



Draft Determination to resolve disputes between BT and various communications providers about changes to AIT terms

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Section 1

Summary

- 1.1 This draft determination sets out Ofcom's proposals for resolving the dispute brought by British Telecommunications plc ('BT') against 1RT Group Limited ('1RT Group'), Bestway Communications Limited ('Bestway Communications'), CFL Communications Limited ('CFL Communications'), Callagenix Limited ('Callagenix'), Flextel Limited ('Flextel'), Mars Communications Limited ('Mars Communications'), Starcomm Limited ('Starcomm') and Telxl Limited ('Telxl').
- 1.2 The dispute concerns changes which BT wishes to make to some of the terms and conditions in the standard contract that it has in place with each of the communications providers ('CPs') which interconnect with BT in order to pass traffic across BT's network. This contract is known as the Standard Interconnect Agreement ('SIA').¹ BT is in dispute with each of the CPs listed above (the 'referred CPs') because each has chosen not to agree the changes which BT proposes.
- 1.3 BT signs a separate SIA with each CP (the 'CP signatories'), although the terms and conditions of each SIA are identical. Throughout this document Ofcom therefore refers to the SIA as a single document, as it applies to all CP signatories in the same way. The fact that the SIA is a standard document helps to ensure that processes which involve signatories to the SIA are consistent and uniform. Therefore one important feature of the SIA is that, in order to change any of the terms or conditions, all CP signatories must agree and sign up to any revised terms before they can be implemented.
- 1.4 The changes that BT is proposing, which are the subject of this dispute, relate to the part of the SIA which sets out the process for identifying and dealing with Artificial Inflation of Traffic ('AIT'). AIT is essentially telephony traffic which is fraudulent or has no legitimate commercial purpose. The current process for dealing with AIT (the 'current AIT process') is contained primarily in Annex E of the SIA.²
- 1.5 Since midway through 2002, BT has been working to develop a new version of the current AIT process by re-drafting the provisions in Annex E of the SIA. This has led to the formation of a new Annex E (the 'revised Annex E')³, which BT now wishes to implement as part of the SIA.
- 1.6 The revised Annex E would change the current AIT process in a number of ways. These changes are set out and considered in **Section 2**. The changes relate to various aspects of the current AIT process including the definition of AIT, the process for retaining revenue where AIT is suspected, BT's involvement in the process and the way in which disputes in relation to AIT may be resolved.
- 1.7 In May 2008, in order to implement the revised Annex E, BT issued the 2008 AIT Supplemental Agreement (the 'Supplemental Agreement') to all CP signatories. As indicated in paragraph 1.3, all CP signatories must agree (by signing the Supplemental Agreement) in order for the changes to take effect.

¹ The SIA, plus the relevant supporting documents, can be found at the following BT Wholesale website link:

http://www.btwholesale.com/pages/static/Pricing_and_Contracts/Reference_Offers/Telephony.html

² Ofcom notes that the current definition of AIT is found in Annex D of the SIA.

³ The revised Annex E is set out in full at Annex 6.

- 1.8 By March 2009, 110 of the CP signatories had signed the Supplemental Agreement. However, despite BT continuing to negotiate, 12 CPs had formally rejected or chosen not to sign the terms of the Supplemental Agreement. This meant that BT was unable to implement the revised Annex E as part of its SIA.
- 1.9 This failure to agree led to BT's submission of a dispute to Ofcom on 6 March 2009. In that submission, BT cited the 12 CPs, namely 1RT Group, Bestway Communications, CFL Communications, Callagenix, Flextel, Mars Communications, Starcomm, Telxl, [X], Tele-Lynx UK Limited ('Tele-Lynx'), Prodigy Internet Limited ('Prodigy') and Vectone Network Limited ('Vectone').
- 1.10 In its dispute BT requested that Ofcom:
- determine that the changes outlined in the Supplemental Agreement are appropriate and applicable to the CPs which had not signed; and
 - direct that the terms and conditions of the SIA between BT and each of the CPs which had not signed shall include the terms of the Supplemental Agreement.
- 1.11 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 30 March we decided that it was appropriate to resolve this dispute, informed the parties to the dispute of our decision and published a Competition and Consumer Enforcement Bulletin entry setting out the scope of the dispute.
- 1.12 In the early stages of the investigation, BT informed Ofcom that [X], Tele-Lynx and Vectone had signed the Supplemental Agreement (on 25 March 2009, 27 March 2009 and 17 April 2009 respectively), and that BT therefore no longer considered itself in dispute with these CPs. On 29 April 2009, BT informed Ofcom that it was also content for Prodigy to be removed from the dispute.⁴ Ofcom has therefore resolved the dispute in relation to the eight remaining CPs, which are the 'referred CPs'.
- 1.13 In resolving the dispute, Ofcom had regard in particular to sections 3 and 4 of the Act. Sections 3 and 4 set out, respectively, the general statutory duties of Ofcom and Ofcom's duties for the purpose of fulfilling Community obligations with respect to, among other things, Ofcom's dispute resolution function under Chapter 3 of Part 2 of the Act.
- 1.14 Following acceptance of BT's dispute for resolution, Ofcom met or held conversations with all the referred CPs and BT.⁵ Ofcom also requested information from each of the parties to the dispute using its formal powers under section 191 of the Act. In response to issues raised in the course of meetings with parties, Ofcom also held a meeting with PhonepayPlus.
- 1.15 It was evident from the information which Ofcom received that the referred CPs have concerns which relate not just to the changes proposed in the revised Annex E, but also, if not more so, to underlying aspects of the AIT process, including the rationale for allowing retentions (which the revised Annex E does not seek to change).

⁴ Ofcom understands that BT has suspended Prodigy's interconnect agreement, and is in the process of terminating it completely. For this reason, BT removed Prodigy from the list of those with which it is in dispute.

⁵ Ofcom received no response from one of the referred CPs, Bestway Communications, during the course of resolving the dispute, despite repeated attempts to contact the company.

- 1.16 In deciding how to approach the resolution of the dispute, we noted the range of views expressed by the parties and the fact that many of the concerns about the AIT process were shared by some or all of the referred CPs. It therefore became clear that it was possible to consider individual CP concerns as falling under a number of common categories. We therefore collated the issues and used them to form the basis of the analysis which is set out in **Section 5**.

Conclusion

- 1.17 In summary, based on the submissions of the parties and the evidence gathered in this dispute, for the reasons set out in this draft determination and explanatory statement, our provisional conclusion is the following.
- 1.18 BT's proposed changes to the SIA provisions, as set out in the revised Annex E, are fair and reasonable. We therefore determine that each of the referred CPs should sign the Supplemental Agreement by no later than fourteen days after the date of the final determination in order to bring into effect the terms of the revised Annex E as soon as possible thereafter.
- 1.19 We also conclude that BT should provide a report to Ofcom no later than 18 months after the revised process take effect. This report should examine how the revised Annex E works in practice and consider possible improvements. We have set out a minimum set of issues which we consider should be addressed as part of this report in **Section 6**.
- 1.20 We have also had regard to Ofcom's own powers to review the matter should evidence suggest that parties are not acting in good faith in implementing the revised process or the operation of the process is otherwise inadequate.
- 1.21 The background to this investigation is set out in **Section 2**. The history to the dispute is set out in **Section 3**. The legal principles and our statutory obligations are set out in **Section 4**, and the analysis and reasoning underpinning the draft determination is set out in **Section 5**. Ofcom's draft determination is set out at **Annex 5**, and the full text of the revised Annex E is set out at **Annex 6**.

Section 2

Background

Introduction

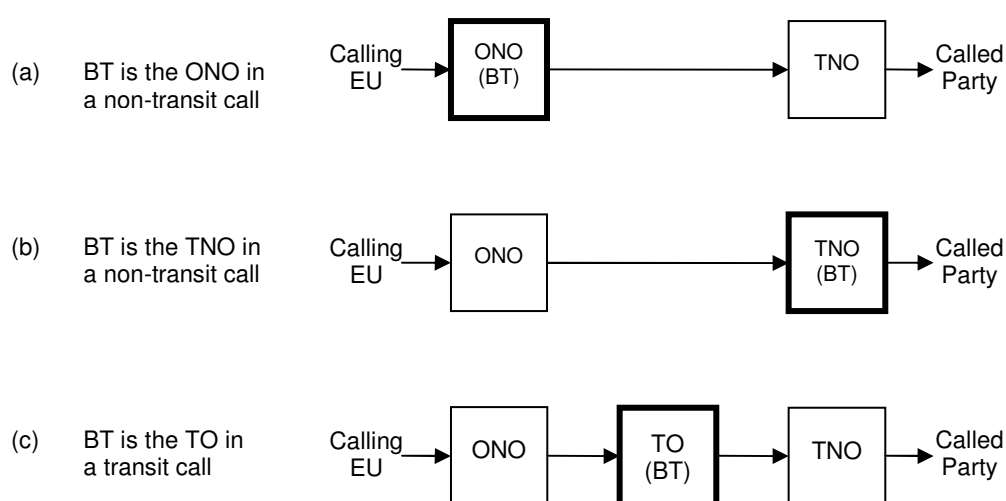
- 2.1 The SIA is a contractual agreement between BT and a CP which governs the interconnection of BT's public electronic communications network ('PECN') and the public electronic communications service ('PECS') of a CP. BT enters into a separate SIA with each CP which wishes to interconnect with BT's PECN. Therefore although a CP will have a contractual agreement in place with BT via the SIA, it will not necessarily have a contractual arrangement in place with any other CP which interconnects with BT's PECN.
- 2.2 Annex E of the SIA sets out the current AIT process.⁶ The SIA provides a mechanism for setting out a common process which is binding on all CPs which interconnect with BT. However although all of the CP signatories are subject to and follow the same process, there is also a need for the CPs to co-operate with each other even where there is no direct contractual relationship between them.
- 2.3 Before describing the current AIT process, we set out below (at a high level) the way in which a call may be routed and paid for by CPs who interconnect with BT, as this helps to explain a) why there is a need for an AIT process within the SIA; and b) why the current AIT process is configured as it is.

⁶ The current Annex E of the SIA can be found at the following link:
http://www.btwholesale.com/pages/downloads/service_and_support/contractual_information/docs/nsia/nannexe.rtf

Routing and charging for calls

- 2.4 When an end user ('EU') makes a call, that call will be conveyed by his or her originating network operator (the 'ONO') to the appropriate terminating network operator ('TNO'), who in turn will route the call to the intended recipient (the called party). Despite the fact that in some cases the ONO may route the call directly to the TNO, in the majority of cases, either because the TNO and the ONO are not interconnected or, even where they are, because it makes commercial sense to interconnect via BT, the call will transit across BT's network (hence the need for the SIA). BT is therefore known as the transit operator ('TO'), and performs this role in the majority of AIT investigations (example (c) in figure 2.1 below). In fact, due to the nature of BT's position in the chain it may depending on the particular call be the ONO, the TNO or the TO. This is demonstrated by figure 2.1 below.

Figure 2.1 BT's position in transit and non-transit calls



- 2.5 In each of the three scenarios above, the EU will pay to the ONO the appropriate cost of the call, based on the call type, duration etc. The ONO is then responsible for making the appropriate payment to the TNO. This is known as the 'termination payment'. Where the call transits across BT's network, the ONO will make the termination payment to BT, which will then pass on the appropriate amount to the TNO.⁷ Depending on the type of call, the TNO may then make a payment to the called party, for example where the TNO has a revenue share agreement with the called party or where the called party is a service provider which offers premium rate services ('PRS') on the called number.
- 2.6 It is important to note that the TNO will not always have a direct contractual relationship with the called party, who may be one or more providers removed down the chain from the TNO. If this is the case the TNO may simply pass any revenue to the next party in the chain, to then be passed on as appropriate. For this reason the

⁷ BT charges the TNO for transiting calls over its network, the cost for which is known as the 'TWIX' payment. The TWIX payment is retained by BT irrespective of whether the transit call traffic is AIT, and Ofcom understands that this does not form part of the AIT process.

called party and the service it operates on the number range may not necessarily be known to the TNO. This fact can make it more difficult for a TNO to investigate cases of suspected AIT caused by the called party, and should be borne in mind when considering the way in which the AIT process works.

- 2.7 At the same time, we note the requirement on all CPs to comply with the General Conditions of Entitlement, which Ofcom makes by way of notification under section 48(1) of the Act (the 'General Conditions'). In particular, General Condition 17 makes clear that certain requirements exist in relation to the allocation adoption and use of telephone numbers by CPs. TNOs should therefore comply with these requirements in sub-allocating phone numbers to third parties.

The current AIT process

- 2.8 The current AIT process is a mechanism for identifying and dealing with AIT carried across BT's network. It is limited in scope to cover AIT which may occur on number ranges where revenue share services are permitted.⁸ It was introduced in 2001 with the aim of enhancing industry provisions to deal with fraudulent and illegitimate activity.
- 2.9 The current AIT process enables the ONO to withhold termination payments otherwise due to a TNO for call traffic on the basis that the ONO suspects that the traffic is in fact AIT. The aim of the process is therefore to prevent the intended beneficiary of fraudulent or otherwise illegitimate traffic from receiving the proceeds of that traffic, and prevent or deter fraudulent activity as a result.
- 2.10 Under this process, if the ONO suspects that call traffic is AIT, it must pass certain preliminary information to the TNO as soon as 'reasonably practicable' to allow the TNO to investigate. Where the traffic transits BT's network, the ONO passes the preliminary information to BT as the TO, which forwards it on to the TNO. The preliminary information which must be sent is the following:
- i) the estimated total duration of the calls in question;
 - ii) the date(s) when the calls were made;
 - iii) the telephone numbers of the revenue share service and the partial CLI⁹ (if available) of the calling centre;
 - iv) any other information the ONO considers relevant; and
 - v) any other information reasonably requested by the TNO (including information regarding the identity of the calling centre and/or calling customer).
- 2.11 Once the ONO has provided the appropriate information, it may give the TNO written notice (no later than 14 calendar days from the end of the monthly billing period) of its intention to withhold payment.¹⁰

⁸ The current AIT process does not cover AIT which may occur on number ranges which have not been sanctioned by Ofcom to host revenue share services. The revised Annex E would broaden the definition of AIT and would therefore potentially cover number ranges which have not been sanctioned for revenue sharing services, but where revenue share activities may occur.

⁹ CLI means calling line identity, which is the number presented to the called party when he or she receives the call.

The A1 Retention Notice

- 2.12 Although the current AIT process does not prescribe a particular format for the written notice, Ofcom understands that the industry currently uses a standard template developed by BT known as the 'A1 Retention Notice'. The ONO must therefore complete this and send it to the TNO. If the call traffic transited BT's network, the ONO must send the A1 Retention Notice to BT, who must then use the details to complete a second A1 Retention Notice and send it to the TNO.¹¹
- 2.13 The A1 Retention Notice identifies the call traffic in question, the amount of revenue to be withheld, the AIT indicator(s) (see paragraph 2.20 below) and/or reasons why the call traffic is suspected to be AIT.
- 2.14 On receipt of the A1 Retention Notice the onus is then on the TNO to investigate the suspected AIT and either:
- accept that the retained payment relates to AIT thereby allowing the ONO to retain the payment permanently; or
 - dispute the retention and give reasons why the traffic is not AIT. If this is the case, the parties should then investigate further to determine whether the traffic is AIT or not.¹²
- 2.15 Ofcom understands that depending on the type of call, methods which a TNO might employ to demonstrate that traffic suspected of being AIT is in fact legitimate include:
- contacting their customer or service provider to provide evidence of the service being offered;
 - advising where the service was advertised and what benefit the service provides to members of the public;
 - providing recordings of calls to show that the callers were genuine; and
 - demonstrating the services operated on ranges which meet with Ofcom guidelines and/or requirements for that particular range.

BT involvement in the retention process

- 2.16 Under the current AIT provisions BT is necessarily involved in all AIT investigations where the call traffic transits BT's network. This is at least in part due to the fact that BT will have one SIA with the ONO and a separate SIA with the TNO, and there is no privity of contract between the ONO and the TNO in a transit call situation.

¹⁰ Ofcom understands that call traffic payments between CPs and BT are made on a monthly basis, and reflect the calls made in the previous period. Therefore the payment will not technically be 'retained' until it is due to be paid and is instead withheld.

¹¹ This is due to the fact that BT contracts separately with each CP, and there may be no direct contractual arrangement between the respective CPs.

¹² Under the current AIT process the parties have six months to agree on whether or not the traffic is AIT. If no agreement is reached by the end of this period, the parties will be considered to be in dispute on the matter.

- 2.17 With regard to which party is best placed to identify AIT and subsequently investigate it, we understand that to some extent it will depend on the type of AIT in any given case. For example the ONO will typically have a contractual relationship with the EU who made the call in question, and may be well placed to identify evidence of harm via customer complaints. On the other hand the TNO may have a contractual relationship with the service provider or information provider which provided the service behind the called number (although this is not always the case, as highlighted in paragraph 2.6). BT in its role as a TO may also be well placed to identify AIT, and Ofcom understands that this is particularly the case in relation to the new and emerging types of AIT such as those set out in paragraph 5.45. This issue is explored in greater detail in Section 5.

Definition and indicators of AIT

- 2.18 The definition of AIT which is used for the purposes of the current AIT process is as follows:

*'a situation where the flow of Calls to any particular Revenue Share Service is as a result of any activity on or on behalf of the party operating that Revenue Share Service disproportionate to the flow of Calls which would be expected from good faith commercial practice and usage of the network.'*¹³

- 2.19 It can be seen from the above definition that the current AIT definition only applies to AIT which occurs on number ranges which host revenue share services. Broadening of the definition could potentially encompass all call traffic which is artificially inflated with no apparent legitimate commercial purpose; and/or which is fraudulent, but the current definition does not cover such activity.
- 2.20 In addition to the definition of AIT, the current AIT process also sets out a list of *indicators* of AIT (the 'AIT indicators'). The AIT indicators are a non-exhaustive list of situations, examples and/or circumstances of AIT, and are used in conjunction with the AIT definition as a guide to when and where AIT may occur. The AIT indicators are set out in full below:

'REVENUE SHARE SERVICE

1. For each of the first 3 months after commencement of service the number of Calls delivered to any new Revenue Share Service exceed by 25% (or such other percentage as the Parties may agree in writing) or more the average number of Calls to similar Revenue Share Services ascertained after the first month and monthly thereafter.
2. After the first 3 months the number of Calls delivered to any Revenue Share Service increases at a rate of 25% or more from any one month to the next.
3. A high proportion of Calls delivered to any Revenue Share Service originate at a small number of Calling Centres whether or not limited in geographical location.
4. The average duration of Calls delivered to any Revenue Share Service differs significantly from that of Calls to similar Revenue Share Services or there are repeated Calls of similar duration.

¹³ The current definition of AIT is contained in Annex D of the SIA. BT proposes that the new definition of AIT would be included in the revised Annex E.

5. Calls delivered to any Revenue Share Service appear to originate without promotion of the Revenue Share Service.
6. A significant proportion of Calls delivered to any Revenue Share Service originate at payphones or use payment systems other than a standard telephone bill.
7. Calls made by or on behalf of the Revenue Share Service to itself excessively.
8. Operating a Revenue Share Service in breach of the law, where such breach can reasonably be regarded as causing AIT.
9. Operating a Revenue Share Service in breach of the ICSTIS Code of Practice, where such breach is of a financial nature and/or can reasonably be regarded as causing AIT.

CALLING PARTIES

1. A high proportion of Calls delivered to any Revenue Share Service are generated at a small number of Calling Centres whether or not limited in geographical location.
2. A small number of Calling Centres generate a high volume of Calls for delivery to any Revenue Share Service.
3. The average duration of Calls delivered to any Revenue Share Service differs significantly from that of Calls to similar Revenue Share Services or there are repeated Calls of similar duration.
4. Calls delivered to any Revenue Share Service appear to originate without promotion of the Revenue Share Service.
5. A significant proportion of Calls delivered to any Revenue Share Service originate at payphones or use payment systems other than a standard telephone bill.
6. Calls made by or on behalf of the Revenue Share Service to itself excessively.
7. Calls made fraudulently.
8. Calls made at a charge to the Calling Party which is less than the outpayment to the Revenue Share Service in circumstances which reasonably indicate that the Revenue Share Service was involved in making such Calls.
9. Calls which last for an excessive duration or result in lockups.
10. For Calls to PRS, Calls originating overseas.'

Proposed changes to the current AIT process

Summary of changes

2.21 The changes which BT proposes to the text of the current AIT process are contained in the revised Annex E. The changes are quite detailed, and have been developed over the course of several years (as explained in Section 3). In order to assess the broad impact of the changes we firstly summarise below what they are before turning to BT's reasons for wishing to implement them.

2.22 **A broader definition of AIT**; as set out at paragraph 2.18 above, the current definition of AIT is as follows:

'a situation where the flow of Calls to any particular Revenue Share Service is as a result of any activity on or on behalf of the party operating that Revenue Share Service disproportionate to the flow of Calls which would be expected from good faith commercial practice and usage of the network.'

2.23 The definition of AIT in the revised Annex E (the 'revised AIT definition') has been drafted to take account of what BT has described as the evolving nature of AIT, and the evidence that it occurs on number ranges beyond those which host revenue share services. The revised AIT definition sets out a two limbed test:

'any situation where Calls (subject to paragraph 1.2 below):

(a) are made, generated, stimulated, and/or prolonged for the direct or indirect benefit of any entity (including a natural person) operating, hosting or otherwise connected with a telecommunication service as a result of any activity by or on behalf of such entity; and

(b) result in a calling pattern which is disproportionate to the overall amount, duration and/or extent of Calls which would be expected from:-

i. a good faith usage; or

ii. an acceptable and reasonable commercial practice relating to the operation;

of Telecommunications Systems.

2.24 The revised AIT definition excludes calls to number ranges commencing with the digits '01' and '02', as these geographical number ranges are considered (at least by BT) to carry a low risk of AIT due to the low call rates on those ranges.

2.25 The revised Annex E also sets out examples of calls which might not be considered 'good faith usage' or 'acceptable and reasonable commercial practice and usage' of telecommunications systems, as referenced in part (b) of the definition.

2.26 **Changes to AIT indicators**; the current AIT indicators are set out above at paragraph 2.20. The revised AIT indicators cover the same basic principles as the current ones but reflect the revised AIT definition in looking to take account of the evolving nature of AIT. This is apparent from indicators 10 ('missed calls'), 11 (bill technology and/or data), 16 ('tromboning') and 17 (CLI manipulation). These are all 'new' AIT indicators designed to take into account forms of AIT which are not expressly referenced in the current AIT indicators. The revised AIT indicators are set out in full below.

Revised AIT indicators

‘Having regard to the telecommunication service:

1. **Excessive Calls:** For each of the first 3 months after commencement of the telecommunications service the number of Calls delivered to that telecommunication service exceed by 25% (or such other percentage as the Parties may agree in writing) or more the average number of Calls to a similar telecommunication service ascertained after the first month and monthly thereafter.
2. **Excessive Growth:** After the first 3 months the number of Calls delivered to any telecommunication service increases at a rate of 25% or more from any one month to the next.
3. **Small Number Calling Centres:** A high proportion and/or volume of Calls delivered to any telecommunication service originate or are generated at a small number of Calling Centres whether or not limited in geographical location.
4. **Call Duration:** The average duration of Calls delivered to any telecommunication service differs significantly from that of Calls to a similar telecommunication service or there are repeated Calls of similar duration.
5. **No Promotion:** Calls delivered to any telecommunication service appear to originate without promotion of the telecommunication service.
6. **Payphone Origination:** A significant proportion of Calls delivered to any telecommunication service originate at payphones or use payment systems other than a standard telephone bill.
7. **Self Generated Calls:** Calls made by or on behalf of the telecommunication service to itself excessively.
8. **Breach of Law:** Operating a telecommunication service in breach of the law, where such breach can reasonably be regarded as causing AIT.
9. **PhonepayPlus Code:** Operating a telecommunication service in breach of the PhonepayPlus Code of Practice (including any equivalent or applicable replacement, future or additional enforceable code(s), guideline(s) and/or practice notes), where such breach is of a financial nature, is not one which would be considered minor having regard to the PhonepayPlus ‘ICSTIS Sanctions Guide’ (including any equivalent or applicable replacement, future or additional guide(s)) and/or can reasonably be regarded as causing or being AIT.
10. **Missed Calls:** Calls made to a telecommunication service in response to a “missed call” (that is a Call of a very short duration and which is unanswered or unanswerable), where it is likely that the initial “missed call” was not genuinely a call which the Calling Party had made in order to contact the called party, but rather the “missed call” was of a very short duration and made with the primarily purpose of getting the called party to make a return Call to the number displayed on their mobile or fixed-line handset as missed, particularly where:
 - (a) the initial called party did not personally know the missed Calling Party or have a legitimate commercial reason for receiving a missed call from that Calling Party;
 - (b) the Call to the missed call number is to a:

- i. per call drop rate of any value;
 - ii. a per minute call rate of 10ppm or more; and/or
 - iii. combination of per call drop rate and per minute call rate, both of any value; and/or
- (c) upon returning the missed call, the caller is encouraged to remain on the Call as long as possible and/or the service on the Call does not appear to be genuine.

11. Impinges Billing Technology: Calls are made to a telecommunication service in a manner reasonably suggesting that billing technology and/or data had been or had attempted to be impinged upon.

12. Fraudulent Calls: Calls made fraudulently (whether there is a direct or indirect relationship between the Calling Party and the particular telecommunications service) but specifically excluding Calls made on individual lost or stolen mobile handsets/SIM cards.

13. Self Generated or Related Calls: Calls made at a charge to the Calling Party which is less than the out-payment to the telecommunication service in circumstances which reasonably indicate that the telecommunication service was involved in those Calls.

14. Excessive Durations: Calls which last for an excessive duration or result in lockups.

15. Overseas: For Calls to PRS, Calls originating overseas.

16. Tromboning: Where there are a high proportion of Calls are to a UK originating number and where those Calls are purposefully routed to an operator or network outside of the UK for the sole purpose of enabling the TNO (and/or its reseller) to route the Call back through BT as transit in order to enable the TNO (and/or its reseller) to benefit from the price differentials between the two Call types, particularly where there appears to be a commercial relationship between the Calling Party and the TNO (and/or its reseller).

17. CLI Manipulation: Where there are a high proportion of Calls where the actual CLIs which are ordinarily visible to operators have been intentionally hidden, modified or replaced by fake or masking CLIs, including but not limited to situations where AIT Indicator 10 applies.'

- 2.27 **A clearer set of timescales for parties;** in contrast to the current AIT process, the revised Annex E identifies specific stages in the AIT retention, investigation and dispute processes and sets out defined timeframes which apply to each of these stages.
- 2.28 The current AIT process sets out that the ONO must provide call information to the TNO 'as soon as reasonably practicable' if it suspects call traffic is AIT. If the ONO intends to withhold the payment relating to the AIT, it must inform the TNO no later than 14 calendar days from the end of the monthly billing period. The following six months is then allotted for investigation by the ONO, TO and TNO to ascertain whether or not the traffic was AIT. If, at any stage during the six month process, the ONO ceases to have reasonable grounds to believe the calls are AIT then the ONO is obliged to pay the withheld revenue to the TNO. However if the ONO continues to have reasonable grounds, then the TNO is obliged to release the ONO from the debt

at the end of the six months, or if it is shown before then that the traffic was in fact AIT. It is at this point that a dispute capable of contractual challenge can be formed.

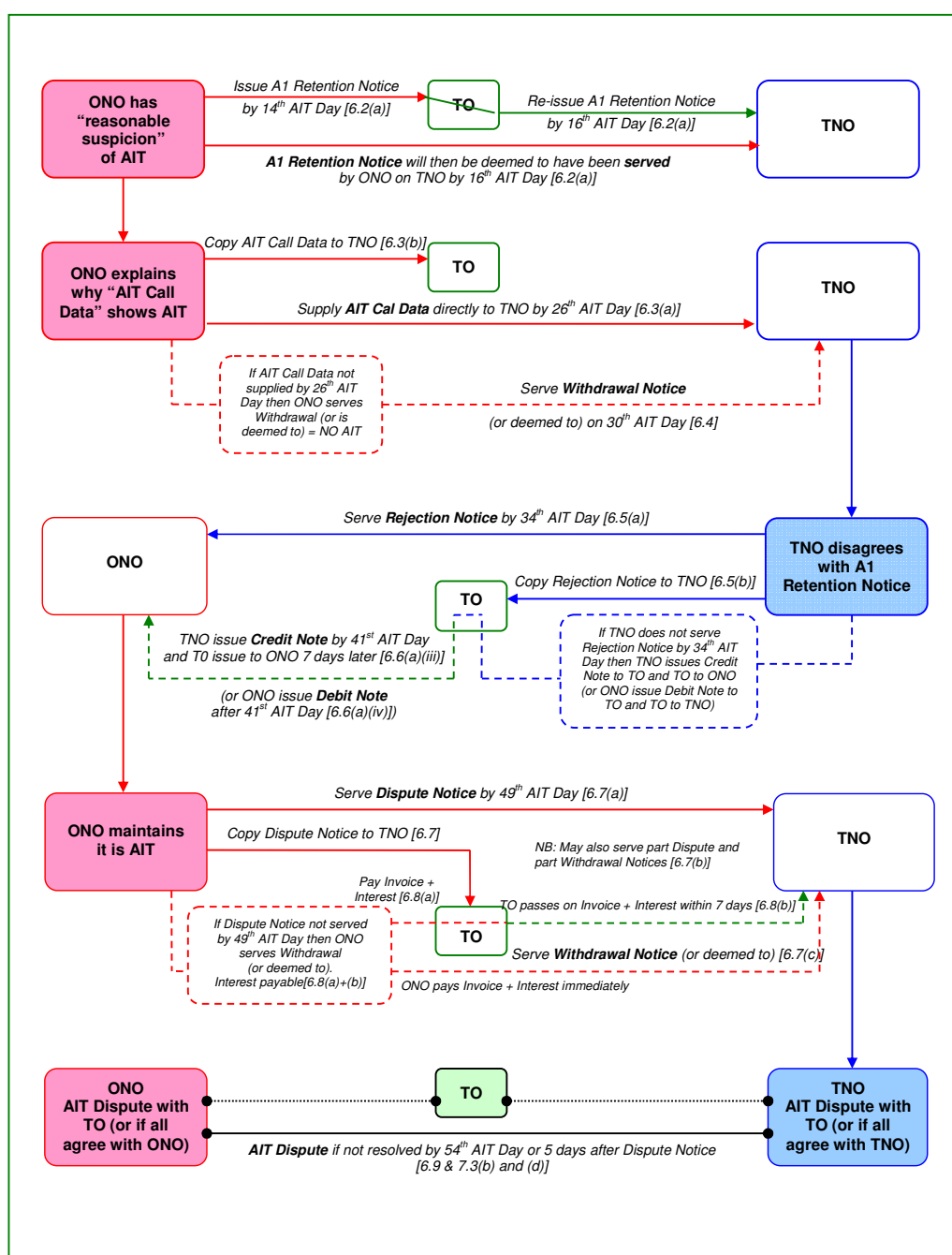
2.29 The revised Annex E sets timescales for each party in each phase of a retention and subsequent investigation as follows:

- (1) An A1 retention notice must be served by the 14th AIT calendar day (where the first calendar day is the first day of the month immediately after the call was made).
- (2) The ONO (via the TO where appropriate) must then supply the rationale for retaining the value of the AIT to the TNO by the 26th AIT calendar day.
- (3) If the TNO disputes the retention, it has until the 34th AIT calendar day to provide evidence to the ONO (in the form of an 'A3 rejection notice') as to the legitimacy of the traffic.
- (4) If the TNO does this, then the ONO can serve an 'A4 dispute notice' by the 49th calendar day, which means that a formal AIT dispute will be created in five days.
- (5) From the date that the dispute is opened, which will be the 54th calendar day, the parties have 10 months to reach a written settlement, enter a binding dispute resolution process or institute court proceedings.
- (6) After that time, the traffic will be deemed to be AIT and the relevant revenue will be retained by the ONO.

2.30 The diagram below helps to explain these timescales and the result on the process if they are not met.¹⁴

¹⁴ A similar process exists for non-transit retention where BT (or other TO) is not involved.

Figure 2.2 ONO initiated transit retention



2.31 **Structural changes**; changes are proposed to the structure of the current AIT process, which BT has said are intended to make the process work more efficiently. Three examples of this which are included in the revised Annex E are:

- (1) failure to meet one of the timescales above means that the investigation is resolved in favour of the other party;
- (2) BT would stand back from certain AIT investigations and/or disputes, where appropriate, to allow more direct contact between the ONO and the TNO; and

- (3) in the case of a dispute in a transit situation BT could (where all parties agree) assign to the TNO any rights to payment from the ONO in order that all retention issues can be settled solely between the ONO and the TNO.
- 2.32 BT believes these changes to the structure of the process would speed up and simplify the outcome of cases of suspected AIT, and would also relieve BT of some administrative involvement in each case.
- 2.33 **Interest payments**; the revised Annex E sets out changes to the way interest is paid on sums retained by the ONO. Currently the ONO is only obliged to pay interest on the sum released to the TNO which is calculated from the date six months after the payment would have been made were it not for the retention. The revised Annex E requires that the ONO pays interest which is calculated from the date when the payment would have been due were it not for the retention. This means that the interest payment due to a TNO, where the matter is resolved in the TNO's favour, will reflect the full period during which the sum was withheld. It is noted that, as in the current system, interest is only payable where the matter is revised in favour of the TNO.
- 2.34 **Justification for retention**; a change is proposed to the information which must be provided by the ONO following the issue of an A1 Retention Notice. This information effectively constitutes the evidence which supports the reason for the retention, that is to say the grounds which the ONO has for suspecting that the traffic is AIT. This information (the call data and the supporting information provided by the ONO) provides the basis on which the TNO can then investigate the matter. The revised Annex E stipulates that the ONO is obliged to provide the same information as in the current AIT process, but in addition it must provide a 'detailed written explanation' of why the call data supports a reasonable suspicion of AIT.
- 2.35 **Burden of proof**; the revised Annex E sets out two thresholds of proof which an ONO must reach in order to retain call traffic. In order to carry out an initial retention an ONO must have a 'reasonable suspicion' that AIT exists. In order to permanently retain the sum associated with the traffic, the standard of proof must rise to a 'strong and convincing suspicion'. The ONO will therefore have to satisfy a higher burden of proof in order to permanently retain any revenue withheld as a result of suspecting AIT.
- 2.36 **BT as transit operator**; BT proposes to extend the remit of its role as a transit operator to allow it to retain revenue independently of an ONO, where it has a reasonable suspicion of AIT and the revenue in relation to that traffic has not already been retained by the ONO. BT envisages using this power in 'exceptional circumstances' where it is the party which identifies the suspected AIT, rather than the ONO. We understand that this might be the case with particular types of AIT, such as 'missed call' and 'micro-short duration' types of call.

BT's reasoning for the changes

- 2.37 In its submission BT argues that although the current AIT process is a 'well established industry mechanism for dealing with fraud and AIT', the threat of AIT remains high particularly with new forms of technology expanding the opportunity for potentially fraudulent activities using communications networks.
- 2.38 In addition BT believes that:
- (1) the process is 'ageing',

(2) the definition needs to be future-proofed as far as possible. In other words definitions should be sufficiently broad to capture forms of AIT which could be developed in the future but which are not currently known; and

(3) the CP 'interfaces and process' need to be improved.

2.39 Without such improvement, it argues, there will be a detrimental impact on consumers who will be subject to far higher levels of fraudulent and scam-type activities. BT considers that a perceived weakness in the UK to deal effectively with such fraudulent activity may make it the target of more fraud from overseas than would otherwise be the case.

2.40 In its dispute submission, BT set out a number of objectives which the revised Annex E seeks to achieve. In summary these are:

- to simplify and speed up the process, and provide more structure to it;
- to clarify the roles and responsibilities of the parties and increase the onus on ONOs to provide better supporting information;
- to reduce the level of AIT fraud by widening the scope of the definition and by allowing BT to retain AIT independently of the ONO in certain circumstances; and
- to allow BT to stand back from an AIT investigation where appropriate, and therefore reduce BTs associated administrative burden and costs.

Section 3

History of the dispute

The parties to the dispute

BT

- 3.1 BT provides telecommunications services in the UK, including narrowband and broadband connection services; local national and international calls services, internet products and services and IT solutions. BT is both a provider of electronic communications networks and electronic communications services and, as such, is a communications provider, for the purposes of the Act.
- 3.2 BT is the UK's designated universal service provider which means that in the UK it provides service and facilities set out in the Universal Services Directive. BT has a PECN which all CPs who interconnect with BT (including all of the referred CPs) use to transit telephony traffic across BT's network for the purpose of providing a PECS.

The referred CPs

- 3.3 The referred CPs which are subject to this dispute are the following: 1RT Group; Bestway Communications; CFL Communications; Callagenix; Flextel; Mars Communications; Starcomm; and Telxl. Each of the referred CPs currently interconnects with BT, and each has either refused to agree the revised Annex E or has failed to engage in negotiation with BT about the proposed changes.
- 3.4 All but one of the referred CPs has provided information to Ofcom, and has met or discussed with us the particular concerns which have led to its decision not to sign the revised Annex E. The exception is Bestway Communications, which has not responded to our requests to engage on this matter.

History of negotiation on the AIT process

Ofcom determination in October 2001

- 3.5 On 1 October 2001 Ofcom made a Direction under the provisions of Regulation 6(6) of the Telecommunications (Interconnection) Regulations 1997 (the 'Ofcom Direction') which determined a dispute between BT and a number of CPs in relation to alterations BT wished to make primarily to AIT provisions of the SIA. This dispute is similar to the current dispute in that in both cases a number of operators have formally rejected or chosen not to sign up to the changes which BT is proposing to the terms of its SIA.
- 3.6 Ofcom's decision was made before the coming into force of the Communications Act 2003 and we have not considered the merits or otherwise of the Ofcom Direction in making its assessment or its draft determination in this case. However, it provides a useful reference point in considering the history of negotiation between BT and the rest of the industry on the terms of the SIA.

Consultation on the revised Annex E

- 3.7 As part of its correspondence with Ofcom, BT provided a summary of the development of the revised Annex E, from the 2002 SIA Contract review up to the

referral of the dispute to Ofcom on 6 March 2009. It provides an overview of the consultation which BT has undertaken with the industry generally, and the negotiation with the referred CPs prior to submission of the dispute. The period is divided into three phases and is summarised below.

Phase 1: 2002 SIA Contract Review to consultation with external Counsel in December 2003

3.8 A review of the AIT process was initiated by the 2002 review of the SIA contract.¹⁵ It appears that at least initially the scope of the review of the AIT provisions was limited to minor process changes. However during the course of negotiations between BT and industry the scope increased. By the end of 2002 the following areas of the process were under discussion:

- a broader definition of AIT;
- the current AIT indicators, and whether all of these were sufficient cause for continued non-payment;
- recognition that 'informal' contact as part of the AIT process was impractical and re-examination of the structure of notifications;
- the responsibility to deal with fraud beyond the current AIT process; and
- an idea that the TO should drop out of disputes in transit situations, leaving the ONO and TNO to investigate between themselves where possible.

3.9 In December 2003 following further industry discussion BT submitted the relevant documentation to external legal Counsel in order to obtain external advice in relation to the proposed process changes above. Iteration with Counsel ran through to March 2004. Counsel suggested the following:

- keep the ONO's right to retain on suspicion of AIT; but require more stringent criteria for continued non-payment;
- develop more structured iterations between the parties, namely the following documents:
 - A1 Notice – ONO Retention Notice (this is the document now recognised as the A1 Retention Notice);
 - A2 Notice - TNO Counter-Notice (i.e. if TNO disputes A1);
 - A3 Notice - ONO Withdrawal Notice (i.e. if ONO withdraws all or part of retention as a result of the Counter-Notice); and
 - A4 Notice - ONO Dispute Notice (i.e. if ONO rejects all or part of the Counter-Notice).
- clarify that receipt of payment by the ONO does not prevent the operation of the AIT process;
- introduce an A5 Fraud Notice (which should be similar to the A1 Retention Notice but not restricted time-wise in a fraud situation);

¹⁵ The SIA Contract review is a biannual opportunity for BT and CPs to negotiate common amendments to the SIA, given that the SIA needs to apply universally to all CPs which interconnect with BT.

- introduce an A6 Mispayment Notice (which would give the ability to flag that a payment has been made, although this has since been recognised as inappropriate);
- propose that transit disputes are dealt with directly between the ONO and the TNO; and
- introduce a process to resolve disputes, with the possibility of a reference to an expert adjudicator.

3.10 The extent of the changes suggested by Counsel meant that a decision was taken to re-address the principles of the process rather than continue detailed discussion of contractual text. Therefore a summary of the proposals, referred to by BT as the 'Storyboard', was prepared by BT to consult with the rest of the industry on the wider context of the changes.

Phase 2: Counsel opinion in early 2004 to February 2008 industry consultation

3.11 BT issued the Storyboard to wider industry in June 2004. That led to renewed negotiations which ran through to mid 2005. From mid 2005, BT asserts that its attempts to move the process on were slowed by a number of issues which needed to be addressed. These can be summarised as follows:

- BT recognised that new types of fraudulent activity were emerging in call traffic on its network. This meant that BT had to divert AIT attention away from the longer term solution in order to take urgent contract action on a number of telephony services (including personal numbering and virtual mobile calls);
- a perceived need was identified for the process to allow BT, in its role as a TO, to initiate A1 Retention Notices independently of the ONO where BT rather than the ONO is the party which suspects AIT;
- there was a growing awareness within BT of the impracticability of arbitration as a generic solution for AIT disputes, and particularly for transit cases where three parties are involved (the ONO, the TO and the TNO). Contractually these would need to involve two arbitrations, one between the TNO and BT, and the other between BT and the ONO. The risk would therefore be that the first arbitration might decide that AIT did not occur and find for the TNO (meaning BT would be obliged to pay the TNO) whereas the second arbitration might decide there was AIT and find for the ONO (which would mean the ONO would not pay BT); and
- there was a need for further input from the BT Litigation team and from external Counsel.

3.12 These issues meant that recommencement of round-the-table negotiation was effectively stalled until May 2006. After this time the discussions began again and by May 2007 it appears that an agreed process was close to being finalised.

3.13 BT considered that it would be appropriate to subject the new revisions to review by external Counsel for a second time to ensure that the process was still robust. Counsel confirmed the process and general drafting in January 2008, proposing only minor drafting refinements. BT therefore submitted the final draft to the industry group in January, which led into the February 2008 industry consultation phase.

Phase 3: Industry consultation in February 2008 to dispute submission

- 3.14 On 1 February 2008 BT initiated a consultation with all SIA CPs by issuing the Interconnect Notification 077/08 dated 1 February 2008.¹⁶ Interconnect Notification 077/08 set out the consultation process and informed CPs of a website containing briefings in relation to the new process, an indicative flow chart of the new process, a copy of the proposed revised Annex E and a summary of the impact on Annex D (which contains the current AIT definition).
- 3.15 Interconnect Notification 077/08 also explained to CPs that implementation of the revised AIT process would require the agreement of all CPs, and the amendment of all currently signed SIAs. Responses to the consultation were requested by 28 February 2008.
- 3.16 BT received formal consultation responses from the following seven CPs:
- QX Telecom;
 - Telx;
 - Flextel;
 - IV Response;
 - Global Crossing;
 - Cable & Wireless; and
 - 3HG.
- 3.17 After informal discussion with Ofcom, on 8 April 2009 BT also briefed the following industry bodies:
- Federation of Communications Services;
 - Telecommunications UK Fraud Forum;
 - Association for Interactive Media and Entertainment (AIME - formerly NOC);
 - Premium Rate Association; and
 - PhonepayPlus.
- 3.18 Following consideration of the consultation responses, on 17 April 2008 BT issued the latest version of Annex E (which is the revised Annex E) to interested CPs which had been involved in the development of the new process (the 'industry group').
- 3.19 On 23 April 2008 BT reviewed the amended text and rationale with the industry group, prior to reviewing the consultation responses at the Standard Contract Forum on 24 April 2008.
- 3.20 All CPs were then briefed via Interconnect Notification 121/08 dated 14 May 2008.¹⁷ Interconnect Notification 121/08 outlined the changes made as a result of the consultation and explained the intention to issue the Supplemental Agreement to all CP signatories.

¹⁶

http://www.btwholesale.com/pages/downloads/service_and_support/contractual_information/docs/aitreview/Updated_Artificial_Inflation_Traffic_Standard_Interconnect_Agreement_07708.pdf

¹⁷

http://www.btwholesale.com/pages/downloads/service_and_support/contractual_information/docs/aitreview/Artificial_Inflation_Traffic_Standard_Interconnect_Agreement_12108.pdf

CP involvement and representation

- 3.21 We understand that CP involvement and participation in the development of the new proposals has changed over time, both in terms of those attending discussions and those receiving related correspondence. BT states that Standard Contract Forum¹⁸ documentation was sent to all CPs which asked to be included on the distribution list, and is also available on the relevant part of the BT website. In addition, we understand that the BT Contract Review Notice which originated the 2004 General Contract Review reminded all CPs of the ongoing AIT industry negotiations, and that this was sent to all CP signatories.

Dispute referral to Ofcom

- 3.22 By 6 March 2009, which was the date on which BT submitted its dispute to Ofcom, 110 CP signatories had signed the Supplemental Agreement. BT required the agreement of 12 further CPs in order to achieve the agreement of all the parties signed up to the SIA, and to be in a position to implement the revised Annex E. Despite negotiations, BT was unable to secure the agreement of these remaining 12 CPs and for this reason BT considered itself in dispute with each of them and referred the matter to Ofcom for resolution.
- 3.23 BT stated that seven of the 12 CPs had refused to agree the terms of the revised Annex E, and the remaining five CPs had failed to respond to BT's written notifications or emails on the matter.
- 3.24 The seven CPs which refused to sign the Supplemental Agreement were 1RT Group, Tele-Lynx, Flextel, Telxl, Starcomm, CFL Communications and Mars Communications. These CPs have raised a number of concerns and reasons for their refusal to agree the new process. These concerns and reasons are assessed in detail in **Section 5**.
- 3.25 The remaining five CPs did not respond to BT's written correspondence, namely Bestway Communications, Callagenix, Prodigy, [X] and Vectone.

Assessment of whether to accept the dispute

- 3.26 Sections 185 to 191 of the Act set out Ofcom's dispute resolution powers. They apply to disputes relating to the provision of network access and to other disputes relating to the rights and obligations conferred or imposed by or under Part 2 of the Act. Section 186 of the Act requires Ofcom to resolve a dispute referred to it under section 185 once it has decided in accordance with section 186(2) to handle the dispute. Ofcom's remedial powers for resolving disputes are set out in section 190 of the Act.
- 3.27 Having considered BT's submission and comments made by the referred CPs, we were satisfied that the dispute that BT had asked Ofcom to resolve is a dispute between CPs relating to network access. In particular, we consider that this dispute is in relation to the terms and conditions on which network access is provided by BT to each of the referred CPs, in accordance with section 185(8)(a) of the Act.
- 3.28 On the basis of the history of negotiations set out above, we concluded that BT had suspended commercial discussions and that the matters in dispute would not be

¹⁸ The Standard Contract Forum is used to discuss developments and issues relating to the SIA.

resolved through further negotiation, or through further attempts to contact the CPs which did not respond to BT's attempts to contact them.¹⁹

- 3.29 We also noted that in order for the changes to take effect, the provisions would need to be agreed by all parties to the SIA. For this reason we considered that there was little scope for BT to resolve the dispute by alternative means.
- 3.30 On 30 March 2009 we decided that it was appropriate for Ofcom to handle this dispute for resolution on the basis of section 186(3) of the Act. We do not consider that there are alternative means available for resolving this dispute which could provide a prompt and satisfactory resolution.
- 3.31 On 30 March 2009 we informed BT and the referred CPs of this decision and published details of the scope of the investigation for consultation on its on-line Competition and Consumer Enforcement Bulletin.²⁰
- 3.32 Ofcom received only one set of comments on the scope, from Flextel. In summary, Flextel was concerned about whether the scope was sufficiently broad to enable Ofcom to take proper account of its underlying criticisms of the existing AIT process. Whilst the dispute focuses on the amendments, as noted at paragraph 5.5 below, it is not possible to assess these concerns without also considering the context of concerns about the current AIT process. However, we did not consider the wording of the scope needed to be changed to take this approach.
- 3.33 Following consideration of Flextel's comments, the scope of the dispute remained unchanged from that published on 30 March 2009:

'The scope of the dispute is to determine whether it is fair and reasonable to amend the existing SIA provisions in relation to AIT to reflect the changes entailed by BTs proposed Annex E (including changing the definition of AIT, the process for retaining monies where AIT is suspected and the associated dispute resolution procedure).'

The parties to the dispute

- 3.34 Following receipt of the dispute referred by BT, we contacted each of the referred CPs informally to ascertain their respective positions on the dispute. In particular, we sought to confirm BT's view that each of the referred CPs did not wish to sign the Supplemental Agreement.
- 3.35 During the course of our discussions with the referred CPs, it became clear that three of these CPs, namely Tele-Lynx, [X] and Vectone, had not reached a definitive view on whether to sign the Supplemental Agreement. We therefore requested that these CPs affirm whether or not they wished to sign and, in doing so, whether or not they considered themselves to be in dispute with BT on this matter. As a result [X], Tele-Lynx and Vectone each signed the Supplemental Agreement (on 25 March 2009, 27 March 2009 and 17 April respectively), and BT confirmed to Ofcom that it no longer considered that it was in dispute with each of these three CPs.
- 3.36 In addition, we became aware during the early part of the investigation that BT had suspended the interconnect facility of one of the referred CPs, namely Prodigy. We

¹⁹ In submitting the dispute, BT indicated that it was willing to continue dialogue with any or all of the CPs referred. However it believed that further negotiation would not achieve agreement, and therefore that the period for negotiation had closed.

²⁰ http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_01013/

therefore asked BT to confirm whether or not it would be content to remove Prodigy from the list of referred CPs in dispute, and on 29 April 2009 BT confirmed that it was content for Ofcom to do so.

- 3.37 We have therefore conducted its investigation having regard only to the eight remaining referred CPs which have chosen not to sign the Supplemental Agreement, namely 1RT Group, Bestway Communications, CFL Communications, Callagenix, Flextel, Mars Communications, Starcomm and Telxl.

Information sought by Ofcom

The referred CPs

- 3.38 Some of the referred CPs had raised issues with BT during the course of the development and consultation on the revised Annex E. It was apparent that some of the referred CPs objected to one or more of the fundamental principles upon which the current AIT process is based, as well as specific aspects of the changes. In light of this, we sought a range of information from the referred CPs, which related to both the revised Annex E *and* the principles underlying the current AIT process, using its formal powers under section 191 of the Act. The requested information included:

- details of the number and type of A1 Retention Notices issued against the relevant CP over the last 12 months;
- whether or not the relevant CP agreed with the principles underlying the AIT process and reasons for disagreement where appropriate;
- details of any involvement the relevant CP had had with the development of the revised Annex E;
- the relevant CP's view on the revised AIT definition;
- examples of the type of information received by the relevant CP from ONOs where it was subject to an A1 Retention Notice;
- the relevant CP's view on the concept of an independent third party holding retained revenue (rather than the ONO) until completion of the investigation and/or after completion;
- the relevant CP's view on BT issuing A1 Retention Notices independently of the ONO in its role as a TO;
- the relevant CP's view on the dispute resolution process; and
- any evidence which the relevant CP may have on how the proposed changes may affect its business.

- 3.39 Following receipt of the written information and evidence requested, Ofcom offered each of the referred CPs the opportunity to meet with us to discuss their particular concerns. From the CP's responses and further discussions, it emerged that individual concerns fell broadly into a number of common categories. We have therefore categorised the issues into four broad themes, to form the basis of our analysis in Section 5.

BT

- 3.40 Following consideration of the dispute submission, we requested more information from BT on the various aspects of its proposed changes. This information included
- an overview of the A1 Retention Notices handled by BT in the previous 12 months;
 - detail on the timeline for the development of the revised Annex E;
 - the safeguards against abuse of the process;
 - detail on the information which an ONO would need to provide to support an A1 Retention Notice;
 - detail on how revenue retained due to AIT are applied by BT, and BT's view on a third party (rather than the ONO) retaining such revenue; and
 - greater detail on AIT Disputes and the dispute resolution process.
- 3.41 We also met with BT to discuss the key concerns which had been raised by the referred CPs, and to gain a better understanding of the issues in dispute, particularly in relation to retention of revenue related to the new and emerging forms of AIT.

PhonepayPlus

- 3.42 We also sought the views of PhonepayPlus to gain a better understanding of issues relating to the regulation of PRS traffic and dealing with suspected fraudulent activity. This was helpful in shaping our thinking on the co-operation needed between parties in order to deal efficiently and effectively with AIT and fraudulent traffic.

Section 4

Ofcom's statutory obligations and regulatory principles

- 4.1 Sections 3 and 4 of the Act set out, respectively, the general statutory duties of Ofcom and Ofcom's duties for the purpose of fulfilling Community obligations with respect to, among other things, Ofcom's dispute resolution function under Chapter 3 of Part 2 of the Act.
- 4.2 Section 3(1) of the Act sets out Ofcom's principal duties in carrying out its functions:
- “(a) to further the interests of citizens in relation to communications matters; and
 - (b) to further the interests of consumers in relevant markets, where appropriate, by promoting competition.”
- 4.3 The things which, by virtue of its principal obligations, Ofcom is required to secure in the carrying out of its functions include, according to section 3(2) of the Act:
- “(a) the optimal use for wireless telegraphy of the electro-magnetic spectrum;
 - (b) the availability throughout the United Kingdom of a wide range of electronic communications services;
 - (c) the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests;
 - (d) the maintenance of a sufficient plurality of providers of different television and radio services;
 - (e) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services; and
 - (f) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both –
 - (i) unfair treatment in programmes included in such services; and
 - (ii) unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.”
- 4.4 Section 3(3) of the Act provides that in performing its principal duties, Ofcom must have regard, in all cases, to:

“(a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and

(b) any other principles appearing to Ofcom to represent the best regulatory practice.”

- 4.5 Section 3(4) of the Act sets out a number of principles which Ofcom must have regard to in performing its principal duties where it appears to Ofcom that they are relevant, including the desirability of promoting competition in the relevant markets and the desirability of encouraging investment and innovation in the relevant markets.
- 4.6 In performing the principal duty of furthering the interests of consumers specifically, section 3(5) of the Act provides that Ofcom must have regard, in particular, to the interests of those consumers in respect of choice, price, quality of service and value for money.
- 4.7 Section 4 of the Act provides that, in determining disputes referred to it under section 185 of the Act, Ofcom must act in accordance with the six Community requirements which give effect, amongst other things, to the requirements of Article 8 of the Framework Directive. In summary, those requirements are:
- to promote competition in communications markets;
 - to secure that Ofcom contributes to the development of the European internal market;
 - to promote the interests of all European Union citizens;
 - to act in a manner which, so far as practicable, is technology-neutral; and
 - to encourage, to the extent Ofcom considers it appropriate, 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; and
 - to encourage such compliance with certain international standards as is necessary for facilitating service interoperability and securing freedom of choice for the customers of communications providers.
- 4.8 Where it appears to Ofcom that any of its general duties under section 3 of the Act conflict in the resolution of a dispute, Ofcom has the discretion to secure that the conflict is resolved in the manner it thinks best in the circumstances.²¹ Similarly, Ofcom has the discretion to secure that any conflict of the Community requirements set out in section 4 of the Act are resolved in the manner it thinks best in the

²¹ Section 3(7) of the Act. Note that where Ofcom resolves a conflict in an important case between the duties in sections 3(1)(a) and 3(1)(b) it must publish a statement setting out the nature of the conflict; the manner in which they have resolved to resolve it; and the reasons for their decision to resolve it in that manner (section 3(8) Act). A matter is “important” if it involves a major change in the activities carried on by Ofcom; or it is likely to have a significant impact on persons carrying on businesses in any of the relevant markets; or it is likely to have a significant impact on the general public in the UK or a part of the UK; or it otherwise appears to Ofcom to have been of unusual importance.

circumstances.²² Where it appears to Ofcom in the exercise of its dispute resolution functions that any of its general duties under section 3 of the Act conflict with one or more of its duties under section 4 of the Act, priority is given to the duties set out in section 4 of the Act.²³ A summary of Ofcom's duties and their application to this case is included in Annex 4.

4.9 Ofcom also exercises its regulatory functions according to the following regulatory principles:

- Ofcom will regulate with a clearly articulated and publicly reviewed annual plan, with stated policy objectives;
- Ofcom will intervene where there is a specific statutory duty to work towards a public policy goal which markets alone cannot achieve;
- Ofcom will operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required;
- Ofcom will strive to ensure its interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome;
- Ofcom will always seek the least intrusive regulatory mechanisms to achieve its policy objectives;
- Ofcom will research markets constantly and will aim to remain at the forefront of technological understanding; and
- Ofcom will consult widely with all relevant stakeholders and assess the impact of regulatory action before imposing regulation upon a market.

²² Section 4(11) of the Act.

²³ Section 3(6) of the Act.

Section 5

Assessment of the issues

Ofcom's approach

Scope of the dispute

- 5.1 In its dispute submission, BT set out details of the differences between the current AIT process and the proposed new process contained in the revised Annex E. BT argues that although the current AIT process is 'a well-established industry mechanism for dealing with fraud and the artificial inflation of traffic under the SIA', it is nevertheless 'ageing and the definition needs to be broadened and, insofar as possible, future-proofed'. BT goes on to say that 'it has been recognised by BT and other major players since the 2002 General Contract Review that the scope and the CP interfaces and process needed to be improved.'
- 5.2 BT makes clear that each of the referred CPs has chosen not to sign the Supplemental Agreement, which incorporates 'improved provisions for the management of artificially inflated (including fraudulent) traffic.' BT therefore requested that Ofcom '[D]etermine that the changes to the SIA [...] are appropriate and applicable [to the referred CPs].'
- 5.3 BT's view is therefore that in conjunction with the industry group it has developed a series of improvements which the revised Annex E would facilitate in a process which is in need of updating and refinement. BT adds that the fact that the referred CPs have chosen not to sign up to the Supplemental Agreement means that the revised Annex E, and therefore the improvements, cannot be implemented. The essence of the dispute therefore concerns the applicability and appropriateness of the changes as they relate to the referred CPs.
- 5.4 In contrast, the referred CPs have in general taken a broader approach to consideration of the facts of the dispute. As can be seen from the analysis below, it is clear that the issues which have been raised by the referred CPs cover not only the proposed changes to Annex E but also the underlying AIT process, that is to say aspects of the process which have not been consulted on and would not change if the revised Annex E was in effect. Some of these issues extend to the fundamental principles upon which the process is based, such as the fairness of one party retaining revenue either temporarily or permanently (the ONO). One CP objects to having any sort of AIT process and thinks that it is not necessary, while others accept the principle but express concerns that the amendments would exacerbate what they see as flaws already apparent in the current AIT process.

Themes

- 5.5 In light of the extent and broad range of views expressed, we consider that although the scope of the dispute relates only to the amendments proposed to the process, it is not possible to assess these concerns without also considering the context of concerns about the current AIT process.
- 5.6 Taking this into account, our approach to assessing the range of issues has been to group them into four themes, each of which covers one aspect of the AIT process.

Under these themes we set out BT's proposed changes and the views expressed by the referred CPs. We then set out our view and our preliminary conclusions.

5.7 The four themes are:

- The fairness of the process;
- The definition of AIT;
- BT's role as a transit operator; and
- The dispute resolution process.

5.8 We now turn to consider each of these themes below.

Theme 1 Fairness of the process

Introduction

- 5.9 One of BT's core objectives in the revised Annex E is to place a 'far greater onus' on ONOs to justify the need to withhold revenue based on suspicion of AIT. The ONO would also have to satisfy a higher burden of proof in order to permanently retain the withheld sum (a "strong and convincing suspicion" test replaces "reasonable suspicion" for permanent retention), and would be required to pay a greater level of compensation to a TNO if the matter is resolved in the TNO's favour.
- 5.10 The referred CPs questioned whether the AIT process represents a fair balance between the interests of ONOs and TNOs. Several of the referred CPs suggested that the ability of the ONO to retain revenue at the expense of the TNO means that there is an inherent advantage afforded to the ONO by the AIT process which the revised Annex E does not address.

Summary of BT's changes

- 5.11 The key change which BT proposes relative to this theme is to require the ONO (or the TO where the revised Annex E would allow it to retain) to supply an explanation, in writing, for retaining sums. This information must be supplied in specified timescales otherwise the initial A1 Retention Notice will be deemed to have been withdrawn and the revenue must be released. This information should constitute a detailed written explanation which supports the 'reasonable suspicion' of AIT that the ONO must have in order to retain.
- 5.12 BT also proposes to introduce a two tier threshold for retentions. Firstly, the revised Annex E sets out that in order to retain in the first instance, the ONO must have a 'reasonable suspicion' of AIT, having regard to the definition of AIT and whether or not there is an absence of good faith usage or acceptable and reasonable commercial practice. Secondly, to retain permanently, the ONO is required to have a 'strong and convincing suspicion' of AIT, i.e. a higher threshold than that for originally retaining the sum.
- 5.13 In addition, BT proposes to alter the way in which interest is payable on sums retained by the ONO. Currently, ONOs are expected to begin paying interest on any retained sum after six months. Under the revised Annex E, interest becomes payable immediately at LIBOR plus 4%,²⁴ if the matter is resolved in favour of the TNO. BT considers that the payment of interest on any revenue retained immediately rather than after six months will deter claims which lack a strong basis.

Views expressed by the referred CPs

- 5.14 We now turn to consider the views expressed by the referred CPs about the roles of the respective parties in the process.

The principle of ONO retention

- 5.15 Some of the referred CPs, although not all, argued that the revised Annex E does not address the overarching imbalance in the process, namely that one party (the ONO) retains the proceeds of AIT. Unfairness results from the principle that the ONO both

²⁴ Interest is calculated from the date the payment would have been due to the date the payment is released.

judges whether traffic can be reasonably suspected of being AIT *and* holds any resulting revenue pending investigation. This perceived unfairness is exacerbated by the fact that the ONO retains the revenue permanently if the traffic is deemed to be AIT. Some argued that the very concept that an ONO, who may be a direct competitor of the TNO in a given market, can take the decision to withhold a revenue stream from a TNO, is unfair regardless of whether the traffic is AIT. This led on to the suggestion that an independent third party should be responsible for performing one or more roles in the AIT process, such as investigating AIT claims, adjudicating on disputes and/or retaining withheld revenue.

- 5.16 Some TNOs felt that the ONO retention principle fosters the assumption that responsibility for AIT is largely down to the TNO, when this is not necessarily the case. Indeed several of the referred CPs provided examples of circumstances when an ONO may benefit from the current AIT process, as a means of mitigating errors in their own operations.
- 5.17 One example which was provided to Ofcom is the use of pre-paid SIM cards to dial 09 numbers. In this scenario, a mobile operator may advertise a pre-paid SIM card offer to the public in a misleading fashion, such as offering bundles of 'free' minutes which are in fact subject to 'fair use' policies or similar conditions. A customer may take advantage to deliberately abuse the offer, which may have a detrimental effect on the mobile operator. However, the mobile operator may use anomalies in the resulting traffic as the basis for a retention as it fits one or more of the AIT indicators. In this case the operator may therefore gain revenue both from the end user who bought the SIM card, and by virtue of withholding the revenue generated created by the traffic sent to the TNO, from that TNO.
- 5.18 As a result of this type of possible scenario, the referred CPs expressed the belief that the current AIT process created a set of perverse incentives for ONOs to retain revenue in the absence of reasonable suspicion of AIT, not to take steps to limit abuse of its own tariffs, and to delay the swift resolution of dispute retentions. Some of the referred CPs argued that the AIT process will remain flawed until this underlying issue is resolved.

Burden of proof

- 5.19 Many of the referred CPs questioned whether the changes to the burden of proof would improve the AIT process in practice. They argued that the concepts of 'reasonable suspicion' and 'strong and convincing suspicion' are too vague to be enforceable, and the need to prove reasonable suspicion in particular will not deter ONOs from withholding revenue. By setting a relatively low threshold of proof for retentions, the argument runs that it is comparatively easy for the ONOs to have a materially detrimental impact on a competitor's revenue stream. In effect, the ONO would have the ability to control the revenue passed on to the TNO. This is particularly the case with services that tend to generate traffic which does not follow 'normal' patterns, such as premium rate services.

Greater justification by ONOs

- 5.20 The referred CPs expressed doubt over whether the obligation on ONOs to provide greater justifications for retaining sums would affect the required change in the behaviour of some ONOs. One referred CP suggested that ONOs should be required, as part of the process of retaining suspected fraudulent AIT, to obtain and supply a crime reference number ('CRN'). This, it argues, might have the dual effect

of further filtering out unscrupulous claims and encouraging more accurate reporting of criminal activity in the sector.

- 5.21 Some of the referred CPs argue that the current AIT process gives ONOs effective control over the revenue streams of downstream operators. While it may be the case that the requirements to provide better supporting evidence and pay interest immediately would improve the process, the revised Annex E does not go far enough to prevent abuse of the system. Some assert that the only way to remove the potential for abuse is to introduce an independent third party into the system which would be responsible for holding any AIT revenue, thus removing any incentive from the ONO to retain without due cause.

Ofcom's view

- 5.22 In relation to this set of issues, the overarching consideration appears to be whether the AIT process is fundamentally flawed in that it creates an incentive for ONOs to retain larger sums in a broader set of circumstances than is fair to TNOs, their customers and consumers generally, and a disincentive for ONOs themselves to take steps to limit AIT.

Retention by the ONO

- 5.23 We consider that the concept of withholding revenue, where there is reasonable suspicion of AIT, is a proportionate and legitimate way in which to deal with the problem. The principle behind retention is to prevent the associated AIT revenue from reaching the party or parties who were responsible for that AIT, and to discourage such activities in the interests of consumers. We consider that this is a legitimate aim which is consistent with Ofcom's duties under sections 3 and 4 of the Act.
- 5.24 The question then arises as to whether the ONO should be the party to retain revenue in circumstances where it identifies patterns giving rise to reasonable suspicions of AIT (we consider the issue of extending the process to TO retentions separately). A number of parties could retain such sums instead, notably the TNO, its customers or an independent third party (some referred CPs suggested PhonepayPlus). We consider that each of these options has drawbacks:
- Retention by the TNO would significantly reduce the incentive for TNOs to monitor service providers' activities and indeed could create an incentive to deal with service providers involved in generating AIT. Even having regard to the fact that service providers can be several steps removed from TNOs and ONOs also bear some responsibility for preventing AIT, we consider that this is a major disadvantage.
 - Retention by the TNO's customers would raise the same problem and additionally make it harder to recover sums which are established as being AIT due to the lack of a contractual link (there is no privity of contract between the ONO and TNO but they are all party to equivalent SIAs with BT).
 - We discussed with PhonepayPlus the possibility of their retaining sums as an independent third party. Whilst not opposed in principle to such a proposal, they noted that they are not resourced or structured to put such a scheme in place in the immediate future. Any such scheme would require the development of

detailed proposals with input from a range of stakeholders, and an assessment of whether the overall benefits would outweigh the additional cost.

- 5.25 We considered the points made by the referred CPs, in particular the concern that there may be some incentive for ONOs to make AIT retentions to boost revenue in the absence of reasonable suspicion and not to cooperate fully to resolve disputes. However, we consider that the revisions include adequate safeguards and in fact reduce the risk of abuse compared with the current process and compared with the alternatives which we have considered.
- 5.26 This is not to say that there are no alternatives to the current process which may merit consideration; however the concept of the ONO retaining funds does not appear to Ofcom to be unfair or unreasonable. Retention by a third party in particular has some merits and we set out our view that BT should examine this concept further, as part of its report to Ofcom, in Section 6. However in the absence of a more developed proposal, it is not clear that such a scheme would necessarily be efficient and effective, and the mere fact that it might represent an improvement does not necessarily imply that the proposed AIT process is in itself unfair or unreasonable.

Fairness of changes

- 5.27 We consider that each change in this area put forward by BT represents an improvement on the current AIT process as it will make retention more rather than less onerous for the ONO and therefore discourage the frivolous retentions or abuses of the system which referred CPs are concerned about. Under the revised Annex E the ONO would be required to provide a 'detailed written explanation' to TNOs following a retention, have a 'strong and convincing suspicion' in order to retain the sum permanently and pay interest on any sum which is released to the TNO which commenced from a much earlier point in the investigation. These are all requirements which are not part of the current AIT process.
- 5.28 We are therefore of the view that these particular changes are fair and reasonable because they go towards tightening up the process and making it more equitable in terms of what is expected from the ONO. We believe the changes would be consistent with Ofcom's duties under sections 3 and 4 of the Act. In particular, it makes self-regulation more effective by increasing the onus on ONOs to explain retentions, to take further steps to establish a 'strong and convincing suspicion' following initial retention and to pay interest from initial retention.

Additional requirements on ONOs

- 5.29 Several of the referred CPs suggested that ONOs should provide evidence of harm caused by the AIT where appropriate. This might include complaints from the bill payer where he or she is victim of a scam, or a crime reference number obtained from the Police where there is suspicion of fraud.
- 5.30 We do not consider that there should be additional requirements placed, beyond those in the revised Annex E, on ONOs following a retention unless it would serve to make unjustified retentions less likely and improve the prospects for early resolution of disputed retentions, without unduly discouraging justified retentions, by imposing a disproportionate administrative burden on ONOs or other bodies such as the Police.
- 5.31 For example, although AIT is by its very nature traffic which has been generated illegitimately, we do not consider that ONOs should generally be obliged to refund end users not least because the relatively small sums which may be involved per

customer would create a disproportionate administrative burden. Further, it may be the case that a refund is not appropriate in certain types of AIT (e.g. where misuse of SIM cards is a factor).

- 5.32 We recognise that a party which can initiate retentions may obtain a windfall, at least until the matter is resolved. However we do not consider, based on the evidence received, that the likely extent of such a windfall is sufficient to call into question the legitimacy of the process as a whole. Nor do we consider it appropriate or proportionate to impose a 'solution' as part of the dispute process which does not allow the sort of thorough consultation required.
- 5.33 In relation to crime reference numbers, we consider that in many cases it may be appropriate for either an ONO or TNO to report suspicions of AIT to the Police, particularly if the "reasonable suspicion" that gave rise to the initial retention is elevated to a "strong and convincing suspicion" for the purposes of permanent retention on further investigation. However, we do not consider that it would be reasonable or proportionate to require a report to be made before issuing a retention notice in all cases, merely as a mechanism to impose an administrative burden and discourage the issue of notices.
- 5.34 However, we would expect BT to provide guidance to ONOs on the sort of information which BT would envisage being supplied as part of the revised Annex E, and in particular what constitutes 'detailed written evidence'. BT occupies a unique position in the process where it has sight of the majority of the retentions made, and the accompanying evidence which is supplied. This puts it in a good position to assess the validity and appropriateness of the retentions and to issue guidance.
- 5.35 We believe the changes proposed by BT to the onus on ONOs would be consistent with Ofcom's duties under sections 3 and 4 of the Act. We would be concerned that the additional requirements proposed by some referred CPs could risk imposing an undue burden, making self-regulation less effective and discouraging some legitimate retentions. However, further changes should not be ruled out depending on the experience of all parties of the revised process, in particular the conduct of ONOs in complying fully with the additional obligations imposed upon them by Annex E.

Burden of proof

- 5.36 Ofcom considers that a two-stage process is appropriate because the initial retention must be made merely on the basis of traffic observed by the ONO or the TO. However the higher second threshold for permanent retention implies that the ONO must consider any innocent explanation for the observed traffic flow.
- 5.37 Although the basis for the initial retention is 'reasonable suspicion', Ofcom considers that it is balanced by the increased onus on the ONO to detail its grounds for suspecting AIT, and also the new timeframes set out in the revised Annex E for moving the process on, which should mean that any retention is limited in duration if the matter is resolved in favour of the TNO.
- 5.38 We take the view that, were an ONO to fail to engage with any substantive evidence or explanation following an initial retention, it is unlikely that a court or arbitrator would consider that 'reasonable suspicion' had been elevated to a 'strong and convincing suspicion'. We consider that given the varying nature and scale of retentions, it would not be appropriate for the process as set out in the SIA to be overly prescriptive on what form this engagement should take.

- 5.39 We do however believe that there is a role for BT to play in developing a greater level of detail on how an ONO might achieve the threshold of 'strong and convincing suspicion' which would be required under the revised Annex E for an ONO to permanently retain AIT revenue.
- 5.40 We believe the changes in relation to the burden of proof would be consistent with Ofcom's duties under sections 3 and 4 of the Act and represent a fair balance between the parties by allowing initial retention based on observed traffic flow whilst requiring engagement between the parties to establish a 'strong and convincing suspicion' based on the actual nature of the traffic.

Theme 2 The definition of AIT

Introduction

- 5.41 This theme covers BT's proposal to broaden the definition of AIT and revise the AIT indicators accordingly to reflect new and emerging types of AIT which are not covered under the current provisions.
- 5.42 BT asserts that the AIT definition and the AIT indicators contained in the revised Annex E have been subject to extensive discussion and consultation with industry and external Counsel. BT also asserts that whilst it wishes to extend the definition, it also intends that it is not so wide as to encourage ONOs to submit flippant claims which cannot be suitably justified.
- 5.43 The view put to Ofcom by a number of the referred CPs is that the new definition would make it easier for retentions to be made, and the number will rise accordingly. It would give an ONO more scope to retain based on its opinion of what 'good faith usage' or 'reasonable commercial practice' is, as these terms are not defined. This view is supported by the belief that AIT monitoring systems used by ONOs to spot suspected AIT traffic will be programmed to identify a wider range of call patterns. These calls could then be subject to retention, whether the traffic is legitimate or not.

Summary of BT's changes

- 5.44 A change to the definition of AIT was one of the core issues proposed early on in the discussions on the AIT process following the 2002 SIA Contract Review. BT states that this was because of evidence which was emerging of new types of AIT which are not captured under the current definition. BT asserts that from November 2002, a broader definition of AIT was under active discussion which culminated in the definition proposed in the revised Annex E.
- 5.45 BT's objective was to widen the scope of the definition to cover 'new' types of AIT activity, some of which are fraudulent and which are not necessarily restricted to premium rate services or revenue share services. Examples of the new types of AIT provided by BT in its dispute submission include the following:
- calls to other NTS numbers; such as 0870 and 0871 prefix numbers, potentially calls to mobiles and the new 03 UK-wide numbers. These may be charged at either pence per minute or pence per call numbers, which are often purposefully lengthy 'help' or 'advice' lines, horoscopes or other services;
 - micro-short duration calls; these are calls generated to register on BT's billing systems so when the TNO bills BT for these calls, BT's records correspond, yet which are so short in duration that they do not register on the billing systems of the ONOs; and
 - missed or 'Wangari' calls; these are calls to mobile phones from a number of calls within a number range which are set up to look like a missed call from another mobile such that the owner of the mobile handset pressed redial on the missed call out of curiosity and is connected through to either a pence per call drop rate call or to a pence per minute call and is misled into staying on the call for as long as possible.

- 5.46 The scope of the revised AIT definition is limited by paragraph 1.2 of the revised Annex E which excludes calls to number ranges commencing with the digits 01 or 02 from the definition of AIT, since these are geographic number ranges with little if any likelihood of AIT due to the low call rates.
- 5.47 As mentioned above BT also stated that its intention is not to broaden the AIT definition so much that it would become 'easy for ONOs to falsely claim a particular call was AIT for cash flow purposes.' In relation to what safeguards would act to prevent this happening, BT expressed the view that the enhanced requirements for ONOs to justify their retentions (as set out in Theme 1 above) will act as safeguards against misuse of a wider definition. BT also commented that its own understanding and expertise in dealing with AIT would act as an additional safeguard in the following way:

'Since the current Annex E has been in operation BT has developed skills and expertise in identifying AIT patterns. BT has a good understanding of the AIT levels of different ONO communication providers and how these differences relate to the different services and network configurations of those communication providers. Clearly if their AIT retention levels were to rise as a result of the new Annex E being implemented BT would immediately question the ONO. BT is well placed to identify if an ONO was using the new Annex E process for cash flow purposes. It is not in BT's interests to see an increase in the volume of AIT cases.'

Views expressed by the referred CPs

- 5.48 The main concerns expressed about the revised AIT definition by the referred CPs are that:
- it is too broad to permit any reasonable degree of certainty over what traffic may be susceptible to retention, and especially premium rate traffic;
 - it contains vague terms which are not defined (such as 'good faith usage' and 'reasonable commercial practice'), and which will allow the ONO too much discretion in deciding whether traffic is legitimate; and
 - legitimate revenue could too easily be retained under the revised AIT definition, which is damaging to the TNO even if the money is later released, and damaging to the credibility of the process as a whole.
- 5.49 One operator expressed the view that the process should incorporate specific exemptions for types of calls which the AIT process was not intended to include, such as calls made from stolen mobile phone handsets.²⁵ Another example given for calls which should be excluded from the process was those made as a result of a private branch exchange ('PBX') hack.
- 5.50 Some argued that concern over the AIT definition is compounded by the AIT indicators which are also too vague and permit retentions on traffic which is perfectly legitimate. This concern relates as much to the current AIT indicators as to the proposed revised AIT indicators. There is a common view among the referred CPs that, due to this, coupled with uncertainty over what constitutes 'reasonable suspicion' for a retention, the revised Annex E would make it significantly easier for ONOs to issue retentions for legitimate call traffic.

²⁵ Ofcom notes that the revised AIT indicators exclude calls made on individual lost or stolen mobile handsets or SIM cards.

- 5.51 Several of the referred CPs suggested that if the definition is more broadly defined, the level of retentions will rise accordingly.²⁶ Should such a rise occur, it was suggested that there would be negative knock on effects such as:
- there would be less certainty for the TNO around the level of revenue it can expect to receive in any given calendar month;
 - there would be an increase in the actual amount of money retained as more number ranges are included;
 - the TNO would need to employ more resource (and therefore cost) to investigate the increased number of retentions made;
 - customers of the TNO may find that more of their revenue is retained, with the result that some or all of their business activities become unsustainable; and
 - premium rate services, which generates traffic which is particularly prone to fluctuation, may become difficult to run or even obsolete.

Ofcom's view

New types of AIT

- 5.52 We consider first the 'new' types of AIT (in the broad sense of illegitimate and/or fraudulent mechanisms to increase traffic) which have been identified. It does not appear to be a disputed point that AIT has evolved since the AIT definition was last updated, and that new forms of AIT and fraudulent traffic now exist. The evidence which BT has provided suggests that specific forms of AIT and/or fraudulent activity have been identified and categorised, as set out in paragraph 5.45.
- 5.53 The current definition only covers AIT which may exist on revenue share services, and its scope is therefore limited as such. The new types of AIT described in paragraph 5.45 extend beyond revenue share services, and it therefore appears that the current AIT definition does not reflect the types of AIT which now exist.
- 5.54 We consider that it is reasonable and sensible for the AIT process to evolve to ensure that as far as possible, new types of AIT can be dealt with appropriately. For that reason, we consider that there is good reason to broaden the AIT definition, and to the extent necessary, the AIT indicators. We further consider that any revised definition should as far as possible provide future-proofing to capture types of AIT which may not yet have been identified or developed.
- 5.55 However, while it is a legitimate aim to take account of all types of AIT, it should be balanced with the need to provide certainty for TNOs, service providers and other parties on what might be considered AIT and what would fall outside the definition.

Scope for misuse

- 5.56 While many of the changes proposed in the revised Annex E appear to increase the likelihood of the parties engaging in a fair and reasonable manner, the proposal to change the AIT definition is one amendment which arguably increases the scope for

²⁶ One referred CP predicted a rise of 15% in the number of A1 Retention Notices issued as a result of the revised Annex E.

misuse and is therefore of particular concern to Ofcom. In this regard we note paragraph 2.3 of the revised Annex E in particular, where it states:

‘The definition of AIT is not intended to be limited to cases of Calls made, generated, stimulated and/or prolonged fraudulently but to any situation where there has been an absence of good faith usage or alternatively an absence of acceptable and reasonable commercial practice relating to the operation of the Telecommunication Systems and/or telecommunication service. It is expressly recognised that it is difficult to identify every potential instance of AIT in advance as new methods of artificially inflating telecommunications traffic are constantly being evolved.’

- 5.57 Therefore it is important that where the definition is broadened, especially to the extent proposed, there are adequate safeguards in place to prevent misuse of the process and to ensure it is applied in the way it is intended.
- 5.58 We note BT’s comments on the safeguards which will deter ONOs from misusing the process. We consider that it is particularly important that BT remains willing and able to scrutinise retentions and challenge ONOs on the quality of their submissions where appropriate. We accept that, not least due to time or resource constraints, it will not be possible for BT in its role as a TO to review every document before passing it to the ONO or TNO. However there is a need for consistency in the quality of information which ONOs provide to TNOs, regardless of the process in place.
- 5.59 We consider that in the absence of an appropriate independent third party to oversee the information which ONOs provide to TNOs in support of retentions, BT is best placed to perform an oversight role. We therefore consider that BT should take all reasonable steps to scrutinise and challenge the supporting information provided by ONOs on behalf of the TNOs. Where appropriate BT should request further information from an ONO where it considers that it would be of benefit to the TNO in investigating the suspected AIT. In this way BT can provide support to a TNO without waiting for the TNO to request it, and it can also ensure that the information provided by ONOs is consistently of a certain quality.

Level of retentions

- 5.60 In terms of the level of retentions, we understand from BT that some retentions currently take place which arguably fall *outside* the current AIT definition, but are still legitimate under the process.
- 5.61 It therefore appears that one outcome of implementing the revised AIT definition would be to clarify that certain AIT related retentions which already occur within the AIT process in practice are legitimate retentions. As such, this particular outcome would not necessarily contribute to any rise in the level of retentions which the revised AIT definition might cause.
- 5.62 Notwithstanding this point, and although it is not possible to forecast the extent of any change in the number of retentions which may result from a change in the AIT definition, it does seem likely that with a broader definition some retentions would be made which would not be made otherwise, if not by BT then by other ONOs.
- 5.63 However, we are satisfied that a potential rise in the number of retentions as a result of the revised AIT definition is balanced by other elements of the revised Annex E, such as the requirement for ONOs to pay interest calculated from the commencement of the retention on retained sums which are subsequently released to the TNO, and the requirement on the ONO to provide a ‘detailed written

explanation' of the reason(s) for suspecting AIT. As indicated above, it also appears that some new types of AIT are already dealt with on an informal basis, so the revised AIT definition may not have a significant impact on the number of retentions made against these types of AIT. We consider that the number of retentions made under the revised Annex E is something which BT should monitor as part of its report on the AIT process, as set out in Section 6.

Exclusions from definition

- 5.64 In terms of restrictions on the scope of the AIT definition, we note AIT indicator 12 in the revised Annex E, which sets out that fraudulent calls made on individual lost or stolen mobile handsets or SIM cards are specifically excluded [as an indicator of AIT]. We consider that it is possible that other types of call exist which would not be considered AIT and which could be explicitly excluded from the definition.
- 5.65 It may be the case that certain types of call activity are generally accepted as being outside the scope of revenue which ONOs would look to retain (such as call activity generated using stolen mobile handsets). The benefit of specifying exclusions is that it would provide certainty for the parties, and it would help to mitigate some of the concerns surrounding the broad nature of the revised AIT definition. While it may be beyond the scope of the changes proposed by BT, we consider that there is scope for BT to consider specific exclusions from the definition of AIT as part of its report to Ofcom.
- 5.66 In summary, we consider that there are compelling grounds for widening the AIT definition and revising the AIT indicators to cover the new types of AIT identified. We further consider that the revised AIT definition, which has been subject to consultation and discussion since late 2002, is an appropriate way to do this and that it would be consistent with Ofcom's duties under sections 3 and 4 of the Act, in particular because it enhances the scope to address emerging forms of AIT thus improving self-regulation and crime prevention.
- 5.67 However we also consider that it is important that such a change is balanced by robust safeguards to prevent abuse of the process. While ONOs would (under the revised Annex E) be required to provide a 'detailed written explanation' for their retention, it is not clear what this explanation could and should include. Ofcom would be concerned if ONOs were unclear on the nature of their obligations in this regard, and therefore considers that BT should (regardless of the process in place but subject to the particular needs of the parties):
- play a pro-active role in advising and guiding ONOs on what supporting information they should provide (in addition to the relevant AIT call data) to justify retentions; and
 - scrutinise the retentions which it receives in its role as a TO to ensure a consistent level of quality, and challenge the ONO where necessary.

Theme 3 BT's role as a transit operator

Introduction

- 5.69 The revised Annex E would afford BT a greater degree of flexibility to become more or less involved in the AIT process depending on the circumstances of each case. BT asserts that it would only exercise the ability to retain AIT independently of the ONO in 'exceptional circumstances' where BT is the party which becomes aware of the AIT and not the ONO. This concept developed from an awareness within BT that certain types of AIT may occur which may only be apparent to BT, or may only be accurately recorded by BT.
- 5.70 BT also considers that there are certain circumstances in which it could legitimately withdraw from investigations and/or disputes and leave them to be resolved by the relevant ONO and TNO. In this way, BT hopes to reduce the administrative and cost burden associated with its current level of involvement with the process.
- 5.71 Several of the referred CPs expressed strong reservations at the idea that BT should be given the ability to retain independently of the ONO. Some felt that the cumulative effect of this power plus a wider definition of AIT would give BT effective control over the cash flows of TNOs, who compete in the same markets as BT. Some CPs therefore linked this to wider concerns about BT's 'dominance' and the alleged anti-competitive nature of the proposed changes.

Summary of BT's changes

- 5.72 In relation to BT's own role as a TO, the revised Annex E would:
- enable BT in certain transit situations to stand back from an AIT investigation and later dispute, which BT argues would speed up and simplify the process and relieve BT from predominantly administrative involvement; and
 - allow BT as a TO to raise a retention independently of the ONO. BT asserts that this power would be used only in 'exceptional circumstances' where BT is the party which becomes aware of the suspected AIT traffic and not the ONO,²⁷ and where BT is the party which is able to identify the appropriate value which should be retained.
- 5.73 In relation to the first proposal above, BT accepts that as a TO, there will always be a role in managing the AIT process (because it has a direct contractual relationship with both the ONO and the TNO). As a result, there will also be costs which it will have to bear. BT estimates that the total cost which it incurs for provision of AIT support on an annual basis is approximately £400,000.²⁸
- 5.74 However, in order to mitigate the financial impact on BT of AIT support, BT wishes to step away from the process and therefore reduce the associated resource which it needs to contribute to facilitating an outcome.
- 5.75 Related to this point Ofcom understands that of 728 retentions which involved transit traffic in the period 1 April 2008 to 31 March 2009, nearly half (321) remained

²⁷ Examples given by BT are micro-short duration calls and missed or 'Wangari' calls.

²⁸ This cost is an estimate provided by BT of total cost to BT Wholesale of AIT support over one calendar year.

unresolved as at 24 April 2009. BT therefore hopes that the revised Annex E would serve to resolve more AIT matters without the need for BT to be directly involved.

- 5.76 The second change is arguably more contentious in that BT would assume the ability to issue retentions in its role as a TO, independently of the ONO. BT claims that it needs this ability in order to deal with the new types of AIT examined above such as 'missed call' and 'micro short duration call' scams. BT argues that it is best placed to carry out this role, because as the TO it is the only party in the process which would be able to accurately ascertain the extent of the AIT and the correct value which should be retained.
- 5.77 BT explained that there is a particular form of AIT which attempts to evade the call accounting systems of the ONO and TO, but to register on the TNO's call accounting system. Those behind the scam will then collect revenue from the TNO without paying the call charges to the ONO. However, because the TO is downstream of the ONO in the call chain, it is more likely than the ONO to register some of the calls, and it will receive the related invoice for the calls from the TNO. BT asserts that if the TNO was aware of what was happening the TO should have been pre-warned. BT argues that in those type of circumstances and because of the time constraints of the AIT process, the new process exceptionally provides that the TO can initiate the retentions.

Views expressed by the referred CPs

- 5.78 One of the referred CPs expressed the view that BT, as the TO with a high degree of experience and knowledge of the AIT process, was a valuable resource during investigations. However, there appears to be relatively little opposition to the principle of BT stepping away from the AIT investigation where parties are given the opportunity to discuss with BT if they feel that dealing directly with the other party would be unreasonable.²⁹ The automatic involvement of BT, whether or not its input is required, clearly adds some element of delay to the process of resolving disputed retentions as well as imposing an unavoidable cost on BT. To the extent that all parties must consent for BT to step back, this seems one of the less controversial provisions of the revised Annex E.
- 5.79 However there was a mixed reaction to BT's proposal to issue retentions independently of the ONO in any given situation. Some of the referred CPs felt that this power should be afforded to BT where it had strong grounds for suspecting AIT, and where it contacted the relevant ONO to inform them of the retention.
- 5.80 Others felt that it would simply give BT too much control and dominance over the process, and even more scope to influence the revenue passed on to TNOs. One CP questioned why this role could not be performed by the relevant ONO (acting on information passed to it by BT where relevant) or an independent third party such as PhonepayPlus.

Ofcom's view

- 5.81 In relation to BT stepping back from investigations, we consider that this provision is a fair and reasonable amendment to the current process subject to each party being

²⁹ The key concern which appears to have been raised is that the parties to an AIT investigation may have no established legal relationship. However, the fact that BT can only withdraw from an investigation where parties agree that this would not be unreasonable appears to overcome this particular concern.

given the opportunity to explain why BT's involvement would improve the prospects of earlier resolution in any given investigation.

- 5.82 At the same time, and as expressed at paragraph 5.67, we consider that the willingness of BT to facilitate co-operation between the parties is an important safeguard against abuse of the process, such as a refusal by one or more parties to act in good faith.
- 5.83 As regards BT's second proposal, BT has provided Ofcom with evidence that, in certain cases of AIT, it will be the only party which is able to accurately identify the scale of the AIT and therefore the correct value of the retention.
- 5.84 We do not consider that the process would be more fair and reasonable were BT's role to be limited to alerting the relevant ONO to the AIT for two reasons. Firstly, this would be likely to slow the process down and increase the administrative burden on both BT and the ONO unnecessarily. In this scenario, the ONO would be informed of the AIT by BT, complete an A1 Retention Notice according to BT's information, pass the documents to BT as the TO, who would then be obliged to create a fresh A1 Retention Notice to serve on the relevant TNO. Secondly, BT's position in terms of its experience and knowledge of these types of AIT makes it well-placed to act swiftly and with all the relevant information to hand. We note the concerns raised by some referred CPs regarding alleged possible abuse of dominance. However, this dispute relates to revisions to the SIA and the concerns raised by CPs presuppose misuse of the revised AIT process by BT in a way that would breach those terms. We have not considered the hypothetical case of a party to the SIA acting in breach of the terms of the SIA as it is not relevant to the determination.
- 5.85 We therefore consider that on the face of it these changes to BT's role as TO are fair and reasonable and would be consistent with Ofcom's duties under sections 3 and 4 of the Act, in particular by making self-regulation more effective and efficient by allowing BT to be involved where its position as TO makes it well placed to raise retentions while reducing complexity by allowing it to step back where its involvement is not required. However we again highlight the need for BT to demonstrate that it acts with due care in its role as a TO. Whilst these changes may improve the process and ensure that AIT is dealt with effectively, we would expect that where BT issues retentions as a TO, it should engage openly and as fully as possible with the relevant TNO.

Theme 4 The dispute resolution process

Introduction

- 5.86 This theme addresses BT's intended proposals to introduce tighter timeframes and make the overall process more structured and expedient, as well as to clarify the dispute resolution options.
- 5.87 In general, the responses from the referred CPs indicated agreement that the defined timescales in the revised Annex E would add clarity and structure to the process. The main concern centred on whether the dispute resolution procedures are adequate and enable a TNO to fairly contest a retention regardless of its value, particularly given the broadened definition of AIT.

Summary of BT's changes

- 5.88 BT recognises that under the current AIT process there may be limited incentive for an ONO to progress an investigation once the A1 Retention Notice has been served, as it has already retained the funds. BT also notes that the TNO may fail to respond (to BT) after receiving the A1 Retention Notice, and that this may be a reflection of the fact that the TNO and/or its customer think they have little prospect of successfully contesting it. It may also be the case that, especially for smaller amounts of retained revenue, the benefit of investigating or disputing the retention would be outweighed by the cost involved.

Timelines

- 5.89 BT therefore intends that its proposals will persuade both ONOs and TNOs to move at a faster pace to resolve AIT cases and where possible agree resolutions between themselves. It hopes by introducing specific timescales into the process, the time taken to resolve a case will be significantly reduced.
- 5.90 It is worth briefly considering the scale of the changes which the revised Annex E would bring about in relation to the obligations on all parties to work to particular timescales. BT provided an explanation of the current process and the proposed new process in relation to the timescales, which is summarised below.

Current Annex E process:

If an ONO party suspects that call traffic is AIT it must 'as soon as reasonably practicable' pass the following information to the TNO (or to the TO (i.e. BT) who is obliged to pass to the TNO 'as soon as reasonably practicable'):

- estimated total duration of the calls;
- dates when the calls were made;
- telephone numbers of the revenue share service and the partial CLI (if available) of the calling centre;
- any other information the ONO considers relevant; and
- any other information reasonably requested by the TNO (including information regarding the identity of the calling centre and/or calling customer).

Following the provision of the information, the ONO may give the TNO (or TO, in a transit situation) written notice (no later than 14 calendar days from the end of the monthly billing period) of intention to withhold payment relating and may then withhold such money.

The general obligation on the parties to 'identify' AIT would cover this investigation stage where the TNO, TO and ONO seek to ascertain whether or not the call traffic in question was AIT. If at any stage in the six months following the notice of intention to withhold the ONO ceases to have reasonable grounds to believe the calls are AIT then the ONO is obliged to immediately pay the withheld amount.

If after six months (from date of issue of the retention notice) the ONO continues to have reasonable grounds to believe the calls are AIT, and the ONO has not received payment from its customers, then the TNO shall release the ONO from the debt. It is only at this point that an AIT dispute capable of contractual challenge is actually crystallised.

***Revised Annex E process:*³⁰**

Step 1: If the ONO has a 'reasonable suspicion' of AIT it serves an A1 Retention Notice by the 14th AIT calendar day (where the first AIT calendar day is defined as the first day of the calendar month following the month in which the call was made). If the 14th AIT calendar day falls on a non-working day such as a weekend then (as with the current Annex E process) it must be served on the previous working day.

Step 2: The ONO then must supply the supporting information (including a detailed written explanation of why it suspects AIT) by the 26th AIT calendar day.

If the ONO fails to supply the requested information and reasons for the retention by the 26th AIT calendar day then the A1 Retention Notice is deemed to be withdrawn on the 30th AIT calendar day and the ONO must immediately pay the TNO the sums retained (plus the appropriate interest).

Step 3: Providing that the ONO provides the supporting information in Step 2 and does not withdraw the A1 Retention Notice, the next step is that the TNO may serve an A3 Rejection Notice. The A3 Rejection Notice sets out why the TNO rejects the ONO's reasons why the call traffic is AIT. The TNO must serve this by the 34th AIT calendar day.

If the TNO fails to serve the A3 Rejection Notice then the ONO is entitled to issue a debit note on the 41st AIT calendar day. Thus the matter is resolved in favour of the ONO.

Step 4: If the TNO serves the A3 Rejection Notice but the ONO still maintains the call traffic is AIT then the ONO can serve an A4 Dispute Notice by the 49th AIT calendar day. This effectively puts the TNO on notice that a formal AIT dispute ('AIT Dispute') will be created in five days.

If the ONO fails to serve the A4 Dispute Notice by the 49th AIT calendar day then the A1 Retention Notice is deemed to have been withdrawn (and the ONO must immediately pay the TNO the retained sums, plus interest calculated from the day the sums would initially have been payable).

Step 5: If the TNO fails to reach a written settlement agreement or a form of binding dispute resolution, or has failed to institute court proceedings within ten

³⁰ References to the ONO in the revised Annex E process would also apply to BT as the TO, as under the revised Annex E BT is able to retain as the TO.

months of the date the matter first became an AIT Dispute (i.e. the 54th AIT calendar day) then the traffic is deemed to have been AIT.

- 5.91 BT argues that introducing these phases in an investigation would give each party more control over the process, and would limit the risk of it drifting without a definitive outcome.

Dispute resolution

- 5.92 In relation to AIT Disputes, under the revised Annex E the parties have an obligation to resolve the dispute 'expediently and appropriately' and 'in good faith and in a timely and co-operative manner'. For the ONO to permanently retain the sum, the standard of proof must also rise from a 'reasonable suspicion' to a 'strong and convincing suspicion' that AIT has occurred.

- 5.93 Paragraph 7.3 of the revised Annex E also sets out the different forms of dispute resolution which may be open to the parties to an AIT Dispute, depending on the circumstances. Four scenarios are envisaged, which are summarised below:

- (a) **Non-transit situation between ONO and TNO:** Where an AIT Dispute in a non-transit situation exists between the parties, they may resolve that AIT Dispute using:
 - i any form of dispute resolution they both agree upon; or
 - ii. court proceedings;
- (b) **Two party transit situation significantly between ONO and TNO (not necessarily involving TO):** Where an AIT Dispute in a transit situation exists between the operator and another non-BT party in a situation where the two non-BT parties and the TO have agreed that the TO does not need to be involved in the resolution of that AIT Dispute, the two non-BT parties may resolve that AIT Dispute using:
 - i any form of dispute resolution they and the TO agree upon (although the TO may choose not to participate in that dispute resolution); or
 - ii. court proceedings;
- (c) **Two party transit situation between TO and TNO (not involving ONO):** Where an AIT Dispute in a transit situation exists between the TNO and the TO (where the TO initiated the A1 Retention Notice) in a situation where the two non-BT parties and the TO have agreed that the ONO does not need to be involved in the resolution of that AIT Dispute, the TNO and the TO may resolve that AIT Dispute using:
 - i any form of dispute resolution the TNO, ONO and TO agree upon (although the ONO may choose not to participate in that dispute resolution); or
 - ii. court proceedings;
- (d) **Three party transit situation between ONO, TO and TNO:** Where an AIT Dispute in a transit situation exists between the TO, the Operator and the non-BT party to a separate BT Standard Interconnect Agreement, they may resolve that AIT Dispute using:

- i any form of dispute resolution they all agree upon and participate in; or
- ii. court proceedings.

10 month deadline

- 5.94 A further change proposed by BT is the imposition of a 10 month deadline which begins from the commencement of the AIT Dispute. If, by this time, the parties have not arranged between themselves either a form of binding dispute resolution, a written settlement agreement or a referral of the matter to court proceedings, then the AIT Dispute will be deemed to have been resolved in favour of the ONO (or TO as per the revised Annex E). BT argues that this cut-off date will prevent the resolution of disputes dragging on indefinitely, and will add a sense of urgency to the parties contesting the retention.

Assignment of rights

- 5.95 Finally, as set out at paragraph 7.4 of the revised Annex E, BT proposes that the TO may (subject to prior written agreement of the TNO and the ONO) assign to the TNO any rights to payment from the ONO for the sum in dispute, in order that all issues as to the retention of the revenue may be settled between the ONO and the TNO.

Views of the referred CPs

- 5.96 Among the referred CPs there was consensus that the introduction of defined phases of the process, and the associated timescales, would go some way to improving the efficiency of investigations. The overarching concern expressed by the referred CPs is whether the improvement is sufficient in the context of other aspects of the proposed changes, particularly to the extent these extend the scope for ONOs to make retentions and thereby trigger the resolution procedure.
- 5.97 The main source of concern centred on the dispute resolution procedures, and the options which are available to TNOs to resolve AIT Disputes. Several of the referred CPs took the view that despite the fact that dispute resolution procedures are addressed in the revised Annex E, they remain inadequate and provide no realistic alternative to court action.
- 5.98 This is linked to a further concern, which is that once an investigation reaches the point of becoming an AIT Dispute, a significant amount of time and resource is required to progress the case. For relatively small amounts of retained revenue, they argue that it is simply not worth pursuing as the cost would outweigh the benefit. For this reason, it is argued, TNOs often have no choice but to write off the retained revenue even if they believe the traffic is legitimate.
- 5.99 Another view expressed by several of the referred CPs was that the process often suffers from a lack of engagement from the ONO and/or BT in helping to progress the investigation. Several CPs felt that this concern would be exacerbated with the introduction of a 10 month deadline for AIT Disputes, as it would encourage the ONO to ignore TNO efforts to negotiate in the knowledge that after 10 months it would permanently retain the disputed sum. Whether this is the case or not, there exists a feeling that BT could and should do more to help TNOs during investigations, particularly where the TNO is a small provider with limited resources relative to the ONO.
- 5.100 A common suggestion was that there should be a role for an independent third party to adjudicate on disputes which arise over AIT, such as Ofcom or PhonepayPlus.

Several CPs felt that if there was a 'free' mediation service it would mitigate the conflict of interest which exists in the fact that the ONO retains the suspected AIT during an investigation and must subsequently be satisfied that the traffic is in fact not AIT to release the withheld sum.

Ofcom's view

Timelines

5.101 We consider that the identification of phases in the process, the introduction of defined timeframes for these phases and the associated documentation³¹ should act to increase the likelihood of parties co-operating in a fair and timely manner. In particular we consider that there will be a far greater onus on both the ONO and the TNO to keep to their respective deadlines to prevent an investigation into AIT from lapsing. For this reason we consider that there is a compelling case to implement the new timescales and associated documentation proposed in the revised Annex E.

Dispute resolution

5.102 We consider that there is some merit in concerns expressed by the referred CPs that there is no default dispute resolution procedure, so that in the absence of a case-by-case agreement on dispute resolution, the only option is litigation. We appreciate the fact that it may be difficult for TNOs to find avenues of suitable dispute resolution, and that when relatively low sums are retained there may be no point in disputing the matter from a financial point of view. On the other hand, a flexible system for agreeing the most appropriate form of resolution has merits in circumstances such as AIT where the sum of money involved and the level of technical complexity can vary greatly from case to case. While we accept that the revised Annex E to some extent clarifies the dispute resolution procedures available, a concern remains that continuing lack of certainty combined with the low value of some cases could encourage the parties not to engage as fully as is desirable.

5.103 We also see some merit in the associated concern that, if there is a practice of TNOs regularly writing off small scale retentions, TNOs are seen to be accepting that the traffic is AIT which is not necessarily the case. One inference which could be drawn from this is that such a practice has helped to foster a view in the industry that responsibility for AIT lies chiefly with the TNO.

5.104 Nevertheless, we note the obligation on parties to act in good faith and would consider this extends to engaging in dispute resolution processes which are reasonable in the circumstances of the particular case. As part of our conclusion in Section 6 we set out the areas which BT should cover in its report to Ofcom, and we expect this to cover the extent to which further refinement of the process is desirable in the light of developing experience of the revised AIT process. In light of this and the fact that the revised AIT process represents an improvement on the current process, we do not consider it to be necessary or appropriate to impose further obligations in the context of this dispute resolution. However, we note that there may be scope for further improvement in future.

5.105 We believe that the option of an independent third party to adjudicate on AIT Disputes could give the parties (in particular TNOs) additional confidence that their claims would be subject to a fair hearing. We understand the argument that while the

³¹ This documentation including the A2 Withdrawal Notice, the A3 Rejection Notice and the A4 Dispute Notice.

court process may offer this, it can be more expensive than alternative forms of resolution, which is unlikely to be a realistic option for AIT retentions below a certain value. Therefore the introduction of a free or low cost means of adjudication may be of real benefit to the parties to an AIT Dispute.

- 5.106 We consider that this idea is something which merits further discussion between the signatories to the SIA. However, as with the concept of a third party holding withheld funds, this is something which would require the development of fresh proposals, input from the relevant stakeholders as well as the identification of a suitable third party to perform the role. This is not something which Ofcom is able to consider in the course of resolving this dispute. Rather we expect BT to examine the practicalities of this concept and report its findings to Ofcom, as set out in Section 6.

10 month deadline

- 5.107 We note that, following the commencement of an AIT Dispute, the parties have 10 months to reach a resolution before the matter is deemed to be resolved in favour of the ONO.
- 5.108 We consider that, were an ONO to withdraw from discussions with the TNO during this 10 month period, and ignore requests for negotiation until the 10 month deadline is met (thereby automatically retaining the value of the retention), it would breach its obligation at paragraph 7.1 of the revised Annex E to act in good faith and in a timely and co-operative manner.

Section 6

Conclusion

The terms of the revised Annex E

- 6.1 In conclusion, we consider that taken as a whole, the changes contained in the revised Annex E represent an improvement on the existing current AIT process. In particular the re-structuring of the process to incorporate new timelines and documentation should provide benefits to all the parties. We believe that allowing for the introduction of the changes would be consistent with Ofcom's duties under sections 3 and 4 of the Act, particularly by increasing the effectiveness of self-regulation and crime prevention by increasing the onus on ONOs to provide evidence and to establish a 'strong and convincing suspicion' whilst extending the scope of the process to address emerging types of AIT.
- 6.2 In addition to the changes set out in the assessment above, we also note the emphasis in the revised Annex E on seeking to establish good practice in a wider context in relation to combating AIT. In particular we note the requirement at paragraph 2.4(b) for parties to take 'reasonably appropriate measures', which include:
- establishing and implementing a process of credit vetting and customer risk assessment of service providers;
 - PhonepayPlus registration checks in respect of service providers (including the inspection of Prior Permission Certificates, where such Prior Permission Certificates are required under the PhonepayPlus Code of Practice for the operation of certain telecommunication services);
 - call data monitoring, regular and timely reporting of AIT Indicators [...] and/or suspected or potential AIT activity; and
 - [ensuring] comprehensive contractual terms with service providers. Such terms and conditions to include obligations [...] for the detection, identification, notification and prevention of AIT, the ability to retain reasonably suspected AIT revenues and the requirement for service providers to obtain similar contractual undertakings from their own service providers.
- 6.3 We consider that these terms are clear specific steps that CPs can take, which would represent a further step towards preventing the progression of AIT, as far as reasonably possible. Ofcom would welcome any such requirements on CPs to have in mind the need to do all that is reasonably practicable to prevent AIT as well as deal with it when it does arise.
- 6.4 Setting aside the concerns about the underlying AIT process and the fundamental principles on which the process is based, we consider that compared to the current AIT process, the revised Annex E is a fairer and more efficient process, which reflects the need to deal with the changing nature of AIT.
- 6.5 In particular we consider that introduction of the revised Annex E would lead to cases being progressed in a more timely and evidence-based manner as follows:

- (1) It would provide the opportunity for TNOs to have direct contact with ONOs (though subject to agreement, which we shall discuss further below), and expects more from ONOs in justifying their retentions;
 - (2) It would provide for TNOs to be compensated from the point at which suspected AIT is retained, if the matter is resolved in the TNO's favour;
 - (3) It would formalise BT's ability to retain AIT which transits its network, as the party which is able to record the true value of the AIT; and
 - (4) It would clarify the point at which an AIT Dispute is reached.
- 6.6 We understand the nature of the concerns raised by the referred CPs about the AIT process, and consider that there is scope for a review of how the new process works in practice and any further improvements which could be made (see paragraph 6.9). However, for the purposes of resolving the dispute which is before Ofcom at this time, and subject to the safeguards described in paragraph 6.8 being consistently applied, we consider that it is fair and reasonable to amend the existing SIA provisions in relation to AIT to reflect the changes entailed by the revised Annex E.
- 6.7 While the referred CPs have raised a number of concerns about the AIT process, Ofcom has not been provided with any legal or practical reasons which would prevent any of the referred CPs from applying the revised Annex E. Bearing in mind that the revised Annex E cannot come into effect until all parties to the SIA have signed the Supplemental Agreement, and that further delay will result in the benefits of the revised Annex E not being available to parties, we consider that each of the referred CPs should sign the Supplemental Agreement, and should do so no later than 14 days from the date of the final determination.

Safeguards

- 6.8 We conclude that while the revised Annex E represents an improvement on the current AIT process, there is a need for all parties but particularly BT to monitor the implementation of the process, and ensure that the safeguards which are inherent in the process are consistently applied. As the process has not yet been implemented, it is not possible to foresee the extent of the measures which may be necessary. However we consider that the credibility of the process depends on the following as a minimum:
- **Clarity on 'detailed written explanation'**; this is the additional information to be provided by ONOs in the event that suspected AIT is retained. This is one of the core changes in BT's package of measures which collectively are designed to place a 'far greater onus' on ONOs to justify their retentions. Ofcom would therefore expect BT to provide appropriate guidance to ONOs on what such an explanation should contain.
 - **BT scrutiny**; linked to the point above, we would also expect BT to provide an appropriate oversight role with the implementation of the revised Annex E. The revised Annex E does not contain provision for independent third party scrutiny of the process, although the definition of AIT will be broadened and ONOs will be required to meet new standards on quality of information and proof. We therefore consider that a level of consistency needs to be achieved in these standards, and that BT should carry out appropriate scrutiny of the information in its role as a TO.

- **BT stepping away from investigations**; although we consider that it is fair and reasonable for BT to step back from investigations where appropriate, we also consider that BT should be willing to intervene subsequently on behalf of either party where negotiations between the ONO and TNO have broken down or are in danger of breaking down; and
- **Good faith obligation**³²; Ofcom would expect that all parties to the process act in a way which demonstrates good faith and a willingness to abide by the spirit as well as the letter of the AIT process. We consider that this good faith requirement is particularly relevant in the event of an AIT Dispute, with the onus on the ONO to remain willing to engage with the TNO to resolve the matter prior to the 10 month deadline.

BT report on the revised Annex E

- 6.9 Notwithstanding our view on the fairness and reasonableness of the revised Annex E, we consider that there are grounds for a review of the AIT process after it comes into effect, in order to:
- a) address legitimate concerns that have been raised by the referred CPs about the underlying process for dealing with AIT, and the wider context in which AIT is retained;
 - b) examine the extent to which the implementation of the revised Annex E has led to improvements in identifying and dealing with AIT; and
 - c) determine whether there is a need for any further development of the process, and if so how that development could be achieved.
- 6.10 Although we consider that this report is necessary and appropriate, we do not consider that it should be carried out as part of the resolution of this dispute. It is not something which Ofcom could reasonably carry out in resolving this dispute in a timely manner in the context of the four month timeframe set by statute and the Framework Directive for the resolution of disputes. Furthermore, it will require the revised Annex E to be in place and operational for a period of time.
- 6.11 We are therefore of the view that BT should carry out a report to achieve the objectives set out in paragraph 6.9. We note that the Supplemental Agreement makes provision for the AIT process to be reviewed if the revised Annex E is implemented. However, the report which we require BT to conduct should be separate from and in addition to any review carried out in line with provisions in the Supplemental Agreement. We consider that BT should provide this report to Ofcom no later than 18 months after the revised Annex E is implemented.
- 6.12 Bearing in mind our discussions with the referred CPs in the course of resolving this dispute, we consider that BT's report should include the following areas as a minimum:
- (1) An assessment of any change in the overall level of retentions;
 - (2) An assessment of levels of compliance with the procedures (and good faith requirement) as set out in the revised Annex E;

³² Section 7 of the revised Annex E

- (3) As assessment of the extent to which retentions are successfully resolved within the ten month backstop date;
 - (4) An evaluation of the overall quality of evidence provided by ONOs; and
 - (5) A consideration of improvements which could reasonably be made to the process and related guidance in the light of the above (including the concept of a third party holding any retained revenue, the concept of a low cost independent dispute resolution process and whether further exclusions can be specified from the AIT definition and/or AIT indicators).
- 6.13 We note that Ofcom also has powers under the Act to review practices in the industry including, in particular, in circumstances such as this where there is a clear consumer interest in AIT processes which discourage fraudulent activities and encourage market participants to combat fraud, whilst at the same time ensuring competition and innovation. Whilst it is, in the first instance, for the industry itself to consider further improvements in the AIT process, we do not rule out conducting such a review ourselves should evidence emerge (as part of BT's report or otherwise) that the revised AIT process is not working effectively.

Annex 1

Responding to this consultation

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 6 July 2009**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://www.ofcom.org.uk/consult/condocs/XXXX>, 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.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email matthew.peake@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Matthew Peake
4th Floor
Competition Group
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- Fax: 020 7783 4109
- A1.5 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.
- A1.6 It would be helpful if you can explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Matthew Peake on 020 7783 4160.

Confidentiality

- A1.8 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, ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

- A1.9 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.
- A1.10 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

- A1.11 Following the end of the consultation period, Ofcom intends to publish a final determination by 24 July 2009.
- A1.12 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

Ofcom's consultation processes

- A1.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.14 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 . 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.
- A1.15 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

Annex 2

Ofcom's consultation principles

- A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

- A2.2 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.
- A2.3 We will be clear about who we are consulting, why, on what questions and for how long.
- A2.4 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.
- A2.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.
- A2.6 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.
- A2.7 If we are not able to follow one of these principles, we will explain why.

After the consultation

- A2.8 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.

Annex 3

Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- A3.2 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.
- A3.3 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.
- A3.4 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/.
- A3.5 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 4

Relevant statutory obligations and regulatory principles

A4.6 In the table below, we summarise the relevant statutory obligations and regulatory principles which flow from sections 3 and 4 of the Act. We also set out the way in which we have considered each of obligations and principles and applied them in this case.

Obligation/Goal	Application to this case
<p>PRINCIPAL DUTY: further the interests of citizens in relation to communications matters</p> <p>Section 3(4) of the Act sets out a number of principles which Ofcom must have regard to in performing its principal duties where it appears to Ofcom that they are relevant, including the desirability of promoting competition in the relevant markets and the desirability of encouraging investment and innovation in the relevant markets.</p>	<p>Consumer interests are very important in the present case. In relation to section 3(4), we considered in particular: prevention of crime under subsection (j) which requires an effective AIT process; promoting effective self-regulation under subsection (c); promoting competition under subsection (b); and encouraging innovation (e.g. not discouraging new services) under subsection (d).</p> <p>We considered the amendments would make self-regulation and crime-prevention more effective without unduly threatening competition or restricting new services. In particular, the changes increase the onus on parties retaining revenue to provide explanations and to co-operate to elevate the 'reasonable suspicion' created by unexplained traffic flows leading to the initial retention to a 'strong and convincing suspicion' required for permanent retention (or else to release the funds). They also remove a potential unfairness in the payment of interest on release of retained funds, whilst allowing the process to address emerging forms of AIT.</p> <p>We gave consideration to further measures to assist consumers (e.g. on repayment of retained sums to customers) but did not believe the current dispute resolution mechanism was the appropriate means to achieve this and particularly were not in a position to assess whether the cost of such measures would outweigh the benefit of returning quite small sums on a case-by-case basis, given the four month timescale allowed by statute for the dispute resolution and the fact that parties to the SIA constitute</p>

	<p>a much wider group than the parties to this dispute. However, we require BT to carry out a further review separate from this process, and to report to Ofcom with its findings.</p>
<p>PRINCIPAL DUTY: further the interests of consumers in relevant markets, where appropriate, by promoting competition</p> <p>In performing the principal duty of furthering the interests of consumers specifically, section 3(5) of the Act provides that Ofcom must have regard, in particular, to the interests of those consumers in respect of choice, price, quality of service and value for money.</p> <p>Section 3(4) of the Act sets out a number of principles which Ofcom must have regard to in performing its principal duties where it appears to Ofcom that they are relevant, including the desirability of promoting competition in the relevant markets and the desirability of encouraging investment and innovation in the relevant markets.</p>	<p>Section 3(5) of the Act refers to choice, price, quality of service and value for money.</p> <p>We considered protection from fraudulent or otherwise illegitimate “scams” to be one aspect of quality of service. However, we were also mindful of the importance of competition between TNOs and the availability of innovative services from service providers.</p> <p>We reached the conclusion that, on balance, the protections in the revised AIT process offered adequate protections in relation to the latter aspect whilst providing protection from the former problem to consumers.</p>
<p>RELEVANT OFCOM GOAL/S:</p> <p>(a) the optimal use for wireless telegraphy of the electro-magnetic spectrum;</p> <p>(b) the availability throughout the United Kingdom of a wide range of electronic communications services;</p> <p>(c) the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests;</p> <p>(d) the maintenance of a sufficient plurality of providers of different television and radio services;</p> <p>(e) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services; and</p>	<p>These goals were considered although we did not consider, based on the nature of the arguments raised by the referred CPs and by BT, and the nature of AIT as an issue that they were directly relevant the present case.</p>

<p>(f) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both –</p> <p>(i) unfair treatment in programmes included in such services; and</p> <p>(ii) unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.”</p>	
<p>COMMUNITY GOALS:</p> <ul style="list-style-type: none"> • to promote competition in communications markets; • to secure that Ofcom contributes to the development of the European internal market; • to promote the interests of all European Union citizens; • to act in a manner which, so far as practicable, is technology-neutral; and • to encourage, to the extent Ofcom considers it appropriate, 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; and • to encourage such compliance with certain international standards as is necessary for facilitating service interoperability and securing freedom of choice for the customers of communications providers. 	<p>Community goals were considered. In particular, we considered the potential impact on competition of having a retention process which meant ONOs (and ultimately service providers) were delayed in receiving revenue where there was a suspicion of AIT. However, we concluded there were adequate safeguards and that there was no realistic alternative to some form of retention of revenue while suspected AIT cases are considered.</p>
<p>REGULATORY PRINCIPLES:</p> <p>Ofcom will regulate with a clearly articulated and publicly reviewed annual plan, with stated policy objectives;</p> <p>Ofcom will intervene where there is a</p>	<p>We considered the regulatory principles.</p> <p>Of particular relevance, we noted that some of the referred CPs’ concerns had some validity (albeit they did not imply the changes were unfair/unreasonable). The question arose as to the best way to address these</p>

<p>specific statutory duty to work towards a public policy goal which markets alone cannot achieve;</p> <p>Ofcom will operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required;</p> <p>Ofcom will strive to ensure its interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome;</p> <p>Ofcom will always seek the least intrusive regulatory mechanisms to achieve its policy objectives;</p> <p>Ofcom will research markets constantly and will aim to remain at the forefront of technological understanding; and</p> <p>Ofcom will consult widely with all relevant stakeholders and assess the impact of regulatory action before imposing regulation upon a market.</p>	<p>concerns given that the timescale of a dispute did not allow for a wide consultation with the industry on possible improvements to the process. We sought to obtain commitments from BT to produce a report on the process within a set time-frame, whilst noting Ofcom's ability to intervene itself. We considered the BT report to be the least intrusive method of encouraging further improvements to the AIT process at this stage.</p>
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Annex 5

The Draft Determination

Draft Determination under sections 188 and 190 of the Communications Act 2003 (“Act”) for resolving a dispute between BT and each of 1RT Group, Bestway Communications, CFL Communications, Callagenix, Flextel, Mars Communications, Starcomm and Telxl concerning changes to the SIA

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-
- i) making a declaration setting out the rights and obligations of the parties to the dispute;
 - ii) giving a direction fixing the terms or conditions of transactions between the parties to the dispute;
 - iii) 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
 - iv) 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 1 February 2008 BT issued Interconnect Notification 077/08, which initiated consultation with all SIA signatories on a new version of Annex E (the revised Annex E). The revised Annex E seeks to alter the AIT process in a number of ways, however for logistical and contractual reasons all signatories to the SIA must agree any changes before they can come into effect. Agreement on the revised Annex E is by way of the 2008 AIT Supplemental Agreement (the Supplemental Agreement);
- (D) on 17 April 2008, following consultation with industry, BT issued an updated Annex E which took account of the suggestions made via the consultation;

- (E) on 14 May 2008 BT issued an Interconnection Notification 121/08, pointing out the changes and explaining its intention to issue the 2008 AIT Supplemental Agreement to all SIA signatories for signature;
- (F) the parties listed above have chosen not to sign the Supplemental Agreement and/or have rejected the terms of the revised Annex E;
- (G) on 10 March 2009 BT referred a dispute with the parties listed above to Ofcom for dispute resolution requesting Ofcom to determine whether the changes made to the SIA are appropriate and applicable to those parties listed above, and to direct that the terms and conditions of the SIA between BT and the parties listed above shall include the terms of the 2008 AIT Supplemental Agreement;
- (H) on 30 March 2009, after receiving the views of all parties, Ofcom decided pursuant to section 186(2) of the Act that it was appropriate for it to handle the dispute and informed the parties of this decision. Ofcom set the scope of the issues in dispute to be resolved as follows-

“The scope of the dispute is to determine whether it is fair and reasonable to amend the existing SIA provisions in relation to AIT to reflect the changes entailed by BT’s proposed Annex E (including changing the definition of AIT, the process for retaining revenue where AIT is suspected and the associate dispute resolution procedure).”
- (I) 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;
- (J) a fuller explanation of the background to the dispute and Ofcom’s reasons for making this Determination are set out in the explanatory statement accompanying this Determination; and

NOW, therefore, Ofcom makes, for the reasons set out in the accompanying explanatory statement, this [Draft] Determination for resolving this dispute-

Declaration of rights and obligations, etc.

1. That the amended SIA provisions in relation to AIT in BT’s proposed Annex E are fair and reasonable and shall be included in the terms and conditions of the SIA between BT and each of the parties listed above.
2. Ofcom directs that the terms and conditions of the BT’s SIA between BT and each of 1RT Group, Bestway Communications, CFL Communications, Callagenix, Flextel, Mars Communications, Starcomm and Telxl shall be amended to include the terms set out in BT’s proposed Annex E as set out in Interconnection Notification 121/08.
3. Ofcom directs that BT shall produce a report, no later than 18 months after the revised AIT process takes effect, covering as a minimum each of the areas set out in paragraph 6.12 of the explanatory statement, and shall provide the report to Ofcom.

Binding nature and effective date

4. This Determination is binding as between BT and each of 1RT Group, Bestway Communications, CFL Communications, Callagenix, Flextel, Mars Communications, Starcomm and Telxl.
5. This Determination shall take effect on the date it is published.

Interpretation

6. For the purpose of interpreting this Determination-
 - a) Headings and titles shall be disregarded; and
 - d) The Interpretation Act 1978 shall apply as if this Determination were an Act of Parliament
7. In this Determination-
 - a) The “Act” means the Communications Act 2003;
 - 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;
 - c) “1RT Group” means 1RT Group Limited, whose registered company number is 05150214, and whose registered office is at Suite 215, 79 Friar Street, Worcester, Worcestershire WR1 2NT;
 - d) “Bestway Communications” means Bestway Communications Limited, whose registered company number is 04559564, and whose registered office is at 140 High Road, Leytonstone, London E14 1UA;
 - e) “CFL Communications” means CFL Communications Limited, whose registered company number is 04419749, and whose registered office is at Redhill Chambers, High Street, Redhill, Surrey RH1 1RJ;
 - f) “Callagenix” means Callagenix Limited, whose registered company number is 03963819, and whose registered office is at Overdene House, 49 Church Street, Theale, Reading, Berkshire RG7 5BX;
 - g) “Flextel” means Flextel Limited, whose registered company number is 02772380, and whose registered office is at Griffins Court, 24-32 London Road, Newbury, Berkshire, RG14 1JX;
 - h) “Mars Communications” means Mars Communications Limited, whose registered company number is 06478834, and whose registered office is at UK House, 315 Collier Row Lane, Romford, Essex RM5 3ND;
 - i) “Starcomm” means Starcomm Limited, whose registered company number is 02830288, and whose registered office is at 1 School House Terrace, Kirk Deighton, Wetherby, North Yorkshire, LS22 4EH;

- j) “Telxl” means Telxl Limited, whose registered company number is 04249562, and whose registered office is at Highfield House, 1562 Stratford Road, Hall Green, Birmingham, B28 9HA;
- k) “Ofcom” means the Office of Communications;
- l) “AIT” means Artificial Inflation of Traffic;
- m) “BT’s SIA” means BT’s Standard Interconnect Agreement.

Neil Buckley
Director of Investigations

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

22 June 2009

Annex 6

The revised Annex E

ANNEX E

ARTIFICIAL INFLATION OF TRAFFIC

1. DEFINITIONS

- 1.1 In this Annex, a reference to a paragraph or Appendix, unless stated otherwise, is to a paragraph or Appendix of this Annex. Words and expressions have the meaning given in Annex D, except as shown below:

“A1 Retention Notice”

written notice (using the form at Appendix E1 and served up to the 14th AIT calendar day or such other date otherwise provided for in this Annex) of a reasonable suspicion of AIT and the retention of sums otherwise due in respect of the relevant Call traffic and including (but not necessarily limited to) all of the following:

- (a) reasons for holding a reasonable suspicion of AIT, (having regard to the definition of AIT, paragraphs 2.2 and 2.3) and the AIT Indicators in Appendix E5);
- (b) estimated value of the sums to be retained;
- (c) estimated total duration and number of the relevant Calls;
- (d) start and end dates when the relevant Calls were made; and
- (e) full dialled telephone number(s) save where there are exceptional circumstances as referred to below;

In exceptional circumstances where there is a reasonable suspicion of AIT across a number of dialled destination numbers, the Party submitting the A1 Retention Notice shall be permitted to supply incomplete dialled destination numbers providing that Party uses best endeavours to supply the best and most detailed information it can having regard to the circumstances and certifies that the information so supplied is the best and most detailed available. Exceptional circumstances

	may include informal or formal regulatory alerts or investigations and/or any Call traffic patterns reasonably suggesting an entity is attempting to disguise AIT activity across a number of dialled destination numbers within a block(s) of numbers.
“A2 Withdrawal Notice” or “Withdrawal Notice”	written notice (using the form at Appendix E2) withdrawing an A1 Retention Notice (or part thereof, in which case precisely specifying the relevant Call traffic and sums subject to the part withdrawal);
“A3 Rejection Notice” or “Rejection Notice”	written notice (using the form at Appendix E3) rejecting and giving reasons and/or grounds for the rejection of an A1 Retention Notice, including reasons why the Calls and/or use of the Telecommunications Systems is a good faith usage and is an acceptable and reasonable commercial practice relating to the usage of the Telecommunications Systems;
“A4 Dispute Notice” or “Dispute Notice”	written notice (using the form at Appendix E4) disputing, with reasons, a Rejection Notice (or part thereof) and raising dispute in respect of the relevant Call traffic (including specifying precisely the relevant Call traffic and sums subject to the dispute);
“AIT” or “Artificial Inflation of Traffic”	<p>any situation where Calls (subject to paragraph 1.2 below):</p> <ul style="list-style-type: none"> (a) are made, generated, stimulated, and/or prolonged for the direct or indirect benefit of any entity (including a natural person) operating, hosting or otherwise connected with a telecommunication service as a result of any activity by or on behalf of such entity; and (b) result in a calling pattern which is disproportionate to the overall amount, duration and/or extent of Calls which would be expected from:- <ul style="list-style-type: none"> i. a good faith usage; or ii. an acceptable and reasonable commercial practice relating to the operation; of Telecommunications Systems;
“AIT calendar day”	the calendar day referred to in the text of this Annex, commencing from the first day of the calendar month following that in which the

Call traffic occurred. Where such nominated calendar day falls on other than a Working Day, any applicable notice shall be given no later than the previous Working Day;

“AIT Call Data”

Call data records supporting a reasonable suspicion of AIT in a Retention Notice and including (but not necessarily limited to) all of the following:

- (a) partial CLI of the Calling Centre(s);
- (b) full dialled destination number(s), save where there are exceptional circumstances as referred to below;
- (c) start time(s);
- (d) duration(s);
- (e) date(s); and
- (f) detailed written explanation of why the AIT Call Data referred to in (a) – (e) above supports a reasonable suspicion of AIT (having regard to the definition of AIT and paragraph 2.2).

In exceptional circumstances where there is a reasonable suspicion of AIT across a range of dialled destination numbers, the Party submitting the AIT Call Data shall be permitted to supply incomplete dialled destination numbers providing that Party uses best endeavours to supply the best and most detailed information it can having regard to the circumstances and certifies that the information so supplied is the best and most detailed available. Exceptional circumstances may include informal or formal regulatory alerts or investigations and/or any Call traffic patterns reasonably suggesting an entity is attempting to disguise AIT activity across a number of dialled destination numbers within a block(s) of numbers.

“AIT Dispute”

a dispute relating to AIT or suspected AIT between a Party serving an A1 Retention Notice and a TNO and which remains unresolved 5 Working Days after a Party has validly served a Dispute Notice and that date shall be known as the “AIT Dispute commencement date”, and for the avoidance of doubt there shall be no AIT Dispute if a Dispute Notice is not served by the relevant

“AIT Indicators”	party in accordance with this Annex E; non-exhaustive list of situations, examples and/or circumstances of AIT as set out at Appendix E5;
“AIT Interest Rate”	means the average of the previous three months’ LIBOR (London Inter-bank Offered Rate) plus four (4) percent, calculated daily;
“Hosted Number”	means a telephone number which has been allocated to a communications provider by Ofcom under the National Telephone Numbering Plan but where that first communications provider allows another communications provider to manage the conveyance of that telephone number on its behalf.
“ONO” or “Originating Operator”	Network a network operator from whose System the Call to a telecommunication service is handed over to the System of a TNO or of the TO under the provisions of a BT Standard Interconnect Agreement;
“Partial CLI”	if available, the telephone number of the Calling Party less the final four digits;
“PhonepayPlus”	means the premium rate communication services regulator (which was known as ‘ICSTIS’ (Independent Committee for the Supervision of Telecommunication Information Services) prior to October 2007) or any succeeding regulator of such services;
“Ported Number”	means a telephone number which has been allocated to a communications provider by Ofcom under the National Telephone Numbering Plan but which has been effectively re-allocated by that communications provider at the request of an end user to a new communications provider.
“TNO” or “Terminating Operator”	Network a network operator to whom a Call is handed over from an ONO or from the TO under the provisions of a BT Standard Interconnect Agreement, on which network operator’s system the telecommunication service is operating or via whose system the telecommunication service is accessed;
“TO” or “Transit Operator”	BT if either: (a) receiving Calls from the ONO in order to hand over such Calls to a TNO, or

- (b) handing over Calls to the TNO (which have been received from an ONO),

under the provisions of a BT Standard Interconnect Agreement. For the avoidance of doubt, BT is not the TO where it hands over Calls resulting solely from non-geographic number portability pursuant to the provisions of Schedule 07 of a BT Standard Interconnect Agreement;

“Transit Situation”

a situation where a Call is handed from an ONO to BT (as the TO) in order for BT to hand that Call to a TNO.

- 1.2 For the purposes of AIT and of this Annex, “Calls” shall exclude Calls to geographic number ranges commencing with the digits 01 or 02.

2. GENERAL

- 2.1 **Purpose:** This Annex is designed, and shall be construed accordingly:

- (a) to cover a variety of contractual situations in relation to a BT Standard Interconnect Agreement, in particular in relation to where:-
 - i. one Party to this Agreement is an ONO and the other Party is a TNO; or
 - ii. BT is a TO and the other Party to this Agreement is either an ONO or a TNO; and
- (b) to act as a uniform code for regulating relations between an ONO and a TNO (and where relevant the TO) in relation to a BT Standard Interconnect Agreement, even though, in a Transit Situation either the ONO or the TNO will not be a Party to this Agreement. In a Transit Situation the Parties (BT and either the ONO or TNO) and the other party to the relevant Call traffic shall use their best endeavours to ensure this Annex operates as a uniform code to bind the ONO, the TNO and the TO.

- 2.2 **Absence of good faith usage or acceptable and reasonable commercial practice:** Without prejudice to the generality of the definition of AIT the following shall not ordinarily be regarded as either a good faith usage or an acceptable and reasonable commercial practice and usage of Telecommunications Systems:

- (a) any situation where any member of the public (including partnerships companies and corporations engaged in normal commercial, academic or governmental business) is misled into making, receiving or prolonging Calls by such party or such person in connection with a telecommunication service;
- (b) any breach of any relevant law or of any then current industry ruling, regulation, convention, policy guidance or statement of principle, including (but not limited to) any such ruling or determination of OFCOM, PhonepayPlus or any successor or similar bodies (other than breaches of the PhonepayPlus Code of Practice which would be considered “minor breaches” having regard to the PhonepayPlus Sanctions Guide);
- (c) any activity which has the effect, intended effect or likely effect of:

- i. preventing the billing system from capturing any necessary billing information (in relation to the conveyance of a Call to a telecommunication service); or
 - ii. causing incorrect billing by the billing system
- of a Party to this Agreement, or of an associated ONO and/or TNO; or
- (d) any use of Telecommunication Systems for purposes other than the genuine conveyance of Calls for the proper benefit of users of the electronic communications network.

2.3 **AIT definition not exclusive:** The definition of AIT is not intended to be limited to cases of Calls made, generated, stimulated and/or prolonged fraudulently but to any situation where there has been an absence of good faith usage or alternatively an absence of acceptable and reasonable commercial practice relating to the operation of the Telecommunication Systems and/or telecommunication service. It is expressly recognised that it is difficult to identify every potential instance of AIT in advance as new methods of artificially inflating telecommunications traffic are constantly being evolved.

2.4 **Obligations in relation to AIT:** The Parties:

- (a) shall not knowingly engage in, assist or allow others to engage in AIT;
- (b) shall use reasonable endeavours, including the use of reasonably appropriate measures, to detect, identify, notify and prevent AIT, both singly and co-operatively, in accordance with paragraph 14A of the main body of this Agreement and this Annex. Reasonably appropriate measures may include:
 - i. establishing and implementing a process of credit vetting and customer risk assessment of service providers;
 - ii. PhonepayPlus registration checks in respect of service providers (including the inspection of Prior Permission Certificates, where such Prior Permission Certificates are required under the PhonepayPlus Code of Practice for the operation of certain telecommunication services);
 - iii. Call data monitoring, regular and timely reporting of AIT Indicators as described in Appendix E5 and/or suspected or potential AIT activity; and
 - iv. comprehensive contractual terms with service providers. Such terms and conditions to include obligations equivalent to those in this Annex for the detection, identification, notification and prevention of AIT, the ability to retain reasonably suspected AIT revenues and the requirement for service providers to obtain similar contractual undertakings from their own service providers;
- (c) when undertaking a technical development in relation to telecommunication services, shall reasonably enhance the facilities for the prevention and detection of AIT;
- (d) agree and understand that the reasonable endeavours that can be carried out by the TO to detect, identify, notify and prevent AIT are necessarily limited;
- (e) undertake to perform their obligations under this Annex in good faith;
- (f) shall ensure that they have a working facsimile facility for the receipt of notices under this Annex E and the other Party is immediately advised of any changes to the facsimile number, or to the other contact details required to be supplied under paragraph 4.1; and
- (g) agree that if the TNO invoices the appropriate party late such that a party is prevented from serving an A1 Retention Notice by the AIT calendar day set out in paragraphs 5.2 or 6.2 then:

- i. the appropriate party shall be entitled to serve the A1 Retention Notice after the AIT calendar day set out in paragraphs 5.2 or 6.2, provided it is served on the TNO within 10 Working Days of receipt of the relevant invoice; and
- ii. all “AIT calendar day” time-limits relating to the service of notices and/or provision of information set out in this Annex E shall be extended by an equivalent number of calendar days as those in which the invoice was issued after the 1st AIT calendar day.

2.5 **AIT notices:**

- (a) Where a notice is issued or served between the parties under this Annex it shall be delivered by fax on a Working Day between the hours of 09.00 and 17.00. If it is delivered after 17.00 it shall be deemed to have been delivered on the succeeding Working Day. If there is evidence that the fax number provided by the recipient party is incorrect or out-of-date, or the fax machine is unavailable or not working then the issuing or serving party may issue or serve a notice as applicable electronically by email to the email address supplied under paragraph 4.1, or failing that provided that it is to an email address which is reasonably believed in good faith by the party issuing or serving the notice to be operational. In the absence of contrary evidence, a notice by email shall be duly served as the time of successful receipt by the recipient (as may be evidenced by, but not limited to, the transmission of an automatic read receipt from, or a manual acknowledgement by, the recipient). Information other than notices may be delivered electronically by email;
- (b) If BT, following public consultation with a range of parties to this Agreement, believes, acting reasonably in all the circumstances, all or one of the forms set out in Appendices E1 to E4 of this Annex E require amending in order for the parties to this Agreement to better be able to comply with their obligations under paragraph 14A of the main body of this Agreement then BT shall be entitled to make such amendments on three months' notice providing the amendments do not materially adversely affect the rights or obligations of a Party to this Agreement.

2.6 **Transit conveyance charge:** For the avoidance of doubt, in a Transit Situation the BT transit conveyance charge appropriate to that type of Call remains payable to BT by the relevant party for that Call, irrespective of the presence or suspected presence of AIT or any retentions that may be made.

2.7 **Interpretation:** The headings in this Annex are for convenience only and shall not affect its interpretation.

3. **RESTRICTION ON USE OF INFORMATION**

3.1 **Data Protection:** Notwithstanding any other provisions of this Agreement in relation to information sharing, any information passed between the Parties in accordance with paragraphs 5 to 8 shall be used and in accordance with Data Protection legislation and only for the following purposes:

- (a) to monitor, prevent or detect AIT;
- (b) to assist the investigation of AIT and to undertake any associated criminal prosecutions;
- (c) to undertake civil proceedings to effect recovery of losses resulting from AIT; and/or
- (d) to resolve an AIT Dispute.

3.2 In a Transit Situation, the TO shall ensure that information from the:

- (a) ONO, is only passed to the TNO; and
- (b) TNO, is only passed to the ONO.

under provisions which are equivalent to paragraph 3.1.

4. NOMINATED PARTIES

4.1 **Representative:** Each Party shall nominate in writing to the other a representative and their fax number and contact details to deal with the service of any notices referred to in this Annex (in accordance with paragraph 2.5) and any ancillary matters under this Annex. Contact details should include email addresses. Each Party shall immediately notify the other in writing of any changes to such representative. Each Party shall be responsible for the dissemination of information internally within its organisation.

4.2 **ONO and TNO to communicate directly in Transit Situations based on contact details provided by BT:** In compliance with obligations under paragraph 14A of the main conditions of this Agreement and with paragraph 2.4(e) of this Annex E, following the issuing of an A1 Retention Notice in a Transit Situation, the ONO and TNO shall copy notices to BT but shall deal directly with the respective TNO or ONO representative as advised by BT and listed on the relevant notice(s) which BT shall copy to the respective Operators, except where:

- (a) the respective TNO or ONO party has agreed with BT in writing that dealing directly with the respective TNO or ONO representative in accordance with paragraph 6.2(a) and as advised by BT would be unreasonable having regard to all the circumstances; or
- (b) BT as the TO issues the A1 Retention Notice in accordance with paragraph 6.2(b) in which case BT shall deal directly with the TNO.

4.3 **TNO porting or hosting:** For the avoidance of doubt:

- (a) if a number is a Ported Number and has been ported by the TNO to another network operator, the TNO (as the range holder for that number) remains responsible for dealing with all matters relating to any Retention Notice or AIT Dispute in respect of such number. The provisions of this Annex shall continue to apply to the TNO regardless of the number having been ported; and/or
- (b) if there is a Hosted Number whereby the TNO is hosting a non-geographic number on behalf of the range holder for that number, and is contracting with the ONO or the TO under this Agreement for the conveyance of Calls to such number, the TNO remains responsible for dealing with all matters relating to any Retention Notice or AIT Dispute in respect of such number. The provisions of this Annex shall continue to apply to the TNO regardless of the number being hosted;

and in both (a) and (b) it shall be the TNO's sole responsibility to deduct or recover any payment relating to AIT from such other network operator.

5. *NON-TRANSIT WITHHOLDING OF PAYMENT FOR AIT*

5.1 This paragraph 5 applies to non-Transit Situations.

- 5.2 **A1 Retention Notice:** If an ONO has a reasonable suspicion of AIT in respect of Calls conveyed by the ONO to a TNO, it shall serve an A1 Retention Notice to the TNO by the 14th AIT calendar day. The ONO may then withhold payment from the TNO subject to the provisions of this Annex.
- 5.3 **AIT Call Data:** The ONO shall supply the associated AIT Call Data to the TNO by the 26th AIT calendar day by e-mail (or exceptionally by special delivery or recorded delivery post if the data is too large to send by e-mail) and confirm by fax the despatch of the associated AIT Call Data.
- 5.4 **Withdrawal Notice:** If the AIT Call Data has not been supplied by 17.00 on the 26th AIT calendar day, the ONO shall be obliged to serve (and if the ONO fails to serve shall be deemed to have served) a Withdrawal Notice on the TNO by the 30th AIT calendar day in respect of all the Calls referred to in the A1 Retention Notice and paragraph 5.8 shall apply.
- 5.5 **Rejection Notice:** If the TNO disputes there are reasonable grounds for an A1 Retention Notice, the TNO shall serve a Rejection Notice on the ONO by the 34th AIT calendar day (unless and to the extent that a Withdrawal Notice has been served or deemed served).
- 5.6 **No Rejection Notice:** If the TNO fails to serve a Rejection Notice by the 34th AIT calendar day, the:
- (a) ONO shall retain permanently the sum stated in the A1 Retention Notice from the TNO;
 - (b) TNO shall issue a credit note to the ONO by the 41st AIT calendar day for the sum stated in the A1 Retention Notice; and
 - (c) ONO will be entitled, in default of the issue of any such credit note by the 41st AIT calendar day, to issue a debit note to the TNO for the sum stated in the A1 Retention Notice.
- 5.7 **Dispute Notice and/or Withdrawal Notice:** After service of a Rejection Notice the ONO may serve on the TNO by the 49th AIT calendar day a:
- (a) Dispute Notice for the full sum withheld under the A1 Retention Notice; or
 - (b) Dispute Notice for part of the sum, and a Withdrawal Notice for the balance of the sum, withheld under the A1 Retention Notice, clearly identifying the precise Call traffic to which the Dispute Notice and the Withdrawal Notice relate; or
 - (c) Withdrawal Notice for the full sum withheld under the A1 Retention Notice,
- and if the ONO fails to serve a Withdrawal Notice in accordance with:
- i. sub-paragraph (b) above for the balance of the sum; or
 - ii. sub-paragraph (c) above for the full sum
- the ONO shall be deemed to have served such a Withdrawal Notice for the applicable sum.
- 5.8 **Payment and Interest:** If a Withdrawal Notice is served (or deemed served), the ONO shall immediately make payment to the TNO of:
- (a) all of the sum specified in the A1 Retention Notice, or in the event of a Dispute Notice also being served under paragraph 5.7 the sum specified (or deemed specified) in the Withdrawal Notice which is no longer the subject of any retention claim; and

- (b) interest on the sum specified (or deemed specified) in the Withdrawal Notice calculated in accordance with paragraph 8.1.
- 5.9 **AIT Dispute:** The Parties agree that if there is an AIT Dispute they have a good faith obligation to resolve it in accordance with the provisions of paragraph 7.
- 5.10 **Number Portability between BT and the Operator:** Notwithstanding paragraph 4.3, in non-Transit Situations in respect of Calls to a ported non-geographic number when BT or the Operator as the range holder of a non-geographic number has ported that number to the other Party as the recipient system under Schedule 07 to this Agreement, in which case any reference to the ONO and TNO, shall be deemed to refer to the range holder and the recipient operator respectively, subject that in paragraphs 5.2 to 5.9 an additional two (2) Working Days shall be allowed in respect of the time provided for the service of such notices and the provision of AIT Call Data and the prescribed time periods in those paragraphs shall be extended accordingly.

6. TRANSIT WITHHOLDING OF PAYMENT FOR AIT

6.1 This paragraph 6 applies to Transit Situations.

6.2 A1 Retention Notice:

- (a) **Initiated by ONO:** If the ONO has a reasonable suspicion of AIT in respect of Calls conveyed (via the TO) to a TNO, it shall issue an A1 Retention Notice to the TO by the 14th AIT calendar day. The ONO may then withhold payment from the TO, subject to the provisions of this Annex. The TO in receipt of that A1 Retention Notice shall re-issue the appropriate A1 Retention Notice(s) (including the identity of the ONO) on the relevant TNO(s) by 5pm on the Working Day immediately following the 14th AIT calendar day and the TO may then withhold payment from the TNO(s) subject to the provisions of this Annex. The A1 Retention Notice(s) so re-issued by the TO to the TNO shall be deemed to have been served by the ONO on the relevant TNO(s) on the date of re-issue by the TO. The TO shall forward a copy of the re-issued A1 Retention Notice to the ONO at the same time and in the same manner.
- (b) **Initiated by the TO:** As an exceptional alternative to the ONO serving an A1 Retention Notice under paragraph 6.2(a), if the TO has a reasonable suspicion of AIT in respect of Calls conveyed by it on behalf of the ONO to a TNO, it may, in its sole discretion, serve an A1 Retention Notice (which shall indicate the identity of the ONO) on the TNO by the 14th AIT calendar day and if so shall forward a copy of that A1 Retention Notice (and any other notices under this Annex) to the ONO at the same time and in the same manner and the TO may withhold payment from the TNO subject to the provisions of this Annex. The ONO may (provided that it has notified the TO of its intentions by the 15th AIT calendar day) withhold payment from the TO (only up to the value which the TO has billed the ONO)..

For the sake of clarity, in a Transit Situation the ONO shall have the primary responsibility for serving an A1 Retention Notice where there is a reasonable suspicion of AIT, however the Parties agree there may be circumstances where the TO becomes independently aware of and forms the initial reasonable suspicion of AIT, in which case the TO may serve an A1 Retention Notice on the TNO and shall liaise, and share AIT Call Data and related notices with the ONO.

6.3 **AIT Call Data:** The Party serving the A1 Retention Notice shall:

- (a) supply the associated AIT Call Data to the TNO; and
- (b) copy that AIT Call Data to either the:
 - i. TO (where paragraph 6.2(a) applies); or
 - ii. ONO (where paragraph 6.2(b) applies)

by the 26th AIT calendar day by e-mail, or exceptionally by special delivery or recorded delivery post if the data is too large to send by e-mail. The Party supplying that AIT Call Data shall confirm by fax the despatch of the associated AIT Call Data to the TNO and either the TO or the ONO.

6.4 Withdrawal Notice: If the Party which served the A1 Retention Notice has not supplied the relevant AIT Call Data in accordance with paragraph 6.3 by the 26th AIT calendar day, that Party shall be obliged to serve (or shall be deemed to have served) a Withdrawal Notice on the TNO (and, where paragraph 6.2(a) applies, provide a copy of same to the TO) by the 30th AIT calendar day and paragraph 6.8 will apply.

6.5 Rejection Notice: If the TNO disputes there are reasonable grounds for an A1 Retention Notice, the TNO shall:

- (a) serve a Rejection Notice on the party which served or is deemed to have served the A1 Retention Notice; and
- (b) copy that Rejection Notice to the TO (where paragraph 6.2(a) applies)

by the 34th AIT calendar day (unless and to the extent that a Withdrawal Notice has been served).

6.6 No Rejection Notice:

- (a) **Where the A1 Retention Notice was initiated by ONO:** Where paragraph 6.2(a) applies, if the TNO fails to serve a Rejection Notice by the 34th AIT calendar day, subject to paragraph 2.6, the:
 - i. ONO shall retain permanently the sum stated in the A1 Retention Notice from the TO;
 - ii. TO shall be entitled to retain permanently a like sum from the TNO;
 - iii. TNO shall issue a credit note to the TO by the 41st AIT calendar day for the sum stated in the A1 Retention Notice and, upon receipt thereof, the TO will issue a credit note for a sum equal to that notified in the Retention Notice to the ONO 7 calendar days thereafter; and
 - iv. ONO will be entitled, in default of the issue of any such credit note within such period, to issue a debit note to the TO for the sum stated in the A1 Retention Notice and the TO will in turn be entitled to issue a debit note to the TNO for a like sum.
- (b) **Where the A1 Retention Notice was initiated by TO:** Where paragraph 6.2(b) applies, if the TNO fails to serve a Rejection Notice by the 34th AIT calendar day, subject to paragraph 2.6, the:
 - i. TO shall be entitled to retain permanently from the TNO the sum stated in the A1 Retention Notice;
 - ii. TNO shall issue a credit note to the TO by the 41st AIT calendar day for the sum stated in the A1 Retention Notice and, upon receipt thereof, the TO will (if relevant) issue a credit note to the ONO 7 calendar days thereafter for a sum equal to that identified and withheld by the ONO; and
 - iii. TO shall be entitled, in default by the TNO of the issue of any such credit note under paragraph 6.6(b) ii to issue a debit note to the TNO for the sum stated in the

A1 Retention Notice and the ONO will be entitled in default of the issue of any such credit note within such period to issue a debit note to the TO for a sum equal to that identified and withheld by the ONO.

6.7 Dispute Notice and/or Withdrawal Notice: After service of a Rejection Notice under paragraph 6.5, the Party which served the A1 Retention Notice shall serve on the TNO (and copy same to the TO where paragraph 6.2(a) applies) by the 49th AIT calendar day a:

- (a) Dispute Notice for the full sum withheld under the A1 Retention Notice; or
- (b) Dispute Notice for part of the sum withheld under the A1 Retention Notice and a Withdrawal Notice for the balance of the sum withheld under the A1 Retention Notice, clearly identifying the precise Call traffic to which the Dispute Notice and the Withdrawal Notice relate; or
- (c) Withdrawal Notice for the full sum withheld under the A1 Retention Notice,

and if the Party which served the A1 Retention Notice fails to serve a Withdrawal Notice in accordance with:

- i. sub-paragraph (b) above for the balance of the sum; or
- ii. sub-paragraph (c) above for the full sum

that Party shall be deemed to have served such a Withdrawal Notice for the applicable sum.

6.8 Payment and Interest: If a Withdrawal Notice is served (or deemed served):

- (a) the Party serving the Withdrawal Notice shall immediately make payment to the Party upon which it served the A1 Retention Notice of:-
 - i. all of the sum specified (or deemed specified) in the A1 Retention Notice, or, in the event of an Dispute Notice also being served under paragraph 6.5, the sum specified in the Withdrawal Notice which is no longer the subject of any retention claim; and
 - ii. interest on the sum specified (or deemed specified) in the Withdrawal Notice calculated in accordance with paragraph 8.1; or
- (b) where paragraph 6.2(a) applies, the TO shall pass the sum which it receives from the ONO under paragraph 6.7(a) to the TNO within 7 calendar days of receipt of payment from the ONO.

6.9 AIT Dispute: The Parties agree that if there is an AIT Dispute, the Party to that AIT Dispute (along with the other party to that AIT Dispute) has a good faith obligation to resolve it in accordance with the provisions of paragraph 7.

6.10 Information Sharing: Although in a Transit Situation where the A1 Retention Notice has been initiated by the ONO under paragraph 6.2(a) the TNO and the ONO are not direct contractual parties, in order to comply with paragraph 14A.1 of the main body of this Agreement and this Annex it shall be their individual responsibilities to serve notices, supply AIT Call Data and/or correspondence directly upon the other (other than the initial A1 Retention Notice) and copying the same to the TO and both ONO and TNO shall be obliged to receive any notice served directly upon it by the other which service shall be considered to be effective contractual service under this Agreement for all purposes connected with this Annex.

7. AIT DISPUTES AND DISPUTE RESOLUTION

- 7.1 **Obligation to Resolve AIT Disputes:** The parties to an AIT Dispute agree they have an obligation to expediently and appropriately resolve AIT Disputes in good faith and in a timely and co-operative manner, irrespective of whether or not they have a direct contract with the other party to that AIT Dispute.
- 7.2 **Standard of Proof for AIT Dispute Resolution:** In relation to the resolution of an AIT Dispute the standard of proof shall be that of a “strong and convincing suspicion” that AIT has occurred in respect of the Call traffic referred to in the A1 Retention Notice in order to permanently retain those sums.
- 7.3 **Formal Resolution of AIT Dispute:** Without prejudice to paragraph 35 of the main body of the Agreement the following sub-paragraphs set out the different forms of dispute resolution which may be open to the parties to an AIT Dispute depending on the circumstances of the AIT Dispute, however this paragraph 7.3 does not prescribe any particular dispute resolutions process nor is it intended to do so:
- (a) **Non-Transit Situation between ONO and TNO:** Where an AIT Dispute in a non-Transit Situation exists between the Parties to this Agreement, they may resolve that AIT Dispute using:
 - i any form of dispute resolution they both agree upon; or
 - ii. court proceedings;
 - (b) **Two party Transit Situation significantly between ONO and TNO (not necessarily involving TO):** Where an AIT Dispute in a Transit Situation exists between the Operator and another non-BT party in a situation where the two non-BT parties and the TO have agreed that the TO does not need to be involved in the resolution of that AIT Dispute, the two non-BT parties may resolve that AIT Dispute using:
 - i any form of dispute resolution they and the TO agree upon (although the TO may choose not to participate in that dispute resolution); or
 - ii. court proceedings;
 - (c) **Two party Transit Situation between TO and TNO (not involving ONO):** Where an AIT Dispute in a Transit Situation exists between the TNO and the TO (where the TO initiated the A1 Retention Notice under paragraph 6.2(b)) in a situation where the two non-BT parties and the TO have agreed that the ONO does not need to be involved in the resolution of that AIT Dispute, the TNO and the TO may resolve that AIT Dispute using:
 - i any form of dispute resolution the TNO, ONO and TO agree upon (although the ONO may choose not to participate in that dispute resolution); or
 - ii. court proceedings;
 - (d) **Three party Transit Situation between ONO, TO and TNO:** Where an AIT Dispute in a Transit Situation exists between the TO, the Operator and the non-BT party to a separate BT Standard Interconnect Agreement, they may resolve that AIT Dispute using:
 - i any form of dispute resolution they all agree upon and participate in; or
 - ii. court proceedings.
- 7.4 **Assignment of rights in an AIT Dispute between ONO and TNO in a Transit Situation:** Without prejudice to paragraph 2.6, where an AIT Dispute exists between an ONO and a TNO in a Transit Situation, the TO may (only with the prior written agreement of authorised signatories of both the ONO and the TNO, but shall be under no obligation to) assign to the TNO any rights to payment from the ONO for the sum in dispute and Call traffic in dispute in order that all issues as to retention of monies may be settled between the TNO and the ONO. Any such assignment agreement shall expressly include provision for acceptance by the TNO that it:

- (a) agrees to be bound by the terms of this Annex;
- (b) will pursue any claim for any monies withheld directly against the ONO; and
- (c) hold the TO free from any further responsibility to make payment to the TNO.

7.5 Deemed Resolution of AIT Dispute: If in relation to an AIT Dispute:

- (a) a form of binding dispute resolution;
- (b) a written settlement agreement; or
- (c) court proceedings

as referred to in paragraph 7.3 has not been reached (in relation to (a) or (b) above) or instituted (in relation (c) above) by the relevant parties within ten (10) months of the AIT Dispute commencement date then the AIT Dispute will be deemed to have been resolved in favour of the party which served the A1 Retention Notice.

7.6 Nothing in this Annex shall prevent either Party from exercising any other rights and remedies that may be available in respect of any breach of the provisions of this Agreement.

8. INTEREST

8.1 Any interest that is specified to be paid under the provisions of this Annex shall be calculated from the date when it was contractually otherwise due to be paid but for the service of a relevant notice to the date when payment was finally made at the AIT Interest Rate.

APPENDICES:

E1	A1 Retention Notice form
E2	A2 Withdrawal Notice form
E3	A3 Rejection Notice form
E4	A4 Dispute Notice form
E5	AIT Indicators

APPENDIX E1: A1 Retention Notice**A1 Retention Notice**

TO (transit operator OR terminating network operator)	COMPANY	Transit Operator	Terminating Network Operator
	NAME / TITLE		
	TELEPHONE		
	FAX		
	E-MAIL		
FROM (originating network operator OR transit operator)	COMPANY	Originating Network Operator	Transit Operator [BT use only]
	NAME / TITLE		
	TELEPHONE		
	FAX		
	E-MAIL		

I hereby give formal notice of an intention to withhold payment for the calls detailed below on grounds of suspicion of AIT in line with the appropriate provisions of the Standard Interconnect Agreement.

Terminating number range(s) and Operator	Dates		Estimated total calls / minutes	Estimated NET value/ interconnect revenue (£) (excl VAT)
Total Interconnect Revenue (£) (excl VAT)				

Details of the “reasonable suspicion” of AIT

I confirm that I am authorised to issue this notice on behalf of the above noted operator, and that numbers and revenues stated represent traffic profiles consistent with AIT indicators described in Annex E of the Standard Interconnect Agreement.

Signature:

Date:

ADDITIONAL INFORMATION (use additional pages if necessary):

APPENDIX E2: Withdrawal Notice

<h1>Withdrawal Notice</h1>			
TO (terminating network operator)	COMPANY		
	NAME / TITLE		
	TELEPHONE		
	FAX		
	E-MAIL		
FROM (originating network operator OR transit operator)	COMPANY	Originating Network Operator	Transit Operator [BT use only]
	NAME / TITLE		
	TELEPHONE		
	FAX		
	E-MAIL		
I hereby give formal notice that we withdraw the retention detailed below.			
Terminating number range(s) and Operator	Dates	Estimated total call minutes	Estimated NET value/ interconnect revenue (£) (excl VAT)
Total Interconnect Revenue (£) (excl VAT)			
I confirm that I am authorised to issue this notice on behalf of the above noted operator.			
Signature:		Date:	

ADDITIONAL INFORMATION (use additional pages if necessary):

APPENDIX E3: Rejection Notice

<h1>Rejection Notice</h1>				
TO (originating network operator OR transit operator)	COMPANY			If Transit, also COPY to ONO or TO
	NAME / TITLE			
	TELEPHONE			
	FAX			
	E-MAIL			
FROM (terminating network operator)	COMPANY			
	NAME / TITLE			
	TELEPHONE			
	FAX			
	E-MAIL			
I hereby give formal notice that we reject this retention. Summary reasons for this rejection are given below, and full details are given in the statement accompanying this notice.				
Terminating number range(s) and Operator	Dates		Estimated total call minutes	Estimated NET value/ interconnect revenue (£) (excl VAT)
Total Interconnect Revenue (£) (excl VAT)				
Summary of basis for rejection of the A1 Retention Notice				
I confirm that I am authorised to issue this notice on behalf of the above noted operator.				
Signature:			Date:	

ADDITIONAL INFORMATION (use additional pages if necessary):

APPENDIX E4: Dispute Notice

<h1>Dispute Notice</h1>				
TO (terminating network operator)	COMPANY			If Transit, also COPY to ONO or TO
	NAME / TITLE			
	TELEPHONE			
	FAX			
	E-MAIL			
FROM (originating network operator OR transit operator)	COMPANY			
	NAME / TITLE			
	TELEPHONE			
	FAX			
	E-MAIL			
I hereby give formal notice that we dispute the rejection notice raised in respect of the case detailed below. Summary reasons for this dispute are given below and full details are given in the statement accompanying this notice.				
Terminating number range(s) and Operator	Dates	Estimated total call minutes	Estimated NET value/ interconnect revenue (£) (excl VAT)	
Total Interconnect Revenue (£) (excl VAT)				
Summary of basis for disputing the Rejection Notice				
I confirm that I am authorised to issue this notice on behalf of the above noted operator.				
Signature: Date:				

ADDITIONAL INFORMATION (use additional pages if necessary):

APPENDIX E5

AIT INDICATORS

In relation to Calls potentially covered by the definition of "AIT" AND having regard to the nature of the telecommunication service, the following situations and/or circumstances may be considered "AIT Indicators" for the purpose of this Annex:

Having regard to the telecommunication service:

1. **Excessive Calls:** For each of the first 3 months after commencement of the telecommunications service the number of Calls delivered to that telecommunication service exceed by 25% (or such other percentage as the Parties may agree in writing) or more the average number of Calls to a similar telecommunication service ascertained after the first month and monthly thereafter.
2. **Excessive Growth:** After the first 3 months the number of Calls delivered to any telecommunication service increases at a rate of 25% or more from any one month to the next.
3. **Small Number Calling Centres:** A high proportion and/or volume of Calls delivered to any telecommunication service originate or are generated at a small number of Calling Centres whether or not limited in geographical location.
4. **Call Duration:** The average duration of Calls delivered to any telecommunication service differs significantly from that of Calls to a similar telecommunication service or there are repeated Calls of similar duration.
5. **No Promotion:** Calls delivered to any telecommunication service appear to originate without promotion of the telecommunication service.
6. **Payphone Origination:** A significant proportion of Calls delivered to any telecommunication service originate at payphones or use payment systems other than a standard telephone bill.
7. **Self Generated Calls:** Calls made by or on behalf of the telecommunication service to itself excessively.
8. **Breach of Law:** Operating a telecommunication service in breach of the law, where such breach can reasonably be regarded as causing AIT.
9. **PhonepayPlus Code:** Operating a telecommunication service in breach of the PhonepayPlus Code of Practice (including any equivalent or applicable replacement, future or additional enforceable code(s), guideline(s) and/or practice notes), where such breach is of a financial nature, is not one which would be considered minor having regard to the PhonepayPlus 'ICSTIS Sanctions Guide' (including any equivalent or applicable replacement, future or additional guide(s)) and/or can reasonably be regarded as causing or being AIT.
10. **Missed Calls:** Calls made to a telecommunication service in response to a "missed call" (that is a Call of a very short duration and which is unanswered or unanswerable), where it is likely that the initial "missed call" was not genuinely a call which the Calling Party had made in order to contact the called party, but rather the "missed call" was of a very short duration and made with the primarily purpose of getting the called party to make a return Call to the number displayed on their mobile or fixed-line handset as missed, particularly where:
 - (a) the initial called party did not personally know the missed Calling Party or have a legitimate commercial reason for receiving a missed call from that Calling Party;
 - (b) the Call to the missed call number is to a:

- i. per call drop rate of any value;
 - ii. a per minute call rate of 10ppm or more; and/or
 - iii. combination of per call drop rate and per minute call rate, both of any value; and/or
 - (c) upon returning the missed call, the caller is encouraged to remain on the Call as long as possible and/or the service on the Call does not appear to be genuine.
- 11. Impinges Billing Technology:** Calls are made to a telecommunication service in a manner reasonably suggesting that billing technology and/or data had been or had attempted to be impinged upon.
- 12. Fraudulent Calls:** Calls made fraudulently (whether there is a direct or indirect relationship between the Calling Party and the particular telecommunications service) but specifically excluding Calls made on individual lost or stolen mobile handsets/SIM cards.
- 13. Self Generated or Related Calls:** Calls made at a charge to the Calling Party which is less than the out-payment to the telecommunication service in circumstances which reasonably indicate that the telecommunication service was involved in those Calls.
- 14. Excessive Durations:** Calls which last for an excessive duration or result in lockups.
- 15. Overseas:** For Calls to PRS, Calls originating overseas.
- 16. Tromboning:** Where there are a high proportion of Calls are to a UK originating number and where those Calls are purposefully routed to an operator or network outside of the UK for the sole purpose of enabling the TNO (and/or its reseller) to route the Call back through BT as transit in order to enable the TNO (and/or its reseller) to benefit from the price differentials between the two Call types, particularly where there appears to be a commercial relationship between the Calling Party and the TNO (and/or its reseller).
- 17. CLI Manipulation:** Where there are a high proportion of Calls where the actual CLIs which are ordinarily visible to operators have been intentionally hidden, modified or replaced by fake or masking CLIs, including but not limited to situations where AIT Indicator 10 applies.