aggregated data fell within GC19 and Article 25. Therefore, we considered that Thomson's argument was based on an incorrect premise.

### **The Number: BT is out of time to challenge domestic vires of USC7**

- A7.76 In the Annex to its letter dated 3 February 2006, The Number argued that BT is significantly out of time to challenge the domestic lawfulness of USC7 by way of judicial review proceedings.
- A7.77 First, we noted that it was not BT which originally raised issue of the lawfulness of USC7 in relation to the disputes. Rather, we first raised this point following consultation with Counsel. Secondly, and more broadly, The Number's point was misconceived. If USC7 is unlawful, then we have no power to order BT to comply

with its terms, and any such decision by us could properly be defended by BT whether or not BT would now be permitted to seek a judicial review of the original decision to impose USC7.<sup>203</sup>

### **The Number: Impact on DQ services market of designating BT only**

A7.78 In the Annex to its letter dated 3 February 2006, The Number made a further argument based on the adverse consequences to competition that in its view would follow were we to accept Leading Counsel's advice and then to seek to correct the current position by designating BT as the universal service provider of DQ services to end-users. The Number argued that such a designation would have the potential to distort existing competition in the DQ services market.

A7.79 We noted this point, but did not consider it to be relevant to the immediate issue before us and it did not affect the conclusions of our Leading Counsel's advice.

### **Conduit: Lack of clarity that Ofcom has properly directed Leading Counsel**

A7.80 In its letter dated 3 February 2006, Conduit submitted that it was not in a position to evaluate the reasoning on which we proposed to rely as set out in our Summary of Leading Counsel's advice. It therefore requested that we provide it with a copy of Counsel's opinion to enable Conduit properly to consider the analysis relied on by us. On 2 March 2006, we provided such a copy to Conduit (and all other parties). We have to date not, however, received any further submissions by Conduit on that opinion. However, already in its 3 February letter, Conduit questioned whether our Leading Counsel had been properly directed by us in three broad respects.

A7.81 First, Conduit argued that our Summary was based on an analysis of sections 65 to 67 of the 2003 Act, whereas the USO notification was issued under the Universal Service Regulations, which were made under the European Communities Act 1972. In this context, Conduit noted that the Summary also lacks any analysis of the transitional provisions in paragraph 7 of Schedule 18 to the 2003 Act and it therefore questioned whether Counsel had been properly directed by us to consider the correct statutory basis for USC7.

A7.82 We noted that Conduit was not arguing that Leading Counsel's analysis did not apply with equal force to the position before the coming into force of the 2003 Act. In any event, the lawfulness of USC7 must now be considered in terms of the statute that is now in force, that is to say the 2003 Act. In this regard, we concurred with the response made by BT to Conduit's submission (see further below).

A7.83 The second point made by Conduit concerned the implications of Counsel's reference to 'receive' in the following passage of the Summary: "... *Therefore, Article 8 plainly requires that the Article 5 services should be achieved by designating one or more undertakings to guarantee that all end-users **receive** comprehensive DQ services*". Conduit argued that, in practice, such an approach would involve us granting the provider of the 'universal directory enquiry service' a special right to require all network operators providing connections to end users to interconnect with

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<sup>203</sup> The position is the same, for example, as where a prosecution is brought for an offence under a bye-law which the defendant considers to be invalid; the defendant is entitled to raise that point in his defence and the Court must decide the question of the legality of the bye-law; see *Boddington v. British Transport Police* [1999] 2 AC 143.

(or otherwise to provide access to) its service. No such right is enjoyed by other DQ service providers and it was therefore unclear to Conduit whether Counsel was directed to Article 5 of the Competition Directive or whether any consideration had been given to the compatibility of such an interpretation with the new directives or broader public law principles of proportionality.

A7.84 We noted in this regard that Article 25(3) of the USD requires Member States to “ensure that all end users provided with a connection to the public telephone network can access ... directory enquiry services in accordance with Article 5(1)(b)”. That Article is implemented by GC8.1(b). We considered that a correct implementation of Article 5 of the USD would involve requiring a designated service provider to make a comprehensive DQ service available to any end-user; the designated provider would therefore be obliged to make that service available to end-users on the networks of other CPs. Those other CPs would, in turn, be subject to GC8.1(b). We did not see what other ‘special right’ would need to be granted to the designated service provider apart from GC8.1(b) (which is plainly based on Article 25(3) of the USD), and therefore we did not see that any difficulty arising under the Competition Directive.

A7.85 The third point by Conduit related to the extent to which Counsel was directed to consider the legal analysis conducted by Oftel prior to the USO notification was issued by the DGT on 22 July 2003.

A7.86 We did not consider this to be a relevant question.

### **BT: Generally supported Leading Counsel’s advice**

A7.87 In its letter of 3 February 2006 to Ofcom, BT agreed with our Leading Counsel's conclusions so far as USC7 is concerned, subject to its more specific comments as summarised below.

A7.88 First, BT agreed that the 2003 Act empowers us to impose USCs only if and to the extent that they are appropriate for securing compliance with the obligations set out in the USD, in particular Article 5(1) of the USD.

A7.89 BT also considered it certainly well arguable that USC7 is unlawful on the basis indicated in Leading Counsel’s advice, namely that it fails to give effect to an obligation under Article 8 of the USD to impose a duty on at least one provider to guarantee the provision of the universal services, in this case those set out in Article 5(1) of the USD. However, in light of its following additional comments, BT did not think it was necessary to express a final view on that point.

A7.90 BT agreed that the obligations purportedly imposed on BT by USCs 7.1 to 7.4 (to maintain a database of information regarding all subscribers who have been allocated a telephone number by any communications provider, to supply the contents of that database to any supplier of publicly available DQ or directories services, and limiting the charges made by BT for such supply) do not reflect any obligations in the USD and are therefore unlawful. In particular, BT submitted that the regime set out in the USD contemplates that all CPs who assign telephone numbers to subscribers will be required to meet all reasonable requests to make available, for the purposes of the provision of publicly available DQ and directories services, the relevant information (Article 25(2)). BT pointed out that the ‘relevant information’ in this context refers to information in relation to subscribers to whom *that provider* has assigned telephone numbers. Article 25(2) then requires the cost of making such ‘relevant information’ available to be “fair, objective, cost oriented and non-discriminatory”. Article 25(2) is reflected, in the UK’s domestic provisions, in GC19.3.

It is the predecessor to Article 25(2) that has been considered by the ECJ in the *KPN* case.

- A7.91 BT further pointed out in this context that, if a Member State has imposed an obligation on a provider to guarantee the provision of the universal service set out in Article 5(1) of the USD, then that designated provider will of necessity have to obtain 'relevant information' from all other providers who assign telephone numbers, in order to enable it to provide a universal DQ and/or directories service. It is through Article 25(2) that a designated universal provider would be able to obtain such relevant information. However, in BT's view, nothing in the USD contemplates or requires Member States to impose on any provider a universal service obligation to obtain, aggregate *and make available to competing DQ or directories providers* relevant information, or indeed any subscribers other than those to whom it has itself assigned telephone numbers. Access to such relevant information would be possible through Article 25(2) (GC19 in the UK). Indeed, BT argued that there is no basis for the imposition of wholesale universal service obligations under the USD and it referred to exactly this argument that BT made to Ofcom during Ofcom's 2003 consultation on the implementation of the USD.
- A7.92 According to BT, it followed that nothing in the USD contemplates or requires any provision as to the charges that a provider subject to such an obligation as is referred to above (assuming it existed) might levy for the provision of such aggregated data. In particular, Article 25(2) has absolutely no application to any such supply of data. It further follows that USC7 is not appropriate to implement the UK's obligations under the USD and is unlawful.
- A7.93 BT also agreed with our Leading Counsel's conclusion that Article 32 of the USD does not support the validity of USC7.
- A7.94 If either USC7 as a whole, or USC7.4 in particular, is unlawful, then BT argued that the present dispute simply falls away. In this context, BT made some provisional observations even if USC7 were held to be lawful. For reasons already set out above, BT claimed that the restriction in USC7.4 on the amount which BT may charge for the supply of aggregated data does not implement Article 25(2): in short, Article 25(2) only applies to the charges made for data relating to the supplier's own subscribers. Accordingly, USC7.4 is not properly to be read in the light of Article 25(2), being neither required nor authorised by that provision. The correct construction of USC7.4, if it is lawful, is that 'cost oriented' refers to the true cost of the supply in question, which in turn includes the additional burden of obtaining and aggregating data from other providers. *KPN* would not prescribe the charges which could be made for such supply.
- A7.95 Separately, in its letter of 23 February 2006, BT responded to Conduit's suggestion that our Leading Counsel's opinion is defective because the statutory basis of USC7 was not sections 65 to 67 of the 2003 Act, but section 2(2) of the European Communities Act 1972. For a number of reasons, BT considered that this point is incorrect, and in any event does not really affect the position.
- A7.96 First, BT pointed out that the USCs were on 22 July 2003 notified *as proposals* under regulation 4(10) of the Universal Service Regulations, which were in turn made under section 2(2) of the European Communities Act 1972. Regulation 4(10) provided that the DGT in specified circumstances:

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

A7.97 Thus, at the time the USCs were notified, they were proposals for measures that, it was intended, would be given effect upon the coming into effect of the relevant enactment to implement the USD. Using the language of the Explanatory Note to the Regulations, they were “preparatory tasks”. BT further pointed out that it was only on the coming into effect of the enactment itself, viz the 2003 Act which came into force on 25 July 2003, that the USCs took effect as such. They were henceforth deemed (by paragraph 7 of Schedule 18 to the 2003 Act) to have been made under section 45 of the 2003 Act, which in turn cross-refers to section 67, as that paragraph 7 makes clear:

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

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

A7.98 It followed, according to BT, that all questions as to the legality and scope of the USCs are to be determined on the basis that the USC were made under section 67. In any event, BT pointed out that Conduit had not identified any material difference between the powers in section 67 of the 2003 Act and those in section 2(2) of the European Communities Act 1972 that might alter the outcome of this issue. Finally, BT submitted that the points made in its letter of 3 February 2006, which support the view that USC7 is invalid, are founded on the terms of the USD itself rather than on any domestic enabling provisions. Those points would apply equally even if Conduit were right to say that the statutory basis of the USCs is the European Communities Act 1972.

A7.99 As noted above, we concurred with the response made by BT to Conduit's submission relating to the implications of the statutory basis of USC7.

## 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>BTWM</b>	BT Wholesale Markets
<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 3</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>LORS</b>	Licensed Operator Registration System. The system used by BT to enable upstream CPs to provide customer information to it for transfer into OSIS
<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