



Determination to resolve a Dispute between Everything Everywhere and BT about BT's termination charges for 03 calls

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Final Determination

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Contents

Section		Page
1	Summary	2
2	Introduction and background to the Dispute	5
3	Analysis of the Dispute	16
4	Submissions on the Draft Determination and Ofcom's response and conclusion	27
Annex		Page
1	The Determination	39
2	NCCN 966	42

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

Glossary of terms

Act: the Communications Act 2003.

CP: Communications provider

DLE: Digital Local Exchange

FAC: Fully Allocated Cost

FNO: Fixed Network Operator

LRIC: Long Run Incremental Cost

MNO: Mobile Network Operator

NCCN: Network Charge Change Notice, the mechanism by which BT notifies other communications providers of changes to its charges

NTNP: National Telephone Numbering Plan.

OCP: Originating communications provider.

SP: Service provider

ST: Single tandem

TCP: Terminating communications provider.

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

Section 1

Summary

- 1.1 This determination (the "Determination") sets out our resolution to the dispute brought by Everything Everywhere Limited ("EE") against British Telecommunications plc ("BT"). We refer to this dispute as the "Dispute" and we refer to EE and BT as the "Parties".
- 1.2 The Dispute relates to the wholesale termination charges for calls to 03 numbers charged by BT to EE. BT issued Network Charge Change Notice 966 ("NCCN 966") to originating communications providers ("OCPs") on 3 August 2009, notifying them of its new wholesale termination charges for calls to 03 numbers, effective from 1 September 2009. The revised rate was aligned with the wholesale termination charges for calls to 0870 numbers as determined by Ofcom in its determination of June 2009 to resolve 0870 call termination rate disputes between BT and various operators (the "0870 Determination")¹.
- 1.3 On 10 September 2010, EE submitted the Dispute to Ofcom, claiming that the termination charges for calls to 03 numbers notified by BT via NCCN 966 were not fair and reasonable. EE considered that the wholesale termination charges for calls to 03 numbers should be the same as or similar to termination charges for calls to geographic 01 and 02 numbers.
- 1.4 Our powers and duties to resolve certain disputes are set out at sections 185-191 of the Communications Act 2003 (the "Act"). In accordance with section 186(4) of the Act, on 1 October 2010 we decided that it was appropriate for us to handle the Dispute. We informed the Parties of our decision and published details of the Dispute, including the following scope, on the Competition and Consumer Enforcement Bulletin part of our website (the "CCEB"):

"The scope of the dispute is to determine whether it is fair and reasonable for BT to apply the wholesale termination charges for calls to 03 numbers originating on the EE mobile network and terminated on the BT fixed network that were notified by BT to EE in NCCN 966."

Summary of analysis

- 1.5 The following paragraphs summarise the analytical framework that we have used for reaching our Determination and the conclusions we have reached:
 - 1.5.1 BT aligned the termination rates for calls to 03 numbers with the termination rates for calls to 0870 numbers, as set in the 0870 Determination. We have therefore considered whether the appropriate analytical framework to determine this Dispute is that used in the 0870 Determination. In the 0870 Determination, the termination rates were set with a view to enabling OCPs to retail 0870 calls at geographic call rates. They were calculated on the basis of the cost of termination of 0870 calls,

¹ Determination to resolve 0870 call termination rate disputes between BT and various operators: <http://stakeholders.ofcom.org.uk/consultations/resolve0870calls/statement/>

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

i.e. geographic call termination charges plus relevant additional costs of termination for 0870 calls on a fully allocated cost basis.

- 1.5.2 In order to assess whether these termination rates are fair and reasonable for 03 calls, we have considered whether there are any material differences in the routing and costs of terminating 03 calls and the routing and costs of terminating 0870 calls. Our conclusion is that there are no such material differences. We have therefore analysed the 03 termination rates which are the subject of this Dispute on the basis of the analytical framework set out in the 0870 Determination.
- 1.5.3 We do not consider that the regulatory requirement which prohibits OCPs from imposing charges which are higher than geographic rates for calls to 03 numbers has any effect on the costs associated with termination of 03 calls. Accordingly, we do not consider that this requires any adjustment to the termination rates set by BT.
- 1.5.4 EE has neither suggested nor provided evidence that it is failing to recover its efficiently incurred costs on calls to 03 numbers.
- 1.5.5 We have also considered the termination rates for 03 calls in the light of our statutory duties and the Community requirements, in particular whether they are consistent with our duties to further the interests of consumers and promote competition.
- 1.5.6 In relation to consumers of 03 calls, OCPs are required to set charges for 03 calls at the same level as for geographic calls; although EE has said the increased termination rates will be passed on to callers, we have not been provided with any evidence to demonstrate that there is a realistic prospect of retail prices for calls to 03 numbers or to geographic numbers increasing.
- 1.5.7 There may be some impact on service providers ("SPs") purchasing hosting services from terminating communications provider ("TCPs"). If termination rates for calls to 03 numbers were aligned with geographic termination rates, TCPs would not recover their costs of terminating 03 calls from the termination charge, because geographic termination rates reflect the costs of terminating geographic calls and the costs of terminating 03 calls are higher than the costs of terminating geographic calls. EE does not explain why TCPs should receive less for terminating 03 calls than they receive for terminating 0870 calls, or indeed why they should receive less than the costs of termination. EE claims that TCPs should recover any cost that is not recovered through the termination rate from the SP. This would be inconsistent with the 0870 Determination.
- 1.5.8 No party has argued and we have no evidence to suggest that the revised termination rates would have any negative effects on competition.

Draft Determination

- 1.6 On 8 December 2010, we issued our draft determination ("Draft Determination") setting out our provisional conclusions in respect of the Dispute and the reasoning supporting these conclusions.

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

- 1.7 The Parties and interested parties were given until 23 December 2010 to provide comments on the Draft Determination. We received comments from EE, BT and C&W. These comments are summarised in **section 4** below.

Final conclusions

- 1.8 Having carefully considered and taken into account the responses received, we have concluded that it is fair and reasonable in the light of our statutory duties for BT to align its termination rates for calls to 03 numbers with those for calls to 0870 numbers to reflect the cost of termination, as calculated in the 0870 Determination. Our Determination is at **Annex 1**.

Structure of the remainder of this document

- 1.9 An introduction and background to this Dispute is set out in **section 2**; Ofcom's analysis and reasoning underpinning the Draft Determination is set out in **section 3**; and a summary of the Parties' and third parties' submissions on the Draft Determination and our response to those submissions is set out in **section 4**. Sections 2 and 3 of this document are identical to those sections of the Draft Determination, save for corrections to typographical errors.

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

Section 2

Introduction and background to the Dispute

Dispute resolution

Ofcom's duty to handle disputes

- 2.1 Section 185(1)(a) of the Act provides (in conjunction with section 185(3)) that in the case of a dispute relating to the provision of network access between different communications providers ("CPs"), any one or more of the parties to such a dispute may refer it to Ofcom.
- 2.2 Section 186 of the Act provides that where a dispute is referred to Ofcom in accordance with section 185, Ofcom must decide whether or not it is appropriate to handle it. Section 186(3) further provides that Ofcom must decide that it is appropriate for it to handle a dispute unless there are alternative means available for resolving the dispute, a resolution of the dispute by those means would be consistent with the Community requirements set out in section 4 of the Act, and those alternative means would be likely to result in a prompt and satisfactory resolution of the dispute.

Ofcom's powers when determining a dispute

- 2.3 Ofcom's powers in relation to making a dispute determination are limited to those set out in section 190 of the Act. Except in relation to disputes relating to the management of the radio spectrum, Ofcom's main power is to do one or more of the following:
 - 2.3.1 Make a declaration setting out the rights and obligations of the parties to the dispute,
 - 2.3.2 Give a direction fixing the terms or conditions of transactions between the parties to the dispute,
 - 2.3.3 Give a direction imposing an obligation to enter into a transaction between themselves on the terms and conditions fixed by Ofcom; and
 - 2.3.4 Give a direction requiring the payment of sums by way of adjustment of an underpayment or overpayment, in respect of charges for which amounts have been paid by one party to the dispute, to the other.
- 2.4 Ofcom may also exercise certain other powers in consequence of its consideration of a dispute, including its powers under Chapter 1 of the Act to set, modify or revoke general conditions.
- 2.5 A determination made by Ofcom to resolve a dispute binds all the parties to that dispute (section 190(8)).

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

Ofcom's duties when determining a dispute

2.6 The dispute resolution provisions set out in sections 185-191 of the Act are functions of Ofcom. As a result, when Ofcom resolves disputes it must do so in a manner which is consistent with both Ofcom's general duties in section 3 of the Act and (pursuant to section 4(1)(c) of the Act) the six Community requirements set out in section 4 of the Act, which give effect, amongst other things, to the requirements of Article 8 of the Framework Directive².

Ofcom's process for determining disputes

2.7 In light of the four month time period within which Ofcom must determine how to resolve disputes (except where there are exceptional circumstances), our *Guidelines for the handling of competition complaints, and complaints and disputes about breaches of conditions imposed under the EU Directives* (July 2004)³ set out the evidence that we require before we will accept a dispute. Those guidelines set out the information that a complainant is required to provide when submitting a dispute, including details of any relevant *ex ante* conditions, a clear statement of the scope of the matters in dispute, details of the preferred remedy (with reasons), evidence of commercial negotiations and a statement of an officer of the company that best endeavours have been used to resolve that dispute through commercial negotiation, before bringing it to Ofcom. The purpose of the guidelines is to aid both Ofcom and the parties to a dispute to manage the dispute resolution process effectively.

2.8 We determine disputes on the evidence available to us in the time available.

Dispute referred to Ofcom by EE

2.9 The Dispute relates to allegations by EE that the termination charges for calls to 03 numbers notified by BT via NCCN 966 are not fair and reasonable. EE considers that the wholesale termination charges for calls to 03 numbers should be the same as or similar to termination charges for calls to geographic 01 and 02 numbers.

2.10 NCCN 966 is set out at Annex 2. For ease of reference, Table 1 shows BT's single tandem termination charges for calls to 03 numbers before and after the introduction of NCCN 966 and the percentage change between the figures.

Table 1: BT's termination charges for calls to 03 numbers⁴

	Day (ppm)	Evening (ppm)	Weekend (ppm)
Before NCCN 966	0.2657	0.1249	0.1003
After NCCN 966	0.5600	0.2600	0.2000
% change	111%	108%	99%

² Directive 2002/21/EC of 7 March 2002

³ <http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/other/guidelines.pdf>

⁴ Source: EE submission, NCCN 966 and Ofcom calculations.

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

- 2.11 NCCN 966 entered into force on 1 September 2009. EE notified this Dispute to us on 10 September 2010. We refer to the period between these dates as the "relevant period".
- 2.12 EE has provided us with an estimate of the total amount that it has paid to BT as a result of the increase in termination rates introduced by NCCN 966. EE estimates the difference between the amount it paid to BT under the NCCN 966 rates and the amount that it would have paid at the rates previously in force as £[~~0~~] for the relevant period.

Background

EE's request for resolution of the Dispute

- 2.13 On 10 September 2010, we received a dispute submission from EE concerning BT's termination charges for calls to 03 numbers. In its submission, EE described how it had expressed its opposition to BT's proposed charges and how it had met with BT in an attempt to resolve their differences by negotiation. Despite negotiation, EE and BT were unable to reach an agreement.
- 2.14 Having considered EE's submission and comments made by BT, we were satisfied that the Dispute is a dispute between CPs relating to network access. This is because the Dispute concerns the terms on which BT is prepared to interconnect with OCPs for the termination of 03 calls hosted on its network.
- 2.15 On 1 October we informed EE and BT of our decision that it was appropriate for us to handle the Dispute for resolution on the basis of section 186(3) of the Act. We did not consider that there were alternative means available for resolving the Dispute which could provide a prompt and satisfactory resolution.

The scope of the Dispute

- 2.16 Having considered the Parties' views, we published the following scope of the Dispute in the CCEB on 1 October 2010:

"The scope of the dispute is to determine whether it is fair and reasonable for BT to apply the wholesale termination charges for calls to 03 numbers originating on the EE mobile network and terminated on the BT fixed network that were notified by BT to EE in NCCN 966."

- 2.17 Our analysis and conclusions are based on Ofcom's current regulatory policies and the numbering regime prevailing at the time that NCCN 966 was introduced, as appropriate. We note that these policies could change in the future. In particular, we are currently reviewing the operation of the regulatory regime for non-geographic numbers, including 03 numbers, in a separate policy project, the Non-Geographic Call Services review⁵. This review is considering policy options that may depart from the current policies. Such possible changes are beyond the scope of the Dispute and are not taken into account in the analytical framework set out below.

⁵ <http://stakeholders.ofcom.org.uk/consultations/ngnservices/>

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

Interested Parties

- 2.18 Virgin Media, Colt Telecommunications, Cable & Wireless Worldwide (“C&W”), 03TALK, Lexgreen, 24 Seven Communications and Magrathea Telecommunications have written to us to state that they are interested in this Dispute⁶. Some of these interested parties have made submissions, arguing that:
- 2.18.1 0870 and 03 numbers are the same in terms of routing and the service they offer and termination rates should therefore be the same (C&W and Magrathea);
 - 2.18.2 the National Telephone Numbering Plan (“NTNP”) clearly differentiates the 03 number range from geographic numbers as “UK-wide numbers at a geographic rate” (C&W);
 - 2.18.3 there is no reason why EE would need to amend its overall call bundles given the low volumes of calls to 03 numbers and the freedom with which it can price its geographic call packages (C&W);
 - 2.18.4 reducing termination rates would reduce innovation and the number of network operators providing services (03TALK);
 - 2.18.5 reducing termination rates would result in SPs needing to pay more to receive calls or migrate to a new number range (Lexgreen and 24 Seven Communications); and
 - 2.18.6 the higher costs of 03 termination rates compared to geographic termination rates is offset by the higher profits EE is making on 0870 calls as a consequence of the reduction in their termination rates (Lexgreen and 24 Seven Communications).

Non-geographic call services

Conveyance of non-geographic calls

Figure 1: Parties involved in a typical non-geographic call



- 2.19 Non-geographic numbers, for example numbers which start 03, 08 or 09, do not relate to a specific location (unlike geographic numbers), but instead to a particular

⁶ Email from Andrew Wileman (Virgin Media) to Paul Dean (Ofcom) (4 October 2010); e-mail from Alistair Dixon (Colt) to Paul Dean (4 October 2010); letter from Justin Hornby (C&W) to Paul Dean (11 October 2010); e-mail from Nick Imrie (03TALK) (12 October 2010) to Paul Dean; e-mail from Mikael Armstrong (Lexgreen) to Paul Dean (19 October 2010); e-mail from David Samuel (24 Seven Communications) to Paul Dean (22 October 2010); letter from Linus Surguy (Magrathea Communications) to Paul Dean (19 November 2010).

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

service. In order for a call to a non-geographic number to be conveyed to its destination, the number in question has to be 'translated' to a geographic number.

- 2.20 The number ranges allocated for non-geographic calls are outlined in the NTNP. The NTNP specifies restrictions on the adoption or use of numbers by services that Ofcom considers appropriate for each range. Non-geographic numbers are used to provide services to the consumer for the price of a phone call. Such services include for example, consumer help lines, customer support services and premium rate chat services.
- 2.21 Figure 1 outlines the parties involved in a typical non-geographic call. These are: the OCP on whose network a call originates; the TCP on whose network a non-geographic number terminates; and the service provider, which is the individual or organisation using a non-geographic number to provide a consumer service and the recipient of the non-geographic call from the consumer wishing to access that service. In the event that the OCP does not interconnect directly with the TCP, a transit CP carries the call between the two.
- 2.22 The TCP performs two distinct functions:
- 2.22.1 First, it terminates the call to the non-geographic number in return for a termination charge paid by the OCP. For further detail, see the following paragraphs regarding non-geographic call service charging arrangements.
- 2.22.2 Second, it provides various 'hosting' services to non-geographic call SPs. These services may include call management, conditional call routing and recorded announcements. In relation to non-geographic numbers other than 0870 and 03 numbers, the TCP may enter into revenue sharing arrangements with the SP.

The conveyance and routing of calls to 03 numbers

- 2.23 For a given 03 call, there can be several different CPs involved in conveying the call from the caller to the organisation or individual receiving the call (e.g. a retailer, information service like NHS Direct etc). This includes the OCP, on whose network the call commences, and the TCP, on whose network the non-geographic number resides. The OCP and the TCP may be the same for some calls. There may also be a CP carrying the call between the OCP and the TCP. This is known as a "transit" service and payments for this transit service are known as "TWIX" payments.
- 2.24 At a technical level, the 03 number dialled by a caller has to be "translated" to a geographic number to deliver the call to its destination. A commonly used industry term for the translation of a non-geographic number into a geographic number to facilitate call termination is "IN DIP".

Near-end handover

- 2.25 The conveyance of an 03 call will generally take place according to a principle called "near-end handover". This can be most easily illustrated by comparing it with the principle of "far-end handover", which has more typically been used for routing geographic calls. For a geographic call, the geographic destination of the call is known to the originating network, which is not the case for a call to an 0870 number. As a result, calls to geographic numbers have typically been routed according to the

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

“far-end handover” principle, whereby the OCP will seek to carry the call as far as possible on its own network.

- 2.26 When an OCP passes a geographic call to a CP for termination, the TCP (in this example BT) levies a call termination charge. TCPs normally have a ladder of interconnection charges to reflect the distance and the number of switching stages over which they carry calls before they are terminated⁷. OCPs normally carry calls on their own networks and deliver them to the TCP as close to their ultimate (geographic) destination as possible, in order to maximise the use of their own networks and to minimise the termination charges payable to TCPs. This is the routing principle conventionally referred to as far-end handover.
- 2.27 The termination charge is determined by the point at which the call is handed over to the TCP:
- 2.27.1 Digital Local Exchange (DLE) Termination: where an OCP that has a large network carries the call all the way to the local exchange closest to its ultimate destination on its own network, resulting in the lowest termination charge payable to BT as the TCP.
- 2.27.2 Single Tandem (ST) Termination: where an OCP that has a smaller network carries the call from the caller to a tandem switch relatively close to its ultimate destination, and then hands the call over to BT for conveyance to the destination and termination on the relevant number, resulting in a higher termination charge payable to BT as the TCP.
- 2.27.3 Double Tandem (DT) Termination: where the OCP hands the call over to BT at a tandem switch further from its ultimate destination, for conveyance to the destination and termination on the relevant number, resulting in the highest termination charge payable to BT as the TCP.

Far-end handover

- 2.28 In contrast to calls routed according to the “far-end handover” principle, calls to 03 numbers (and other non-geographic number ranges) are currently typically routed according to the principle known as “near-end handover”.
- 2.29 It would not be possible to apply the “far-end handover” approach to the first leg of an 03 call (before translation to a geographic number), since the OCP does not know the final geographic destination of the call. 03 calls must therefore be taken off the OCP's network as soon as possible.
- 2.30 EE has told us that it hands over all calls, both geographic and non-geographic, at the nearest point of interconnection to the relevant carrier. Our understanding is that

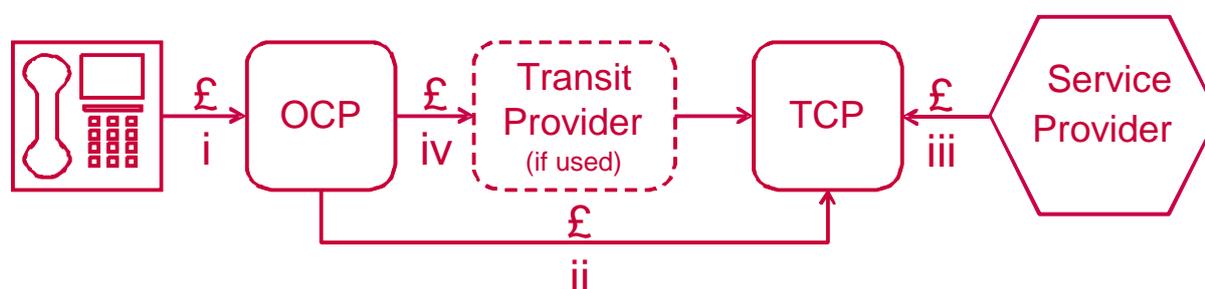
⁷ Strictly speaking, when BT acts as a TCP it levies a ladder of interconnection charges, and under the reciprocity arrangements, other TCPs also levy the same ladder of charges at the same rates as charged by BT. The reciprocity arrangements stem from the fact that charges for fixed geographic call termination have since 1997 been calculated on the basis of a principle of reciprocal charging (See the Ofcom statement *Network Charges from 1997*, published July 1997. See also: *Determination to resolve a dispute between BT and Telewest about geographic call termination reciprocity agreement – Final Statement*, 16 June 2006). Available at: http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_all/cw_890/determination.pdf

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

for both geographic and non-geographic calls, EE uses a transit operator to deliver the call, as opposed to carrying it on its own network⁸. In this scenario, it is the transit operator that determines the point of handover to the TCP. As EE has acknowledged, the same routing principles as outlined above will govern that decision. Thus, for calls to geographic numbers, the transit operator will typically carry the calls as close to their final destination as possible, in a similar manner to “far-end handover”. For calls to non-geographic numbers, including 03 numbers, this will not be possible because the transit operator will not be able to identify the physical location of the number and so the transit operator will deliver the call to the TCP at an earlier stage, in a similar manner to “near-end handover”.

Charging arrangements for calls to 03 numbers

Figure 2: transactions between parties in respect of 03 calls



2.31 As illustrated in Figure 2, for every end-to-end call to an 03 number there may be a number of transactions between the different parties involved:

- 2.31.1 The caller is billed by the OCP for the call.
- 2.31.2 The OCP passes the TCP's termination rate to the TCP as payment for call termination.
- 2.31.3 The TCP is prohibited from sharing its termination revenues with the service provider. Instead, the service provider will typically make a payment to the TCP for any call hosting services over and above call termination.
- 2.31.4 Where the call is transited by a third party the transit provider invoices the OCP for its transit charge for the service after handing the call over for completion.

03 number regulation

2.32 Ofcom introduced the 03 number range in 2007, following consultation with industry. Ofcom's policy in relation to 03 numbers is set out in the following documents.

Telephone Numbering - Safeguarding the Future of Numbers (July 2006) (the "July 2006 statement")⁹

2.33 The July 2006 statement set out Ofcom's general strategic framework regarding how telephone numbers would be managed over the following five to ten years. It referred

⁸ A third party transit operator will not be used where the relevant “carrier” is also the TCP.

⁹ <http://stakeholders.ofcom.org.uk/binaries/consultations/numberingreview/statement/statement.pdf>

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

to concerns regarding poor consumer awareness of the absolute level of call charges for pre-existing non-geographic numbers and the nature of revenue-share, as well as a number of 'scams', resulting in the erosion of consumer trust in those number ranges.

- 2.34 Among other actions, the July 2006 statement set out a proposal to allocate a new type of number, starting with '03', for those businesses, public services and voluntary services who wanted a common national number, but who did not wish to charge consumers a premium for contacting them. Consumers would pay the same amount for 03 calls as they would for calling a geographic number. No revenue sharing would be permitted on calls to 03 numbers.
- 2.35 Ofcom expected 03 numbers to be a range that public services would feel appropriate to use in preference to charged-for 08 numbers. In order to build trust, Ofcom stated that:
- 2.35.1 consumers would have a clear understanding of the price that they were paying for a call, mainly as call tariffs and call discounts would be required to be the same as if the consumer were calling a geographic (01 or 02) number. The new range was also intentionally numerically next to the existing geographic number ranges;
 - 2.35.2 the use of revenue-sharing would be forbidden on this new range. The intention was that consumers calling these numbers should be confident that they would be paying only for the call, and not for any additional services provided by the organisation being called;
 - 2.35.3 we would initially allocate memorable 03 numbers that should appear to suit many of the services that are expected to use 03 numbers. Notably, 0300 numbers would be available for public services and not-for-profit services. This was intended to contribute to making customers feel comfortable when calling 03 numbers, and thereby promote more rapid uptake of them; and
 - 2.35.4 Ofcom would work with those UK CPs responsible for managing international network interconnection, to try and ensure that the new range could be widely called from abroad. The absence of revenue-share, which can deter foreign providers from enabling these calls, was designed to assist this process.
- 2.36 The July 2006 statement also set out the consultation process for the introduction of 03 numbers.

Raising confidence in telephone numbers: Including new 'UK-wide' 03 numbers and a consultation to amend General Condition 17 (February 2007) (the "February 2007 statement")¹⁰

- 2.37 The February 2007 statement implemented a number of Ofcom's decisions regarding management of telephone numbers. It confirmed Ofcom's intention to introduce 03 numbers.

¹⁰ <http://stakeholders.ofcom.org.uk/binaries/consultations/numbering03/summary/03.pdf>

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

- 2.38 The February 2007 statement also clarified the requirement that consumers should pay the same amount for 03 calls as they would for calling a geographic number and confirmed that revenue-sharing would be prohibited. It stated that these requirements would apply to calls from CPs on all lines, including a BT line, any other fixed line, a mobile or payphone and that all call tariffs and call discounts would be required to be the same as if the consumer was calling a geographic (01 or 02) number. This would apply to all call minutes, including ones that were part of the customer's inclusive minutes within a bundle.
- 2.39 Ofcom set out its views in relation to concerns expressed by stakeholders. In particular, we considered:
- 2.39.1 the likelihood of a "waterbed effect" applying, whereby limiting one set of prices may be compensated for by a change in other retail prices – in summary, we considered this suggested that OCPs would not lose out financially from migration from 08 to 03 numbers and the volume of such migration would in any event be low¹¹;
 - 2.39.2 the concern raised by OCPs that they would lose revenue due to the introduction of the 03 number range – we did not accept that argument on the basis that OCPs would have the flexibility to adjust their combined prices for 01, 02 and 03 calls in competition with each other and Ofcom was simply requiring OCPs to price calls to 03 numbers by reference to prices that are not regulated and which OCPs are able to vary¹²;
 - 2.39.3 the likely call stimulation effect of opening the 03 number range¹³; and
 - 2.39.4 the risk of OCPs potentially being required to originate calls at a loss – in this regard, Ofcom noted that its then "current understanding from its contact with industry stakeholders is that 03 termination rates ought to be close to, and may match, those for geographic calls" and that "Ofcom does not see how OCPs, including mobile networks, would make losses when originating 03 calls".
- 2.40 Ofcom announced a further consultation with a view to implementing this requirement, including a consultation on amending GC 17 so that Ofcom's decision would be enforceable against all CPs. We also announced the process for allocation of 03 numbers.

Raising confidence in telephone numbers: Amending General Condition 17 (May 2007) (the "May 2007 statement")¹⁴

- 2.41 The May 2007 statement confirmed the results of Ofcom's consultation process, that the obligation in respect of 03 numbers as set out in the February 2007 statement would remain unchanged. It set out Ofcom's hope that 03 services would be launched in the following month or two.

¹¹ The February 2007 statement, para. 3.34.

¹² The February 2007 statement, para. 3.32.

¹³ The February 2007 statement, para. 3.35.

¹⁴ <http://stakeholders.ofcom.org.uk/binaries/consultations/numbering03/statement/gc17statement.pdf>

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

- 2.42 Ofcom stated that it would consider using its powers to place an obligation on all public electronic communications networks if end-to-end connectivity was not provided to customers.
- 2.43 The May 2007 statement acknowledged concerns expressed by CPs about 03 termination rates not being known, but stated that it was for CPs to negotiate terms between themselves as well as with service providers. Ofcom said that it would deal with any disputes that arose. Ofcom did not anticipate that OCPs would make losses due to the interconnection prices agreed for 03 calls¹⁵.

General Condition 17.12

- 2.44 A new GC 17.12 was introduced following the May 2007 statement:

Requirements in connection with the use of telephone numbers

17.12 Where Customers of a Communications Provider are making calls to UK-wide Numbers (03), Harmonised numbers for harmonised services of social value (116XXX numbers) or Non-Geographic Numbers starting 0870, the Communications Provider shall comply with the designations for those numbers in the National Telephone Numbering Plan.

The National Telephone Numbering Plan

- 2.45 The NTNP was amended following the May 2007 statement, introducing a new definition for 'UK-wide Number', amending Part A to include the designations for the 030, 033, 034 and 037 number ranges and amending Part B to set out revised restrictions for the adoption of telephone numbers. The amendments to Part A made it clear that 03 numbers are UK-wide Numbers that must be charged at a geographic rate. The relevant sections of Part A are reproduced in Table 2. A consolidated version of the NTNP is available on Ofcom's website:
<http://stakeholders.ofcom.org.uk/binaries/telecoms/numbering/numplan080410.pdf>.

Table 2: Extract from Part A of the NTNP

A1: Public Telephone Network Numbers (11 digits long, including the '0', unless otherwise stated)	
Number(s) beginning	Designation
030	UK-wide Numbers at a geographic rate: to be used by public sector bodies and not-for-profit bodies, calls charged at up to the same rate the customer would pay to call a UK Geographic Number, with calls to 030 numbers counting towards inclusive call minutes if the customer has remaining inclusive minutes to UK Geographic Numbers, and included in any discount structures that apply to UK Geographic Numbers

¹⁵ The May 2007 statement, paras. 3.40 and 3.76.

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

A1: Public Telephone Network Numbers (11 digits long, including the '0', unless otherwise stated)	
Number(s) beginning	Designation
033	UK-wide Numbers at a geographic rate: calls charged at up to the same rate the customer would pay to call a UK Geographic Number, with calls to 033 numbers counting towards inclusive call minutes if the customer has remaining inclusive minutes to UK Geographic Numbers, and included in any discount structures that apply to UK Geographic Numbers
034	UK-wide Numbers at a geographic rate: migrating numbers from matching 084 numbers, calls charged at up to the same rate the customer would pay to call a UK Geographic Number, with calls to 034 numbers counting towards inclusive call minutes if the customer has remaining inclusive minutes to UK Geographic Numbers, and included in any discount structures that apply to UK Geographic Numbers
037	UK-wide Numbers at a geographic rate: migrating numbers from matching 087 numbers, calls charged at up to the same rate the customer would pay to call a UK Geographic Number, with calls to 037 numbers counting towards inclusive call minutes if the customer has remaining inclusive minutes to UK Geographic Numbers, and included in any discount structures that apply to UK Geographic Numbers

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

Section 3

Analysis of the Dispute

Introduction

- 3.1 This section sets out our analytical framework for resolving the Dispute and our assessment of the issues against this framework.
- 3.2 The analytical framework is intended to address the scope of the Dispute, which is: "to determine whether it is fair and reasonable for BT to apply the wholesale termination charges for calls to 03 numbers originating on the EE mobile network and terminated on the BT fixed network that were notified by BT to EE in NCCN 966".

The termination rates set by BT

The 0870 Determination

- 3.3 BT set the 03 termination rates which are the subject of this Dispute at a level to bring them in line with the 0870 termination rates determined by Ofcom in the 0870 Determination. We have therefore considered whether the appropriate analytical framework to determine this Dispute is that set out in the 0870 Determination.
- 3.4 We concluded in the 0870 Determination that the termination charges should be set at a level that enables TCPs to recover the costs of termination of 0870 calls, i.e. geographic call termination charges plus other relevant costs, namely:
 - 3.4.1 the inter-tandem conveyance costs arising from near-end handover; and
 - 3.4.2 an allowance for interconnection circuit costs,on a fully allocated cost basis.
- 3.5 Ofcom considered that the termination charges set according to this methodology were consistent with our objective of ensuring alignment between the retail prices of geographic calls and 0870 calls.
- 3.6 We took the view that this approach enables TCPs to recover the costs of providing 0870 termination which are additional to the costs of terminating geographic calls, with a contribution to common costs. These additional costs stem from the differences in call routing between 0870 calls and geographic calls (see paragraphs 2.23 to 2.31, above). These are costs that are incurred by the TCP and saved by the OCP in the case of 0870 calls but would be incurred by OCPs (and not the TCP) in the case of geographic calls.
- 3.7 We calculated a termination charge that allows recovery of costs related to near-end handover and interconnection circuits by using the relevant BT wholesale charges. As a cross-check, we calculated a "no-arbitrage ceiling", to avoid the risk of arbitrage activity if the charges paid to TCPs were too high. The rates calculated by Ofcom are set out in Table 3.

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

Table 3: Proposed maximum Day (D), Evening (E) and Weekend (W) 0870 NTS termination charges in the 0870 Determination, pence per minute

<i>Point of handover (described in terms of the origination service on BT's network prior to handover)</i>	D	E	W
DLE	0.67	0.31	0.25
ST (near-end)	0.56	0.26	0.20
ST (far-end - short)	0.41	0.19	0.15
ST (far-end - medium)	0.41	0.19	0.15
ST (far-end - long)	0.41	0.19	0.15

3.8 We determined that the termination rates set in this way were consistent with the six principles of pricing and cost recovery¹⁶.

The routing and conveyance of calls to 03 numbers

3.9 If 03 calls are routed in the same way as 0870 calls and the TCPs' termination costs are similar to those of terminating 0870 calls, we consider that the methodology used in the 0870 Determination would be equally applicable in this Dispute in the absence of clear reasons why the facts or circumstances of 03 calls are sufficiently different from 0870 calls to justify a different approach.

3.10 We therefore asked the parties for information to ascertain whether:

3.10.1 calls to 03 numbers are routed in the same way as calls to 0870 numbers; and

3.10.2 the TCPs' costs of terminating calls to 03 numbers are similar to those of terminating calls to 0870 numbers.

3.11 EE and BT have both confirmed that calls to 03 numbers and calls to 0870 numbers are routed in the same way. Further, EE has confirmed that it does not incur different costs in respect of the two call types and BT has confirmed that its costs of origination, transit and termination are the same for the two call types.

3.12 This confirmation from EE and BT implies that the methodology used by Ofcom in the 0870 Determination to calculate the rates to be paid by BT to other TCPs is equally applicable in the present Dispute. Because the Parties have confirmed that 03 calls are routed in exactly the same way from origination to termination and involve the same costs of termination as 0870 calls, it is our view that, in the absence of any

¹⁶ These principles were developed by Oftel in the context of number portability, endorsed by the Monopolies and Mergers Commission (Telephone Number Portability: A Report on a reference under s13 of the Telecommunications Act 1984 (MMC, 1995)) and have subsequently been used by Ofcom in analysing various pricing issues.

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

other relevant factors, it is fair and reasonable for BT to set termination charges for 03 calls at the same level as those for terminating 0870 calls.

- 3.13 We now consider whether there are other relevant factors that we need to take into account.

Submissions in relation to the application of the 0870 Determination analytical framework and methodology for 03 termination rates

- 3.14 EE has disputed the application of the termination rates set under the analytical framework in the 0870 Determination on two grounds: first that, from the caller's perspective, 03 numbers are equivalent to geographic numbers, not 0870 numbers and the additional termination costs should be borne by the call recipient and the TCP in accordance with the cost causation principle; and second, the basis on which 03 numbers were introduced, as set out in the February 2007 statement. It has also said in its response to our information request that it routes both geographic and 03 calls in the same way. We have therefore decided to consider whether this alters the application in this Dispute of the distinction between the routing of 0870 calls and geographic calls drawn in the 0870 Determination.

- 3.15 EE has also said that if Ofcom considers that the termination rates for 03 calls are to be calculated in line with the 0870 Determination, then GC 17 and the NTNP should be modified to allow 03 calls to be retailed at a higher price than geographic calls.

- 3.16 We deal with each of these points in turn.

- 3.17 **Equivalence of 03 and geographic calls** EE contends that, if 03 numbers are to be treated as equivalent to 01 and 02 geographic numbers at the retail level, they should also be afforded equivalent treatment at the wholesale level and the termination rate applicable to 01 and 02 numbers ought to apply equally to calls to 03 numbers.

- 3.18 We do not consider that 03 termination rates should be set at the same level as geographic termination rates because:

3.18.1 the 0870 termination rates included the additional costs of the TCP in terminating such calls, namely the additional conveyance costs of the TCP arising from near-end handover of 0870 calls and circuit costs;

3.18.2 03 calls are routed in a manner which incurs the additional TCP costs which are present for 0870 calls but which are not present for geographic calls; and

3.18.3 if termination rates for 03 calls were set at the same level as geographic termination rates, this would not permit recovery of the additional costs incurred by the TCP, which would be inconsistent with the six principles of pricing and cost recovery, as assessed in the 0870 Determination¹⁷.

- 3.19 The different retail designations for calls to 03 numbers and calls to 0870 numbers in the NTNP do not affect our provisional conclusions in relation to the appropriate termination rates for 03 calls. Firstly, our provisional view is based on the similarity in the routing and costs associated with 03 and 0870 calls services. We do not consider

¹⁷ See, in particular, paragraphs 6.30 and 6.35 which concluded that the inclusion of additional costs of terminating 0870 calls in the 0870 termination rate was consistent with the cost causation principle.

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

that the retail treatment of 03 calls has any effect on the allocation of costs associated with their termination. Secondly, although (unlike 03 calls) OCPs are not obliged to set 0870 call prices in the same way as calls to geographic numbers, the termination rates that we set in the 0870 Determination took account of our policy to re-establish such links. Similarly, a consideration against alternative higher rates proposed by other parties in the 0870 dispute was that they would be likely to deter BT from linking 0870 call prices to geographic call prices.

- 3.20 EE has also stated that, if 03 numbers are to be treated as non-geographic numbers, the requirement in the NTNP that they be treated as equivalent to geographic numbers at the retail level cannot be justified. However, EE has not explained why it considers that setting termination rates for 03 calls at the same level as termination rates for 0870 calls is incompatible with setting the retail rates for 03 calls at the same level as retail rates for geographic calls. In particular, EE has not provided any evidence that it is not recovering its costs of originating 03 calls nor has it provided a view as to what costs of terminating 03 calls are relevant in setting a fair and reasonable termination rate.

The February 2007 statement

- 3.21 EE has also argued that Ofcom's introduction of the 03 number range was carried out on the understanding that the wholesale termination rates for 03 calls "ought to be close to, and may match, those for geographic calls"¹⁸.

- 3.22 To see the context for the phrase quoted by EE, the complete paragraph from the February 2007 Statement is as follows:

"Also on financial impact, Ofcom notes that mobile operators – including Vodafone and the Mobile Broadband Group – have expressed concerns about potentially originating calls at a loss, or alternatively cross-subsidising 03 calls. However, Ofcom's current understanding from its contact with industry stakeholders is that 03 termination rates ought to be close to, and may match, those for geographic calls; Ofcom would expect that the costs of providing value-added services to SPs would be met by those SPs. In this context, Ofcom does not see how OCPs, including mobile networks, would make losses when originating 03 calls."

- 3.23 We consider that this statement represented Ofcom's view at the time of the statement of the likely level at which termination rates for 03 calls would be set by operators, and does not constitute an Ofcom policy preference for the level of those rates. However, we have also considered whether Ofcom's expectation has been borne out by events, by considering:

3.23.1 how 03 termination rates set at the same level as current 0870 termination rates (as proposed by BT) compare to geographic termination rates (as proposed by EE);

3.23.2 whether the costs of providing value-added services to SPs would be met by SPs at the 0870 termination rates; and

¹⁸ The February 2007 statement, para. 3.37.

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

- 3.23.3 whether there is evidence that EE would make losses when originating 03 calls at the 0870 termination rates whilst charging geographic call prices at the retail level.

Comparison of termination rates

- 3.24 We note that, at the time of the February 2007 statement, termination rates for calls to 0870 numbers were set at a level which was substantially higher than the rate which was subsequently set following the 0870 Determination in June 2009. This level was also substantially higher than the geographic termination rates which applied at that time: Table 4 shows that, in February 2007, BT's termination rates for 0870 calls were at least seventeen times higher than the daytime and evening single tandem geographic rate and more than fourteen times higher than the weekend single tandem geographic rates¹⁹.
- 3.25 Termination rates for 0845 calls in February 2007 were lower than those for 0870 calls but were nevertheless high relative to geographic termination rates. They were about six times higher than the daytime single tandem geographic rate and more than three times higher than the evening and weekend single tandem geographic rates.

Table 4: comparison of BT's TR (in ppm) for geographic, 0870 and 0845 calls at the time of the February 2007 Statement

	D	E	W
February 2007 rates			
Geographic termination rates			
<i>CT Local Exchange</i>	0.23	0.10	0.08
<i>CT Single Tandem</i>	0.34	0.15	0.12
BT's termination rates for 0870 calls	5.91	3.7	1.74
BT's termination rates for 0845 calls	2.07	0.56	0.56
Rates following the 0870 Determination in June 2009			
Geographic termination rates			
<i>CT Local Exchange</i>	0.23	0.10	0.08
<i>CT Single Tandem</i>	0.34	0.16	0.12
Termination rates for 0870 calls (by point of handover)			
<i>DLE</i>	0.67	0.31	0.25
<i>ST (near-end)</i>	0.56	0.26	0.20
<i>ST (far-end)</i>	0.41	0.19	0.15

- 3.26 Against this background of much higher termination rates for calls to 0870 and 0845 numbers, Ofcom believed in February 2007 that wholesale termination rates for 03 calls should be closer to geographic termination rates than to the prevailing non-geographic termination rates.
- 3.27 The termination rates subsequently set in the 0870 Determination are much closer to geographic termination rates than those which applied before the 0870 Determination

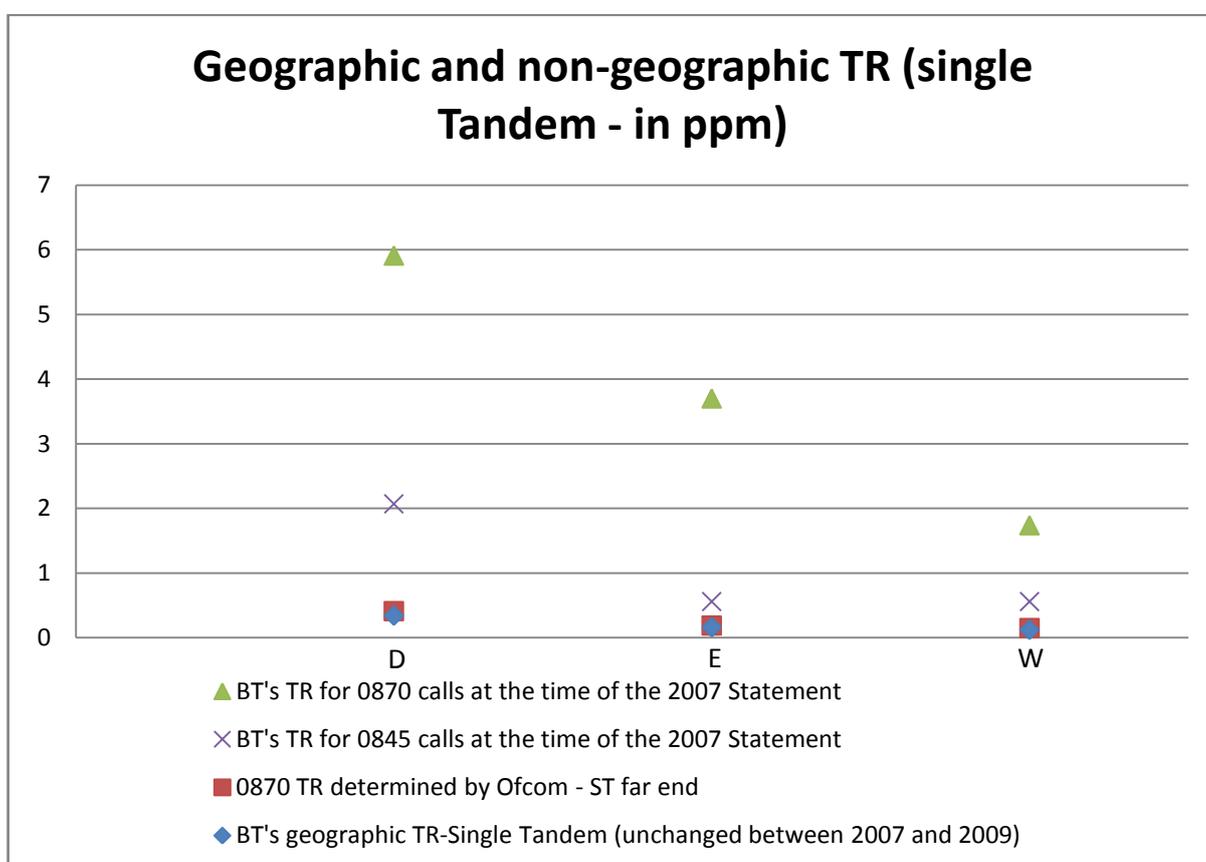
¹⁹ The rates are also more than five times higher than the highest of the rates for geographic calls ("CT inter-tandem conveyance long" which is not reported in Table 4).

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

are. This is illustrated by a comparison of the 0870 termination rates which applied in February 2007 and those which applied following the 0870 Determination (see Table 4).

- 3.28 As discussed at paragraphs 3.3 to 3.8, termination rates for 0870 calls were set at the single tandem geographic rates plus a contribution for the additional costs of conveyance and interconnection circuits incurred by the TCP for 0870 calls (but which would not have been incurred by the TCP for geographic calls). The 0870 termination rate varies according to the point of handover but is never below the equivalent rate for geographic termination. This is illustrated by Figure 3, which shows that the single tandem rates for far-end handover of 0870 calls are close to the single tandem geographic rates²⁰.

Figure 3: Comparison of geographic and non-geographic termination rates



- 3.29 It is therefore our view that the termination rates determined by Ofcom for 0870 calls (and subsequently introduced by BT as its 03 termination rates) are close to geographic rates and therefore are consistent with the expectation that Ofcom expressed in the February 2007 statement as to how these calls would be charged.

Value-added services

- 3.30 We have considered whether the costs of value-added services provided by TCPs to SPs would come out of the termination rates set by BT for calls to 03 numbers. We

²⁰ The greater numerical differences between the 0870 termination charges and the geographic rates for DLE or single tandem near-end handover reflect the allowance in the 0870 charges for additional costs of conveyance incurred by the TCP.

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

do not consider this would be the case, given that the termination rates for 03 calls reflect the termination rates for 0870 calls and the termination rates set in the 0870 Determination were set to reflect the costs of terminating 0870 calls. The 0870 Determination explicitly excluded from the stack of relevant costs, those costs which Ofcom did not consider properly related to termination costs. In particular, we stated that outpayments to SPs should not be recovered through the termination charge²¹.

Cost recovery

- 3.31 Given the comments in the February 2007 Statement, we have considered the available evidence on whether BT's termination charges enable EE to recover its efficient costs of origination.
- 3.32 EE has not suggested to us that it fails to recover its efficient costs of origination on 03 calls at BT's termination charges, nor has it provided any evidence to this effect.

Further guidance

- 3.33 Ofcom provided further guidance on its position in relation to termination rates for calls to 03 numbers in the May 2007 statement, in response to concerns from some CPs that termination rates were not yet known. Ofcom explicitly left the issue of the appropriate level for termination rates for industry to resolve, stating:

"It is for CPs to negotiate terms, between themselves and with SPs that are considering adopting 03 numbers. Ofcom will deal with any disputes that arise [...]. Ofcom does not see why OCPs should make losses due to the interconnection prices agreed for 03 calls. The use of 03 numbers is one choice of several for SPs, and Ofcom would expect the benefits to SPs of using 03 services to be reflected in what they are willing to pay for them. Ofcom also anticipates more traffic to 03 numbers than 08 numbers used for the same purpose [...] which should mean more interconnection revenue and a different basis for negotiation than with 08 numbers"²².

- 3.34 The May 2007 statement reflects Ofcom's expectations in respect of 03 numbers. However, it is clear from the May 2007 statement that Ofcom expected CPs to determine the appropriate level for termination rates. Ofcom anticipated that there could be some disagreement regarding termination rates and provided for this by accepting that it could become necessary to accept disputes on this issue at a later date.
- 3.35 The May 2007 statement makes it clear, however, that, although Ofcom considered that it should be for CPs to negotiate termination rates between themselves, we did not intend that OCPs should be required to make losses as a result of the termination rates charged for calls to 03 numbers.

Routing of 03 calls and geographic calls by EE

- 3.36 In addition to these submissions, EE has informed us that "all calls [originating on EE network, including geographic calls] are handed over at the nearest point of interconnection to the relevant carriers" (in effect transit providers) who "will route the call according to a number of factors dependent upon their network architecture, capacity constraints, routing costs and the owner of the number ranges."

²¹ The 0870 Determination, para. 6.59.

²² The May 2007 statement, para. 3.40.

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

3.37 We do not consider that this affects our view that it was appropriate for BT to set the 03 termination rates at the same level as 0870 termination rates. This is because an efficient transit operator will engage in near-end handover for 03 calls, whereas it will engage in far-end handover for geographic calls. The costs incurred by the transit operator for 03 calls will therefore mirror the costs of an OCP engaging in near-end handover without transit. Therefore, to the extent that the transit charge paid by EE when routing geographic calls on a near-end handover basis reflects the efficient conveyance costs of an OCP routing the same call on a far-end handover basis, the reasoning adopted in the 0870 Determination should still apply (i.e. that the TCP incurs greater cost to terminate 0870 calls than geographic calls, because more of its network is used). Given that the transit market (inter-tandem conveyance/transit) is competitive, it is reasonable to assume that the prices charged by transit operators reflect the efficient costs of conveyance²³.

Third party submissions

3.38 We have received a number of third party submissions which have expressed support for the view that termination rates for 03 calls and 0870 calls should be treated in a similar way (for further detail, see paragraph 2.18). BT has stated that there was general industry consensus that termination rates for 03 calls and 0870 calls should be the same. BT notes in this regard that, after it had implemented the 0870 termination rates as required by Ofcom's determination, it received an OCCN from C&W seeking the same rates for calls to its 03 services. We do not consider it necessary to reach a conclusion as to whether there was a general industry consensus regarding the appropriate termination rates for 03 calls.

Assessment of BT's termination rates against Ofcom's statutory duties and Community requirements

3.39 As part of our analysis, we have also considered our general duties in section 3 of the Act and also the six "Community requirements" set out in section 4 of the Act, which give effect, among other things, to the requirements of Article 8 of the Framework Directive²⁴. In particular, we have considered the termination rates proposed by BT in the light of:

- our duties to further the interests of consumers;
- our duties to promote competition; and
- other considerations to which we must have regard and which appear relevant to the determination of this dispute.

Furthering the interests of consumers

3.40 Consistent with the approach that Ofcom has taken in other disputes, we have considered the impact of the termination rates on two sets of relevant consumers: the

²³ The same reasoning would hold true if single transit is involved. In the Review of the Fixed Narrowband Services Wholesale markets (February 2010 Further Statement), we concluded that BT had SMP in the single transit market but that a charge control was not necessary. This was mainly because "BT faces competitive pressures on routes that carry large amount of traffic. Some routes to and from Mobile Network Operators (MNOs) are among these more competitive routes." (paragraph 4.70).

²⁴ Directive 2002/21/EC.

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

caller at the originating end of the call (the customer of the OCP) and the call recipient at the terminating end (the Service Provider ("SP"), which is the customer of the TCP) (see the illustration at Figure 2 above)²⁵. Both types of consumer are relevant in the context of our statutory duties, and hence we need to consider the impact of NCCN 966 in relation to both.

Impact on callers

- 3.41 OCPs are required to set charges for 03 calls at the same level as for geographic calls. EE has said that BT's increased termination rates for 03 calls will be passed on indirectly to callers and will increase the pressure on OCPs to increase the charges of calls to 03 numbers or withdraw 03 numbers from some call packages or bundles. However, in the absence of any evidence to demonstrate that EE is unable to cover its efficient costs of originating 03 calls, we are not persuaded that there is a realistic prospect of this occurring. We also note in this context that at the present time, 03 traffic volumes represent less than 1% of EE's geographic call volumes and that the difference in termination rate payments between geographic calls and 03 calls are relatively small in ppm compared to the average retail price²⁶.

Impact on SPs

- 3.42 On the available evidence, it is unclear whether NCCN 966 would necessarily have any effect on SPs. However, if there were an effect, we would expect it to be positive for SPs. This is because NCCN 966 has resulted in TCPs receiving higher termination rates for 03 calls terminating on their networks than were in place prior to the introduction of NCCN 966. If termination rates for calls to 03 numbers were aligned with geographic rates, TCPs would not recover their costs of terminating 03 calls from the termination charge, because geographic termination rates reflect the costs of terminating geographic calls and the costs of terminating 03 calls are higher than the costs of terminating geographic calls. TCPs would therefore need to recover any cost that is not recovered through the termination rate elsewhere, most likely from the SP through higher hosting prices. If so, this would mean that SPs would be worse off with EE's proposed termination rates than with BT's rates as set out in NCCN 966.

Promoting competition

- 3.43 We have considered the effect of the termination rates for 03 calls on competition. We have not identified any adverse effects on competition and no evidence has been provided to suggest that any adverse effects would arise. We note that the traffic volumes and the value of the difference in termination rates payments between geographic calls and 03 calls are currently small. Accordingly, were there to be an impact on competition, our expectation as matters stand at present is that it would be *de minimis*.

²⁵ See, for example 'Determination to resolve a Dispute between Cable & Wireless and BT about the application of NCCN500 to calls to ported numbers', dated 3 June 2010.

²⁶ For further discussion, see paras. 5.21 to 5.26 in Annex 3 of the 0845 Determination: http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/closed-cases/all-closed-cases/761146/Final_Determination.pdf.

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

Other considerations under Ofcom's statutory duties and the Community requirements

- 3.44 We have also considered our duty to encourage the provision of network access and service interoperability for the purposes of securing efficiency and sustainable competition in communications markets and the maximum benefit for the customers of communications network and services providers (subsections 4(7) and 4(8) of the Act). We consider this duty to be of relevance since this dispute concerns the service of call termination, which is essential for encouraging interoperability between different networks, so that customers of one network can call the customers of other networks (and the latter receive such calls). We are satisfied that BT's rates are consistent with this objective on the basis that BT's termination rates enable it to recover the costs of providing 03 termination which are additional to costs of terminating geographic calls and in the absence of evidence to suggest that EE is not recovering its efficient costs of origination.
- 3.45 For the same reason, we are satisfied that BT's termination rates are consistent with the objective of encouraging investment and innovation in relevant market (section 3(4)(d)).
- 3.46 In reaching our provisional conclusion, we have kept in mind our duty under subsection 3(3)(a) of the Act to ensure that our regulatory activities are, among other things, transparent, accountable, proportionate and targeted only at cases where action is needed. In particular, this document sets out the parties' arguments and the reasoning that underpins our provisional conclusion, and the parties will have an opportunity to comment on this in advance of our final determination. We consider that this draft determination is consistent with previous decisions in relation to call termination, notably the 0870 Determination, to which the issues in this dispute are closely related.

Modification of GC 17 and the NTNP

- 3.47 As we explain in this section, we consider that it is fair and reasonable for BT to charge termination rates for 03 calls in line with those set in the 0870 determination. We have not identified any relevant factor which might justify an alternative approach and, in particular, have noted at paragraph 3.32 that EE has not suggested that it is failing to recover its efficient costs of origination at BT's revised termination rates and has not submitted any evidence to this effect. We therefore consider that that BT's revised termination rates do not require the modification of GC 17 and the NTNP to enable EE to retail 03 calls at a higher price than its retail prices for geographic calls.

Provisional conclusion

- 3.48 Our provisional conclusion therefore, is that we consider that the termination rates set by BT are fair and reasonable, on the basis that:
- 3.48.1 it is fair and reasonable for BT to align its termination rates for 03 calls with those set by Ofcom for 0870 calls, given the similarities in the costs of routing and conveyance of those calls;
- 3.48.2 it is fair and reasonable for BT not to align its termination rates for 03 calls with its termination rates for geographic calls, given the differences in the costs of routing and conveyance of those calls;

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

- 3.48.3 the termination rates set in NCCN 966 are consistent with our general duties and the Community requirements, including our duties to further the interests of consumers and promote competition.

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

Section 4

Submissions on the Draft Determination and Ofcom's response and conclusion

Responses to the consultation

- 4.1 Ofcom received responses to its Draft Determination from:
- 1) EE;
 - 2) BT; and
 - 3) C&W.
- 4.2 BT and C&W provided short responses in which they supported Ofcom's findings in its Draft Determination. EE submitted a more substantial response disagreeing with Ofcom's provisional conclusion in the Draft Determination. In this section, we summarise the key issues raised in EE's response and set out our view on each issue and any impact on our analysis. Our Determination to resolve the Dispute is at Annex 1.
- 4.3 We have grouped EE's response into the following themes:
- 4.3.1 the analytical framework;
 - 4.3.2 issues specific to 03 numbers;
 - 4.3.3 Ofcom's methodology;
 - 4.3.4 the interests of consumers.

The analytical framework

Analytical framework: legal issues

EE's comments

- 4.4 EE argues that Ofcom's adoption of the framework used in the 0870 Determination leads to an unfair bias in favour of BT since BT's principal justification for increasing its 03 termination rates was that they would be the same as 0870 rates. We stated in the Draft Determination that "*[i]f 03 calls are routed in the same way as 0870 calls and the TCPS' termination costs are similar to those of terminating 0870 calls, we consider that the methodology used in the 0870 Determination would be equally applicable in this Dispute...*"²⁷. Instead, citing the Competition Appeal Tribunal's judgment on the core issues in the termination rate dispute appeals²⁸, EE argues that in deciding whether BT's justification for the increase is justified, Ofcom as a neutral

²⁷ See para. 3.6 above.

²⁸ *T-Mobile and others v Ofcom* [2008] CAT 12 (the "TRD judgment")

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

arbitrator should have regard to what is fair as between the parties and reasonable in the light of Ofcom's statutory objectives and the Community requirements.

- 4.5 EE also argues that it is inappropriate for Ofcom to adopt the framework used in the 0870 Determination because EE was not involved in that dispute, nor was there any indication at the time of the 0870 Determination that the outcome of that dispute would also apply to termination charges for calls to 03 numbers.

Ofcom's response

- 4.6 BT revised its termination charges for calls to 03 numbers as set out in NCCN 966 to align them with the termination charges for calls to 0870 numbers as determined in the 0870 Determination. In order to establish whether that was justified, our first step was to consider whether it was appropriate to adopt the analytical framework set out in the 0870 Determination for determining the 0870 rates to this dispute.

- 4.7 In order to make that assessment we looked at:

4.7.1 the routing of 03 calls and termination costs in comparison to 0870 calls: the Parties confirmed that this was similar for both types of calls; BT confirmed that its costs of termination for both types of calls are the same;

4.7.2 any relevant differences which might justify an alternative approach: we considered that the difference in regulation between 03 numbers and 0870 numbers did not necessarily mean that different termination rates were justified – first, we considered that the retail treatment of 03 calls did not affect the allocation of costs associated with their termination, on which the termination rates were based; second, although OCPs are not obliged to treat 0870 call prices in the same way as calls to geographic numbers (unlike 03 call prices), the termination rates that we set in the 0870 Determination took account of our policy to re-establish links to geographic call prices and therefore were set at a level to encourage OCPs to charge geographic rates for 0870 calls; and

4.7.3 the position of EE as OCP as a result of the higher 03 termination charge: we found that there was no available evidence to suggest that EE was unable to recover its efficient costs of origination for 03 calls as a result of retail regulation and the increased termination rates charged by BT - that remains the position since EE has said that it earns a lower margin on 03 calls compared to geographic calls but has not provided evidence to indicate that it is not covering its efficient costs of origination.

- 4.8 The analytical framework set out in the 0870 Determination was assessed by reference to Ofcom's statutory obligations and the Community requirements²⁹. In our assessment of this dispute, we have also considered BT's increased termination rates resulting from the application of that framework in the light of Ofcom's statutory obligations and the Community requirements and are satisfied that BT's revised termination rates are reasonable in the light of those duties for the reasons set out in paragraphs 3.39 to 3.46 above.

- 4.9 Accordingly, we consider this approach is consistent with paragraph 178 of the *TRD* judgment to which EE has referred. Furthermore, the analytical framework of the

²⁹ The 0870 Determination, paras. 6.64 – 6.81, 6.92 – 6.101 and 6.166 – 6.174 and Table 13.

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

0870 Determination takes account of the position of both the OCP and the TCP. In applying that framework to this Dispute, we examined both BT's costs of termination and the ability of EE to recover its costs of origination for 03 calls and we are satisfied that neither the framework nor its application is unfairly biased in favour of BT but instead strikes a fair balance between the parties.

- 4.10 We accept that there was no indication at the time of the 0870 Determination that our resolution of that dispute could also apply to 03 termination charges. The principal reason for this is that Ofcom resolves each dispute on its facts and the 0870 Determination only applied to the termination rates which were in dispute between the parties to that dispute, namely termination rates for calls to 0870 numbers. It would not have been possible for Ofcom to make a determination in respect of termination rates for calls to other numbers. That said, stakeholders should be aware that Ofcom will endeavour to act consistently in exercising its dispute resolution powers and so previous determinations may be instructive if parties bring a dispute which appears similar to a previous dispute. The 0870 Determination implicitly set the 0870 termination rates at a level which would prevent BT making losses on calls to 0870 numbers³⁰. As a result of submissions made by EE in this dispute, we considered it appropriate to address this factor more explicitly, in order to have proper regard to the position of EE as OCP and the impact on it of BT's increased termination rates.

Analytical framework: the additional cost elements

EE's comments

- 4.11 The 0870 Determination involved a dispute between BT and a number of fixed network operators ("FNOs") and did not involve any of the MNOs. Ofcom found in the 0870 Determination that additional cost elements (namely, the inter-tandem conveyance costs arising from near-end handover and an allowance for interconnection circuit costs) were incurred by the TCP but should ultimately be borne by the OCP and therefore added to the termination charge.
- 4.12 EE considers that Ofcom has assessed this Dispute from the perspective of FNOs, in stating that the additional costs included in the termination charge would be incurred by the OCP in the case of geographic calls but are saved by the OCP in the case of 0870 calls and 03 calls due to near-end handover. EE points out that FNOs and MNOs interconnect in a different way from how FNOs interconnect with each other and that all call traffic is taken off EE's network at the earliest opportunity. Moreover, EE considers that Ofcom should not have applied these additional cost elements to this Dispute without explaining from first principles their relevance to calls to 03 numbers and whether they should be borne by OCPs. EE therefore argues the 0870 framework is unsuitable.

³⁰ In the 0870 Determination, we set the 0870 termination rates at cost, "at a level that we consider will enable BT to continue to include 0870 calls in inclusive packages, and to price 0870 calls at the same rate as geographic numbers" (para. 6.166 of the 0870 Determination). This implied that BT would not make losses on calls to 0870 numbers. If the rates were such that BT would be making losses on 0870 calls, BT would not have incentives to continue to include 0870 calls in inclusive packages, and to price 0870 calls at the same rate as geographic numbers. In particular, as a cross-check, we determined a no-arbitrage ceiling above which we considered that there would be an unacceptable risk of BT being dis-incentivised to include 0870 calls in inclusive packages or to price them at geographic rates.

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

- 4.13 EE also observes that the 0870 Determination related to a dispute between parties which both originated and terminated 0870 calls, while in this Dispute EE originates 03 calls but does not host them. EE argues that Ofcom failed to give proper consideration to whether this distinction should have yielded a different result.

Ofcom's response

- 4.14 We do not consider that the analytical framework used in the 0870 Determination is only appropriate for disputes between FNOs. The 0870 Determination was concerned with calculating termination charges which reflected the cost of terminating an 0870 call and set a ladder of charges by reference to the point of handover. In the present Dispute, we remain of the view that those charges in relation to 03 calls are fair between the parties, taking into account the routing of 03 calls and the costs that each party incurs as a result.
- 4.15 We consider that the rationale for including the additional cost elements in the termination charge for 03 calls is the same as that for including them in the termination charge for 0870 calls. As explained in the 0870 Determination³¹, they are costs which are incurred by the TCP in the case of a near-end handover call, but which would be incurred by the OCP (directly, or indirectly if a transit provider is used) in the case of a geographic call handed over at the far-end. In the 0870 Determination, we decided, taking account of Ofcom's principles of pricing and cost recovery, that these charges should be borne by the OCP so that, as far as possible, the underlying costs of call origination for 0870 calls and geographic calls would be aligned³². The same analysis applies to 03 calls, given their similarity to 0870 calls in terms of routing and the fact that the policy preference on which the 0870 Determination was based is similar to the regulatory requirement which applies to 03 calls. This is explained in further detail at paragraphs 3.18 and 3.19 above. In particular, and as stated, we consider that the assessment of the six principles of pricing and cost recovery carried out in the 0870 Determination remain applicable in this Dispute.
- 4.16 As set out in paragraph 3.37 above, Ofcom does not consider that EE's practice of handing over all traffic at the nearest point of interconnection alters this analysis, because the same principles will be reflected in efficient transit arrangements. As stated, an efficient transit operator will engage in near-end handover for 03 calls and far-end handover for geographic calls, meaning that the additional cost elements reflect efficient routing principles whether the call originates on a fixed network or a mobile network. EE did not comment on the differences in the transit/conveyance costs incurred by its transit provider arising from differences in the routing by that transit operator of 03 and geographic calls. In a competitive market we would expect these cost differences to be reflected in the prices charged by transit operators³³. In particular, we would expect these differences to be reflected in EE's transit arrangements if they are efficient, even though they may not necessarily be in the form of distinct transit prices for 03 and geographic calls³⁴.

³¹ The 0870 Determination, para. 6.60.

³² *Ibid.*, para. 6.34.

³³ As previously noted, the market for inter-tandem conveyance and Inter-tandem transit is competitive and all CPs face competitive pressures in the Single Transit market on routes to/from MNOs. In particular, none of these markets is subject to a charge control.

³⁴ For example, EE's transit arrangements could consist of a transit price which is an average/blended transit price, e.g. across geographic and 03 calls (and other non-geographic calls). However, we

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

- 4.17 Finally, we do not consider that the fact that EE does not host 03 calls renders the analytical framework used in the 0870 Determination inappropriate to the consideration of this dispute. The fact that parties to the 0870 dispute were both originators and terminators of traffic was only relevant to the question of whether transit charges should be met by the TCP or the OCP and specifically, whether transferring responsibility for the transit charges in relation to 0870 calls from the TCP to the OCP would result in mass re-routing³⁵. It did not affect the level of the 0870 termination rates and therefore we do not consider it relevant to the assessment of the 03 termination rates.

Analytical framework: the cost recovery cross-check

EE's response

- 4.18 EE argues that Ofcom is applying the wrong test, in referring to whether EE is recovering its costs. It considers this is similar to the "Gains from Trade" test which was rejected by the CAT in its *TRD* judgment. Instead, Ofcom should assess whether the combination of the retail regulation on EE as OCP and the termination charge levied by BT as TCP results in a fair and reasonable balance as between EE and BT.

Ofcom's response

- 4.19 Ofcom considers that EE has mischaracterised the cost recovery cross-check set out in the Draft Determination. The "Gains from Trade" test allowed termination rates to be set as high as the TCP wished as long as it avoided the OCP making a loss. This is not the case in our analytical framework as we are setting 03 termination rates at cost and examining EE's ability to recover its efficient costs only as a cross-check. While this cross-check is designed to ensure that our determination is fair as between the parties, it is not sufficient in itself to resolve the Dispute and is not used to limit EE's margin on 03 calls.
- 4.20 The 0870 Determination was published shortly after the CAT handed down the *TRD* judgment and Ofcom determined termination charges which it considered to be fair and reasonable, taking into account that judgment. As set out in paragraphs 4.6 to 4.9, we are satisfied that our approach is consistent with the *TRD* judgment.

Issues specific to 03 numbers

The regulatory treatment of 03 calls

EE's comments

- 4.21 EE argues that 03 numbers should be distinguished from 0870 numbers because their regulatory designation in the NTNP, together with GC 17, requires OCPs to treat 03 numbers in the same way as geographic numbers. This means that OCPs can reflect higher termination rates for calls to 0870 numbers in their retail prices, but cannot do so for calls to 03 numbers.

expect any such price would take into account the costs of routing 03 (and other non-geographic) calls, as well as geographic calls.

³⁵ The 0870 Determination, paras. 6.46 - 6.52.

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

4.22 EE also argues that the combination of the requirement that calls to 03 numbers be charged at geographic rates and the higher termination rates associated with them, means that OCPs are forced to accept a lower margin on 03 calls than on geographic calls. EE states that calls to 03 numbers are, as a result, subsidised by calls to geographic numbers.

Ofcom's response

4.23 We consider that the regulatory distinction between 03 numbers and 0870 numbers is narrower than stated by EE. The NTNP states that calls to 03 numbers must be charged at geographic rates, whereas calls to 0870 numbers must be charged at geographic rates *except where call charges have been published in accordance with General Condition 14.2*. Regulatory policy for 03 numbers and 0870 numbers therefore links both numbers to geographic rates. The distinction is that an OCP can depart from the requirement to charge geographic rates for calls to 0870 numbers, provided that it fulfils certain conditions. However, this distinction is not relevant to the 0870 Determination because, as explained above, we set 0870 termination rates on the basis that the rates would enable the OCP (in that case, BT) to include 0870 calls in inclusive packages and price 0870 calls at the same rate as calls to geographic numbers.

4.24 Ofcom has consistently sought to re-establish the link between 0870 calls and geographic calls (see paragraph 3.5 above):

4.24.1 In our April 2006 Statement, *NTS A Way Forward*³⁶, we proposed to restore the link between the retail prices of NTS calls and geographic calls. To reduce the potential for arbitrage that this proposal created, we also determined that 0870 calls should be removed from the scope of the BT NTS SMP Condition AA11 (the "NTS Condition").

4.24.2 In April 2009, we published a further Statement, *Changes to 0870*³⁷, which introduced changes "*designed to facilitate a restoration of the linkage between the pricing of 0870 calls and calls to geographic numbers*"³⁸.

4.24.3 The 0870 Determination set the termination rates for 0870 calls on the basis of "*Ofcom's policy to re-establish the links between retail charges for 0870 calls and those for geographic calls*"³⁹ and, in particular, on the basis that BT (the OCP) would retail 0870 calls at geographic rates and include them in its call packages.

4.25 EE has asserted that OCPs may be forced to accept a lower margin on 03 calls than on geographic calls on the basis that termination rates for geographic calls are lower than the rates proposed for 03 calls, while retail rates are the same. However, EE has not provided Ofcom with any accompanying evidence which would enable us to assess the materiality of this assertion and its potential impact on EE.

4.26 We observe that EE's assumption that the higher termination rates for 03 calls automatically lead to lower margins ignores the potential differences in conveyance/transit costs incurred by the OCP. While for geographic calls, OCPs

³⁶ http://stakeholders.ofcom.org.uk/consultations/nts_forward/statement/

³⁷ <http://stakeholders.ofcom.org.uk/binaries/consultations/0870calls/statement/0870statement.pdf>

³⁸ *ibid.*, at para. 1.2.

³⁹ The 0870 Determination, para. 1.19.

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

would generally convey the call as far as possible on their own network and hand it over on a far-end basis thereby incurring additional conveyance costs, such costs would be saved in the case of an 03 call for which the OCP would hand over the call on a near-end basis. Because the difference between the 0870 termination rate set in the 0870 Determination and BT's geographic termination rate relate to elements of cost avoided by the OCP in the case of 0870 calls (but instead incurred by the TCP), the additional cost of 0870 termination relative to geographic termination is likely to be similar to the conveyance savings achieved due to the near-end handover of 0870 calls.

- 4.27 The same logic follows for 03 calls given their similarity to 0870 calls both in terms of routing and costs. It also applies irrespective of EE's current conveyance arrangements for geographic calls because, as explained at paragraph 4.16, we would expect conveyance/transit charges in a competitive market to reflect both the efficient costs of conveyance/transit and any difference in the cost of routing calls⁴⁰. This issue was addressed at paragraphs 3.36 to 3.37 above.
- 4.28 In addition, whilst recognising the potential for call volumes to grow, the current low volumes of 03 calls, combined with the proximity of the termination rates set in NCCN 966 to geographic termination rates, suggests that any resulting lower margin is at present likely to be minimal.
- 4.29 We note for completeness that we disagree with EE's statement that the alleged lower margin implies that 03 numbers are subsidised by calls to geographic numbers. In our view, any disparity in margins would only involve a subsidy if EE were failing to recover its costs (defined in an appropriate way) of retailing 03 calls. EE has not argued that this is the case and the reference to cross-subsidisation is therefore not appropriate.

The benefits of 03 numbers

EE's comments

- 4.30 EE submits that the lower margins which it claims are unavoidable cannot be a fair and reasonable outcome, as in its view it is the TCP and the SP who benefit from the 03 number, not the OCP or the caller. As far as the OCP is concerned, there is no distinction between 03 calls and geographic calls.
- 4.31 EE argues that the choice of whether to use an 03 number or a geographic number is one for the SP, with no benefit to the consumer. EE concludes that Ofcom's six principles of pricing and cost recovery mean that any additional costs caused by the SP choosing to use an 03 number should be borne by the TCP/SP.

Ofcom's response

- 4.32 We agree that the TCP and the SP benefit from the SP choosing to use an 03 number. However, we consider that the caller also benefits from this choice. In particular, the caller benefits from the alignment of 03 and geographic prices. It also

⁴⁰ We noted in footnote 33 the potential that the transit price paid by the OCP could be an average/blended price across geographic and 03 calls (and other non-geographic calls). If so, the conveyance cost savings relating to near-end handover would be reflected in this blended price rather than a distinct price for transit of 03 calls.

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

benefits from the greater price certainty that Ofcom sought to achieve in introducing 03 numbers.

- 4.33 EE's argument that there is no benefit to the caller rests on its assertion that "there is no difference whatsoever, and therefore no benefit to the consumer, between calling a geographic number or an 03 number." By comparing calls to 03 numbers only with calls to geographic numbers, EE has not considered that, in the absence of 03 numbers, some SPs who currently use 03 numbers may have chosen other non-geographic numbers. In our view, when compared with calls to other non-geographic numbers (e.g. 0870 or 0845) for which consumers often pay rates which are above geographic rates but also often have little visibility of the level of these rates⁴¹, 03 callers will benefit both from paying geographic rates and from greater price certainty.
- 4.34 We do not agree that the SP's choice of an 03 number means that the six principles of pricing and cost recovery require any additional costs to be borne by the TCP/SP. We considered the six principles in detail in the 0870 Determination (as referred to at paragraph 3.18 above) and we considered that the allocation of the costs of routing and terminating 0870 calls between the OCP, the TCP and the SP met those principles. Specifically, we considered that allowing for the additional cost to the TCP arising from near-end handover in the case of 0870 calls is consistent with the principle of cost causation to the extent that it means that charges will more closely reflect the usage made of the networks of the OCP and TCP respectively⁴². We identified these additional costs as being an allowance for circuit costs and inter-tandem conveyance costs. We considered that the principle that transit costs should fall to the OCP was consistent with the principle of distribution of benefits⁴³. We also said that making the charges cost-reflective supports the alignment of retail 0870 and geographic call prices, therefore promoting the principle of effective competition⁴⁴. Given the similarity between 03 calls and 0870 calls, we consider that these arguments also apply to 03 calls.
- 4.35 By contrast, applying the six principles of pricing and cost recovery led us to conclude that other cost elements of 0870 calls should be borne by the TCP and not recovered through the termination charge. For example, we considered that cost causation does not clearly determine who should pay IN DIP costs⁴⁵. Instead, in line with the objective of aligning prices and the effective competition principle, we determined that IN DIP costs should be borne by the TCP⁴⁶. Given the similarity between 03 calls and 0870 calls, we consider that this reasoning applies equally to 03 calls.

⁴¹ See further, Ofcom's recent consultation paper, *Simplifying Non-Geographic Numbers* (the "December 2010 consultation") at paras. 4.13 to 4.25.

⁴² The 0870 Determination, para. 6.30.

⁴³ *Ibid.*, para. 6.57.

⁴⁴ *Ibid.*, para. 6.30.

⁴⁵ *Ibid.*, para. 6.56.

⁴⁶ *Ibid.*, para. 6.58.

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

The designation of 03 calls

EE's response

- 4.36 EE argues that Ofcom has not addressed the confusion over whether 03 numbers are geographic or non-geographic and that this confusion continues in the December 2010 consultation⁴⁷.
- 4.37 EE does not consider that Ofcom has properly responded to EE's request to reconsider the retail regulation of 03 numbers in the NTNP and GC 17.

Ofcom's response

- 4.38 We consider it is clear that 03 numbers are non-geographic numbers which must be charged at a geographic rate - as illustrated in the December 2010 consultation, which begins "*Non-geographic calls are those made to 03, 05, 070/076, 080, 0845, 0870, 083/4, 0871, 09, 116 and 118 numbers.*".
- 4.39 We considered the retail regulation of 03 numbers in the NTNP and GC 17 when assessing whether the termination rates set out in NCCN 996 were fair and reasonable. We do not consider that modification of the NTNP and GC 17 is required as a consequence of our consideration of this dispute for the reasons set out in paragraph 3.47 above.

Ofcom's methodology

Comparison of termination rates

EE's comments

- 4.40 EE argues that Ofcom's comparison of BT's 03 termination rates to the 0870 termination rates that were in force prior to the 0870 Determination is illogical, particularly since those old 0870 termination rates were found by Ofcom to be unreasonable.
- 4.41 EE also notes that the current 0870 termination rates charged by BT are not the same as its 03 termination rates, because BT introduced new termination rates for 0870 calls. Although Ofcom has ordered BT to withdraw the new 0870 termination rates, BT has refused to do so.

Ofcom's response

- 4.42 EE's comment misunderstands the basis for the comparison in the Draft Determination and the implication that Ofcom drew from it. Ofcom compared current 0870 termination rates with (i) geographic termination rates, (ii) the 0870 termination rates that were in force in February 2007 and (iii) the 0845 termination rates that were in force in February 2007. The reason for this comparison was to assess Ofcom's expectation, stated in February 2007, that wholesale termination rates for 03

⁴⁷ EE also considers that the December 2010 consultation fails to consider the issues that arise at the wholesale level as a result of the significant market power of TCPs in terminating calls to non-geographic numbers hosted on their networks. For completeness, we note that the December 2010 consultation considers both wholesale arrangements and possible regulatory options at the wholesale level (at Annexes 3 and 4).

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

calls should be closer to geographic termination rates than to the termination rates for non-geographic calls that prevailed at the time. The comparison shows that Ofcom's expectation was met, based on the termination rates prevailing at that time. We are satisfied that, notwithstanding the increase to the termination rates for 03 calls, these remain relatively close to geographic termination rates.

- 4.43 We do not consider that BT's introduction of new termination rates for 0870 calls is relevant, given that Ofcom found that the rates set by NCCN 986 were not fair and reasonable and directed the parties to revert to the termination rates that Ofcom had set in the 0870 Determination. The fact that BT has not implemented this direction pending its appeal of the 0845/0870 determination⁴⁸ does not alter our conclusion in this Dispute that the rates proposed by BT for 03 calls are fair as between the parties and reasonable in the light of our statutory duties and the Community requirements.

Use of FAC

EE's comments

- 4.44 EE notes that the 0870 framework applied a Fully Allocated Cost ("FAC") methodology and that this has been carried across to this Dispute. EE argues that this use of FAC is inconsistent with the cost methodology used in the regulation of mobile voice call termination. Ofcom currently applies a Long-Run Incremental Cost Plus ("LRIC+") methodology to mobile call termination, but is proposing to use a pure LRIC methodology in its current review of wholesale mobile call termination. EE argues that the same cost methodology should be applied to the costs of fixed networks as is applied to the costs of mobile networks.

Ofcom's response

- 4.45 We consider that there are similarities between FAC and LRIC+⁴⁹. Both cost standards provide for the recovery of incremental costs as well as a contribution towards common costs. However, we have a preference for FAC in relation to fixed networks for a number of reasons⁵⁰. Accordingly, Ofcom considers that the current FAC-based cost standard used for 0870 termination rates (and for 03 termination rates) is consistent with the FAC-based cost standard used for setting geographic termination rates (and more generally for setting the charge controls for wholesale services) on the BT network. We also consider that the LRIC+ cost standard used for the current mobile termination charge controls (which expire on 31 March 2011) is consistent with this approach.

⁴⁸ <http://www.catribunal.org.uk/237-6794/1169-3-3-10--British-Telecommunications-PLC--.html>

⁴⁹ In the 2009 Leased Line Charge Control Statement (<http://stakeholders.ofcom.org.uk/binaries/consultations/lcc/statement/lccstatement.pdf>), we said at para. 3.175 (second bullet) that "LRIC+EPMU and CCA+FAC have some similarities in that the definition of costs for both is still forward looking, unlike Historic Cost Accounting ("HCA") approaches. Charges based on forward-looking costs provide appropriate incentives for entry and investment. Both also include an allocation of fixed common costs to allow for full cost recovery."

⁵⁰ In the 2009 Review of BT's Network Charge Controls (http://stakeholders.ofcom.org.uk/binaries/consultations/review_bt_ncc/statement/nccstatement.pdf), we summarise at para. 4.67 the reasons why Ofcom prefers FAC (on a Current Cost Accounting (CCA) basis) to LRIC+ as: "the greater transparency and reliability of CCA FAC data than available LRIC data; continuity with past NCCs; and consistency with other charge controls."

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

- 4.46 The mobile call termination review (covering regulation from 1 April 2011) has not yet been completed and no decisions have yet been made. In any event, this Dispute does not relate to mobile termination rates and we do not consider that this Dispute is an appropriate forum in which to re-evaluate our approach to the appropriate cost standard for geographic or mobile call termination rates, not least given the limited time available to resolve disputes.

The interests of consumers

EE's comments

- 4.47 EE disagrees with Ofcom's statement that it is not convinced that the increased cost of termination charges for calls to 03 numbers will be passed on to consumers. EE argues that, in a competitive retail market, any increase in termination charges has to be passed on to consumers either directly or indirectly.

Ofcom's response

- 4.48 The Ofcom statement to which EE refers relates to EE's submission that BT's increased termination rates for 03 calls will be passed on to callers and will increase the pressure on OCPs to increase the charges of calls to 03 numbers or withdraw 03 numbers from some call packages or bundles. Our response to this was that "in the absence of any evidence to demonstrate that EE is unable to cover its efficient costs of originating 03 calls, we are not persuaded that there is a realistic prospect of this occurring."⁵¹
- 4.49 Our statement therefore related to the prospect of an increase in the price of 03 calls and holds true given the regulatory requirement for 03 calls to be retailed at geographic prices. That regulatory requirement means that EE cannot pass this cost increase directly to consumers through higher prices for 03 calls and remain compliant with GC 17 and the NTNP.
- 4.50 We accept that an increase in BT's termination rate for 03 calls will increase the marginal cost to EE of sending 03 calls to BT and that that increase to EE could, in theory, affect other prices. However, EE's response does not specify that prices for calls to geographic numbers (and consequently also calls to 03 numbers) will go up. We do not consider that an effect on other prices is inevitable, as a change to an input cost does not necessarily have to result in a change to retail prices to consumers.
- 4.51 As noted at paragraph 3.41 above, the current volume of 03 calls is low (less than 1%) when compared to the volume of geographic calls, and there is a relatively small difference in the ppm termination rate charges between geographic calls and 03 calls. As a result, even if future call volumes increase, the financial impact on EE is likely to be relatively small (see paragraph 2.12 above), and we would therefore expect the financial impact (if any) on consumers to be correspondingly small.

⁵¹ See para. 3.41 above.

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

Assessment of our conclusions against Ofcom's statutory duties and Community requirements

- 4.52 We have carefully considered whether our conclusions in this determination are consistent with both Ofcom's general duties in section 3 of the Act, and (pursuant to section 4(1)(c) of the Act) the six Community requirements set out in section 4 of the Act, which give effect, among other things, to the requirements of Article 8 of the Framework Directive⁵².
- 4.53 For the reasons set out above at paragraph 3.39 to 3.46, we consider that our conclusions are reasonable in light of our statutory duties.

Conclusion

- 4.54 For the reasons set out in this determination, our final conclusions and reasoning in resolution of this Dispute remain the same as our provisional conclusions as set out in the Draft Determination. In particular, we determine that the termination rates set by BT in NCCN 966 are fair as between the parties and reasonable in the light of our statutory duties and the Community requirements. Accordingly, we do not require the Parties to make any alterations to the terms on which they do business.

⁵² 2002/21/EC

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

Annex 1

The Determination

1.1 Dispute between Everything Everywhere and BT

Determination under sections 188 and 190 of the Communications Act 2003 (“Act”) for resolving a dispute between Everything Everywhere Limited (“EE”) and British Telecommunications plc (“BT”) concerning the issue of whether it was fair and reasonable for BT to apply the wholesale termination charges for calls to 03 numbers originating on the EE mobile network and terminated on the BT fixed network that were notified by BT to EE in NCCN 966

WHEREAS—

(A) section 188(2) of the Act provides that, where Ofcom has decided pursuant to section 186(2) of the Act that it is appropriate for it to handle the dispute, Ofcom must consider the dispute and make a determination for resolving it. The determination that Ofcom makes for resolving the dispute must be notified to the parties in accordance with section 188(7) of the Act, together with a full statement of the reasons on which the determination is based, and publish so much of its determination as (having regard, in particular, to the need to preserve commercial confidentiality) they consider appropriate to publish for bringing it to the attention of the members of the public, including to the extent that Ofcom considers pursuant to section 393(2)(a) of the Act that any such disclosure is made for the purpose of facilitating the carrying out by Ofcom of any of its functions;

(B) section 190 of the Act sets out the scope of Ofcom's powers in resolving a dispute which may, in accordance with section 190(2) of the Act, include—

- making a declaration setting out the rights and obligations of the parties to the dispute;
- giving a direction fixing the terms or conditions of transactions between the parties to the dispute;
- giving a direction imposing an obligation, enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by Ofcom; and
- for the purpose of giving effect to a determination by Ofcom of the proper amount of a charge in respect of which amounts have been paid by one of the parties to the dispute to the other, giving a direction, enforceable by the party to whom sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment;

(C) on 10 September 2010, EE submitted a dispute with BT to Ofcom for resolution, claiming that the termination charges for calls to 03 numbers notified by BT via NCCN 966 are not fair and reasonable. EE considers that the wholesale termination charges for calls to 03 numbers should be the same as or similar to termination charges for calls to geographic 01 and 02 numbers;

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

(D) on 1 October 2010, Ofcom decided that it was appropriate for it to handle this dispute and set the scope of the issues to be resolved in the dispute as follows:

“The scope of the dispute is to determine whether it is fair and reasonable for BT to apply the wholesale termination charges for calls to 03 numbers originating on the EE mobile network and terminated on the BT fixed network that were notified by BT to EE in NCCN 966”;

(E) a non-confidential draft determination was sent to the parties on 8 December 2010 and published on Ofcom's website on 9 December 2010;

(F) in order to resolve this dispute, Ofcom has considered (among other things) the information provided by the parties and Ofcom has further acted in accordance with its general duties set out in section 3 of, and the six Community requirements set out in section 4 of the Act; and

(G) a fuller explanation of the background to the dispute and Ofcom's reasons for making this Determination is set out in the explanatory statement accompanying this Determination.

NOW, therefore, Ofcom makes, for the reasons set out in the accompanying explanatory statement, this Determination for resolving this dispute—

I Declaration of rights and obligations, etc.

1 It is hereby declared that it is fair and reasonable for BT to apply the wholesale termination charges for calls to 03 numbers originating on the EE mobile network and terminated on the BT fixed network that were notified by BT to EE in NCCN 966.

II Binding nature and effective date

2 This determination is binding on EE and BT in accordance with section 190(8) of the Act.

3 This Determination shall take effect on the day it is published.

III Interpretation

4 For the purpose of interpreting this Determination—

a) headings and titles shall be disregarded; and

b) the Interpretation Act 1978 shall apply as if this Determination were an Act of Parliament.

5 In this Determination—

a) **“Act”** means the Communications Act 2003 (c.21);

b) **“BT”** means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989;

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

- c) "EE" means Everything Everywhere Limited, whose registered company number is 02382161, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989;
- d) "Ofcom" means the Office of Communications.



Neil Buckley

Director of Investigations

A person duly authorised in accordance with paragraph 18 of the Schedule to the Office of Communications Act 2003

27 January 2011

Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

Annex 2

NCCN 966

NETWORK CHARGE CHANGE NOTICE

NCCN NUMBER: 966

SERVICE: *BT UK WIDE NUMBERS*
BT 03 Calls Charges

EFFECTIVE DATE: 1st September 2009

Associated terms and conditions are within Schedule 204 of Annex C of the Current Standard Interconnect Agreement dated 1st October 1997.

SUBMITTED TO OFCOM ON: 3rd August 2009

BY: Zack Thompson

ROLE: Interconnect Pricing
BT Wholesale

SIGNED: *Zack Thompson*

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Determination to resolve a dispute between EE and BT about BT's termination charges for 03 calls

CHARGE CHANGES
EFFECTIVE DATE: 01/09/2009

Current Prices

Description	Effective Date	Until	Daytime	Evening	Weekend
All Operators (Note a)	17/07/2007		0.2657	0.1249	0.1003
All Operators (Note b)	17/07/2007		0.1106	0.0506	0.0399
All Operators (Note c)	17/07/2007		0.3763	0.1756	0.1402

Notes:

- a) Current average for Single Tandem
- b) Local Tandem Conveyance (LTC) Uplift. BT will charge the LTC Uplift for calls collected at the DLE.
- c) Current average for Single Tandem plus LTC Uplift

Proposed Prices

Description	Effective Date	Until	Daytime	Evening	Weekend
All Operators (Note a)	17/07/2007	31/08/2009	0.2657	0.1249	0.1003
All Operators (Single Tandem)	01/09/2009		0.5600	0.2600	0.2000
All Operators (Note b)	17/07/2007	31/08/2009	0.1106	0.0506	0.0399
All Operators (Note c)	17/07/2007	31/08/2009	0.3763	0.1756	0.1402