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**Response to the Ofcom consultation on:
Directory Enquiries (118) Review**

The Number (UK) Ltd

22 August 2018

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1. Executive summary

- 1.1 Telephone directory enquiry ('DQ') services have declined very far from their peak. Providers, including smaller players and also larger players such as TNUK, have had to adapt to a declining market for voice DQ services. The use of a voice call to obtain information has been transformed by the growth in mobile consumer data services. Some providers have left the DQ services market, or outsourced their operations, looking to reduce costs and scale back activity as volumes decline. At the same time, innovation has continued in this market, with DQ services finding a new phase of commercial life as a niche product, selling hyper-convenience to a wide but small user base.¹ As DQ services have shifted from a mass-market offering to a specialist offering, and as the number of users has fallen, and the focus of the providers has narrowed, prices have risen.
- 1.2 As the largest and highest-profile DQ provider, TNUK is uniquely affected by Ofcom's Directory Enquiries (118) Review (the '**DQ Review**'). We would welcome a review that considers whether the regulatory conditions for telephone DQ services continue to be relevant, and that provides scope to debate how the sector ought to be dealing with the declining volumes in telephone DQ services to ensure that quality, choice and competition is maintained for customers.
- 1.3 It is therefore with surprise and disappointment that TNUK responds to Ofcom's proposals. Ofcom's analysis seems to miss or gloss over some important aspects of the DQ market, including the degree to which most customers (seven in ten) are happy with the service they receive. Ofcom's proposed intervention (a price cap) represents a very significant change in the market conditions under which TNUK and other providers operate, but the impacts of that proposal have not been robustly assessed.
- 1.4 Ofcom's price cap proposal:
- (a) Could not be justified by Ofcom's analysis set out in the DQ Review, which is skewed and partial in its treatment of the options. Ofcom's analysis is often contradictory, as Ofcom appears to contort its findings in order to make the case for its preferred outcome.
 - (b) Rests largely on a consumer survey which appears to be flawed in a number of important ways, meaning that it is has limited evidential value (and far less value than Ofcom appears to impute to it). In order to understand this study, TNUK has commissioned a review by an independent expert in survey design and analysis, Mr David Rodgers. His report is annexed to this submission and outlines a range of concerns which mean that Ofcom's proposals are not justifiable in the way that Ofcom seems to believe (the '**Rodgers Report**'). The Rodgers Report concludes that the quantitative elements of the survey have limited evidential value,² and that the 'bill shock' evidence which is based on customer perceptions of their last call cost against prior expectation, as relied on by Ofcom, is unreliable.³ The qualitative elements of the

¹ The user base for DQ services is broad, with one important characteristic: the age group 16 -34 is underrepresented – see the discussion in section 7 below.

² Rodgers Report, paragraph 3.

³ Rodgers Report, paragraph 54(d).

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study have even less evidential value, such that *'the qualitative work does not provide much understanding of DQ users' experiences...'*⁴

- (c) Is not economically robust, for the reasons given in the accompanying report by independent experts, CEG (the '**CEG Report**'). In this report CEG concludes that *'the proposed price cap carries a significant risk of causing greater costs than benefits'* and that other remedies are available *'that could more effectively address Ofcom's specific concerns and do so at lower cost to customers generally'*.⁵
 - (d) Is based on material errors in Ofcom's analysis – specifically, the level of the price cap is based on what Ofcom understands to be 2013 prices, but that price level is based on erroneous calculations in the DQ Review.⁶
- 1.5 Ofcom has also underestimated the impact of its proposals on providers – including on TNUK. [X]. Ofcom's DQ Review document does not properly assess, or acknowledge, the impact of its regulatory intervention on TNUK, or the impact on competition that its proposed price cap would entail.
- 1.6 In this submission, we have sought to assist Ofcom by providing detailed comments on the analysis set out in the DQ Review, to enable Ofcom to re-consider these issues in light of a more complete evidentiary picture. To illustrate that there are a wider range of options available than Ofcom appears to recognise, we have also set out on a preliminary basis some possible alternative measures that might be considered by Ofcom, to test the proportionality of any proposals and see whether they are at least as effective, or better, at achieving the outcomes that Ofcom wants to see for customers, without the harm that would follow from Ofcom's proposal.
- 1.7 TNUK looks forward to discussing our concerns with Ofcom in the course of its review.
- 1.8 TNUK's submission is structured as follows:
- (a) Section 2 summarizes Ofcom's proposed price cap.
 - (b) Section 3 sets out the legal framework applicable to the decision to impose a price cap.
 - (c) Section 4 sets out a short summary of relevant commercial information about the DQ sector, and the nature of DQ services.
 - (d) Sections 5 to 8⁷ deal with Ofcom's evidence of consumer harm and its analysis of the DQ market supporting Ofcom's conclusion that regulation is necessary:
 - (i) Section 5 considers Ofcom's finding that the prices consumers pay for DQ services have risen steeply.
 - (ii) Section 6 considers Ofcom's finding that consumer understanding of current DQ prices is very poor.

⁴ Rodgers Report, paragraph 4.

⁵ CEG Report, paragraphs 149 and 12.

⁶ See section 9 below.

⁷ Sections 5 to 8 constitute TNUK's response to Ofcom's consultation question 1.

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- (iii) Section 7 examines Ofcom's finding that 'many consumers have no alternative'.
- (iv) Section 8 analyses Ofcom's finding that DQ users experience harm in the form of 'bill shock'.
- (e) Section 9 considers the effectiveness of Ofcom's proposed price cap: is the price cap capable of addressing and would it in fact address the problems that Ofcom identifies?
- (f) Section 10 provides more information on the harmful impacts on competition and consumers that a price cap would entail, especially in those areas where Ofcom's analysis does not consider those impacts in sufficient detail (or at all).⁸
- (g) There are also three annexes:
 - (i) Annex 1 sets out briefly some alternative proposals to Ofcom's proposal, to illustrate the range of options available.
 - (ii) Annex 2 is the Rodgers Report referred to in this response.
 - (iii) Annex 3 is the CEG Report referred to in this response.

⁸ Sections 9 and 10 constitute TNUK's response to Ofcom's consultation question 2 and 3. TNUK's response to Ofcom's question 4 is comprised in this submission (all of which deals with the appropriateness of Ofcom's proposed notification to modify the Numbering Plan).

2. Ofcom's proposal

- 2.1 Ofcom's proposal, as set out in the DQ Review, is to implement a price cap.⁹ The price cap proposed is £3.10 including VAT for a 90 second DQ services call.
- 2.2 The principal justification relied on by Ofcom for this cap is to protect consumers against 'bill shock'.¹⁰ This is an emotive term used by Ofcom to refer to any situation where the customer pays a charge any greater than what he or she expected the price to be.
- 2.3 This is an unusual and extreme form of price cap. Rather than being set at a level that acts as a 'backstop' in order to protect consumers against prices that are found to be excessive (as ascertained by some objective standard), it is set at a level that:
- (a) reflects the current price choice made by the former incumbent monopoly provider of DQ services;
 - (b) is lower than the prices prevalent in the market, which seem to be prompting only a very small number of complaints from consumers;
 - (c) is described as being set at 2013 prices, but based on erroneous calculations (see Section 9);
 - (d) reflects the price expectations of consumers based on the Kantar Media consumer survey commissioned by Ofcom to support its findings in the DQ Review (the '**KM Study**'). TNUK believes that the KM Study's analysis on price expectations is flawed. As observed in the Rodgers Report, data from unprompted questions shows that respondents whose last DQ services call was more than three months ago were less able to answer.¹¹ If the KM Study data is based only on those callers whose DQ services call was less than three months ago, and you look only at their unprompted responses, the price expectations of respondents were much higher than the price expectations presented in the KM Study;¹² and
 - (e) is lower than the price cap that Ofcom decided not to impose in 2013 (£3.60 per min or £5.40 per 90 seconds), without being based on analysis that would overcome the concerns identified by Ofcom in 2013 (for example, that a price cap would become a de facto focal point for industry prices).

⁹ DQ Review, paragraph 4.77. We note that although Ofcom refers to this proposal as a 'price cap', the proposed rule is simply a limit on the price of DQ services – it is not a 'price cap' in the sense often used as a regulatory term of art, being incentive-based regulation designed to enable flexibility within an overall cap on revenue. We use Ofcom's term for simplicity in our submission.

¹⁰ DQ Review, paragraph 4.5(a). Ofcom also considers that the proposal will improve affordability and reduce incentives for fraud and misuse on the 118 range.

¹¹ Rodgers Report, paragraph 47.

¹² £3.98 per 90 seconds for mobile (vs. £3.54 per 90 seconds - using £2.36 per minute in the KM Study, slide 42) and £3.73 per 90 seconds for landline (vs. £2.93 per 90 seconds - using £1.95 per minute in the KM Study, slide 40).

3. Legal framework

- 3.1 This section discusses the legal framework within which Ofcom's proposal needs to be assessed.
- 3.2 The key points are that:
- (a) Any regulation must meet the requirements of proportionality and be targeted;
 - (b) Price regulation is a remedy of last resort;
 - (c) Competition in DQ services is an inherent element of the regulatory regime. EU law and its statutory duties therefore require Ofcom to be especially mindful of the impact of its proposals on competition;
 - (d) Any decision to regulate must secure Ofcom's statutory duties and be consistent with its statutory objectives;
 - (e) Any decision to regulate must not be discriminatory. In particular, it is not open to Ofcom simply to choose one provider's preferred pricing level and regulate the other providers to price at the same level; and
 - (f) Regulatory decisions should not have the effect of conferring a dominant or monopoly position on any enterprise.

The regime is permissive, with regulation only where necessary

- 3.3 The approach of the EU Common Regulatory Framework for Electronic Communications ('**CRF**') (reflected in the UK in the Communications Act 2003 (the '**Act**')) is permissive: all persons are authorised to provide electronic communications services, subject to regulation imposed by Ofcom (as the responsible national regulatory authority) in response to specific concerns or problems (or to meet requirements set out in the CRF). Ofcom must exercise its regulatory functions having regard to principles that require it to target regulation only in circumstances where such regulation is *necessary*.¹³
- 3.4 The CRF imposes limits on Ofcom's ability to regulate, specifically to ensure that the freedom conferred on communications providers is not unreasonably or unduly constrained.¹⁴ These limits include the requirement that Ofcom act strictly within the scope of its powers (*vires*) and, where it has discretion to act, that it does so in a way that is reasonable and proportionate.

¹³ *BT v Telefonica O2* [2014] UKSC 42 at 15: 'Sections 3 and 4 provide, in terms corresponding to the Directives, for the matters to which Ofcom must have regard in performing its functions generally. Section 3(3) reflects the permissive character of the regulatory scheme, by providing that Ofcom must have regard, in all cases, to "the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and *targeted only at cases in which action is needed*"' (emphasis added by UKSC).

¹⁴ Authorisation Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 (as amended by Directive 2009/140/EC) ('**Authorisation Directive**'), Recital 3: 'The objective of this Directive is to create a legal framework to ensure the freedom to provide electronic communications networks and services, subject only to the conditions laid down in this Directive and to any restrictions in conformity with Article 46(1) of the Treaty, in particular measures regarding public policy, public security and public health.'

- 3.5 As the European Commission ('**Commission**') notes in its guidance to National Regulatory Authorities ('**NRAs**') in the context of setting significant market power ('**SMP**') conditions:

117. Community law, and in particular Article 8 of the Framework Directive, requires NRAs to ensure that the measures that they impose ... are justified in relation to the objectives set out in Article 8 and are proportionate to the achievement of those objectives. Thus any obligation imposed by NRAs must be proportionate to the problem to be remedied. ... in addition to the market analysis supporting the finding of SMP, NRAs need to include in their decisions a justification of the proposed measure in relation to the objectives of Article 8, as well as an explanation of why their decision should be considered proportionate.

118. Respect for the principle of proportionality will be a key criterion used by the Commission to assess measures proposed by NRAs ... The principle of proportionality is well-established in Community law. In essence, the principle of proportionality requires that the means used to achieve a given end should be no more than what is appropriate and necessary to attain that end. In order to establish that a proposed measure is compatible with the principle of proportionality, the action to be taken must pursue a legitimate aim, and the means employed to achieve that aim must be both necessary and the least burdensome, i.e. it must be the minimum necessary to achieve the aim.¹⁵

- 3.6 The EU principle of proportionality is also well-established in the UK's domestic legal scheme and the court has adopted essentially the same position as the Commission – that is, proportionality involves a consideration of two questions: '*first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be achieved by a less onerous method.*'¹⁶

Price regulation is a remedy of last resort

- 3.7 It is widely recognised that direct determination of prices by a regulator is amongst the most onerous form of regulation that could be imposed. The CEG Report notes:

Price controls fundamentally change competitive market dynamics by reducing firms' flexibility in developing product offers to enable a reasonable return on their current and past investments. In recognition of the risks to quality of service, product choice, investment and competitive dynamics, price controls are typically used sparingly by regulators in order to address identified competition problems. Applying price controls in the absence of a finding of a significant competition problem is highly unusual. Where there is not a problem of enduring significant market power, any

¹⁵ Commission SMP Guidelines at paragraphs 117 and 118. References omitted are to the SMP-specific nature of the guidelines and the Article 7 process (which is specific to SMP conditions), but Article 8 of the Framework Directive operates with respect to the actions of NRAs generally, and there is no reason why the approach taken in relation necessity and proportionality would or could be different when, for example, setting conditions attaching to the rights to use a telephone number.

¹⁶ R (Lumsdon) v LSB [2015] UKSC 41 at 33.

benefits of price regulation are likely to be too limited to justify its costs and risks. [...].¹⁷

- 3.8 Ofcom itself acknowledged, in its last review of non-geographic numbers, that: ‘*retail price regulation is intrusive and that it should only be imposed where strictly necessary*’ and found that ‘*in principle, we would only expect to use it in limited circumstances and where clearly necessary to protect consumers.*’¹⁸ This is true in general terms, and can also be seen in the ways in which Ofcom’s power to regulate prices (taken across the whole of the CRF) are subject to additional safeguards and constraints not applying to other less onerous forms of regulation.¹⁹
- 3.9 As well as being inherently intrusive, retail price regulation is also a second-best solution as a policy approach because it ‘controls outcomes’ (that is, the price paid) but does not address the underlying root cause or problem that drives the need for regulation.
- 3.10 It is for this reason that the CMA’s guidelines for its ‘regulatory’ activities in setting remedies in a market investigation specifically counsels against the use of price controls where there are alternatives available:

389. Remedial action may also be required to address consumer detriment directly, for example where effective remedies aimed at introducing competition by addressing the [adverse effect] are unavailable or will not bear fruit in the short term (see Annex B, paragraphs 86 to 93). Price controls are the most obvious example, However, such measures to control outcomes are not likely, by their nature, to provide a solution to the underlying problem and may also give rise to distortion risks, if retained over a long period. For these reasons ... remedial action to control outcomes will not generally be preferred as a long-term solution.²⁰

- 3.11 It follows that direct price regulation must be a remedy of last resort. Normally, price regulation is only considered where specific market failures, or an absence of competition mean that there is no option for any process of competition to be effective. As a general principle, the CRF provides that Ofcom cannot impose a price cap on providers which do not have SMP.²¹ In the DQ review, there is no proposal by Ofcom to make any SMP determination with respect to any person (nor could the analysis set out in the DQ Review be used to support such a determination, given that Ofcom does not apply the framework to be applied in such cases (for example, analysing competitive conditions in a rigorous way)). Indeed, Ofcom

¹⁷ CEG Report, paragraph 32.

¹⁸ *Simplifying non-geographic numbers: Policy position on the introduction of the unbundled tariff and changes to 080 and 116 ranges*, 15 April 2013, paragraph 6.13.

¹⁹ For example: the Act provides additional requirements that must be met in relation to any price control measure imposed as an SMP condition, above and beyond the already substantial requirements in respect of SMP conditions generally; on appeal to the Competition Appeal Tribunal (‘CAT’), and price control matters (only) may be referred to from the CAT to the Competition and Markets Authority (‘CMA’) for additional review and scrutiny.

²⁰ CMA Remedies Guidelines. See also Annex B, paragraph 89, which notes that the CMA ‘*will not generally use remedies that control outcomes unless other, more effective, remedies are not feasible or appropriate.*’

²¹ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (‘**Framework Directive**’), recital 27.

recognises that the sector operates in a way that is consistent with a finding of effective competition.

- 3.12 Especially given that Ofcom's analysis of 'bill shock' arises from Ofcom's view of consumer expectations, which in turn relates to the level of consumer awareness of prices, then it is obvious that informational remedies (which are not limited to a tariff-based PCA of the sort ruled out by Ofcom – see Annex 1) are a plausible alternative approach. The starting point for best practice in economic regulation is generally that, in relation to *bona fide* services offered at prices that some consumers are willing to pay, an information requirement is thought to be sufficient to protect consumers. The fact that some consumers, having been provided with information, may not interest themselves in thinking about that information in any detail, or may likely miscalculate the cost of the call (perhaps because they underestimate its length) is not, by itself, an indication an informational remedy is insufficient or that a more intrusive remedy is justified.²² Ofcom should therefore consider whether information can be made available that can be easily accessed, understood and acted on by consumers before considering more interventionist regulation.

Ofcom's power to set maximum prices relates only to service designation

- 3.13 Ofcom proposes to rely on the power provided for in the Annex to the Authorisation Directive in relation to numbers to make general conditions on the use of certain phone numbers through modification to The National Telephone Numbering Plan.²³
- 3.14 Ofcom's rationale for doing so is the assertion that it needs to protect customers in relation to their expectations about the costs of calling numbers with a 118 prefix.
- 3.15 The power to set 'maximum prices' for the Numbering Plan was introduced in 2009 and implemented by Ofcom on 25 May 2011. The Annex to the Authorisation Directive provides that conditions that may be attached to the right of use of numbers may include:

Designation of service for which the number shall be used, including any requirements linked to the provision of that service and, for the avoidance of doubt, tariff principles and maximum prices that can apply in the specific number range for the purposes of ensuring consumer protection in accordance with Article 8(4)(b) of Directive 2002/21/EC (Framework Directive).

- 3.16 Properly construed, this is a power to determine the designation of specific *services*. The relevant tariff principles or maximum prices must form part of the designation of the relevant service in the Numbering Plan.
- 3.17 The most significant example of the lawful use of this power was the creation of 'freephone' services on the 080 number range, in respect of which Ofcom set a maximum price of zero (so that calls that were previously only free from fixed phones became free-to-caller on fixed and mobile phones). It did so having identified three specific market failures in the 080/116 number range and after conducting a robust assessment of the likely impacts on a range of stakeholders.

²² See, for example, *What does Behavioural Economics mean for Competition Policy?*, March 2010, OFT1224, at 4.1.2: The implication is that educating consumers about their biases, even if this does not change them, may be sufficient to remove much of the associated consumer detriment.

²³ The National Telephone Numbering Plan, last published by Ofcom on 26 April 2018 (the '**Numbering Plan**').

- 3.18 The analogous application of that principle to DQ would be the creation of a service category of 'price-limited DQ services', with a capped price. This would be the case if there was demand for some service (for example, for 'Free(D)Q' rather than 'DQ' services) and Ofcom wished to create a specific number or number range for that service.
- 3.19 Unlike, say, freephone services, where the price regulation ('free') is inherent to the nature of the service designation, there is no link or connection between Ofcom's task of designating the service of 'directory enquiries' in the Numbering Plan and the proposed price cap. Ofcom uses the Numbering Plan to regulate DQ prices because it is (on Ofcom's analysis) conveniently available for that purpose, not because it is an intervention that by its nature sits within the Numbering Plan or that has any specific relevance to Ofcom's role in relation to telephone numbers at all.
- 3.20 There is no evidence in the Amending Directive²⁴ or the amended form of the CRF that the 2009 reforms were intended to create a broad new basis for price regulation that was not subject to the strict limits on intervention already applying under the CRF. It follows that where price regulation is, in substance, not an inherent element of service designation, Ofcom should only impose a price cap where it is consistent with regulatory best practice to do so. The obvious starting point is that such a price control should only be imposed where Ofcom has concerns that, absent a price cap, the party in question may abuse their SMP and competition law remedies are insufficient to address the concerns.²⁵ At a minimum, Ofcom ought to be responding to some specific and clearly characterised supply-side market failure, and to have exhausted other options available to it. That is not the case here.

EU law and its duties require Ofcom to be mindful of harm to competition

- 3.21 EU law has recognised the benefits of competition in DQ services. That is why EU law required that DQ services be opened up to competition.²⁶
- 3.22 It is not open to Ofcom to decide that competition is not of real value in this market, e.g. because Ofcom assumes service quality would not fall, and/or regulated prices would not rise, if competition were reduced or removed. Such an approach would be incompatible with the CRF and with Ofcom's duties in relation to competition.
- 3.23 Ofcom's duty is to act in ways that do not reduce or distort competition. Ofcom therefore, needs to be confident that what it is proposing is not going to unnecessarily restrict competition in DQ services, such as by:
- (a) weakening/lessening price competition (even if, as Ofcom appears to believe, the intensity of price competition in the retail DQ services market is less than in some other markets); or
 - (b) reducing, [~~]~~ competition in the wholesale and/or the retail DQ services markets [~~]~~
- 3.24 Ofcom's most important reason for not adopting a price cap in relation to DQ in 2013 was the risk that such a price cap would harm the interests of consumers by acting as a focal point for

²⁴ Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 ('**Amending Directive**').

²⁵ Framework Directive, recital 27.

²⁶ Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services, Article 5.

increased prices (as all providers ended up charging a price set by Ofcom).²⁷ In its current proposals, Ofcom does not even acknowledge, let alone assess the risk of, this scenario.

Any intervention needs to attain Ofcom's statutory objectives and duties

3.25 Ofcom's general duties in sections 3 and 4 of the Act include proportionality in regulation and promoting competition.

3.26 It is a principal duty for Ofcom under the Act to further the interests of citizens in relation to communications matters and further the interests of consumers in relevant markets, where appropriate by promoting competition.²⁸ In addition, Ofcom must also have regard, where relevant, to the desirability of promoting competition in relevant markets.²⁹ The DQ services market was liberalised in 2002 so that customers could benefit from competition in DQ services. At its simplest, the benefits of competition for consumers are 'lower prices, better products, wider choice, and greater efficiency than would be obtained under conditions of monopoly'.³⁰ Conversely, less competition in a market will likely result in less choice, lower quality and higher prices for consumers.

3.27 To guide Ofcom in the performance of its principal duties under the Act:

...Ofcom must have regard, in all cases, to—

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

(b) *any other principles appearing to OFCOM to represent the best regulatory practice.*³¹

3.28 What is clear from this section of the Act is that Ofcom *must* have regard *in all cases* to these principles.

3.29 As noted above, to be proportionate, a measure:

(1) must be effective to achieve the legitimate aim in question (appropriate),

(2) must be no more onerous than is required to achieve that aim (necessary),

(3) must be the least onerous, if there is a choice of equally effective measures, and

(4) in any event must not produce adverse effects which are disproportionate to the aim pursued.³²

²⁷ NGCS Statement, at A7.451-3: '*Whilst maximum prices for individual services under Option 1 [a price cap] may improve price transparency somewhat, it could lead to price inflation, particularly from fixed lines as DQ providers standardise their own prices. [The unbundled tariff] has the potential to address these issues by reducing the vertical externality that hampers price competition. With greater clarity on prices generated by a clear service charge message, DQ providers will be able to price differentiate to a greater degree.*'

²⁸ Section 3(1) of the Act.

²⁹ Section 3(4) of the Act.

³⁰ Competition Law (Eighth Edition), Richard Whish & David Bailey, 2015, page 4.

³¹ Section 3(3) of the Act.

³² See for example *BAA limited v Competition Commission* [2012] EWCA Civ 1077 at 4.

- 3.30 Therefore, even if Ofcom has the power to set a maximum charge for DQ services, it should do so only where it has clearly identified a failure of effective competition and has carefully considered the proportionality of the measures it proposes to put in place to address that failure.
- 3.31 In addition, to change the Numbering Plan specifically (as Ofcom proposes to do) Ofcom must not revise or otherwise modify the relevant provisions unless they are satisfied that the revision or modification is—
- (a) objectively justifiable in relation to the matters 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 modification is intended to achieve; and
 - (d) in relation to what it is intended to achieve, transparent.³³
- 3.32 Therefore, in addition to Ofcom’s general duties under the Act, Ofcom must also have consideration of the specific criteria set out above, if the Numbering Plan is used to make regulatory changes.

Any intervention by Ofcom must not be discriminatory

- 3.33 Article 8 of the Framework Directive requires national regulatory authorities to apply objective, transparent, non-discriminatory and proportionate regulatory principles. Including by ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services.³⁴
- 3.34 Ofcom therefore, needs to ensure equal treatment between DQ services providers. It may not unduly favour one DQ operator over others – for example, any measures proposed should not favour the former telecoms monopoly or use that operator as a benchmark for regulating other parties, who may have different characteristics and/or basis of costs.

EU law: Article 106(1) of the Treaty on the Functioning of the European Union (TFEU)

- 3.35 Article 106(1) TFEU provides that:

“In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.”

- 3.36 The legal import of that requirement, most particularly when read alongside Article 102 TFEU – has been considered by the EU Court of Justice on a number of occasions, including in Case C-553/12P *Dimosia Epicheirisi Ilektrismou AE (DEI)* (EU:C:2014:2083). A public authority, such as Ofcom, must not adopt a measure that either: (a) has the potential to lead the undertaking to behave in such a way as to abuse its dominant position; or (b) produces similar effects to those of an abusive behaviour.

³³ Section 60(2) of the Act.

³⁴ Article 8(5)(b) of the Framework Directive.

Ofcom's assessment of the price cap

3.37 In order to justify its proposal, Ofcom therefore needs to:

- (a) identify the consumer protection problem that needs to be addressed and measure its size and assess whether it relates to particular categories of consumers rather than all consumers;
- (b) ensure that remedies other than price regulation have already been tried or would not work; and
- (c) assess the proportionality of the proposal and ensure it would not result in undue discrimination between DQ services providers [X].

4. The DQ sector in context

- 4.1 This section sets out background information regarding Ofcom's regulation of the 118 number range.
- 4.2 The key points are:
- (a) DQ has been competitive since 2002;
 - (b) TNUK offers a wide range of DQ services using nine numbers, and at a variety of price points, including a free-to-caller number and a £1 per call service. They also have a website with free unlimited DQ services searches;
 - (c) DQ service volumes are in steep decline, with profound implications for DQ providers;
 - (d) Notwithstanding Ofcom's views about the effect of consumer choice on prices (taken in isolation), Ofcom is wrong to treat this as implying that consumers have no ability to constrain providers. Consumers can (and do) exercise choice over call volume, and service providers such as TNUK have strong incentives to compete for consumers on service and experience quality.

History of liberalisation of telephone DQ services

- 4.3 On 10 December 2002, Oftel opened up telephone DQ services to competition in the UK, with the launch of over two hundred 118 numbers. These replaced BT's legacy 192 and 153 numbers, which ceased operating in August 2003.
- 4.4 The launch of 118 numbers meant that DQ services customers could select the DQ service of their choice, rather than have to use the DQ service provided by their CP.
- 4.5 The liberalisation of DQ services resulted in an overall reduction in BT's share of telephone DQ services calls³⁵ as new, standalone, DQ services providers entered the market, and BT was no longer the monopoly provider.

TNUK

- 4.6 TNUK and its affiliates provide DQ services in Europe and answers calls from callers in the UK, France, Ireland, Switzerland, and Austria. TNUK was founded in 2002 and is based in London, United Kingdom. TNUK is the largest provider of DQ services in the UK, accounting for around 40% of all call volumes. In the UK, TNUK³⁶ provides DQ services through nine numbers in the 118 number range. They are: 118 118; 118 551; 118 661; 118 811; 118 848; 118 888; 118 899; 118 932; 118 949.
- 4.7 TNUK's flagship number is 118 118. Calls to 118 118 cost £4.49 per call plus £4.49 per minute, (minimum 60 second charge applies) including VAT.³⁷ On the 118118 website³⁸ TNUK also advertises:

³⁵ *Telephone directory information obligations and regulations, Consultation on a proposal to remove and/or amend universal service obligations and general conditions relating to the provision of telephone directory information*, 10 March 2008: https://www.ofcom.org.uk/_data/assets/pdf_file/0025/37456/dirinfo.pdf

³⁶ Three of the nine numbers are provided by Conduit Enterprises Limited, a subsidiary of TNUK.

³⁷ The access charge is in addition to the prices specified in this paragraph of TNUK's response.

³⁸ See: <http://www.118118.com/about118#PhoneDirectory>

- (a) 118 811: a simplified, low cost version of its 118 118 service, charging just £1.00 per call;
- (b) 118 888: a national directory enquiries service with call completion and SMS, charged at the same rate as 118 118;
- (c) 118 661: an international directory enquiries service with call completion, also charged at the same rate as the 118 118 service;
- (d) 118 848: a national enquiries number with no call completion or SMS, charged at £2.00 per minute;³⁹
- (e) 0800 118 3733: a wholly free telephone directory service for callers. TNUK understands that it is the only DQ services provider to provide a wholly free telephone directory service in the UK. From August 2017 to July 2018, TNUK answered around [redacted] calls made from [redacted] unique phone numbers, free of charge;
- (f) In addition to the telephone numbers above, TNUK's website also provides unlimited searches free of charge.⁴⁰

4.8 Customers can also get answers to their enquiries by texting 118 118; answers from 118 118 cost £3.50 (plus standard network charges). TNUK also has the 118 118 app which can be downloaded on both Apple and Android devices. It is available on demand, or customers can subscribe to a monthly plan from £2.48 a month. Customers get unlimited DQ calls included in the monthly plan. Other measures in place for TNUK customers include a no-quibble refund policy (discussed further in section 8) and a price per call cap.⁴¹

4.9 TNUK also provides managed DQ services (aka 'white label' services) on behalf of [redacted].⁴²

4.10 TNUK has spent considerable money in the UK on brand advertising, capital expenditures, wages and fixed/operational expenses (approximately [redacted] to date) and believes that service quality has greatly increased since DQ services were liberalised in December 2002. [redacted].⁴³

The decline of telephone DQ services

4.11 DQ services are only used by approximately 2% of the population and this is a sector that Ofcom itself recognises is in 'steep' decline.⁴⁴

4.12 Call volumes have reduced from 7.14 million calls in Q3 2014 to 1.95 million calls in Q2 2017, which represents an average annual decline of 38% per annum.⁴⁵ Reported DQ revenues are also in decline, from a total of £27m in Q3 2014, to £12m in Q2 2017.⁴⁶

4.13 [redacted].⁴⁷

³⁹ A minimum 60 second charge applies.

⁴⁰ See: <http://www.118118.com/about118#PhoneDirectory>

⁴¹ [redacted].

⁴² [redacted].

⁴³ As measured internally by TNUK's Quality Team.

⁴⁴ DQ Review, paragraph 3.22.

⁴⁵ DQ Review, paragraph 3.8.

⁴⁶ DQ Review, paragraph 3.9.

⁴⁷ [redacted].

Nature of DQ services

- 4.14 DQ services operate in a competitive market, and – notwithstanding the issues identified by Ofcom – the process of competition between DQ providers continues to produce price and quality benefits for consumers (for example, there are a range of price points available in the market, with differing levels of quality, and different service options and price structures). TNUK appreciates that there are features of DQ services (e.g. the infrequency with which customers use DQ services) which mean that competition is imperfect. But most markets, including PRS and other telecoms markets, are characterised by imperfect competition. This does not mean that competition is not important. That competition operates at both the retail level (in which DQ providers offer rival services to callers) and the wholesale level (in which ‘white label’ services are offered to enable DQ service facilities to be used to offer services to different retail providers).
- 4.15 TNUK does not dispute that it is inherent in the nature of a service that may be used at a time when consumers are time-poor and need an answer quickly that DQ users may be less likely to research DQ services’ prices or service quality statistics at the point when they use those services, compared to some other communications markets that Ofcom regulates. Given the evidence that users of DQ services use those services infrequently, many consumers may not have in mind the cost of the service when they call, even if they were previously made aware of it. But this does not mean consumers are not aware of the charge or would not call the service if they knew what the charge was. For example, Ofcom’s survey data is largely drawn from consumers who were recalling usage of the service months ago (or even longer) but in practice, consumers pursuing a DQ service involving, for example, onward call connection are provided with specific and detailed price information at the point of purchase; there is no necessity for them to recall that information thereafter, as it is re-provided each time they call. Nor do these features of the DQ market mean that competition is not important or is not producing benefits for consumers.
- 4.16 It is very much in the interests of DQ service providers, such as TNUK, to ensure that its customers have a positive experience. The number of DQ users is contracting, and notwithstanding that brand recollection of TNUK’s flagship number 118 118 is high (reflecting years of investment in that brand), all users have access to the full range of competing DQ services. Whilst each DQ user may use the service only a couple of times a year on average, this does not detract from the fact that most customers are likely to be returning customers (i.e. ‘repeat business’). TNUK found that around [redacted]% of callers who called 118 118 in June 2018 had called in the previous 12 months, around [redacted]% of 118 118 callers had called in the previous 3 years, around [redacted]% of 118 118 callers had called in the previous 5 years and around [redacted]% of 118 118 callers had called in the previous 10 years.⁴⁸
- 4.17 If a customer finds the service very fast and efficient, and the call-handler pleasant to deal with, then the customer is more likely to use DQ services in general – and in particular that supplier’s service – again. In contrast, if the customer has a bad experience – e.g. a reaction that can fairly be described as ‘bill shock’ – then the customer is more likely to take the trouble to find out (whether by searching online, or as a result of talking to relatives/friends about the negative experience) about alternative DQ service numbers and make a written or mental note of those numbers for use in the future.

⁴⁸ [redacted].

- 4.18 TNUK's business model also involves offering wholesale/white label DQ services to third party undertakings that compete with itself and BT in the retail DQ services market. [REDACTED].
- 4.19 In addition, TNUK offers free DQ services to consumers [REDACTED]. It is a feature of many competitive markets that some consumers pay more than others, and there is an element of cross-subsidisation between different groups of customers. This represents a benefit to those price-sensitive consumers who choose to use the cheaper services.

5. Ofcom's finding that the prices consumers pay for DQ services have risen steeply

Summary

- 5.1 This section analyses Ofcom's 'DQ sector overview', which encompasses factual findings about:
- (a) the structure of the DQ sector;
 - (b) the prices consumers pay for DQ services;
 - (c) levels of advertising; and
 - (d) the provision of pricing information using onward call connection.
- 5.2 The key points are:
- (a) Ofcom's analysis does not identify any market failure. Consumers exercise a choice to access the non-essential DQ service when they value the speed and convenience it offers;
 - (b) Critically, Ofcom does not give appropriate recognition to the fact that after an initial short call period, for onward call connection, all TNUK customers (and, TNUK understands, those of other major providers) are offered specific and detailed pricing information on every call; and
 - (c) Ofcom's analysis does not do enough to analyse the relationship between declining volumes and rising prices. And overstates the 'four-fold' increase in price due to a miscalculation of the 2013 prices.

Ofcom's analysis

- 5.3 Ofcom notes that TNUK and BT are the largest two providers, with other providers having a much smaller share of call volumes and revenues.⁴⁹
- 5.4 Ofcom notes that prices have risen steeply. They estimate that the price of a 90 second call to TNUK has risen in real terms four-fold, from £2.77 in January 2013 to £11.23 in June 2018.⁵⁰
- 5.5 Ofcom states that they have seen little evidence of material innovation or service development since 2013.⁵¹ In particular, they find that service charges are rarely advertised - so the requirement to publish DQ service charges to help raise the awareness of service charges and reduce the risk of price rises, has not been effective.⁵²
- 5.6 Ofcom notes that on-call pricing information is provided with onward call connect services and that there is no evidence that, in general, providers are failing to comply with the Phone-paid Services Authority's (PSA) rules in relation to this information.

⁴⁹ DQ Review, paragraph 3.7: TNUK has around 40% and BT 20-30% based on call volumes and around 60% and 20-30% respectively based on call revenues.

⁵⁰ DQ Review, paragraph 3.11.

⁵¹ DQ Review, paragraph 3.15.

⁵² DQ Review, paragraph 3.16.

TNUK Response

- 5.7 Ofcom's analysis fails to address the significance of the 'steep' decline in volumes. Providers have, in effect, used rising prices to mitigate the effects of collapsing volumes. This is rational and reasonable behaviour in a competitive market where there is rapid decline, as seen in the DQ services sector. It is common to observe exit and consolidation in such markets (and this has occurred in DQ), with remaining providers left to consider how best to recover their fixed costs from a declining user base.
- 5.8 Ofcom does not carry out any analysis (or evince much curiosity) as to *why* prices have increased in the DQ market. This is a substantial gap in Ofcom's thinking, both because it means that Ofcom does not consider properly the underlying market dynamics, but also because it means that in designing a remedy, Ofcom is 'flying blind', in that it has no view about the root cause of the underlying price rises that have triggered its review. It also means that Ofcom has no way to distinguish between efficient and inefficient, excessive or problematic pricing in respect of DQ services.
- 5.9 In addition, as outlined further in section 9 below, the calculations used by Ofcom to determine the prices for DQ services in 2013 have been miscalculated. For example, in February 2013, a 90 second call from a BT Landline to 118 118 cost £4.37, not £2.77 as stated by Ofcom (due to per-minute pricing). So, the price increase for these calls would be an increase by a factor of just over two (2.6) not 'four-fold' as Ofcom states.
- 5.10 The pricing that emerges also reflects the outcome of consumers' choices: they opt to call the numbers they know, rather than spend time researching cheaper alternatives. As the CEG Report puts it, *'critical to customers' use of DQ services is the ability to remember the number for a service when they need it, even when they use the service infrequently'*.⁵³ But if consumers are not happy with the price of a single call, there is no material barrier to them calling a different 118 number next time or finding an alternative to DQ telephone services. Ofcom treats the decisions that consumers make about how much time and effort they place in finding alternative numbers as being extrinsic to consumers, when in fact you would expect a customer who has had a negative experience of a DQ service to shop around. This is discussed further in section 7.
- 5.11 As a result, Ofcom's analysis does not identify (nor does it claim to identify) any market failure. DQ services are used infrequently by consumers and so it is easy for them to find alternatives. There is no evidence that there is a lack of choice in the market. Although TNUK and BT are larger than other providers, there are a range of other services available. Ofcom's analysis does not make (or even seek to make) any findings with respect to a lack of effective competition in DQ services.
- 5.12 In addition, on-call pricing is provided for onward call connections.⁵⁴ Onward call connection represents the most expensive part of a DQ services call, as this part of the call will generally take longer than the call to a 118 number itself. Before the onward call is connected, consumers are informed of the cost at that point and have the option to end the call. A consumer who remains on the call has chosen to do so, in a situation where they have been provided with relevant and specific pricing information at the point at which it is directly relevant to their purchasing behaviour. TNUK found that, in May/June 2018, [8<]%

⁵³ CEG Report, paragraph 4.

⁵⁴ DQ services providers are required to explain the costs of using onward call connection to customers before they are put through to the number, as set out in specific guidance from the PSA.

who chose to use onward call connection abandoned the call after hearing the price announcement. [38] % of callers who heard the price announcement still continued with the call. This on-call pricing represents a very significant increase in consumer price transparency and is one that Ofcom does not do enough to recognise or appreciate.

- 5.13 In the KM Study, seven in ten DQ users reported that they were satisfied with their last experience of calling a DQ service and only 15% indicated that they were dissatisfied.⁵⁵ This reflects the fact that 118 numbers can, and do, what a customer requires of them: they give quick and convenient directory enquiries information.
- 5.14 The commentary on chart 31 of the KM Study attempts to steer the interpretation of this evidence [that the majority of DQ users were satisfied with their last experience of calling a DQ service] by saying that: *'the qualitative evidence suggests that those who answered satisfied and very satisfied on the survey may have disassociated their view of the service received from the cost and seemed to treat these as two different experiences.'*
- 5.15 This assertion cannot be supported by ten qualitative interviews alone. The view in the Rodgers Report is that the qualitative work has *'little evidential value'* due to the low number of interviews conducted, and the skew towards particular respondent types (as the qualitative work does not represent the views of the great majority of those who they were satisfied and very satisfied with their experience).⁵⁶
- 5.16 In addition, there is nothing to legitimise the assertion that the respondents had *'disassociated'* their view. In fact, according to the D Rodgers Report:
- ...it is difficult to see why consumers in the quantitative survey would disassociate their view of the service received from its cost. The satisfaction question is phrased in terms of satisfaction with their 'last experience', and typically when rating a service experience a consumer will consider all the factors that are important to them, including the cost of the service. Indeed, we often find in other markets that price or cost is a key driver of satisfaction ratings with a service provision.*⁵⁷
- 5.17 Furthermore, the CEG Report finds that evidence in the KM Study *'...suggests that at least these customers [in chart 31 of the KM Study] recognise DQ to be a premium service with a premium price attached'*.⁵⁸
- 5.18 A fairer and more robust assessment of this data is required for Ofcom to fulfil its duty to act reasonably and consistent with principles of best practice. The most important point is a simple point: for the majority of customers, DQ services work well, even though the service is expensive. Ofcom is wrong to dismiss that evidence and appears to skew the data to provide support for its diagnosis that customers need protection from *'bill shock'* in the form of a price cap.

⁵⁵ KM Study, chart 30.

⁵⁶ Rodgers Report, paragraph 26(b).

⁵⁷ Rodgers Report, paragraph 26(d).

⁵⁸ CEG Report, paragraph 48.

6. Ofcom's findings regarding consumer understanding of current DQ prices

Summary

6.1 This section analyses Ofcom's findings regarding consumer understanding of DQ prices.

6.2 The key points are:

- (a) Ofcom's conclusions go beyond what can be supported by the evidence – in particular, Ofcom perceives a problem in the fact that some consumers underestimate actual retail prices for DQ services, even though this may well be a common phenomenon in relation to products that are typically purchased by consumers infrequently; and
- (b) Ofcom treats the level of awareness by consumers weeks or months after their last DQ call as being evidence about their level of awareness when purchasing DQ services in future. This fails to recognise the role played by the price announcements required under PSA rules that provide customers using onward call connection with specific pricing information.

Ofcom's analysis

6.3 Ofcom found that 65% of consumers did not know the cost of calling a DQ service before they made their last call. And 43% of DQ users said they did not have any idea of the cost at that point.⁵⁹

6.4 In addition, Ofcom found that the average estimates made by consumers for the cost of calling a DQ service were below the cost of calls to the most popular DQ numbers, particularly for non-DQ users.⁶⁰

6.5 According to the KM Study, 35% of all DQ users said the cost of their last call to a DQ service was more than they expected it to be, 21% said the call cost about what they expected, 41% did not know the cost of their last call and 3% said it was less than expected.⁶¹

TNUK's response

6.6 Ofcom does not acknowledge that understanding of current DQ prices may be poor simply because consumers use DQ services infrequently. In the last 12 months, almost half of respondents to the KM Study (46%) had only made one call, 27% had made two calls and 25% had only made three or more calls. Because DQ services are so rarely used (even four calls a year is only a call once every three months), it is hardly surprising that price recollection is not that high. This does not point to any market failure, but simply the reality that something used infrequently is recalled less well than something used frequently.

6.7 In addition, as highlighted in the Rodgers Report, there does not appear to be a question in the survey regarding bill payer status.⁶² So, the fact that consumers did not know the cost of calling a DQ service may be because they are not the one paying the bill, and therefore may have no, or at least less, concern over the price.

⁵⁹ DQ Review, paragraph 3.29.

⁶⁰ DQ Review, paragraph 3.30.

⁶¹ KM Study, chart 14.

⁶² Rodgers Report, paragraph 21.

- 6.8 There is also a material flaw in Ofcom's evidence, which is that it is limited to asking consumers about their previous usage, when that may have taken place weeks, months or even years ago. Consumers are not well-placed to provide a detailed and accurate account of matters such as pricing for an individual element on their phone bill over that time period. Many of the respondents in the KM Study had also made their last DQ call more than three months ago. The Rodgers Report specifically found that for question 18 (how much more did [the DQ services call] cost compared to what you expected) customers whose last DQ services call was more than three months ago were less able to answer.⁶³ It seems likely that consumers would be expected often to underestimate the cost of something that they use infrequently, in circumstances where the price is a small element of total expenditure, but this does not justify imposing a price cap on all those goods and services.
- 6.9 This is particularly so, as is the case with DQ services, when alternative options are available to consumers. In such a market, you would expect consumers to find other alternatives, rather than put up with a price that they are not happy with. The reason customers continue to use DQ services is because they are happy with the service they are being provided with.
- 6.10 Ofcom also fails to fully appreciate the most important reasons for a consumer making a DQ service call: speed, convenience, and accuracy. Even if it is true that consumers' knowledge of prices is out-of-date, DQ services are not all about the cost; consumers want a quick and convenient way of obtaining a number and choose DQ services because they offer the quickest and most convenient way (unlike, for example, calling a friend or relative, which is another option open to all consumers with a telephone). The Rodgers Report specifically highlights that there is insufficient weight placed on consumer benefits of using the service.⁶⁴
- 6.11 In addition, for the lengthiest (and therefore more expensive) part of the call – onward call connection - there is a real-time price announcement. So, consumers should be fully aware of how much the call is going to cost at this point, as they are told the exact amount before they carry on the call. At this point of the call, if the consumer is not happy with the price of that onward connection, they have the choice to hang up and call the number that they have obtained direct. This is significant because Ofcom uses evidence as to whether consumers can *recall* DQ prices as being determinative of the question of whether consumers *know* DQ prices when they come to incur costs for future DQ calls. In fact, there is a significant and material source of information available to consumers that supplements their recall, being the service-specific detailed pricing announcement prior to any onward call connection (and it is the onward connected calls that incur the highest charges that Ofcom is most concerned with in respect of 'bill shock').

⁶³ Rodgers Report, paragraph 46(c).

⁶⁴ Rodgers Report, paragraph 54(c).

7. Ofcom's finding that 'many consumers have no alternative'

Summary

7.1 This section analyses Ofcom's finding about consumer choices and alternatives to DQ.

7.2 The key points are:

- (a) Ofcom implies that DQ services ought to be treated, in policy terms, as an essential service that raises concerns if they are not affordable to all consumers. There is no evidence that DQ plays this role for consumers generally, or for specific groups of consumers.
- (b) TNUK disputes whether the evidence that Ofcom has about consumers' recollection of whether they had alternatives is robust.

Ofcom's analysis

7.3 Ofcom found in its DQ Review that four in ten (42%) of DQ users said they did not have an alternative way of getting the number they needed on that occasion, for example by using the internet or a phone book.

7.4 Ofcom also found that DQ users aged 65+ were significantly less likely to have internet access when they made their last call (26% of DQ users said they had an internet connection compared to 13% of DQ users aged over 65).⁶⁵

TNUK's response

7.5 Although Ofcom characterise DQ as a service that '*can be an important service for some consumers who do not have access to alternatives such as internet search*',⁶⁶ Ofcom does not argue that use of DQ services is essential (and we note that Ofcom has previously not included DQ services on the list of 'essential services' about which affordability issues are relevant in other work dealing with affordability issues).⁶⁷

7.6 Ofcom's analysis of the evidence is unbalanced and does not hold the weight it gives to it:

- (a) First, the majority of consumers do have alternatives. They choose to call DQ services anyway.
- (b) Second, Ofcom's finding that internet access is lower for older DQ users (aged 65+) is immaterial in this instance because:
 - (i) the question relied upon in the KM Study to establish whether alternatives were available is vague – too vague to support the reading Ofcom places on it; and

⁶⁵ DQ Review, paragraph 3.26.

⁶⁶ DQ Review, paragraph 3.56.

⁶⁷ The UK Regulators' Network (UKRN) 2015 publication, *Understanding affordability issues in essential services*, lists the essential services in communications (nominated by Ofcom based on its own research) as being '*basic fixed-line broadband, basic fixed-line voice connections, basic mobile voice and data services and a second class postal service*' (at paragraph 2.6).

- (ii) a closer inspection of the data reveals that DQ service usage is generally consistent across all age, working status and SEG groups – with the exception of the 16-34 age group.⁶⁸ So, this suggests that there are not significant differences between older DQ users when compared to other DQ users due to their lower usage of the internet.

- 7.7 The first objection to Ofcom’s approach is that it places too much weight on the KM study, which is flawed (with the Rodgers Report setting these concerns out in more detail). Specifically, the wording in the KM Study (question 14a), which established that 42% of DQ users said they did not have an alternative way of getting the number, is vague and may have been interpreted by respondents in different ways.⁶⁹ The Rodgers Report therefore considers that it is possible that an alternative option had been available but was not considered by the respondent when replying to this question, particularly if they were struggling to recall the detail of an event that happened many months ago.⁷⁰
- 7.8 Question 15 is further evidence that question 14a of the KM Study did not work well, as only 23% of respondents said they could not obtain the number in any other way, and in question 14b only 9% of those answering the question said they had no alternative.⁷¹ This shows that the KM Study findings need to be presented in a more balanced manner, and highlights the tendency by Ofcom to interpret the results in a way which suits the conclusions they want to reach: i.e. that customers had no alternative to the DQ service, when in fact, they did.
- 7.9 But beyond this first objection, there is a second objection: even based on Ofcom’s data, its reasoning is not clear or justified. Whilst four in ten DQ users claim they did not have access to an alternative way of getting the number, four in ten DQ users stated that they did have access to an alternative way of getting the number and chose to use DQ services anyway.⁷² This is likely to be for several reasons, including, as Ofcom found, that most DQ users (82%) use the service because it is important that they receive the number they are requesting at the time they request it.⁷³ There is nothing to suggest that the majority of those DQ users without internet access would not have chosen to use DQ services anyway; for exactly the same reasons that those consumers with internet access still chose to use DQ services.
- 7.10 In addition, everyone with access to DQ services by telephone, also has the ability to call any other person (for example, family members, friends or neighbours, or to consumer organisations that are offering information to assist those who need it) to ask for the required number instead, or make additional calls (for example to the switchboard of an organisation, seeking to be connected to the right extension, or to a related organisation that might be able to give them that information). It is unlikely to be true that alternatives are not available in an absolute sense. Consumers are presumably making a choice to have speed and convenience (and accuracy), over a free call to someone they know.
- 7.11 Ofcom also does not consider the fact that there are other, cheaper, voice DQ services available. TNUK itself offers other cheaper, more simplified services. First, there is 118 811; a

⁶⁸Rodgers Report, paragraph 5(a).

⁶⁹ Rodgers Report, paragraph 27(a).

⁷⁰ Rodgers Report, paragraph 27(a).

⁷¹ Rodgers Report, paragraphs 28(a) and 29(a).

⁷² 18% of DQ users said ‘don’t know’ to whether they had alternatives to calling DQ Services. See KM Study, chart 34.

⁷³ DQ Review, paragraph 3.23.

simplified and low cost version of its 118 118 service. Calls to 118 811 cost £1 per call plus access charge. There is also TNUK's free service: 0800 118 3733. TNUK understands that it is the only provider to offer a wholly free telephone DQ service to consumers. So even if a customer has one DQ call exceeding their expectations, there is nothing to stop them for looking for cheaper, or even free, alternatives for next time.

- 7.12 The fact that 85% of UK adults use a smart phone and nine in ten people have access to the internet in their home,⁷⁴ demonstrates that most customers have free or relatively low-cost alternatives to telephone DQ services. The CEG Report also observes a simple truth: *'the fact that 98% of the population do not use DQ services suggests alternatives are readily available'*.⁷⁵ And volumes in DQ Services are expected to decline at a consistent rate (of around [redacted]%) year on year.
- 7.13 Ofcom's conclusions that older DQ users (aged 65+) have less access to the internet is immaterial in this instance. Firstly, on closer inspection of the data from the KM Study, the Rodgers Report found that DQ usage was *'reasonably consistent across all age, working status and SEG groups'*, with the exception of 16-34 year olds.⁷⁶ Therefore, there do not appear to be 'significant differences' between the 65+ age group when compared to other age groups in their use of DQ services, as stated in the KM Study.⁷⁷
- 7.14 The Rodgers Report considers that a more balanced summary of the profile of DQ service users should have been provided and raises this as a specific concern.⁷⁸ Ofcom has shown once again how it has not provided a balanced view of the data and instead opted to use the data in a way which will provide it with the desired results. The assertion that: *there were significant differences between these groups versus all DQ users and Ofcom wanted to understand the consumer impact of using 118 DQ services particularly amongst older and more vulnerable groups*⁷⁹ is misguided and led to an unbalanced report by Ofcom of DQ users.
- 7.15 [redacted].⁸⁰
- 7.16 Secondly, even accepting that internet access is generally lower amongst those aged 65+, Ofcom has failed to give sufficient weight to the alternative options available to DQ users for this very reason. Under General Condition ('GC') 8.2, CPs are required to provide their consumers, upon request, with a telephone directory book containing all telephone numbers of subscribers who have been assigned telephone numbers within the consumer's local area (directory information for all other subscribers outside of the local area who have been assigned telephone numbers by any CP must also be provided upon request). In addition, under GC 15, CPs are required to provide a free publicly available telephone services (using number 195) for disabled people who are unable to use a printed directory because of their disability.
- 7.17 GCs 8.2 and 15 provide clear and free alternatives for DQ users without access to the internet and for whom a telephone directory book is unsuitable, respectively. Ofcom does not consider

⁷⁴ CEG Report, paragraph 20.

⁷⁵ CEG Report, paragraph 57.

⁷⁶ Rodgers Report, paragraph 5(a).

⁷⁷ KM Study, chart 7.

⁷⁸ Rodgers Report, paragraph 5(a).

⁷⁹ KM Study, chart 7.

⁸⁰ [redacted].

the benefits of increasing the transparency and expansion of these readily available services in its DQ Review.

8. Ofcom's finding that DQ users experience harm in the form of 'bill shock'

Summary

- 8.1 This section analyses Ofcom's findings with respect to the prevalence of what Ofcom terms 'bill shock'.
- 8.2 The key points are:
- (a) Ofcom's findings on 'bill shock' are overstated – by adopting a definition that any increase above what is 'expected' (even pennies) constitutes 'shock', Ofcom is using an emotive term inappropriately in order to seek to justify regulatory intervention. There is no basis for finding that consumers suffer 'shock', or suffer any other form of genuine harm, merely because the price they paid for a product was more than the amount that they guessed (sometimes many months later).
 - (b) In any event, Ofcom's specific assessment of £2.4m as the likely quantum of such 'bill shock' is four times too high – even on Ofcom's own reasoning, a more accurate estimate would be around £0.6m.
 - (c) In any event, Ofcom over-reads the evidence, reaching contradictory conclusions and failing to identify a material concern with the KM data (which is further explained in the Rodgers Report). For example, when consumers were asked what their most likely cause of 'bill shock' is for telecoms services in the last 12 months, only 10% of consumers mentioned DQ services. Ofcom dismisses this evidence even though it has greater evidential value than the 39% figure that Ofcom uses as a basis for its finding of harm.
 - (d) Ofcom's findings are not corroborated by other data, where Ofcom's theory of harm enables specific testable predictions. For example, if Ofcom's conclusions on 'bill shock' were right, it would be logical to expect that such consumer impacts would be reflected in consumer complaints data. In fact, complaints about TNUK in particular are very low, in both absolute and relative terms.

Ofcom's analysis

- 8.3 Ofcom bases its 'bill shock' analysis on the fact that 39% of DQ users said they had made at least one call in the last 12 months to a DQ service that cost more than they expected it to be. Based on this, Ofcom estimates that circa 450,000 adults in the UK experienced 'bill shock' in relation to a DQ services call.
- 8.4 Ofcom estimates that DQ users have therefore, paid around £2.4 million in excess of expectations over the same 12-month period.⁸¹

TNUK's response

- 8.5 Ofcom's analysis of 'bill shock' is problematic because:

⁸¹ DQ Review, paragraph 3.38.

- (a) First, Ofcom's finding of 'bill shock' is an inappropriate use of language and anyway overstated;
- (b) Second, Ofcom's consumer complaints regarding DQ services are so low as to be insignificant;
- (c) Third, Ofcom makes multiple findings in this section of the report that are contradictory.

8.6 Each of these is considered in turn below.

Ofcom's finding of 'bill shock' is overstated

- 8.7 'Bill shock' is a subjective and emotive term, implying a substantial or material disruption to a consumer. What counts as 'shock' is not explained by Ofcom beyond a consumer paying more than they expected, and Ofcom interprets the data so that, for example, a consumer who paid more than they expected but not 'by a lot' but 'by a little' is still considered to be amongst those who are 'shocked'. But consumers must pay more than they expect for a range of services and products all the time, and it is hardly considered to be a reasonable basis for considering price regulation. Indeed, the CEG Report comments that *'Paying more than expected may surprise consumers but calling each such instance a 'bill shock' is likely to overstate the actual extent to which customers' welfare has been harmed'*.⁸²
- 8.8 Furthermore, even based on Ofcom's findings of harm, the CEG Report finds that *'The size of the 'bill shocks' is also limited particularly as Kantar's definition includes customers who paid both a little or a lot more than expected'*. It points out that if customers are paying, on average, £5.44 more per DQ call than expected, and there are two average 'bill shocks' a year, then the amount of 'bill shock' would amount to less than 2% of the average annual spend on telephone services.⁸³ The limited amount of 'bill shock' based on average spend demonstrates how Ofcom has overstated its finding.
- 8.9 Thus Ofcom adopts the position that any amount paid over what a consumer expected, even pennies, is a form of 'bill shock'. Some consumers responded that they had spent just 0-49 pence over what they had expected.⁸⁴ Ofcom calculates that the total amount in excess of expectations is £2.4 million. However, the CEG Report finds that the average difference between the price paid and the price a consumer is willing to pay, would equate to a harm of £0.6 million, one quarter of the amount found by Ofcom.⁸⁵ This is an important factor in assessing the costs and benefits of intervention, which is a necessary element in a properly-establishing impact assessment (which is not currently present in Ofcom's analysis).
- 8.10 In addition, as stated in the CEG Report, Ofcom has not considered the possibility that the bill may have been higher than expected because of an *'unexpectedly high call length'*.⁸⁶ If consumers are underestimating the length of their call, particularly in cases where onward call connection is used, then a consumer will experience 'bill shock' no matter the price.

⁸² CEG Report, paragraph 36.

⁸³ CEG Report, paragraph 39. Average annual spending on telephone services is £634.40.

⁸⁴ KM Study, chart 50.

⁸⁵ CEG Report, paragraph 45.

⁸⁶ CEG Report, paragraph 41.

Ofcom's finding of 'bill shock' is misrepresented

- 8.11 Of significance, is that when consumers were asked what their most likely cause of 'bill shock' is for telecoms services in the last 12 months, only 10% of consumers mentioned DQ services. DQ services did not feature as a major cause of 'bill shock' in the telecoms sector. Ofcom said it considered the reason for this was because it *'likely reflects those with more memorable experiences or those without more prominent bill shock experiences in relation to other types of other telecoms use'*.⁸⁷ There is no evidence cited by Ofcom to support this interpretation.
- 8.12 The Rodgers Report finds that the 10% figure (from Q1 of the KM Study) has greater evidential value than the 39% figure that Ofcom uses as a basis for its finding of harm, *'as the data comes from a question that is straightforward to answer, is based on current perceptions, and is within the broader context of all telecoms spend'*.⁸⁸ On the other hand, the 39% figure (drawn from questions 17 and 18b of the KM Study) *'has little evidential value as it is based on questions that require respondents to recall a level of detail that will be beyond many of them'*.⁸⁹
- 8.13 The Rodgers Report considers that: *'the "bill shock" evidence based on perceptions of last call cost against prior expectation is unreliable and conflicts with other, more robust evidence from the same KM Study which indicates that "bill shock" is much lower'*.⁹⁰
- 8.14 The CEG Report supports this position, as it notes: *'The discrepancy between answers to similar questions in the Kantar survey suggest that Ofcom's definition of bill shock does not provide a reliable basis on which to infer material consumer harm'*.⁹¹ And finds that *'In my view, the 10% figure is more likely to capture instances of actual shocks, i.e. a surprise with a significant negative effect'*.⁹²
- 8.15 Once again, Ofcom has not provided a balanced account of the evidence and has instead given preference to one piece of evidence, over other 'more robust' evidence, to suit the conclusions Ofcom wanted to reach. At best, 'bill shock' is only experienced by 10% of customers, not 39% of customers as Ofcom finds. TNUK submits that this conclusion drawn by Ofcom ignores the reality of consumers' responses; the majority of consumers were not aggrieved by DQ service calls and Ofcom should have taken a more balanced and reasoned approach in its analysis of the evidence.

Ofcom's consumer complaints regarding DQ services are so low as to be insignificant

- 8.16 The CEG Report finds that Ofcom's direct complaints (around 10 per month) are negligible (representing only 0.002% of DQ call volumes).⁹³ Ofcom tries to side-line the volume of complaints by claiming that they are 'the tip of the iceberg', but there is no evidence to support this besides the qualitative interviews, which the Rodgers Report has found to be of 'little' evidential value.⁹⁴ The KM Study itself notes that the qualitative interviews should *'not be relied on as conclusive and provide directional insight only'*.⁹⁵ Yet Ofcom has ignored this

⁸⁷ DQ Review, paragraph 3.39.

⁸⁸ Rodgers Report, paragraph 37(c).

⁸⁹ Rodgers Report, paragraph 37(c).

⁹⁰ Rodgers Report, paragraph 54(d).

⁹¹ CEG Report, paragraph 37.

⁹² CEG Report, paragraph 38.

⁹³ CEG Report, paragraph 46.

⁹⁴ Rodgers Report, paragraphs 4 and 18.

⁹⁵ Kantar Media Directory Enquiries Services Technical Report, 13th June 2018, section 3.1.

warning and used weak evidence as a strong basis for dismissing other evidence which demonstrates that there is less harm to consumers.

- 8.17 TNUK also notes that Ofcom complaints regarding telephone DQ services has one of the lowest rates of complaints by call volume in the telecoms sector. Based on Ofcom’s published data, DQ services have only 3.6 complaints per 100,000 callers compared to 75, 54, 21 and 19 for broadband, landline, pay monthly mobile and pay tv customers, respectively.⁹⁶ TNUK also notes that there has been a very material transformation in the structure and nature of pricing in relation to all non-geographic calls, including to 118, in between those two points of comparison (since the reform in 2015 which separated access and service charges). Ofcom does not consider the impact that this may have had on customer complaints.
- 8.18 TNUK also tries to mitigate any ‘bill shock’ by providing at least a partial refund to all complainants. Complaints related to large bills without extenuating circumstances are refunded at a level of at least 50% (and up to 100% at TNUK’s discretion).⁹⁷ If all DQ users were provided with this level of compensation from DQ services then ‘bill shock’ across the DQ services sector would be mitigated. Ofcom worries that ‘consumers may be unaware that they exist or reluctant to contact an SP to complain for the fear they will incur further charges.’⁹⁸ But customers could be made more aware of this service (and that no costs will be incurred) through greater transparency measures.

Ofcom makes findings in this section of the report that are contradictory

- 8.19 Ofcom acknowledges that there is a specific PCA for onward connected calls, but then concludes that ‘consumers using the call connect service suffer material levels of bill shock’.⁹⁹ This contradicts Ofcom’s thesis that one source of the problem is a lack of marketing and hence, price information. Onward callers have the best possible information available to them, as they are told the price of the onward call before they are connected. Consumers have the opportunity at this point to hang up, rather than incur the cost. Indeed, in May/June 2018, [X%] of 118 118 callers who chose onward call connection abandoned the call after hearing the price announcement.
- 8.20 Ofcom tries to explain away lower bad debt by suggesting that the callers who cannot afford the service are not calling anymore.¹⁰⁰ In Ofcom’s Simplifying Non-geographic Numbers Review, BT’s bad debt associated with calls to PRS numbers (both 09 and 118) for financial year 2009/10 was 5.2% of retail revenue.¹⁰¹ In Ofcom’s current DQ Review, BT’s bad debt for financial year 2016/17 was in excess of 1% of total revenue from 118 calls.¹⁰² Even if 5.2% is discounted to take account of 09 numbers, this suggests that more consumers are paying their bills for 118 calls. This could be because customers are experiencing lower ‘bill shock’, or

⁹⁶ See: <https://www.ofcom.org.uk/about-ofcom/latest/features-and-news/telecoms-pay-tv-complaints-q4-2017>

⁹⁷ DQ Review paragraph 3.48. TNUK formal s135 information request response, September 2017. Further information was provided in subsequent correspondence in June 2018.

⁹⁸ DQ Review, paragraph 3.49.

⁹⁹ DQ Review, paragraph 3.55.

¹⁰⁰ DQ Review, footnote 106.

¹⁰¹ Simplifying Non-geographic Numbers - Detailed proposals on the unbundled tariff and Freephone (Published 4 April 2012), Part B – Revenue-sharing ranges, para 10.61.

¹⁰² DQ Review, paragraph 3.63.

because customers now have a variety of different alternatives from which to obtain information.

- 8.21 In the 'affordability' section of the DQ Review, Ofcom seems to contradict itself by saying that '*high prices and consumer uncertainty about charges may be deterring some from using the services*',¹⁰³ when at the same time finding that consumers are suffering harm because they are calling DQ services and experiencing 'bill shock'. If the former is right, then Ofcom's concerns here are not clear, as these consumers appear to be aware of the price of DQ services calls - and may instead have found a free/cheaper alternative to using DQ services.
- 8.22 In relation to fraud, Ofcom notes that 'where evidence of these practices comes to light, enforcement action is likely to be taken'.¹⁰⁴ Yet Ofcom seems to equate the ability to set high services charges with providers' decisions to engage in fraud. This is unfounded. As highlighted in the CEG Report, action is already taken against those companies guilty of misuse and the PSA has recently proposed introducing new requirements for DQ services to further prevent fraud.¹⁰⁵
- 8.23 As enforcement action is already taken for misuse, and new requirements are likely imminent,¹⁰⁶ Ofcom would not be justified in lowering the price of service charges for this reason – particularly as these are not practices that the majority of DQ services providers engage in.

Conclusions

- 8.24 The evidence used by Ofcom in the consumer survey is not presented in a balanced way. This has resulted in Ofcom dismissing evidence which indicates that the 'bill shock' experienced by consumers is substantially lower than Ofcom acknowledges, and would, in any event, not meet the thresholds for significant regulatory intervention in the form of a price cap.
- 8.25 As highlighted in sections 5 to 8, the KM Study, on which Ofcom has heavily relied, is flawed. The qualitative evidence holds 'little' evidential value, due to 'its limited scope and unrepresentative coverage'¹⁰⁷ as only 10 qualitative interviews were held, and these had a heavy emphasis on social grade DE respondents.¹⁰⁸ This is not representative of DQ service usage, as usage is 'reasonably consistent' across all age, working status and SEG groups, with the exception of the 16-34 age group.¹⁰⁹
- 8.26 Even the quantitative evidence holds 'limited' evidential value, as it is '*not robust in evaluating expectations of 118 DQ prices and consumer 'bill shock', nor does it provide reliable evidence about the availability of alternative information sources available to consumers.*'¹¹⁰ In particular, the 'bill shock' evidence used by Ofcom is 'potentially unreliable' as it expects customers to recall information from many months ago. More reliable evidence, which shows

¹⁰³ DQ Review, paragraph 3.57.

¹⁰⁴ DQ Review, paragraph 3.69.

¹⁰⁵ CEG Report, paragraph 71.

¹⁰⁶ See: Consultation on new Special conditions for Directory Enquiry Services, PSA review of Directory Enquiry Services, 13 June 2018.

¹⁰⁷ Rodgers Report, paragraph 4.

¹⁰⁸ Rodgers Report, paragraph 18.

¹⁰⁹ Rodgers Report, paragraph 5(a).

¹¹⁰ Rodgers Report, paragraph 3.

'bill shock' is substantially lower, is disregarded by Ofcom and means Ofcom overstates the harm caused to consumers through the emotive term 'bill shock'.

- 8.27 The Rodgers Report also found a 'fundamental design flaw' in the KM Study. The data relies on answers from DQ services calls within the last 12 months, which the Rodgers Report disagrees with. Instead:

50. ...A much more robust approach would be to re-run the tables, based on those whose most recent call was within the last three months and exclude those who said they "do not know about the payment of my telephone services" (from chart 54/55). This would provide a dataset from a group of respondents who would be more likely to recall specific 118 DQ calls they had made and had the knowledge of the call costs.

51. However, the problem then would be sample size, as it is likely that this group from whom we could obtain more reliable data would be too small to withstand rigorous statistical analysis, which is a fundamental design flaw with the KM Study.¹¹¹

- 8.28 The finding of the Rodgers Report is that the core evidence upon which Ofcom has relied (the KM study) is, at best, of 'limited' evidential value, and at worst, of 'little' evidential value and fundamentally flawed, in ways set out in that Report.¹¹² TNUK considers that Ofcom could not continue to place the weight that it does on that evidence, in light of those flaws. To take the decision to impose a measure as intrusive as a price cap, Ofcom must undertake a more rigorous analysis of the harm it has identified, and ensure that the evidence that it uses to shape any regulatory intervention is robust. The evidence presented by Ofcom thus far falls substantially short of meeting the required level of confidence, given the material risks and harmful impacts that would certainly result from Ofcom's proposed price cap.

¹¹¹ Rodgers Report, paragraphs 50 and 51.

¹¹² Rodgers Report, paragraphs 4 and 18.

9. Would Ofcom's proposed price cap achieve Ofcom's objectives?

Summary

- 9.1 This section sets out TNUK's submissions on the *effectiveness* of the proposed price cap in addressing Ofcom's consumer protection concerns that are said to require regulatory intervention by means of the price cap and to justify the price cap as being a proportionate measure.
- 9.2 The key points are:
- (a) An effective remedial intervention for a harm identified by a regulator would be one that was appropriately tailored for targeting that harm as effectively as possible. The price cap will not do this. Rather, it would be an ill-targeted intervention that would not meet Ofcom's stated objectives.
 - (b) The price cap will not be effective in addressing 'bill shock' (as that term has been defined by Ofcom in the DQ Review), since many consumers will still pay more for the call than the price they estimated they would pay.
 - (c) Indeed, it is possible that the incidence and degree of 'bill shock' would actually *increase*. [§<].
 - (d) Ofcom's concern about affordability would also not be met. For some low-income consumers, DQ services charged at the level of the cap would still represent a significant cost relative to their weekly disposable incomes, and could be paid for by financial debt. [§<].
 - (e) Consumers will be no better informed about the price of the call (at the time they make the call) or the different prices on offer from different DQ providers.
 - (f) The capped price is unlikely to have a significant impact on the incidence of fraud, as there would still be sufficient financial incentive for unethical operators to engage in fraud using 118 numbers in the absence of rigorous anti-fraud regulatory enforcement activity.
- 9.3 This section also sets out some factual errors arising in relation to the price cap proposal and the way in which Ofcom has determined what it considers the regulated price should be.

Ofcom's analysis

- 9.4 The harms that Ofcom has identified are:
- (a) 'bill shock', '*arising from actual prices exceeding consumer expectations*'. 'Bill shock' has a number of constituent elements:
 - (i) poor price transparency and low levels of consumer price awareness; and
 - (ii) increased prices.
 - (b) Some customers 'experience affordability issues' in relation to DQ calls; and
 - (c) misuse of DQ services.

Ofcom's price cap does not address the harm identified

- 9.5 It is axiomatic that any regulatory intervention must be targeted so as to best address the problem under consideration. This is both a statutory obligation and a requirement of regulatory best practice. The test of proportionality requires first that the measure proposed represents a sufficient response to the underlying problem so as to achieve the relevant statutory objective – a solution that does so only in part will not do, where a more effective and comprehensive targeted approach is available.¹¹³
- 9.6 **'Bill shock'**. A price cap on a 90 second call will not address 'bill shock' (on Ofcom's definition of that term) and therefore, does not address the harm which Ofcom has identified.
- 9.7 The underlying cause of 'bill shock' – that is, what Ofcom considers to be the difficulty that consumers experience in knowing how much that they are likely to be charged – will not be addressed at all by Ofcom's proposed price cap. That cap would do nothing to increase consumers' awareness of prices of DQ services. Once a price cap is introduced, the factors that lead to poor price awareness will all still be present:
- (a) There is no prospect or expectation that advertising of services will be more likely in the presence of a price cap.
 - (b) On-call pricing information will still not be available for the initial part of the call.
 - (c) On Ofcom's analysis, at least, it will still be the case that 'many consumers have no alternative but to call a DQ service that they remember to get the number they need'. As a result, it will still be the case that consumers will tend to call the only number they know or the first number that comes to mind.
- 9.8 It follows that the price cap will not affect Ofcom's finding that 'consumer understanding of the level of DQ prices is very poor' – even though the price itself that consumers do not understand will be a different price.
- 9.9 Customers will therefore, be no better informed about the price of the call or the different prices offered by different DQ services.
- 9.10 Further, Ofcom has failed to recognise in the DQ Review that the problem of consumers being unaware of the price of the call does not apply to the 'onward connection' element of a call to TNUK's service, since every customer who is offered onward connection is given a highly-specific PCA with the relevant price information. The PSA's guidance and Ofcom's mystery shopping exercise 'indicates that ... providers are complying with the PSA's guidance'.¹¹⁴
- 9.11 The greatest 'bill shock' will be experienced on a call where onward call connection has been used, and where the consumer has spent longer on the call than he or she either anticipated they would spend, or remembers having spent. The price cap proposed by Ofcom does not address either call length or the unexpected 'shock' of a high cost for a lengthy call (e.g. where the caller forgets that he has used call connection to reach the called party), so there will still be customers who are exposed to the harm of 'bill shock' that Ofcom has identified. There are

¹¹³ This was the position that the losing party in Lumsdon found itself in, under the reasoning adopted by the court: their proposal did not meet the relevant objective, and hence, could not constitute a 'less onerous alternative', since it was unacceptable because it was not an alternative scheme to the measure proposed, it was a lesser measure that did not achieve the objective: see Lumsdon at 116.

¹¹⁴ DQ Review, paragraph 3.21.

already total call caps operated by TNUK and BT. The function of these call caps is to protect consumers against mistakenly running up a substantial bill on a single call. If Ofcom had shown that some form of cap was appropriate at all, then a per-call cap would be more suited to addressing the type of harm Ofcom believes it has identified.

9.12 Indeed, it is possible that the incidence and degree of ‘bill shock’ would actually *increase*. [X].

9.13 **Affordability.** There is no basis for concluding that Ofcom’s price cap will be effective in addressing the affordability issues identified by Ofcom in the DQ Review. The measure is not well targeted to those users, who constitute a very small fraction of DQ users (8%, which Ofcom describes as ‘a small proportion’).¹¹⁵ There is no basis for anticipating that the Ofcom price cap will be more effective at reducing bad debt (which Ofcom considers is a proxy for affordability) than the existing commercial price caps, which Ofcom acknowledges already appear to be operating to reduce bad debt.¹¹⁶

9.14 Furthermore, the CEG Report found that only 1% of DQ users appear to have ‘a clear affordability issue’, because:

...Of the 8% of DQ users reporting that they have been “affected financially”, half (i.e. 4% of users) had said that they had cut back on other expenditure. An economist might view 100% of people purchasing a product as being affected financially by doing so and spending money on any product implies less income will be available to spend on other products. A further quarter of these users reported the financial effect as borrowing money to pay for the telephone service. Around half of UK households (in each income decile) have financial (non-mortgage) debt. Again, any expenditure by these households would have contributed to them needing to borrow. It is not clear why DQ calls should be singled out or whether the act of borrowing should be regarded as a severe impact. The remaining quarter of these DQ users experiencing ‘affordability’ issues is split between those who delayed payment of the telephone service and those unable to pay their telephone service. It is only in relation to the latter group, i.e. 1% of DQ users, for whom there appears to be a clear affordability issue. This is not to understate that the cost may have caused a significant problem for these customers or for some of the other customers Ofcom considers to have been affected. However, it is important to understand both the number of customers affected and the extent to which they have been affected and Ofcom’s conclusion is not supported by the evidence it has presented in the Consultation.¹¹⁷

9.15 For this very small proportion of consumers for whom the cost of calling a DQ service gives rise to affordability issues, DQ services charged at the level of the cap would still represent a significant cost relative to their weekly disposable incomes, and could be paid for by increased financial debt. [X]. As the CEG Report goes on to note, ‘...there are already DQ services

¹¹⁵ DQ Review, paragraph, 3.65.

¹¹⁶ DQ Review, paragraph 3.63.

¹¹⁷ CEG Report, paragraph 65 (footnotes omitted from the original).

*available at prices below Ofcom's cap. Making consumers aware of these cheaper services would better address affordability issues.*¹¹⁸

- 9.16 **Misuse.** There is no basis for concluding that Ofcom's price cap will have any direct effect on fraud and misuse on the 118 range (and Ofcom does not suggest that it would). Ofcom's hypothesis is that there may be an indirect effect, in that the incentives to carry out such frauds may be reduced. But Ofcom does not consider that:
- (a) Where there is an effective method to carry out a fraud in relation to 118 calls, that is likely to be profitable at a range of price points. There is no reason to anticipate (and certainly, Ofcom has not undertaken any consideration of the question whether) the capped rate will have the effect of significantly reducing instances of fraud.
 - (b) If the effect of a price cap is to induce more consumers to use DQ services (or for example to have greater confidence that the price is regulated) then the vulnerability to consumers to scams may be *increased*, and the value of those frauds may be greater under Ofcom's proposal.
- 9.17 There is no evidence on these issues in Ofcom's analysis, and the actual impacts of the Ofcom price cap on fraud is highly uncertain.
- 9.18 What is certain is that a price cap that has a small downward effect on the incentives for fraudulent operators is far less effective as a response than the obvious alternative, which is for Ofcom to use its consumer protection powers to tackle those fraudulent operators directly. TNUK strongly urges Ofcom to do so.

Factual errors

- 9.19 As previously noted, the 2013 prices Ofcom cites in its DQ Review (and which it uses to set the proposed price cap) are wrong. Calls from a BT landline to 118 500 in Q1 2013 were charged at £2.61 for the first minute and £1.99 for subsequent minutes.¹¹⁹ Similarly, calls from a BT landline to 118 118 from February 2013 were charged at £2.58 for the first minute and £1.79 for subsequent minutes. In 2013, calls originating from BT landlines to any DQ number were charged on a per-minute basis. As a result, a 90 second call made from a BT landline to 118 500 would have cost £4.60, not £2.83¹²⁰ and a call made to 118 118 would have cost £4.37, not £2.76. In addition, calls originating from mobile carriers were also charged at higher levels with Orange (now EE) and Vodafone charging £4.50 per 90 seconds for calls to 118 500 and about £3.75 per 90 seconds for calls to 118 118. Therefore, 2013 prices (which Ofcom did not deem inappropriate at the time) exceeded the price cap currently proposed. Given that Ofcom justifies its proposal specifically by reference to 'returning to 2013 levels', this error is a material one – Ofcom's basis for opting for the proposed price cap is based on a mistake about the 2013 prices.
- 9.20 TNUK believes that the KM Study's analysis on price expectations is also flawed. As observed in the Rodgers Report, data from unprompted questions shows that respondents whose last DQ services call was more than three months ago were less able to answer.¹²¹ If the KM Study data is based only on those callers whose last DQ services call was less than three months ago,

¹¹⁸ CEG Report, paragraph 79.

¹¹⁹ All prices provided in this paragraph are VAT inclusive.

¹²⁰ DQ Review, paragraph 4.17.

¹²¹ Rodgers Report, paragraph 47.

and you look only at their unprompted responses, the price expectations of respondents was much higher than the price expectations presented in the KM Study. Price expectations would amount to £3.98 per 90 seconds for mobile (compared to £3.54 per 90 seconds - using £2.36 per min in the KM Study)¹²² and £3.73 per 90 seconds for a landline (compared to £2.93 per 90 seconds - using £1.95 per min in the KM Study).¹²³ Both of these are amounts above the price cap currently proposed by Ofcom.

- 9.21 There is also a question about the role played by the access charge (which forms part of the overall cost of the call to the consumer). With a price cap of £3.10, the access charge charged by some CPs would amount to approximately 25% of the overall price charged to consumer. That would be very high, when it is the DQ services provider that is providing the service to customers. Ofcom does not consider access charges in the DQ Review, despite a suggestion by the Communications Consumer Panel that Ofcom extend its DQ Review to take account of access charges.¹²⁴ It is not clear why Ofcom did not consider access charges in its review, [redacted] especially if a price cap is imposed.
- 9.22 Lastly, if Ofcom did decide to impose a price cap, TNUK does not consider that a four month implementation period is long enough, particularly at the level of the price cap that Ofcom is currently proposing. As observed in the CEG Report, *'the proposed 4 month implementation period risks imposing substantial costs on investors, the businesses and their employees given that such a large price reduction can be expected to [redacted]'*.¹²⁵ [redacted].

¹²² KM Study, chart 42.

¹²³ KM Study, chart 40.

¹²⁴ Ofcom Annual Plan 2018/19, A2.105.

¹²⁵ CEG Report, paragraph 10.

10. Impact of the proposed price cap on competition and consumers

- 10.1 It is incumbent on Ofcom to assess the effects of its proposals, including on competition. As noted above, competition in DQ services is valuable and benefits consumers in relation to price, quality and choice. The fact that some consumers pay a premium price does not prove otherwise. [REDACTED].
- 10.2 [REDACTED]. Ofcom's DQ Review contains virtually no consideration at all about any disadvantages of price caps, including the disadvantages that Ofcom itself cited in 2013.
- 10.3 In addition, Ofcom's analysis does not consider the interrelationships between:
- (a) retail DQ services, and
 - (b) wholesale services,
- and how the imposition of the proposed price cap in the retail DQ services market could affect competition in the wholesale DQ services market.
- 10.4 Examining the impact on competition, not just at the retail level (which is nevertheless largely absent in the DQ Review) but at the wholesale level (and its impacts on white label offerings) is critical when suggesting any regulatory intervention - let alone the most intrusive form of regulation, a price cap.
- 10.5 For the purpose of understanding how the price cap would be likely to affect competition in the DQ services markets, it is essential to consider how the price cap would [REDACTED].
- 10.6 TNUK is the only major competitor to BT in the retail DQ services market, with TNUK's 118 118 service commanding a level of consumer recognition comparable to that enjoyed by BT's 118 500 service. [REDACTED].
- 10.7 [REDACTED]. In addition, as explained at paragraph 4.18 above, TNUK offers to provide to its and BT's competitors in the retail market wholesale DQ services on a 'white label' basis, thus facilitating competitive entry and expansion into the retail DQ services market by operators for whom it would not be efficient (or might in some cases not be economic) to create their own DQ call handling operations. [REDACTED]. The telephone DQ services sector is already in rapid decline, with an average customer volume loss of around [REDACTED]% year on year.
- 10.8 [REDACTED].¹²⁶ Quality is an important factor for consumer-facing mobile network businesses and other companies with strong brand reputations, when purchasing 'white label' customer-facing services that will be operating under their own brand.
- 10.9 TNUK has given careful consideration to projecting the impacts that the proposed price cap would have [REDACTED].
- 10.10 [REDACTED].
- 10.11 [REDACTED].
- 10.12 Should the price cap (as currently proposed by Ofcom) be imposed, [REDACTED].

¹²⁶ [REDACTED].

- 10.13 The DQ Review does not consider the impact that these developments would have on competition [§]. That is a major failing in the DQ Review’s analysis of the impacts of the proposed price cap. [§].
- 10.14 [§]. It is very difficult to see how such regulatory action could be compatible with the CRF or Ofcom’s legal duties (see Section 3 above) – especially as the DQ Review appears to attach very little, if any, importance to promoting, or even maintaining, competition in DQ markets.
- 10.15 [§].
- 10.16 [§].
- 10.17 [§].
- 10.18 [§] Ofcom, in the DQ Review, expresses unfounded doubts about the reliability of the information and evidence that TNUK has already provided Ofcom about the impact that the proposal would have on TNUK’s [§] business model for DQ services. Ofcom has dismissed, with little explanation, this evidence as not being credible.¹²⁷ With respect to the reasons provided by Ofcom [§].¹²⁸
- (a) if Ofcom was having difficulty in understanding how TNUK had calculated the common costs, then Ofcom could – and should – have raised further queries with TNUK before publishing the DQ Review, so that TNUK had the opportunity to answer those queries; and
 - (b) as noted above, [§].
- 10.19 [§].
- 10.20 [§].
- 10.21 [§].
- 10.22 [§].
- 10.23 [§]. Ofcom is wrong to ignore the benefits to those consumers who currently pay less, such as consumers who are sufficiently concerned about prices for DQ services such that they take the additional trouble involved in using the 0800 or online services. Approximately [§] unique customers called TNUK’s free DQ service [§] times in the twelve months from August 2017 to July 2018. In addition, in the last 12 months, TNUK’s free website (118118.com) had [§] unique visitors generating [§] page views.¹²⁹ TNUK believes that a significant majority of customers to its website will have been searching for a free listing.
- 10.24 [§]. In DQ services, there is a link between service quality and lower costs for the consumer. That is because the better resourced and trained a DQ service provider’s call handlers are (and the more of them are available), the quicker they can perform searches for the customer,

¹²⁷ DQ Review, paragraphs 4.45-4.47.

¹²⁸ [§].

¹²⁹ Source: Google Analytics.

which in turn means the calls will generally be shorter and result in a lower charge for customers (since most DQ services' prices include a 'pence per minute' element).¹³⁰

10.25 TNUK considers that service quality is also an important feature for business customers (which make up approximately [X]% of TNUK's customer base). Ofcom does not consider the impact of the price cap on this set of customers. In addition, Ofcom's extrapolation of the KM Study data may not properly represent all DQ users, as it does not take into account business customers, who presumably have different views from residential customers on DQ services (particularly with regard to 'bill shock').

10.26 BT has recently cut its price for its DQ service, against the background of Ofcom considering the imposition of a price cap. [X].

10.27 [X].¹³¹

10.28 The DQ Review also fails to take into account the impact that the price cap would have on [X].

10.29 Finally, there is also a likelihood that Ofcom's intervention could damage investment incentives in the telecoms industry as a whole. TNUK has been a major investor in the UK market, growing as a corporate citizen, household name brand and employer, contributing to the UK economy over many years. If Ofcom's proposal was given effect, TNUK's reasonable expectations when it entered the market, and on which its investment decisions were based, would have been undermined for no good reason. TNUK speaks to this issue with the experience of a multinational investing entity, and considers that such a dramatic change of direction, [X] would tarnish the reputation of the UK as an attractive place to launch new businesses. This would send a terrible signal to the world about the risks of investing in the UK telecoms markets, especially at a time when the UK is otherwise facing great economic uncertainty.

10.30 When TNUK entered DQ services in the UK, it was entering a market in which BT had previously had a monopoly and still retained huge natural advantages (many of which it still has). The only way TNUK could counter this was to make a huge investment in marketing, which played a large part in accomplishing Ofcom's then objectives of moving DQ services into a competitive space, educating consumers about the new 118 number range, and making customers aware of the fact that they now had a choice of DQ services providers. Without that investment, it is unlikely that those goals would have been achieved. Now Ofcom is sending a message that it will undermine such efforts by imposing a price cap based on the incumbent's current pricing.

¹³⁰ TNUK DQ call handling staff is exceptionally well trained and experienced with an average tenure of over [X].

¹³¹ TNUK has invested enormous effort in developing the human resources supporting its service, with a people-intensive methodology for answering calls which costs substantial amounts for hardware and call centre locations and training of our agents. TNUK's call centre staff, as noted above, is extremely experienced and very well trained and very speedy. [X].

11. Conclusion

- 11.1 Ofcom's approach for setting its proposed price cap is not well reasoned, beyond referring to BT's price and stating [redacted] that Ofcom does not believe that the price would threaten TNUK's cost recovery. This is not sufficient for a regulator considering the determination of such a significant regulatory intervention.
- 11.2 Ofcom's choice to base regulation around BT's choices is extraordinary, discriminatory and irrational. Ofcom has general duties under both UK and EU law (as set out in more detail in Section 3 above) to apply objective, transparent, non-discriminatory and proportionate regulatory principles.
- 11.3 TNUK does not consider that these principles have been applied to Ofcom's decision and that Ofcom has not fully considered the range of alternative options available to it, which offer proportionate and non-discriminatory means of addressing the harm Ofcom has identified.
- 11.4 If a price cap is appropriate at all, Ofcom needs to explain what the legitimate aim of the cap is (i.e. what it is intended to achieve), and what negative side-effects are to be avoided. Only once this level of analysis has been undertaken can Ofcom then use those principles to derive the appropriate level of the cap.
- 11.5 TNUK does not think a price cap of the type proposed by Ofcom is appropriate to address the perceived harm that Ofcom has identified, as it will not directly address the 'bill shock' (as defined by Ofcom) that a customer experiences if they are i) unaware of the cost, and ii) make a DQ services call which is longer than expected.
- 11.6 Instead, if further regulatory intervention is needed, there are alternative proposals that could be considered (as outlined in the attached Annex 1). The alternatives identified by TNUK may offer different approaches that could be better tailored to addressing the consumer protection problem that Ofcom considers exists in telephone DQ services (for example, measures which would increase transparency so that customers have a greater awareness of the cost they will incur when making a DQ services call).
- 11.7 TNUK is happy to discuss different ways of addressing the consumer harm Ofcom believes it has identified in telephone DQ services. But the imposition of a price cap of the type proposed by Ofcom in a rapidly declining sector [redacted] is not the answer.

Annex 1: Alternative remedies Ofcom has failed to properly consider when assessing the proportionality of its proposal

Summary

- A1. For the reasons set out in the main body of TNUK's consultation response, Ofcom's case on consumer harm is unsound and therefore does not provide a proper basis for concluding that there is a significant problem to be addressed. If, however, Ofcom were right that some form of further regulation were needed, then Ofcom needs to consider, diligently and with an open mind, potential alternative approaches such as those set out further below in this Annex. The fact that Ofcom would also need to consult fully before adopting such alternative approaches is not a good reason for Ofcom to rush into adopting its presently proposed price cap based on BT's chosen new price for its DQ service.
- A2. As set out in TNUK's submission, TNUK's view is that Ofcom's proposal to introduce a price cap at £3.10 including VAT for a 90 second call is not capable of being adopted in its current form because:
- (a) the evidence gathered to prove the basis for action is inadequate and inconclusive;
 - (b) the level of the price cap Ofcom has chosen is not justifiable or proportionate on a legal or regulatory basis;
 - (c) the effect of the proposal on DQ services [X] is unjustifiable and disproportionately damaging.
- A3. These alternatives are not intended to be proposals by TNUK of specific actions that Ofcom could take, without further policy consideration and consultation. But they illustrate the fact that there *are* alternatives, and that Ofcom's policy analysis does not consider widely enough the different ways that Ofcom might respond to perceived problems in the DQ market. Without properly exploring those alternatives, Ofcom cannot satisfy itself that its approach is proportionate. TNUK reserves its position in relation to any possible future proposals Ofcom may bring forward for consultation.
- A4. The key points are:
- (a) Ofcom has not done enough to objectively evaluate the evidence it has gathered and consider all of the options available to remedy the harm it has identified by assessing, in turn, its impact on competition and proportionality; and
 - (b) This Annex identifies a number of possible alternative remedies that could be considered and assessed to establish whether they might better address the harm Ofcom has identified [X].

Public education campaign

- A5. Many of the issues Ofcom identifies are caused by poor consumer price awareness. A price cap would not address consumer understanding.
- A6. A public education campaign concerning the range of telephone DQ services available and their applicable charges, would better alleviate Ofcom's concerns. This could consist of a combination of measures to increase information supply to customers, which could in turn increase price transparency significantly.

- A7. There are different ways of doing this. For example, DQ service providers could be obliged to improve the provision of price information on their websites and any other channels used to interact with consumers (in terms of clarity, prominence etc). Other potential measures include, for example, a requirement that CPs include DQ services information with customer bills, or Ofcom (or the PSA) could help to publicise prices through carrying a price comparison table in a prominent place on its website.

Generic PCA supplemented by a number-checker automated voice enquiry service

- A8. Ofcom has dismissed a generic PCA on the ground that it would not give consumers enough information.¹³² But Ofcom has not considered the idea of introducing a generic PCA (of around five seconds) which directs callers to a phone number where they could consult an automated service to find out the cost of the call.
- A9. The advantage of this approach is that it would enable consumers who are price-sensitive to be put on notice that they are calling a premium rate number, but also to be able to check the price of the call with ease if they wish.¹³³ It is a far less complex technological solution than a tariff-based PCA, with lower capital costs (that Ofcom sees as being an obstacle).
- A10. The initiative to set up and run the free service to provide this information could be funded and managed on a co-regulatory basis by the industry, in cooperation with regulators.

Targeted support to more vulnerable customers

- A11. There are some consumers who, for reasons relating to a medical condition, disability, etc., find it difficult to use a paper directory or online directory service. The 195 scheme already exists to enable such consumers to have access to a free voice DQ service.
- A12. If take-up of 195 is low for eligible customers, the appropriate response is to establish why that is happening. If, for example, the problem lies in a lack of knowledge about the 195 scheme, then the appropriate remedies would be ones directed at publicising the scheme. If access to the scheme is considered to be too difficult due to the administrative burden on the applicant, or the eligibility criteria to be satisfied, then these problems could be addressed by relaxing the criteria or the evidence required from the applicant.
- A13. TNUK sees merit in Ofcom examining how the 195 scheme is working in practice, with a view to modifying it, as appropriate, to ensure that a greater number of consumers with few or limited alternatives to using DQ services are able to benefit from free or low cost DQ services.

Stronger action by regulators to ensure providers are responsive

- A14. Ofcom could, for example, establish a more effective escalation of consumer complaints by establishing complaint-handling standards. These could be overseen by the PSA, who could ensure that DQ providers respond to complaints fairly, effectively and consistently. The PSA could also advertise standards on its web site and mandate further general advertising to increase awareness of associated consumer benefits. Workshops could assist in the administration of the new regime and regulators could report publicly on complaint levels and

¹³² DQ Review, paragraph 4.74.

¹³³ The PSA already provides an online number checker. The PSA appears to be a viable option for extending this service to include a free telephone number checker.

categories to encourage providers to respond in a way that improves on the prevailing situation under current competitive conditions.¹³⁴

¹³⁴ We note, for example, that Ofcom was active in promoting broadband speed to prompt the competitive process. It launched a broadband and mobile checker app - a free app to help consumers get the best from their internet connection: <https://www.ofcom.org.uk/phones-telecoms-and-internet/advice-for-consumers/advice/ofcom-checker>

Annex 2: Rodgers Report

Please see the Rodgers Report, dated 16 August 2018, submitted as a separate attachment to this written response.

Annex 3: CEG Report

Please see the CEG Report, dated 22 August 2018, submitted as a separate attachment to this written response.