080 and 116 number ranges

Statement on dispute resolution guidance

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Statement

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Contents

Section 1

Introduction

The NGCS statement

1.1 Over the last three years we have undertaken a detailed review of non-geographic call services. We have today published a statement which sets out our decision to make changes to the regulation of these number ranges: *Simplifying non-geographic numbers; final statement on the unbundled tariff and the 080 and 116 ranges* ('the NGCS statement').[1]

1.2 In the NGCS statement we set out our decision to make the 080 and 116 number ranges free-to-caller[2] from all telephones (both fixed and mobile).[3] We have also decided to set an access condition on persons that terminate calls to 080 and/or 116 numbers (terminating communications providers or TCPs) requiring them to purchase wholesale origination for calls to these numbers on fair and reasonable terms (including charges). These decisions therefore confirm the view we set out previously in our April 2013 policy position.[4]

April 2013 guidance consultation

1.3 We anticipate that making the 080 and 116 ranges free-to-caller may prompt changes to current wholesale arrangements for calls to these numbers. We recognise that negotiations relating to revised origination charges for these calls may give rise to potential disputes as to what constitutes a fair and reasonable charge (as required by our access condition). We therefore consider it would be helpful to provide guidance as to how we would resolve any such future dispute.

1.4 In April 2013 therefore, alongside our policy position, we also published draft guidance on how we would be likely to assess what is a fair and reasonable origination charge for calls to (free-to-caller) 080 and 116 numbers, if called to do so in a dispute.[5]

Final guidance

1.5 We received 8 responses to our draft guidance. All of the non-confidential responses are available on our website.[6] To the extent relevant, we have also taken into account stakeholder comments on the approach we took to deriving ranges of origination charges for the purposes of our impact assessment (impact assessment ranges or IARs) in the April 2013 policy position.

[1] http://stakeholders.ofcom.org.uk/consultations/simplifying-non-geo-no/final-statement
[2] By 'free-to-caller' we mean that the number can be accessed by consumers at a retail price of zero and, where the call is made from a public payphone, without having to use coins or cards.
[3] See Section 4 of the NGCS statement for further details.
[4] *Simplifying non-geographic numbers, policy position on the unbundled tariff and the 080 and 116 number ranges* ('the April 2013 policy position'), http://stakeholders.ofcom.org.uk/consultations/simplifying-non-geo-no/summary. This document set out the decisions we were minded to take but those decisions were provisional on the issues on which we were consulting as part of that document.
[5] *080 and 116 number ranges: consultation on proposed dispute resolution guidance* ('April 2013 draft guidance'), http://stakeholders.ofcom.org.uk/consultations/080-116-ranges/
[6] http://stakeholders.ofcom.org.uk/consultations/080-116-ranges/?showResponses=true

1.6 Having considered all comments from stakeholders, we are now publishing our final guidance. This statement therefore summarises the comments received from stakeholders, sets out our response to those comments, and describes the approach we have decided to adopt. Our guidance is set out in full in the Annex to this statement.

The dispute resolution process

1.7 Section 185(1)(a) of the Communications Act 2003 (the Act) gives Ofcom jurisdiction to resolve certain disputes, including those relating to the provision of network access between different communications providers (CPs). By virtue of section 185(8), this includes a dispute as to the terms or conditions on which network access is or may be provided in a particular case. Section 185(2) of the Act also gives Ofcom jurisdiction to resolve a dispute between CPs relating to rights or obligations conferred or imposed by or under Part 2 of the Act.[7]

1.8 Section 185(3) provides that any party to a dispute may refer it to Ofcom. Section 185A empowers Ofcom to invite any one or more of the parties to a dispute to refer it to Ofcom under section 185(3).

1.9 Section 186 of the Act provides that where a dispute is referred to Ofcom in accordance with section 185, Ofcom must decide whether or not it is appropriate to handle it, and sets out the considerations that Ofcom may take into account in doing so.

1.10 Where it is appropriate for Ofcom to handle the dispute, section 188 of the Act provides that Ofcom must consider the dispute and make a determination for resolving it within four months, except in exceptional circumstances.

1.11 Ofcom's powers to resolve disputes are set out in section 190 of the Act. They include the power to make a declaration setting out the rights and obligations of the parties to the dispute, to give a direction fixing the terms or conditions of transactions between the parties to a dispute, and/or to give a direction imposing an obligation, enforceable by the parties to a dispute, to enter into a transaction on the terms and conditions fixed by Ofcom. For the purpose of giving effect to a determination of the proper amount of a charge in respect of which amounts have been paid by one of the parties to the dispute to the other, Ofcom may also give a direction requiring the payment of sums by way of adjustment of an underpayment or overpayment.

How Ofcom resolves a dispute

1.12 Ofcom has published guidelines, which describe our dispute resolution process in detail.[8] Stakeholders should refer to those guidelines for information on how to refer a dispute to Ofcom, the submission requirements we will apply and the process we will follow.

1.13 Dispute resolution is a statutory function, which Ofcom must exercise consistently with its statutory duties, in particular as set out in sections 3 and 4 of the Act (which

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[7] Provided the dispute is not excluded by virtue of section 185(7) of the Act.

[8] *Dispute resolution guidelines*, 7 June 2011, published at: http://stakeholders.ofcom.org.uk/binaries/consultations/dispute-resolution-guidelines/statement/guidelines.pdf

give effect, amongst other things, to the requirements of Article 8 of the Framework Directive).[9]

1.14 A determination made by Ofcom to resolve a dispute binds all the parties to that dispute.[10] Since a subsequent dispute with similar facts is likely to result in a similar decision (given our statutory duties, including our duty to have regard to the principle that regulatory activities should be consistent) we would expect dispute determinations to be read across and followed in situations where a third party is facing similar questions and circumstances to the dispute that has been determined.

1.15 Ofcom's duty to resolve disputes within four months (except in exceptional circumstances) has an impact on the level of analysis that it is appropriate and feasible for Ofcom to undertake. We are rarely, for example, able to carry out the same detailed level of analysis of costs as we would in exercising other *ex ante* regulatory powers, such as in a market review. In making a determination to resolve a dispute, Ofcom will rely on its best assessment of the available evidence within the four month statutory deadline.

Structure of this document

1.16 In **Section 2** we summarise the stakeholder comments we received in response to the April 2013 draft guidance as well as setting out our response to those comments and providing a high level summary of our final guidance on how we would approach any future dispute as to whether origination charges for calls to the 080 or 116 number ranges are fair and reasonable. The final guidance is set out in full in **Annex 1**.

1.17 In **Section 3**, we explain how we have recently applied the three Principles in our final guidance to currently available evidence for the purposes of our impact assessment contained within the NGCS statement.

[9] Directive 2002/21/EC.
[10] Section 190(8) of the Act.

Section 2

Response to stakeholder comments on the proposed guidance

Introduction

2.1 In this section we set out, and respond to, stakeholder comments received in response to our April 2013 draft guidance. First we have briefly summarised our approach in that draft guidance.

April 2013 draft guidance

2.2 We said in April 2013 that our analytical framework for assessing whether origination payments were fair and reasonable would consist of the following three cumulative Principles. We noted we had previously used these Principles when considering wholesale charges for calls to 080 numbers in other regulatory contexts.[11] We also noted we would apply the same analytical framework to both fixed and mobile origination payments:

- **Principle 1:** OCPs should not be denied the opportunity to recover their efficient costs of originating calls to a free to caller number range.
- **Principle 2:** the origination payment should, taking into consideration our statutory duties:
  - provide benefits to consumers, taking into account indirect and tariff package effects; and
  - avoid a material distortion of competition either among OCPs or among TCPs.
- **Principle 3:** the origination payment should be practical to implement.

2.3 Our proposed guidance was set out in Annex 1 of the April 2013 draft guidance and detailed the factors we would take into account and the issues we would consider under each of these Principles.

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[11] We said that we have used these three Principles in previous disputes (see *Determination to resolve a dispute between BT and each of T-Mobile, Vodafone, O2 and Orange about BT's termination charges for 080 calls*, 5 February 2010: ('080 Dispute Determination'), available at: http://stakeholders.ofcom.org.uk/binaries/consultations/draft_deter_bt_tmobile_vodafone/nonconf.pdf and *Determination to resolve disputes concerning BT's tiered termination charges in NCCNs 1101, 1107 and 1046, Final determination*, 4 April 2013 ('Tiered Rates Determination'), available at: *http://stakeholders.ofcom.org.uk/binaries/consultations/provisional-conclusions/statement/040413.pdf*) and in reaching assumptions about the likely level of origination charges for the purpose of assessing the impact of making the 080 and 116 ranges free-to-caller (see the April 2013 policy position, Section 12). The use of these three Principles was also accepted by the Competition Appeal Tribunal in its judgment on the appeals against the 080 Dispute Determination (see *British Telecommunications plc and Everything Everywhere Limited v Office of Communications*, 1 August 2011, [2011] CAT 24, available at: http://www.catribunal.org.uk/238-7221/Judgment.html). However, we noted that the precise wording of the three Principles may differ slightly between these uses, depending on the regulatory context in which they are employed.

2.4 We asked the following question about our the draft guidance:

Question 1: Do you have any comments on how we have applied these three Principles to generate the draft guidance in Annex 1?

Stakeholder comments

2.5 We received comments not just on our application of the three Principles (on which we consulted) but also on the analytical framework itself. We address the comments relating to the framework first before responding to comments on its application, taking each Principle in turn. We note that we have modified some aspects of our application of the three Principles in response to stakeholder comments received in relation to the draft guidance and the April 2013 policy position. We describe and explain these modifications at the end of the discussion of each Principle.

Analytical framework

<u>Stakeholder comments</u>

2.6 We received comments from some stakeholders on the relevance and drafting of the three Principles. In particular, BT said that it was not necessary or appropriate to apply the three Principles in the context of origination payments for free-to-caller services, arguing that the only relevant test was Principle 1. It said that Principle 2 was introduced in the context of non-geographic call termination, where Ofcom's policy preference for 080 calls to be free was to be balanced against other considerations. It said in the present case, the purpose of the regulation was to ensure that calls are free, so the only relevant consideration was whether or not the OCP could recover its efficient costs. BT noted that the three Principle test did not apply in the context of mobile termination rates.[12]

2.7 [✂] had concerns about the reliance on the three Principles given they were used in a judgment which the Court of Appeal had ordered to be set aside.[13] It said in one sense that meant Ofcom's logic was not applicable. It also noted that the Supreme Court had granted BT permission to appeal the Court of Appeal judgment, which meant that, until the Supreme Court's judgment had been handed down, there was continuing regulatory uncertainty.[14]

2.8 EE disagreed with the way in which the three Principles were drafted. EE considered that the phrasing of the Principles should reflect the test as most recently set out in our determination of disputes concerning BT's tiered termination charges in NCCNs 1101, 1107 and 1046 ('Tiered Rates Determination')[15], which was modified from its initial formulation to reflect the decision of the Court of Appeal. EE considered that this would result in the wording of Principle 2 giving foremost weight to the requirement that charges be beneficial to consumers. It argued that this was particularly important in the present context, given the stated consumer protection

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[12] BT, April 2013 policy position response, p.19.

[13] *Telefonica O2 UK Limited, Everything Everywhere Limited, Vodafone Limited and Hutchison 3G UK Limited v British Telecommunications plc,* 25 July 2012, [2012] EWCA Civ 1002. Available at: http://www.catribunal.org.uk/238-6086/1151-3-3-10-British-Telecommunications-Plc-Termination-Charges-080-calls.html

[14] [✂].

[15] *Determination to resolve disputes concerning BT's tiered termination charges in NCCNs 1101, 1107 and 1046, Final determination*, 4 April 2013, available at: *http://stakeholders.ofcom.org.uk/binaries/consultations/provisional-conclusions/statement/040413.pdf*

justification underpinning Ofcom's proposals. EE also argued it was also important to ensure regulatory consistency.[16]

2.9 EE argued that Principle 2 should be redrafted to take a new factor into account - the impact of the proposed origination charges on OCPs' and TCPs' prices for freephone services, which it referred to as the Direct effect. In EE's view, origination payments will have a direct effect on the prices charged by TCPs to their SP customers for the termination and hosting of calls to 080 and 116 numbers.

2.10 EE also considered that Principle 2 should be redrafted to take into account the potentially beneficial impact of the level of the origination charge on competition. EE considered that Principle 2 in the draft guidance was deficient because it only considered ways in which the level of the origination charge may distort competition, without considering the ways in which it might also promote competition, to the benefit of consumers.

Ofcom's response

2.11 With regard to BT's comment, we note that the three Principles were developed in the context of our 2010 dispute determination in relation to calls to 080 numbers ('080 Dispute Determination')[17] to assess whether a set of termination rates for 080 calls were fair and reasonable. We consider this broad analytical framework appropriate in the current context, given that an origination payment for a 080/116 call can also be viewed as a negative termination rate. We consider the mobile termination rate guidance less relevant as it was developed in a very different context, notably an SMP condition arising from a market review of wholesale call termination to mobile numbers.

2.12 We are aware that one of the potential effects on consumers assessed in the 080 Dispute Determination was the likely impact of the termination rates on the price of calls to 080 numbers, which is clearly not relevant once 080 and 116 are made free to caller. However, there are other potential consumer implications of different levels of origination charge, and we continue to consider these should be taken into account in any assessment of fair and reasonable charges. We do not consider that Principle 1 by itself, under which we establish the range of efficient costs relevant for recovery through origination charges, would be sufficient for this purpose.

2.13 We recognise Principle 1 is important in ensuring that OCPs are not denied the opportunity to recover their efficient costs of originating calls to a free to caller number range. However, its application results in a range of possible origination charges lying between the pure LRIC of origination and LRIC+ (with no allowance for A&R) costs. As noted in the draft guidance, different origination charges within this range are likely to have both positive and negative effects on consumers such as through their impact on service availability and the tariff package effect ('TPE'). Given our duty towards protecting the interests of consumers, we consider it necessary to take these consumer impacts into account in our assessment.

2.14 In addition, we expect the ranges derived under Principle 1 to vary according to whether a call is originated from a fixed line or a mobile, reflecting the underlying differences in the cost of origination. The resulting differential in fixed and mobile

[16] EE, April 2013 policy position response, pp. 46-47.

[17] *Determination to resolve a dispute between BT and each of T-Mobile, Vodafone, O2 and Orange about BT's termination charges for 080 calls*, 5 February 2010: available at: http://stakeholders.ofcom.org.uk/binaries/consultations/draft_deter_bt_tmobile_vodafone/nonconf.pdf

origination charges may further impact consumers if it sends SPs incorrect price signals for decisions they may take to use cost mitigation measures. It could also, in theory, impact on competition between fixed and mobile OCPs. We therefore consider it appropriate to take into account any effect that relative prices consistent with the ranges derived under Principle 1 may have on price signals to SPs as well as on competition. These potential impacts on consumers and on competition are all considered under Principle 2.

2.15 We also continue to consider Principle 3 is necessary because of the prospect that the application of Principles 1 and 2 may result in differing fair and reasonable charges for mobile and fixed originated calls. If this situation arises, we would need to assess whether it is practical for a TCP to distinguish between fixed and mobile originated calls. There may be other practical issues brought to light in the course of any dispute over fair and reasonable charges, which we would want to be able to take into account in our assessment.

2.16 With respect to [✂] comment, we do not accept that our reliance on the three Principles is misplaced. They were set out in our 080 Dispute Determination, which in this regard was endorsed by the CAT in its 08x judgment. That judgment was appealed on a point of law to the Court of Appeal and the application of the three Principles was not at issue in that appeal. It is therefore unclear why the overturning of the CAT's judgment based on unrelated grounds (or indeed its reinstatement by the Supreme Court, should this occur) would impact our use of these Principles.[18] As a result, we do not consider the possibility of a Supreme Court judgment should create any material uncertainty over our guidance.

2.17 With respect to EE's comment regarding the drafting of the Principles, we noted in the April 2013 policy position that we had slightly modified the wording of the Principles in the Tiered Rates Determination to reflect the particular characteristics of those disputes.[19] For clarity, we set out the differences here.

2.18 In the draft guidance, we said that under Principle 2 the origination payment should, taking into consideration our statutory duties:

- provide benefits to consumers, taking into account indirect and tariff package effects; and
- avoid a material distortion of competition either among OCPs or among TCPs.

2.19 In the Tiered Rates Determination, we said that under Principle 2 the wholesale termination charges ('WTCs') should be beneficial to consumers. We said that we would assess this by considering the following factors:

- direct effect: impact of the proposed WTCs on MNOs' retail prices for NTS calls;
- mobile tariff package effect: impact of the proposed WTCs on MNOs' retail prices for other mobile services;

[18] As a general point, we also consider it could be appropriate to draw on some aspects of a judgment which was subsequently overturned on unrelated grounds. For example, we made some refinements to the Principles in the Tiered Rates Determination to reflect comments by the CAT in its 08x judgment as we considered these assisted clarity.
[19] April 2013 policy position, Section C, 12.16.

- indirect effect: impact of the proposed WTCs on SP revenue, and through improved services, on callers; and

- competition effect: impact of the proposed WTCs on competition, whether beneficial or detrimental.

2.20 This formulation of Principle 2 in the Tiered Rates Determination did not have a substantive impact on the way in which it was applied. It was merely a drafting change intended to clarify that our assessment of the impact on competition was a factor we would consider in order to reach a view on whether the proposed charges were beneficial to consumers and to acknowledge the potentially beneficial impact of tiered termination charges on competition.[20]

2.21 We do not think it is necessary to align the drafting for the purposes of regulatory consistency alone. In the April 2013 policy position, we said that we did not consider it necessary to use the same modified wording for the purposes of the impact assessment, as some of the issues driving our assessment of a free-to-caller approach were distinct from those applying to the Tiered Rates Determination.[21] However, in light of EE's comments, we have considered whether adopting any aspects of the modified drafting could aid clarity in the current context.

2.22 We consider it would be confusing to include the Direct effect in the context of a dispute over fair and reasonable origination charges for calls to free to caller 080/116 numbers. The Direct effect relates to the retail call price charged to consumers for calls to the affected number ranges, which will be free regardless of the level of the origination charge. We do not consider it appropriate to label the price charged by TCPs to their SP customers a Direct effect, as suggested by EE, because this price does not directly affect callers. However, we realise this price could have an Indirect effect on callers through its effect on SP revenue and, in turn, on service availability. As a result, we consider this effect best assessed in the context of the Indirect effect.

2.23 With regard to EE's comment that we should redraft the competition effect to consider the impact of the proposed origination charges on competition, whether beneficial or detrimental, we discuss the mechanism proposed by EE in more detail in relation to the application of Principle 2 Step 3 below. If we were to receive evidence in the course of a dispute clearly demonstrating that the level of the origination charge had a beneficial impact on competition, and through this on consumers, we would want to consider this evidence as part of our assessment of Principle 2. We therefore agree that it makes sense to align the drafting of the competition effect with that used in the Tiered Rates Determination. In doing so we note that, as we set out in that determination, competition is not necessarily a good in its own right.[22] As a result, we will not consider whether the level of the origination charge benefits competition per se but rather whether or not it would lead to overall benefit to consumers.

2.24 In light of the above, we now define Principle 2 to state that the origination charge should be beneficial to consumers. We set out that we would assess this Principle by considering the following factors:

[20] Tiered Rates Determination, 3.4 and 3.22.
[21] April 2013 policy position, Part C, 2.16
[22] Tiered Rates Determination, 3.89.

- Indirect effect: impact of the proposed origination charge on service provider (SP) costs, and on callers through resulting relevant decisions by SPs such as the impact on service availability and cost mitigation measures;

- Tariff Package effect: impact of the proposed origination charge on OCPs' retail prices for other services; and

- Competition effect: impact of the proposed origination charge on competition, whether beneficial or detrimental.

Relationship between six principles and analytical framework

Stakeholder comments

2.25 Only EE commented on the six principles of pricing and cost recovery, stating that fitting these into the analytical framework added a seemingly unnecessary and undesirable additional layer of complexity. It considered that there was, for example, overlap with the distribution of benefits principle being considered in both Principle 1 and Principle 2. In addition, cost minimisation could also be considered a benefit to consumers and thus part of Principle 2 as well as (potentially) Principle 1, as Ofcom had proposed. EE also disagreed with Ofcom's exclusion of the principle of reciprocity and considered that it was relevant to assess the level of charges proposed by large vertically integrated operators such as BT and CWW/Vodafone in their respective capacity as OCP/TCP. EE noted that Ofcom did not find it necessary to refer directly to the six principles of pricing and cost recovery in its recent Tiered Rates Determination and that this could be inconsistent.[23]

Ofcom's response

2.26 With regard to EE's comments on our use of the six principles of pricing and cost recovery, we note that our intention in referring to them in the April 2013 policy position was to improve clarity over how we had derived our IAR rather than to add complexity. We are not concerned about the fact that some of the principles of pricing and recovery may appear under more than one Principle in our guidance, as long as this does not result in any double-counting of costs or benefits in our assessment. We did not claim there was an exact correspondence between the six principles and our analytical framework, merely that they covered the same substantive issues. With regard to the particular example put forward by EE, we clearly set out in the draft guidance that Principle 1 considered the distribution of benefits derived by persons who provide services using 080 or 116 numbers (service providers or SPs) from different types of origination costs whereas Principle 2 considered the distribution of benefits more widely between callers and SPs.[24]

2.27 We did not refer to the six principles in the Tiered Rates Determination as we had set out clearly their relationship with the analytical framework in the original 080 Dispute Determination, a relationship which was subsequently endorsed by the CAT. We considered the relationship to be sufficiently similar to the framework used in the most recent determination that we did not feel it necessary to set it out again.[25] This was in contrast to the April 2013 policy position, where we noted that the relationship between our analytical framework and the six principles of pricing and cost recovery responded to our current specific aims and objectives, and therefore that the

[23] EE, April 2013 policy position response, pp. 48-49.
[24] April 2013 draft guidance, A1.15.
[25] 080 Dispute Determination, 4.55 – 4.59.

relationship between our interpretation of Principle 1 and the six principles of pricing and cost recovery may differ from that in previous decisions.

2.28 With regard to EE's comment that we should assess the level of charges proposed by large vertically integrated operators under the principle of reciprocity, we set out in the draft guidance that we did not consider this principle to be relevant because origination is not necessarily a reciprocal service.[26] We do not consider that the fact some vertically integrated operators act as both OCPs and TCPs should cause us to revise this position. Instead, we consider that EE's comment relates to the concerns it shares with a number of other stakeholders regarding the ability of vertically integrated operators to leverage their position to their advantage when agreeing origination charges. We responded to these and similar concerns in Annex 6 of the NGCS statement.

Amendments to the guidance to reduce risk of dispute

<u>Stakeholder comments</u>

2.29 Both Three and EE commented on ways in which they considered the draft guidance could be amended to reduce the risk of disputes being raised.

2.30 Three said that the proposed reliance on commercial negotiations informed by a wider range of fair and reasonable origination charges would inevitably lead to disputes.[27] It argued this would be the case because:

- the range of mobile and fixed origination charges set out in the guidance give rise to a very large number of possible fair and reasonable combinations;
- whether a given mobile origination charge results in an average SP payment within the required range depends on factors outside the mobile OCPs' control;
- charges within Ofcom's preferred range could give rise to average SP outpayments outside the 1-1.5ppm range if the share of mobile-originated calls lies outside the 45-60% range (which Three argues is likely to happen in the short term); and
- as the largest TCP and transit provider BT is likely to set a mobile origination charge unilaterally towards the lower end of Ofcom's range, leading to endless disputes and appeals in a similar manner to BT's tiered termination charges.

2.31 Three argued that reliance on bilateral negotiations would be costly and result in multiple charges reflecting differences in bargaining position. It also considered that the origination payments agreed by industry would simultaneously determine the average SP payment, thus, the fairness of an individual charge would depend on the level of charges agreed by other OCPs.

2.32 Three proposed that all of these problems could be avoided if Ofcom were to narrow the range of potential fair and reasonable mobile origination charges, suggesting that a mobile origination charge set at 2.15ppm would result in Ofcom's desired average SP outpayment as long as the share of mobile originated calls was between 45% and 60%.[28] However, as set out above, Three considered that the share of mobile

[26] Draft 080/116 Dispute Guidance, paragraph A1.16.
[27] Three, April 2013 policy position response, p.10-12.
[28] Three, April 2013 policy position response, p.12-13.

originated free-to-caller 080 calls is unlikely to reach 60% and therefore proposed a gradient of fair and reasonable mobile origination charges of 3.3ppm in 2015, falling to 2.5ppm in subsequent years.[29]

2.33 EE also considered that the draft guidance should set a narrower range of fair and reasonable charges than currently specified and make it clear that it would only be in exceptional circumstances that Ofcom would consider charges outside of this range to be fair and reasonable (specifying precisely what those exceptional circumstances are likely to be). EE said it was concerned that in its current form the guidance would do little to assist TCPs and OCPs to reach commercial agreements without lengthy delays and further Ofcom intervention. It suggested several proposals which it said would improve the draft guidance:

- specify what evidence Ofcom considers could result in its review of a fair and reasonable charge outside its nominated range;

- clarify how Ofcom is likely to assess the proportion of calls that are originated from fixed and mobile lines. EE suggests that Ofcom states whether it would assess this (i) across all 080 number ranges and all OCPs as a whole or (ii) differently for individual ranges or according to individual OCPs. It also suggests that we should err on the side of caution, deciding that there is likely to be less rather than more fixed to mobile substitution (i.e. closer to current levels), at least initially, with a party able to reopen this if the evidence subsequently proves this assumption to have been materially incorrect; and,

- include what level of origination charge Ofcom considers reasonable and precisely which matters and what evidence to support this would need to be established to justify a departure from this level.[30]

Ofcom response

2.34 Whilst we do not consider that disputes are inevitable, as Three argues they are, we do recognise that a dispute over the level of the mobile origination charge may be likely. Both Three and EE suggested we could reduce this risk of dispute by narrowing the range of fair and reasonable origination charges set out in the draft guidance to a single charge. To be clear, the draft guidance itself was intended to set out the framework we would use to assess whether an origination charge was fair and reasonable in the course of a dispute. We do not consider it appropriate to determine the level of fair and reasonable charges in advance of being called upon to resolve a dispute. However, we appended a recent application of our framework to the draft guidance to provide stakeholders with an indication of the type of evidence we would be likely to consider in the course of any dispute and some early clarity over the range of charges we would be likely to consider fair and reasonable on the basis of available evidence. We referred to this range of charges as the base case scenario range.

2.35 As a result of the publication of the narrowband charge control and further consideration of the likely fixed-mobile substitution, we have in fact narrowed our base case scenario range for the mobile origination charge to between 1.5ppm and 2.4ppm for our impact assessment in the NGCS statement (compared to the range of 1.3ppm to 3ppm set out in the April 2013 policy position). This has reduced the number of possible combinations of fair and reasonable fixed and mobile charges,

[29] Three, April 2013 policy position response, p.13-14.
[30] EE, April 2013 policy position response, pp. 50-51.

although we recognise this number nonetheless remains large. We also recognise that a difference of 1ppm in the mobile origination charge makes a significant difference to OCPs, TCPs, and it is therefore unclear the extent to which narrowing the range to this differential will increase the scope for commercial agreement. However, we do not consider it appropriate to narrow the range further than this because of our remaining uncertainty over some key factors and the possibility that further evidence may come to light to resolve this uncertainty in the course of any dispute.

2.36 We recognise that fair and reasonable mobile origination charges depend in part on factors outside of OCPs' control - in particular, the extent of fixed-mobile substitution and the weight we place on asymmetric risk and/or the LRIC differential. However, we do not consider it appropriate to amend our framework so that this is no longer the case because we continue to believe these factors are relevant to an assessment of fair and reasonable origination charges. We recognise there is currently some uncertainty surrounding these factors but also consider it possible this uncertainty may be reduced by the time any dispute is raised through the availability of further evidence. We also note that it is not uncommon for businesses to make pricing decisions in the face of commercial uncertainties using the best information available to them at the time, and consider it reasonable to expect mobile OCPs to be able to do the same in the context of 080/116 origination charges.

2.37 We recognise the SP outpayment could differ from the range we consider appropriate if the share of mobile-originated calls differs from the amount we assumed in deriving our base case scenario range. If this were to occur in the short run, we would not consider it problematic for the reasons set out in paragraphs 2.41. As a result, we do not consider it likely to be appropriate to set a gradient of charges to reflect any transitional period. If the fixed-mobile split were to differ significantly from our assumptions once it had stabilised around its medium term level, we would expect a renegotiation of charges or another dispute. However, if this were the only factor to change following an initial agreement or determination, we consider it should be relatively straightforward for OCPs and TCPs to agree the appropriate new level of charges.

2.38 With regard to Three's comment that BT will unilaterally set charges, it may be that BT, along with all TCPs, proposes an origination payment towards the lower end of our base case scenario range. However, it will be open to any OCP to challenge BT directly or to raise a dispute if they consider the charge is too low to be compliant with BT's obligation to purchase origination on fair and reasonable terms.

2.39 We do not consider the fairness of an individual charge is likely to depend on the level of charges agreed by other OCPs because we expect the application of our guidance to result in a small range of origination payments for each of fixed and mobile. Whilst our guidance does include a step to assess the relative level of fixed and mobile charges, it does not include a consideration of the level of the charge relative to that agreed by other OCPs of the same type (i.e. fixed or mobile). Whilst the application of the guidance means the mobile origination payment depends to an extent on the fixed charge, we do not expect this to have much effect in practice given the narrow base case scenario range set out for the fixed origination charge of 0.4-0.5ppm.

2.40 In response to EE's comment regarding the circumstances under which we would consider charges outside of the range specified in the guidance, this would occur if new evidence were to be made available. It is difficult to anticipate what this evidence may be in advance of seeing it, but we would consider anything relevant to our application of the three Principles as set out in the guidance. This is most likely to take the form of material updates to current available evidence, but may include any new evidence relevant to the way in which we have applied the Principles.

2.41 With regard to EE's comment on how Ofcom would assess the proportion of fixed and mobile originated calls, the presumption in our draft guidance was that this would be on the basis of all 080 number ranges and all OCPs as a whole. However, we recognise there is potential for variation in the proportion of mobile originated calls across all 080 numbers, for example depending on the nature of the service provided and the demographic of callers. This gives rise to the possibility that origination charges may, in theory, vary by TCP or by fixed or mobile OCP. With respect to the potential for differentiation by TCP, we consider it likely that TCPs will agree a single origination charge for each of fixed and mobile calls, and account for variation in the proportion of calls received when agreeing hosting charges with individual SPs. However, we do not consider it appropriate to rule out definitively in advance scenarios in which this is not the case- for example, if there were a TCP which specialised in hosting SPs with a higher than average proportion of mobile calls. With regard to the potential for differentiation by fixed or mobile OCP, we similarly consider it likely that TCPs will agree a single origination charge for each of fixed and mobile originated calls, although cannot definitely rule out charges that are differentiated by OCP. However, we have set out clearly in the final guidance that there would need to be compelling evidence of consumer benefit for us to consider charges differentiated either by TCP or OCP (beyond the fixed/mobile distinction) to be fair and reasonable, given the potential implications for competition and practicality.

2.42 We disagree with EE that we should initially assume the proportion of fixed-mobile calls is closer to the current levels on 080 in order to err on the side of caution. We consider fair and reasonable charges should be assessed with reference to the proportion of 080 calls we expect to be originated from mobiles in the medium term rather than during any transitional period (see paragraph 2.78 below). We have based our assessment of this proportion on the evidence available to us and therefore consider our assumptions appropriate. We do not consider that assuming a lower proportion of mobile calls than this would constitute erring on the side of caution because such an assumption would no longer be supported by available evidence.

Principle 1

Stakeholder comments

2.43 We received a number of direct comments on Principle 1, which we summarise and respond to below.

2.44 Sky stated that it agreed with the Principle and considered it entirely appropriate that OCPs should be able to recover their network costs as well as certain non-network costs, including those associated with customer service.[31]

2.45 [✂] also agreed that OCPs should always be allowed to recover their efficient cost of origination. However, it said the calculation of those costs was important and it remained fundamentally opposed to the unreasonable and unnecessary recovery of common costs from dominant positions. In particular it argued that because a high proportion of D and E socioeconomic groups were mobile-only, the mobile OCPs

[18] Sky, April 2013 policy position response, p.3.

were all dominant in originating calls to 080 numbers (which it noted could well be of social value and importance) made by these groups.

2.46 It argued that the origination charge represented a cross-subsidy from socially important services to mobile OCPs because it contributed towards mobile OCPs' common costs (albeit some common costs were excluded by Ofcom). It said the extent of this cross-subsidy would increase as the anticipated fixed-mobile substitution occurred. [✂] therefore believed that the positive externality arguments Ofcom had put forward should not apply in the case of not-for-profit or charity services using these numbers. Furthermore it argued that, in order to satisfy this "*welfare test*" the origination charge should be at, or close to, the LRIC of call origination for 080.[32]

2.47 The Helplines Partnership ('THP') said that, whilst it accepted that OCPs should not be denied the opportunity to recover their efficient costs of originating calls, it thought that the emphasis on how this was applied should be on efficiency and ensuring that mobile origination costs were as low as possible for organisations offering socially important services.[33]

Ofcom's response

2.48 We acknowledge Sky's support of Principle 1. However, whilst relevant elements of non-network costs are included in LRIC+ which forms the upper bound under Principle 1, this may not be the case for the lower bound of the pure LRIC of origination. As set out in the draft guidance, we consider it unclear whether non-network costs are incremental to call origination.[34] As a result, we may produce a range for incremental costs in assessing Principle 1 in the context of any dispute, the lower bound of which may exclude all non-network costs.

2.49 With regard to the comments on the appropriate level of cost recovery from socially important services, we note that we have not conducted a competition assessment in the market for originating 080 calls and therefore do not consider we need to respond to the comment regarding the dominance or otherwise of mobile OCPs in the market for originating 080 calls. We continue to consider that SPs, even socially important SPs, may potentially benefit from network and some non-network common costs- primarily because this expenditure allows callers to contact SPs. We therefore consider it may be appropriate for origination charges to include a contribution from SPs towards these costs, although we do not conclude on where within the range determined by this upper bound and the lower bound of pure LRIC the origination charge should be under Principle 1.

2.50 We agree that the impact of the origination charge on service availability on 080 is important, and particularly so in relation to socially important services. As a result, we assess this impact under Principle 2, where we consider the impact of higher origination charges on consumers. We note that the range of efficiently incurred costs we identify under Principle 1 for 116 calls is identical to 080 calls, despite the fact that the 116 number range exists purely for the purpose of hosting services of extreme social value whereas there are a large number of commercial users on 080. We identify a different base case scenario range for 116 numbers than for 080 in Section 3 as a result of the application of Principle 2, where we consider it relevant to

[32] [✂].
[33] THP, April 2013 draft guidance response, p.3.
[34] A1.23, April 2013 draft guidance.

take into account the nature of services affected as part of any assessment of consumer harm.

2.51 We discussed two sources of positive externality in our draft guidance which we considered potentially relevant to the level of the origination charge - a network externality (which supported a higher origination charge) and a caller externality (which supported a lower origination charge). Although not specified in the stakeholder's response, we consider the comments on the positive externality were likely to have been intended in relation to the network externality, as placing weight on the caller externality would be to the benefit of socially important SPs. However, we stated clearly in the draft guidance that we did not consider that higher origination charges were an appropriate means of addressing any network externality. We have not included any reference to this effect in our final guidance as it is not a factor we propose to take into account in our assessment of any future dispute.

2.52 It is unclear what *"welfare test"* [✂] had in mind in its response. However, we do not consider it appropriate to take consumer welfare into account under Principle 1 as this would lead to double-counting. Consumer welfare is considered explicitly under Principle 2, where we assess the impact of the origination charges on consumers.

2.53 In our application of Principle 1 in the draft guidance, we said we considered customer care costs may be incremental to the origination of free-to-caller 080 calls.[35] As a result of stakeholder comments in relation to our IAR, we now recognise that some billing costs may potentially also be incremental and have amended the drafting of the guidance to reflect this. We also now clarify in our explanation of why we do not consider the LRIC+ measure of cost should include non-network costs that even where there is potential for SPs to benefit from a proportion of these costs, we consider their inclusion in the origination charge would be wasteful or inefficient for similar reasons to the rejection of the Network Externality Surcharge ('NES') in mobile termination rates.

Principle 2 Step 1

Stakeholder comments

2.54 The draft guidance set out three distinct Steps under Principle 2. We consider here responses received in relation to Step 1 of Principle 2, which assessed the appropriate level of SP outpayments by trading-off the impact on consumers of reduced service availability and a lower TPE. Comments on this step related broadly to:

- evidence of consumer harm from reduced service availability;
- consumer benefits from a favourable change in the TPE; and
- TCP pass-through of higher origination charges to their SP customers.

2.55 O2 O2 ('O2') disagreed with our assumption that consumers would suffer as a result of SPs migrating away from 080 to other number ranges and argued that we should place less emphasis on the "right" SP outpayment in this Step as a result. It considered our approach implied lower origination payments were favourable simply because they supported the free-to-caller number range business model, which it

[35] April 2013 draft guidance, A1.22.

argued was no longer cost effective to provide.[36] It argued that suppressing mobile origination payments to support an inefficient business model would result in consumers being worse off because other mobile prices would be higher.[37] O2 stated instead that either the guidance should assume a proportionate share of all common and fixed costs is allocated to mobile outpayments or the mobile outpayment should be imposed by regulation.[38]

2.56 Three agreed that there should be a cut-off point for the average SP payment where the negative effect of steep reductions in service availability would outweigh the maximum additional benefits from the TPE. However, it said it saw no reason for this to be at 1.5ppm, noting that Ofcom had not estimated the consumer impact of reduced service availability.

2.57 Three also considered that Ofcom underestimated the benefits consumers would derive from further increases in the average SP payment via the TPE. In its view, Ofcom should take zero-rating as given and from there assess whether the extra consumer benefits for every increase in the SP origination payment (through the TPE) would outweigh the associated consumer loss due to reduced service availability.

2.58 With regard to TCP pass-through, EE criticised Ofcom's assumption that any increase in the current level of origination charges will be passed straight through to SPs, saying that we had not examined whether or not this is in fact likely to be the case. EE argued that the 2009 Flow of Funds data suggested the current level of outpayments from TCPs to OCPs could be doubled by reducing TCPs' profits (with no impact on the charges paid by SPs). It said that the ability and likelihood of TCPs to bear some of the costs of higher origination payments in this way was relevant to any assessment of fair and reasonable charges because it affected:

- the impact of the level of the origination charge on SPs' revenue and, through this, on callers; [39]
- the fairness of requiring OCPs to recover less than LRIC+ A&R costs to limit this impact; and
- the caller externality analysis. [40]

2.59 THP said it would like Ofcom to take into account the impact on socially important services as part of the dispute resolution process as this was directly linked to Principle 2 of providing benefit to consumers.[41]

Ofcom's response

2.60 We consider that O2 and Three's comments on the consumer impact of reduced service availability on 080 (including migration from 080) are more relevant to our application of the three Principles to the currently available evidence, rather than to the guidance itself. As a result, we have responded to these comments in full in Annex 5 of the NGCS statement, where we apply the Principles to the available

[36] O2, April 2013 draft guidance response, p.1.
[37] O2, April 2013 draft guidance response, p.2.
[38] O2, April 2013 draft guidance response, p.1
[39] EE referred to this impact as the "Indirect effect".
[40] EE, April 2013 policy position response, pp. 47-48.
[41] THP, April 2013 draft guidance response, p.3.

evidence to generate an assumption about origination charges for the purposes of our impact assessment. We set out in that Section why we do not consider it meaningful to estimate the harm to consumers from reduced service availability on 080 quantitatively. Instead, we present a more detailed qualitative assessment of this harm, which we consider supports limiting the increase in average SP outpayment to 1ppm or less. This is because we consider the adverse effects of reduced service availability at greater increases in SP outpayments, when taken together, are likely to exceed the benefits to consumers from a favourable change in the tariff package effect. We set out the reasons for this in full in Annex 5 of the NGCS statement.

2.61 Our final guidance in Annex 1 reflects the fact that we would seek to carry out a similar qualitative assessment of consumer harm in considering any future dispute about fair and reasonable origination charges. We consider this addresses THP's concern as we would consider the impact of higher origination charges on socially important services in our assessment of Step 1 of Principle 2. In particular, we note that we would be particularly concerned if SPs providing socially important services were to cancel their service altogether, or if they were to migrate to alternative number ranges and callers were deterred from accessing their services as a result of the higher call price.

2.62 With regard to O2's comment, we do not consider lower origination payments to be favourable purely because they support the free-to-caller business model. Instead, we consider they provide benefits to consumers by mitigating the impact on 080 service availability and, through this, the cost to consumers. We agree with O2 that lower origination charges are likely to result in higher prices for other mobile services, and therefore weigh this negative (tariff package) effect against the positive impact on service availability when assessing the appropriate SP outpayment.

2.63 As to O2's comment that the guidance should assume a proportionate share of all common and fixed costs is allocated to mobile outpayment origination charges rather than assess the target SP outpayment, we do not think this would be appropriate because it would not necessarily result in a mobile origination charge which benefits consumers. Moreover, we do not see any compelling economic basis for preferring this measure of cost over alternative cost metrics. We set out the range of efficient costs we consider relevant for recovery through the origination charge (and, through this, the SP outpayment) in the application of Principle 1, which we found to include a number of different cost measures ranging from the pure LRIC of origination to LRIC+ (excluding A&R costs).

2.64 We do not think it would be appropriate to impose the origination charge through regulation for reasons set out in detail in Annex 6 of the NGCS statement.

2.65 With regard to Three's comment on our assessment of the TPE, we agree that the relevant consideration for any future dispute is the change in the TPE resulting from a given change in origination charges (rather than the absolute level of the TPE itself). In the April 2013 policy position, we estimated the absolute level of the TPE associated with different levels of origination charge for the purposes of our impact assessment, where the absolute level of cost to consumers was the relevant consideration. In our discussion of the TPE in the draft guidance we then cross-referred to these estimates in order to reduce duplication. However, to improve clarity, we have revised the drafting in the final guidance to make clear that we will weigh the change in the TPE against the impact on consumers from the reduction in service availability associated with a given increase in the origination charge.

2.66 We agree with EE that the extent to which TCPs pass through the increase in origination charges to their SP customers will affect the average SP outpayment associated with a particular origination charge. In turn, this will affect the impact of a particular origination charge on 080 service availability and, through this, on consumers. We therefore recognise the importance of considering the likely behaviour of TCPs when faced with an increase in origination charges. In the draft guidance, we stated that higher origination payments are likely to be ultimately passed on to SPs by TCPs through higher charges for hosting.[42] We discussed the basis for this assumption in detail when responding to a related comment on TCP pass-through in relation to our IAR in Section 5 of the NGCS statement. We concluded there that, given the nature of the cost increase and our understanding of the way in which the market for TCP hosting works, our assumption that higher origination payments were likely to be passed through to SPs was reasonable for the purposes of deriving our IAR.

2.67 We do not consider that EE's analysis of the 2009 Flow of Funds data provides any basis to revise this conclusion. EE's analysis shows that TCPs retained nearly half of all revenue paid by SPs in relation to 080 calls in 2009. However, it does not tell us anything about the profits made by TCPs on 080 hosting, which would require a consideration of the costs associated with providing a hosting service as well as the revenues retained. As a result, we do not agree with EE that the Flow of Funds data suggests TCPs have the ability to absorb a doubling of origination charges. As set out in paragraph A5.20 in Annex 5 of the NGCS statement, we consider that results from the theoretical and empirical literature support our assumption of complete (or close to complete) pass-through in the current context.

2.68 Nonetheless we recognise that, in the course of a dispute, new evidence may be brought to light which causes us to revise this assumption. Such evidence would be relevant to any consideration of the impact of the level of the origination charge on service availability under Step 1 of Principle 2 and would duly be taken into account in our assessment of whether a particular charge were fair and reasonable.

2.69 EE also argued that TCP pass-through is relevant to our analysis of the caller externality because it says that the decision-maker in the first instance is actually the TCP, and only then the SP. We continue to consider that the primary decision maker regarding the SP's choice of number range is the SP itself, although recognise that the TCP may have some indirect control over this decision through its choice over the level of charges it bills SPs. However, we do not consider it necessary to respond to this point given the fact we now do not consider the caller externality separately from our analysis of the impact on service availability (for the reasons set out in paragraphs A5.261 to A5.231 in Annex 5 of the NGCS statement). As a result, we no longer list the caller externality as an additional factor that could imply higher origination charges may result in negative effects for consumers and so affect the appropriate trade-off.

2.70 In summary, we make a number of modifications to our application of Principle 2 Step 1 in the final guidance in light of stakeholder comments, in order to improve clarity. In particular, we now clarify that we make the trade-off under Step 1 by comparing the changes in service availability and the TPE associated with a given change in the origination charge.[43]

[42] April 2013 draft guidance, A1.37.

[43] We note that the given change in origination charges that we consider will depend on the conditions prevailing at such time as any dispute regarding fair and reasonable charges is raised. For example,

2.71 Additionally, we no longer list the positive network externality as a potential source of consumer benefit from higher origination charges. This is to simplify the drafting because we do not take this effect into account in our assessment for the reasons set out in the draft guidance. We have similarly deleted the reference to increases in the price paid by SPs as a source of consumer harm because we do not place much weight on this effect, over and above the effect on callers from a reduction in service availability or quality.

Principle 2 Step 2

Stakeholder comments

2.72 We received a number of comments relating to Step 2 of Principle 2, which we proposed should assess the relative level of fixed and mobile origination charges resulting in the appropriate SP outpayment derived under Step 1. These responses can be categorised as follows:

- assumptions regarding fixed to mobile substitution;
- price signals to SPs;
- competition between fixed and mobile OCPs; and
- practical difficulties with the approach.

2.73 Considering each in turn, Three argued that the share of mobile originated free-to-caller 080 calls is unlikely to reach 60%. It considered the benchmark used to derive this upper bound to be inappropriate because it included business calls, which it said will not be affected by our proposals. Three suggested instead using the share of residential calls, which is currently 47%. It also argued that the share of mobile originated calls would take time to reach this level, during which period average SP outpayments would be below the fair and reasonable level. It therefore proposed a gradient of fair and reasonable mobile origination charges of 3.3ppm in 2015, falling to 2.5ppm in subsequent years. These charges would result in an average SP outpayment between 1ppm and 1.7ppm (which it considered a more appropriate upper bound for the SP outpayment) for all fixed origination charges between 0 and 0.6ppm.[44]

2.74 With regard to our assessment of price signals to SPs, O2 argued that it was not clear that a scenario in which an SP seeks to reduce call volumes from mobiles is a problem.[45] It considered that if mobile origination payments were kept below the efficient level, which it considered included a proportionate mark-up for all network and non-network fixed and common costs, then the price signals sent to SPs will

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if a dispute were to be raised prior to any origination charges for free-to-caller 080/16 calls being agreed or determined, we would be likely to take into account the level of origination charges being proposed by the parties to the dispute and consider a change from the lower of those charges to the higher charge. However, if a dispute were to be raised at a time when arrangements for origination payments for free-to-caller 080/116 calls were already in place, we would be likely to consider the change between the existing origination charge and the new rate being proposed. We would also take into account the extent to which any given change would result in origination charges being outside of the range determined under Principle 1.

[44] Three, April 2013 policy position response, p.13-14.

[45] O2, April 2013 draft guidance response, p.2-3.

encourage inefficient behaviour and consumers will be worse off as a result of higher prices for other services.[46]

2.75 O2 also commented on the impact of relative prices on competition between fixed and mobile OCPs. It stated that it did not understand Ofcom's comments on this but noted that any distortion of competition would be unlikely to arise if fixed and mobile outpayments were cost oriented.[47]

2.76 Finally, O2 said it was concerned that trying to achieve the "correct" SP outpayment in this step would create a number of practical difficulties.[48] Firstly, it argued that Ofcom would need to quantify various effects and impacts, which it argued would present a practical challenge. It suggested that rather than a specific number, a range of reasonable SP outpayments may be more credible in practice.[49] Secondly, it had concerns about the implications for practical dispute resolution if mobile originated charges were expected to vary continuously by reference to the proportion of traffic originated by mobile OCPs.[50] Finally, it considered the approach likely to encourage inefficient behaviour by TCPs, who it argued would be incentivised to increase their margins to an inefficient level, increasing the average SP outpayment. O2 considered this would mean that Ofcom would need to consider the appropriate cost of providing the TCP service when determining a dispute and stated that Ofcom did not appear to have considered the impact of SP/TCP commercial relationships.[51]

Ofcom's response

2.77 In relation to Three's comments on the level of fixed to mobile substitution, we continue to consider it appropriate to have regard to both the mix of all calls and the mix of residential calls when assessing the likely proportion of 080 calls originated from mobiles. Although we are not requiring business calls to be free to caller, our working assumption (as set out in paragraph 4.109 in Section 4 of the NGCS statement) is that they will also be zero-rated and therefore that the origination charge will apply to all calls- not just residential calls. We have been unable to determine whether callers of 080 numbers are more likely to behave as residential or business customers for the purposes of deciding the share of calls to 080 that are likely to be originated from mobile, and therefore continue to consider it appropriate to place weight on both call split estimates. In any event, we note that our updated estimates of the proportion of residential calls originated from mobile now clearly support a share of mobile-originated 080 calls of 60%. We set these estimates out in full in Annex 5 of the NGSC statement, where we note they are significantly higher than the evidence available at the time of the April 2013 policy position and show that 62% of residential calls were originated from mobiles in 2012.

2.78 We also consider it is unlikely to be necessary or appropriate to apply a gradient of charges in the manner outlined by Three. As set out in Annex 5 in the NGCS statement, we expect the proportion of mobile-originated calls to stabilise relatively quickly after an initial increase. We also consider that SPs will make their decisions regarding whether or not to remain on the range on the basis of what their average outpayment is likely to be once it has stabilised, and not rely only on its level during any initial transitional period. As a result, we consider the appropriate average SP

[46] O2, April 2013 draft guidance response, p.3.
[47] O2, April 2013 draft guidance response, p.3.
[48] O2, April 2013 draft guidance response, p.2
[49] O2, April 2013 draft guidance response, p.2
[50] O2, April 2013 draft guidance response, p.2
[51] O2, April 2013 draft guidance response, p.2

outpayment in the medium term, when the fixed-mobile call split has stabilised around its new level. We also note that we would not be determining a fair and reasonable SP outpayment, but rather a fair and reasonable origination charge-taking into account the average level of SP outpayment we consider appropriate.

2.79 With regard to O2's comment on price signals to SPs, we do not consider that the mobile origination charge which provides an efficient price signal to SPs necessarily includes a proportionate mark-up for all network and non-network costs. We set out clearly in the April 2012 consultation[52] and again in Annex 5 of the NGCS statement why we consider SPs receive appropriate price signals for their decision on cost mitigation measures when the difference between origination payments for fixed and mobile calls reflects the difference in the incremental costs of fixed and mobile origination.

2.80 In response to O2's comment regarding the competition effect, we set out here the two potential competition effects resulting from the relative level of the fixed and mobile origination charge which we considered in the draft guidance. The first was that a mobile origination payment which was too high may result in SPs using cost-mitigating measures to limit calls from mobile. This, in turn, may make consumers less inclined to make 080 calls from their mobiles, adversely affecting competition between fixed and mobile OCPs for the origination of 080 calls. However, we did not place much weight on this issue as we had already considered the issue of cost mitigation measures by SPs in our discussion of efficient price signals to SPs. The second potential competition effect we considered was whether a higher mobile origination payment could distort competition between fixed and mobile OCPs for wider telephony bundles (i.e. for telephony services other than calls to 080 numbers). However, we concluded this was unlikely to have a material effect given that revenues from origination payments are small in relation to overall mobile revenues.

2.81 With regard to O2's comment that any distortion of competition is unlikely to arise when origination charges are cost-oriented, we note that we consider the risk of distortions to competition between fixed and mobile OCPs is likely to be minimised whenever the difference in fixed and mobile origination charges reflects the difference in their incremental costs. This is because, as a general rule, a price differential that reflects resource costs is unlikely to have a distortionary effect in this regard. However, there are a number of potential measures of cost and it is possible that cost-oriented charges may result in a price differential that does not reflect differences in resource cost and, through this, gives rise to a distortion in competition. As a result, we consider it appropriate to retain this step in any assessment of the relative level of fixed and mobile origination payments.

2.82 In relation to O2's comment that it would not be practical to quantify the various effects and impacts needed to achieve the appropriate SP outpayment, we note that it is not clear from this comment which effects and impacts O2 had in mind nor why they would need to be quantified in order to be taken into account in our assessment. For example, we set out our qualitative assessment of the impact on consumers from reduced service availability on 080 in the NGCS statement, which led us to conclude that the average increase in SP outpayment should be limited to no more than 1ppm. In relation to its suggestion that a range of appropriate SP outpayments would be more credible, we note that: (i) our analysis was in terms of the average and different SPs may experience higher or lower outpayments than this average; and (ii) the draft guidance did set out a range of average SP outpayments from 1 to 1.5ppm, which we considered appropriate on the basis of current available evidence. We continue to

[52] April 2012 consultation, A23.112 - A23.116.

consider this range of SP outpayments appropriate, as set out in the final guidance in Annex 1.

2.83 With regard to O2's comment that it would not be practical to vary the origination charges continuously with changes in the fixed-mobile traffic mix, we are not proposing that they should. First, we recognise the advantage of stability and predictability in the level of origination charges, for SPs in making their migration and other operational decisions, for TCPs and for OCPs. Second, we consider it likely that the average traffic mix for 080/116 calls will stabilise around the average traffic mix for all calls relatively soon after implementation. In our discussion of the fixed-mobile split in the draft guidance, we considered the likely evolution of the average call mix by projecting recent trends forward. In any future dispute, we outpayment will have regard to the likely evolution of the fixed-mobile call split in order to make any determination consistent with changes that can reasonably be anticipated. We consider that applying this approach to any dispute determination would result in an origination charge that would be likely to remain fair and reasonable for some time going forward.

2.84 O2 also commented that our application of Step 2 Principle 2 was likely to encourage inefficient behaviour by TCPs, who would be incentivised to increase their margins to increase the average SP outpayment. We do not consider it likely that TCPs will have ability or the incentive to increase their hosting margins in this way as it is our understanding that the market for TCP hosting is working reasonably well for SPs. Nonetheless, if we were required to form a view on the appropriate level of TCP cost, in the absence of evidence to the contrary, we consider it would be reasonable to assume costs would remain similar to those before zero-rating and therefore do not consider this would present any particular practical challenges.

Principle 2 Step 3

Stakeholder comments

2.85 EE considered there to be a number of ways in which a higher level of origination charges may promote competition that are not currently assessed under Principle 2. For example, it stated that if mobile OCPs could recover origination charges which make a contribution to their A&R costs, then this could increase their incentives to promote 080 calls from mobiles to customers. This activity may in turn enhance the competitiveness of 080 SPs who have a service model that is particularly benefited by calls originated from mobiles – such as those looking to generate sales leads from customers on the move.[53]

Ofcom's response

2.86 We note there is a distinction between encouraging competition between SPs and improving the competitiveness (or profitability) of SPs. EE's mechanism places weight on the latter, which we consider is in principle more relevant to the effect on service availability in Step 1 than an effect on competition per se, as considered under Step 3.

2.87 On the merits of EE's argument, our understanding is that it suggests, in effect, that service availability on 080 of SPs with a business model focussing on calls from mobile may benefit from a higher mobile origination charge. The argument is that higher origination charges would lead mobile operators to engage in greater

[53] EE, April 2013 policy position response, pp. 48.

promotion of 080 calls from mobile; and that this would stimulate SPs to offer greater availability on 080 of services with a mobile focus. In response, we note that there is clear effect in the opposite direction, since a higher mobile origination charge would increase the cost faced by SPs on 080 and especially so for SPs with a mobile focus, receiving a relatively large proportion of their calls from mobile. On the basis of the current available evidence, it is unclear to us that the effect arising from the mechanism put forward by EE would be present and sufficiently large to more than offset this negative effect on SPs of raising their costs.

2.88 Nonetheless, as set out above, in our framework we recognise the level of the origination charge may impact on competition in a way that affects consumers, of which we are not yet aware given current available evidence. If evidence were brought to us in the course of any dispute suggesting this were the case, we would consider it under Step 3 of Principle 2. We have therefore modified the drafting to make clear we would assess whether there is any impact of the proposed origination charge on competition, not just whether there is any material distortion to competition.

2.89 In response to stakeholder concerns over the potential for variation in origination charges between OCPs or between TCPs, we clarify that we would consider the impact of such variation on competition under Step 3 of Principle 2. We also set out that given the potential for such differentiated charges to have an adverse effect on competition, we are unlikely to consider it fair and reasonable for fixed or mobile origination charges to vary between OCPs and/or TCPs unless we had clear evidence of an objective justification for such variation; that a distortion in competition between OCPs/TCPs would not arise or would not be material; and that such variation in origination charges would be to the overall benefit of consumers.

Principle 3

<u>Stakeholder comments</u>

2.90 O2 made similar comments in relation to Principle 3 to those it raised in relation to Principle 2 Step 2, saying that it envisaged two practical problems with the scheme being proposed. The first of these was in relation to the application of a “target” SP outpayment, which it considered would require mobile outpayments to be manipulated frequently with reference to a number of factors.[54] The second was that BT, through its role as OCP, TCP and transit provider, would have the opportunity and incentive to manipulate charges to minimise mobile OCP outpayments and maximise its own profits, for example by seeking to inflate fixed OCP costs and TCP margins. It considered Ofcom would need to determine these factors in order to resolve a dispute, and queried whether the statutory four month deadline would provide sufficient time. [55]

2.91 [✂] highlighted that, even in a not overly uncommon call scenario, up to six CPs could be involved in the process of routing the call and under Ofcom’s proposals each of those CPs could have freely negotiated a separate origination charge with each mobile OCP. It questioned whether Ofcom envisaged the origination charge flowing through all the parties in such a call scenario and noted that this would work if each mobile OCP contracted with each TCP directly, but that this appeared contrary to the arguments from mobile OCPs about the need for administrative simplicity. [✂] believed that an assessment of the potential competitive distortions falling upon

[54] O2, April 2013 draft guidance response, p.4
[55] O2, April 2013 draft guidance response, p.4.

consumers and the potential adverse consequences within the industry of multiple, discriminatory origination charges, would lead Ofcom to conclude that only a single origination charge could satisfy both Principles 2 and 3.[56]

Ofcom's response

2.92 With regard to O2's comments, we do not consider that trying to achieve a "target" SP outpayment under Step 2 is likely to raise issues of practicality in relation to our ability to resolve a dispute within the statutory deadline. In particular, we do not anticipate the mobile origination payment will be continually varying with changes in the traffic mix for the reasons set out in paragraph 2.41 above. The other determinant of the average SP outpayment, the fixed origination charge, is likely to remain relatively stable as it will be based on an assessment of costs that will not be revisited until the next narrowband market review in 2016, as reflected in our narrow base case scenario range for this charge.

2.93 We also do not consider it likely BT will be able to minimise mobile OCP outpayments- either by inflating fixed OCP costs or by inflating TCP margins. BT's wholesale call origination remains subject to a price control, which has required us to conduct a detailed cost modelling exercise separately in relation to the most recent narrowband market review. It would be very difficult for BT to argue that fixed OCP costs were materially different from these estimates- particularly for the 3 year period covered by the latest review. We also consider that switching by SPs to rival TCPs would act as a constraint on attempts by BT (or other TCPs) to inflate their margins, given our finding that the market for TCP hosting appears to be working well for SPs.

2.94 Finally, we recognise the potential complexity in the flow of origination charges under certain routing arrangements, and discussed some of the issues associated with this (in particular those relating to the use of transit providers) in the NGCS statement. We set out in our statement that we consider this complexity may be one of the factors which results in the emergence of a small range of origination charges, if not a single charge, for each of fixed and mobile originated calls. However, we do not consider we should definitively rule out at this stage the potential for OCPs and TCPs to agree differential charges if they wish, as long as the agreed charges are fair and reasonable. In any future dispute, we would consider under Principle 3 whether a particular origination charge was likely to create practical difficulties by virtue of being different from origination charges agreed between other OCPs/ TCPs. We have discussed above that differentiated charges may also be considered under Step 3 of Principle 2.

116 guidance

Stakeholder comments

2.95 Three and [✂] commented on the summary of how we had applied the three Principles to 116 calls in the April 2013 policy position. Three considered that the first scenario with a single origination charge of 0.5ppm was most likely to prevail given BT's favourable position in terms of access to market information, and the obvious benefits to it compared with the second scenario (both mobile and fixed origination charges at pure LRIC). It was concerned this would create a dangerous precedent of breaching Principle 1 by allowing fixed OCPs to charge more than pure LRIC and forcing mobile operators to receive below this level. Moreover, it considered Ofcom was missing an opportunity to reduce costs to 116 SPs as it

[56] [✂]

thought it likely most mobile OCPs would agree to keep charges at current levels under Scenario 2 whilst fixed OCPs would be forced to reduce charges to pure LRIC.[57]

2.96 [✂] said it was '*right and proper*' that there should be no inappropriate recovery of common costs or otherwise by mobile OCPs in relation to calls to 116 numbers, given their designation for services of social value. It suggested that the designation of 116 numbers meant that the LRIC of call origination should be considered fair and reasonable in light of Principle 2 for consumer benefit.[58]

<u>Ofcom's response</u>

2.97 We note that both comments related to the summary of our application of the three Principles to the 116 number range in the April 2013 policy position. This summary was included in the consultation document accompanying the draft guidance to assist stakeholders in understanding how we would apply our guidance to specific evidence in any future dispute, and did not form part of the draft guidance itself. Nonetheless, as the comments were raised in response to our draft guidance, we respond to them here.

2.98 We agree with [✂] that the social value of services on 116 should be taken into account when assessing fair and reasonable origination charges for 116 calls. However, we note that in our recent application of the three Principles to 116, we derived two ranges for 116 calls- one scenario in which both fixed and mobile origination charges were maintained at existing levels (approximately 0.5ppm for both) and another in which each was set at their pure LRIC levels (0.035-0.059ppm in the case of fixed origination charges and 0.778-0.884ppm in the case of mobile). Whilst the second scenario is consistent with [✂]'s approach, the first is not as it results in fixed OCPs recovering more than their pure LRIC costs. We set out our reasoning for considering this first scenario appropriate in the April 2013 policy position and the consultation accompanying the April 2013 draft guidance. We do not agree with [✂] that the first scenario would set a dangerous precedent of breaching Principle 1 by allowing fixed OCPs to charge more than pure LRIC. Firstly, pure LRIC is only the lower bound of the range of costs established in Principle 1, so charges above this level would not necessarily breach this Principle. Secondly, and in any case, our reasoning supporting the first scenario was specific to the particular circumstances of 116 and would not automatically read-across to other situations, such as 080. Therefore, we continue to consider our reasoning is valid.[59]

2.99 In relation to Three's concerns, we do not consider BT will be able to unilaterally impose the scenario in which origination charges for 116 calls are maintained at current levels against the wishes of one or more of the mobile OCPs. Instead we consider that if a mobile OCP were unhappy with the current rate, they could challenge an offer from TCPs on this basis - either directly with the TCP or by raising a dispute. In any such dispute, we would apply the three Principles set out in our final guidance in Annex 1. The first of those Principles is that OCPs should not be denied the opportunity to recover their efficient costs of originating calls to a free-to-caller number range and we have indicated in the guidance that we consider the pure LRIC of origination to be the minimum level of cost recovery consistent with this Principle.

[57] Three, April 2013 policy position, p.15-16.
[58] [✂].
[59] See paragraphs 3.64, 3.66 and 3.67 of the April 2013 draft guidance.

2.100 We disagree that we are missing an opportunity to reduce costs to 116 SPs. Gamma suggests that mobile OCPs would agree to keep charges at current levels despite them being below pure LRIC, Although this is possible, we do not have evidence from mobile OCPs that they would behave in this way. We also note that whilst we would welcome mobile OCPs setting origination charges for 116 calls below pure LRIC, we do not consider we could require them to do so, given that it is inconsistent with Principle 1

Section 3

Recent application of the three Principles in the NGCS statement

Summary of findings

3.1 In the April 2013 policy position, we applied the three Principles to reach a view about the level of fair and reasonable fixed and mobile origination charges that would arise if the 080 and 116 ranges were made free-to-caller based on currently available evidence. We used those as assumptions to inform our assessment of the impact of a free-to-caller approach. Having previously consulted on the application of the three Principles, we invited comments from stakeholders only on certain areas of our framework that we had revisited in the April 2013 policy position.

3.2 In response to stakeholder comments, we have updated our analysis in the NGCS statement, particularly in relation to the impact on consumers of reduced service availability/quality on the 080 range. In Annex 5 of the NGCS statement we therefore set out an updated assessment of what a fair and reasonable origination charge is likely to be for each of the 080 and 116 ranges, based on an application of the three Principles to the latest available evidence. This became our base case scenario range for the purposes of our impact assessment.

3.3 The base case scenario range for origination charges based on the Principles and currently available evidence is:

- For 080:
    - **0.4 - 0.5ppm** for fixed originated calls and **1.5 - 2.4ppm** for mobile originated calls. However, we note that we would only consider a mobile origination charge to be fair and reasonable if it resulted in an average service provider (SP) outpayment that did not exceed 1.5ppm (taking into account the fixed origination charge and the likely proportion of calls that are originated from fixed and mobile lines).
- For 116:
    - fixed and mobile origination charges either both maintained at existing levels (approximately **0.5ppm** for both fixed and mobile calls) or set at our estimates of pure LRIC (**0.035 – 0.059ppm** in the case of fixed origination charges and **0.78-0.88ppm** in the case of mobile).

3.4 We consider that this assessment of likely fair and reasonable charges, based on currently available evidence, will provide TCPs and OCPs with a good starting point for their negotiations in relation to fair and reasonable origination charges.

3.5 As noted in Section 1, we would nevertheless approach any future dispute on its own facts and would have regard to the evidence available to us at the time of any dispute (including any evidence adduced by the parties to the dispute).

Annex 1

Guidance on dispute resolution in relation to origination charges for calls to 080 and 116 numbers

Scope of guidance

A1.1 This guidance relates to wholesale origination for calls to 080 and 116 numbers. In the document entitled *Simplifying non-geographic numbers, final statement on the unbundled tariff and the 080 and 116 ranges*, published today ('the NGCS statement'), we have decided to make these ranges free-to-caller.[60] We are also introducing an access condition on persons who terminate calls to 080 and/or 116 numbers (TCPs).[61]

A1.2 Annex 11 of the NGCS statement contains the access condition and includes a list of the TCPs on whom Ofcom is imposing the condition. The access condition requires TCPs to purchase wholesale origination for calls to 080 and 116 numbers on fair and reasonable terms (including charges).

A1.3 Ofcom exercises dispute resolution powers under sections 185 to 191 of the Communications Act 2003 (the Act). This guidance describes how Ofcom would approach any future dispute as to whether origination charges for calls to 080 or 116 numbers are fair and reasonable.

The dispute resolution process

A1.4 Section 185(1)(a) of the Act gives Ofcom jurisdiction to resolve certain disputes, including those relating to the provision of network access between different communications providers (CPs). By virtue of section 185(8), this includes a dispute as to the terms or conditions on which network access is or may be provided in a particular case. Section 185(2) of the Act also gives Ofcom jurisdiction to resolve a dispute between CPs relating to rights or obligations conferred or imposed by or under Part 2 of the Act.[62]

A1.5 Section 185(3) provides that any party to a dispute may refer it to Ofcom. Section 185A empowers Ofcom to invite any one or more of the parties to a dispute to refer it to Ofcom under section 185(3).

A1.6 Section 186 of the Act provides that where a dispute is referred to Ofcom in accordance with section 185, Ofcom must decide whether or not it is appropriate to handle it, and sets out the considerations that Ofcom may take into account in doing so.

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[60] By 'free-to-caller' we mean that the number can be accessed by consumers at a retail price of zero and, where the call is made from a public payphone, without having to use coins or cards.
[61] http://stakeholders.ofcom.org.uk/consultations/simplifying-non-geo-no/final-statement
[62] Provided the dispute is not excluded by virtue of section 185(7) of the Act.

A1.7 Where it is appropriate for Ofcom to handle the dispute, section 188 of the Act provides that Ofcom must consider the dispute and make a determination for resolving it within four months, except in exceptional circumstances.

A1.8 Ofcom's powers to resolve disputes are set out in section 190 of the Act. They include the power to make a declaration setting out the rights and obligations of the parties to the dispute, to give a direction fixing the terms or conditions of transactions between the parties to a dispute, and/or to give a direction imposing an obligation, enforceable by the parties to a dispute, to enter into a transaction on the terms and conditions fixed by Ofcom. For the purpose of giving effect to a determination of the proper amount of a charge in respect of which amounts have been paid by one of the parties to the dispute to the other, Ofcom may also give a direction requiring the payment of sums by way of adjustment of an underpayment or overpayment.

A1.9 Dispute resolution is a statutory function, which Ofcom must exercise consistently with its statutory duties, in particular as set out in sections 3 and 4 of the Act (which give effect, among other things, to the requirements of Article 8 of the Framework Directive).[63]

A1.10 Ofcom's duty to resolve disputes within four months (except in exceptional circumstances) has an impact on the level of analysis that it is appropriate and feasible for Ofcom to undertake in determining a dispute. We are rarely, for example, able to carry out the same detailed level of analysis of costs as we would in exercising other ex ante regulatory powers, such as in a market review.

A1.11 In this guidance we set out the framework we will apply in assessing whether origination payments are fair and reasonable. In practice, however, we recognise that our assessment is likely to depend on the available evidence. In making a determination to resolve a dispute, Ofcom will rely on its best assessment of the available evidence within the four month statutory deadline.

Framework for assessing fair and reasonable origination charges

A1.12 In assessing whether origination payments are fair and reasonable, we will apply the following three cumulative principles, which we have previously used in other regulatory contexts.[64] We will apply this analytical framework to both fixed and mobile origination payments:

[63] Directive 2002/21/EC

[64] We have used these three Principles in previous disputes (see *Determination to resolve a dispute between BT and each of T-Mobile, Vodafone, O2 and Orange about BT's termination charges for 080 calls*, 5 February 2010: (080 Dispute Determination), available at: http://stakeholders.ofcom.org.uk/binaries/consultations/draft_deter_bt_tmobile_vodafone/nonconf.pdf and *Determination to resolve disputes concerning BT's tiered termination charges in NCCNs 1101, 1107 and 1046, Final determination*, 4 April 2013 (the Tiered Rates Determinaton), available at: *http://stakeholders.ofcom.org.uk/binaries/consultations/provisional-conclusions/statement/040413.pdf*) and in reaching assumptions about the likely level of origination charges for the purpose of assessing the impact of making the 080 and 116 ranges free-to-caller (see the NGCS statement, Annex 5). The use of these three Principles was also endorsed by the Competition Appeal Tribunal in its judgment on the appeals against the 080 Dispute Determination (see *British Telecommunications plc and Everything Everywhere Limited v Office of Communications*, 1 August 2011, [2011] CAT 24, available at: http://www.catribunal.org.uk/238-7221/Judgment.html). However, the precise wording of the three Principles may differ slightly between these uses, depending on the regulatory context in which they are employed.

- **Principle 1:** originating communications providers ('OCPs') should not be denied the opportunity to recover their efficient costs of originating calls to a free-to-caller number range.

- **Principle 2:** the origination charge should be beneficial to consumers, taking into account the following factors:

  - Indirect effect: impact of the proposed origination charge on service provider ('SP') costs, and on callers through resulting relevant decisions by SPs such as exiting (or not joining) a free-to-caller number range with an impact on service availability, and cost mitigation measures;

  - Tariff package effect: impact of the proposed origination charge on OCPs' retail prices for other services; and

  - Competition effect: impact of the proposed origination charge on competition, whether beneficial or detrimental.

- **Principle 3:** the origination payment should be practical to implement.

A1.13 In any dispute, our analytical framework will follow these three principles by considering whether such a charge is consistent with the answers to the following questions:

- **Range of efficient costs relevant to recovery through origination charges**: what type of costs should and should not be recovered through origination charges? (**Principle 1**);

- **The appropriate level of origination charge within the range determined under Principle 1 and taking into account the origination charges proposed by the parties to the dispute**: within the range determined under Principle 1 and taking into account the origination charges proposed by the parties, what are the levels of fixed and mobile origination charge that maximise benefits to consumers? This analysis should take into account the trade-off between changes in service availability and the tariff package effect (Step 1), the efficiency of price signals to SPs for their decisions on cost mitigation measures (Step 2), and any potential effects on competition (Step 3) (**Principle 2**);

- **Practical to implement**: are the origination payments implied by the application of our framework practicable to implement? (**Principle 3**)

A1.14 In order to explain our approach in answering each of these questions, we first set out the relationship between our analytical framework and Ofcom's six principles of pricing and cost recovery below. We then explain in more detail our approach in each of the three Principles.

Relationship between our analytical framework and the six principles of pricing and cost recovery

A1.15 We have used the six principles of pricing and cost recovery in previous decisions[65] - these are:

[65] See, for example, the 080 Dispute Determination, at paragraphs 4.55 – 4.59

- cost causation: costs should be recovered from those whose actions cause the costs to be incurred;
- cost minimisation: the mechanism for cost recovery should ensure that there are strong incentives to minimise costs;
- effective competition: the mechanism for cost recovery should not undermine or weaken the pressures for effective competition;
- reciprocity: where services are provided reciprocally, charges should also be reciprocal;
- distribution of benefits: costs should be recovered from the beneficiaries especially where there are externalities; and
- practicability: the mechanism for cost recovery needs to be practicable and relatively easy to implement.

A1.16 The six principles of pricing and cost recovery cover the same substantive issues as the analytical framework of Principles 1 to 3 set out above, as follows:

- Principle 1 relates to the principles of *cost causation, cost minimisation* and *distribution of benefits*, focusing primarily on the benefits derived by persons who provide services using 080 or 116 numbers (service providers or SPs) from different types of origination costs;
- Principle 2 relates to the principles of *effective competition* and *distribution of benefits* more widely between callers and SPs; and
- Principle 3 relates to the principle of *practicability*.

A1.17 The one principle that is not listed above is *reciprocity*. We consider that reciprocity is not relevant in this context as origination is not necessarily a reciprocal service.

Principle 1: recovery of efficient costs of origination

The range of efficient costs relevant to recovery through origination charges

A1.18 Under Principle 1, we establish the range of efficient costs relevant for recovery through origination charges for calls to 080/116 numbers. In other words, what types of efficient costs should and should not be considered for recovery from origination charges for calls to each of these number ranges.

A1.19 We will apply the principles of *cost causation, cost minimisation* and *distribution of benefits* to the evidence available to us. The limited four month dispute resolution period affects the level of analysis it is appropriate and feasible for us to undertake in determining a dispute. For example, we are normally unable to carry out the same detailed level of analysis of costs as we would in a market review. In determining any dispute as to whether origination charges are fair and reasonable, we are therefore likely to draw on existing cost modelling work that we have carried out for other regulatory purposes.[66] We would nevertheless consider any cost or

[66] In particular, our mobile call termination ('MCT') cost model and our modelling of BT's network costs in the Narrowband Market Review.

other evidence presented to us by the parties to a dispute in light of the specific facts and circumstances of that dispute.

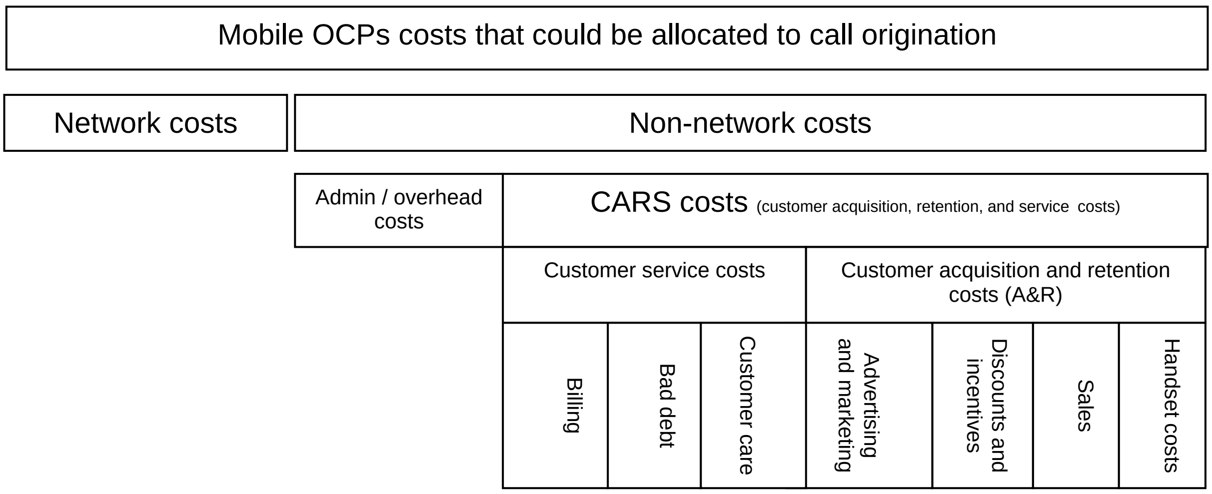
A1.20 The activities that OCPs perform to originate a call can be classified into two categories of costs, namely:

- network costs: operating cost and capital costs of maintaining, running, and operating the network the call is originating on; and

- non-network costs: costs associated with customer acquisition, customer retention, and the administration and distribution activities associated with selling and providing telecommunications services.

A1.21 We consider that non-network costs can further be divided into two categories: (i) customer acquisition, retention and service costs ('CARS costs'); and (ii) administration and overhead costs. All of these costs can be classified as shown in Figure A1.1 below.[67]

Figure A1.1: Mobile call origination costs



A1.22 The difference between customer acquisition and retention ('A&R') costs and customer service costs, shown in Figure A1.1 above, is that the former are incurred to win new subscribers or incentivise existing subscribers to stay whereas the latter are incurred in the ordinary course of servicing existing subscribers.

The minimum level of efficient costs relevant to recovery through origination charges

A1.23 We consider that the minimum level of costs that OCPs should have the opportunity to recover through origination charges should be determined by the minimum level of cost recovery that ensures that OCPs have an incentive to supply origination. This is the **pure LRIC** of origination. This is because any origination charge above the marginal cost (approximated by the pure LRIC) will make a contribution to the

[67] We consider that it is only appropriate to consider net handset costs (i.e. gross handset costs less any revenues associated with the subsequent sale of those handsets) rather than gross handset costs.

recovery of fixed and common costs and therefore is likely to ensure that OCPs have an incentive to provide origination.

A1.24 In the case of calls to a free-to-caller number range, we consider it unclear whether non-network costs are incremental to call origination. We consider that customer care costs, and potentially some billing costs[68], could be incremental, depending on the evidence provided by TCPs and/or OCPs. We may therefore produce a range for incremental costs, the lower bound excluding all non-network costs and the upper bound including an allowance for customer care costs. There are different methodologies that could be used to do this. For example, the pure LRIC of customer case costs might be approximated by applying a downlift factor to the LRIC+ customer care costs.

Acquisition and retention costs should not be recovered through origination charges

A1.25 We consider that the upper bound of efficient costs relevant to recovery by OCPs through origination charges for calls to 080 and 116 numbers is the LRIC+ cost of origination, including a contribution to both network and relevant non-network common costs.

A1.26 In terms of network costs, we believe that SPs are likely to benefit from this expenditure, since it allows callers to contact them. We therefore consider that it may be appropriate for origination charges to include a contribution from SPs to the OCPs' fixed and common network costs.

A1.27 In relation to non-network costs, we do not consider the LRIC+ measure of costs should include a contribution to all types of these costs. We believe that a contribution to customer care costs would be consistent with the principle of distribution of benefits (i.e. that costs should be recovered from the beneficiaries), as these include expenditure on activities such as call centres from which SPs are likely to benefit. However, we do not consider that OCPs' A&R costs are relevant to recovery through the origination charge. This is because we consider SPs are unlikely to benefit from the majority of these A&R costs and therefore should not be required to contribute to their recovery. Even to the extent there is potential for SPs to benefit from a proportion of these costs, we consider their inclusion in the origination charge is likely to be wasteful or inefficient for similar reasons to the rejection of the Network Externality Surcharge (NES) in setting mobile termination rates.

A1.28 A&R costs relate to the following categories (see Figure A1.1 above):[69]

- **Marketing and advertising**: these costs include all the expenses associated with attracting customers through marketing and advertising. Examples of these costs are advertising campaigns and brand sponsorship.

[68] In the case of billing costs, we would only consider these incremental to origination for calls to 080/116 numbers subject to appropriate evidence being available showing that OCPs need to incur additional billing system costs exclusively associated with billing 080/116 wholesale customers.
[69] This characterisation comes from the Competition Commission's 2009 Determination in relation to Mobile Call Termination, at paragraph 8.5 (*Mobile phone wholesale voice termination charges, Determination*, Competition Commission, 16 January 2009 ('CC 2009 MCT Determination'), published at: http://www.competition-commission.org.uk/appeals/communications_act/mobile_phones_determination.pdf). We consider that A&R costs for fixed OCPs can be broken down in a similar way, albeit that some of the categories listed above are more relevant for mobile OCPs than for fixed OCPs (e.g. handset subsidies).

- **Handset costs**: handset costs are incurred by mobile OCPs when they supply customers with a handset to make and receive calls. It is usual within the UK mobile sector that the initial cost of a handset for post pay customers is subsidised wholly or in part by the mobile OCP.

- **Discounts and incentives**: discounts and incentives are offered by OCPs in order to attract or retain customers on or to their network. These generally take the form of reduced retail prices.

- **Sales**: a significant proportion of these costs relate to the large mobile OCPs' branch network of shops and particularly the personnel, distribution and depreciation costs associated with operating this network of shops. The other significant element within this category is contract commissions paid to third-party retailers for selling mobile OCPs' products. There are also a small amount of costs relating to telesales and Internet sales.

A1.29 For the most part, we do not consider SPs are likely to benefit from expenditure associated with these activities and therefore should not be required to contribute to these costs. Even to the extent there is potential for SPs to benefit (such as through an expansion of the total number of mobile subscribers), we similarly consider that recovery of A&R costs is unlikely to be consistent with the principles of *cost causation* and *cost minimisation*. In terms of *cost causation*, we consider that the activities described above are primarily targeted at callers (rather than SPs). Under these circumstances, we do not consider that SPs should make a contribution to these costs because they do not cause these activities to take place. In relation to *cost minimisation*, we consider that allowing OCPs to recover A&R costs from SPs is unlikely to provide them with the right incentives to minimise costs. This is because OCPs do not directly compete for SPs. Therefore, if SPs contribute to A&R costs, OCPs may have an incentive to increase their A&R expenditure to inefficient levels, as this would allow them to subsidise the services they offer to the customers they compete for (i.e. callers) through the origination payments they charge to SPs. [70]

A1.30 In light of the above, we consider that **LRIC+ (with no allowance for A&R) costs** should be the upper bound of the range of efficient costs relevant for recovery from origination charges in Principle 1.

Principle 2: the origination charge should be beneficial to consumers, taking into account the indirect effect, tariff package effect and competition effect

Overview of the analytical steps in Principle 2

A1.31 As discussed above, our analysis under Principle 2 relates to the principles of *effective competition* and *distribution of benefits.* We will consider how a given change in origination charges[71] would impact consumers. As set out above, we consider we should assess Principle 2 by taking into account the following effects:

[70] For a fuller discussion as to why SPs should not contribute to A&R costs, see paragraphs A5.59 to A5.69 of Annex 5 of the NGCS statement.

[71] The change in origination charges that we consider will depend on the conditions prevailing at such time as any dispute regarding fair and reasonable charges is raised. For example, if a dispute were to be raised at a time when arrangements for origination charges for free-to-caller 080/116 calls are already in place, we would be likely to consider the change between the existing origination charge

- o Indirect effect: impact of the proposed origination charge on SP costs, and on callers through resulting relevant decisions by SPs such as exiting (or not joining) a free-to-caller number range with an impact on service availability, and cost mitigation measures;
- o Tariff Package effect: impact of the proposed origination charge on OCPs' retail prices for other services; and
- o Competition effect: impact of the proposed origination charge on competition, whether beneficial or detrimental.

A1.32 Our framework for assessing these effects can be separated into distinct steps:

- **Step 1: Trade off for consumers between the reduction in service availability/quality and tariff package effect.** We have discussed above that OCPs should not be denied the opportunity to recover their efficient costs of origination and that a charge between pure LRIC and LRIC+ (with no A&R costs) satisfies this principle. We will seek to assess how a given change in the origination charge is likely to affect consumers. An increase in origination charges has two opposing effects on consumer welfare. This trade off arises because an increase in the average outpayment made by SPs (who ultimately pay the origination charge through their host TCP) is likely to lead to: (i) a reduction in service availability/quality on the 080 and 116 ranges as a result of SPs exiting (or choosing not to join) those number ranges (e.g. by migrating to other number ranges on which callers have to pay for calls); but (ii) a reduction in the prices which OCPs charge consumers for other retail services through a favourable change in the tariff package effect ('TPE'). We will therefore seek to determine the average SP outpayment that would, in our view, best take account of this trade off (before taking into account any asymmetry of risk).

- **Step 2: Assess the relative level of the fixed and mobile origination charges.** Once we have determined under Step 1 an appropriate average SP outpayment, we will first look at the range of fixed and mobile origination charges that would be likely to result in an average SP outpayment of this amount, given the relative volume of fixed and mobile calls (as this will affect how different fixed and mobile origination charges translate into the average outpayments made by SPs) and any other relevant sources of variation. Depending on whether the number range in question is already free-to-caller or not, this may involve making an assumption about the likely level of fixed-mobile substitution that would result when free-to-caller is implemented. There may also be other predicted changes to the relative call mix which we would take into account.

  Second, we will look at the extent to which we should take into account: (i) the LRIC differential argument, i.e. the implications that different price-cost differentials between fixed and mobile OCPs will have on competition and the price signals to SPs for cost mitigation measures; and (ii) any asymmetry of risk, i.e. whether there is an asymmetry in the risk or scale of adverse effects

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and the new rate being proposed. However, if a dispute were to be raised prior to any origination charges for free-to-caller 080/16 calls being agreed or determined, we would be likely to take into account the level of origination charges being proposed by the parties to the dispute and consider a change from the lower of those charges to the higher charge. We would also take into account the extent to which any given change would result in origination charges being outside of the range determined under Principle 1.

as between origination charges inadvertently being set too high or too low. Both of these considerations could imply a different average level of SPs' origination payments from that established in Step 1.

- **Step 3: Assess whether there is any impact of the proposed origination charge on competition.** It is possible the level of the origination charge may impact on competition in a way that affects consumers and that we have not considered in Step 2 in relation to the relative level of fixed and mobile origination payments (e.g. among fixed OCPs or among mobile OCPs or between different TCPs). We will consider whether any such effects are likely to arise as part of our assessment of Principle 2.[72]

A1.33 We explain in more detail each step in turn below.

Step 1: Trade off between the reduction in service availability/quality and the tariff package effect

A1.34 We will seek to take into account how a given change in the origination charge is likely to affect consumers. Increases in origination charges are likely to result in both:

- consumer detriment from reduced service availability/quality; and
- consumer impact from a reduction in the price of other telecoms services via the TPE.

A1.35 We will seek to determine the average SP outpayment that would, in our view, best take account of this trade-off. In addition, we consider that there is an additional factor that affects the appropriate trade-off for consumers, namely, the asymmetric risk of the level of payments. That is, if there is material uncertainty about the effect of increases in SPs' outpayments, we need to consider whether there is an asymmetry in the risk or scale of adverse effects as between origination charges inadvertently being set too high or too low. For example, if in our judgement the adverse effects on balance are larger from an average origination charge that is too high, placing weight on the asymmetry of risk would lead us to consider that lower levels of the average origination charge are fair and reasonable.

A1.36 We look into these factors in turn below.

[72] The competition issues between fixed and mobile OCPs considered under step 2 are assessed in the NGCS statement. However, we note that the step 3 competition issues, such as those between different fixed OCPs or between different TCPs, are not part of the analysis for the NGCS statement (summarised in Section 3 of this document). We only needed to consider the potential impact of step 2 competition issues between fixed and mobile OCPs in the NGCS statement because for the purposes of our impact assessment we did not need to reach a view on whether there would be multiple fixed and/or mobile origination payments, which could give rise to step 3 competition issues. This was because we derived a range of likely origination payments to reflect our uncertainty about various assumptions. Whether payments were the same for all OCPs and/or TCPs therefore had no effect on our impact assessment as long as all payments fell within our IAR. We recognise, however, that a consideration of other potential distortions to competition could be relevant in the context of a dispute. We therefore include this additional step for completeness in our approach to assessing Principle 2.

Consumer detriment from reduced service availability/quality

A1.37 We will seek to assess the consumer detriment resulting from the reduction in service availability/quality likely to be associated with a given increase in origination charges.[73] In doing so, we will first assess available evidence on the likely impact of an increase in origination charges on service availability/quality. We will then consider the consumer detriment associated with this impact.

A1.38 It may be difficult to quantify the consumer detriment from a given reduction in service availability/quality on 080/116 and we may therefore assess this effect qualitatively. In doing so, we will consider the impact of potential sources of consumer harm from reductions in service availability such as the impact on consumers from:

- SPs cancelling their services;
- SPs migrating to other number ranges;
- SPs employing cost mitigation measures or reducing some other aspect of service quality;[74]
- new SPs being deterred from entering the range; and
- wider costs associated with a reduction in service availability/quality (for example, the impact on the 080 brand of material exit from the range).

A1.39 We are likely to be particularly concerned if we thought a given increase in the origination charge could risk weakening the benefits to consumers of our decision to make 080 and 116 free to caller through its impact on service availability on these number ranges.

Consumer impact of a change in the TPE

A1.40 Any change in origination charges will impact OCPs' incremental profits (i.e. the excess of revenue over incremental costs). This change in OCPs' profits may in turn affect consumers through the prices they pay for other telecommunications services (through the resulting change in the TPE).[75] In assessing this effect, we recognise the relationship between origination charges and OCP profits is not necessarily straightforward because any change in origination charges is likely to cause SPs to alter their behaviour in ways that may affect OCP profits. In light of this, we will consider various potential mechanisms through which a given change in origination charges could affect OCPs' profits (and thereby the TPE). For example:

- any change in OCP revenues for calls to SPs that remain on the 080 range;

[73] In footnote 71, we explain the given change in origination charges that we are likely to take into account in different circumstances.
[74] In practice, we may consider the implications of this effect for origination charges under Step 2 where it is also relevant.
[75] As discussed above, we consider the tariff package effect is likely to be significant but not complete, with the result that callers are unlikely to benefit (suffer) from the full extent of any increase (decrease) in OCP incremental profit.

- any change in OCP revenues as a result of SPs migrating to alternative number ranges (where possible, we will seek to take into account both changes in revenues as a result of calls to other number ranges being substituted for 080 calls and any changes in call volumes that may result from this migration);

- any change in OCP revenues as a result of an SP choosing to withdraw its service.

3.6 In the event of a dispute we would seek to make a judgement as to the extent to which these effects would impact consumers and, in doing so, come some way towards off-setting the effects on service availability/quality described above. In making this trade-off, we will weigh the change in the TPE against the impact on consumers from the change in service availability resulting from a given change in the origination charge [76] In doing so, we will take the fact that 080 and 116 are free-to-caller as given.

<u>Asymmetric risk of the level of payments</u>

A1.41 In setting origination charges in a dispute, we recognise that potential variation in the evidence we consider might inadvertently lead us to set the origination charge at too low or too high a level. For example, our evidence might under-state actual SP exit for a given increase in the origination charge, leading us to set the origination charge at too high a level. If we thought there was a risk this might happen, we would consider the potential impact on consumers from setting too high or too low an origination charge. We would also take into account what we considered to be the relative likelihood of each outcome. If we concluded the consequences to consumers were more harmful under one scenario than another, or that one scenario was more likely than another, we may find it appropriate to adjust the origination charge accordingly. For example, if we found that the adverse effect on consumers was likely to be greater if the origination charge were set too high compared to a scenario in which it were set too low, we may take this into account through reductions in the level of charges that we consider to be fair and reasonable.

A1.42 In practice, we may consider the implications of the asymmetric risk for origination charges under Step 2 – for example, this may be because both asymmetry of risk and Step 2 considerations, such as the LRIC differential, although motivated by different concerns, would both be addressed by the same change in fixed or mobile origination charges.

Step 2: Relative prices between fixed and mobile origination charges

A1.43 In Step 1 we will take a view on the average SP outpayment that strikes the right balance for consumers between service availability and the TPE. There are however many combinations of potential fixed and mobile origination charges (within the range of costs established under Principle 1) that would yield this average SP outpayment. In determining a dispute, we will take a view on what constitutes a fair and reasonable fixed or mobile origination payment having regard to:

- the proportion of calls to the free-to-caller range originated from fixed and mobile lines, given that this will determine the average outpayments made by

[76] In footnote 71, we explain the given change in origination charges that we are likely to take into account in different circumstances.

SPs for calls to their numbers. This may require an assumption about the likely extent of fixed-mobile substitution if the number range in question is not already free-to-caller, or if further changes in the mix of calls are anticipated; and

- the implications that different price-cost differentials between fixed and mobile OCPs will have on competition and the price signals given to SPs.

A1.44 We explain in more detail each of these issues in turn below.

Fixed to mobile substitution

A1.45 The share of calls to 080 and 116 numbers that are originated from mobiles will, in turn, affect the relative impact of the level of fixed and mobile origination charges on SPs' average outpayments and, hence, on the risk that higher SP outpayments may lead to additional migration away from these ranges, as considered under Step 1.

A1.46 For example, assume that under Step 1 we conclude that an average SP outpayment of 1.5ppm strikes the appropriate balance between service availability/quality and the change in the TPE. If we then also assumed that the level of fixed origination payments was to reach the maximum level determined under Principle 1 (i.e. LRIC+ with no A&R) and this was, for example, 0.5ppm, this would mean that an appropriate mobile origination charge would be:

- 2.2ppm if 60% of call minutes came from mobiles[77]; but

- 3.8ppm if 30% of call minutes came from mobiles.[78]

A1.47 This means that, in order to determine a fair and reasonable fixed or mobile origination charge from the average SP outpayment obtained in Step 1, we would need to form a view in any dispute on what proportion of call minutes to a free to caller number range are (or are likely to be) accounted for by fixed and mobile CPs. In doing so, we would take into account any relevant evidence provided by the parties or otherwise available to us.

The impact of price differentials on competition and price signals

A1.48 Differences in fixed and mobile origination charges may have an impact on:

- the price signals given to SPs for cost mitigation measures; and

- competition between fixed and mobile OCPs.

The price signals for SPs

A1.49 If the difference between fixed and mobile origination payments is greater than the difference in the incremental costs of fixed and mobile origination, then the price signal for SPs' decisions on cost mitigation measures would not be efficient. This is because SPs may have too great an incentive to mitigate the costs of more expensive mobile-originated calls with measures that may result in consumer

[77] It can be seen that if we assume fixed origination payments of 0.5ppm and the share of calls originated from mobile is 60%, then the value for the mobile origination payments that gives an average SP outpayment of 1.5ppm is 2.17ppm. In other words, 0.5ppm x 40% + 2.17ppm x 60% = 1.5ppm.

[78] In other words, 0.5ppm x (1-30%) + 3.83ppm x 30% = 1.5ppm.

detriment. For example, SPs may resort to cost-reducing measures themselves (e.g. shortening the duration of the call when originated from a mobile) or may request their host TCP to apply alternative measures (e.g. playing recorded announcements that re-direct mobile callers to a non free-to-caller number).[79] Such cost mitigation measures by SPs may reduce the risk of SPs exiting the free-to-caller number ranges by enabling them to manage their costs, which benefits consumers, but they may also adversely affect the consumer experience of calling from a mobile phone.

A1.50 Considered in isolation, the fixed and mobile origination charges that avoid any distortion to price signals for SPs' decisions on cost mitigation measures would involve a difference in these charges that reflected the difference in their LRIC costs. We can calculate the extent to which any given level of fixed origination charge contributes to a fixed OCP's fixed and common costs. This will be the amount by which the charge exceeds the pure LRIC of fixed call origination. By adding the same pence per minute amount to the pure LRIC of mobile call origination, we can derive a mobile origination charge which gives the mobile OCP the same pence per minute contribution to its fixed and common costs as the fixed OCP has received. We call this the LRIC differential charge. A mobile origination charge at the LRIC differential level reflects the difference between fixed and mobile incremental costs, and therefore creates incentives for SPs to only engage in cost mitigation measures regarding mobile calls when it is efficient to do so.

A1.51 In determining whether an origination payment is fair and reasonable, we will consider the extent to which any implied difference between fixed and mobile origination payments exceeds the difference between fixed and mobile origination incremental costs. In light of this, we would consider the likelihood of SPs employing cost mitigation measures and their impact on consumers. When deciding how much weight to put on the LRIC differential, we also note that the use of cost mitigation measures is not the only relevant decision taken by SPs which is affected by the level of the origination charge. In addition, the SP decision regarding whether to exit (or join) 080/116 is also affected and, through this, the appropriate balance for consumers between service availability and the TPE (which is considered under Step 1). As a result, we will trade off the price signals for SPs regarding the use of cost mitigation measures with the price signal for SPs regarding whether to exit 080/116.

A1.52 Placing weight on the LRIC differential would be likely to reduce the level of the mobile origination charge. This is because under Principle 1 of our framework we have concluded that the upper bound of origination charges should be LRIC+ with no A&R. Thus, fixed origination charges beyond that level would not be considered fair and reasonable. Given the level of LRIC+ with no A&R for fixed calls is likely to be materially lower than for mobile calls, a reduction in the mobile origination charge is likely to be the only way of bringing the pence per minute contribution to fixed and common costs from mobile origination charges closer to the contribution made by fixed origination charges. We note that a reduction in the mobile origination charge would in turn reduce the average SP outpayment. We recognise that this would also have the effect of remedying (at least in part) any concern we might have about the asymmetric risk of too high an SP outpayment (see Principle 2, Step 1). We would take this into account in our assessment of both factors.

[79] The access condition will effectively prevent TCPs from blocking calls from mobile, as they will be required to purchase call origination from mobile OCPs upon reasonable request.

The impact on competition between fixed and mobile OCPs

A1.53 Fixed and mobile OCPs compete in relation to:

- retail 080/116 calls, and
- wider bundles of telephony services.

A1.54 In terms of competition in retail 080/116 calls, there cannot be price competition between fixed and mobile OCPs for calls to these free to caller numbers, as the price for callers is zero. SPs can, however, influence which device callers use (e.g. if they use measures to mitigate the higher costs of calls originated from mobiles such as using recorded announcements, as discussed above). In determining a dispute about fair and reasonable origination charges, we will consider the extent to which these measures may be used by SPs and the extent to which they may impact on competition between fixed and mobile CPs in retail 080/116 calls, taking into account the evidence available to us.

A1.55 In terms of competition for wider telephony bundles, it is possible that a distortion in competition may arise if mobile OCPs obtain a greater contribution from TCPs/SPs to the recovery of their common costs than fixed OCPs receive (or vice versa). This may enable them to undercut fixed OCPs when competing against them for subscribers or calls in wider telephony bundles (i.e. to numbers other than to 080/116), not due to greater efficiency or superior performance but to differences in origination charges for calls to 080/116. While fixed and mobile CPs generally provide services in separate markets this does not preclude some material degree of competitive interaction between the two in some situations or for some customers. In determining a dispute about fair and reasonable origination charges, we will consider the extent to which a proposed origination charge may give rise to a distortion of competition, taking into account the evidence available to us.

A1.56 In considering these two potential impacts, we will also take into account the materiality of any distortion in competition between fixed and mobile OCPs.

Step 3: Assess whether there is any impact of the proposed origination charge on competition

A1.57 It is possible that the level of the origination charge may impact on competition in a way that affects consumers and that we have not considered in Step 2 in relation to the relative level of fixed and mobile origination payments, e.g. among fixed OCPs, or among mobile OCPs, or between different TCPs, or in other markets such as for transit.

A1.58 For example, an origination charge paid to a particular mobile OCP that differed significantly from the level paid to other mobile OCPs could potentially create a distortion to competition between mobile OCPs.

A1.59 Similarly, differences in the origination charges paid by TCPs to a given OCP could also create distortions to competition between TCPs in the hosting market. For example, if a TCP was to secure lower origination charges this would give that TCP a competitive advantage over other TCPs and could therefore distort competition in the hosting market.

A1.60 As a result of these potential impacts on competition, we are unlikely to consider it fair and reasonable for mobile or fixed origination charges, respectively, to vary between OCPs and/or TCPs unless we have clear evidence that there is an objective justification for such variation(s); that a distortion in competition between OCPs/TCPs would not arise or would not be material; and, that such variation in origination charges would overall be to the benefit of consumers. We will consider these factors, if relevant, in our assessment of Step 3.

A1.61 We also recognise the possibility that there may be benefits to competition from the level of the origination charge which we have not previously identified, and would take these into account under this step.

Principle 3: practicality

A1.62 The analysis under Principle 3 relates to the principle of *practicability*, namely, that any fair and reasonable charge that we determine needs to be practicable and relatively easy to implement.

A1.63 We envisage that the level of a fair and reasonable origination charge may differ for fixed and mobile originated calls. This would require TCPs to identify the type of OCP – fixed or mobile - that has originated a particular call (for the purposes of deciding which origination payment is appropriate, mobile or fixed). One of the issues that we may therefore consider under Principle 3 is whether CPs are likely to be capable of distinguishing the identity of the originator of the call for the purpose of deciding which origination charge is applicable, particularly when the call has been routed through a transit provider.

A1.64 If charges differ by OCP and/or by TCP, we will also need to be satisfied that this is practical to implement. Our assessment of the practicality of multiple origination charges in this case would be likely to consider factors similar to those raised in relation to Principle 3 in previous disputes, which involved termination rates that varied by OCP.[80] These factors may include, but are not necessarily limited to, a consideration of whether porting at the OCP end would affect billing accuracy and whether multiple origination charges would introduce significant additional complexity and/or to potential distortions to OCPs' choice of transit provider (which may be a relevant consideration under Step 3 above).

Enforcement action

A1.65 Whilst dispute resolution is likely to be the most common regulatory means of considering whether an origination charge is fair and reasonable, it is not the only regulatory instrument available. It is open to Ofcom to investigate whether TCPs are compliant with an access condition, and to take enforcement action under sections 94 to 103 of the Act (whether or not a dispute has been referred to us for resolution). Ofcom will also take the content of this guidance into account in any such proceedings, as appropriate.

[80] The 080 Dispute Determination, the 0845/0870 Dispute Determination and the April 2013 Tiered Rates Determination.