



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

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Draft Determination

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### **Glossary of terms**

**Act:** the Communications Act 2003.

**CP:** Communications provider

**DLE:** Digital Local Exchange

**DT:** Double tandem

**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.

## Section 1

# Summary of analysis and proposed resolution of the Dispute

- 1.1 This draft determination (the "Draft Determination") sets out our proposed 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 ("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")<sup>1</sup>.
- 1.3 On 10 September 2010, EE submitted a dispute to Ofcom, 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.
- 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 proposed resolution of the Dispute and the provisional 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 set out in the 0870 Determination. The termination rates in the 0870 Determination were set

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

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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, 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 provisional 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, 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 this is a realistic prospect.
- 1.5.7 There may be some impact on service providers (SPs) purchasing hosting services from 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. TCPs would therefore need to recover any cost that is not recovered through the termination rate elsewhere, most likely from the SP.
- 1.5.8 There is no evidence to suggest that the revised termination rates would have any negative effects on competition.
- 1.5.9 In the absence of any other relevant factors, we have provisionally 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, as calculated in the 0870 Determination.

### Ofcom's proposed resolution of the Dispute

- 1.6 In light of our provisional conclusions in respect of each of the above factors, we are therefore minded to consider that the termination charges set by BT in NCCN 966

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are fair as between the Parties and reasonable in light of our statutory duties. Our Draft Determination is at **Annex 5**.

### Next steps

- 1.7 The Parties and other interested parties have until **5 pm on 23 December 2010** to comment on these proposals. After considering any comments received, Ofcom will make a final decision as to the scope of its determination for resolving the Dispute. Details of how interested parties should respond to this consultation are set out in **Annexes 2-4**.

### Structure of the remainder of this document

- 1.8 An introduction and background to this dispute is set out in **section 2** and Ofcom's analysis and reasoning underpinning the draft determination is set out in **section 3**.

## 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)).



## 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 Directive<sup>2</sup>.

## 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)<sup>3</sup> 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 1. 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 numbers<sup>4</sup>**

	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%

<sup>2</sup> Directive 2002/21/EC of 7 March 2002

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

<sup>4</sup> Source: EE submission, NCCN 966 and Ofcom calculations.

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- 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 £[X] 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 review<sup>5</sup>. 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.

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

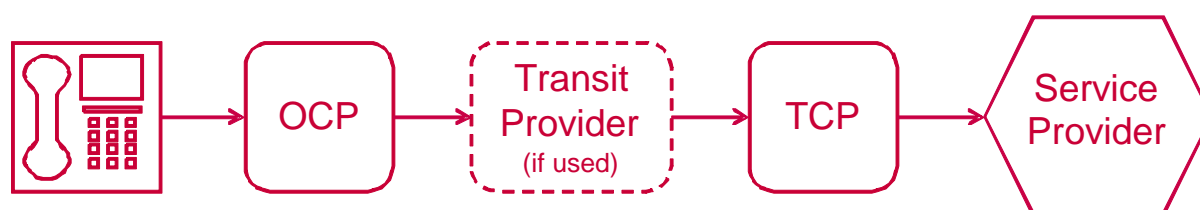
## Interested Parties

- 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 dispute<sup>6</sup>. 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

<sup>6</sup> 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).

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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 terminating communications provider ("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

"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 terminated<sup>7</sup>. 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 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 its destination 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

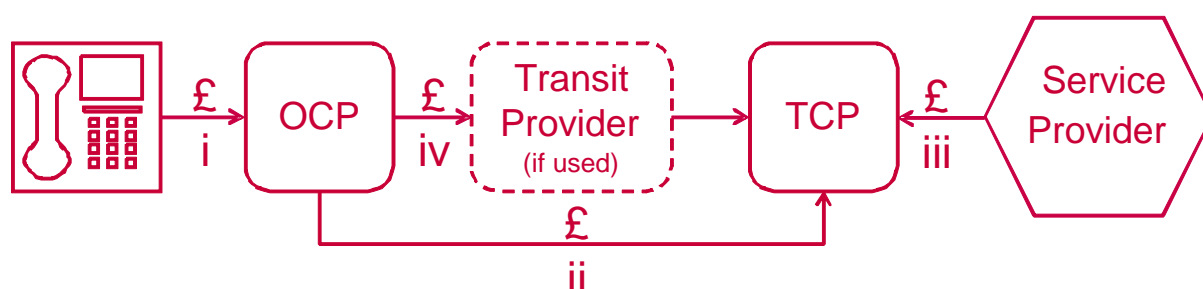
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<sup>7</sup> Strictly speaking, when BT acts as a TCP it levies a ladder of interconnection charges, and under the reciprocity arrangements, other TCPs also levy the same ladder of charges at the same rates as charged by BT. The reciprocity arrangements 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](http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_all/cw_890/determination.pdf)

for both geographic and non-geographic calls, EE uses a transit operator to deliver the call, as opposed to carrying it on its own network<sup>8</sup>. 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”)***<sup>9</sup>

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

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

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

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")<sup>10</sup>***

- 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.

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



- 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 low<sup>11</sup>;
  - 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 vary<sup>12</sup>;
  - 2.39.3 the likely call stimulation effect of opening the 03 number range<sup>13</sup>; 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 GC17 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")<sup>14</sup>***

- 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.

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<sup>11</sup> The February 2007 statement, para. 3.34.

<sup>12</sup> The February 2007 statement, para. 3.32.

<sup>13</sup> The February 2007 statement, para. 3.35.

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



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- 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. 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 calls<sup>15</sup>.

### **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**

<b>A1: Public Telephone Network Numbers (11 digits long, including the '0', unless otherwise stated)</b>	
<b>Number(s) beginning</b>	<b>Designation</b>
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

<sup>15</sup> The May 2007 statement, paras. 3.40 and 3.76.

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

<b>A1: Public Telephone Network Numbers (11 digits long, including the '0', unless otherwise stated)</b>	
<b>Number(s) beginning</b>	<b>Designation</b>
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

## 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.
- 3.1 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:
  - 3.1.1 the inter-tandem conveyance costs arising from near-end handover; and
  - 3.1.2 an allowance for interconnection circuit costs,on a fully allocated cost basis.
- 3.2 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.
- 3.3 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.
- 3.4 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.

**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

- 3.5 We determined that the termination rates set in this way were consistent with the six principles of pricing and cost recovery<sup>16</sup>.

### **The routing and conveyance of calls to 03 numbers**

- 3.6 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.
- 3.7 We therefore asked the parties for information to ascertain whether:
- 3.7.1 calls to 03 numbers are routed in the same way as calls to 0870 numbers; and
  - 3.7.2 the TCPs' costs of terminating calls to 03 numbers are similar to those of terminating calls to 0870 numbers.
- 3.8 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.
- 3.9 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

<sup>16</sup> 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.

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.

- 3.10 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**

- 3.11 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.
- 3.12 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 GC17 and the NTNP should be modified to allow 03 calls to be retailed at a higher price than geographic calls.
- 3.13 We deal with each of these points in turn.
- 3.14 **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.
- 3.15 We do not consider that 03 termination rates should be set at the same level as geographic termination rates because:
- 3.15.1 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;
  - 3.15.2 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
  - 3.15.3 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 Determination<sup>17</sup>.
- 3.16 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

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<sup>17</sup> 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.

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.

- 3.17 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**

- 3.18 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"<sup>18</sup>.

- 3.19 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."

- 3.20 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:

- 3.20.1 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);
- 3.20.2 whether the costs of providing value-added services to SPs would be met by SPs at the 0870 termination rates; and

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<sup>18</sup> The February 2007 statement, para. 3.37.

- 3.20.3 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**

- 3.21 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 rates<sup>19</sup>.
- 3.22 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
<b>February 2007 rates</b>			
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
<b>Rates following the 0870 Determination in June 2009</b>			
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

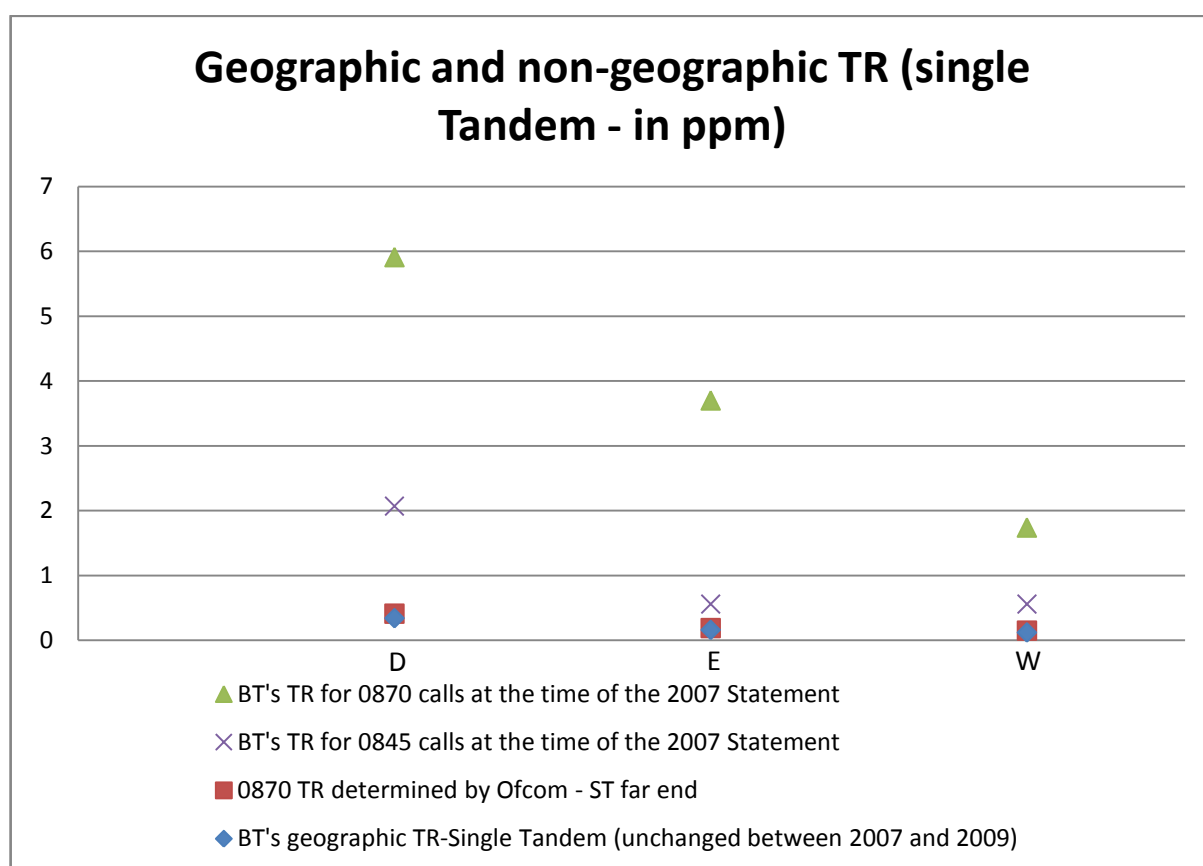
- 3.23 Against this background of much higher termination rates for calls to 0870 and 0845 numbers, Ofcom believed in February 2007 that wholesale termination rates for 03 calls should be closer to geographic termination rates than to the prevailing non-geographic termination rates.
- 3.24 The termination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

<sup>19</sup> 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).

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).

- 3.25 As discussed at paragraphs 3.3 to 3.5, 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 rates<sup>20</sup>.

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



- 3.26 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**

- 3.27 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

<sup>20</sup> 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.



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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 charge<sup>21</sup>.

### **Cost recovery**

- 3.28 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.
- 3.29 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**

- 3.30 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"<sup>22</sup>.
- 3.31 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.
- 3.32 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**

- 3.33 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."

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<sup>21</sup> The 0870 Determination, para. 6.59.

<sup>22</sup> The May 2007 statement, para. 3.40.

- 3.34 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 conveyance<sup>23</sup>.

### Third party submissions

- 3.35 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

- 3.36 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 Directive<sup>24</sup>. 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

- 3.37 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

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<sup>23</sup> 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).

<sup>24</sup> Directive 2002/21/EC.

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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)<sup>25</sup>. 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**

- 3.38 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 price<sup>26</sup>.

### **Impact on SPs**

- 3.39 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**

- 3.40 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*.

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<sup>25</sup> 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.

<sup>26</sup> 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](http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/closed-cases/all-closed-cases/761146/Final_Determination.pdf).

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

- 3.41 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.
- 3.42 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)).
- 3.43 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 GC17 and the NTNP**

- 3.44 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 3.29 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 GC17 and the NTNP to enable EE to retail 03 calls at a higher price than its retail prices for geographic calls.

## **Provisional conclusion**

- 3.45 Our provisional conclusion therefore, is that we consider that the termination rates set by BT are fair and reasonable, on the basis that:
- 3.45.1 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;
- 3.45.2 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;

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- 3.45.3 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.

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## Annex 1

# NCCN 966

## NETWORK CHARGE CHANGE NOTICE

**NCCN NUMBER:** 966

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

**EFFECTIVE DATE:** 1<sup>st</sup> September 2009

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

**SUBMITTED TO OFCOM ON:** 3<sup>rd</sup> August 2009

**BY:** Zack Thompson

**ROLE:** Interconnect Pricing  
BT Wholesale

**SIGNED:** *Zack Thompson*

**PP W2.157E**

**BT Brentwood**

**One London Road**

**Brentwood**  
**Essex CM14 4QP**  
**Tel: 01277 323 461**

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**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

## Annex 2

# Responding to this consultation

## How to respond

- A2.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 23 December 2010**.
- A2.2 Ofcom strongly prefers to receive responses using the online web form at <http://stakeholders.ofcom.org.uk/consultations/draft-everything-bt-termination/howtorespond/>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A2.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email [Paul.Dean@ofcom.org.uk](mailto:Paul.Dean@ofcom.org.uk) attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A2.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Paul Dean  
4<sup>th</sup> Floor  
Competition Group  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA
- Fax: 020 7783 4109
- A2.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A2.6 It would be helpful if you can explain why you hold your views and how Ofcom's proposals would impact on you.

## Further information

- A2.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Paul Dean on 020 7981 3626.

## Confidentiality

- A2.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether



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all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

- A2.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A2.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

### Next steps

- A2.11 Following the end of the consultation period, Ofcom intends to publish a final determination by 31 January 2011.
- A2.12 Please note that you can register to receive free mail updates alerting you to the publications of relevant Ofcom documents. For more details please see: [http://www.ofcom.org.uk/static/subscribe/select\\_list.htm](http://www.ofcom.org.uk/static/subscribe/select_list.htm)

### Ofcom's consultation processes

- A2.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 3.
- A2.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at [consult@ofcom.org.uk](mailto:consult@ofcom.org.uk) . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A2.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash  
Ofcom  
Sutherland House  
149 St. Vincent Street  
Glasgow G2 5NW

Tel: 0141 229 7401  
Fax: 0141 229 7433

Email [vicki.nash@ofcom.org.uk](mailto:vicki.nash@ofcom.org.uk)

## Annex 3

# Ofcom's consultation principles

A3.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

### Before the consultation

- A3.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.
- A3.3 We will be clear about who we are consulting, why, on what questions and for how long.
- A3.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.
- A3.5 We will consult for up to 10 weeks<sup>27</sup> depending on the potential impact of our proposals.
- A3.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.
- A3.7 If we are not able to follow one of these principles, we will explain why.

### After the consultation

- A3.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

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<sup>27</sup> In the case of disputes we will consult for ten working days from the publication date of the draft determination; this reflects the four month deadline for Ofcom to issue its final determination.

## Annex 4

# Consultation response cover sheet

- A4.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk).
- A4.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A4.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A4.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at [www.ofcom.org.uk/consult/](http://www.ofcom.org.uk/consult/).
- A4.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

## Annex 5

# The Draft 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;

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(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;

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- 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**

**[date of final determination]**