



Response to Ofcom Consultation on Service Charge Caps for 09 and 118 Services

on behalf of The Number UK Ltd (118 118)

19 September 2012

NON-CONFIDENTIAL VERSION



Introduction

“For the [118] SC, in the first instance we propose not to implement maximum prices for the service charge. We believe that there is a reasonable prospect, under the new regime, of sufficient competition amongst SPs to keep prices to reasonable levels.”

Ofcom – Simplifying Non-Geographic Numbers, 16 December 2010

The key question therefore, is what has changed since Ofcom made this unambiguous statement in its initial consultation in which it proposed to implement unbundling? Specifically, what evidence has Ofcom provided in the form of new unquestionable facts that have come to light which justify its decision to reverse entirely its previous position?

As we will demonstrate throughout this response, Ofcom's evidence base for its central proposal to cap the 118 SC is extraordinarily weak. In fact, the question seems only to have arisen because PRS SPs were pressing for an increase in the current 09 cap. Ofcom appears to have concluded that if it is considering that cap, it may as well consider the 118 price cap at the same time, which TNUK does not believe is a rational basis for intervention. In pursuing that course Ofcom does not acknowledge the fundamental differences between DQ and PRS.

Moreover, it is clear that much of Ofcom's analysis (not to mention the proposed level of the caps themselves) is focused almost entirely on the 09 number range, whilst 118 seems to be little more than an add on or an afterthought.

Indeed, Ofcom largely concedes that there is no current consumer harm resulting from the level of DQ charges. Throughout the consultation it refers constantly to '*incentives*' which could lead to, '*potential*' and '*possible*' harm which it believes may occur in the future in a given set of circumstances. TNUK is unaware of any other instance of Ofcom imposing price regulation on the basis of harm which it thinks may (may not) occur at some point in the future.

Taking all of these facts together, TNUK is extremely concerned that Ofcom may be 'sleep-walking' into imposing a cap on the 118 SC on an inadequate and fault ridden consideration of the issues and no proper consideration of the potential adverse impact on (at the end of the day) consumers of the regulation proposed.



Summary

Ofcom's Regulatory Principles

- Ofcom's Regulatory Principles are intended to be the foundation for how Ofcom operates and they should not simply be overlooked where they do not fit with Ofcom's proposed policy position
- The proposal to impose a SC price cap conflicts with four of those Regulatory Principles namely:
 - *Ofcom will operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required.*
 - *Ofcom will strive to ensure its interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome.*
 - *Ofcom will always seek the least intrusive regulatory mechanisms to achieve its policy objectives.*
 - *Ofcom will consult widely with all relevant stakeholders and assess the impact of regulatory action before imposing regulation upon a market.*

Ofcom's Assessment Criteria

- Several of the proposed assessment criteria are uncontroversial but TNUK has concerns about: Access to directory enquiry services at an affordable price; Consumer exposure to fraud and bill shock; Bad debt
- Whilst we have no objection to the inclusion of these criteria in principle, TNUK is concerned at Ofcom's approach and particularly the lack of evidence which it presents to support its position

Should the 118 SC be capped?

- In the December 2010 consultation, Ofcom stated explicitly that it would not cap the 118 SC and it has provided no justification for reversing that earlier position
- DQ services are fundamentally different to PRS and so it is anathema to DQ SPs to make calls any longer or slower than they must be
- The 118 SC should not be capped because (i) Ofcom has provided no evidence that consumer harm currently exists which would require or justify a cap (ii) Ofcom is not proposing to include any sunset provisions or timeframe or process for re-assessing the level or need for the cap

Transparency/consumer price awareness

- Ofcom provides no evidence on the level of consumer price awareness for DQ services
- Although it has research in relation to other non-geographic ranges, it has no information in relation to DQ, but it acknowledges that consumers know the real cost of DQ calls
- Improved price transparency is one of Ofcom's key objectives for unbundling and so a SC cap is not needed to achieve the same objective
- Ofcom believes that a cap will help consumers to estimate the price of a call, but this is directly contradicted by the fact that awareness of the price of 09 calls was still low despite a 13 year cap



- There is no evidence to support Ofcom's view that unbundling of itself will lead directly to DQ SPs increasing their prices, which runs contrary to Ofcom's wider analysis
- It is also directly contrary to its views in relation to the AC, where it believes no such risk exists

Efficient Prices

- Ofcom does not refer here to the orthodox view that price efficiency is reduced by imposing caps
- Instead it simply repeats that a cap is needed to address the risk that the introduction of unbundling will lead to an increase in the DQ SC, which adds nothing to its previous analysis

Service Availability and Innovation

- Ofcom's view that a cap will increase confidence and therefore demand and innovation is undermined by the fact that no evidence of bill shock or fraud exists which would demonstrate that confidence is indeed lacking and therefore impacting demand

Consumer exposure to fraud and bill shock

- Complaints about 118 are at an extremely low level and declining further
- There is actually no evidence that the complaints which are made are always about bill shock and it is likely that some are about other matters (which will not be impacted by a price cap)
- Critically, Ofcom overlooks the distinction between complaints made about BT versus mobile originated calls
- It is likely that the vast majority of complaints relate to the far higher cost of mobile originated DQ calls, which a SC cap will do nothing to address
- Perversely, Ofcom is using complaints about the level of mobile OCP charges to justify imposing a price cap on the 118 SC, which will do nothing to address the problem being complained about
- Ofcom's recent "extensive" Review of Unexpectedly High Bills contained no reference to DQ
- There is no evidence whatsoever of fraud ever having existed on the 118 number range and the fact that it is so well recognised makes it a very unlikely target for fraud
- It is astounding that Ofcom is attempting to justify regulation on the basis of it, particularly as Ofcom decided in the April 2012 consultation no longer to use fraud as grounds for introducing unbundling
- There is no basis to Ofcom's belief that a cap is needed to reduce 'incentives' for fraud, because despite the fact that DQ charges have never been capped, no fraud has ever existed

Bad Debt

- Ofcom is proposing price regulation without evidence or analysis as to the level of bad debt or the magnitude of its distorting effect on the AC
- As 118 is only 1% of total NGC call volumes and the level of bad debt on those calls is only about 1% or 2%, any distorting effect would be extremely negligible and in reality would almost certainly not exist
- Ofcom overlooks the critical distinction between bad debt generated on charges set by TNUK and bad debt generated on charges set by OCPs
- Mobile OCP charges can constitute well over 30% of the total cost of a mobile originated call, which means well over 30% of the bad debt generated on any such calls



Regulatory Burden

- TNUK would not incur any significant costs from the implementation of a 118 SC cap
- Whilst Ofcom's lack of detailed analysis does minimise costs, if it had done the required level of analysis it would in fact have added to the regulatory burden

Access to directory enquiry services at affordable prices

- Whilst TNUK welcomes Ofcom's concern in this area, it overlooks the distinction between charges set by TNUK and charges set by OCPs, which is fundamental because the cap will only apply to the SC element of the call
- Therefore SC price regulation alone cannot ensure the overall retail cost of DQ calls does not exceed a certain 'affordable' level

Structure of the 118 SC

- TNUK agrees that it is logical to set different per call and per minute maximum SCs
- TNUK disagrees that the SC caps should not be uplifted by inflation because this review has been prompted by the lack of inflation increases on the existing PRS cap
- Whatever level of cap Ofcom regards as 'correct' must be uplifted for inflation to avoid it becoming 'incorrect', particularly as Ofcom has no clear intention to review the regulation in future
- TNUK agrees that the caps should be set exclusive of VAT

At what level should the 118 SC be capped?

- Virtually all of Ofcom's evidence relates to the 09 number range, which has very little relevance to 118
- There is no logical reason why Option 1 has been included with regards to 118, whilst the caps in Options 2 and 3 have clearly been proposed by the PRS industry

Transparency/consumer price awareness

- Ofcom makes no reference to the important SP obligations to publish the SC (conveniently allowing it to claim that a cap is need to improve transparency) or PPP obligations to inform consumers of the price of the call before onward connection
- We believe that those obligations combined with unbundling will significantly improve transparency

Efficient Prices

- Consumer demand is the key issue but it's necessary to distinguish between demand for existing and new services
- Although there may be no demand in 2012 for existing services at over £3/min, the regulation will continue indefinitely and demand may well exist in future years when the regulation is still in place
- Some new services may be more expensive to provide than current generation DQ services and therefore justify a higher price point or else they will be uneconomic
- All revenue will still have to be generated during the length of the call, although higher costs will be incurred outside of the call, which fundamentally changes DQ cost dynamics
- Ofcom has created the potential problem of a focal point by choosing to impose a cap, but a lower cap is much more likely to become a focal point than a higher cap because it is closer to existing prices



Service quality, variety and innovation

- There will inevitably be future adverse impacts as immovable price caps begin to bite increasingly hard on commercial freedom and flexibility on DQ SPs

Consumer exposure to fraud and bill shock

- Ofcom provides no evidence as to whether its proposed level of caps best addresses the problems of fraud and bill shock (which it believes exist) or whether a higher (or lower) cap may be more effective
- Ofcom is guessing that fraud or bill shock might be a problem at £3/min and £5/call. But if it subsequently detects consumer harm at a lower level, Ofcom is likely to intervene in any case, so there is no logic in regulating in advance of the problem materialising
- The longer DQ calls which are more likely to generate high bills are those that involve onward connection, but the existing PPP obligation to inform those customers of call costs removes the possibility of bill shock

Bad Debt

- As Ofcom has no evidence of the level of bad debt on 118 calls, it has been unable to assess the distorting effect on the level of the AC and therefore what level of cap is required to remedy any possible distortion

Regulatory Burden

- Higher SC caps will not necessarily create greater potential for unintended consequences, as lower caps create a greater potential in relation to 'service, quality and innovation' and 'efficient prices'

Access to directory enquiry services at affordable prices

- The introduction of unbundling will help ensure access to DQ services at affordable prices and a SC price cap will be ineffective at achieving that aim

Pre-Call Announcements

- A PCA would only apply to the SC and therefore provide no information about the total call cost and might actually therefore be misleading and confusing
- There are many complex issues which Ofcom has not even considered and so further consultation would be required in advance of any final decision to implement a PCA
- ✂



Other Consumer Protection Measures

- A consumer opt-in would have a catastrophic impact on DQ call volumes and associated SP revenues, which would threaten their commercial viability and/or require massive marketing investment to encourage opt-ins – there would also be a huge surge in complaints
- TNUK does not believe that voluntarily call-barring sometimes applied on 09 calls is suited to 118 calls
- The annoyance factor of overly frequent time-related notifications on relatively short calls may make them unhelpful or ineffective and outweigh any potential advantages
- Dedicated number ranges cannot be applied to 118 number range, but in any case they would have a hugely distorting impact on the DQ market because DQ SPs invest hugely in marketing their designated numbers in order to aid memorability and this investment would have been wasted
- As there is no evidence of fraud on the 118 number range, an extension of the withhold period would provide no benefit
- TNUK does not believe that additional consumer protection measures (particularly PCAs) would be justified under any of Ofcom's policy options and Ofcom has provided no analysis to justify why PCAs are needed in relation to Option 3 (having concluded that they are not required under Option 2)
- Ofcom's statement that the higher volume of complaints to PPP about mobile services justifies increased consumer protection measures is a complete distortion, as the vast majority of mobile complaints to PPP relate to premium reverse billed SMS services, which have nothing whatever to do with the cost of voice calls

Legal Framework

- ✂
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Ofcom's Regulatory Principles

Before addressing the specific questions in the consultation, TNUK would like to highlight some of Ofcom's 'Regulatory Principles' which we believe are relevant to the regulation being proposed. Regrettably, Ofcom's proposed SC cap does not in the main adhere to (and sometimes directly contradicts) its own regulatory principles.

These principles are intended to be the foundation for how Ofcom operates as a regulator¹. TNUK does not consider that it is proper simply for Ofcom to overlook or dismiss them in cases where they do not fit with its proposed policy position as seems to be the undoubted case in this instance. We will comment briefly on each in turn:-

- ***Ofcom will operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required.***

As we will outline, Ofcom largely concedes that there is currently no evidence of consumer harm such as would justify a SC cap. Its position appears to be that consumer harm may occur at some point in the future if and when prices reach a certain level and therefore it is imposing a price cap several years in advance at a level at which it guesses harm might occur. Such an approach can clearly not be described as operating "with a bias against intervention". Indeed, this regulatory principle seems to have been drafted specifically for a situation in which no harm currently exists, but Ofcom believes that it might emerge at some point in the future. Yet rather than adhering to it, Ofcom is choosing to intervene at the earliest possible stage, namely when service charges are first being segregated from access charges. **Ofcom should not regulate on the basis of vague possibility – only when it is demonstrably necessary².**

- ***Ofcom will strive to ensure its interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome.***

As we will demonstrate in full detail in this response, Ofcom provides no meaningful let alone coherent evidence to support the need for a cap on the SC and the evidence which it does provide is more than questionable. A SC cap is also totally disproportionate to a problem which does not exist and is inconsistent with Ofcom's proposal not to cap the AC.

- ***Ofcom will always seek the least intrusive regulatory mechanisms to achieve its policy objectives.***

¹ <http://www.ofcom.org.uk/about/what-is-ofcom/statutory-duties-and-regulatory-principles/>

² When considering this principle in its Better Policy Making Guidelines Ofcom quotes from the Better Regulation Taskforce – "*The option of not intervening...should always be seriously considered. Sometimes the fact that a market is working imperfectly is used to justify taking action. But no market ever works perfectly, while the effects of...regulation and its unintended consequences, may be worse than the effects of the imperfect market*"



Ofcom must surely concede that a price cap is one of the most intrusive forms of regulatory intervention available to it³. It is made all the more intrusive in this case because it will apply to a DQ SP's entire revenue and does not allow for rebalancing to occur in relation to other uncapped services. It therefore imposes restrictions on the whole business in the most fundamental manner. This is in contrast to a price cap being imposed upon a particular service of an OCP or TCP e.g. the international roaming price cap, which will only apply to a relatively small proportion of overall income. That is therefore a far less intrusive form of regulation, not least because the OCP/TCP is able to adjust other uncapped prices in order to compensate.

- ***Ofcom will consult widely with all relevant stakeholders and assess the impact of regulatory action before imposing regulation upon a market.***

As we will outline, it is clear that Ofcom's preferred level of price caps have been proposed by the 09 PRS industry with whom it appears that Ofcom has been in discussion since at least the December 2010 consultation. By contrast, TNUK has not had any similar discussions with Ofcom about the proposed level of the caps (nor we believe have any other DQ providers). As a result, the caps have not been set with DQ in mind and inadequate consideration has been given to how well suited they may be to the DQ business. Indeed, DQ appears to have been added as something of an afterthought. Moreover, as we will demonstrate, TNUK also does not believe that Ofcom has properly considered the potentially adverse impact of the regulation on the future of this industry because it has adopted a very narrow and short-sighted view of consumer demand in the future.

In summary TNUK believes that there are very serious questions about Ofcom's adherence to its own regulatory principles. Indeed, if Ofcom does not adhere to them it would be without doubt open to challenge if Ofcom proceeded with its proposed form of regulation, by way of a SC price cap.

³ Communications Minister Ed Vaizey MP described the roaming regulation price caps as "intrusive regulation" in a letter of 13 March 2012 to the DCMS Select Committee - http://www.parliament.uk/documents/lords-committees/eu-sub-com-b/RoamingRegulations/Roaming_correspondence.pdf



Response to Questions

Question 4.1: Do you agree with the assessment criteria we are proposing to use for our analysis, and in particular the three additional criteria we have identified as relevant?

TNUK agrees with the inclusion of the following assessment criteria to be used for Ofcom's analysis as regards the 118 number range, which we regard as correct and uncontroversial:-

- Transparency/consumer price awareness
- Efficiency of prices
- Service quality, variety of innovation
- Regulatory burden

However, the inclusion of the three additional criteria raises further questions. Although we will deal with the substance of Ofcom's analysis of each criterion in response to Question 4.3, we will comment here briefly on its decision to include each of those criteria within its analysis.

Access to directory enquiry services at an affordable price

Whilst TNUK agrees in principle with Ofcom's desire to assess the affordability of DQ services, it is notable that Ofcom has only chosen to do it at a time and in a way which we believe will ultimately be ineffective.

For several years, TNUK has complained to Ofcom about the level of retail charges set by mobile OCPs for calls to DQ services. For all of the reasons which Ofcom has previously outlined (primarily in relation to the vertical externality), this has resulted in a dire situation of unnecessarily high mobile DQ charges combined with a lack of price transparency on mobile calls, competition and service innovation.

Unfortunately, throughout this period Ofcom did not appear to recognise that access to mobile originated DQ services at an affordable price was a concern, let alone something which should be a regulatory obligation, as a result of which no action was taken and volumes of mobile originated calls continued to decline. Whilst all forms of landline calls have been in decline, the decline in mobile originated DQ calls is in stark contrast to the increase in mobile originated calls more generally.

In mid-2014, after many years of consideration Ofcom is proposing to introduce unbundling which is specifically designed to address the vertical externality as well as those other adverse consequences. Yet, it is only when unbundling (which is designed to control prices through competition) is already in place that Ofcom appears to be demonstrating a concern. Moreover whether such a control is necessary at all in the new and unbundled regime could only be assessed after unbundling and its effects on improving the competitive environment have been examined.

Ironically (as we discuss in response to Question 4.3), the inclusion of this assessment criterion is unfortunately now somewhat less relevant in an unbundled scenario, because in only applying it to the SC Ofcom is not actually ensuring that the overall retail cost of DQ services is affordable.



Consumer exposure to fraud and bill shock

Again, whilst TNUK has no objection to Ofcom's desire to assess consumer exposure to fraud and bill shock, we will explain in response to Question 4.3 why we do not believe that these criteria justify price regulation being imposed on the 118 number range. As we will detail, there is literally no evidence of fraud and no substantive evidence of bill shock, such as would justify SC price regulation, in an unbundled scenario.⁴

However, TNUK has some concerns that Ofcom's analysis of fraud and bill shock within its assessment of the 118 number range is designed to support a pre-determined view that SC price regulation is required, despite having no evidence to support it and despite it being contrary to the ethos of unbundling.

Bad Debt

TNUK accepts the inclusion of bad debt as an assessment criterion for the 118 number range, but we strongly contest that the evidence which Ofcom has presented to support its inclusion provides any justification for price regulation.

Once again, we will address the substance of whether or not bad debt exists in response to Question 4.3. But our concern is again based on the fact that there is no evidence of bad debt on the 118 number range and therefore no justification for imposing price regulation on the 118 SC. As with fraud and bill shock, we are concerned that Ofcom's assessment of the criterion is designed to support a pre-existing bias towards a particular form of regulatory intervention, rather being objective.

In this instance, the situation is made worse by the fact that Ofcom has been prompted to include the criterion as a response to unsubstantiated complaints made by (predominantly mobile) OCPs motivated by their own financial interests⁵. We explain in response to Q4.3 why their arguments are flawed, but the unfortunate result therefore is that Ofcom has chosen to assess a criterion in support of the commercial interests of OCPs, which leads directly to a decision to impose price regulation on competing SPs. This seems evidently wrong both in practice and in principle to the point of irrationality.

Question 4.3: Do you agree that a maximum SC should apply to 118 numbers for the reasons set out above?

At the start of this response, we highlighted the following Ofcom statement taken from the December 2010 consultation:-

"For the [118] SC, in the first instance we propose not to implement maximum prices for the service charge. We believe that there is a reasonable prospect, under the new regime, of sufficient competition amongst SPs to keep prices to reasonable levels."

⁴ For the avoidance of doubt, the evidence which TNUK has previously presented to Ofcom, concerned the total retail charges set by mobile operators and therefore is not relevant in an unbundled scenario

⁵ This is evidenced by the OCPs' responses to the December 2010 consultation, as summarised by Ofcom in the April 2012 consultation, primarily at para 10.32-10.44



It is notable, and disappointing, that nowhere in the current consultation does Ofcom even acknowledge the position which it adopted in the December 2010 consultation, let alone try and justify its reversal. That is a remarkable omission which says much about the level of evidence and analysis upon which it now bases its current position.

At the heart of TNUK's concerns and objections to Ofcom's proposals is the fact that DQ services are fundamentally unlike many of the types of services found on 09 PRS number ranges. Whilst we make no judgement as to whether there should be a cap on the 09 number range (and if so at what level) we believe that the considerations as to whether there should be a cap on the 118 number range are profoundly different, in a way in which Ofcom appears not to recognise or accept. Specifically, 09 services are often designed to lengthen the call as much as possible or at the very least have no incentive to try to shorten it, because it is not what consumers need or expect.

By contrast, DQ SPs do have every incentive to make the call as short as possible, because that is the highest priority of DQ customers. As we discuss and demonstrate in response to Q5.2 and in Annex 2, consumers choose to call DQ services precisely because they want the information quickly and efficiently. We provide evidence that in very many cases, they do so even though free alternative sources of information are available to them, because it is the fastest way to get the information they need.

Therefore it is anathema to DQ SPs to make calls any longer or slower than they must be. Whilst such an approach might generate a small amount of additional revenue for that single call, it makes the consumer far less likely ever to call again because they did not receive the service that they needed. The DQ sector already faces significant challenges regarding declining volumes and therefore SPs do everything possible to retain existing customers by providing the service they want rather than giving them more reason not to call again.

As a result, TNUK does not agree that a maximum SC should apply to the 118 number range for two principal reasons:-

1. Ofcom has provided no evidence that any consumer harm currently exists which would: require or justify the imposition of 118 SC price regulation; now or in the future; at the levels which Ofcom has proposed or at any other levels
2. Ofcom is not proposing to include any sunset provisions in the regulation or any timeframe or process for re-assessing the level or need for the cap. Such provisions should be standard practice for all price regulation as is the case for call termination and roaming regulation. The absence of such provisions would appear to be in clear breach of Section 6(1) of the Act⁶

We will address each point in turn and will begin by commenting on Ofcom's analysis as regards its chosen assessment criteria.

⁶ Section 6(1) states "(1) OFCOM must keep the carrying out of their functions under review with a view to securing that regulation by OFCOM does not involve — (a) the imposition of burdens which are unnecessary; or (b) the maintenance of burdens which have become unnecessary."



Transparency/consumer price awareness

In its analysis of transparency and consumer price awareness, it is notable that Ofcom provides no evidence (or even comment) on the actual level of consumer price awareness for DQ services. That is because it has no evidence because it has done no research on this critical point.

Throughout the three consultations, Ofcom's analysis of consumer price awareness is based upon the results from its 2009 Consumer Survey (partially updated for 2010 and 2011). As Ofcom is obviously aware, that survey excluded any research on consumer price awareness on the 118 number range⁷, which is why Ofcom has no evidence of it. The fact that Ofcom does not acknowledge this omission and instead attempts to gloss over and disguise the point is extremely disingenuous.

By way of example, although Ofcom does not attempt to comment on the level of consumer price awareness for DQ services in the relevant section of the consultation, it does make very brief comment in the first bullet of para 4.4. In very carefully worded terms it states:-

***“a lack of consumer price awareness:** we presented evidence suggesting that callers often do not know the cost of calls to non-geographic numbers from mobile and fixed lines. We considered that consumers’ awareness of the price of 118 calls was poor due to the wide range of tariffs and tariff structures but that it was not clear whether consumers over-estimated the price for these calls since they tend to be aware that they are relatively expensive. In relation to 09, we said that survey evidence showed that price awareness was low but that, unlike other non-geographic number ranges, consumers tend to under-estimate the price of these calls.”*

The first sentence and the third sentence may be based on survey evidence, but neither applies to the 118 number range. By contrast, the intervening second sentence that “consumers’ awareness of the price of 118 calls was poor” is pure and unsubstantiated conjecture. Despite this however, Ofcom’s ultimate conclusion is that consumers do not in fact over-estimate the price of 118 calls because they are aware of the real cost. This is a very important point. By definition, bill shock does not occur if consumers are aware of the cost of the call, so Ofcom’s evidence significantly undermines the need for a cap to address concerns about bill shock.

Nothing in Ofcom’s very brief updated analysis in this consultation undermines or contradicts that crucial point. Indeed, Ofcom states (as it has in the two previous consultations) that concerns about price transparency will be addressed through the introduction of the unbundled tariff. It is worth reiterating that improved price transparency is one of Ofcom’s key objectives in introducing unbundling, which is why the need for any additional methods (let alone price regulation) must be carefully justified.

In fact, Ofcom’s only substantive argument in relation to consumer transparency appears to be that a cap will enable consumers “to make reasonable estimates of the likely retail price of a particular call”. However, the evidence provides no support for this conclusion and in fact totally undermines it.

⁷ Figure 4.4 ‘Mean predicted price by number range’ of the December 2010 consultation best demonstrates this point by providing evidence of expected consumer prices on the 0800, 0845, 0870, 0871 and 09 number ranges, but not 118



09 services are subject to an effective cap of £1.53 per minute or per call which has remained in place unaltered (except for VAT variations) for 13 years. Yet despite the cap Ofcom's consumer survey evidence clearly demonstrates that consumers still had very limited confidence that they knew the cost of the calls and indeed their estimates were fairly inaccurate. Surely there can be no more persuasive evidence that price caps are a totally ineffective means of enhancing price transparency. Even on the 08 number ranges where charge caps are lower and therefore (by Ofcom's analysis) the margin for error is reduced, Ofcom's evidence is that consumers' price awareness is poor.

None of this is surprising. Indeed, it is the reason why Ofcom has chosen to introduce unbundling. The disconnect, however, is that despite consumers having poor price awareness in relation to the number ranges that are already capped (which itself has led to the need for unbundling) Ofcom nevertheless still appears to believe price caps are an effective means of improving price awareness. Self-evidently, this is an illogical, irrational and nonsensical conclusion.

Furthermore, the only way in which a price cap might (even in theory) provide enhanced levels of consumer price awareness is if prices are generally at or close to the cap⁸. A price cap will clearly do nothing to promote improved price awareness if there are a wide range of varying prices some way below it. Logically, Ofcom must therefore be expecting prices to be at or close to the cap if it believes that it will be an effective means of promoting price awareness. Either conclusion would be surprising and unsupported by any evidence, but in the absence of either, the merits of a price cap are yet further undermined.

Finally, Ofcom states its belief that the introduction of unbundling may of itself lead DQ SPs to increase their prices. Once again, this is merely a statement of opinion without any evidential support, which also runs contrary to Ofcom's wider analysis. Of course, Ofcom's rationale for introducing unbundling is that it will increase competition and therefore exert downward pressure on SCs.

Yet Ofcom also appears to believe that the opposite will in fact occur (even if only for some unspecified temporary period) and that DQ SCs will increase as a result of the introduction of unbundling. If we pursue the logic of that approach, it must mean that Ofcom believes that price competition will actually be reduced by the introduction of unbundling, but there is simply no basis for that belief and nor does Ofcom attempt to provide any.

Moreover (in view of Ofcom's proposed level of SC price caps) it also means that Ofcom believes not merely that DQ SCs will rise, but that they will rise above £3/min or £5/call in that short temporary period following the introduction of unbundling (before presumably falling again as the pro-competitive effects of unbundling are felt). Once again, there is simply no economic analysis to support that theory. Even if the introduction of unbundling did cause price increases (which TNUK strongly contests), the existence of a temporary price increase, which Ofcom fully expects to be reversed, cannot justify the imposition of a permanent form of price regulation.

Lastly, TNUK would again highlight that Ofcom's entire analysis (that a price cap is required because the introduction of unbundling will lead to an increase in the level of the SC) runs completely contrary to its

⁸ This is already the case for the 08 and 09 number ranges even though price awareness is still poor



analysis in respect of the AC. In our response to the April 2012 consultation, TNUK highlighted the many contradictions in Ofcom's approach of choosing to regulate the SC but not regulate the AC, which we do not intend to repeat here.

Suffice it to say, that there is no reason to believe that "*consumer uncertainty*" created by the introduction of unbundling is any more likely to lead to increases in the SC than it is to increases in the AC. In fact, TNUK believes that the risk is far greater as regards the AC owing to the much lower level of price transparency obligations which Ofcom is proposing to impose. If Ofcom believes that "*consumer uncertainty*" justifies the need for a SC cap, it should surely reach the same conclusion as regards an AC cap.

Efficient prices

Ofcom's analysis regarding efficient prices appears to be somewhat unorthodox. In the section relating to the 118 number range (paras 4.65 to 4.68) Ofcom does not even mention the generally accepted view, which is that price efficiency is maximised by allowing providers complete commercial freedom to set prices, as this is most likely to ensure that prices reflect consumer preferences. Specifically (from a DQ SP's perspective) continuous investment is required in order to ensure that we have high quality, accurate and up to date data, which is the core aspect of our business.

Without the ability to generate the revenue required to sustain the necessary levels of investment, our business would quickly lose its key value to consumers and soon become uneconomic. TNUK's internal metrics demonstrate a clear improvement in customer satisfaction as a direct result of increased levels of investment in data and so without that level of investment call volumes would decline still further. The changes contained in Proposed EU Data Protection Legislative Framework which could require consumers to opt-in to have their data included in directories (discussed further in response to Q4.8) are likely to add further to SPs' costs in obtaining the necessary data.

By contrast, price caps are generally considered inefficient because they substitute commercial freedom for a regulated price, which is subject to regulatory failure and therefore far less likely to reflect accurately consumer preferences. This view is outlined by Ofcom at length in the December 2010 and April 2012 consultations, but it entirely absent from its reasoning in this case.

Instead, Ofcom's only argument in favour of price caps on 118 SC as regards efficient prices, is simply to reiterate the points it has just made in the previous section about the risk that prices will rise as a result of low consumer price awareness. We have explained above why those arguments have no credibility and they certainly have no relevance when considering how to ensure efficient prices.

In discussing efficient prices in relation to the 09 number range, Ofcom grudgingly accepts that "*it can be argued*" that not setting caps allows SPs greater flexibility to "*set prices that match consumers' preferences*", before once again falling back on the same argument that a cap is required to address the low consumer price awareness which will apparently result from the introduction of unbundling.

However, Ofcom explicitly accepts in relation to 118 (and 09) that there is no need or merit in setting price caps as a means of addressing a lack of competition, because unbundling itself will "*address any potential*



competition concerns". As Ofcom's only argument in this section in favour of price caps on the 118 SC simply relates back to concerns about low price awareness, there is clearly no additional reason related to efficient prices why a cap should be introduced.

Service availability and innovation

"The absence of a cap would offer SPs the opportunity to make higher returns on their services which may also provide stronger incentives for service innovation."

TNUK welcomes Ofcom's acknowledgement at para 4.69 that price caps are likely to harm service availability and innovation which is the accepted orthodox view on the consequences of introducing retail price caps.

However, Ofcom then attempts to make the counter argument that by providing consumer protection against bill shock and fraud, a cap will in turn increase consumer confidence, which will in turn contribute to consumer demand, which will in turn generate quality, variety and innovation. The argument is certainly novel, as TNUK is not aware that Ofcom has ever previously argued that lower regulated prices will increase innovation at the market level which is regulated.

However, Ofcom has absolutely no evidence of bill shock or fraud resulting from the current level of the DQ SC which significantly undermines the argument (as discussed further below). There is therefore no reason to believe that 'confidence' is lacking in a way that a price cap would remedy, thereby increasing demand. The argument also requires several stages in logic before reaching a conclusion which is directly contrary to the generally accepted view that Ofcom has always previously supported which is the principle that price caps harm innovation.

TNUK believes that any objective analysis would conclude that the price caps will have an adverse impact on service availability and innovation and certainly could not be said to have any positive impact. Unfortunately, it appears as if Ofcom is again attempting to manufacture arguments to support its pre-determined view that a price cap should be imposed, rather than assessing the evidence in any genuinely objective and rational manner.

Consumer exposure to fraud and bill shock

TNUK believes that issues of fraud and bill shock are quite different and so we will address each in turn.

Bill Shock

At paras 4.51 to 4.52 Ofcom provides evidence of the number of complaints about 118 numbers received both by its own Ofcom Advisory Team, as well as PhonepayPlus. Ofcom concedes that complaints have "*remained fairly low*", but does not actually comment upon the dramatic reduction in complaints of approximately 60% in the 2 years between 2008 and 2010, which is evidenced by the PhonepayPlus data. Although Ofcom does not choose to provide any historical comparative data of the number of its own complaints over recent years, one must assume that they have followed a similar downward trajectory.



Ofcom's Consumer Experience Reports provide further useful insight into the comparative level of complaints which it receives about DQ services. Section 6 of its most recent 2011⁹ report contains data on the numbers of complaints which it has received across a wide range of services. It states that in 2010-2011 Ofcom received approximately 6,800 telecoms complaints each month. This compares with approximately 7 complaints per month which it received in relation to DQ services¹⁰, which therefore equates to just 0.1% of total telecoms complaints received by Ofcom.

Ofcom may seek to argue that as the definition of telecoms complaints is so broad, it is unsurprising that the percentage which relates to DQ is so low, but TNUK notes that similarly narrow issues such as silent calls and early termination fees generate far higher levels of complaints.

However, if one looks specifically at the PRS market, it is evident that DQ actually generates an even lower level of complaints. PhonepayPlus' Annual Report 2011/12¹¹ states that it received 8,499 complaints in the year. Data provided by Ofcom in Figure 4.1 of this consultation confirms that in 2011 PPP received just 35 complaints related to 118, which equates to 0.4% of total PRS complaints received by PPP.

This provides a very useful context, particularly when one considers that DQ is the third most used premium rate service and actually generates the highest level of revenues¹². By way of further context, 118 118 received approximately 40 million calls in 2011, as we believe it is the most called number in the UK. Set against this volume, the total number of complaints received by both Ofcom and PhonepayPlus is clearly infinitesimally small.

Furthermore, there is actually no evidence that these complaints even relate to bill shock (let alone fraud, for reasons discussed further below). They are simply complaints about DQ. Whilst it may be reasonable to assume that some (or even most) relate to the cost of the call, it is equally reasonable to assume that not all do.

It is likely that some complaints will be about various other issues, most obviously the accuracy of the information provided and the level of customer service provided by agent. Whilst all such complaints are regrettable and should be addressed, they will in no way be addressed by the imposition of a cap on the 118 SC. Ofcom is therefore being disingenuous by simply assuming that all of the complaints relate to the cost of the call and thereby using them to justify price regulation, when in reality that is almost certainly not the case.

Moreover, there is one further crucial point which seems to have been entirely overlooked by Ofcom in its rather brief analysis of complaints numbers. That is, that none of these figures make any distinction between complaints that relate to BT/landline originated calls (where the retail charges are set by TNUK) and complaints that relate to mobile originated 118 calls (where the retail charges are set by the mobile

⁹ http://stakeholders.ofcom.org.uk/binaries/research/consumer-experience/tce-11/6_protection.pdf

¹⁰ The 86 complaints are attributed to a slightly different time period i.e. June 2011-June 2012, so do not provide a direct comparison. However, in the absence of any directly comparable data, they still provide a reasonable indicator of the percentage of total complaints which relate to DQ.

¹¹ [http://www.phonepayplus.org.uk/About-](http://www.phonepayplus.org.uk/About-PhonepayPlus/~media/Files/PhonepayPlus/Corporate/PhonepayPlus_Annual_Report_2011_12.pdf)

[PhonepayPlus/~media/Files/PhonepayPlus/Corporate/PhonepayPlus_Annual_Report_2011_12.pdf](http://www.phonepayplus.org.uk/About-PhonepayPlus/~media/Files/PhonepayPlus/Corporate/PhonepayPlus_Annual_Report_2011_12.pdf)

¹² PPP 'Current & Future Market for PRS 2011 Report



OCPs). Critically, it is only those charges set by TNUK which would in any way be affected by the proposed SC price regulation, which Ofcom is attempting to justify by reference to these complaint numbers.

As mobile/landline originated calls to 118 118 are split almost exactly 50/50 the most favourable interpretation to Ofcom would be that only half of the complaints which Ofcom or PPP receive relate to the level of retail charges set by TNUK. The other half of the complaints relate to the retail charges set by the mobile OCPs which are excluded from this cap and not subject to any equivalent AC cap. In reality, it is almost certainly the case that far more than 50% of those complaints relate to mobile originated calls simply because the charges set by the mobile OCPs are so much higher. Certainly that accords with the proportion of complaints which TNUK itself receives.

Some support for this can be found in PPP data which confirms that in 2011 84% of all complaints that it received related to mobile services¹³. Almost certainly the vast majority of those complaints relate to premium SMS services which constitute the largest element of the PRS market. However, to the extent to which they might include 118, they must necessarily relate to the high cost of mobile originated calls (set by the mobile OCPs) and not the lower cost of BT originated calls (set by TNUK).

Ofcom will be aware that the premium applied by the mobile OCPs to the cost of 118 calls is the issue which has most concerned TNUK throughout this entire process (and it is a complaint with which we believe Ofcom has some sympathy). And yet, Ofcom finds itself in the perverse situation of using consumer complaints about the level of that mobile OCP premium to justify imposing a price cap on the 118 SC – a price cap which will do nothing to address the problem complained about, but which will only discriminate against the DQ SPs.

The end result is that Ofcom is using evidence of perhaps 2 or 3 complaints at most which it receives per month about the (service) charge set by TNUK to justify imposing price regulation on those charges. At the same time, it is not proposing to cap the mobile AC in response to the (almost certainly greater number of) complaints it receives about the level of the retail charges set by the mobile OCPs. Worse, it is misinterpreting those complaints and using them to justify a regulation which will have no impact on them. The fundamental flaw in that analytical approach should be obvious.

Moving beyond the small number of complaints identified, Ofcom yet again falls back on the same consumer price awareness argument (that unbundling will reduce competition and thereby encourage SPs to raise prices), which it appears intent on including within every assessment criteria. We have already outlined above why that argument has no merit, but the fact that Ofcom continually seeks to repeat and rely upon it, demonstrates the lack of any other available evidence to support Ofcom's case.

Finally, it is also worth noting that in May 2011 Ofcom published a Call for Inputs in relation to 'Unexpectedly High Bills'¹⁴. It does not contain a single reference to the 118 number range. In March this

¹³ PPP Quarterly Operational Report Q3 2011- http://www.phonepayplus.org.uk/About-PhonepayPlus/~media/Files/PhonepayPlus/Corporate/Quarterly_Report_2011_12_Q3.pdf

¹⁴ <http://stakeholders.ofcom.org.uk/consultations/unexpectedly-high-bills/summary>



year, Ofcom published the resulting '*Review of Unexpectedly High Bills – Findings and Next Steps*'¹⁵, which it described as "*an extensive evaluation of the issue of unexpectedly high bills*". The only reference to 118 is in a footnote which simply mentions it as one of several non-geographic number ranges which feature as part of this NGCS Review.

This provides yet more evidence which further undermines Ofcom's apparent attempt to impose price regulation on the basis of complaints about bill shock which it says it has received.

Fraud

There is simply no evidence whatsoever in this consultation or anywhere else of fraud ever having existed on the 118 number range.

TNUK has been operating in the DQ market since liberalisation a decade ago and has been the market leader ever since. We have never come across a single example of fraud on the 118 number range in all of that time. In that context, it is astounding that Ofcom has even raised the issue, let alone attempted to justify regulation on the basis of it.

It is even more remarkable considering the updated position which Ofcom has adopted in respect of fraud in the April 2012 consultation, compared with the December 2010 consultation. That is Ofcom no longer believes that fraud exists to any material extent on any non-geographic number ranges and therefore it is no longer seeking to use it as justification for introducing unbundling, as had previously been the case. It is notable that in reaching that conclusion (just a few months prior to publishing this consultation) Ofcom made no mention of the possibility of fraud existing on the 118 number range.

In the April 2012 consultation, Ofcom acknowledges that fraud only exists to any material degree on the 070 number range and that is specifically because of the similarity in the public's mind with the 07 mobile number range, which fraudsters are able to exploit. By contrast, 118 is almost certainly the most well recognised of any number ranges, which is very largely a result of the significant level of marketing and advertising activity undertaken by TNUK over the past decade. So not only is there no evidence of fraud, but any objective analysis would conclude that 118 is also the number range least likely to be the subject of fraud, because of how well understood it is.

In highlighting the very low level of complaints which Ofcom has received, Ofcom even goes so far as to comment that fraud "*may have been limited*", as if to suggest that there is any evidence whatsoever that it even exists.

Having found no evidence of fraud, Ofcom is left only to conclude that "*if we did not set a cap on the SC this could increase the incentives for fraud*". Once again, this statement has no foundation and is contradicted by the available evidence. For a decade, 118 call charges have been uncapped and yet there has been no fraud. There is therefore no basis for a belief that a continuation of the status quo would suddenly somehow create an incentive which has never previously existed.

¹⁵ <http://stakeholders.ofcom.org.uk/consultations/unexpectedly-high-bills/statement/>



Moreover, Ofcom's specific justification for imposing a 118 SC price cap at para 4.73 states that "*in the absence of a cap, prices will be set at a higher rate than would otherwise be the case, increasing the incentives for fraud...*" Again, the statement lacks basic logic. Each 118 number is a separate entity and so the level of the SC set by the established and reputable players in the market has no impact on whether or not potential fraudsters target the 118 number range and creates no incentive for them to do so. Therefore there is no reason to limit the commercial freedom of those reputable players.

Conclusion on fraud and bill shock

Despite having to acknowledge a very low level of complaints (which may or may not be related to SC bill shock) and a complete absence of any fraud, Ofcom somehow still manages to conclude at para 4.54:-

"We therefore believe that there are strong arguments to set a maximum SC cap to ensure that consumers are adequately protected against the risk of bill shock and fraud."

This is an extraordinary and irrational conclusion in the circumstances.

TNUK rejects entirely the notion that considerations of fraud should feature within Ofcom's justification for a 118 SC price cap, in view of the complete lack of evidence that fraud exists today or may exist in the future. Whist bill shock may be a more relevant fact to consider, Ofcom's evidence is that the level of complaints in relation to the bill shock resulting from the level of 118 SCs is extremely low. TNUK therefore cannot accept that it provides any basis for the introduction of intrusive price regulation.

Bad Debt

TNUK is acutely aware that OCPs (and mobile OCPs in particular) have been pressing Ofcom hard to allow them to set a higher 'premium rate' access charge for calls to 09/118 services on the basis that those calls generate a higher level of bad debt. However, we are equally aware that they have provided no evidence whatsoever to support this bald assertion. Specifically, they have provided no evidence of the level of bad debt currently generated on calls to 118 and indeed we strongly suspect that they have not even investigated or calculated it themselves prior to making the complaints that they have made.

In the April 2012 consultation, Ofcom discussed the issue of bad debt based on the 5.2% BT PRS Bad Debt Surcharge and at page 23 of our response we explained why that figure bore no resemblance to the actual level of bad debt generated by other (predominantly mobile) OCPs on calls to 118. In particular, we noted that two of the three reasons identified as causes of bad debt on the 09 number range do not apply to 118 and that the mobile OCPs almost certainly generate a far lower level of bad debt than BT.

TNUK recognises that 118 calls are likely to generate some level of bad debt for OCPs. But Ofcom is proposing to impose SC price regulation without any analysis or evidence as to what the level of bad debt might be, let alone any analysis as the magnitude of the distorting effect on the AC and whether or not the level of the SC cap which it is proposing is at the right level to address that distortion.



In the absence of evidence to the contrary, TNUK does not accept that the level of bad debt on 118 calls will have any distorting effect (and certainly none which would justify SC price caps). Ofcom's evidence from the Flow of Funds Study is that 118 call volumes constitute just 1% of total NGC volumes. This very strongly suggests that any distorting effect of bad debt generated on a very small percentage (probably no more than 1% or 2%) of this very small number of calls would be negligible and in reality would almost certainly not exist at all.

Indeed the fact that no OCP (or Ofcom) has even attempted to calculate the actual level of bad debt on 118 calls of itself demonstrates that no distorting effect can occur, because if OCPs do not know the level of bad debt which they are generating, how can they adjust the level of their AC to take account of it?

Moreover, Ofcom has once again overlooked exactly the same critical issue which it overlooked in respect of the volume of bill shock complaints. That is the distinction between charges set by TNUK and charges set by OCPs. Specifically, in this case the distinction is between bad debt currently generated by the (service) charge element of the call set by TNUK and bad debt generated by the additional premium element of the call charged by mobile OCPs to their customers.

Depending on the individual mobile OCP and length of the call, that premium can constitute well over 30% of the total cost of the call¹⁶. Of course, TNUK recognises that under unbundling a single access charge will ensure that OCPs are not responsible for a greater amount of bad debt on 118 calls than they are on other non-geographic calls. (That said, as the AC will be uncapped, there is no way of knowing how high it will be set and therefore what level of bad debt it might generate by itself.)

But that is not the situation today. Today mobile OCPs are sometimes responsible for over 30% of the bad debt generated on 118 calls, so if Ofcom is basing its proposals on current levels of bad debt which it can measure, it needs to take account of this effect which it has so far failed to do.

However, Ofcom has not undertaken any such analysis. TNUK would question why Ofcom has not taken the straightforward step of issuing statutory s135 information requests to OCPs requesting details of their bad debt on 118 calls. This information could then be used to calculate the likely distorting impact which it would have on the level at which they set the AC, which in turn would allow Ofcom to assess what level of SC cap might be required to remedy that effect. In the absence of such a calculation, TNUK cannot accept that Ofcom has provided any evidence that bad debt justifies a cap on the 118 SC (and that Ofcom has not simply taken this decision as a concession to the OCPs for having implemented a single AC).

Regulatory Burden

TNUK agrees that it would not incur any significant regulatory burden as regards implementation costs resulting from the imposition of a cap on 118 SC. We do not consider that the DQ market is suited to SPs agreeing between themselves the level of a self-imposed cap, so we do not think that this is a relevant consideration.

¹⁶ For example 34% on a one minute call from Orange or T-Mobile or 33% on a 5 minute call from Vodafone at current prices



For reasons already explained above, TNUK does not accept Ofcom's argument that a SC cap will benefit 118 SPs by enhancing consumer confidence. In any case, the argument is not relevant to the regulatory burden and Ofcom has already made it in relation to consumer awareness.

We note Ofcom's statement that it is not proposing to set a cap on the basis of a detailed analysis of underlying costs, which will therefore minimise regulatory costs. Whilst we certainly agree that Ofcom's lack of detailed analysis generally will minimise costs, we do not regard this as optimum approach. Although we further agree that underlying costs are not relevant to Ofcom's process for setting a cap, we have highlighted throughout this response many other areas in which we believe that Ofcom's analysis and evidence gathering is clearly lacking. If Ofcom had done the analysis which we believe is required, it would have added to the regulatory burden of imposing a price cap.

However, TNUK does believe that the issues of restricting SPs' pricing freedom and the risk of unintended consequences from the setting of the cap are significant and we address these in further detail in response to Question 4.8 concerning the level at which any cap may be set.

Access to directory enquiry services at affordable prices

As we outlined in response to Question 4.1 above, we welcome Ofcom's concern about ensuring the affordability of DQ services, although we note that it did not mention the Universal Service Directive obligations in either the December 2010 or April 2012 consultations.

However, Ofcom has once again overlooked the critical issue highlighted twice above, which is the distinction between the (service) charges set by TNUK and the additional premium (access) charge applied by the OCPs. In this case the issue is fundamental because the proposed price regulation will only apply to the SC element of the call. The AC element of the call will be entirely unaffected and uncapped, which means that the total charge payable by the consumer will also be uncapped – half a cap is no cap at all.

Ofcom does not comment on what it regards as an 'affordable price' for DQ services, but whatever price that might be, Ofcom's proposed SC price regulation will not ensure that the cost of calls to DQ will not exceed it, because it is placing no cap on the AC. Although the point is obvious, Ofcom does not even acknowledge it when discussing this issue. If Ofcom's regulation cannot ensure the protection of consumers then there must be doubt that it has the power to impose it under the powers stemming from the Authorisation Directive which Ofcom has chosen to use to implement its decisions in this area.

In conclusion, attempting to justify the imposition of a SC price cap on the basis of ensuring affordable access to DQ services would appear to fail a very basic and simple test. So TNUK does not consider that it is a relevant consideration and should not therefore form part of Ofcom's reasoning.

Furthermore, Ofcom yet again falls back on the argument that a 118 SC cap is required because the introduction of unbundling (or "*regulatory change*" as it is called in this context) will reduce competition and therefore lead to an increase in 118 SCs or "*exploitative prices*" as Ofcom describes them. TNUK continues to believe that this argument is without merit and unsupported by any evidence or analysis.



Instead, we agree with Ofcom's contrary argument (which forms the entire basis of its December 2010 and April 2012 consultations) that unbundling will increase competition and therefore place downward pressure on prices. Whilst it may not ensure that DQ prices remain at any specific 'affordable' price (because the AC will remain uncapped and unrestricted), it should impact both SCs and ACs and therefore provide a more effective means of addressing the price actually paid by consumers, than a cap placed on only half the price. In an unbundled scenario there is no need on the evidence to interfere with the almost certain identifiable positive consequences of competition and the benefits that this will bring the consumer.

Question 4.4: Do you agree that a different maximum SC for calls charged on a per call basis and calls charged on a per minute basis is appropriate?

Ofcom will be aware that DQ services typically operate on a combination of a call set-up charge followed by a per minute tariff. Although the per call model has not historically been the most attractive to DQ SPs, that is not to say that it might not form the basis of some innovative and beneficial services or business models in the future. TNUK is certainly therefore very interested in its continuation and what level of regulation is being applied to it.

However, notwithstanding our objection to a 118 SC cap in principle and our comments below on the level of those caps, we agree that it is logical to set different maximum SCs for calls charged on a per call and a per minute basis.

Question 4.5: Do you agree that we should use the RPI measure of inflation to uplift the BT's current maximum retail price for 09 calls to derive the maximum SC under Option 1?

For reasons of consistency with existing Ofcom regulation in other areas, TNUK agrees that RPI is the correct measure of inflation for these purposes. Whilst we note that Ofcom's preferred option does not involve any current or future planned inflationary increases (and so the measure of inflation is therefore entirely academic), TNUK disagrees with this approach. As we explain further below, we believe that whatever option Ofcom chooses should be subject to inflationary increases and therefore the issue is relevant.

Question 4.6: Do you agree that we should not uplift the SC caps by inflation on an annual basis?

TNUK strongly disagrees that the SC caps should not be uplifted by inflation.

We provide much more detailed comment in response to Question 4.8 on the appropriateness of the SC caps in each of Ofcom's proposed options. But for the purposes of responding to this question we will assume that they are 'correct' and the only issue is whether they should be adjusted for inflation.

Ofcom comments that an inflation increase "*is likely to be more attractive for Option1*", but surely it is a matter of common sense that it must be so adjusted. This review has been prompted by the problems caused by the fact that the existing £1.53 cap has not been increased by inflation. So for Ofcom to make a single one-off inflation adjustment and then allow the problem to continue exactly as before clearly makes no sense.

However, TNUK believes that the arguments in favour of inflation increases for options 2 and 3 are equally strong. Ofcom appears to have three arguments to the contrary:-



1. *"we consider that the level of the cap would already reflect any potential increase in the costs of SPs since we introduced BT's retail cap in 1997"*
2. The proposed caps would *"provide some parity"* with mobile shortcodes
3. *"consumers would need to be aware and remember the regular movement of the cap"*

All of these arguments are without merit. We will comment briefly on each in turn.

Firstly, TNUK accepts that the proposed level of caps take account of inflation since 1997, but the issue is how to take account of further inflationary rises over an indefinite future period of time, so Ofcom's comment about past inflation is irrelevant in this context.

Secondly, the proposed caps would only provide parity with mobile shortcodes at current rates and assuming they themselves do not move with inflation, which is most unlikely. As Ofcom notes, the self-imposed maximum is actually £10, so the current *"most common retail price"* of £5 seems certain to increase over time. Indeed, it seems quite likely that the £10 cap itself will be increased over the indefinite time period which Ofcom is considering and there is certainly nothing to prevent it.

Thirdly, there is clearly no requirement for consumers to be aware of the movement of the cap, any more than they have ever been aware of the level of any other price regulation which Ofcom has previously imposed. Price caps are intended to protect consumers by restraining prices (usually in situations of weak competition) and so it is only important to ensure that CPs comply with them. Whether consumers know the level of the cap is irrelevant, particularly if Ofcom expects the majority of prices to be well below the cap. That is why Ofcom has never proposed any measures to publicise price caps to consumers and nor does it propose to do so in this case.

TNUK believes that at whatever level Ofcom decides to set the caps, there can be no logical reason not to include an annual inflationary price adjustment. Ofcom will presumably have sufficient faith in its analysis that it will set the caps at the 'correct' rate for when they are implemented in mid-2014. It must believe that it is setting caps which are neither too high nor too low. If that is the case and Ofcom does not allow for an inflation adjustment, then by definition the level of the price cap will become 'incorrect' and out of date over time.

TNUK would stress again that Ofcom has set no timeframe or end-point for reviewing the level (or existence) of the caps. It acknowledges that the absence of an inflation adjustment *"may require us to review the SC caps in the future"*, but is no more precise or definitive than that. Without any greater level of confidence being provided, TNUK believes that Ofcom should still allow for an inflation adjustment to take effect in the interim or absence of any other Ofcom review. The need should be even more obvious to Ofcom because this review has only been made necessary by the fact that the existing £1.53 PRS cap was not adjusted for inflation. As Ofcom has acknowledged the adverse impact which this has caused, it should be keen to avoid a repeat in the future.

Moreover, as we discuss in response to Question 4.8, the £1.53 cap in Option 1 itself appears to have no particular logical foundation to it (certainly as regards 118 calls). Therefore, if it is no more precise or



'correct' than Options 2 or 3, there is equally no reason to conclude that those options have any less a requirement for an inflation adjustment than does Option 1.

Question 4.7: Do you agree that the maximum SC cap should be set exclusive of VAT?

As outlined in our response to the April 2012 consultation, TNUK agrees with Ofcom's analysis of the benefits and disadvantages of setting VAT inclusive or VAT exclusive SC caps. TNUK agrees that whilst setting VAT exclusive caps, may not be ideal, it is clearly preferable to setting VAT inclusive caps for all of the reasons which Ofcom has outlined.

Question 4.8: Do you agree that Option 2 (a £3 per minute and £5 per call cap) is the most appropriate maximum service charge limit for 09 and 118 numbers? If not, please explain why.

We will discuss below Ofcom's analysis of its three options in accordance with each of its assessment criteria. However, we are most concerned to note that virtually all of the evidence relates to the 09 number range, which has very little relevance to 118.

We find this both surprising and disappointing given the fact that (according to PPP figures¹⁷) DQ is the PRS segment generating the greatest amount of revenues in 2011, higher than all 09 services combined. As such, we believe that it deserves more serious consideration rather than just being as an after-thought or an 'add-on' to 09 in this consultation.

Specifically, (and most critically) the proposed level of caps in each of the options appear to have been provided by the 09/PRS industry and certainly have not been subject to any prior consultation with DQ SPs.

Option 1

Whilst TNUK understands the reasons for including this option, Ofcom provides no explanation or comment on the underlying historical basis for the £1.50 limit set in 1997. It simply accepts it as 'fact', but without any further analysis or justification TNUK believes that it has very limited credibility. In particular, we do not believe that a limit for 09 calls set in 1997 has any relevance at all to a possible cap for 118 calls in 2014. So whilst we welcome the fact that this is not Ofcom's preferred option, we see no logical basis why it was even included for consideration in relation to 118 calls.

Options 2 & 3

In relation to the price per minute options, Ofcom states at para 4.111 that:-

"Stakeholders have indicated to us that a cap at £3 per minute would allow them to offer the full range of services that they are willing to provide on the 09 range"

before making similar comments about Option 3 with reference to the views of the PRA and AIME.

¹⁷ PPP 'Current & Future Market for PRS 2011' Report



In relation to the price per call options, Ofcom makes no reference at all to 118 when it states at para 4.104 that the £5 figure is based on the most common charge from mobile shortcodes and that:-

"We consider that a cap on the SC at this level will allow service providers to offer equivalent services on the 09 range to those currently provided via mobile shortcodes"

Similarly, Ofcom's discussion of the price per call Option 3 is based entirely on a consideration of 09 charges and how they relate to mobile shortcodes and again references the views of AIME.

Clearly, Ofcom has been discussing the issue of the level of caps with the 09 industry to address their concerns and the PRA itself suggested the £3, £5 and £10 per minute and per call options. But we are extremely concerned that there has been no equivalent discussion with DQ SPs and instead Ofcom has simply chosen to apply the same limits.

TNUK assumed that Ofcom's statement in the December 2010 consultation that *"we propose not to implement maximum prices for the [118] service charge"* meant that it did not intend to implement maximum prices for the 118 SC. As a result, we did not address the question of the level of possible SC caps in our response.

However, not only is this no longer the case, but Ofcom has simply taken the views expressed by the PRS industry and commuted them as if they can equally be applied to 118, which is clearly inequitable. TNUK recognises that this review began as a consideration of whether to increase the PRS cap. Subsequently, it has been enlarged to encompass the question of whether to cap the 118 SC, but in the process DQ has been excluded from much of Ofcom's thinking, certainly as regards the appropriate price points, with no discussion with the DQ industry.

We will now proceed to consider Ofcom's analysis in relation to each of its assessment criteria.

Transparency/consumer price awareness

It is notable that in all of Ofcom's discussion about the role of price caps in improving transparency and consumer price awareness of the SC, nowhere does Ofcom even refer to the separate regulatory obligations on the SPs regarding publication of the SC. As we understand it, this will require all SPs to provide pricing information wherever they publicise or promote their number.

In the April 2012 consultation, Ofcom places great emphasis on these requirements and the fact that they should ensure that consumers always have ready access to SC price information. In Ofcom's view, this is a core part of the effective functioning of unbundling and its positive impact on competition. Yet in this consultation that reasoning is entirely absent, which conveniently provides Ofcom with the opportunity of saying that price caps are required in order to improve consumer transparency, whereas in fact there are other obligations already in place which are designed to achieve exactly that aim.

Whilst at a simple level it may be correct that a lower price cap reduces the price points and thereby assists price transparency, the same effect could equally be achieved by raising the price floor, but Ofcom is not recommending that. Similarly, a reduced number of price points also equates to a reduced level of price



competition, which would have a far greater adverse economic impact. As such we cannot attach much credence to consumer price awareness as a reason for imposing a lower level of price cap.

On the contrary, we agree with Ofcom's primary argument that unbundling combined with the SC publication requirements will significantly improve transparency and consumer price awareness, which is one of Ofcom's principal reasons for introducing it. We believe that other arguments concerning transparency and price awareness within the context of unbundling are inconsequential in comparison.

Ofcom also does not refer in this section to the existing PPP obligation on DQ SPs to inform consumers of the price of the call before providing onward connection, which is of critical importance to any discussion of transparency/consumer price awareness in relation to the 118 number range. However, we think it is actually even more relevant to a discussion of bill shock and therefore we deal with it in more detail below.

Efficient Prices

Once again TNUK is disappointed to note that Ofcom's discussion in this section relates almost entirely to 09, with very limited reference to 118. In fact for some reason it also seems to be primarily concerned with drop charges, rather than per minute charges.

Before discussing the key price efficiency issues of consumer demand and focal points, it is worth highlighting the obvious flaw in Ofcom's justification for not setting the caps in line with the highest charges which apply on mobile shortcodes. Ofcom's reasoning is that whilst the retail charges may be very different, the wholesale payments to SPs are likely to be broadly similar because of the mobile OCPs very high retentions.

This is a very odd justification in view of the fact that most of Ofcom's discussion about efficient prices (and these price caps generally) revolves around levels of consumer demand and price awareness, as well as bill shock, bad debt and affordability etc. All of these arguments depend entirely on retail charges paid by consumers and not wholesale payments to SPs, which are irrelevant in these circumstances. Yet, when Ofcom is seeking justification for imposing discriminatory or asymmetric caps it relies on a wholesale argument, which does not feature anywhere else.

Consumer Demand

We agree that the key issue in an assessment of the level of the cap as regards efficient prices is the degree of consumer demand for services at a particular price point. However, the question of consumer demand appears to fall into two quite distinct categories. Firstly, what will be the level of demand for existing DQ services in the future at particular price points. Secondly, what will be the level of demand for new/different 'DQ' services in the future at particular price points. Ofcom appears only to have considered the former, although it is clearly the latter which is more likely to generate a demand for services at higher price points



- *Demand for existing services*

It is impossible to comment on the level of demand for existing services without any clarity as to the timeframe in respect of which Ofcom is assessing that demand.

For example, TNUK agrees that as of today (in 2012) there is no evidence of consumer demand for existing DQ services costing more than £3/min. But the regulation is not due to come into effect until at least mid-2014 and therefore that is the earliest date at which the question of consumer demand becomes relevant. TNUK has no evidence of likely consumer demand in mid-2014.

However, Ofcom has not proposed any sunset provisions or said anything substantive about the need to review the level of the caps at any particular point in the future. (By contrast, each of the international roaming regulations have included specific sunset provisions requiring them to be reviewed and deadlines by which the regulation would cease to have effect, if not reviewed.) Therefore, the question of whether there will be consumer demand for existing services above £3/min in 2016, 2017, 2018 or beyond becomes an equally relevant consideration (not least because the current PRS cap has remained unaltered for 13 years).

Within that context, TNUK believes that it is highly likely that there will be consumer demand for some kind of 118 services costing more than £3/min at some future date. That means that Ofcom's proposed level of cap will almost certainly impact SPs' pricing freedom in a way that runs contrary to consumers' preferences with all of the adverse effects which will inevitably follow in terms of efficient prices. Unfortunately, Ofcom has not even considered the question and rather surprisingly appears only to be thinking in terms of current demand in 2012. That cannot be the correct approach and runs the risk of causing permanent damage to the DQ sector.

It is worth noting the potential impact of the Proposed EU Data Protection Legislative Framework and the intention to require consumers to have to opt-in to including their data in directories, which would change a key dynamic for TNUK in terms of how we can acquire directory data. This in turn could fundamentally impact one of the core cost drivers of DQ SPs and inevitably any increase in costs of this kind may ultimately be passed on to consumers. Therefore, even continuing to provide the same service which we are currently providing is likely to become far more expensive for TNUK which could lead to an increase in the SC paid by consumers.

- *Demand for new services*

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Case Study 1 –





Focal Point

Ofcom correctly identifies the problem of a price cap becoming a focal point but it is worth noting that the problem is entirely of Ofcom's own making in the sense that if there was no unnecessary price cap, there would be no concern about it becoming a focal point. However, having identified the potential problem of the cap becoming a focal point, Ofcom seems to interpret it in a somewhat peculiar manner. Ofcom's position in para 4.138 is that:-



“Where there is a risk that a cap may become a “focal point”, lower caps (e.g. Option 1 or 2) may be more appropriate than higher caps (e.g. Option 3) to prevent SPs setting excessive prices.”

However that approach entirely overlooks the obvious question of what level of cap is more likely to become a focal point. Ofcom seems to assume that the risk is the same regardless of the level of the cap, but that is clearly not the case. Self-evidently, a lower cap is much more likely to become a focal point than a higher cap because it is that much closer to existing prices and therefore the incentive and ability of providers to raise their prices to the level of the cap is all the greater.

Unfortunately, (as regards DQ) Ofcom seems to have chosen a level of cap which is most likely to maximise that adverse effect of becoming a focal point, by choosing a level which exactly matches the highest priced services currently in the market. If the cap was set above the level of any existing charges, it would be much more commercially difficult for providers to risk increasing charges to a much higher level than any other provider has previously charged and thereby undermining use of their services. Put simply, providers are much less likely to increase their prices in response to a higher cap and much more likely to increase their prices in response to a lower cap. Although the incentives should be obvious, Ofcom appears to overlook it entirely.

As we explained in our response to the April 2012 consultation (and we reiterate below in response to Q5.2), that is exactly what happened in Germany (although in that case it was a de-facto cap in the form of a PCA which became a focal point, rather than an absolute cap.)

Although the level of cap proposed by Ofcom is higher than that that in Germany, the difference in timeframe (2006 versus beyond 2014) negates that difference. TNUK believes that the German experience strongly suggests that a higher level of cap is preferable. Whilst we are conscious of Ofcom’s intention that the cap should prevent excessive prices, we nevertheless believe that it must be set a level somewhat beyond all existing prices in order to remove (or minimise) the incentive for all prices quickly to converge at that point.

Service quality, variety and innovation

There is limited additional analysis in this section compared to what has gone before, so TNUK has little further comment to add. We will therefore very briefly reiterate comments previously made as they are relevant to an assessment of service quality, variety and innovation.

Ofcom again frames its analysis in terms of higher caps providing stronger incentives for service innovation versus lower caps providing protection against bill shock and fraud and thereby increasing demand. We have already highlighted above the lack of evidence to support the need for a cap to address problems of bill shock and particularly fraud and we note that Ofcom appears to be deploying these same arguments again and again to support its case for caps in relation to every assessment criterion.

As discussed above, Ofcom’s analysis in this section is again based only on current prices in 2012 and takes no account of the fact that the regulation will not be implemented until mid-2014 and then apply for an



indefinite period beyond that. We therefore disagree that Ofcom's proposed caps will provide sufficient headroom for 118 services going forwards.

TNUK is therefore most concerned that service quality, variety and innovation will inevitably be damaged in the future as the immovable price caps which Ofcom imposes begin to bite increasingly hard on the commercial freedom and flexibility of DQ SPs.

Consumer exposure to fraud and bill shock

When will a problem occur?

Throughout the consultation, Ofcom relies very heavily on protection from fraud and bill shock as justification for imposing price regulation. Therefore, the question of whether Ofcom's preferred option has been set at a level which best addresses those apparent problems is absolutely critical.

However, on this point, Ofcom provides no evidence at all. Indeed, its analysis consists of a single short paragraph (4.153) which does no more than repeat the obvious point that a lower cap provides greater protection against bill shock than a higher cap. That is wholly insufficient justification for imposing intrusive price regulation.

The question which therefore necessarily arises is why does Ofcom believe that bill shock and fraud is most likely to be a problem at £3/min and £5/call, rather than at any higher or lower level? Why not £4/min and £6/call or even £2/min and £4/call? There is simply no attempt at any analysis on this point, although the implications of the decision are potentially hugely significant.

Of course, the problem which Ofcom faces is that there is no evidence to assess because there is currently no level of bill shock or fraud to measure and no (appreciable) call volumes at the level of charges which Ofcom is proposing to cap. Ofcom is simply guessing that fraud or bill shock might be a problem at £3/min and £5/call.

TNUK accepts that there will be a level of call charges at which bill shock becomes a real problem (although we do not accept that the same applies to fraud because there is no evidence that fraud has ever or will ever occur on the 118 number range). However, we do not know what that level is or indeed whether DQ retail charges will ever reach it. Similarly Ofcom also does not know, but nonetheless it has decided to guess and impose intrusive price regulation on the basis of that guess.

But what if Ofcom is wrong? What will Ofcom do in two or three years' time if it begins to detect evidence of fraud or bill shock at a lower level than the cap which it has set? Will it do nothing on the basis that it has already chosen the cap and implemented the regulation or will it take action to protect consumers, despite the charges being below the cap? If it will take action, then what is the purpose or benefit of Ofcom's current approach of guessing several years in advance at what level a problem might occur, rather than forbearing to see at what level the problem actually does occur and regulating accordingly?



Such an approach would clearly be much more in line with Ofcom's much promoted regulatory principle that *"Ofcom will operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required."* However, in this case, its preferred approach seems to run directly contrary to that principle.

Existing transparency obligations

A significant issue relating to possible bill shock on 118 calls concerns the variable length of those calls. DQ calls tend to fall into two distinct categories, which relate to whether or not onward call connect is also provided. The average length of a call to 118 118 is about 90 seconds, which is approximately how long it takes to request and receive a number. The short length of those calls of itself determines that bill shock is not a problem

Invariably, the only way in which calls may be significantly longer (and generate a higher bill) is where consumers have asked to be connected to the number which has been provided. However, in those instances the existing PhonepayPlus regulatory requirement (that DQ SPs must clearly inform customers of the price of a call before providing onward call connect¹⁸) directly addresses the problem of bill shock. This is a matter on which Ofcom will have been consulted by PPP and had to agree to the requirement.

Our analysis over a number of years shows that there are few calls which fall between the short/average length (where bill shock is not a problem) and the longer onward call connect length (where specific consumer protection against bill shock already exists). However, Ofcom makes no direct reference to the PPP requirement in this section despite its obvious relevance.

TNUK believes that the PPP regulation already provides significant consumer protection against possible bill shock on 118 calls and therefore further undermines the need for a SC cap to perform the same purpose.

Bad Debt

Ofcom begins this short section at para 4.155 with the statement:-

"Due to the nature of payments in the NGCs market, calls made from an OCP are often left unpaid and result in bad debt costs". [emphasis added]

That is a quite remarkable statement in view of the fact that it is self-evidently not true that non-geographic calls are *"often"* unpaid and result in bad debt. Even the 'worst case scenario' evidence that Ofcom does have is that BT's PRS Bad Debt Surcharge on 09 calls is 5.2%. Whilst TNUK strongly contests that 5.2% is the correct figure for the level of DQ bad debt (particularly for mobile OCPs), in any case it can hardly be described as meaning that call charges are often unpaid. Unfortunately, Ofcom's loose use of language

¹⁸ The PPP Directory enquiry service provider guidance note states at paragraph 2.3 that "prior to further connection being made by the provider, the consumer should be clearly informed of the cost, and have the opportunity to opt out of the connection".



sets the tone for attempting to justify its intention to cap the SC in order to limit OCP bad debt, regardless of the evidence which is actually available.

Beyond that TNUK has nothing further to add to the points already made above in relation to bad debt. We would simply reiterate that OCPs have not provided (and Ofcom has not otherwise obtained) any evidence of the level of bad debt generated on 118 calls. As a consequence, Ofcom has made no assessment of the degree to which that level of bad debt may have a distorting effect on the level of the AC set by the OCPs. TNUK strongly believes that the available evidence indicates that the distorting effect will be extremely small and in reality almost certainly does not exist at all (particularly taking into account that a significant level of any existing bad debt will be due to the OCPs' own additional premium, rather than the level of the charge set by DQ SPs).

In the absence of any such assessment, it is impossible for Ofcom to go on to assess what level of price cap is required to remedy any possible distortion, which should be the purpose of this section of the consultation. Instead, Ofcom is forced to rely on the simplistic statement that a lower cap is likely to result in a lower level of bad debt, which falls some way short of any proper assessment of what level of cap may actually be required.

Regulatory Burden

Again, TNUK has nothing substantive to add to points already made above in relation to regulatory burden.

We acknowledge that there will not be any significant costs of implementation, but we disagree that "*the potential for unintended consequences is likely to be greater for higher SC caps*" as this naturally depends upon which unintended consequences one considers. By focusing again on the (entirely unsubstantiated) risk of fraud, Ofcom ignores the fact that the lower SC caps create a much greater potential for unintended consequences in respect of 'service quality, variety and innovation' as well as 'efficient prices'.

TNUK also strongly disagrees with Ofcom's view that a higher SC cap creates a greater risk of the cap becoming a focal point. For reasons already explained, this is palpably not the case and we believe that the opposite is true i.e. the lower the cap, the greater the chances of it becoming a focal point because it is closer to existing prices and therefore maximises the incentive and ability of providers to increase their prices to that level.

Access to directory enquiry services at affordable prices

We note that in this section Ofcom is very hesitant in using this as justification for a SC price cap. We assume that it acknowledges the points which we have already made above relating to the fact that a SC cap will only apply to part of the cost of the call. As the AC will remain unrestrained and uncapped, a SC cap cannot be effective at ensuring the availability of DQ calls.

Again, we agree with Ofcom that the better argument is that the introduction of unbundling will itself ensure access to DQ services at affordable prices, because of the greater level of transparency and competition which it will bring, thereby exerting downward pressure on prices. We reject once more the



suggestion that a cap is required in order to “*avoid demonstrably exploitative pricing*” as it has no evidential support and runs contrary to Ofcom’s principal argument about the pro-competitive benefits of unbundling.

Question 5.1: Are there any other consumer protection measures we should consider for the 09 and 118 ranges? Please explain why you consider any additional measures you identify might be appropriate.

TNUK does not believe that additional consumer protection measures are required and does not have any suggestions to make in this regard

Question 5.2: Do you have any comments on our assessment of the costs and benefits of a pre-call announcement on the 09 and 118 range? Please provide reasons for your view.

TNUK notes that Ofcom is not currently proposing to implement any additional consumer protection measures in conjunction with its preferred Option 2 and this would include PCAs. However, we also note Ofcom’s statement at para 5.55 that if it were instead to implement Option 3 it believes that additional consumer protection measures would in fact be required and it considers “*that the pre-call announcement is likely to be the most effective means of addressing the increased risk of harm that may flow from SCs within the Option 3 ranges*”.

TNUK therefore feels that it is important to comment in some detail on the possible imposition of PCAs, even though it is not currently Ofcom’s preferred option. We will outline below the results of our research on consumer attitudes to PCAs, but first we would like to highlight some additional points which appear to have been overlooked in Ofcom’s analysis.

Firstly, Ofcom identifies improved transparency and price awareness at the point of call as the key benefit of a PCA. However, Ofcom overlooks (and does not even acknowledge) the fundamental weakness of such a PCA, which is that it would only apply to the SC and therefore would provide no information about the actual retail cost of the call which the consumer will pay i.e. SC plus AC. One might reasonably conclude that a partial PCA is no PCA at all, because it does not fulfil the key objective of informing customers of the price of the call. In view of all of the disadvantages in terms of consumer experience (which we outline below), PCAs in an unbundled scenario appear to have extremely limited benefits.

Ofcom refers to the existing PCA on the 0800 range and the previous attempt to impose a PCA on the 070 range, with reference to the costs and method of implementation. But it does not seem to acknowledge that a PCA in an unbundled scenario is fundamentally a very different proposition. It may be easier and cheaper to implement (because it does not require the interrogation of databases of tariffs by number), but as a consequence it is therefore of very significantly reduced value to consumers. Ofcom’s failure to recognise this point is a major flaw in its analysis.

Moreover, not only does a ‘SC only’ PCA very significantly undermine any value which it might otherwise have, but it actually risks confusing and misleading consumers in a way which could in fact be harmful. If the only details of a ‘pounds and pence’ price which are included in the PCA are the SC, it is very possible that a consumer who is not paying sufficient attention might assume that is actually the price of the call and overlook some vague and obscure reference to an ‘access charge’. Indeed, a consumer might well assume that the AC refers to their monthly line rental or perhaps some inclusive bundled minutes.



In that case, far from improving transparency or price awareness, a 'SC only' PCA would actively undermine it. It would give consumers false confidence that they understood the price of a call, which in some cases might increase, rather than lessen, incidences of bill shock.

Secondly, TNUK would reiterate the danger highlighted in our response to the April 2012 consultation that a PCA effectively becomes a de-facto cap, because DQ SPs are so anxious to avoid it due to the severely detrimental impact which it has on the consumer experience (as outlined below). As we previously mentioned, this is precisely what occurred in Germany.

In 2006, the regulator introduced an obligation on DQ providers to play a PCA for any call which cost €2/min (or higher). As a result, the two leading DQ providers in Germany (Deutsche Telekom and Telegate) both increased their charges in order to set them at exactly €1.99/min. TNUK is not aware of any DQ provider in Germany who charges in excess of that level. We have also been told informally that it is most unlikely that either Deutsche Telekom or Telegate will increase prices for the foreseeable future, due to the PCA. As we explain below in relation to our research, this is because PCAs undermine the fast and efficient nature of a DQ service, rather than because SPs do not want callers to know the price of the call. So although the PCA in Germany is not strictly a cap, it had exactly the same effect.

Thirdly, we highlighted in our response to the April 2012 consultation¹⁹ a great number of issues which Ofcom would have to address prior to the imposition of a PCA. Most of those issues have not been mentioned by Ofcom in this consultation and none have been addressed in detail. Whilst we recognise that may be because Ofcom is not currently proposing to impose a PCA, we are conscious that Ofcom is nevertheless maintaining PCAs as a backstop option if it should proceed with Option 3.

However, TNUK does not believe it would be acceptable for Ofcom simply to decide to impose a PCA without a far more rigorous and detailed analysis of at least the issues which we have highlighted. The short analysis contained in the current consultation is in no way sufficient to consider the major (detrimental) impact which PCAs would have on the market and whether they can be justified from a cost benefit perspective. To be clear, this is not simply a matter of implementation, as Ofcom states in para 1.18:-

"Should we consider, as a result of responses to this consultation, that it would be appropriate to implement additional consumer protection measures on the 09 and/or 118 ranges, we would anticipate that we would consult on the detail of any such proposal during the course of implementation period following the publication of our Statement."

Rather than simply considering the "detail of any such proposal" there are fundamental questions of whether to proceed with PCAs at all which Ofcom would have to address. TNUK would be extremely concerned if we did not have the opportunity to make representations on these issues before any final decision to implement a PCA was made.

¹⁹ Pages 8-9 of the TNUK response

**TNUK Research – Consumer Attitudes to PCAs**

At para 5.16, Ofcom refers to TNUK's response to the April 2012 consultation in which we briefly described how PCAs would adversely affect the consumer experience. Ofcom also refers to its own research from 2005 which supports this position, although the full results of the research (and questions related to PCAs in particular) do not appear to have been published. Therefore, TNUK decided to commission some new research specifically in order to understand consumer attitudes to the type of PCA which would apply to the SC in an unbundled scenario²⁰. Annex 2 of this response contains the detail of the research, but we will highlight the most relevant parts here.

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²⁰ The research was undertaken by international market research agency 2CV, who questioned 1,857 nationally representative consumers, which included 936 DQ users (identified as having made a DQ call in the last month).



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Question 5.3: If relevant, please provide an estimate of the likely costs that you would incur if a pre-call announcement were implemented on these ranges, taking account of any benefits it may bring.

As Ofcom is proposing that this obligation apply to TCPs, TNUK has no information concerning the costs of implementing a PCA on the 118 number range.

However, we would anticipate that TCPs would seek to pass these costs onto SPs and therefore the question is of significant interest to us. Unfortunately, if those costs had to be incurred, TNUK may have no option but in turn to pass those costs onto consumers, by way of an increased SC.



Question 5.4: Do you have any comments on our assessment of the costs and benefits of a consumer opt-in for 09 and 118 numbers? Please provide reasons for your view.

TNUK agrees with Ofcom that there are likely to be several very serious adverse consequences of implementing this option and few, if any, benefits.

The proposal appears to be that this would apply not only to new subscribers of any fixed or mobile OCP (who may be asked to opt-in as part of the subscription process), but rather to all existing fixed or mobile subscribers. That would mean that on the day the requirement was introduced, not a single person in the UK would have access to 118 or 09 calls, until they each opted-in.

Ofcom correctly identifies that the major adverse consequence would be the impact on demand. Indeed, TNUK believes that it would likely be catastrophic with a similar impact on associated SP revenues. That would not simply dampen competition and incentives to invest in service quality, variety and innovation, but it is likely in some cases to threaten the commercial viability of certain players in the market. At the very least, it would require them to invest in significant marketing campaigns in order to sustain their businesses by persuading consumers to opt-in.

The effect is not likely to be short-term. Indeed, it is highly probable that some (perhaps many) consumers would simply stop using 118 and 09 services altogether, which would cause permanent (and irreversible) damage to the market. As Ofcom identifies, the resulting lost revenues would have an enormously detrimental impact on investment in innovation and in all probability would end it entirely, as market players focused on their own commercial survival.

It would also likely prompt a huge surge in consumer complaints both to SPs and OCPs. Although many such calls might simply result in consumers being persuaded to opt-in, it would still constitute a very poor consumer experience and generate a lot of negative sentiment towards 118 and 09 more generally. It would also generate a significant increase in the volume of calls to SP and OCP contact centres which would have to be managed.

All of this is in addition to the points which Ofcom itself makes with which we fully agree. Most notably, it would call into question the universal service regulatory obligation to ensure access to DQ services and therefore may well be subject to challenge in that regard.

Finally, we note Ofcom's reference to the fact that OCPs could provide call-barring to their consumers on a voluntary basis. Whilst we have no objection to it in principle, TNUK does not believe that it is particularly well-suited to 118 calls. The rationale for applying it to 09 calls is twofold.

Firstly, 09 calls are charged at different rates, so consumers might choose only to bar their access to the more expensive bands. 118 has no equivalent banding system, so consumers would likely have to bar access to all or no services.

Secondly, consumers sometimes misunderstand the 09 number range and therefore wish to protect themselves from inadvertently making calls which they might not otherwise have wished to make. By



contrast, 118 is almost certainly the most well recognised and well understood of any of the non-geographic number ranges. Consumers know exactly why they need or choose to make calls to 118 services and so the question of inadvertent calls does not arise.

As an aside, we would also note that even a voluntary call-barring scheme implemented by an OCP would be subject to the provisions of the Universal Services Directive. TNUK therefore believes that such a scheme could only lawfully operate by allowing consumers to opt-in to having their calls barred, rather than requiring them to opt out of having them barred.

Question 5.5: Do you have any comments on our assessment of the costs and benefits of time-related notifications on the 09 and 118 range? Please provide reasons for your view.

TNUK broadly agrees with Ofcom's assessment, except for comments related to fraud. It would seem that this option has the fewest potential adverse consequences of the five possible consumer protection measures which Ofcom has proposed. Indeed TNUK already voluntarily implements time-related notifications.

The principal disadvantage would seem to be the annoyance factor if the beeps were required to be played too often on relatively short calls. It is far from clear that consumers would find them helpful in those circumstances. Although TNUK is not fundamentally opposed to the idea, we believe it would be necessary to undertake consumer research (involving live trial testing of calls with beeps) in order to understand consumers' reactions to more and less frequent beeps and from which they believe they would generate the greatest benefit.

However, we once again disagree with Ofcom's reference to fraud within this context. We reiterate that there is no evidence of fraud on the 118 number range. This is very likely because it is almost certainly the least suitable number range in the entire numbering plan to be used for call back scams, owing to the very high level of consumer awareness that it is used exclusively for DQ services. As such, we believe that considerations of fraud are irrelevant to 118 in this context and it need not form part of any assessment of the appropriateness of this option.

Question 5.6: If relevant, please provide an estimate of the likely costs that you would incur if time-related notifications were implemented on these ranges, taking account of any benefits it may bring.

As with PCAs Ofcom is proposing that this obligation apply to TCPs and therefore TNUK has no information concerning the costs of implementing time-related notifications on the 118 number range.

However, we would anticipate that TCPs would seek to pass these costs onto SPs and therefore the question is of significant interest to us. Unfortunately, if those costs had to be incurred, TNUK may have no option but in turn to pass those costs onto consumers, by way of an increased SC.

Question 5.7: Do you have any comments on our assessment of the costs and benefits of dedicated number ranges on the 09 and 118 range? Please provide reasons for your view.

As Ofcom correctly identifies, this option cannot be applied to the 118 number range.



Not only is there no spare 118X range that could be designated for DQ services charged at the highest rates, but even if it were possible, it would have a hugely distorting impact on the entire DQ market for a range to be so designated. In contrast with 09 SPs, 118 SPs invest hugely in marketing their designated numbers in order to aid memorability. Effectively the number becomes the brand name and nowhere is this more true than for TNUK. The impact of designating a separate range for higher charged services would be to re-set the market back 10 years, and likely force providers once again to invest heavily in promoting new numbers. The cost of doing so and the wasted resource of previous marketing would ultimately have to be passed on to consumers.

Question 5.8: Do you have any comments on our assessment of the costs and benefits of an extension of the 30 day withhold period on the 09 and 118 range? Please provide reasons for your view.

As TNUK has outlined many times consistently throughout this response, there is no evidence of fraud ever having existed on the 118 number range and no evidence to suggest that it will ever exist in the future. Consequently, TNUK does not believe that this option can be considered relevant to the 118 number range.

TNUK would most strongly object to having its revenues unreasonably delayed and withheld, in order to address a non-existent risk of fraud from some theoretical and non-existent fraudulent operator. That is in addition to the broader point which Ofcom makes that this option would not in fact provide any greater protection against fraud ever where it does exist and therefore is similarly unlikely to create any disincentive to potential fraudsters.

Question 5.9: Do you agree with our assessment that additional consumer protection measures would only be justified if SPs are able to set SCs for services on 09 and 118 with the ranges proposed under Option 3? Please provide reasons for your view, including, if relevant, the measures that you consider would be appropriate.

TNUK agrees with Ofcom's reasoning that no additional consumer protection measures would be justified if Ofcom was to implement either Option 1 or Option 2.

TNUK disagrees that additional consumer protection measures would be required if Ofcom was to implement Option 3. In particular we disagree that the imposition of a PCA would be required in those circumstances because Ofcom has provided no evidence whatsoever to support that view. Indeed, in assessing the PCA proposal Ofcom does not make a single reference to how they relate to its different price cap options, so there is simply no basis for a conclusion that Option 3 requires a PCA, having concluded that Option 2 does not.

Disappointingly, Ofcom's only justification appears to come in para 5.50 and para 5.55 where it references current and historic levels of complaints received by PPP. Despite an overall trend of a declining level of complaints, Ofcom nevertheless manages to conclude that this provides some justification for imposing price regulation. It appears to do so on the basis that:-

"The higher and steadier volume of complaints in relation to mobile services, some of which are charged at levels equivalent to those under the Option 3 caps, suggests that in this scenario the



increased risk of consumer harm may be sufficient to justify additional consumer protection measures.”

This is a complete distortion and an entirely inaccurate portrayal of these figures.

The complaint data which Ofcom has presented is only split between ‘mobile’ and ‘landline’ with no further description or granularity as to what it relates. Whilst Ofcom acknowledges in para 5.49 that the complaints relate to voice, SMS and web-based services, it should be aware that in reality the vast majority of mobile complaints to PPP do in fact relate to premium reverse billed SMS services, which have **nothing** whatever to do with the cost of voice calls²¹.

Moreover, the cost of those services is fixed by the mobile OCPs and so has not increased over time and therefore cannot explain any increase in the level in complaints. TNUK understands that the increase has been largely driven by the more widespread adoption of SMS subscription services to which consumers have unwittingly signed up. The number of mobile complaints therefore provides no relevant evidence whatsoever.

Aside from that basic error, Ofcom also overlooks the fact that in mid-2009 PPP took over responsibility for regulating 0871. As (according to the Flow of Funds study) 0871 generated over five times the volume of calls of 118 or 09, it would be reasonable to assume that a significant proportion of any mobile voice call complaints related to 0871. But as calls to that number range are very significantly below Option 3 rates, it further undermines Ofcom’s arguments.

In any case, it is not even accurate to imply that a significant percentage of 09/118 calls are currently charged by mobile OCPs at Option 3 rates. Whilst some are, Ofcom is stretching all credibility to conclude that those calls are generating a level of complaints to PPP which justifies the imposition of price regulation beneath that level. There is simply no basis for that conclusion.

Question 6.1 – Do you agree that the level of the SC should be set at £5 per call and £3 per minute and that no additional consumer protection measures will be required? If not, please provide alternative options and evidence to support your preferred option.

TNUK does not agree that the level of the SC should be set at £5/call and £3/min. For all of the reasons outlined in this response, TNUK does not believe that Ofcom should impose any cap on the 118 SC at all at this time. The rationale for our position can be summarised in two key points:-

- Ofcom has not provided any evidence to demonstrate that a cap on the 118 SC is required. On the contrary, the evidence which both Ofcom and TNUK have provided indicates that consumers are currently aware of and satisfied with the cost of calls to 118. Ofcom appears to accept that evidence.
- 118 SC levels are not at a level which that justifies caps in bill shock terms. There may be a level at which a 118 SC cap is required (in response to evidence of a high level of bill shock, as and when

²¹ The fact that Ofcom inaccurately refers to PhonepayPlus as PayphonePlus in para 5.51 does not instill confidence that it fully understands the regulation and incidence of complaints in the premium rate market



it exists), but neither TNUK nor Ofcom have any information as to what that level might be. TNUK does not agree that it is sensible for Ofcom to guess that the level might be £5/call and £3/min, because that guess may be either too high or too low. The better approach is for Ofcom to forbear in order to assess at what level the problem actually does occur and then regulate accordingly (which of course is exactly what it is intending to do in relation to the AC, without providing any justification for a different approach and is in accordance with its regulatory principles).

The argument about the imposition of additional consumer protection measures is a different one. Even if Ofcom were to impose a cap above £5/call and £3/min, TNUK does not believe that additional consumer protection measures can be justified at this time without clear evidence to demonstrate a consumer demand for them. In that sense, the price level at which the measures may be imposed is a secondary issue which need only be considered once Ofcom has gathered and assessed evidence which demonstrates their value.

Question 6.2 – Do you agree with our proposals in relation to the timing of our proposals for a maximum SC charge for 09 and 118 numbers taking?

In principle, TNUK agrees that any and all necessary measures in relation to the implementation of unbundling should be introduced at the same time.

However, for reasons just outlined in response to Question 6.1, TNUK does not believe that a price cap on the 118 SC should be imposed at the same time as unbundling is implemented. For all of the reasons outlined in some detail in this response, a cap on the 118 SC should not be imposed unless and until Ofcom has evidence that it is required and would be beneficial. It is not possible to predict in advance when, if ever, that point might be reached and therefore it is nonsensical to impose price regulation on DQ SPs before assessing the effects of unbundling and particularly how prices develop following its introduction.



Annex 1 – Legal Framework





Annex 2 – 2CV Research into Consumer Attitudes to PCAs



All queries in relation to this response should be to Simon Grossman, Director of Government & Business Affairs, The Number, Whitfield Court, 30-32 Whitfield Street, London W1T 2RG – simon.grossman@118118.com – 07971 050 001