Everything Everywhere Limited - Response to Ofcom's second consultation on simplifying non-geographic numbers

Non-Confidential

11 July 2012

Table of Contents

1 Introduction and overview of key submissions

Everything Everywhere Limited ("EE") welcomes the opportunity to respond to Ofcom's second consultation on simplifying non-geographic numbers ("NGNs"), which sets out Ofcom's detailed reform proposals for the implementation of a new unbundled tariff structure ("unbundling") on the 08x, 09 and 118 ranges and the setting of a maximum retail price of zero for all fixed and mobile calls to the 080 and 116 ("freephone") ranges ("the 2nd Consultation").

EE supports Ofcom's objective of trying to improve the consumer benefits to be derived from their use of NGNs. EE also accepts that the relevant retail and wholesale markets for NGNs are not working perfectly. In particular, as EE has explained to Ofcom in extensive detail in response to Ofcom's call for inputs and first consultation on this issue, as well as in EE's recent dispute filings in cases CW/01083/01/12 and CW/01088/03/12 and EE's recent response to Ofcom's call for inputs on its upcoming Fixed Narrowband Market Review ("FNMR"), EE believes that all communications providers who terminate calls to NGNs ("TCPs") have significant market power ("SMP") in the wholesale market for termination of these calls. In this respect, the market for wholesale call termination to NGNs is no different to the markets for wholesale call termination to geographic and mobile numbers, which markets Ofcom has also found to be working imperfectly. In these markets, Ofcom has accordingly determined it appropriate to impose SMP conditions to address the relevant market failings. EE once again urges Ofcom to take the same approach here.

Notably, in no market has Ofcom yet taken the extreme and novel step of exercising its new powers under the Communications Act 2003 ("Act") to "impose tariff principles and maximum prices" for the "purpose of protecting consumers". Clearly, these highly interventionist powers are not ones to be exercised lightly. Furthermore, consistent with all duties performed by Ofcom under the Act, any obligations imposed by Ofcom in the exercise of these powers must be **proportionate**, **consistent** and **targeted only at cases in which action is needed** (s 3(b)). We also note Ofcom's stated preference for using its competition powers, which preference is to be enshrined in statute. Notwithstanding the additional analysis in the 2nd Consultation, we remain of the view that this is an example of a problem which should be dealt with utilising such powers.

Whilst the true and full cost of implementing Ofcom's proposals cannot yet be known, it is clear even on Ofcom's early (and we would say inappropriately low) estimates, that the costs to all stakeholders involved in the provision, consumption and regulation of calls to NGNs of implementing Ofcom's proposals will be material and highly significant, involving both an enormous raft of one-off changes to be implemented in the period leading up to the launch of the new regime and high ongoing implementation and monitoring costs[1].

EE welcomes some of the amendments that Ofcom has proposed since the first consultation to reduce this burden - such as no longer proposing to require that the access charge ("AC") and service charge ("SC") be split out in customer bills under unbundling. EE also welcomes confirmation by Ofcom of its initial position that the imposition of mandatory retail price caps for all calls to NGNs is not an appropriate means for addressing Ofcom's concerns, in view of, inter alia, the extremely high risk of regulatory failure.[2]

EE also welcomes the further research that Ofcom has done into what may be a fair and reasonable origination charge for mobile calls to freephone numbers, should Ofcom proceed with its proposals to mandate that these calls be zero rated, although EE remains of the view that the impact assessment range specified by Ofcom in the 2nd Consultation still severely underestimates the level at which this charge should be set - to the unfair disadvantage of mobile OCPs and detriment of consumers of both NGN calls and other telecommunications services.

Overall, however, having now reviewed Ofcom's supplementary evidence and analysis in support of its proposals in the 2nd Consultation, EE continues to hold the vast majority of the concerns expressed in response to Ofcom's first consultation that it is simply not warranted to impose the costs associated with unbundling and mandating that freephone calls be free-to-caller, in the

1 For example, Ofcom estimate upfront costs in the range of £69m-£87m and annual costs in the range of £2m-£6m for unbundling and mobile OCPs risking under-recovery of an efficient allocation of average operator costs of £181m in network and £1,602 million in CARS costs [Table A22.5] under its freephone proposals.

2 See §§9.183-9.185

interests of "consumer protection". Specifically, as set out in further detail below in response to the Ofcom's consultation questions:

a) EE accepts that consumer awareness of the price of making calls to NGNs from mobiles and landlines is not perfect. However, EE notes that awareness of the price of making calls to other types of numbers is not perfect either[3]:

- Relative to other number ranges, awareness of the price of calls to freephone numbers continues to be high and Ofcom even accepts that "For 080 numbers the problem of over-estimation does not appear to be widespread"[4]. Yet Ofcom is proposing the most extreme of any of the measures available to it to improve price misperception for these ranges - to remove all originating communications provider ("OCP") retail pricing flexibility and mandate zero rating of all such calls. EE remains of the view that this response by Ofcom meets none of the legal requirements for it to be necessary, proportionate and consistent with its treatment of other number ranges and further fails to heed the warnings of the Competition Appeal Tribunal ("CAT") in the 08 Case regarding the caution to be exercised by Ofcom when regulating the pricing of communications providers in the absence of any relevant SMP findings.[5]
- In the case of calls to 08x, 09 and 118 numbers, EE accepts that customer price awareness is imperfect. However, the evidence compiled by Ofcom suggests that awareness of these prices is **improving over time**, with a significant increase in the accuracy of customer price perceptions in Ofcom's 2011 survey results as compared with Ofcom's 2009 survey results[6]. This indicates that other industry measures recently put in place to improve transparency may already be working to address this area of consumer harm, and that Ofcom's costly remedy of unbundling may therefore be unnecessary. Furthermore, the remedy of unbundling is entirely untested, and there is no evidence that it will actually work to improve customer awareness of the price of making calls to NGNs. Indeed, the limited indicative evidence that Ofcom has gathered suggests that customers are likely to make **worse** rather than better decisions regarding which NGN calls they should make.

b) Even if it is accepted that Ofcom's proposals will improve customer awareness of NGN prices (which EE does not), Ofcom has failed to adequarely substantiate the hypothesis that is central to its positive cost-benefit analyis for consumers - that improved price awareness will result in a corresponding overall increase in demand for calls to NGNs:

- In relation to calls to freephone numbers, Ofcom in fact appears to accept (as it must do, in the absence of any evidence supporting a contrary finding)[7] that its radical proposals will **not necessarily result in any overall increase in demand and may even result in a reduction in demand** for calls to freephone numbers due to the exit of existing 080 service providers ("SPs").[8].
- In relation to calls to 09 numbers, Ofcom's research and analysis actually predicts that there **will be a reduction** in demand for calls to 09 numbers, as unbundling is expected to correct current customer price under-estimations of the cost of calls to 09 numbers.
- In relation to calls to 08x and 118 numbers, Ofcom's predictions are purely theoretical and are not validated by any "real-world" data. A number of factors cast doubt on the likely validity of these predictions once unbundling is implemented in practice.

3 See for example Table A8.7, A8.8 and A8.9.
4 §A8.89.
5 BT v Ofcom [2011] CAT 24 at [442]
6 See Table A16.8.
7 Ofcom analyses the results of two case studies to determine whether zero rating freephone numbers is likely to lead to an increase in overall demand and in both cases is unable to find clear evidence of an overall increase in demand - see §§A8.262-A8.263.
8 See §§ 16.135 and A26.12. Ofcom accordingly runs sensitivities for a 1% and 5% overall increase in volumes but assumes no change in overall 080 call volumes in its base case.

c) EE remains of the view as expressed in response to the first consultation that the relative prices of calls to NGNs as compared with the price of calls to other number ranges do appropriately reflect the preferences of UK consumers of telecommunications services. However, to the extent that this is not true for all customers / customer groups, EE notes that:

- The drastic forms of intervention into retail pricing and retail pricing structures that Ofcom is proposing appear to be highly disproportionate, given the limited evidence of harm and general (entirely proper) discretion given to OCPs without SMP to set their retail pricing strategies for all other telecommunications services and products as they see fit.
- In relation to the mandated zero rating of freephone calls:
    - The operation of the tariff package effect will result in countervailing adjustments to the prices for products and services other than freephone calls which will also not reflect current market driven prices set according to current consumer preferences; and
    - The likely forced migration and/or exit from the market of the many SPs who do not appear to wish to pay higher origination charges in return for free-to-caller access to their numbers from mobiles is similarly likely to cause NGN services to diverge from both consumer and SP preferences.
- To the extent that unbundling is intended to address a concern that prices for calls to 08x, 09 and 118 numbers are higher than the prices that (at least some) consumers would prefer:
    - Ofcom's own analysis indicates that, by requiring OCPs to set a single access charge (AC) for all NGN calls, prices for calls to 08x numbers are likely to **increase** above current levels[9]; and
    - The setting of a separate service charge ("SC") under unbundling will **remove** the current competitive constraints on the SC in respect of "locked-in" calls. In the case of an NGN call to a customer's retail bank to check on the customer's account, for example, there is no NGN offered by any competing SP that the customer can call as a substitute for making this call. Accordingly, other SPs do not constrain the level of the SC. However, as the current retail price for the call is set by the customer's OCP, competition between OCPs still means that there is some competitive pressure on the level of the charges for these calls.[10] Under unbundling, as the OCP will simply pass on the SC set by the SP, this competitive constraint will be removed. This may be expected to have an overall countervailing impact on any reductions in prices for calls to NGNs resulting in competition between OCPs in relation to the level of the AC.

d) EE agrees with Ofcom that access to socially important services, particularly for vulnerable customers, is an important policy objective. However, EE remains of the view that Ofcom's concerns that the current prices and/or perceptions of prices for calls to NGNs are the cause of a lack of access to these services are overstated, and thus that the likely benefits of Ofcom's proposals in facilitating access to such services are also overstated. More worryingly, EE has signficant concerns that Ofcom's proposals may result in outcomes that are **worse than the status quo for vulnerable consumers**, particulary those with a disability and the over 55's, who are most likely to live in fixed only households.

e) EE welcomes Ofcom's conclusion that Ofcom is "not confident that the termination rates that would arise commercially (absent regulation or involvement by Ofcom) are likely to lead to desirable outcomes for consumers" (§4.78). However we cannot reconcile this conclusion with Ofcom's apparent view that it would not benefit consumers for Ofcom to remove/address these

[9] Specifically, based on Ofcom's estimations, enforcing a single AC is likely to result in callers to 08x numbers from fixed lines paying 0.5ppm per minute more than they would do if multiple ACs were permitted, and callers to 08x numbers from mobiles being likely to pay 1.3ppm more than they would do if multiple ACs were permitted (Table 10.2).

[10] As Ofcom notes at §9.284, this is true for a high proportion of 08x calls.

wholesale market imbalances with appropriate SMP remedies. Certainly, Ofcom may determine (whether before or after having taken such action) that it will/does not address **all** of the consumer concerns that Ofcom has identified in its 2nd Consultation. However, this is surely no excuse for Ofcom not acting to bring about the consumer benefits that will be able to be delivered through the correction of the relevant wholesale market distortions. Importantly, we also have significant doubts as to whether Ofcom's retail oriented proposals will have the quick fix "additional benefit" of addressing the current wholesale market imbalances that Ofcom appears to hope for:

- In particular, we are extremely concerned at BT's suggestion in response to Ofcom's first consultation that it's "ladder style" variable termination rates could continue to endure "as a potential "safety net" under the unbundled remedy"[11]. The fact that a major TCP such as BT could even entertain this entirely unacceptable role and possibility indicates that a) Ofcom has not yet adequately considered or explained (in either of its consultation documents to date) exactly how it expects wholesale arrangements regarding the SC to work between TCPs and OCPs[12] and b) there would appear to be a large and highly undesirable risk for further wholesale disputes and/or subversion of Ofcom's intentions to occur under the unbundling remedy[13].
- It is clear that the imposition of an access condition on TCPs to acquire wholesale origination to freephone numbers from OCPs on "fair and reasonable terms" will leave open the critical question of what those fair and reasonable terms are. As Ofcom has correctly observed in relation to the remedy of setting maximum NGN prices in general (but inappropriately downplayed in the context of its freephone proposals): any determination on this issue will require Ofcom to consider this question
  "across a diversity of OCPs, TCPs and SPs, taking into account tariff rebalancing, fixed and mobile costs, the multiplicity of services offered on the ranges, as well as the impacts on consumers. In addition to the regulatory burden of obtaining and analysing the data required to carry out these assessments, determinations of this nature and scope are likely to entail a considerable exercise of judgment, some of which will, inevitably, be finely balanced. This is a sizeable task that, by its nature, carries a significant risk that errors in assessment and/or judgement will be made....furthermore...as well as setting the initial...price points, Ofcom would need to regularly review them to ensure they remained appropriate. This increases the regulatory burden and of the option and compounds the scope for error."[14]

In this respect the delays and costs to industry and consumers associated with Ofcom deliberations, disputes and/or some degree of regulatory failure are virtually inevitable.

Fundamentally, we do not believe that there is any form of retail regulation that can effectively and efficiently act as a substitute for proper wholesale regulation imposed and reviewed on a regular basis in accordance with Ofcom's obligations under the European Common Regulatory Framework ("CRF"), and we consider that it is improper for Ofcom to consider that this could ever be the case.

11 §A17.27
12 See for example the high level and ambiguous nature of Ofcom's statement at §9.187 that the SC "would be paid to TCPs and SPs to cover or contribute towards their costs", which is virtually the only explanation offered regarding the construction and payment of the SC in the 2nd Consultation (apart from the discussion in Annex 18 on the location of the Assumed Handover Point).
13 It is notable that Ofcom even acknowledges these concerns in the 2nd Consultation, but yet does nothing to allay them - see §§9.333-9.334.
14 §§9.177-9.178.

2 Response to consultation questions

2.1 Questions regarding Ofcom's summary of concerns

Q4.1

Do you agree that the analysis set out in Section 4 and the supporting annexes which draws on our initial assessment in the December 2010 review, stakeholder comments and the further research undertaken in 2011, appropriately characterises the market, the market failures and the effects on consumers? If not please set out your alternative views.

No. On balance, EE considers that Ofcom's evidence and analysis reveal the retail market for NGNs in the UK to be a competitive, albeit imperfect, market in need perhaps of fine tuning, but not warranting any major structural forms of regulatory intervention such as those being proposed by Ofcom. We set out our alternative views below.

EE's views on Ofcom's alleged market failures

(i) Lack of price awareness

In the 2nd Consultation, Ofcom concludes that "the evidence indicates poor price awareness in the market for NGCs" (§4.38) and characterises this as one of the three "market failures" warranting its intervention for consumer protection purposes. For instance, Ofcom argues that customers lack an awareness of 08x prices. In particular, Ofcom argues that in combination with broader suspicion and mistrust of NGNs, survey respondents expect 08x prices to be higher than actual 08x prices.[15]

EE accepts the evidence that some respondents overstated 08x prices in Ofcom's survey. However, awareness of the price of making calls to other types of numbers is not perfect either. For example, a significant proportion of consumers (43%) does not know the price of a fixed to mobile call, but expect it to be expensive (Table A8.6). EE notes that Ofcom argues, based on the Competition Commission's ("CC's") decision in the recent MTR appeals,[16] that historically high fixed to mobile call prices drive this result and that these prices will fall in response to recent MTR cuts, thereby removing the problem of price misperception for these calls. However, the CC is not as categorical on this point as Ofcom suggests. First the CC acknowledges that BT has not previously passed through MTR cuts in its fixed to mobile retail prices. Secondly, the claimed "finding" by the CC was in fact only an **expectation** at that time, and the CC recognised that expectations and outturn can differ, noting that the issue of pass through was a key point of contention the MTR Appeal. EE is not aware of any evidence that BT has reduced fixed to mobile prices since the CC's determination. In fact, EE understands that BT has increased the cost of its Line Rental Saver product from £120 to £129 from 2nd of March 2012 for 12 months in advance by debit/credit card – (equivalent to an increase from £10 to £10.75 from 2nd of March 2012 a month).[17] To this extent, EE therefore believes that Ofcom's contrast of the position in relation to price awareness for NGN calls vs calls to mobiles is invalid, and cannot be used to justify Ofcom's unique interventionist treatment of NGN retail pricing.

In terms of customer awareness of the price of calls to freephone numbers, this remains strong relative to other number ranges and Ofcom even accepts that "For 080 numbers the problem of over-estimation does not appear to be widespread as the median expected value is very similar to the true cost"[18]. EE also notes that only 5% of 080 calls are made from mobiles compared to between 10%- 30% for other NGNs[19]. This is due in part to the mandatory pre-call announcement

[15] That is, of those respondents who could estimate a ppm price, the expected mean of those estimates was above the actual 08 call price. The difference between the higher expected mean price and the actual price is referred to as the price misperception.

[16] http://www.catribunal.org.uk/238/all/2/Judgments.html

[17] http://www.productsandservices.bt.com/consumerProducts/displayTopic.do?topicId=32331

[18] §A8.89.

[19] See Ofcom's second consultation, Figure 3.3.

("PCA") that must be given by mobile OCPs if they are going to charge for freephone calls. EE considers that the PCA combined with the low share of 080 calls from mobiles provides strong supporting evidence that customers are highly aware of the difference in cost of calling 080 numbers from mobiles as compared to calling from landlines.

In addition, EE notes that the same Ofcom survey respondents who overstated 08 prices understated the price of 09 calls.[20] On Ofcom's logic, the same underlying market failure (price misperception) is thus both causing 08x callers to under-consume and 09 callers to over-consume NGN calls. EE considers that these directionally opposite results for 08 and 09, taken together, contradict Ofcom's assumptions of market failure and purported damage to the overall NGN brand as a result of lack of price awareness.

Finally, the evidence compiled by Ofcom suggests that awareness of NGN call prices is **improving over time**. In particular, Table A16.8 in the 2nd Consultation shows that expected prices fell significantly for all NGN ranges in the 2011 survey as compared to the 2009 survey[21]. We note in this regard that, when the 2009 survey was commissioned, much of the pricing information now available through operators' websites, including more prominent charge information and NGN price checkers, was not available. EE believes that it is plausible that better pricing information in the market introduced since 2009 (including Three's and T-Mobiles' NGN website price checkers) may have driven this result - suggesting that the market is capable of timely self correction for these problems, without the need for further intervention by Ofcom. It is also notable that these improvements in price awareness [✂] [✂].

(ii) The vertical externality

In the 2nd Consultation, Ofcom concludes that there is a market failure in the form of a vertical externality, on the basis of its view that the evidence suggests that (§4.43-4.45)

"...many SPs would prefer alternative pricing arrangements to those that they currently have, but are unable to negotiate them successfully with OCPs", and the fact that Ofcom has "...not found evidence to suggest that realistic alternatives currently exist for SPs that prefer alternative charging arrangements."

EE accepts that Ofcom's survey evidence and responses to its first consultation indicate that at least some SPs would prefer alternative pricing arrangements which give them greater control than they currently have over the ultimate price paid by consumers for calling their NGNs. EE also accepts the evidence that Ofcom provides that certain individual SPs such as the National Grid[22] appear to date to have failed to be able to secure arrangements meeting with their preferences.

However, EE considers that it remains at least a "very open question" as to whether or not the radical forms of intervention being proposed by Ofcom - namely mandating that all current 080 calls be free-to-caller and that all 08x, 09 and 118 calls be unbundled, are a proportionate means to meet the preferences of these SPs, in the interests of protecting consumers. Indeed, Ofcom appears to be preferring the interests of some SPs over consumers.

Taking first the preferences of 080 SPs:

- Ofcom has provided little evidence of any significant level of unmet demand by SPs offering services of social importance that are not already zero rated. As Ofcom goes to pains to stress in the 2nd Consultation[23], calls to 080 numbers from landlines are as a matter of practical

20 For example, see Ofcom's 2nd Consultation, Table A16.8.

21 Mean expected prices on 08x ranges were between 46ppm and 51ppm but are now 32ppm to 34ppm (compared to actual 2009 prices of 21ppm - 34ppm). For 09, expected prices have also fallen, from 70ppm to 47ppm (compared to actual 2009 prices of 113ppm). EE notes that the same survey evidence suggests price misperception has been eliminated on the 0871 range.

22 In relation to this particular example given by Ofcom, EE notes that the relevant number is in fact zero rated on its Orange network. EE is not aware of any approaches from National Grid to zero rate the number on its T-Mobile network since the joint venture between the two companies was established in 2010.

23 See for example 2nd Consultation, § 15.17.

effect, if not legal obligation, already always free-to-caller. Furthermore, calls to all THA NGNs and other services such as The Samaritans are already voluntarily zero rated by mobile operators. In addition, the Department of Works and Pensions ("DWP") has successfully managed to negotiate with the six major mobile OCPs to zero rate all calls to its NGNs.

- To the extent that there are SPs (whether offering socially important services or otherwise) who wish to have their 080 numbers zero rated by mobile OCPs in return for payment of a higher origination charge, these SPs appear to be in the distinct minority (17% of all surveyed 080 SPs)[24]. This suggests that there are likely to be a number of alternate means of addressing the preferences of these SPs that are less costly (in terms of forcing migration costs upon the majority of 080 SPs who do not desire this change to the 080 range, impact to mobile OCP margins, costs of agreeing appropriate origination charges etc), and thus more proportionate than the mandatory zero rating of all existing and future 080 numbers, including the following:
    - Allowing the market to continue to evolve to meet these needs - e.g. with inclusive 080 minutes in bundles (such as many of T-Mobile's current pay monthly tariffs and legacy Flext tariffs) or a policy of not charging for these calls (such as that of the MVNO Giffgaff)[25].
    - Use of zero rated mobile short codes. In this respect, EE notes that it has only very recently (in June 2012) launched the use of zero rated mobile short codes across both of its Orange and T-Mobile brands. EE expects that this recent change to EE's commercial arrangements will have a noticeable impact on the popularity of zero rated mobile voice short codes across the industry.
    - A third party such as Ofcom or a commercial aggregator being designated to facilitate commercial negotiations in this regard in order to reduce transaction costs (e.g. using something like the existing DWP agreement as a precedent/template).
    - Establishing a new NGN range, such as 0500, to meet the preferences of these SPs.
    - Setting a maximum price for calls to 080 numbers from mobiles (e.g. a maximum price equal to the AC, which will offer clear pricing transparency benefits over the current pricing situation but still allow mobile OCPs to recover their full costs of origination from the caller rather than the SP).

In terms of the preferences of 08x SPs:

- The focus of Ofcom's evidence as presented in the 2nd Consultation is on 08x SPs who would like prices for calls to their numbers to reflect the cost of calls to geographic numbers. EE notes that the 03 range already provides this price certainty. EE therefore does not consider that the implementation of unbundling on the 08x range is a necessary or proportionate means to address the preferences of these SPs.
- To the extent that 08x SPs wish to have calls from mobiles charged at other rates, EE remains of the view as set out in response to the first consultation that there are viable alternatives available in the market to meet these preferences, including the use of mobile voice shortcodes and/or entry into commercial negotiations with OCPs to secure this outcome. In relation to the latter option in particular, EE remains of the view that, if there was genuine unmet market demand in this regard that was being inhibited by the relevant transaction costs of negotiation, intermediaries such as the aggregators who perform this role in the market for mobile shortcodes would step in to meet it.

In terms of the preferences of 09 and 118 SPs, EE understands that further evidence and proposals will be provided in Ofcom's supplementary consultations on these ranges and EE will respond on this point in the context of those supplementary consultations.

---

24 For example, at § 16.167 of the 2nd Consultation, Ofcom report that in the 2011 SP survey only 47% of SPs surveyed viewed the current level of mobile OCP pricing for calls to 080 numbers as a disadvantage, and only 36% of these respondents were prepared to pay a higher origination charge to ensure that Freephone was free-to-caller on mobiles - equating to just 17% of all 080 SPs.

25 See §14.40.

(iii) The horizontal externality

Regarding horizontal externalities, Ofcom argues that there are insufficient incentives on OCPs and SPs to take into account the impact of their NGN call pricing on other numbers within the same NGN range (defined to the 2 digit level)(§8.28-8.29). Ofcom further argues that the price of mobile calls to NGNs influences consumer perceptions of the price of fixed line calls to NGNs, which may give rise to a horizontal externality between mobile and fixed OCPs(§8.30).

EE has doubts as to the existence and/or gravity of these horizontal externalities, for the following reasons:

- Ofcom accepts that mere correlation between customers overestimating different types of NGN calls does not demonstrate a **causal link** between the overestimation of one type of call and a consequent overestimation of another type of call. Specifically, Ofcom admits that it has no conclusive proof that overestimations of mobile NGN prices cause overestimations of fixed NGN prices, and that other unidentified exogenous factors may be relevant. Correlation is no substitute for direct causal evidence (qualitative or quantitative), because there may be other factors that explain why expectations of fixed prices are as stated in the survey responses (e.g. BT increasing call bundle charges).[26]
- Even in terms of the correlation evidence, the only significant correlation is between fixed calls to 080 numbers and fixed calls to 0845 numbers. This is hardly evidence of widespread cross contamination of price misperception across the ranges.
- Ofcom fails to adequately explain why horizontal externalities on one number range (e.g. 08x) would be expected to impact on other number ranges (e.g. 09), when the two have such different demand and supply characteristics (e.g. 08x calls are less discretionary in nature than 09 calls)[27]. Indeed, the validity of this hypothesis is essentially ruled out by Ofcom's evidence that calls to 09 numbers are essentially currently being over-consumed due to price underestimations, at the same time as callers are overestimating 08x call prices. There is accordingly serious doubt about the correctness of Ofcom's conclusions that there is a single "brand" of NGNs in the UK covering all of the different varieties of NGN calls.

EE's views on the purported effects on consumers of Ofcom's alleged market failures

(i) A reduction in demand for NGCs, particularly from mobile phones

Ofcom now accepts that "...the evidence does not suggest that problems [i.e. price over-estimations and reduced demand for NGN calls] are necessarily getting worse over time" (§4.54). EE welcomes this acknowledgement.

However, Ofcom still maintains that "consumers are overestimating prices and consequently making fewer NGCs that [sic] we would expect them to otherwise make even in the context of a generally declining market." (§4.54) Ofcom admits that "it is difficult to discern the true scale of this suppressed demand" (§4.52). However, Ofcom maintains that the evidence it has gathered suggests that "improved price awareness may stimulate at least a relatively small but significant increase in call volumes as customers increase both the number and duration of calls", and that "...even if there is little sensitivity to price, material changes in volumes are still likely to result from greater awareness" (§4.52).

In order for Ofcom's conclusions to support its proposals for zero rating freephone calls and unbundling calls to 08x, 09 and 118 numbers as being necessary, proportionate and consistent with Ofcom's treatment of other number ranges, four propositions must be correct:

[26] Another alternate explanation, for example, is that customer's price overestimations of 08x calls are influenced by the fact that they resent the need to pay for these largely non-discretionary calls in the first place, as compared with more discretionary 09 calls, which customers are more likely to willingly chose to make and the price of which customers underestimate.

[27] Ofcom's analysis appears to agree - see §13.54.

- a) Customers must be materially overestimating the price of NGN calls, relative to other types of calls;
- b) Ofcom's proposals must result in a decrease in the rate at which or extent to which customers currently overestimate the prices of NGN calls;
- c) To the extent that Ofcom's proposals result in a decrease in either the rate at which or extent to which customers overestimate the prices of NGN calls, this must stimulate in an increase in either the number or duration of NGN calls; and
- d) There must be no other less costly and interventionist manner to stimulate the same level of increased demand for NGN calls likely to be achieved through the implementation of Ofcom's proposals. Furthermore, Ofcom must establish that stimulation of additional demand for NGN calls is of overall consumer benefit, given the many and increasingly popular alternatives to the use of these services such as online content services, mobile "apps" and mobile voice and SMS short codes.

For the reasons set out below, EE believes that the evidence casts significant doubt upon the validity of each of these propositions.

a) Extent to which customers are currently overestimating NGN call prices

EE does not believe the evidence demonstrates that customers materially or consistently overestimate the price of 08x and freephone calls, whether considered in absolute terms or relative to the price of calls to other types of numbers.[28] For example, Ofcom's 2011 survey evidence shows that mobile customers correctly estimate the price of calls to 0871 numbers (Table A16.8) and the median expected value of 080 calls is very similar to the true cost"[29]. As noted above, price overestimations in respect of these calls have also fallen significantly between 2009 and 2011, and may be even lower when the 2011 expected prices are compared with 2011 average actual prices rather than the comparison with 2009 average actual prices made by Ofcom.[30]

In regarding calls to 09 numbers, Ofcom's research directly contradicts Ofcom's hypothesis. Specifically, the survey data reveals that customers currently **underestimate** rather than overestimate the price of these calls, and by a margin that is much greater than the extent to which they overestimate the cost of calls to 08x numbers (Table A16.8).

b) Likelihood that Ofcom's proposals will reduce NGN price overestimations (to the extent that such overestimations exist)

On the point of price awareness, the rationale for unbundling is that it will lead to improved price awareness because pricing will be more predictable. However, Ofcom must accept that its proposed remedy of unbundling is untested, and that Ofcom does not have any evidence at all that it will actually work to improve customer price awareness.

Where the SC is not apparent at the point of call (which is likely frequently to be the case, for example, in relation to 08x numbers dialled with reference to a telephone directory or business card), consumers will still (as today) either have to look this information up or hazard a guess.[31]

Furthermore, there is a real risk (substantiated by Ofcom's early 2011 Experimental Research) that customers will be confused by the separation of the AC and the SC, and that current levels of price misperception will actually worsen. For example, Ofcom’s 2011 Experimental Research[32] suggests customers make slightly worse call choices when charges are unbundled:

---

28 See Figures 1-4 of Ofcom's 2011 Consumer Survey, and Tables A8.12, A8.13 and A16.8 in the 2nd Consultation
29 §A8.89.
30 EE notes that that many NGN retail prices did increase between 2009 and 2011, but not as a result of BT's ladder charges or related disputes. E.g., NGN prices are likely to have increased over this period in response to Ofcom's expected regulatory cuts in MTR revenues. At that time, Ofcom's consultation and final statement was in fact predicated on the expectation that under the waterbed effect MNOs would be able to recover some loss in MTR revenues through the retail market.
31 Based on Ofcom's 2011 survey results, this is likely to be true in at least 35% of cases - see §13.53
32 Experimental work on potential interventions in relation to non-geographic calls, London Economics, August 2011

"Where participants were provided with call charge information, they did slightly worse where prices were unbundled. Scenario 2 (bundled charges) performed better than scenarios 4 and 5 (unbundled charges) and while this difference is small, it is statistically significant. [33]

...

A downside of unbundled ACs and SCs compared to full price information is that subjects make more errors in call decisions. This effect is small but significant in our data. The requirement to add two separate charges makes the choice to make a call, or not, more difficult. We observe this effect in a university student subject pool, which is a select "smart" subject pool; and, in an environment which is simplified compared to the real world where subjects need to focus only on one problem. We therefore we believe that this downside of unbundled tariffs has high external validity to the real world field."

These results give real cause for concern that adding further complexity to billing and tariffing through unbundling could have unintended negative consequences for customers' choice and welfare, rather than benefits.

In relation to freephone calls, it is accepted that mandating that these calls must be free from all fixed and mobile phones should, over time and given the appropriateness awareness campaigns, result in accurate customer perceptions of this zero price point. However Ofcom's 2nd Consultation acknowledges several far less drastic and interventionist means of achieving similar results regarding accurate perceptions of 080 prices:

"...we acknowledge that an advertising campaign might mitigate the horizontal externality by reducing the confusion between fixed and mobile prices, as well as confusion between 080 and other 08 ranges"[34]

"...currently most consumers believe that mobile 0800 calls are more expensive than fixed 0800 calls. This suggests that the distinguishing feature of a Maximum Mobile Price number range, namely that mobile calls are charged whereas fixed calls are not, broadly fits with consumers' expectations about 0800 calls."[35]

c) Likelihood that a reduction in NGN price overestimations (to the extent that these exist) will increase demand for NGN calls

In relation to calls to freephone numbers, Ofcom appears to accept in its base case that its proposals will not necessarily result in any overall increase in demand for calls to freephone numbers.[36] EE considers 080 calls are not overly discretionary (as compared with 09 numbers) and hence we would not expect an increase in total volumes[37]. Even in relation to the likelihood of greater fixed to mobile substitution, it is notable that the majority (59%) of survey respondents stated that they wouldn't call from mobiles were the price to be zero rated, with only 16% saying they would like to make such calls (§16.125)[38].

33 Scenario 2 refers to the test where there was a bundled access and service charge with no search. Scenario 4 refers to the test where there was unbundled access and service charge with no search and Scenario 5 refers to the scenario where was an unbundled access charge with the service charge shown and no search.

34 §16.22.

35 §A25.16.

36 See §§16.135 and A26.12. Ofcom accordingly runs sensitivities for a 1% and 5% overall increase in volumes but assumes no change in overall 080 call volumes in its base case

37 Ofcom's analysis appears to agree - see §13.54

38 EE notes that Ofcom is dismissive of this important result. EE considers that the anecdotal evidence to which Ofcom refers to support its discarding of this evidence only mitigates the strength of the result at best - and that it certainly does not overturn it.

In relation to calls to 09 numbers, Ofcom's research and analysis actually appears to predict that there will be a **reduction** in demand for calls to 09 numbers, as unbundling is expected to correct current customer price under-estimations of the cost of calls to 09 numbers. Ofcom therefore disregards calls to 09 numbers in its impact assessment[39]. EE considers that this approach is flawed, and that Ofcom should properly **reduce** the financial value of the benefits predicted to be gained from an uplift in 08x and 080 call volumes by the equivalent financial value of the predicted level of reduction in calls to 09 numbers.

In relation to calls to 08x numbers, Ofcom's predictions are purely theoretical and are not validated by any "real-world" data. A number of factors cast doubt on the likely validity of these predictions once unbundling is implemented in practice.

[✂] [✂]

These concerns appear to be justified by EE's real world experience. Specifically, whilst, as noted above, the level of NGN price overestimations between 2009 and 2011 has decreased significantly, this fact [✂] [✂].

EE also notes that the low level of demand elasticity for NGN calls estimated by Ofcom (which Ofcom, EE would say broadly correctly, estimates to be -0.3) would appear to be inconsistent with Ofcom's predictions of any material increase in demand in response to reductions in price over-estimations. Specifically, EE notes the evidence that it has recently provided to Ofcom in the context of dispute CW/01088/03/12 suggests that [✂] [✂][40]. Accordingly, Ofcom's proposals may be expected to force expected prices and demand for NGN calls even further away from equilibrium levels, generating allocative inefficiency.

In addition, Ofcom must factor in the potential for any increase in demand stimulated by a decrease in **perceived** NGN prices being outweighed by an increase in **actual** NGN prices under Ofcom's proposals. As noted in (ii) below, there is a real risk that NGN prices could increase under unbundling.

d) Availability of alternatives for stimulating demand for calls to NGNs

As noted above in EE's comments on the vertical externality, there would appear to be many other mechanisms available both in the market and to Ofcom to stimulate increased demand for NGNs, all of which would entail less cost to the industry and consumers than Ofcom's proposals.

Furthermore, in order to demonstrate that its proposals are in the best interests of consumers in line with Ofcom's duties, Ofcom must establish that any stimulation of additional demand for NGN calls is in any event a worthwhile endeavour, given the many and increasingly popular alternatives to the use of these services such as web browsing and online content services, mobile "apps" and mobile voice and SMS short codes. Ofcom has failed to do this.

Consequently, EE does not believe that Ofcom has demonstrated that its proposals are necessary or proportionate for the protection of consumers to an extent adequate to legally empower Ofcom to implement those proposals.

(ii) The relative prices of NGCs and GCs do not reflect consumer preferences

Given that Ofcom's proposals are said to be, and legally must be, entirely motivated by a need to "protect consumers", EE finds Ofcom's admissions that "...it is difficult to draw accurate and reliable inferences ...about consumer's price preferences..." (§4.56) and that "NGCs are not featured in Ofcom's list of most complained about issues" (§4.60) to be of quite **fundamental concern**.

---

39 §16.84.

40 See confidential EE response of 22 June 2012 to Ofcom's 1st Notice requiring the provision of specified information under section 191 of the Communications Act 2003 (CW/01088/03/12)

Ofcom's statutory obligations under the Act and the CRF, which are motivated by regulatory best practice in the interests of consumers, mandate that Ofcom must exercise extreme caution before intervening in a market, and should act only when necessary. What "seems right" in theory isn't necessarily always what is right in practice. Absent real world data to support a clear case for the need and net benefit of intervention, the prudent course is to refrain from acting.

As set out in EE's response to Ofcom's first consultation, EE believes that mandating that 080 calls are zero rated will definitely result in forced changes to mobile OCP tariff structures that do not reflect the preferences of some if not the majority of consumers. In contrast, establishing a new range which is free-to-caller from both mobiles and fixed lines would enable the preferences of consumers and SPs who desire a service which enables free calls from mobiles to be met, without causing distortions to existing OCP tariff structures. If Ofcom is genuine in its desire to ensure that prices reflect consumer preferences, then EE would continue to urge Ofcom to prefer this option over mandated changes to the 080 range (see further our response to questions 16.1 and 16.2 below).

In terms of 08x, 09 and 118 pricing not "reflecting consumer preferences", it is clear that Ofcom in essence believes that these prices are set "higher than they should be" (§4.56). This does beg a very thorny but important question regarding what level of retail pricing set by an OCP without SMP is "too high". As set out in EE's response to Ofcom's first consultation, EE remains of the view that overall levels of retail mobile pricing in the UK are highly competitive and do reflect efficient and appropriate pricing levels. However, even assuming that Ofcom has a legitimate objective of reducing current NGN pricing through unbundling, there are at least doubts that Ofcom's proposals will achieve this objective. To begin with, all additional costs of implementing unbundling will need to be recovered from call prices, which is likely to motivate price increases rather than decreases. Furthermore, the setting of a separate SC under unbundling will **remove** the current competitive constraints on the SC - as the SC set by the SP will simply be passed through to the customer by the OCP, and will not be reduced in any way as a result of competition in retail pricing between competing OCPs as currently.[41] The impact of this effect may be particularly significant in respect of the material proportion of "locked-in" NGN calls (eg. calls to the NGN of a customer's retail bank which are not substitutable for calls to any other NGN), in respect of which there is no competition between SPs influencing the level of the SC.[42] This may be expected to have an overall countervailing impact on any reductions in prices for calls to NGNs resulting in competition between OCPs in relation to the level of the AC. Finally, as noted in detail in response to question 10.1 below, if Ofcom insists on mandating a single AC rather than separate ACs for 08x and 09/118 calls (which proposal EE strongly objects to), then this is also almost certain to result in an increase in current 08x pricing.

(iii) Loss of access to socially important services, particularly for vulnerable consumers

See the response to question 5.1 below.

(iv) Consumers' loss of service diversity and innovation and SPs' lack of incentives to invest in the market

Ofcom admits that it has minimal hard evidence upon which to base its predictions that there will be an improvement in service provision and choice as a result of its proposals (whether as a result of falling prices or service innovation), due to the inherent uncertainty of predicting whether such benefits will materialise, and if so to what extent. Overall, Ofcom considers calls to NGNs to be strongly price inelastic (-0.3), thus suggesting a low likelihood of such benefits arising. We therefore consider that Ofcom should heed the warnings given by the CAT in the 08 Judgment, and place very little weight on such benefits in its analysis.[43]

41 Whether or not these charges will instead be constrained by adverse publicity rather than competition (§§9.286-9.287) is difficult to predict with any degree of certainty and depends, as Ofcom notes, on factors such as whether or not an SC can be characterized as being "unusually high".

42 As Ofcom notes at §9.284, this is true for a high proportion of 08x calls.

43 See [2011] CAT 24 at §§ 347; 375-377; 445

Indeed, in the case of freephone calls, Ofcom has in fact gathered very strong indicative evidence that there is likely to be a significant reduction in 080, 116 and potentially 050 freephone service diversity and SP investment if Ofcom proceeds with its proposals to zero rate all of these ranges. Specifically:

- When faced with a 1ppm increase in their current 080 origination costs (equivalent to the lower end of Ofcom's 2.5ppm-3ppm impact assessment range for the mobile origination charge under its proposals assuming 50% fixed to mobile substitution), circa 18% of current 080 SPs are either very or fairly likely to exit the range. With approximately 40,000 080 SPs and assuming a ratio of just one 080 service to each SP, this equates to a worst case scenario of the **loss of 7,200 current 080 services**. Assuming, as per Ofcom's current preferred options, there is no other non-free-to-caller freephone range for these SPs to migrate to, even SPs who are prepared to sustain the costs of migration in order to continue to provide their services will need to move to chargeable ranges - resulting in the necessary loss of the truly free-to-caller access to these services currently enjoyed by fixed consumers today.
- Similarly, although there are only a handful of current 116 SPs, Ofcom has clear evidence that one of these SPs is likely to exit the range if faced with higher origination charges[44] and it seems reasonable to assume that future 116 SPs may be similarly deterred from launching new services.
- In both cases, given that Ofcom is not predicting any material increase in overall demand for freephone services as a result of its proposals (essentially just fixed to mobile substitution), it seems very likely that the increased costs of origination faced by SPs under Ofcom's proposals will result in them having less disposable cash to invest in the innovation of their services.

In contrast, Ofcom provides no evidence of what is essentially simply a blind hope that the small degree of increased accuracy of consumer pricing perceptions regarding these ranges likely to result from Ofcom's proposals will sufficiently "re-invigorate" them to warrant countervailing investment and innovation by new 080, 050 and 116 SPs. Such hopes do not constitute the rigorous and objectively justifiable cost benefits analysis necessary to support Ofcom's legal case for intervention.

EE's views on wholesale concerns

As Ofcom will be well aware from EE's previous submissions on this point, EE considers that there is likely to be real harm to consumers arising from wholesale termination charges for calls to NGNs, which needs to be addressed by Ofcom.

Presently, the impact of "ladder style" termination charges for calls to NGNs is muted due to the ongoing disputes and the hiatus pending the Court of Appeal decision. However, this should not be taken as an indication that the future impacts from such wholesale termination charges for NGNs on consumers will not be harmful. In the recent past, mobile operators have been undertaking margin repair activities with respect to falling call termination revenues. What is clear is that in the competitive mobile retail market, the loss of any significant revenue stream will need to be recouped as far as is possible from raising other prices.

This is clear from the recent 2011 MTR appeal, which looked at the impact of reducing MTR revenue on retail prices. The CC took the view that Ofcom‟s regulatory decision to prohibit recovery of shared fixed and common network costs from MTRs (under a proposed pure LRIC cost standard) would require that these costs be recovered via higher retail prices (and in particular for PAYG customers). It is also clear that the same impacts are likely to arise from the introduction of termination charges for 080, 0845, 0870, 0844/3, 0871/2/3, and 09 number ranges. Termination charges on these number ranges are likely to require further increases in retail prices that will impact customers similar to those impacts already experienced from MTR cuts. That of course will affect the most vulnerable mobile customers.

[44] §A27.37

Ofcom argues at Annex 17 its reasons for why implementing wholesale remedies is not appropriate (see Ofcom reference at 9.36-9.40). EE disagrees with Ofcom for the following reasons.

- Recommendation 2007/879/EC (Recommendation on relevant markets) defines in its Annex as Market 3 the wholesale market of "Call termination on individual public telephone networks provided at a fixed location." In its comments pursuant to Article 7(3) of Directive 2002/21/EC dated 15 September 2005 (SG-Greffe (2005) D/205049), the Commission has advised in this respect that:

"In accordance with the Recommendation, the wholesale market for call termination on individual public telephony networks provided at a fixed location should be understood as the transmission of calls directed to an end-user of a public telephone service at a fixed location from a connection point between two networks to an end-point of a public telephone network ***determined by a specific network address****. Therefore,* ***call termination to non-geographic numbers is not per se excluded from the market definition*** *and should, in principle, be subject to market analysis under Article 16 of the Framework Directive. On the other hand, termination of calls directed to independent service providers ("ISPs") offering content services may be subject to different competitive constraints resulting from low switching costs and the potential countervailing buyer power of ISPs".*

- In the UK context, the CAT has recently held that: "under the telecommunications system as it presently operates in the UK, an originating CP cannot make any choice as to which communications provider terminates any particular call (including calls to 080, 0845, and 0870 numbers)... therefore, the terminating CP has an effective monopoly..." (BT v Ofcom [2011] CAT 24 at [400]).

- There are several externalities at play in the UK which have broken the links between the different interests of OCPs, TCPs and SPs in relation to the retail charges for calls to non-geographic numbers and the charges for wholesale call termination to these numbers. These are set out in detail by Ofcom, in its current consultation.

- Accordingly, whilst the market in the UK for **hosting** non-geographic numbers may be competitive, we do not believe that this acts as a constraint on the significant market power of TCPs when it comes to negotiating the price to be charged to OCPs such as EE for the wholesale termination of calls to the NGNs hosted on that TCP's network. We also do not believe that it is a bar to a finding of SMP on the part of TCPs in this market that they, as well as OCPs, differ in the size of their operations.[45] The same is equally true in the case of TCPs of geographic and mobile calls. Whilst this has influenced Ofcom's views regarding the appropriate SMP remedies to be imposed on smaller TCPs of fixed geographic and mobile calls, it has not precluded the initial SMP finding.

We accordingly conclude that Ofcom's proposals in the 2nd Consultation must take into account the existence of SMP in relation to non-geographic call termination. Ofcom will also need to consider the position of non-geographic call termination in its upcoming FNMR. In its response to Ofcom's call for inputs on the FNMR, EE has submitted that non-geographic call termination should be included in the fixed call termination markets covered by that review (which requires remedies to be designed appropriately). Failure to at the very least consider this issue would be a failure of Ofcom's duties under the Act and the CRF.

2.2 Questions on the legal and analytical framework

[45] cf §Table A10.2.

Q5.1:

Do you have any comments on our Equality Impact Assessment? In particular do you agree with our view that our proposals for changes to non-geographic numbers are likely to have an overall positive impact on the equality groups identified in Annex 15?

EE has concerns that Ofcom's proposals may have a detrimental impact on all customer groups, especially vulnerable customers in the equality groups identified in Annex 15.

Ofcom concludes that while the benefits will apply equally to all consumers, there may be some particular benefits for vulnerable consumers. We are not convinced that Ofcom has drawn the correct conclusions on these impacts in all instances. Unless Ofcom acknowledges and addresses these weaknesses, there is a significant risk that the proposals could instead result in dis-benefits to all consumers, with vulnerable consumers being particularly **adversely impacted**.

We consider each of these 4 categories of impacts of Ofcom's proposals set out in Annex 15 in turn below.

a) Improved price awareness

It is notable that Ofcom's own 2011 Experimental Research has concluded that unbundling resulted in an **increase in errors in the making of call decisions,** as the requirement to add two separate charges together makes the choice to make a call, or not, more difficult. It must be stressed that this effect was observed in a university subject pool and in a simplified simulated environment. This might suggest that for many customers "in the real world" unbundling could lead to a greater number of misinformed choices at point of use. We are concerned that this could particularly impact vulnerable consumers and deter them from making calls.

b) Prices for NGCS services that better reflect consumer preferences

Under Ofcom's current proposals, the same AC is to apply for 08x and 09 call charges. There is accordingly a real risk and even likelihood, which is acknowledged by Ofcom in the 2nd Consultation, that the cost of calling 08x numbers may be higher than today (to account for the 09 element), which logically will not reflect the preferences of consumers of 08x calls. As set out in our response to question 10.1 below, this impact could be mitigated by allowing an option for different access charges to apply to 08x and 09 numbers, and we strongly urge Ofcom to take this course. To the extent that Ofcom declines to take this course, the resulting higher costs of calling 08x numbers will most certainly impact vulnerable customers more than other customers, particularly where socially important services continue to be operated on these 08x number ranges (and we note that 08 numbers tend to be used for customer service numbers, which customers may have no option to call; whereas 09 numbers are better associated with optional entertainment services).

As noted in response to question 4.1 above, there is also a risk that unbundling will result in decreased competitive pressure on and therefore ultimately higher SCs being set for "locked-in" calls to NGNs - such as calls to essential services on 08x numbers like customer service, doctors surgeries or help lines. Again, this factor may result in prices that do not reflect consumer preferences, and has the potential to particularly negatively impact vulnerable customers who rely on calling such "locked-in" numbers.

c) Improved access to socially important services, particularly for vulnerable consumers

We believe that Ofcom has overstated the potential for improvements and understated the potential for harm to access to socially important services under its proposals.

Ofcom promotes its 080 proposals as the flagship benefit of its NGN reforms for vulnerable consumers (A15.6). Yet, Ofcom must accept that most socially important numbers operating on 080 numbers **are already zero rated from both landlines and mobiles**, whether as part of The Helplines Association or DWP schemes. In addition, there are of course many other available means of accessing socially important services other than via calls to 080 numbers, such as through call-back services, geographic numbers, mobile short codes, online chat services and email[46] etc. Access to socially important services is already a reality.

It is also notable that Ofcom has failed to find any valid statistical evidence to suggest that there will be any material overall increase in the volume or length of calls to freephone numbers above current levels as a result of its proposals. This suggests that customers, including vulnerable customers, are already getting the access to socially important services on 080 numbers that they need, and that all Ofcom's proposals will do is provide an alternative means of access, which is more costly for OCPs and SPs to provide.

Furthermore, as a result of these higher costs (in the form of likely lost margins for mobile OCPs and higher origination costs for SPs), there is a real risk that:

- available funds for mobile OCPs to invest in other socially important products and services could be limited and/or that the price of and thus access to other OCP socially important products and services will be increased under the tariff package effect (which risk will be further exacerbated by the need to recover the costs of implementing unbundling); and
- that the circa 83% of SPs who do not wish to pay higher origination charges in order to facilitate free-to-caller calls from mobiles to their 080 numbers will either be put out of business or be forced to migrate to another number range in relation to which calls are free-to-caller from neither landlines nor mobiles - which could materially negatively impact the current levels of access to socially important services by all consumers, especially vulnerable ones.

It is difficult to predict with any certainty the extent to which the impact of these effects will flow through to consumers and how quickly, but we are concerned that Ofcom has not paid sufficient attention to this possibility at all. The fact that it cannot be quantified does not mean the risk does not need to be factored into Ofcom's thinking.

Ofcom should also not underestimate the impact of its proposals, in particular mandating free-to-caller mobile freephone access, on payphone viability.[47] Payphones are likely to provide an important means of communication with family and friends as well as socially important services for a range of vulnerable customers (e.g. those temporarily or longer term unable to afford a phone of their own). Any proposals which may result in less payphones being viable and hence removed from service should be carefully considered in this context.

Lastly, EE notes that not all socially important services operate on 080 numbers - many also operate on landline numbers or other 08 number ranges. Access to these services will not necessarily be improved by Ofcom's proposals, and may indeed become worse[48]. As noted in detail in EE's response to Ofcom's first consultation, the reason not all socially important services operate on 080 numbers is that there is no legal or regulatory requirement to do so. Numbering regulation will not in itself necessarily improve access to these services if the service providers choose to use more expensive numbers. Access to services of public importance is a much wider social issue over which Ofcom does not have jurisdiction outside of the communications space.

d) Better service variety, innovation and availability through the increased demand for NGC services

As noted above in response to question 4.1, Ofcom has provided very little evidence that these benefits are likely to accrue to any customers or customer groups. Indeed, in the case of Ofcom's

46 Ofcom raises a concern in the 2nd Consultation that mobile only households won't necessarily have access to the internet [15.37]. However, EE notes that the majority sales of mobile handsets are now smartphones which enable access to the Internet, with many attractively priced handset and mobile data access packages available to mobile only customers. For example Android phones including various Samsung handset models retail for £30-£40 and have 3G internet connectivity.

47 See Figure 16.1 and §16.207.

48 As mentioned above, there is no evidence that unbundling will lead to a fall in call charges, and there is a risk that the opposite may be true. Clearly, an increase in price may result in new barriers to services being erected.

preferred freephone proposals (mandated free-to-caller designation for all ranges) the evidence suggests that there will most likely be a material loss in service variety and availability.

In conclusion, while it may be argued that vulnerable consumers may enjoy some benefits from Ofcom's proposals, we believe there is a very high risk that they will be disproportionately **negatively impacted** by a move to a charging structure that is more complicated than what exists today, and, potentially, by the impact of the tariff package effect and other price rises and SP migrations away from the 080 range.

Ofcom flags some of these risks as a potential area of concern as a result of its proposals (A15.8). However, Ofcom suggests that the impact will largely befall fixed customers only and that overall customers will have a better choice of tariffs based on their call preferences. Ofcom therefore dismisses this concern and does not explore the hypothesis further. On the contrary, we believe that this merits further examination to avoid unexpected consequences on fixed line customers, particularly from the perspective of vulnerable customers. It strikes us as both odd and concerning that, even though Ofcom notes that **those with a disability and over 55 are most likely to be in fixed only households** (A15.13), Ofcom does little to understand the extent of the potential negative impact of Ofcom's proposals on these customers. Ofcom simply states that the negative impact is lessened because many vulnerable customers also live in mobile only households (and Ofcom believes these customers to benefit). This conclusion clearly ignores the fact that a significant group of vulnerable customers may not be better off - namely those who live in fixed only households. Ofcom's Equality Impact Assessment therefore seems incomplete.

2.3 Questions regarding the revenue sharing ranges

Q9.1:

Do you have any comments on our provisional conclusion that the unbundled tariff should be applied to the revenue-sharing non-geographic number ranges, and in particular on the additional evidence (gathered since the December 2010 Consultation) which we have used to support our assessment?

See section 1 of this response, together with our responses to questions 4.1, 5.1 and 13.4.

Q10.1:

Do you agree with our proposal that the AC should be allowed to vary between tariff packages but that OCPs should be subject to a tariff principle permitting only one AC for NGCs? If not please explain why.

EE accepts that, the more complex the AC pricing structure, the greater the risk that it will not be transparent to callers. EE also accepts the concept that a single price may be easier for callers to remember than multiple prices. However, callers are already able to remember tolerably well several different prices for their telephone calls, depending on the category of the call – calls to geographic numbers, calls to mobile numbers, calls to emergency services numbers etc.

EE therefore does not believe that it is essential that all types of calls to NGNs should be considered to fall in the same category, and hence to charged at the same price by OCPs, just because the calls fall within the scope of Ofcom's current review.

There is already a clear distinction in consumer views between calls to 08 and 09 numbers. Ofcom's own research shows that consumers are well able to distinguish and understand differences in call purpose and cost up to the second digit of the dialled number - suggesting that there is no need to necessarily use the same AC across these separate types of calls (§10.56).

Indeed, Ofcom has already proposed that there will be three distinctly charged categories of such calls, with 03 numbers continuing to be charged like geographic calls, 080 numbers free to caller, and only the other types of non-geographic calls subject to the "single" AC. Furthermore, in Ofcom's proposed illustrative guide to the number ranges (Figure 1.1), Ofcom clearly and transparently lists out 3 different categories of NGN calls that will be subject to an AC – "08 numbers", "09 Premium Rate numbers" and "Directory Enquiries".

EE accordingly remains of the view that it will not materially impair Ofcom's transparency objectives nor the ability of customers to remember the relevant charges if OCPs are given the flexibility to set more than one AC for these distinct categories of NGN calls and that to do otherwise would simply result in unnecessarily reduced retail pricing flexibility and reduced ability for OCPs to set economically efficient prices for no obvious gain (cf §10.75).[49]

At the same time, EE believes that this approach would bring clear consumer benefits. In particular, this would enable OCPs to more accurately reflect their underlying costs when setting the AC. It is expected that calls to "09 Premium Rate numbers" and potentially also calls to "Directory Enquiries" will continue to cost considerably more to the caller than calls to "08 numbers". As acknowledged by Ofcom in permitting the PRS Bad Debt Surcharge of 5.2% afforded to BT as an OCP in relation to premium rate calls, there is a materially higher risk of bad debt in relation to these calls (§10.61). Additionally, for some premium rate calls there is a mandatory a pre-call announcement, offering the caller the option to terminate the call at no charge to the caller. Such aborted calls nevertheless generate costs for the OCP.[50]

EE believes that it is both efficient and appropriate to allow OCPs to reflect the different potential bad debt costs, administrative costs and network costs associated with these different categories of NGN calls when setting the AC.

Otherwise, if OCPs are required to use a blended single pence per minute AC to cover the higher costs associated with calls to "09 Premium Rate numbers", the AC is likely to unduly penalise callers accessing "08 numbers", which would not be a favourable outcome for consumers – especially when "08 numbers" are some of the most popular in the entire range of NGNs, used to contact a wide range of both socially important and commercially significant service providers in the UK. Specifically, based on Ofcom's estimations, enforcing a single AC is likely to result in callers to 08x numbers from fixed lines paying 0.5ppm per minute more than they would do if multiple ACs were permitted, and callers to 08x numbers from mobiles are likely to pay 1.3ppm more than they would do if multiple ACs were permitted (Table 10.2).[51] A single AC per tariff also exposes OCPs to a compounded commercial risk of customers' relative calling patterns changing (e.g. blended call origination costs will increase if relatively more 09 calls are made in the future). OCPs may therefore seek a further overall increase in the blended AC to attempt to compensate for that commercial risk.

Managing the bad debt and aborted call risks associated with 09 calls may, to some extent, be possible through setting a different AC for different tariff packages - e.g. setting a higher AC for higher credit risk customers. However, given that the overwhelming majority of callers do not make calls to 09 numbers at all, we remain of the view that this would be an inefficient "blunt instrument" for managing this risk, which would still be likely to unduly penalise the majority of the higher credit risk customers for the low bad debt risk 08x calls that they do make, to cover for the high bad debt risk on the 09 calls that they don't make (cf §10.69).

In contrast, Ofcom has found that the evidence it has gathered "demonstrates that few consumers call 09 numbers" (§10.58, Table 10.1). We therefore fail to see how the risk that these few

49 We must say that we were quite surprised at Ofcom's suggestion at §10.81 that an element of Ofcom's intention in setting a single AC is to curtail the ability of OCPs to set economically efficient retail prices, on the basis that such efficient pricing could be "socially undesirable". We trust that this is not actually a motivation for Ofcom's current preferences in relation to the setting of the AC and should be disregarded. However, to the extent that this is a driver behind Ofcom's preference for a single AC, Ofcom should articulate very clearly and carefully exactly which "social concerns" it considers should outweigh the setting of economically efficient prices and invite further submissions from industry on the matter.

50 We do not consider it determinative in relation to the clear existence of these costs that BT has not sought to recover them under the current PRS bad debt surcharge - cf §10.53. We further note that the costs to mobile OCPs of call origination are many times higher (even using Ofcom's impact assessment range, which we believe markedly underestimates these costs) than the costs to fixed OCPs, such as BT.

51 There appears to be absolutely no evidentiary basis for Ofcom's bald assertion in §10.73 that the increase would in fact be lower than these levels, and we would therefore urge Ofcom to either substantiate this claim with relevant facts, or disregard it as an invalid assumption.

consumers may not fully recall / underestimate the AC for calls to 09 numbers if OCPs are permitted to set multiple ACs (§10.59) can be considered to outweigh the risk that the many callers to 08x numbers will be overcharged if Ofcom mandates a single AC.

Furthermore, it seems that the risk to 09 callers is likely in practice to be much lower than estimated by Ofcom - as those who use these services the most are correspondingly more likely to recall their relevant 09 AC applicable to these calls. It is true that a higher proportion of customers never make calls to 09 numbers than in respect of 08x calls. However, as is the case with 08x calls, the vast majority of those customers make those calls either sometimes (once a month) or rarely (less than once a month), with in each case less than 10% of the customers who make these calls making them regularly (every week) (see responses to questions 21 and 21 of the 2010 consumer survey). We therefore consider that those consumers who do make 09 calls are no less likely to recall an 09 specific AC than those customers who make 08x calls are likely to recall the AC for 08x calls. Accordingly, we do not consider that there is any justification for Ofcom's concerns that competitive pressure in respect of a separate AC for 09/118 calls would be weakened by low consumer awareness of that AC - for those customers who make these calls, awareness levels are likely to be similar as for customers who make 08x calls (cf §§10.67-10.68; 10.80).

Finally, we note Ofcom's observations that, in response to its initial consultation, "most OCPs argued for allowing the AC to vary depending on the number range, and specifically that there should be two ACs, one for the 08 range and one for the 09/118 ranges" (§§10.32; 10.41). As a matter of general principle, we think that Ofcom should exercise extreme caution when proposing to go against the majority opinion of industry regarding the merits of commercial proposals where there is a very high risk of regulatory failure.

Q.10.2:

Do you agree with our proposed structure for the AC, in particular that: (i) that the AC should be a pence per minute charge only, but can be subject to a minimum one minute call charge; (ii) that the AC should not vary by time of day; and (iii) that the AC can be included as part of call bundles provided that inclusion does not differentiate by number range? If not please explain why.

AC as a ppm charge only, subject to a 1 minute call charge

The consumer benefit of a pence per call ("ppc") charge over a pence per minute ("ppm") charge is certainty of price regardless of call duration. For calls to services where the customer potentially faces being placed on hold for a period of time outside of the customer's control, some customers might prefer to be able to control their costs with a ppc AC rather than via the less convenient method of repeatedly calling back in the hope of finding a less busy time when their call will be answered more quickly - which is the only option available with a ppm AC.

Recognising that the AC is intended to allow for (efficient and competitively driven) recovery of current OCP revenues on NGN calls, in the face of uncertain and potentially very short call durations - e.g. in respect of new NGN services, if OCPs are only permitted to set a 1 minute minimum call duration, this could potentially motivate the setting of a higher overall ppm AC than if the OCP was, for example, able to set a minimum call charge duration of longer than 1 minute.

Assuming that there is a single AC per OCP tariff package (or single 08x and 09/118 AC as per our preferences discussed in response to question 10.1 above)[52] we do not believe that the transparency benefits for consumers of insisting that this AC cannot take the form of a ppc charge for some or all of an OCP's tariffs and/or be set at a minimum call duration level of higher than 1 minute if a ppm charge will outweigh the potential negative consequences for consumers of these restrictions.

52 We agree with Ofcom's conclusions at §§10.107-10.109 that the AC cannot and should not vary to reflect variability in individual SCs.

We are therefore not convinced that the restrictions on the form of the AC being proposed by Ofcom are necessary or appropriate "for the purposes of protecting consumers" (cf §10.113) [checked to here]

AC should not vary by time of day

We continue to agree with Ofcom that there should be no time of day ("ToD") variation in the AC.

Inclusion of the AC in bundles

EE welcomes the flexibility proposed to be offered to OCPs to include the AC within their inclusive bundles, should they commercially decide to do this. As noted in EE's original consultation response, in practice, we suspect that it is unlikely that OCPs will include just the AC for NGN calls in-bundle – as leaving the SC outside of the bundle will expose the customer to overall call-charge uncertainty, and it is certainty and simplicity of pricing that tends to make bundled pricing so attractive to consumers (cf §10.130).

We welcome Ofcom's proposed flexibility to allow OCPs to "absorb" the cost of the SC, and thus to offer the full cost of calls to particular NGN ranges in their bundles (e.g. for OCPs to be able to offer calls to certain number ranges for "free" within their allowance of total minutes or at particular times of day) (§10.388). EE believes that Ofcom's proposals would severely limit retail pricing flexibility and competition to the detriment of the best interests of consumers if OCPs were not given this flexibility.

However, in terms of retail pricing flexibility, EE is most concerned by Ofcom's proposal to only allow the AC to be included in a bundle if there is no differentiation by number range (§ 10.142). Following current practices, EE envisages that there may be OCPs who would, for example, potentially look to include calls to 084/087 numbers in their bundles of calls to geographic and mobile numbers, but who may not also wish to include the lesser used and generally more expensive 09 numbers in these bundles. For example, in many of EE's current T-Mobile pay monthly tariffs EE includes all 080 and 08x calls in bundle, but does not include 09 calls in bundle. EE considers that it is likely to be unduly detrimental to retail pricing flexibility and innovation and the best interests of consumers for Ofcom to limit OCPs' retail pricing offers in this fashion and foresees a high degree of risk of regulatory failure if Ofcom regulates to limit this flexibility.

Q10.3:

Do you agree with our proposal not to impose a cap on the AC in the first instance? If not please explain why.

EE agrees with Ofcom's ongoing preference that the AC should not be regulated. EE does not support the need to regulate the price of the AC and considers that the transparency achieved through the unbundled approach will ensure sufficient competition amongst OCPs to ensure the AC is set at efficient levels. Regulation is likely to have distortionary effects which would in fact reduce competition (e.g. as has to a large extent been seen with EU roaming caps), as well as forcing operators to recover costs inefficiently from other services. There is also no market power issue to justify any form of price cap. Accordingly Ofcom is right to refrain from intervention in the absence of clear evidence of a need to do so (§10.193).

Q10.4:

Do you agree with our proposed approach for the structure of the SC? In particular that: (i) bespoke SCs should be prohibited; (ii) that no further restrictions on the SC structure should be required (e.g. allowing ppm and ppc SCs, no restriction of ToD charging subject to ability of billing systems to pass through the charges) If not, please explain why and provide evidence if possible.

Bespoke SCs

EE firmly agrees with Ofcom's conclusion that there should not be bespoke SCs

As Ofcom observes in the 2nd Consultation, allowing bespoke SCs would clearly undermine the information value of the "universality" of the SC (i.e. a single SC per non-geographic number) – in terms of allowing retail price competition to occur between OCPs around the AC, and between SPs around the SC (§§10.209-10.213).

The variable termination charges introduced by TCPs to date have depended on the total retail price the OCP charges the caller for the call to the non-geographic number. However, it is possible to envisage a new type of variable termination charge under the unbundled tariff remedy whereby the termination charge varies according to the AC applied by the OCP. As Ofcom again rightly acknowledges in the 2nd Consultation, there is a very high risk that this could allow TCPs to exploit relative power imbalances in negotiations to the detriment of consumers, as well as causing further disputes (§10.215).

It is therefore imperative that, if Ofcom proceeds with its proposal for unbundling, the relevant legal instruments issued by Ofcom regarding the implementation of these proposals expressly exclude the possibility of SCs (or any other charges levied on OCPs by TCPs in relation to the termination of NGN calls) that vary according to the identity of the OCP or the level of the OCP's AC. We will provide further comments in this regard once Ofcom issues its consultation on the relevant legal instruments.

Other restrictions on the SC charging structure

In relation to ToD variations in the SC we are quite surprised that Ofcom has decided to ignore the recommendations of the industry technical working group ("TWG") that these should not be allowed, in order to avoid billing system problems and complexities (§10.242), particularly when Ofcom is uncertain about whether or not there are any efficiency benefits to be gained from allowing ToD variation (§10.239). In order not to delay implementation and expend valuable industry time on negotiating potential arrangements for SC pricing points to allow for ToD variations at a high cost to industry and with no or minimal efficiency/consumer benefits, we would recommend that anyone arguing for ToD variations be required to first present for consultation a positive cost benefit analysis in support of the same prior to industry being obliged to consider it in any detail.

We do not object to allowing price points for the SC which cover both ppm and ppc charging options. However, we are very concerned at the suggestion that any such options could result in the OCP potentially being out of pocket (see e.g. §10.254). Regardless of the ppm or ppc form it takes, any risk of the SC not covering the TCP/SP's costs and/or not being recovered fully or at all from the calling customer **should lie entirely with the TCP and not the OCP** - as the OCP has absolutely no control over this element of the call charge. We expect Ofcom's forthcoming proposed legal instruments for the implementation of unbundling to appropriately protect OCPs in this regard.

Q10.5:

Do you agree with our proposals to impose maximum SC caps for the purposes of protecting the identity of the number ranges? Do you agree that the caps should apply to the 084, 087 and 09 ranges and that they should be set exclusive of VAT in the Numbering Plan? If not please explain why and provide evidence to support your position if possible.

EE supports Ofcom's proposals.

EE remains of the view that consumers will benefit from more clear and stable termination charges tied to specific number ranges and that there is real value in maintaining tariff bands for SCs based on number range to assist consumers in identifying the likely cost of making calls to NGNs. Such price banding, enforced through the NTNP, should hopefully lessen the risk of "bill shock" and enhance consumer confidence in calls to NGNs.

However, one point not clearly covered in the 2nd Consultation is the need to ensure that the SC advertised by the SP **matches exactly** the SC that is billed by the TCP to the OCP (e.g. rounded to the same number of decimal places etc). Otherwise there is a risk of both customer confusion and OCP commercial exposure. EE expects Ofcom's legal instruments to appropriately cover this issue.

Q10.6:

Do you agree with our proposed SC cap of 5.833p for the 084 range and 10.83p for the 087 range? If not please explain why.

EE agree with the principle of having an SC cap and broadly tying it to current wholesale charge-bands for these calls. Otherwise EE does not have further views on the absolute level of the proposed caps.

Q10.7:

Do you agree that the number of SC price points should be restricted? Do you agree that that restriction should be somewhere between 60 and 100, and where within that range do you consider would be optimal? Do you have any comments in relation to how Ofcom should decide where in that 60 to 100 range the maximum number of SC price points available should be set?

EE agrees that the number of different SC price points should be restricted. We believe that the restriction should be set at the lower end of the proposed range i.e. 60. Limiting the number of price points has operational and therefore cost benefits. [✂] [✂], but more importantly, the management of these price points is a manual process. Therefore, the more price points there are, the more resource intensive it is for us to manage.

Limiting the range of price points for each number range is potentially more important, however. This will not only, potentially, help build consumer awareness of prices, but it also helps us mitigate any cost under-recovery issues that may occur should the SP unexpectedly change their SC. On this last point, we expect Ofcom to oversee the establishment of a code of practice to ensure that price changes by SCs are managed effectively (so that there is no bill shock or confusion for consumers or risk of under-recovery by OCPs) - see further our response to question 12.2 below.

EE agrees that it is logical to seek to keep the distinction between the 08 and 09 price range in terms of the SC price points that apply (with 09s generally being more expensive than 08). This would be in line with customer expectations.

Q10.8:

Do you agree with Ofcom's proposed approach to agree the relevant SC price points with industry rather than specifying them as part of the Numbering Plan? Do you have a particular preference for which SC price points are necessary within the different number ranges? What criteria would you propose for the selection of price points?

Ofcom is proposing that it sets an overall cap on the number of price points but that industry agrees which exact price points are set under that overall cap (§ 10.367) "albeit with Ofcom involvement". OCPs will be required to bill their customers based on price points which will be set collectively by TCPs. The options within each type of number of range, which will be available for SPs and which OCPs will be obliged to charge, will therefore be subject to the overall requirement for that number range (i.e. the 7ppm 084x cap) and the overall cap on the number of price points. However, this still creates potential for a significant number of options to be available within those constraints. EE supports providing clarity and certainty for OCPs in terms of the **absolute number of price points with which their billing systems will need to deal**.

However, the current proposed process for setting the individual price points remains opaque and subject to a number of important issues:

The exact nature of Ofcom's involvement is not clear nor is the process for resolving disputes on such issues both between CPs and between CPs and SPs. Ofcom needs to explain what role its “involvement” in the process will take. At one extreme this could lead to Ofcom taking little more than an observer role, which EE does not consider would be appropriate.

There are potential competition law issues where prices are being set (albeit within specified ranges) by operators collectively in what Ofcom considers is an otherwise competitive market. It is not clear how these issues will be dealt with.

Ofcom is proposing that these price points are not specified within the numbering plan and therefore the different SCs will presumably be set on a contractual basis through the carrier price list. The process required for changing such price points over time is therefore not clear as the existing NCCN/OCCN processes would not seem to be appropriate or workable in this context.

The basis on which Ofcom would enforce its overall cap on the total number of SCs is not clear. This means that any changes to this overall cap would potentially be taken on an opaque basis on request by TCPs. However, OCPs need to undertake long term billing system capex in order to service the particular number of price points, and would potentially need notice of changes here over years rather than the usual NCCN/OCCN type timescales.

As each SC price point will presumably need to be assigned a specific set of numbers it is not clear why the agreement process which Ofcom envisages could not be put into the numbering plan. This could be subject to, for example, annual review (which could take account of any need for inflationary changes). We believe that this approach would allow sufficient flexibility to SPs,but also stability which would benefit customers, increase customer awareness and ensure that OCPs have sufficient certainty around which to build their billing arrangements.

This would provide Ofcom with a method of enforcing its overall caps, and ensuring that any criteria which are set for determining the price points are transparently applied and understood. Such criteria should be based on ensuring that there is sufficient variation in the SCs to fulfil SP needs. As such they should be driven by the need to ensure continuing competition in the provision of services to SPs and not by any requirements of TCPs - to avoid, for example, a repeat of the current TCP "ladder charging" NGN termination rate structures. This should therefore focus on giving SPs as wide as possible a variety of appropriate price points within the overall constraints set by Ofcom.

EE has one cautionary note it wishes to raise. The rationale for such price points given in the 2nd Consultation seems to be based on ensuring that TCPs and SPs are broadly able to replicate any existing charging arrangements, which is in principle sensible. However it is unclear how such an initial sensible starting point which promotes and protects competition now can be maintained over time under Ofcom’s proposed approach.

As an OCP EE has no comments on which SC price points are necessary other than to say these price points need to have regard to consumer preferences and the need to limit confusion where possible.

Q10.9:

Do you agree with our assessment on the location of the AHP on BT’s and other CPs’ networks set out in Annex 18? If not, please explain why you disagree.

EE continues to support the proposal that the Assumed Handover Point ("AHP") should reflect a Near End Handover ("NEH") regime on the grounds of efficient cost recovery and welcomes Ofcom's proposals in this regard. OCPs cannot determine the termination point of calls to NGN ranges prior to handover to TCPs, where the non-geographic call is then translated into a geographic number for onward routing. Accordingly we agree with Ofcom's view that it is most efficient for calls to be handed over at closest point to the point of the origination of the call as this minimises end-to-end call conveyance costs (§A18.25).

Accordingly the AHP should be based on NEH. For the avoidance of doubt this means that:

- for BT originated traffic, the AHP is the Digital Local Exchange ("DLE") (§A18.26)

- for BT terminated calls, the AHP will be the point of interconnection closest to the origination of the call - e.g. originating switch in the OCP's network (§§A18.28-A18.30)
- where a transit provider is used the AHP is at the ingress point to the transit provider's network (Figure A18.1)
- Similarly, in contrast to Ofcom's suggestion (see §A18.51) we do not see any reason to depart from the NEH principle when there is direct routing between two CPs other than BT.

Q10.10:

Do you agree that for calls that route via a transit network, the TCP should pay for transit? If not, please explain why you disagree. In particular please explain your views on how incentives can be included within an "OCP pays" approach to ensure the TCP seeks to interconnect directly (where this is efficient) and not to reduce its points of interconnection at the expense of the OCP and efficient end to end call routing.

EE supports the proposal that TCPs pay for transit conveyance services on the basis of the cost recovery principle that TCPs are best placed to minimise costs of transit (§A18.37).

However we are concerned at Ofcom's suggestion that "the OCP should bear the costs of the interconnection circuits to the transit provider" (A18.3). We do not see why it is necessary for Ofcom to interfere in the existing (or future) arrangements between OCPs and transit providers in relation to the payment for interconnection circuits between their networks (which as Ofcom acknowledges may cover a range of traffic other than NGN calls). In some cases the OCP may pay for these circuits (§A18.39) but in other cases OCPs and transit provider can and do strike different commercial arrangements.In either case, this would not prevent the AHP for the purposes of the SC being set at the ingress point to the transit provider's network as set out in Figure A18.1.

Q10.11:

Do you agree with our proposed approach for calls between two non-BT CPs, both for the case when a transit network is used and for when direct interconnection is implemented? If not, please explain why you disagree.

No. We believe that the efficiency considerations in favour of NEH apply equally to direct and indirect call routing between an OCP and TCP other than BT as they do when BT is the OCP or TCP. Therefore we consider that the same principles should also be applied when the SC is set by a TCP other than BT.

That is to say, the AHP should remain at the originating switch (§A18.40), and the TCP should be given the appropriate infrastructure investment signals to build out to pick-up traffic from this point where it is efficient to do so (e.g. involves a cost saving to the TCP over using a transit arrangement), just as is the case when a TCP is deciding whether and how far to invest when picking up traffic from BT's local exchanges (§A18.9).

Establishing direct interconnection relationships is costly for both OCPs and TCPs (hence the current reliance on transit arrangements). In addition, the option to use transit arrangements provides some degree of competitive constraint on direct interconnect termination rates. It would be undesirable for Ofcom's proposals to distort the current pricing signals given in this regard, which EE believes are efficient. This approach is also far more likely to generate disputes between non-BT CPs than a simple and clear rule that the AHP should be the NEH point in all cases.

Our comments in relation to transit arrangements as set out in response to question 10.10 above also apply equally regardless of whether or not any of the parties involved (OCP, TCP or transit provider) are BT.

Q11.1:

Do you agree with Ofcom's assessment that the unbundled tariff should also apply to the 0845 and 0870 range? If not, please explain why.

EE agrees with Ofcom's decision that it is most appropriate for Ofcom to align the still heavily used 0845 and 0870 ranges with the other 08x ranges.

EE believes that de-linking the 0845 and 0870 range from geographic rates and aligning them with the other 084x and 087x ranges will help to avoid customer confusion and enhance customer price awareness by promoting closer price alignment amongst the 08x ranges.

However, we would be concerned if the implementation of unbundling on these ranges were to necessarily result in an increase in charges for 0845 and 0870 calls - e.g. those that are currently included in bundles at an incremental price of zero. Therefore, for the reasons set out in response to question 10.2, we strongly believe that (a) OCPs should be allowed to absorb the SC for such calls, should they so choose and (b) OCPs should be allowed to absorb the AC for just these specific number ranges, should they so choose. Furthermore, for the reasons set out in our response to question 10.1 we believe that there should be separate 09 and 08x ACs to avoid unnecessary inflation of 08x call charges.

Q12.1:

Do you agree with our proposal not to mandate the presentation of disaggregated AC and SC charges on customers' bills? Do you agree with our view that it should be up to OCPs to decide the best way to present these charges to their customers on bills OCPs but that we require that at a minimum, the OCPs should include the customer's AC on the bill they receive?

We agree with Ofcom's proposal not to mandate the presentation of disaggregated AC and SC charges on customers' bills and believe it to be much more proportionate and workable than what was proposed in 2010. We also believe that it provides the same information to customers without requiring extremely costly and bespoke changes to our billing system.

It should be up to OCPs to decide the best way to present unbundled call charges to customers on bills. Ofcom may wish to set the overall requirement for ACs to be included, but exactly how and where on bills this information should be communicated to customers must be the operators' domain. This will ensure that the regulation is future proof and sufficiently flexible to cope with changing customer expectations and information needs. For example, it would allow us to take on board feedback from customers and to make changes to our bills in order to accommodate this feedback. We would stress that we are incentivised to take on board this feedback and to evolve our communications - after all, the less calls we receive about call charges owing to clear communications, the better for us as well (from a customer experience and customer service cost perspective).

It would also help ensure that implementation is more cost effective as the "means to the end" will be in our control. [✂][✂]

Q12.2:

Do you agree with the requirement for a central SC database. If so what would be your preferred approach – public sector or private sector provision? If you do not agree with the need for the database what approach for the dissemination and verification of SC would you prefer and why. Are there any other issues with respect to the database you would wish to raise?

We believe that a central SC database is likely to be critical to the success of the unbundling proposals, should Ofcom decide to proceed with these. Without access to a comprehensive and up-to-date database of SCs, we do not believe that Ofcom's proposals will be workable from a consumer transparency perspective and are likely to be much more difficult and risky for CPs to implement from an operational perspective.

As Ofcom acknowledges in the 2nd Consultation, in around at least 1/3 of cases, customers dialling unbundled NGNs are not likely to have access to the SC at the point of call (e.g. when dialling from a non-classified directory or based on a business card). In order to meet Ofcom's transparency and consumer protection imperatives, it is imperative that consumers have some means of quickly, easily and reliably finding out how much they will need to pay for the SC component of the call, should this cost be important to them. Ready access to comparative SC pricing information is also critical if Ofcom hopes to stimulate any competition between SPs in relation to the level of their SCs.

Assuming that the costs of development, operation and maintenance of the central SC database are kept tightly under control by Ofcom and the accuracy of the information contained in it is verified and assured, we believe that this is likely to be the most efficient and effective way for the industry to provide access to this information to consumers.

For example, depending on the forms of database queries decided to be developed on a costs/benefits basis, OCPs could then simply refer customers (via the OCPs' websites and potentially also in point of sale and billing information) to the relevant weblink, shortcode and/or phone number which enable the customer to query the database to find out SC costs via online, SMS and/or phone call query. Furthermore, for SPs publishing their NGNs in forms that are likely to be updated less frequently than the SC (e.g. on the side of a trade van) a similar link could be published in order to improve customer price awareness without the risks of outdated pricing information being given and/or high costs of updating it which are associated with publication of the current SC.

In terms of operational requirements, it is critical that Ofcom's unbundling proposals are not unduly burdensome or risky for OCPs to implement. As Ofcom has identified in its consultations, there are currently circa 400 TCPs in the market, with no upper limit on this number. Arrangements for notifying the SC to OCPs which potentially differ in form and timing between TCPs are therefore likely to be unduly burdensome to implement and control for OCPs. Critically, what an OCP needs is:

- For the SC to be **commercially reliable**. Any SC notified to an OCP for the purposes of onward billing to an end-customer must be verified as accurate. If proven inaccurate, the risk of this (e.g. any obligation to compensate the customer) must lie entirely with the SP. This function could potentially be fulfilled separately by the major transit operators and directly interconnected TCPs, according to relevant rules specified by Ofcom. However, the best way to assure quality control and consistency across the industry is likely to be via the development of a central SC database and uniform rules regarding input requirements, reliance on the inputs etc. The database would also then be able to fulfil a dual purpose - access by CPs for operational purposes and access by consumers for transparency purposes, which may be more efficient.
- For notification of all new and/or changed SCs to be notified to the OCP in a **co-ordinated manner**. There are many tens of thousands of SPs. Under unbundling, each one of these SPs will need to confirm their starting SC and retain the right to change the level of their SC. There would simply not be enough hours in the day for an OCP to be able to process notifications in this regard on an individual basis. We therefore strongly believe that any notification of new or changed SCs to OCPs must take place on a single day for all SCs - e.g. initially on a specified date and thereafter on the first working day of every month. Again this function could potentially be fulfilled separately by the major transit operators and directly interconnected TCPs, according to relevant rules specified by Ofcom. However, having a centralised SC database could provide a convenient and efficient way to manage this process - TCPs could input any changes into the SC database as and when the SP requests the change and it is approved by the TCP, but these changes could then be stored by the database until the designated OCP notification date at which point in time all such changes would be simultaneously notified to OCPs. The costs and benefits of each option would need to be considered. However, given that up-to-date SC information needs to be accessible to consumers via the database (and thus inputted into it) anyway, it would seem to make sense to control all changes centrally through the database.
- For appropriate **advance notification** of all new and/or changed SCs to be given to the OCP in order that they can be implemented in the OCPs' retail billing systems and correctly charged to

the end-customer. EE requires not less than **8 weeks' notice** in this regard and with any lesser period of notice there is a material risk that the required IT development work to reflect the new or changed SC will simply not be possible. Such an outcome would be highly undesirable for the consumer, the SP, the TCP and the OCP - as it will mean that the customer is being charged the incorrect amount for the SC. It would be possible to give this advance notice according to a simple rolling schedule - e.g. all changes to be notified on the 1st working day of every month and to come into effect 8 weeks later. Where these rules were inputted into the centralised SC database this could provide a convenient and efficient way to ensure that all SCs are updated and the new information accessible to consumers and CPs as soon as the changes come into effect upon expiry of the relevant notice period.

- To have a simple, quick and cost effective means of **responding to customer queries** regarding the SC, noting that the OCP has no control over the level of this charge or any changes to it. As the OCP is still responsible for billing customers for NGN call charges (including the SC) it is likely that the OCP will remain the customer's first port of call for any queries or complaints regarding these charges. Without ready access to a reliable source of information giving details of the service associated with an NGN and the level of the SC for that NGN, our frontline will not be able to adequately respond to such queries - which would be detrimental for each of the consumer, OCP and SP. Providing OCP customer service agents with access to the information in a central SC database would seem to be the most efficient and effective way to meet this requirement.).

We believe this database should be managed by Ofcom (or any self/co regulatory body designated as the NGN compliance body) in order to encourage SP compliance and to avoid the need for the creation of yet another entity to manage this database (and the complexities of the governance arrangements that would come with this). In terms of funding of the database, this should be a levy on SPs. On a cost causation basis, OCPs cannot control the number of SCs, the number of changes to the SC, or the accuracy of the SC input information and thus the requirements for any corrections to it. Requiring SPs to bear the costs of the database is therefore likely to ensure that it is established, operated and maintained in the most efficient manner. The existing PhonepayPlus SP/number checker database would be a useful starting model.

There will need to be clear requirements around how the information in the database will be kept up to date and how accuracy will be ensured. Having Ofcom or the NGN compliance body as the database manager should help encourage good behaviour. There needs to be a sanctions process for non-adherence to database management requirements.

Q12.3:

Do you agree with the need for reformation of the existing processes for number range building and tariff change notification? If so, what do you consider to be the key characteristic of a revised set of processes? Do you consider that there is a need for regulatory intervention in their establishment, if so why and on what basis should Ofcom intervene.

We do not believe that there is any need for Ofcom involvement in the current industry processes for number range building.

However, as noted in our response to question 12.2 above, we do foresee a need for clear and enforceable rules (with sanctions for non-compliance) regarding the accuracy of SC information notified to OCPs and the process for so doing. There is no reason why industry could not be tasked with initial development of these rules. However, in the event of any lack of consensus and in terms of ultimate Ofcom endorsement and enforcement of the rules, Ofcom involvement will be required. Clearly, all of this must be settled well in advance of any proposed implementation date for unbundling.

Q12.4:

Do you consider that there is a need for additional regulatory intervention in the area of end-users' access to non-geographic numbers, in addition to GC20? If so why and what form should such an obligation take?

In EE's response to Ofcom's consultation on its proposed amendments to GC 20, EE raised significant concerns that Ofcom's proposed wording was far wider than that required to comply with Article 28 of the Universal Service Directive - the primary purpose of which is to secure technically and economically feasible **cross-border access** to NGNs - i.e. in one EU country from another EU country. In its statement on the amendments to GC 20 issued on 25 May 2011, Ofcom responded to these concerns by assuring CPs that (§11.18):

"...the proposed obligations in GC20.1 are not intended to affect the current policy on providing 'end to end' connectivity in the UK (which is achieved through an access-related condition on BT) or relate to 'any to any' principles without further analysis."

To date, Ofcom has not conducted any formal analysis regarding whether or not there is any need to expand the current regime for ensuring end-to-end connectivity within the UK (i.e. through the access condition imposed on BT). EE remains strongly of the view that there is no such need. Were Ofcom to form a contrary view that market circumstances had changed sufficiently to potentially warrant its increased regulatory intervention in this area, then Ofcom would need to establish all of the criteria necessary for imposing such additional obligations under section 73 of the Act. As Ofcom has acknowledged elsewhere in the 2nd Consultation, Ofcom would need, inter alia, to ensure that this action was proportionate, and would therefore need to act cautiously before exercising any such powers (§17.59). In the absence of having conducted any such analysis and/or any relevant findings of SMP, Ofcom should not and cannot use the current wording of GC 20 as a "back-door" means of imposing such end-to-end connectivity obligations on CPs regarding NGNs.

Q12.5:

What steps / actions do you consider need to be undertaken to ensure changes to the structure and operations of non-geographic numbers are successfully communicated to consumers?

EE agrees that any changes to NGN charging structures will need to be actively and clearly communicated to customers if these are to be understood and have the desired impact on consumer behaviour. The proposed unbundled pricing structure is very different to the status quo and will be complex for consumers to understand and factor into their purchasing decisions (see further our responses to questions 4.1 and 5.1 above). Moreover, the structural changes also need to be very clearly communicated to SPs as well. We would refer Ofcom again to the confusion that surrounded the launch of the 03 number range, which we believe contributed to the slow take up of this number range. For example, when the BBC first launched this number range, the widely watched Breakfast programme incorrectly promoted it as a premium rate number warning customers that "calls from mobiles would cost considerably more". This is likely to have led to many consumers being put off using this range and other SPs being deterred from exploring this range as a possibility for use with their services.

Ofcom will need to play a central role in the communications campaign. In particular, we agree that Ofcom media activity will be key to disseminating information about and raising awareness of the new charging structure (§12.91). It will also be a cost effective means of reaching out to consumers. Ofcom should also engage with consumer groups in order to help bolster the message.

Of course, a co-ordinated communications campaign will come at a cost. A balance must be drawn between a sustained and widespread customer information campaign and the costs of the campaign. **Proportionality is key**. It is also imperative that any **costs are shared equitably and efficiently** amongst relevant stakeholders. In particular, those parts of the value chain that will benefit most from the changes (SPs), should be expected to bear most of the costs of ensuring that these changes are a success. The cost of communicating the changes must not be borne solely by those CPs that are directly regulated by Ofcom (TCPs and OCPs), but by the NGN value chain as a whole.

Ofcom must also be cognisant that OCPs will already be bearing the costs of proactive communications to our base about any changes to customer price plans. Websites, price guides and other customer facing communications will need to be amended in light of the changes. For the avoidance of doubt, we do not believe that the format of any OCP communications about the structural changes should be dictated by Ofcom. For example, there should be no requirement to send printed communications to customers where electronic communications, including SMS, would suffice and be more appropriate. We would remind Ofcom that we do not have contact addresses for many PAYG customers in any case, and mobile customers are accustomed to receiving this type of service information by text (indeed, many customers will expect it). Broadband customers can receive this information by email for maximum impact at minimal cost. Additionally, OCPs would also incur a training cost for their frontline staff. Each and every EE sales advisor and/or customer service agent will need to have time booked off line to be trained in the new pricing structure. When sales advisors and customer service agents are not dealing with customers but training, this is a cost that EE has to bear. Training schedules are also always congested and planned well in advance. Therefore we believe that the Communications Working Group's lead time of 3-6 months to communicate the changes to customers is overly aggressive (§12.97). We would suggest that a **minimum of 6 months** would be more reasonable to avoid disruption to other training and communications requirements and to help us manage costs.

In light of these inherent implementation costs, we would emphasise that OCPs should not also be expected to shoulder the burden of any wider media or advertising campaign. Any additional costs will need to be funded by wider industry (we also note that we already fund Ofcom and therefore contribute to Ofcom's media budget, which will no doubt be invoked to fund the communications campaign as well). The cost of additional communications campaigns could be funded through a levy on SPs. This could be the same levy that is collected to fund wider compliance activity, and the PhonepayPlus/ASA funding models could be used as a starting point.

Q12.6:

Do you agree with our proposal that existing price publication obligations (with some modifications) are sufficient to ensure that consumers are made aware of their ACs? Do you agree that we would need to specify the AC as a key charge?

We have long been concerned about the overly prescriptive nature of Ofcom's price publication obligations. The amount of regulatory information that needs to be provided grows year on year without any assessment of the necessity or effectiveness of this information. There is therefore a real risk that too much information is being provided in a manner which is not relevant to customers, thereby resulting in customers ignoring the information altogether. This means that price transparency may actually be obfuscated by pricing transparency obligations.

We believe that existing regulation fails to ensure properly informed consumers, because the obligations are too detailed and rigid: the regulation dictates the precise information to be provided, and the manner in which it is to be provided, rather than allowing us to respond to customer information needs. For instance, GC14.2 sets out in detail how NTS numbers should be promoted in all advertising and promotional material (annex 2, section 4) regardless of whether the information is even relevant to the promotion or relevant to the consumer at that part of the sales journey.

We are accordingly pleased that Ofcom has recognised that there is no need for **additional regulation** to ensure customers are made aware of their ACs(§12.129). However, we remain very concerned that Ofcom is still not addressing the fundamental concerns that EE and many other industry participants and indeed Ofcom itself has raised around the consumer benefit and efficacy of the existing regulations regarding publication of NGN and other pricing information. It is critical that Ofcom examines the need and potential for regulatory roll-back in this area - to both reduce unnecessary regulatory burden on CPs and also even more importantly to ensure maximum effectiveness for consumers. Ofcom needs to start re-focusing on what is actually important for consumers. Ofcom should conduct research on what pieces of information are regarded to be of genuine importance to all customers at different stages in the customer journey and the level of information which can reasonably be absorbed by the average consumer.

That all being said, we do not deny that, should Ofcom proceed with its proposals for unbundling, OCPs will need to communicate with their customers regarding the relevant NGN pricing changes. Specifically, we fully agree that OCPs should be - and can only be - responsible for communicating the AC to customers. Information about SCs (including any changes to the SC) needs to be provided by SPs directly. We would also be prepared to replicate or provide links to relevant Ofcom information on maximum SC charges for each number range on our websites to assist customer understanding of total costs, but we should not be required to provide any further detail on SCs and certainly not on a service by service or number by number basis. Of course, OCPs will not be able to avoid handling customer billing queries regarding the NGN call charges on their bills and inevitably many if not the majority of these queries are likely to relate to the variable SC element of those charges, which charges are entirely outside of the control of the OCP under the unbundled structure. The need to recognise these increased customer service costs for OCPs and to ensure that such queries can be handled in the most efficient and cost effective way possible is covered by our responses to question 12.2 above and 13.4 below.

Turning to the second half of Ofcom's question: while we agree that we have a responsibility to provide AC information on our websites and to customers upon request, we are not convinced that the AC should be specified as a "key charge" at point of sale. Each customer's needs are different: not all customers will think ACs are important and an explicit requirement to provide information on ACs - and in all cases - may mean that other more individually pertinent information is unavoidably omitted. This will not only result in customers being uninformed about ACs (because they just ignore the information provided) but also in customers being uninformed about additional services that they do wish to use (because there is no time in the process to provide the information, the customer has lost interest in the information or because the customer feels so overwhelmed by the quantity of information that has been provided that they absorb no information at all).

That being said, after conducting a review of all the efficiency of informational requirements, should Ofcom still conclude that the AC is a key charge for all customers in spite of the relative infrequency with which most customers use NGNs, it must ensure that any requirement focuses on the outcomes to be achieved rather than being overly prescriptive. So, Ofcom may wish to require us to provide information on ACs advertising material and/or at point of sale and/or post sale, but it should not dictate precisely how this information should be presented, to give us the flexibility to design our communications in a way that best reflects customers' changing needs.

Q12.7:

Do you agree with our provisional view that the requirement for SPs to advertise their SCs could be implemented through a condition on SPs that is enforced through an industry Code of Practice and the ASA? Are there any other options (beyond the two outlined) which Ofcom should be considering? What do you consider is the best approach for securing industry commitment and developing a Code of Practice?

EE agrees that an SP requirement to advertise their SCs needs to be actively enforced. We agree that there are similar co-regulatory models already in operation that serve as a useful starting point for any NGN SP compliance regime, for example PRS regulation by PhonepayPlus or advertising regulation by the ASA. We therefore agree with Ofcom's provisional shortlist of options.

We do not have a strong preference for either of the options and we believe there are pros and cons for both options that need to be worked through. From a consumer perspective, it would make sense for the same body to regulate all aspects of marketing and promotions. PhonepayPlus already regulates the promotion of premium rate numbers (including 0871), so from that perspective it would be logical for PhonepayPlus's remit to be extended to cover the promotion of all other 08 numbers as well. Otherwise, it may be confusing for customers looking for redress. It would be undesirable if they were "passed from pillar to post" due to a failure to understand the difference between 0871 (which would be regulated by PhonepayPlus) and 0870 (which would be regulated by the ASA) in spite of these ranges being identical to the two-digit level. The alternative would be to move the promotion of all numbering services to the ASA. The ASA has the benefit of being widely known outside of the PRS sector (we expect that general industry awareness of the ASA is likely to be higher than that of PhonepayPlus - all advertisers will be aware of ASA, whereas only PRS operators are likely to be aware of PhonepayPlus).

We understand the concerns around PhonepayPlus regulation being perceived as more expensive. However, in our view, the current PhonepayPlus code (or indeed the 0871 Statement of Application) need not apply in its entirety to all 08 numbers. Indeed, a new agreement/code may be drawn up to apply to 08 services, with a relevant (and possibly different) funding levy agreed. Deciding on PhonepayPlus as the regulatory body need not mean that the full code and costs of regulation need to apply.

It would be interesting to seek and hear proposals from both PhonepayPlus and the ASA around how a Code of Practice might be developed and how the promotion of 08 numbers might be managed and funded. We do not believe that it is possible to make a clear decision on the best option in the absence of further details (otherwise it becomes a matter of which body is preferred rather than which one is best placed to do the best job, and most cost effectively). We believe that understanding how each body would approach regulation will help inform the discussion and help to secure industry commitment and engagement. This would also be in the spirit of co-regulation.

Q12.8:

Do you agree internationally originated calls should be charged at the same SC as an equivalent domestic call? If not, please set out your reasons. Do you agree that originators should be able to set a separate AC level for roaming calls in a given country, though the other characteristics of the AC should still apply?

Currently, when the customer of a UK mobile OCP is roaming outside the UK on the network of an international telecommunications provider and makes a call to a NGN in the UK, the wholesale price that the UK mobile OCP must pay for the call depends entirely on the wholesale price for the call charged to it by the relevant international telecommunications provider on whose network the customer is roaming. This wholesale price may, or may not, bear a logical relation to the price to terminate the call in turn charged to the international telecommunications provider by the UK TCP who hosts the relevant non-geographic number. The international telecommunications provider may, in its absolute discretion, choose to charge a wholesale price to the UK mobile OCP for origination and termination of this call which is either based on the charge by the UK TCP (e.g. some kind of cost-plus charge,) or which bears no relationship at all to this internal cost borne by the international telecommunications provider. Subject to its general bargaining power in relation to the parties' overall roaming arrangements, such matters are entirely outside of the UK mobile OCPs' control.

The wholesale charges by the international telecommunications provider may therefore vary considerably as between calls to different UK non-geographic number ranges (with no necessary relationship to the maximum prices that Ofcom may specify for these number ranges in its NTNP), between different times of day (e.g. depending on the international telecommunications provider's general traffic management pricing practices) and with different charging structures than necessarily simply a ppm charge. We therefore consider that it would impose entirely disproportionate commercial risk onto UK mobile OCPs to force them to limit their charges to their roaming customers to a rigid format Access Charge that was potentially highly incompatible with their wholesale costs in relation to these calls.

Customers are already very familiar with the fact that they are likely to face a different charge to call the same UK number when they are roaming overseas as compared to when they are in the UK, as well as the fact that the charging structure may be different (e.g. a call to the same UK mobile number may be "in-bundle" when dialled in the UK but charged on an "out-of-bundle" basis as well as at a different rate when dialled from overseas). We therefore cannot see any particular consumer protection policy justification for requiring the UK AC charging structure to also be applied when the calling customer is located outside of the UK.

Finally, we note that GC 20, implementing the revised Article 28 of the Universal Services Directive, requires CPs to ensure access to NGNs for end-users in any part of the European Community. However this obligation (both in the Universal Services Directive and in GC 20) is limited to circumstances in which such access is both **technically and economically feasible**. We do not consider that it would be economically feasible to require OCPs to provide such access in return only for a retail AC which may not adequately cover the OCPs' wholesale costs of providing such access. Of course, theoretically at least, it may be possible to set an AC for roaming calls to NGNs that is so high that the risk of an OCP being left out of pocket in respect of an individual call is relatively low. However, we feel that forcing OCPs to take this approach would be likely to artificially inflate the retail charges for these roaming calls, to the detriment of UK roaming consumers.

In contrast, EE supports Ofcom’s position that in relation to the SC element of the charge for calls to NGNs, there does not need to be a distinction between calls originated in the UK and those that are originated outside the UK. Since the cost of providing the service in question remains unchanged, there is no necessary basis for a higher SC for calls originated outside of the UK (unlike for the AC, where roaming services charges are incurred in relation to the origination of the call).

However, we do not consider that it is likely to be necessary for consumer protection purposes / may be disproportionately burdensome for Ofcom to intervene in TCPs' current commercial international interconnection arrangements with overseas OCPs by mandating that the same SC as applies in the UK must necessarily be applied in this context. As noted above, it is normal for customers to expect that higher charges may apply when they access UK number ranges from overseas. Potentially, imposing such a restriction may assist in fulfilment of Ofcom's obligations under Article 28 of the Universal Services Directive. However, in this context the obligation would need to be limited to calls which are originated from within the EU only and not from other countries outside of the EU - which may make implementation and enforcement unduly complex relative to the likely benefits.

Q12.9:

We would welcome stakeholder views on our proposed approach for applying the unbundled tariff to payphones. Do you agree that it is appropriate to allow payphones to set a minimum fee for NGCs?

EE does not operate any payphone services and therefore has no particular views on this question.

To the extent that any of Ofcom's proposals (unbundling or in relation to the freephone ranges) will operate any differently when a call is made from a payphone as compared to when the call is made from a landline or mobile phone, then these differences need to be very clearly communicated to consumers (especially given the reliance by, e.g. vulnerable customers on the use of payphones). .

Q12.10:

Do you consider there is a need to exempt business to business telephony contracts from some of the constraints of the unbundled tariff regime? Is so what exemptions do you consider appropriate and why are they necessary (please give examples of the conflicts you would identify if exemptions are not provided). To which contracts should the exemptions apply and why?

Ofcom’s primary focus of concern in the 2nd Consultation is on residential consumers and we note that the 2nd Consultation does not refer to any specific forms of detriment having been suffered by business customers in relation to their consumption of NGN calls.

Prima facie, business customers (government, large corporate and small to medium enterprises) may be expected to be more savvy in their awareness of call costs than residential consumers, as well as being better able to negotiate with communications providers so as to receive offers tailored to their particular business needs, the volume of services that they are acquiring etc.

We therefore do not believe that there is any relevant consumer protection policy justification for applying the unbundling structure or mandated free-to-caller freephone calls principles to the tariff packages offered by OCPs to business customers.

We also doubt that Ofcom has valid legal powers to require the unbundled tariff regime and maximum retail price of zero for freephone calls to be implemented in respect of business customers.

Ofcom states in the Consultation that its legal powers to implement unbundling flow from sections 56(1)(ba) and 58(1)(aa) of the Act. As Ofcom also notes in the Consultation, these new provisions of the Act were inserted by the Electronic Communications and Wireless Telegraphy Regulations 2011 ("the Regulations"), in order to implement the revised EU Framework Directives in the UK (see §§5.12-5.22).

The Regulations have been issued by the Secretary of State in exercise of the powers conferred by section 2(2) of the European Communities Act 1972 ("ECA"). In the present context, Article 2(2) of the ECA only authorises the making of secondary legislation which is (a) for the purpose of implementing an EU obligation of the UK, or (b) for the purpose of dealing with matters arising out of or related such an obligation.

Paragraph 1 of Part C to the Annex to the revised Authorisation Directive, which is the relevant EU obligation of the UK being implemented by sections 56(1)(ba) and 58(1)(aa) of the Act, only provides for national regulatory authorities ("NRAs") to designate tariff principles and maximum prices if these tariff principles and maximum prices are for the very specific purposes of "ensuring consumer protection in accordance with Article 8(4)(b) of Directive 2002/21/EC (Framework Directive)". Article 8(4)(b) of the Framework Directive requires NRAs to promote the interests of citizens of the European Union by, inter alia, "ensuring a high level of protection for consumers in their dealings with suppliers...". The term "consumer" as referred to in this Article is clearly defined and limited by Article 2(i) of the Framework Directive to mean only a "natural person who uses or requests a publicly available electronic communications service for purposes which are outside his or her trade, business or profession".

It is therefore extremely clear that the relevant provisions of the Authorisation Directive do not oblige or empower NRAs such as Ofcom to designate tariff principles and maximum prices for any other purpose than the protection of natural persons in their dealings with suppliers when using or requesting communications services for non-business related purposes.

Accordingly, we do not believe that the Secretary of State was or is legally empowered to implement secondary legislation under Article 2(2) of the ECA to give Ofcom any powers in relation to the designation of tariff principles and maximum prices otherwise than for the purpose of protecting consumers who are natural persons, acting for non-business purposes.

As Ofcom has noted in the Consultation, the current definition of "consumer" in the Act is broader than the definition in the Framework Directive (§§5.17-5.20). Legally, there is therefore already a real question as to whether or not the Regulations are ultra vires. Were Ofcom to seek to rely on the ultra vires aspect of this transposition of the revised EU Framework Directives in the UK by seeking to regulate the dealings of business customers with communications suppliers (e.g. by requiring unbundling to be implemented for business customers or by mandating that freephone calls for business customers must be free to caller), we anticipate that litigation on this point could well be a likely outcome.

EE therefore believes that it is legally necessary that any Ofcom regulations seeking to implement unbundling and/or mandating that freephone calls are free-to-caller provide **an exception** giving OCPs the option, should they so choose, to offer different tariffs (whether specific published retail tariffs or bespoke pricing packages for individual customers) to customers who wish to make calls to NGNs **predominantly or exclusively for business purposes**. This exception would, for example, enable a corporate customer whose employees made a large number of calls to 0845 and 0844 numbers and a lesser number of calls to 0800 numbers to enjoy a bespoke pricing package offering a low fixed flat rate for all of their 0845 and 0844 calls (without needing to worry about the differing SCs that may be attached to the individual numbers within these ranges that was being dialled) in a trade-off for also paying a low fixed flat rate for all of their 0800 calls, and so on, depending on the customer's individual needs and preferences.

For the reasons set out above, we feel that such an exception is required in order to prevent Ofcom's proposals from being legally invalid, and this is the case irrespective of the size of the relevant business customer's business - if the customer is a) not a natural person or b) a natural person using the calls for purposes that are within his or her trade, business or profession, then it is impermissible for Ofcom's proposals to be aimed at protecting the customer in this context.

However, from a policy perspective, we also do not believe that allowing for this OCP pricing flexibility in respect of business customers is likely to undermine the simplicity of Ofcom's proposals or to confuse customers (either residential or business customers). Most OCPs today offer published tariffs and plans that are specifically designed for business customers, as well as bespoke pricing packages for larger corporate and government customers. For example, EE offers a separate suite of business phone plans and products to its Orange customers, which appear under an entirely separate "business" tab on the Orange website to the "personal" tab. These offers currently co-exist very comfortably with the other published retail offers that OCPs have for their residential customers, without undermining the simplicity of the propositions designed for and marketed to residential customers. We can we see no reason why the implementation of unbundling and/or mandated free-to-caller freephone calls for residential customers would change this dynamic. Of course, this exception would not prevent OCPs from voluntarily choosing to take the same approach for their business customers as for their residential customers, should they see a market demand for this.

Q.12.11:

Do you agree with our proposal that implementation should take place 18 months from the date of the final statement?

[✂] [✂]

Q13.1:

Do you agree with our estimates of the billing costs for implementing the unbundled tariff, taking into account the discussion in Annex 19? If not, please explain why and provide evidence to support your response, particularly of the level of costs you are likely to incur as a result of our proposals.

EE is unable to estimate one off or annual billing costs until the final proposals are known to enable project resourcing to be set up to identify these costs as the precise details can impact greatly on the software development costs

EE notes that direct implementation costs are very likely to be high, and in particular, those that relate to the required changes to OCP legacy billing systems. The costs of rebuilding billing systems to meet the proposal are highly uncertain, with serious and potentially costly execution risks. Accordingly Ofcom must be very conservative in its estimation of these costs. The one off costs of £3million should represent the central (and not the upper) cost estimate in Ofcom's cost benefit assessment. EE also consider the annual costs of £6 million may not represent the upper end of possible costs, especially if change requests are needed to fix problems with our third party providers.

Q13.2:

Do you agree with our estimates of the level of migration and misdialling costs for service providers who may migrate as a result of the unbundled tariff (taking into account the analysis and evidence in Annex 12)? If not please explain why and provide evidence.

Migration costs

As Ofcom acknowledges, there is an inherent high risk of regulatory failure regarding Ofcom's estimation of migration costs, as "SPs are extremely diverse and...this leads to substantial differences in migration costs. Moreover, the cost of migrating different numbers operated by the same SP may also vary substantially. This means that it is **extremely difficult for us to obtain reliable data on the costs of migration**" (§A12.8, emphasis added).

We consider that this would suggest that Ofcom errs on the side of assuming that these costs should be on the higher end of any range of estimates, rather than the lower end - so as to ensure that Ofcom's proposals truly can be verified as being proportionate and likely to generate net benefits for consumers.

In this regard, we do not agree with Ofcom that its assumption that SPs that "choose" to migrate will tend to have lower migration costs (cf §A12.73). As noted by Ofcom at footnote 492, in fact it cannot be assumed that simply because an SP incurs large migration costs it will not migrate. It depends entirely on the "benefits" of migration for the SP. For many SPs for whom it is critical, for example, to have an 0845 number charged at the same price or no higher than a geographic call (at least by some means such as via a BT landline), they may consider that they have no choice but to migrate to 03 under unbundling. This could be true for a number of government, charity, utility, banking and other "blue chip" 08x SPs for whom it is important to have a comparatively "low cost" means of contacting the organisation by phone[53]. Even if there is an overall cost rather than a financial benefit to the organisation of making the move, the potential public relations consequences of a failure to do so may make this a "necessary evil" under Ofcom's proposals.

Given that Ofcom's further research has suggested that 4 out of the 5 of the cost estimates for migration costs are underestimates (Table A12.5), we consider that the new range of £1000 to £2500 per migrating SP is still likely to be an underestimate of the relevant costs. We therefore recommend that Ofcom, as a minimum, uses only the upper end of this range in its cost benefits assessment. Furthermore as the responses to Ofcom from the major bank indicate, the costs of migration for just two to three major SPs like this have the potential to exceed Ofcom's low end cost estimate for the entire industry. Ofcom should therefore factor into its overall cost assessment migration costs in this vicinity (i.e. in the £0.5m plus range) for at least a handful of such SPs.

We also note that Ofcom's estimates are based on an estimated total number of 13,000 0845 SPs and 9,000 0870 SPs (§11.195). In addition, there may be a large number of SPs operating on the 0844/3/2 and 0871/2/3 ranges who will face similar migration imperatives as a result of Ofcom's proposals. Ofcom should also consider the migration costs of these SPs in its calculations.

Misdialling costs

At §13.10, Ofcom suggests that it has estimated misdialling costs at £1.1-£3.6 million. In fact, the £1.1 million lower end figure appears to be a mis-transcription of the correct figure of £1.8 million in Table 11.8 (the scenario 2 figure for the unbundled tariff). Ofcom's total cost estimate range in §13.11 corrects this error (£2.2m + £1.8m = Ofcom's figure of £4m), but makes another error on the upper end of the range (£3.6m + £10.9m = £14.5m, not Ofcom's figure of £14.4m). Cost differences of this magnitude matter to the industry and to consumers, and Ofcom ought to take more care when performing such calculations.

We also consider that these costs are likely to be a material underestimate of misdialling costs, for the following reasons:

- These figures are based only on the costs of misdialled calls to 0845 and 0870 numbers (§11.197). As noted above, we believe that a significant proportion of 0844/3/2 and 0871/2/3 SPs could also be incentivised to migrate as a result of Ofcom's proposals. Hence the volumes of calls to these numbers should also be included in Ofcom's cost assessment.
- The SC element of the misdialled calls is only estimated at 2ppm including VAT (fn 572). Given Ofcom's proposed price maxima for 084x and 087x of 7ppm and 13ppm (Table 10.5), it would seem that actual misdialling costs may be significantly higher than Ofcom's estimate. Ofcom should factor this into its costs analysis.
- No misdialling costs whatsoever are allocated for calls to SPs who are likely to get rid of their existing 08x numbers rather than face the costs of migration (9% of SPs under scenario 1 and

[53] See for example the response by DWP discussed at §12.209.

5% under scenario 2)[54] There could be a range of factors motivating such a decision which are unrelated to customer propensity to call these numbers (e.g. an SP with two popular existing numbers might simply decide to get rid of one of them and promote the other number exclusively). If customer misdialling propensities for these SPs were the same as for migrating SPs, then this would suggest that Ofcom's current misdialling estimates should be inflated by circa a further 50%[55] - which is a highly material increase. We do not believe that it is appropriate for Ofcom to simply discount these costs outright.

- No allocation has been made for the consumer time cost involved in misdialling the incorrect number and re-dialling the correct one.

Finally, we note that unbundling could create confusion across other number ranges and so indirect costs may be even more significant. Those who have misdialled numbers may be less likely to call NGN numbers again. In addition, those consumers may warn friends or family about calling not just that NGN, but others as well. Banks and utilities for example, could be concerned with 0845 prices being unbundled. This has the potential to affect millions of UK consumers. Ofcom does not appear to have factored in this regulatory risk of a major SP changing number range and the consequential indirect effects on the range and other number ranges. Ofcom argues that there are horizontal externalities, in supporting its proposals for unbundling. However, these potential costs of confusion on the wider market are not included as potential factors exacerbating horizontal externalities.

Q13.3:

Do you agree with our estimates of the communication costs of implementing the unbundled tariff? In particular: (i) the costs of OCP communication with their customers; and (ii) the costs of TCP communication with their SP customers. If not, please explain why and provide evidence to support your response, particularly of the level of costs you are likely to incur as a result of our proposals.

EE previously provided Ofcom with information on this issue in response to question 7.1 in Ofcom's first consultation. Specifically, we noted that the steps we would need to take in communicating the relevant changes to our customers would include (but not necessarily be limited to) the following:

- communicating changes to contract terms to our entire customer base (e.g. at a minimum via circa 30 million text messages);
- changing all relevant collateral (e.g. Customer Information Forms) for all of our current PAYG, PAYM and fixed tariffs;
- updating price guides for all our tariffs;
- updating terms and conditions on our websites;
- ensuring that correct documentation is available in all of our circa 700 retail stores;
- ensuring that all of our indirect partners also have the opportunity to make changes and distribute new contracts to stores;
- at initial implementation stage, a detailed training programme will need to be implemented to make sure that customer service (and retail) staff understand the complexities of tariff unbundling and are able to explain this to consumers and to deal with related queries/complaints. For EE, this will be a significant piece of work in view of the size of our customer service footprint and the complexity of the information; and
- customer confusion over unbundling may drive increased complaints into our call centres (e.g. having two charges on a bill instead of one could lead consumers to believe they have been double-charged).

[54] See Table 11.6 and §11.200.

[55] I.e. noting that the rate of SPs who would migrate vs get rid of their number was 20%:9% under scenario 1 and 10%:5% under scenario 2.

Whilst a minimum 18 month time frame is necessary to ensure that all of these steps can be completed in time, such a lead time is not a panacea which suddenly removes the need to incur very significant costs in relation to each of these steps. For example, changes to contract terms, customer information forms and price guides will obviously need to be notified to customers only shortly before the launch of unbundling, when the changes actually take effect. It cannot be assumed that any other business as usual contract changes would be scheduled to be made at this point in time. Hence, the need to make these changes is likely to involve a material incremental cost to OCPs. Similarly training and communication of revised customer service scripts etc is likely to be scheduled as close as possible to the launch date for unbundling (allowing time of course to complete the full national roll-out). Again it cannot be assumed that there would be any similar training programs scheduled for this time - hence such training is likely to involve an incremental cost for OCPs. Finally, any mass communications campaign to explain unbundling to consumers may well be run as a stand-alone piece rather than being combined with other communications, given the complexity of the unbundling concept and the need for discrete marketing etc messages to be understood and absorbed by customers with limited time / attention spans. We therefore believe that an incremental cost of zero for such communications is highly unlikely.

We therefore believe that Ofcom's industry wide estimate of the initial costs to OCPs' to communicate with callers about the introduction of the unbundled of 0.4million and 2.7million is a very material underestimate.

Furthermore, for the reasons detailed in response to question 13.4 below, we are quite surprised that Ofcom has not factored in any annual communications costs to OCPs in relation the implementation of unbundling.

Q13.4:

Do you have any comments on our impact assessment for the unbundled tariff?

The impact assessment that Ofcom sets out in section 13 of the 2nd Consultation builds upon Ofcom's assessment of the need for and likely benefits of its proposed remedy of unbundling as set out in the remainder of the 2nd Consultation. Where we have already commented on Ofcom's assessment of these matters in response to other consultation questions, we have not repeated those comments here. In particular, we have already provided detailed comments on Ofcom's qualitative assessment of the market failures it believes exist, the harm being caused by those market failures and the ways in which Ofcom believes its unbundling proposals are likely to address this harm in Section 1 of this response and in our response to Question 4.1.

In response to this question, we therefore focus predominantly on Ofcom's **quantitative assessment** of the impact of implementing its unbundling proposals in terms of:

- The likely costs caused; and
- The likely benefits to consumers derived.

EE's views on Ofcom's assessment of the costs likely to be caused by unbundling

Ofcom argues that the one off costs of implementation will be no more than £86.7 million with annual costs of no more than £5.8 million (Table 13.2). This quantitative assessment is based on Ofcom's assessment of (a) billing costs (b) migration costs including misdialling and (c) communications costs for OCPs and TCPs. EE's views on Ofcom's assessment of these costs are set out above in response to questions 13.1, 13.2 and 13.3.

EE's key concern is that Ofcom's cost assessment is **missing an evaluation of entire key elements** of costs to industry and consumers likely be caused by unbundling. These missing elements include, but are not likely to be limited to:

- **Annual costs of OCP communications with callers**: It is an obvious omission in Ofcom's impact assessment that Table 13.2 assumes absolutely no additional ongoing annual costs to OCPs in their communications with customers as a result of unbundling:

- Unbundling of call charges is novel concept in the UK. The splitting of NGN charges into an AC (which the OCP controls and which the customer can therefore influence with their choice of tariff package) and an SC (which is set by the SP and over which the OCP and consequently the customer has no control but is nevertheless required to pay to the OCP as a part of its telecommunications bill) is not a simple concept to explain or understand, even for educated and intelligent consumers, let alone the less educated and vulnerable ones.
- At the same time, the UK telecommunications market is a dynamic one, with significant numbers of customers both switching OCPs and entering the market for the first time every day.
- There will without a doubt be an ongoing annual cost to OCPs to explain unbundling to its new customers.

- There can also be little doubt that the two-part structure of NGN prices under unbundling will drive additional calls from customers about their bills into OCP call centres, and that calls to deal with customer NGN pricing queries will take longer than they do currently due to the need to explain this structure (and in particular the lack of OCP control over the SC that a customer suffering from, for example, bill-shock from calling a NGN that a customer may wish to call to complain about). In Ofcom's recent consultation on consumer switching, Ofcom estimated that an increase in the length of a switching call by 5 minutes together with an increase in the online switching verification process of 1 minute would involve an overall cost to consumers of approximately £0.5m per year, assuming that the value of consumer time is £5.97 per hour.[56] Ofcom should conduct a similar analysis in respect of the likely annual cost of additional consumer and OCP (and potentially also SP) time spent on billing queries as a result of its unbundling proposals. Furthermore, there are likely to be additional indirect costs related to these increased call centre queries - such as opportunity costs for the OCP of not being able to handle calls related to other matters, and costs to the customer such as deciding to disconnect before reaching a customer sales representative due to increased call waiting times (resulting in an overall bad customer experience and possible churn risk).
- Any costs whatsoever to be **caused to SPs** otherwise than as a result of migration:
    - Table 13.2 considers the costs to TCPs of communications and negotiations with SPs regarding the changes to their pre-existing commercial arrangements for NGN hosting, but does not appear to factor in any costs to SPs in this regard. Even when an SP ultimately does not decide to migrate between or within an NGN number range, SPs may be expected to incur time and money costs in **responding to TCP communications** as set out in §§13.27-13.32. These potentially quite significant costs need to be included in Ofcom's impact assessment.
    - Furthermore, Ofcom needs to factor in the costs to SPs to comply with the obligations to be imposed by Ofcom to **advertise their SC**, to the extent that these obligations require SPs to a) amend any of their existing advertisements/communications regarding NGN call pricing or b) impose additional disclosure and publication obligations on SPs to those that they have currently. Clearly, compliance with these obligations will be central to the success of unbundling, and it is a significant omission from Ofcom's impact assessment that no costs are included in this regard.

- The initial and ongoing costs to be caused by the implementation of the ultimate chosen solution for **regulation of SC advertising**: clearly it is difficult to estimate these costs at the present point in time when there is so much uncertainty regarding what approach Ofcom proposes to adopt. However, there will clearly be costs associated with these proposals and

---

56 http://stakeholders.ofcom.org.uk/binaries/consultations/switching-fixed-voice-broadband/summary/condoc.pdf - paras 7.86-7.88; A8.77

Ofcom needs to factor these into its analysis of the likely overall welfare benefits (or detriments) of its proposals.

- The costs of establishing and maintaining an accurate **central source of information** accessible to consumers, industry and regulators alike regarding the SC set for each NGN: Ofcom proposes at §§12.55-12.63 that a central database of SC should be created and maintained. As set out in our response to question 12.1 above, EE agrees that this will be important to the success and ultimate efficient implementation of unbundling, should Ofcom decide to proceed with its unbundling proposals. EE appreciates that it is currently difficult to estimate the costs associated with this database, whilst options in this regard are still being explored by Ofcom with industry. However, there will clearly be set up and ongoing costs associated with this element of Ofcom's proposals, and these must be included in Ofcom's ultimate overall impact assessment.
- The welfare loss to consumers to the extent that NGN prices may increase as a result of unbundling (e.g. the likely increase to 08x prices estimated by Ofcom in Table 10.2 should Ofcom proceed with its proposal to insist upon having a single AC for all 08x, 09 and 118 calls).
- The welfare loss to consumers to the extent that unbundling results in greater customer confusion regarding the absolute cost of NGN calls, leading to worse price misperception and call and tariff choice decisions, and higher mistrust.

Without a full assessment of each of these missing cost elements, as well as any others raised by stakeholders in response to Ofcom's 2nd Consultation, Ofcom's impact assessment is incomplete, and Ofcom lacks this element of the legal justification (that its proposals are proportionate and required for the protection of consumers) necessary for Ofcom to be able to proceed with these proposals.

EE's views on Ofcom's assessment of the benefits likely to be derived from unbundling

EE notes that Ofcom has only modelled the expected benefits for residential callers, and has not modelled any benefits/detriments for OCPs, TCPs, SPs or business callers (§13.43).

EE agrees with this approach by Ofcom in so far as it is essential for Ofcom to demonstrate benefits for residential consumers in order for Ofcom's proposals to have any chance of being authorised under ss 56(1)(ba) and 58(1)(aa) of the Act and Paragraph 1 of Part C to the Annex to the revised Authorisation Directive (see further our response to question 12.10).

However Ofcom also has more general duties under section 3 of the Act to ensure that any action it takes furthers the interests of consumers (in the more broadly defined sense under the Act rather than under the CRF), as well as being proportionate and targeted only at cases where action is needed. In this context, it is therefore important that Ofcom also ensures that its proposals do not cause overall net welfare detriment or disproportionate disbenefits to other stakeholders, including OCPs, TCPs, SPs and business customers. Ofcom's impact assessment does not appear to consider these matters other than in a highly cursory fashion which, for example, discounts by means of a mere fly-away footnote only the potential "negative impact on suppliers' profits"[57].

Ofcom admits that its modelling rests upon a number of assumptions, which creates a number of uncertainties about its resulting estimates (§13.44). Ofcom states that it has attempted to mitigate the impact of these uncertainties by adopting conservative modelling assumptions (§13.44). However, Ofcom then backs away from the implications of following its own advice in this regard - as this course leads to a requirement for:

57 See §§ 13.58 to 13.61 and footnote 730.

- a 34.9% reduction in price overestimation to be necessary to outweigh the costs of Ofcom's proposals,[58] which may not be realistic given the general inaccuracy of consumer telecommunications pricing recall and the fact that levels of price overestimation for NGN calls appear to be falling markedly over time in any event (see Table A16.8); and/or
- a 4.5%[59] threshold shift for demand, which again may not be realistic given the general decline in the NGN market due to competing services such as mobile web-browsing, apps and shortcodes as well as the relative price inelasticity (-0.3) of these calls.

More fundamentally, however, for the reasons set out in our response to Question 4.1, EE believes that there is an inherent and unavoidable uncertainty as to whether or not Ofcom's proposals will result in the creation of **any benefits at all (indeed we would say overall negative consequences),** which uncertainty cannot be mitigated by the use of any form of conservative modelling assumptions. Given that Ofcom argues that even a fractional reduction in hypothetical price misperception would generate sufficient benefits to offset the resource costs of unbundling, Ofcom needs to face up to the possibility that its unbundling proposals could also generate fractionally worse call decisions in the real world, which could easily mitigate against any benefits of unbundling. This risk needs to be factored in as a further negative adjustment to Ofcom's "most pessimistic" threshold levels.

In contrast, it is certain that Ofcom's proposals will result in ultimate costs to consumers at the very least in the magnitude of those identified in Table 13.2.

This being the case, EE does not believe that Ofcom has provided evidence adequate to justify a decision to proceed with its radical proposals.

2.4 Questions regarding the freephone and 116 ranges

Q16.1:

Do you agree with our assessment of the options for the 080 range? In particular, do you agree with our preferred option of making 080 genuinely free to caller? If not, please explain why.

We do not agree that any change to the current regulation of 080, 116 and 050 numbers is either necessary or likely ultimately to bring benefits to consumers or SPs. We remain of the view that, given where we are, the current regulatory regime strikes an appropriate balance between the needs and preferences of all of the different stakeholders involved in the provision and usage of these NGNs.

We further remain of the view that Ofcom should first consider acting only at the wholesale level before considering what retail remedies (if any) are necessary and proportionate. In this respect, Ofcom's conclusions regarding the high risk of regulatory failure when setting maximum retail prices are no less applicable in the case of the freephone ranges than they are in respect of the other NGN ranges:

"In principle, where consumers are aware of prices and absent externalities, competition is likely to result in an efficient pattern of prices. In contrast, under the system of maximum prices we are considering, the actual pattern of retail prices is largely determined by the regulator. Whilst in principle regulation could also lead to an efficient pattern of prices, in practice there is a significant risk of regulatory failure, for the reasons set out in more detail at paragraphs 9.176 to 9.181 below, there is a risk that regulated prices are not set at the correct level and regulation may also be less agile in responding to changing circumstances."[60]

[58] See § 13.48 and footnote 717. In contrast to Ofcom, EE considers that it is highly relevant to consider the survey responses of consumers who claim to know the costs of NGN calls, as these are the very consumers who are the ones most likely to be actually using them.
[59] See §§ 13.50 and 13.55, footnote 718 and Table A16.21.
[60] §9.147.

However, of the potential options for intervention in freephone retail pricing discussed by Ofcom in the 2nd Consultation we believe that the reforms least likely to cause harm to consumers would be to:

- Designate the 080 and 116 ranges as Maximum Mobile Price ranges, with a maximum SC of zero and a maximum mobile price set equal to the mobile OCP's 08x AC. In addition, Ofcom could optionally:
  - Bolster current awareness and understanding of the current practice of fixed OCPs of not charging for these calls by mandating a maximum retail price of zero for calls from fixed lines in the NTNP; and
  - Issue a guideline on what a fair and reasonable origination charge for optionally zero rated mobile calls to 080 numbers would be. As explained below, this is likely to be a range between the mobile OCP's 08x AC at the upper level and an amount of not less than 5ppm at the lower level, allowing recovery of the mobile OCP's LRIC costs and an appropriate contribution to CARS costs. Mobile OCPs would, of course and as currently, retain the ability to set a lower origination charge or waive it entirely in their discretion.
- Designate the 0500 range as a free-to-caller range from both mobiles and landlines, with a maximum SC of zero. In conjunction with this proposal it would be necessary for Ofcom to issue a guideline on what a fair and reasonable an origination charge should be on this range. For fixed OCPs the recommendation would, in line with current charges, recommend a maximum charge of 0.5ppm. For mobile OCPs the range should again be set at the mobile OCP's 08x AC at the upper level and not less than 5ppm at the lower level, to allow for recovery of LRIC+ costs and an appropriate contribution to CARS costs.

Whilst we are not convinced that any fundamental reform of current retail pricing for calls to freephone numbers is required, we believe that these proposals would offer consumer benefits over the status quo as follows:

- Transparency and simplification of pricing would be achieved on each of the ranges. At the same time, an important ability to adapt mobile retail pricing to meet consumer preferences would be retained through variation of the AC would be retained.
- A simple solution would be provided to the vertical externality with the introduction of an entirely free-to-caller range (0500). Providing SPs with an **option** or even **incentive** to migrate is less interventionist than **forcing** them to migrate (e.g. mandated changes make continued operation on the range uneconomical for the SP). Choosing 0500 rather than 080 for this range is likely to entail a **forced** migration for a smaller number of SPs than if 080 was designated as the free-to-caller range. This is accordingly the more proportionate option.
- By addressing the vertical externality, opportunities for new and innovative freephone services will be created. At the same this option contains the lowest risk of loss of diversity of existing freephone services.
- The proposed maximum prices will prevent charges from becoming "too high". This will enhance access to freephone services (including socially important services) to all customers (including vulnerable customers). At the same time, this option contains the lowest risk of a negative TPE in respect of charges for other telecommunications services and the lowest risk of forcing freephone SPs to migrate to ranges which are more expensive for callers to access than the current freephone ranges.
- Given the absence of any mobile OCP SMP findings, allowing the origination charge for zero rated freephone calls to be set up to the level of the AC entails the lowest risk of distorting market driven pricing signals.

In contrast, the evidence gathered by Ofcom quite clearly suggests that its seeming preferred option of mandating that each of these ranges must be "genuinely free to caller" from both fixed lines and mobiles will entail the highest costs for industry and consumers, with virtually no hard evidence to suggest that there will be any countervailing benefits for consumers generated by these proposals.

In terms of the likely very high cost to consumers of Ofcom's proposals, we deal with these in our responses to questions 16.2-16.4 below. In terms of the likely benefits to consumers of Ofcom's proposals, we have already provided an overview of our key concerns in response to questions 4.1 and 5.1 above. However, below we offer a few additional observations on Ofcom's analysis in section 16 of the 2nd Consultation.

First and foremost, we find it extremely telling that Ofcom has declined to conduct a quantitative costs and benefits assessment of its proposals (§16.259). We find Ofcom's reasons for declining to do so unconvincing, and believe that the absence of a quantitative assessment supporting Ofcom's proposals is a clear indication that these proposals do not meet the mandatory statutory requirements of being necessary and proportionate for the protection of consumers. Specifically:

- We disagree that "the types of costs involved in implementing the changes to 080 are different" to those applicable in relation to the implementation of unbundling in any way which makes it unnecessary or infeasible for Ofcom to quantify those costs (cf §16.259). Ofcom's quantitative costs assessment for unbundling involves looking at 3 cost elements, each of also applies to the implementation of Ofcom's freephone proposals. For example;
  - In terms of communications costs for TCPs, OCPs and SPs Ofcom lists a large number of the relevant cost categories in detail at §17.98;
  - Ofcom actually assesses the level of migration costs (if not misdialling costs) at §§16.205-16.206; and
  - Ofcom notes that "mobile OCPs would need to...remov[e]... all PCAs and mak[e]...some billing system amendments to ensure that these calls did not appear on customers' bills" (§17.98).
- In addition, Ofcom has made a quantitative assessment of other important costs associated with its freephone proposals - such as extra resource costs due to fixed to mobile substitution in the order of £23 to £35 million per annum (§16.146)[61].
- We find it equally unconvincing that Ofcom is unable to appropriately replicate the way in which it has quantified the benefits of unbundling for its 080 proposal (§16.259). With all NGNs it is true that "SPs largely benefit from calls they receive" - which after all is why they pay hosting fees to TCPs (cf §16.259). We can see no reason why this should be a bar to Ofcom attempting to model the benefits to consumers it claims will result from greater awareness, and the transparency, of freephone pricing in terms of reduced price misperception and/or increased demand, just as Ofcom has endeavoured to do for unbundling (obviously this exercise may fail, in that Ofcom may be unable to demonstrate any likely consumer benefits in terms of overall increased demand for and use of freeephone numbers - but checking this is precisely the point of conducing such an exercise).

We do not believe that a mere "policy preference" of Ofcom for these ranges to be free-to-caller (or as close to free as possible), even a longstanding one, is any kind of substitute for a rigorous cost benefit analysis of the need for and proportionality of this preference, in order to protect consumers as Ofcom is claiming. We also believe that little weight should be given to the CAT's comments on this policy preference in the 08 Judgment, (cf §14.21) given its view that:

[61] Ofcom suggests that substitution may not be inefficient if customers value the convenience of using a mobile more than the incremental cost difference of using a fixed line. Ofcom considers that the incremental cost difference between the cost of landline originated calls and mobile originated calls is 0.6-07ppm (fixed cost 0.1ppm, mobile cost 0.7-0.8ppm). Ofcom also notes that the difference between the mean expected price of landline originated calls and mobile originated calls is 23ppm (fixed price 6ppm, mobile price 29ppm). As 23ppm is higher than 0.6-7ppm, Ofcom suggests that this is likely to mean that too low a proportion of 080 calls are originated from mobiles (§16.147). However the ratios between the differences in incremental costs and price estimates are broadly similar - 1:7-8 re costs and 1:5 for retail price estimations - suggesting that the contrary might well also be true.

"We consider questions of policy preference to be, par excellence, the sort of question where there is no single "right answer", and we agree with the Tribunal's statement in T-Mobile that the Tribunal should be slow to overturn such decisions" (at [230])

In terms of the claimed benefits of Ofcom's proposals, we note that:

- In terms of the likely impact on overall demand for freephone calls, little weight should be placed on the feedback of resellers that "demand from SPs has decreased substantially for Freephone numbers as a result of the charges from mobile" (§16.89). After all, these charges have been around since 1996 (§14.12). Preference should be given to actual data. In this respect, the highest that Ofcom has managed to state the case is that ((§16.93):

"Overall, we note that it is very difficult to discern the true scale of suppressed demand. However, the evidence suggests that Option 1 is likely at the least to stimulate a relatively small but significant number of additional calls".

- Ofcom recognises that mandating calls to 080 and 116 numbers as free-to-caller will result in callers receiving price signals that do not reflect the additional costs associated with using a mobile phone to originate these calls, and thus that it is at least "unclear" "whether or not Option 1 represents an improvement on the status quo".[62]
- In terms of consumer pricing preferences, we do believe that weight should be given to the results of survey question 39 in the 2010 consumer survey (cf §16.130). We consider the comments of survey respondents such as "How can my bills be the same if I don't call 0800 very often - it doesn't make sense" reflect not confusion but quite rational consumer analysis. In fact, it would be impossible for Ofcom to guarantee that a consumer's bill would never rise as a result of decreased 080 charges in return for higher charges for other calls, as this would depend entirely on the mix of calls made by the customer each month. Whilst initial pricing levels may be set to achieve a cost neutral outcome for the consumer the cost impact (positive or negative) would change as soon as the customer changed his or her call mix. Where a customer makes no or very few 080 calls, he or she is right to fear that increased call charges for other types of calls would be of overall detriment to him/her as soon as more non-080 calls were made than at the time when the prices were set;
- In terms of the likely tariff package effect of Ofcom's proposals, it is critical for Ofcom to appreciate the difference between an impact on revenues vs. an impact on profits. In the absence of any change in an OCPs costs, loss of revenue will indicate loss of profits. However growth in revenue will not necessarily indicate growth in profits (cf Ofcom's confusion of the two in §§16.136-16.139). Further details are provided in response to question 16.2 below.

Q16.2:

Do you have any comments on the analysis used to develop the Impact Assessment Range for the mobile origination charge and the Mobile Maximum Price range for 080 calls as set out in Annexes 21 to 25? Please provide evidence to support your comments.

Ofcom supports its preferred option of making the 080 range "genuinely free to caller" by an assessment of three policy options[63], which are assessed in the context of an "Impact Assessment Range" for relevant mobile origination charges. EE considers that:

- Ofcom's assessment in a number of respects **materially underestimates** the relevant mobile costs, such that it does not provide a robust basis for the proper evaluation of Ofcom's proposals; and
- does not, in any event, support a conclusion that making the 080 range free-to-caller is likely to be in the **best interests of consumers**.

62 See §16.150

63 As set out in §§ A21.12-14 and summarised in Table A21.2, being defined as Options A, B and C.

While Ofcom's assessment is extremely detailed, this answer sets out a number of key flaws identified by EE, which we believe undermine the conclusions reached by Ofcom. We set these out according to the topics covered by each of Annexes 21-25.

Annex 21 - Introduction to the freephone options

Our main comment is that there should be a fourth Option D considered by Ofcom. This would be the same as Option C but simply reverse the number ranges ((i) maximum retail price of zero set for 0500 calls and (ii) maximum fixed price of zero for 080 calls and maximum retail mobile price equivalent to the AC for 080 calls. It is a significant failing in Ofcom's analysis that it has not compared and contrasted the costs and benefits of its Option C with this Option D.

Annex 22 - the cost of originating mobile calls to freephone numbers

Ofcom assesses the costs of originating mobile calls to freephone numbers. It does this through estimating both network and non-network costs. The costs of originating mobile calls to a free to caller range are estimated at between 0.7ppm-0.8ppm (pure Long Run Incremental Cost ("LRIC")) up to 3.9ppm (LRIC+ added to all relevant Customer Acquisition and Retention ("CARS") costs).

The Impact Assessment Range of 2.5-3.0ppm is then defined in Annex 23 in relation to a range of different considerations and is not solely a range reflecting the efficient costs of a mobile network. However, one of the key principles applied by Ofcom is that mobile operators should be able to recover their efficient costs. EE strongly endorses this principle, which is supported by relevant precedent in Ofcom, CAT and CC decisions, as well as economic theory. However, we do not believe that Ofcom has fully and correctly applied this principle in the present case.

Table A23.1 sets out a range of potential cost metrics for mobile call origination, based on the costs identified in Table A22.1. Ofcom's conclusion that its Impact Assessment Range is appropriate is consistent with the costs set out in this table, assuming that mobile operators should only be allowed to recover some proportion of their CARS costs from NGN call origination.

However, EE considers that the figures presented in Tables A22.1 and A23.1 do not provide an appropriate basis for assessing the costs of call origination, for the following reasons:

Network and administration cost estimate is likely to be too low

- First, these figures are clearly derived from the more detailed breakdown in table A22.9, which presents ranges, whereas Table A23.1 simply uses the lower end of these ranges without adequate explanation.
- Second, the network and administration costs on which these ranges are based are stated to be derived from the 2011 Mobile Termination Rate ("MTR") cost model (i.e. the model which was used to derive relevant cost benchmarks for mobile call termination revenue, as amended in line with the CC Determination of 9 February 2012 on the mobile call termination appeal). The MTR cost model does not produce pure LRIC estimates for mobile origination, and Ofcom has not provided the updated model which it has used to derive these cost figures. More fundamentally, EE has been unable to reconcile the figures reported by Ofcom with the MTR cost model. As a high level check, EE notes that the LRIC+ figures (with and without administration costs) which the model does report are above 90% of the equivalent LRIC+ figures for call termination. The 1.45ppm (for 2013/14 in 2011/12 prices) reported for network LRIC+ for call origination therefore appears, low compared to EE's calculation of the equivalent call termination figure of 1.62ppm:[64]
    - Some of the reasons for this difference may arise from the approach which Ofcom has taken to inflating prices. The most detailed explanation of this is in footnote 39 of Annex 22, which refers to the 2.5% inflation assumption made in the MTR cost model. If this

64 While less relevant in EE's view, the reported pure LRIC rate of 0.67ppm (in 2011/12 prices) also appears low given that is the same as the pure LRIC rate in 2014/15 for call termination in 2008/09 prices.

means that Ofcom has inflated 2008/9 prices to 2011/12 prices by using an assumed inflation rate of 2.5%, EE believes this is fundamentally misconceived. The appropriate inflator here should be actual RPI. The assumption made in the MTR cost model is simply that – an assumption for modelling purposes. Inflation has in fact been above 2.5% over the relevant period, and therefore this would represent a non-trivial under-estimate of current nominal prices if it is, in fact, what Ofcom has done in deriving these figures.

- Furthermore, in some cases, it is not clear that Ofcom has made any adjustment for inflation at all. For example, the 0.17ppm reported for administration costs appears to be exactly the relevant figure for call origination derived from the model directly (in 2008/9 prices). If this is the case, then the LRIC+ network and administration cost figure of 1.62ppm used by Ofcom for its Impact Assessment Range would appear to be a material underestimate. EE considers that a figure of 1.73ppm for the LRIC+ of call origination would be more appropriate, based on the version of the MTR cost model last published and with an appropriate inflation used.

- Third, as recognised in § A22.60 of the 2nd Consultation, shared and common costs are increasingly no longer recovered from pure LRIC derived MTRs (and will not be recovered at all from them by the time these proposals are implemented). It is important, to ensure overall efficient cost recovery, that such costs are also included in the call origination charge (the extra 0.3ppm referred to in that paragraph must therefore be added to an appropriate estimate of LRIC+ for call origination to ensure consistency and coherence of regulation. While Ofcom refers to this factor, it is not clear how or if it has been taken into account subsequently, and this adjustment is not included in the figures reported. Without access to the model which Ofcom has used (and only a brief description of the methodology used to derive it), EE is also unable to confirm whether it agrees that 0.3ppm is the correct adjustment to make here.

CARS cost allocation is too low

- Fourth, it is not clear precisely how Ofcom have arrived at its ppm estimate of CARS costs. It appears that Ofcom has simply divided total CARS costs (in £m) by total minutes[65] to derive a ppm estimate of 2.38ppm. This figure is based on out of date figures and warrants greater transparency. A very simple dividing of EE's own 2011 CARS costs by all outbound voice minutes would suggest a significantly higher figure. EE does not accept that the recovery of CARS cost from calls to 080 numbers should be estimated by allocating cost by volume alone (e.g. EPMU). EPMU has no particular economic efficiency justification, and Ofcom has previously rejected its use as being appropriate in some charge control scenarios, which approach has been supported by the CC.[66] Ofcom's analysis in the 2nd Consultation makes it clear that mobile OCPs' revenues tend to be significantly higher on 080 calls than for calls to geographic and mobile numbers, which Ofcom accepts does at least to some extent (i.e. even adjusting for the market failures alleged by Ofcom)[67] reflect a higher consumer willingness to pay more for these calls. EE therefore considers that an allocation based solely on volumes will not distinguish appropriately between those mobile calls on which there are typically higher revenues and lower volumes (e.g. 080) and those mobile calls which typically generate higher volumes and lower revenues (e.g. geographic calls). EE therefore considers that if CARS costs are allocated according to revenues rather than volumes, this will provide a better approximation of relative willingness to pay (and therefore pricing in line with ramsey principles) in the recovery of these costs:

---

65 It is unclear whether total minutes is referring to all outbound voice minutes, or whether it has adopted the approach taken for network termination costs, which is to allocate costs across all minutes (voice and data equivalent minutes) excluding inbound voice minutes.

66 For example, in the context of Ofcom's WLR and LLU charge controls.

67 See for example §A23.156

- Put simply, EE considers 2.38ppm is too low an estimate of the CARS costs, compared to those costs that can otherwise be recovered efficiently for 080 calls in a competitive retail market.
- EE considers that 080 call origination payments need to recover **at least 3.12ppm of CARS costs**, based on a revenue attribution approach. This figure is derived by taking published mobile service revenues[68] and attributing Ofcom's estimate of CARS costs[69] by the proportion of mobile NGN revenues[70] to this total mobile service revenue. Under this approach, the ppm cost is 31% higher than using an EPMU approach (it needs to be remembered that EPMU has no particular economic efficiency justification). This calculation demonstrates how a revenue attribution approach could be both practical and would ensure mobile operators receive an efficient contribution toward CARS costs based on willingness to pay, and in line with economic efficiency (ramsey pricing principles) via the call origination charge on 080.

In combination, the above points suggest that an appropriate level of efficient cost recovery from 080 call origination charges should be **at least 5ppm**, based on a proper assessment of the figures which Ofcom itself provides. A figure of 5.2ppm is reasonable on this basis, comprising 1.73ppm[71] for call origination LRIC+, 3.12ppm for CARS costs and 0.3ppm to take account of the under-recovery of fixed and common costs from call termination. EE strongly expects that further investigation of these issues and greater transparency in the overall approach would lead to a conclusion that the appropriate cost recovery based rate is above this figure.[72]

In contrast, Ofcom's Impact Assessment Range assumes a much lower appropriate origination payment range of 2.5ppm -3ppm, which range is critical to Ofcom's cost benefit assessment of Options A and C.[73] The above concerns suggest that this range will not allow mobile OCPs to recover their efficient costs - in violation of the first of Ofcom's cost recovery principles. EE therefore strongly believes that the use of this range for the purposes of assessing the costs and benefits of Ofcom's freephone proposals (and hence the legal validity of those proposals) is inappropriate and needs to be reconsidered.

Annex 23 - Assessment of the origination payments for a free to caller range

Our response in relation to Ofcom's analysis in this Annex addresses the wider arguments which Ofcom uses to derive and apply its range of 2.5ppm-3ppm (as opposed to the question of whether it enables efficient cost recovery, which is dealt with in our response to Ofcom's cost analysis in Annex 22).

Ofcom argues that the setting of an origination charge of between 2.5-3ppm (the Impact Assessment Range) under its proposals that all fixed and mobile 080 calls should be free-to-caller will appropriately balance (a) the impact on the prices that fixed and mobile operators charge for telecommunications services other than 080 calls, which Ofcom terms the "tariff package effect" ("TPE") and (b) the impact on SPs and ultimately service availability for consumers. EE has very

68 http://stakeholders.ofcom.org.uk/binaries/research/cmr/q12011.pdf

69 Ofcom's average operator CARS cost of £1,602 million.

70 Ofcom's second consultation, § 3.24. In 2009, mobile OCPs retained £509m (£443million incl VAT of 15% rate).

71 Ofcom has previously considered (in its determination of the dispute raised on NCCN 956 between BT and each of T-Mobile, Vodafone, O2 and Orange about BT's termination charges for 080 calls) that the appropriate cost figure for origination should be symmetrical with that for call termination (for example, stating "We agree that the efficient cost of termination provides a suitable estimate of the efficient network costs of origination" in § A3.23 of http://stakeholders.ofcom.org.uk/binaries/consultations/draft_deter_bt_tmobile_vodafone/nonconf.pdf (Final Determination of 5 February 2010). Taking this approach would mean the LRIC+ figure would be above 1.8ppm for 2013.14, properly inflated to 2011/12 prices.

72 It must also be recognised that the MTR cost model was developed for the purposes of estimating appropriate cost benchmarks for MTR regulation and the cost estimates it provides for other services, such as call origination, has not been scrutinised in any previous proceedings. The exact model which Ofcom has used is therefore important and greater scrutiny of the treatment of call origination costs is warranted if it is to be used to set charges for such services.

73 This is based on an application of Ofcom's 6 principles of cost recovery as recently modified to the "three principles" set out in Ofcom's 080 Decision of February 2010 and endorsed by the CAT in its 08 Judgment.

significant concerns with the analysis used to estimate both of these impacts on the industry, and thus ultimately on consumers.

The TPE

It is perhaps worth starting with EE's understanding of Ofcom's use of the terms "positive TPE" and "negative TPE" in the 2nd Consultation, as these terms can mean different things in different contexts. In the 2nd Consultation, EE understands Ofcom's term "negative TPE" to mean an impact on consumers in relation to the prices charged by OCPs for products and services other than NGN calls which is a "bad" impact, i.e. that the prices for these other products and services are **likely to go up**. Similarly, EE understands that the term "positive TPE" is used by Ofcom in the 2nd Consultation to describe an impact on the prices charged by OCPs for products and services other than NGN calls which is a "good" impact, i.e. that the prices for these other products and services are **likely to go down**.

Although Ofcom does not explain its logic in any detail, Ofcom's analysis appears to assume that, in the current highly competitive UK retail mobile market, if mobile OCPs' "incremental profits"[74] on 080 calls fall, then they will need to recover these lost profits from other products and services and hence the prices of other products and services are likely to rise, and vice versa if mobile OCPs' "incremental profits" on 080 calls rises. Equally, Ofcom appears to have applied the same logic in relation to the "incremental profits" retained and prices charged by fixed OCPs.

It is fundamental to the validity of this analysis for Ofcom to correctly ascertain in relation to the **revenue** currently received by mobile and fixed OCPs in relation to their origination of 080 calls:

- which proportion of this revenue represents an appropriate allocation to recover the OCPs' **costs** of originating 080 calls (as the costs of origination and hence the need to recover these costs will remain unchanged under Ofcom's proposals); and
- which proportion of this revenue represents the **profits** retained by OCPs in respect of the origination of these calls (as it is likely that these profits are, at least in the highly competitive UK retail mobile market and potentially also in the retail fixed market, currently being used by OCPs to cross-subsidise the costs of providing other products and services, resulting in consumers currently enjoying lower prices for those other products and services than would otherwise be the case).

Overall, OCPs need to allocate the revenues that they receive from the supply of all of their products and services to cover not only their incremental costs of supply, but also their fixed and common costs. If regulation prevents OCPs from doing this, then they will logically ultimately be forced out of business. There is no reason for Ofcom to assume that OCPs will not or should not recover any of their fixed and common costs from the origination of 080 calls. Indeed, the logic of setting pure LRIC MTRs is that OCPs will and should recover their fixed and common costs from call origination.

Accordingly, it is entirely incorrect and inappropriate for Ofcom to do as it has done in the 2nd Consultation and assume that all revenues earned above pure LRIC costs are "incremental profits"[75], and this **fundamental error** vitiates the entirety of Ofcom's TPE analysis in respect of mobile originated 080 calls.

As set out above, EE believes that the full efficient cost to a mobile OCP (i.e. the incremental cost plus efficient recovery of fixed and common costs) of originating an 080 call is at least 5ppm. However, even on Ofcom's cost analysis, this cost is in the range of 2.5-3ppm. Accordingly, on Ofcom's analysis, under its mandatory zero rating proposals, mobile OCPs will be able to make absolutely no incremental profits on 080 calls (regardless of the volume of such calls), and on EE's analysis mobile OCPs will (unless Ofcom changes it recommendations on the appropriate call

[74] A26.1
[75] See A26.8, footnote 269 and Table A26.1

origination charge to be payable), lose at least 2-2.5ppm on every single 080 call they originate. Contrary to the entirely incorrect and inappropriate suggestions in Tables A26.1 and A26.2, there can accordingly be absolutely no question that, as compared to the present situation where mobile OCPs are on average charging retail prices of between 20ppm (for residential consumers)[76] and 14.1ppm ex VAT for 080 calls overall[77] and are thus able to retain incremental profits of in excess of 9ppm, the TPE in respect of mobile originated calls to 080 numbers **will be very distinctly negative, irrespective of the volume of additional mobile originated calls generated** as a result of Ofcom's Option A and C proposals. In contrast, the setting of a mobile maximum price equivalent to the AC is likely to have minimal distortionary TPE:

"...setting the maximum price equal to the AC has significant attractions. It mitigates the risk that the maximum price fails to reflect callers' preferences. It is more flexible since it is likely to be relatively simple for an OCP to change its AC if circumstances change. It is also capable of reflecting the diversity of callers. For example, the minority of callers that value cheap non-geographic calls are likely to select a package with a low access charge"[78]

In relation to the TPE for fixed originated 080 calls, EE finds Ofcom's suggestion that "the origination payment received by fixed OCPs is likely to exceed their incremental costs of originating 080 calls"[79] somewhat surprising, given Ofcom's comments earlier in the 2nd Consultation that:

"In terms of the level of fixed origination payments, we have not received any evidence that the current level is inappropriate. The level of origination payments for calls originated on BT's network is currently regulated and cost reflective. Corresponding origination payments are paid to other fixed OCPs".[80]

On the basis of these comments, EE assumes that, even if the current fixed origination charge of 0.5ppm exceeds the pure LRIC cost to fixed OCPs to originate 080 calls, this amount is still appropriately cost reflective. Accordingly, it would not seem to be appropriate to consider any of this amount to represent an element of "incremental profit" that could or should be used to cross-subsidise fixed OCPs' costs of providing other products and services. Assuming therefore that under Ofcom's proposals fixed OCPs will continue to receive no more and no less than an origination charge of 0.5ppm for the origination of 080 calls (which we understand to be the case), EE believes that the **TPE for fixed OCPs will be completely neutral, regardless of the extent of any fixed to mobile substitution or overall change in the volume** of 080 calls generated as a result of Ofcom's proposals.

The impact on SPs and service availability

To begin with, it would seem that Ofcom has incorrectly judged the level of origination charge that surveyed SPs who are in favour of these proposals would be willing to pay.

Specifically, although the mean willingness to pay among the 36% of those SP respondents who would be willing to pay a positive call origination charge (i.e. the 17% of all 080 SPs surveyed) was 2.9ppm, the figures reported in the 2nd Consultation[81] suggest there is a “bimodal distribution”. Accordingly, using the average of these figures (in terms of the mean figure of 2.9ppm) is inappropriate. Examination of the table suggests two modes of responses for both 4ppm-5ppm and 10ppm-19ppm payment ranges.[82] In short, Ofcom’s data shows two distinct groups of SPs and it is inappropriate to use a simple average (mean) across both groups. These statistics are rather suggesting that there are two levels of willingness to pay, 4-5ppm the highest (12%), 2-

76 Table A8.10, presumably inc VAT.
77 Table A23.1, ex VAT, based on average 2009 prices.
78 A24.35
79 See §A26.14
80 See §A23.13
81 See Figure 16.9
82 Ofcom's 2nd Consultation, Figure 16.9.

3ppm (9%) the second highest and 10-19 ppm (8%) the third highest. By basing its conclusions on a simple average across the different groups Ofcom has abstracted away from the actual data to an inappropriate degree. At the very least, this suggests more detailed investigation is required. It is not appropriate to assume, as Ofcom does, that the simple average is an important input to deriving the Impact Assessment Range.

In terms of the levels of increased origination charges that could motivate 080 SPs to get rid of their numbers we note that the numbers involved were expressed to SPs in absolute terms: total cost increase to the SP, rather than in terms of how much more the SP would be prepared to pay specifically in relation to mobile originated calls. We consider that leads to a fundamental weakness in Ofcom's analysis, which is extremely sensitive to the level of origination charge SPs would be prepared to pay for mobile originated calls[83].

Specifically, we do not believe that it is possible to extrapolate, as Ofcom has done in the 2nd Consultation, from a finding that an SP would be prepared to pay an extra 1ppm on top of the amount the SP "currently pays" (which is what the 2011 SP Survey establishes) to a finding that the same SP would therefore be happy to pay an increased origination charge of between 2.5-3ppm for mobile calls (which is what Ofcom claims in Annex 23[84]. The fixed to mobile substitution ratios underlying this extrapolation predicted by Ofcom[85] may well prove to be overall accurate, or they may not. However, they are extremely unlikely to reflect the mix in inbound traffic types and hence costs for individual SP - some SPs such as those offering a "bad driver" or traffic reporting hotline may find that nearly all of their calls are made from mobiles, whereas 080 conference call numbers are likely to continue to be predominantly dialled from landlines. In line with this, SPs are likely to have quite differing views regarding the likely mix of fixed and mobile calls to their 080 number if it is zero rated and this will potentially materially influence the level of origination charge that the SP is prepared to pay for mobile originated calls. Other factors may include the relative importance of receiving mobile calls when considered in the context of the actual cost. For some SPs a ratio of 5 to 6 times the cost of receiving a fixed originated call may be acceptable (i.e. the 2.5ppm-3ppm impact assessment range vs the fixed origination cost of 0.5ppm), but for others it may not be.

We therefore believe that Ofcom needs to re-run this crucial survey question to ask SPs specifically regarding what level of compulsory origination charge for mobile originated 080 calls would be likely to cause them to get rid of their 080 number and then to re-run its analysis of the comparative costs and benefits of options A to C (and D) in light of these findings.

Overall, to the extent that the impact assessment range is based on willingness to pay of SPs, it is subject to significant uncertainties and flaws which undermine this aspect of the range's derivation.

Nevertheless, to the extent that Ofcom's findings do suggest that a potentially very significant proportion of current SPs would get rid of their 080 numbers at the impact assessment range level of origination charges, we consider that these findings should weigh very heavily against Options A and C. We fail to see how it can be considered in the best interests of consumers to potentially cause up to 19% of current 080 SPs to cease operating their 080 numbers.[86] That is to say that, overnight, consumers might suddenly find themselves with potentially circa 8,000 less 080 services to choose from than they have currently, purely as a result of Ofcom's proposals. In contrast to Ofcom's quick dismissal of these results[87], we do not believe that it is open for Ofcom to pass judgement on the value of these services to consumers, their popularity, or the suitability of any alternatives without evidence to support this approach (which Ofcom has so far not provided).

Clearly, some of these SPs will migrate their services to other ranges. However, unless there is another range to migrate to which is free to call from landlines (and there is none under Ofcom's Option A), then in all scenarios this will result in consumers who were previously able to access the

83 See for example §§A23.80-A23.82
84 A23.49.
85 40%-50% - A23.56
86 See §A26.17.
87 §See A23.67

service for no cost in at least some situations being unable to do so in any situation.[88] Furthermore, the costs to mobile callers may be higher under the new range (even on 03) than the charges were for mobile calls to the previous 080 number, depending on the customer's specific tariff plan with its OCP.

These kinds of results should serve a strong warning to Ofcom that its proposals to mandate the zero rating of 080 numbers from both fixed lines and mobiles cannot be justified on the basis of consumer protection, and are extremely likely to harm rather than promote the best interests of UK consumers, in violation of Ofcom's statutory obligations.

Annex 24 - Assessment of the mobile maximum price

We agree with Ofcom's conclusion that under Option C, the maximum price of mobile calls should be set equal to the AC (§A24.82). For the same reasons we believe that the same conclusion would apply under our preferred Option D (designation of 080 vs. 0500 as the mobile maximum price range).

We note that Ofcom is indecisive as to the maximum price that should apply under Option B (§A24.74). We are inclined to consider that setting a low maximum price of 4.2 or 5 ppm is an inferior solution to setting a maximum price of the AC in terms of the TPE and distortion of prices that meet consumer preferences. At the same time, it is likely to be an inferior solution to a maximum price of zero for those SPs that truly do want and are prepared to pay for truly free-to-caller access to their numbers. We therefore prefer Option D over Option B.

Annex 25 - selection of the free to caller and maximum mobile price range

Finally in Annex 25 the 2nd Consultation addresses which number ranges should be free to caller and which should be a maximum mobile price range.

For the reasons set out below, we do not believe that the evidence and analysis set out in Ofcom’s 2nd Consultation support Ofcom's conclusion that 080 should be free to caller; and 0500 should be the maximum price range, rather than the other way around.

SPs' preferences

EE fully agrees with Ofcom's conclusion that "selecting the option that the majority of 080 SPs prefer is likely to reduce the scale of migration and hence the associated migration costs" (§A25.4). For the avoidance of any doubt, this was precisely the same point we were trying to make in response to Ofcom's first consultation (cf §A25.5).

In seeking to ascertain these preferences, Ofcom bases its analysis entirely on the response to survey question 20 in the 2011 SP Survey. However, it is very difficult to reconcile the responses to this survey question with the responses given to survey questions 14 and 16, on which Ofcom also places significant reliance in its assessment of the costs and benefits of its various freephone proposals.

According to survey question 14, only 47% of SPs (a minority) considered that the charge for mobile phone calls to their freephone number was a (slight or major) disadvantage. According to survey question 16, only 36% of these SPs, that is 17% of all 080 SPs surveyed (a very small minority), were prepared to pay more for mobile customers to get free-to-caller access to their freephone number.

These results simply do not tally with the suggestion in the responses to survey question 20 that 51% (a very finely balanced majority) of 080 SPs would prefer a situation where the cost to their organisation of operating their freephone number increases but the price of the mobile call is free

[88] We do not think that it makes a significant difference to this analysis that some of these number ranges will be "in-bundle". First, apart from the 03 range, this will not universally be the case. Second, many tariffs include only a limited number of minutes in-bundle. Forcing consumers to trade minutes speaking to family and friends for time spent in dealing with customer service issues on a former 080 helpline etc should still appropriately be regarded as a cost to consumers.

to the caller to an alternative (i.e. the mobile maximum price option) where this cost does not increase. Furthermore, this majority finding is only valid when the increased cost is 0.5ppm, which is lower than Ofcom's impact assessment range. When the cost is increased to 1ppm (the level of Ofcom's impact assessment range) the majority preferences reverse, with only 47% of SPs preferring the mandatory free-to-caller option over the mobile maximum price option.

Even assuming that both sets of results are valid, we do not believe that these results sustain Ofcom's claim that "more 080 SPs would prefer 080 to be free to caller" (§A25.8). In fact, only 17% (a small minority) of 080 SPs surveyed would prefer to pay more to have 080 become a free-to-caller range and only 47% of 080 SPs would prefer to pay amounts within Ofcom's impact assessment range over having a maximum mobile price range, with the remainder of SPs either indifferent, unsure or against this proposal.

We therefore do not agree with Ofcom's conclusion that the evidence on SPs' preferences tends towards 080 being the free-to-caller range under option C (§A25.9).

Callers' current beliefs about call prices

We welcome Ofcom's sensible conclusion that evidence "provides a tentative indication that, under Option C it may be simpler to establish the proposition that 080 is a Maximum Mobile Price number range and 0500 is free to caller than the converse" (§A25.18). Given the consumer protection, transparency and awareness motivations behind Ofcom's proposals, we disagree with Ofcom that limited weight should be given to this conclusion (cf §A25.18).

Ofcom's policy preference about the extent of free calls

Ofcom suggests that "where an SP is largely indifferent" about whether it is located on a free-to-caller number range or a maximum mobile price range, Ofcom would prefer the SP to be on the free-to-caller range, because consumers will benefit from free mobile call prices (§A25.19). However in practice, we expect that few 080 SPs are likely to be indifferent to an effective minimum tripling of their current costs of receiving calls (from 0.5ppm to 1.5ppm, assuming a 50:50 fixed to mobile substitution ratio).

We remain of the view that Ofcom should only impose such costs on 080 SPs where there is a clear desire by at least a majority of such SPs for this change and/or a pressing consumer protection need for the change. Presently, neither proposition holds true. Between 83% and 53% of 080 SPs (depending on the survey questions considered) have expressed no clear preference for Ofcom's proposed changes. Furthermore, making 0500 the free-to-caller range would appear to meet Ofcom's consumer protection objectives, without forcing these changes on SPs.

Lastly we note that it would remain open for Ofcom to issue guidelines on what a fair and reasonable origination charge would be for voluntarily zero rated 080 mobile calls, even if the range was still designated as a mobile maximum price range. This would be another way to help meet the preferences of SPs with only a weak preferences for free mobile calls but no desire to migrate to another range to achieve this outcome.

We therefore believe that it would be disproportionate for Ofcom to push ahead with this particular policy preference. Rather, Ofcom should chose the more proportionate option of leaving 080 as the maximum mobile price range (if Ofcom intervenes in retail pricing on this range at all).

Q16.3:

Do you agree with our estimates of the level of migration and misdialling costs for service providers who may migrate as a result of our proposal to make the 080 range free to caller (taking into account the evidence and analysis in Annex 12)? If not please explain why and provide evidence.

EE has provided detailed comments on the Analysis set out in Annex 12 in response to question 13.2 above.

In terms of migration costs, for the reasons set out in that response, we believe that Ofcom should only use the upper end of this range - £2,500 per SP in its cost assessment. We note also in this regard that the decision to migrate to another range under Ofcom's preferred option of mandating that each of the 080, 116 and 0500 ranges must be free-to-caller can in no sense be considered voluntary for those SPs who cannot afford to pay higher origination charges than they do currently (cf Ofcom's assumptions in relation to 0845 and 0870 migration to 03). This reinforces our view that Ofcom should only use the upper end of its cost assessment range.

Furthermore, given the lack of choices for SPs who get rid of their 080 numbers under Ofcom's preferred option, we find it quite surprising that only 60% of these SPs say that they would migrate their 080 service to another number range (§16.205) - as this would imply that almost half of them would either go out of business or use a means of contact other than a telephone number. We note Ofcom's comment that there is some uncertainty around the reliability of this figure, given the small sample size (fn 187). It may be that some SPs who have more than one contact number did not consider it to be "migrating" if they simply closed their 080 number and relied on their other existing contact number(s). However, the costs of changing stationary and signage etc to remove the reference to the obsolete 080 number are likely to be very similar in this case to the costs associated with migrating to a new number (essentially all costs except the telecommunications costs). Basically, these costs can only be avoided if the SP goes out of business. Ofcom should make further investigations as to what percentage of 080 SPs this is likely to be and only reduce its figures by this amount.

We also note that the figures used in this analysis are quite inconsistent with the figures used in Ofcom's analysis in Annex 25, which suggest that "if 080 were the free to caller range then up to 33% of SPs might migrate to the Maximum Mobile Price 0500 range" (§A25.21). There is obviously a huge difference in potential migration costs between the assumption in section 16 of the consultation that only 6.6%-11.4% of SPs would migrate, as compared to the 33% estimated in Annex 25. In order to ensure that its remedies are in all cases proportionate in line with Ofcom's obligations under the Act, we would strongly recommend that Ofcom uses the costs from the "worst case" scenario.

In addition, as noted in response to question 13.2 above, Ofcom should factor into its overall cost assessment migration costs in the £0.5m plus range for at least a handful of major 080 SPs who may not find it commercially viable/beneficial to retain their existing 080 numbers under a free-to-caller regime.

In terms of misdialling costs, we note that although question 16.3 asks for our views on Ofcom's assessment of these in the context of its proposal to mandate the zero rating of 080 calls, section 16 of the 2nd Consultation doesn't actually include any such assessment. This is a notably omission in Ofcom's analysis. Clearly, even for misdialled free-to-caller 080 calls there is a network cost (recovered via the relevant interconnection and hosting charges). Furthermore, regardless of whether or not the call is charged to the consumer there is a time cost involved in misdialling the incorrect number and re-dialling the correct one.

Q16.4:

Do you agree with our proposal to treat the 116 ranges in the same way as the 080 range (i.e. designate all as free to caller) as set out in detail in Annex 27? If not please explain why.

EE's position on this issue has not changed since our response to Ofcom's first consultation. We remain of the view that allowing some 116 numbers to be designated as freephone rather than requiring all 116 numbers to be designated as free-to-caller will best meet the needs of current and future 116 SPs (and hence consumers of these services).

The only evidence that Ofcom has gathered on this point seems to support our analysis.

Ofcom acknowledges that there will be "a risk of reduced service availability" under its proposed approach to zero rate all 116 numbers(§16.297). This is difficult reconcile with Ofcom's claim that its proposal is nevertheless the one most likely to "facilitate access to these services by vulnerable households" (§16.297). .

Ofcom has provided no evidence that the current arrangements are confusing to customers. They would further be quite consistent with a context in which 080 remained designated as a freephone range and 0500 designated as a free-to-caller range (or vice versa) (cf §A27.27)

To the extent that Ofcom is worried about high pricing to 116 calls (§A27.14) we believe that this concern could be addressed by setting an SC of zero, a maximum fixed price of zero and a maximum mobile price equal to the 08x AC. We believe that this should adequately meet Ofcom's consumer protection objectives without the risk of reduced service availability.

If Ofcom does decide to mandate the zero rating of all 116 calls, EE does not believe that it would be appropriate for OCPs to be legally required to under-recover their costs of origination. Hence, we believe that any guidelines from Ofcom regarding what a fair and reasonable origination charge would be for these ranges must at least allow OCP to recover their full costs of origination (as detailed in our response to Question 16.2 above). We also note in this regard that, contrary to Ofcom's suggestion in the 2nd Consultation, Ofcom has previously found that "Some of these [116] services may focus on providing useful but non-urgent information **or have a commercial element**"[89] (emphasis added).

Of course, these guidelines would not prevent OCPs from voluntarily agreeing to waive or reduce such charges in view of the relevant services being offered (e.g. as they do currently for THA services).

Q17.1:

Do you agree with our provisional view that it is appropriate for an access condition to be imposed on all TCPs hosting designated Free to caller numbers requiring them to:

(i) purchase wholesale origination services for calls terminating on designated free to caller ranges from any requesting OCP;

(ii) to do so on fair and reasonable terms and conditions (including charges); and

(iii) notify their SP customers of any initial revision to the charges for wholesale origination services within two months of Ofcom imposing the requirement for zero maximum prices.

If not do you consider any ex ante intervention is required? Please give your reasons for or against such intervention and your preferred approach.

EE broadly agrees with Ofcom's proposals in relation to items (i) and (ii). However, we remain of the view as set out in our response to Ofcom's first consultation, that the more appropriate course would be for Ofcom to conduct a market review, find 080 TCPs to have SMP, and to impose an obligation to procure 080 origination on fair and reasonable terms as an SMP remedy.

Furthermore, we remain of the view that Ofcom should implement such wholesale reforms **before** it determines that further regulation of retail freephone pricing is necessary. When presented with an origination charge that generates, for example, broadly the same level of revenue that a mobile OCP could generate from charging for 080 calls (as would be the case if the origination charge was set at the level of the 08x AC) - adjusted as appropriate for any expected increase in the volume of calls to the number, it is difficult to see why a mobile OCP would not be prepared to reach a commercial agreement to zero rate such calls.

In relation to (iii), as set out in further detail in response to question 17.3 below, EE does not believe that SPs will be able to place much reliance in terms of their migration planning on advance notification of a potential origination charge which is still subject to agreement between the TCP and OCPs, and hence variation. We therefore consider that this obligation should more usefully be altered to an obligation on TCPs to notify OCPs of their proposed origination charge within 2 months of publication of Ofcom's guidelines on what a fair and reasonable range for that charge is likely to be, although notice could also be given to SPs for their information (see §17.65).

[89] http://stakeholders.ofcom.org.uk/binaries/consultations/116/statement/116statement.pdf at §1.15

In terms of the contents of those guidelines, we believe that they should specify a range of charges, with:

- the OCP's 08x AC at the upper level; and
- not less than 5ppm at the lower level, to allow for recovery of LRIC costs and an appropriate contribution to CARS costs (see further our response to question 16.2 on this point).

In terms of the upper end of this range, given that there has been no finding on the part of mobile OCPs that they have SMP, we do not believe that there is any requirement for these charges to necessarily be cost based. Rather, it is more important that these reflect market driven competitive pricing levels, so that the mobile OCP is not required to be left out-of-pocket as a result of Ofcom's proposals. Setting the upper limit for the origination charge at the level of the 08x AC strikes an appropriate balance in this regard - ensuring that the OCP is neither over nor under compensated relative to the revenues it could generate in the market from charging for these calls rather than zero rating them. We note that Ofcom has raised a number of practical objections to such a suggestion at §16.38. We respond as follows:

- In terms of the fact that the AC will vary between OCPs and according to different tariff packages, this is no different to the way in which the "ladder style" termination charges of BT, C&W and many other TCPs currently operate today. In its guidelines, Ofcom could simplify the process for deriving the relevant AC - e.g. by requiring OCPs to calculate an average overall AC across all of their tariff packages and updating this figure annually based on the previous year's tariffs and traffic volumes;
- OCPs already zero rate certain 080 numbers on an SP by SP basis and we do not see any particular complexity associated with potentially expanding this to a broader number of SP number ranges;
- Ofcom would not be precluded from proposing different arrangements for mobile and fixed originated calls, given the differing costs of origination and current market pricing etc.

Q17.2:

Do you agree that the access condition does not need to be extended to OCPs, but is effectively binding on both parties? If not please give your reasons.

Yes. This seems to be the most proportionate approach.

Q17.3:

Do you support an implementation period of either: (i) 12 months; or (ii) 18 months (in line with the implementation of the proposed unbundled tariff)? Please explain your reasoning as well as providing any evidence to support your view.

We are dissappointed that Ofcom's "proposed approach to implementation" of its freephone proposals is still in a very "green" form, considering the large impact that these proposals will have on all existing freephone stakeholders.

Essentially, all Ofcom has done in the 2nd Consultation is to identify, at the highest conceptual level, an initial list of tasks that needs to be completed over this period (§17.98). This list is not only long, but it involves multi party discussions and activities that need to happen in succession not parallel. Moreover, some issues, for example, wholesale agreements, including TCP and OCP discussions around origination payments, are likely to take a significant time period in themselves (and possible disputes cannot be ruled out). We therefore completely disagree that 12 months would be sufficient, proportionate or realistic.

First and foremost we are concerned at the absence of detail in the first two critical steps in the list. We agree entirely that, in the event that any of the existing freephone ranges are mandated as free-to-caller, the existing SPs on these ranges must be given adequate advance notice of the increased origination charges that they will face to continue to receive calls on the range after the proposals come into effect, in order that the SPs can consider their migration options (§17.66).

However, as Ofcom's impact assessment demonstrates, a difference of just 0.5ppm in increased origination costs is likely to dramatically affect the propensity of SPs to decide to migrate or not (e.g. 18% are likely to get rid of their number when faced with a 1ppm increase in cost whereas 28% are likely to do so in the face of a 1.5ppm increase - see Figure 11 in the 2011 SP Survey).

We therefore do not believe that SPs are likely to be able to take decisions in this regard in advance of the actual level of the payment being agreed between the SP's TCP and OCPs (cf §17.68).

Accordingly, we believe that the first step in the implementation chain must be the issuance of Ofcom's guidance on what Ofcom considers would be a fair and reasonable origination charge (see §17.64). The 2nd Consultation lacks any indication as to when this guidance will be published by Ofcom.

Following this, we agree with Ofcom that it is likely to be proportionate to give TCPs a period of 2 months in which to notify their proposed origination charges (§17.67). Whilst this information will be of interest and some relevance to an SP, the charge must be agreed with OCPs before the SP can rely on it. Hence, we would suggest that this initial notification must be given to OCPs (although it may also be advised to SPs).

A period of not less than 3 months should then be allowed for commercial negotiations between OCPs and TCPs to take place on the level of the origination charge. Following this, it would be prudent to allow for a 4 month period for any disputes to be referred to Ofcom for resolution. It is only at this point (and assuming no challenge to the CAT) that it would be appropriate for the new origination charge to be notified to SPs and the rest of the steps in Ofcom's list to take place.

We would also make the following comments on the list of implementation activities identified:

- First, we are concerned that Ofcom only looks at SP costs in its consideration of timescales in §§17.101-17.105. Clearly there will be implementation challenges and costs for OCPs as well. However, while Ofcom touches upon this possibility (§17.98), there is no attempt at an analysis of any cost impact on OCPs. [✂][✂], there are communications costs and activities that need to be accounted for (both internal training and communications and customer facing communication, which we discuss in more detail below).
- Second, from a commercial impact perspective, a "big bang" rather than a staged approach also helps us devise a coherent NGN review strategy, which will ultimately be less disruptive for consumers. This is important in order to minimise the tariff package effect.
- Third, Ofcom rightly notes that timescales are dependent on customer communication requirements (e.g. at §17.99). Ofcom suggests that 12 months may be sufficient to ensure all the necessary industry changes **and** to ensure the price changes are comprehensibly communicated to consumers because the 080 customer communication element may be more straightforward than for other 08x ranges. However, while the "all calls to 080 are free" message may be easy to communicate, that simple message may be lost if not provided within the context of unbundling for call charges to other 08 numbers, when that is also due to change (we would not want consumers to think all 08 numbers are free or to think 080 becomes chargeable again once unbundling is introduced).
- Having a single, rather than multiple, communications campaign also helps make better use of limited resources - we can send one rather than 2 messages to customers about 08 pricing and we would only need one media campaign. We note that Ofcom also notes the benefits of having a single communications campaign (§17.104) as well as the benefits to SPs of being able to plan their migration to alternative number ranges once the reform proposals for those ranges are also settled (§17.05),.

For all of the above reasons, we believe that a minimum 18 month implementation period would be required in respect of any freephone range that is to be re-designated as a free-to-caller range.

In contrast, setting a maximum mobile price equivalent to the 08x AC on the current 080 range would be far less complex and costly to implement, essentially avoiding the need for the first five of the seven steps on Ofcom's list in §17.98, as there would be no requirement to agree on a new origination charge nor any need for existing 080 SPs to migrate anywhere if they did not wish to do so.[90] However, for the reasons set out above, it would still be most efficient for the industry and beneficial for consumers for this change to take place at the same time as the implementation of unbundling.

Q17.4:

Do you have any other comments on our proposed implementation approach for making Freephone free to caller? For example, do you consider it necessary for a requirement on SPs to publicise that 080 calls are free to be part of any agreed Industry Code of Practice on the advertising of non-geographic calls and do you have any other suggestions for how SPs could be encouraged to publish that at the point of calls? Are there any other implementation issues which need to bet taken into account?

We agree with Ofcom[91] that the majority of SPs who remain on / migrate to any new free-to-caller range (be that 080 or 0500) are likely to have a natural incentive to promote the fact that calls to their numbers are now free from both landlines and mobiles, given that they will be paying more in origination charges purely to support this feature.

We therefore agree that it is unlikely to be necessary or proportionate to impose an obligation (whether in an Industry Code or otherwise) on SPs[92] to advertise that these calls are free (§17.110).

For the same reasons, we believe that any obligations in respect of PCAs advertising that calls are free (whether imposed on the SP or OCP) would similarly be both unnecessary and disproportionate.

Furthermore, we note that it could be confusing for consumers who are currently used to hearing network PCAs only where the 080 call is chargeable, to hear the opposite message (in other words, a PCA to say that 080 calls are now all free could conversely confuse customers and deter them from calling).

Finally, we agree that Ofcom needs to engage with organisations such as the CAB, as well as the media, to ensure that the message around any changes to 080 call charges is communicated to end users.

90 Of course, if the 0500 range is designated free-to-caller then the circa 17% of SPs who would prefer to pay more to enable free-to-caller mobile access could choose to migrate to this range. However this decision could be made at any time most convenient and cost effective for the SP and therefore need not delay the changes to the designation of either range.

91 17.109.

92 Or for that matter, lest there be any doubt OCPs.