



**Dispute between Cable & Wireless UK and
British Telecommunications plc
Relating to BT's 0845 POLOs**

OFCOM PROVISIONAL CONCLUSIONS

BT Response

17 December 2012

Executive Summary

1. BT's adjusted method proposed for the apportionment of package revenue into the 0845 NTS Condition POLO calculation produces an accurate, fair and reasonable result that is entirely consistent with the NTS Call Origination Condition, the associated NTS Formula and the Ofcom's National Telephone Numbering Plan, and avoids the circularity that clearly arises with Ofcom's proposed method.
2. Whilst the differences between BT's method and Ofcom's proposed method is small, Ofcom's proposed approach would have the effect – all input cost and revenue factors remaining constant – of increasing the 0845 POLO simply due to the recalculation of the POLO at each recalculation period or event, i.e. absent any improvement in the 0845 service purchased. Such a method – which increases the payment for a service absent any increase in benefit, to either the direct purchaser (BT) or the indirect purchaser (BT's customer's, who are citizen consumers in relation to this communication matter) of the 0845 services – could itself be characterised as unfair and unreasonable. Ofcom's proposed methodology seems to be in conflict with the following regulatory requirements:
 - Ofcom's duty under s.3(1)(a) of the Communications Act 2003, by failing to further the interests of citizens in relation to communications matters (in this context neither CW UK, nor its customers are citizens in relation to communication matters)
 - Ofcom's duty under s.3(1)(a) of the Communications Act 2003, by failing to promote the interests of consumers in relevant markets, where appropriate by promoting competition, BT is a consumer of the 0845 termination service and has no option but to purchase those services.
 - the NTS call origination condition and the associated NTS formula by not proposing a method for the allocation of package revenue into the NTS formula in a way that does not create 'circularity'.
 - the requirement to determine disputes – subject to the reasonable application of Ofcom's duties – in a way that is commercially fair between the parties. Two undertakings negotiating in a competitive market, would simply not agree to a charge that increases due simply to the passage of time, absent any other benefit to the payee party in return for that increased price.
3. Even if the Ofcom methodology is seen as fair and reasonable, the main problem for BT is Ofcom's unfair approach to implementation of the chosen methodology (namely that BT must make good any underpayment but cannot reclaim any overpayment). Ofcom has invented an artificial concept of the 'minimum POLO' in order to justify an unfair and unreasonable provisional conclusion. The NTS Condition has no such concept and simply requires the payment of the revenue earned after deduction of the costs of retailing and originating an 0845 call. To use this artificial concept to enable CW UK to keep overpayments it has received, while avoiding the obligation to make good any underpayments, when it was well

aware of BT's position, is unreasonable and will encourage other terminating CPs to reject fair and reasonable charge change requests.

4. Since the issue of Ofcom's Provisional Conclusions document Ofcom has clarified its position¹ in respect of the status of BT's contractual position and confirmed that it has no intention of directing CW UK to repay any overpayment, even in respect of that aspect of the disputed charge changes notice 0845 POLO calculation that were not disputed. An approach that deprives a CP of undisputed payments, encourages regulatory gaming (and ultimately disputes) is clearly unreasonable.
5. Given the significant problems with the way that Ofcom is proposing to resolve this dispute, Ofcom should reconsider its approach and direct that:
 - BT's amended method to the calculation of the revenue attributable to in package 0845 calls is fair and reasonable and should apply from 1 November 2009;
 - BT should recalculate the level of 0845 POLOs that should have been paid for all 0845 POLOs for the period 1 November 2009 to the date of Ofcom's Final Determination of this dispute, using actual call data on a quarter by quarter basis (or such other periodicity or event trigger as Ofcom finally determines);
 - BT should pay to CW UK any resulting underpayment in 0845 POLOs for the period 1 November 2009 to the date of final determination of the dispute
 - CW UK should repay to BT any resulting overpayment in 0845 POLOs for the period 1 November 2011 to the date of final determination of the dispute; and
 - (from the date of the final determination) BT should calculate the revenue attributable 0845 POLOs every quarter thereafter (or such other periodicity or event trigger as Ofcom finally determines).

¹ E-mail from Martin Hill to Tony Fitzakerly, 5 December 2012

1 Introduction and background

1. On 3 October 2012 Ofcom decided that it was appropriate for them to handle a dispute between BT and Ofcom about the charges that CW UK levies and BT pays for the termination of 0845 calls that are retailed by BT on CW UK's behalf and terminated on CW UK's network.
2. Ofcom defined the scope of this dispute as:

"... to determine:

- *the appropriate methodology for apportioning retail line rental revenue for the purposes of setting 0845 POLOs payable by BT to Cable & Wireless UK in the period 1 November 2009 to the date of the determination which will be issued by Ofcom to resolve the dispute;*
- *the methodology that BT should use to work out whether it should make further payments to Cable & Wireless UK with respect to the period 1 November 2009 to the date of the determination, taking into account the determination of (1) and BT's acknowledgement that it did not allocate additional package fee revenues to 0845 POLOs before August 2011; and*
- *if relevant, whether BT's pricing letter of 22 March 2012 was a fair and reasonable mechanism to notify Cable & Wireless UK of BT's proposed change in the level of the 0845 POLO."*

3. There is an additional aspect to the dispute between CW UK and BT, not covered by the terms of the scope prescribed by Ofcom, concerning whether, and if so, to what extent, CW UK should repay to BT overpayments that BT has made to CW UK for the termination of 0845 calls on CW UK's network since November 2011.
4. On 30 November 2012 Ofcom published their Provisional Conclusions and set a consultation period of 10 working days, i.e. by 5pm on 14 December 2012 for the parties and any other interested persons to comment on their Provisional Conclusions. This document is BT's response to those Provisional Conclusions.
5. The headings used here are those used in the provisional Conclusions. Unless otherwise stated, the character "§" references paragraph numbers in Ofcom's Provisional Conclusions document, and references to paragraphs are references to paragraphs in this document. Unless stated otherwise, the abbreviations adopted in this document are the same as those used by Ofcom in its Provisional Conclusions.

1.1 Regulatory requirement for BT to originate NTS Calls

6. In paragraphs 2.4 to 2.14, Ofcom briefly describes the complex regulatory provisions that underlie the payments that BT pays and CW UK charges for the termination of 0845 calls on CW UK's network. Ofcom, however, overlooks an

important aspect of these regulatory provisions – Ofcom’s National Telephone Numbering Plan (the Plan).²

7. The Plan describes the use that may be made of telephone numbers in the UK. Part A: Telephone Numbers Available for Allocation, of the Plan describes, at A1, the use – or using Ofcom’s terminology ‘designation’ – that may be made of 0845 numbers,

“Special Services basic rate: charged (before discounts and call packages) at BT’s Standard Local Call Retail Price for BT customers inclusive of value added tax (the price charges by other Originating Communications providers may vary)”

8. The terms “Special Services”, “BT’s Standard Local Call Retail Price”, and “Local Call” are defined in the Plan. “Special Services” means, “a service paid for through the telephone bill of a Subscriber, and charged for BT customer (before the application of calling packages and discounts) at rates set out in Part A of [the Plan]”, “BT’s Standard Local Call Retail Price” means “the retail price for a Local Call made by BT customers which operates as the standard retail price before the application of calling packages and discounts as shown on BT’s retail price list”, and “Local Call” means, “a call made from one Geographic Number to another Geographic Number within a limited geographic area”.

9. The importance of the omission of the Plan is discussed in Section 2 of this document.

10. In §§ 2.9 to 2.14 Ofcom describes how, from a regulatory perspective, the POLO is calculated. Key in this calculation is the “discount rate”. As Ofcom explains the “discount rate” is calculated by dividing BT’s “total revenue” by the “headline revenue” and then deducting this from 1. Ofcom describes the “headline revenue” as,

“the amount that BT would receive if all calls were priced at the headline rate”

and goes on to make the point,

“[i]n practice, many calls are discounted and the actual amount of revenue that BT earns is lower” (§2.14)

Ofcom continues, explaining that “total revenue”,

“refers to the amount of revenue that BT actually receives for the chargeable calls plus an amount of revenue to reflect inclusive calls”

and identifies one of the key issues that the dispute needs to resolve i.e.,

“[i]t is this revenue [for inclusive calls] that is the subject of the dispute”.

It is therefore essential that this revenue for inclusive calls is accurately and “fairly and reasonably” calculated, as it is only by appropriately calculating this figure that the POLO can in turn be properly calculated.

² <http://stakeholders.ofcom.org.uk/binaries/telecoms/numbering/numplan201210.pdf>

1.2 Dispute resolution

11. Following the Competition Appeal Tribunal (“CAT”)’s and Court of Appeal’s respective judgments in the PPC1 appeal proceedings³, BT remains of the view that it is inappropriate for Ofcom to use its dispute resolution powers to resolve disputes that are historic in nature. BT accepts, that the current state of the UK’s domestic case law allows Ofcom to determine historic disputes; however, this submission is made without prejudice to BT’s principled position and any future appeal that BT may bring on the extent of Ofcom’s dispute resolution powers.

2 Analysis of the provisional conclusions

12. This section responds to the questions posed and provisionally answered by Ofcom in Section 3 of its Provisional Conclusions when considering the appropriate methodology to apportion retail line rental revenue for the purpose of setting 0845 POLOs payable by BT to CW UK and in turn to resolve the dispute.
13. Ofcom refers to a “retail charge for line rental”; however, BT’s various packages are a charge for a bundle of services which include provision of an active fixed telephony line and, to a lesser or greater extent, various inclusive calls, including for certain packages, at certain times, inclusive to package calls to 0845 numbers. BT therefore simply refers to “packages”.

“Question 1: Assessment of BT’s methodology for apportioning line rental”

2.1 BT’s response

14. In the absence of a clear policy statement or direction from Ofcom as to either the amount of, or the appropriate method for calculating the value of inclusive 0845 calls, BT proposed what it believed to be a “fair and reasonable” calculation method.
15. BT’s proposed method adopted a “call re-pricing” approach. This approach adopted the Inclusive Call Allowances (ICAs) approach applied to inclusive call packages (bundles of different call types but not line rental or other services). The reason for this was that Oftel / Ofcom itself had historically applied just such a call re-pricing method.⁴ In the absence of any other guidance, BT took this past regulatory practice as an indicator of likely future regulatory practice. BT’s proposed derived price, given this past regulatory practice, was fair and reasonable, especially given that BT was not proposing to charge for these calls on a marginal / usage basis. For example, the proposed derived price was above the fully allocated cost of the service and around double the cost of normal fixed call termination.

³ British Telecommunications PLC v Office of communications (Private Circuits) case number 1146/3/3/09 <http://www.catribunal.org.uk/238-5136/1146-3-3-09-British-Telecommunications-Plc-.html>

⁴ Ofcom acknowledges this in footnote 29 of their Provisional Conclusions. However, Ofcom comments, in terms, that they need not consider whether such an approach is fair and reasonable due to their other concerns.

16. Having said that, BT acknowledges that there may be other methods that could be considered “fair and reasonable”; and this designation is not exclusive to just one method, especially where uncertainty exists for any proposed method.⁵ However, Ofcom’s proposed method is not such a method.
17. Ofcom gives two reasons or “concerns” as to why they consider BT’s proposed method may not to be “fair and reasonable” (§3.35). Both of these concerns are considered in turn:

2.1.1 Concern 1

“BT deducts the costs of inclusive weekend 0845 calls when calculating the margin on the [package] but does not allocate any of the associated revenue to those calls.”

18. The premise for this concern is plainly wrong. BT allocates a share of revenue based on the benchmark (historic) price for its weekend 0845 calls multiplied by the volume of 0845 calls in any given month. Whilst this revenue allocation is not done explicitly, e.g. as part of an Equal Percentage Mark Up calculation, following Ofcom’s approach in Paragraph 3.29. However, the margin that BT has included in the calculation is the line rental package revenue less the costs of the inclusive services - i.e. it is a portion of the revenue. Furthermore, as BT has increased the package charge over time, the allocation of revenue to 0845 calls and thus the POLO has also increased.
19. Moreover, as Ofcom acknowledges in the second bullet point of §3.34, the amount apportioned to 0845 calls deemed revenue is above the call origination costs.
20. Finally, Ofcom is concerned at §3.31 that BT’s approach results in revenue being apportioned to 0845 calls independently of the package costs (C_{LR}). However, the total margin apportioned to 0845 calls under BT’s proposed method would grow directly with the total volume of 0845 calls consumed by customers as BT proposes the use of current volumes to weight the costs of each inclusive service.

2.1.2 Concern 2

“In circumstances where the net revenue from line rental (R_{LR}) exceeds the costs of line rental (C_{LR}), it is not fair and reasonable for insufficient revenue to be allocated to inclusive weekend 0845 calls to cover the fully allocated costs of those calls. The extent to which this concern is realised is unclear (the data above only relates to a single OCCN). However, in the light of Concern 1, this appears to be a risk under BT’s approach.”

21. By fully allocated costs BT understands Ofcom to mean the sum of the 0845 wholesale call origination costs, the retail uplift costs and the call termination POLO. As the POLO is derived from the 0845 Deemed Revenue, less BT’s wholesale call origination costs and Retail Uplift Costs, the 0845 POLO should play no part in the calculation as a cost input – the 0845 POLO is the output.

⁵ Ofcom seems to acknowledge this at § 3.29, e.g. “one way to allocate line rental...”

22. As Ofcom acknowledges, the call wholesale origination costs and the Retail Uplift Costs are both covered by the output of BT's methodology (§3.34).
23. The sum of these costs is the total cost of providing the (services within the) package. Deducting the total cost of providing the package from the charge for the package gives the net revenue available for allocation to the various in package services.
24. There are a number of ways of then allocating the net revenue to the services forming BT's packages, including on an "EPMU" basis, and on a "forgone revenue" basis as suggested by BT.
25. BT accepts that a proportion of the revenue generated by any given package that includes inclusive 0845 calls should be allocated to those calls. The key question is – what is appropriate fair and reasonable methodology for allocating an appropriate amount of package revenue to the inclusive 0845 calls within a package?
26. BT's proposed method does not prioritise rentals, even if that were the intention; rather, BT's proposed method calculates the 0845 price as a proportion of the bundle margin, i.e.,

$$P_{0845} = y * (R_{LR} - C_A - C_{Other} - C_{0845})$$

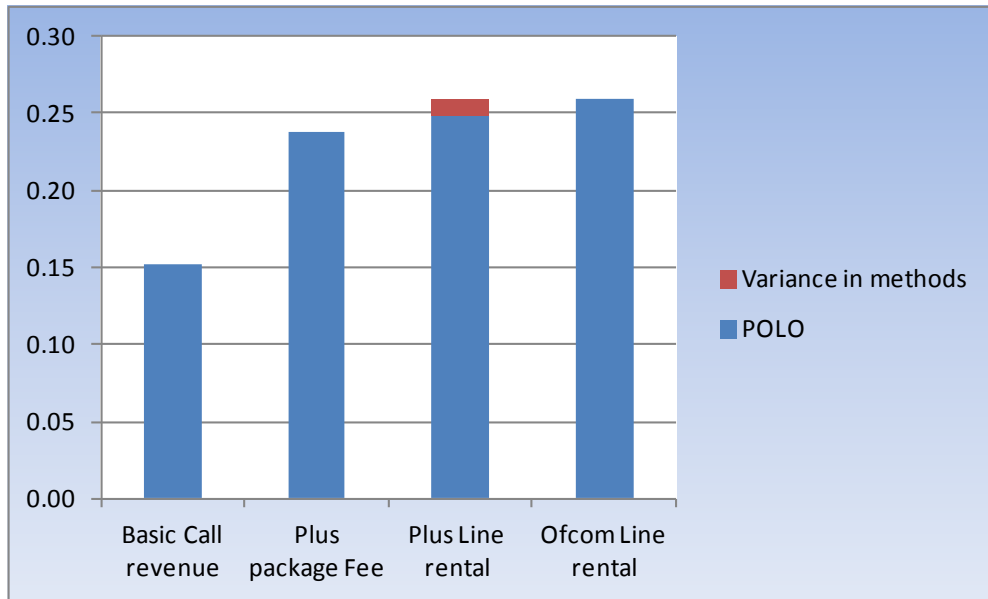
Where y = share of revenues at (historic) unbundled prices for Access, Other call types and 0845 calls.

27. There is clearly no priority in this formula – each of the costs types (used to get to y) are treated in the same way. BT's proposal calculates M_{LR} , and allocates this across the three services forming the package.

2.1.3 Cost treatment and BT's correction

28. BT incurs large monthly costs (both up-front and on-going) for the provision of the active access line to its customers and for call costs incurred by BT for retailing, originating, and terminating customer inclusive geographic calls; therefore, BT's first priority in setting the package price is to ensure that these costs are appropriately recovered.
29. BT's costs include line rental retail costs, Openreach WLR and associated charges, NCC call conveyance costs for non-0845 calls included in package, and retail call conveyance costs for non-0845 calls included in package.
30. It is also important to ensure that the margin is adjusted to reflect the actual line rental revenue received by BT by taking into account the impact that the share of our Consumer base that take the Line Rental Saver product has on the headline rental price.
31. The margin that remains is what is available for allocation to BT for its profit and for 0845 POLOs.

The table below details the weekend pence per minute POLO rates that result from variations in discount calculations:



From the left, the first two columns detail the POLO rate payable from discounts derived by BT's measurement of 0845 calls revenues plus the attribution of calls package fees. These items are not contested, however, they comprise the vast bulk of the impact on 0845 discounts.

32. The third and fourth columns illustrate the weekend POLO rates that result from the attribution of line rental by BT's and Ofcom's approaches respectively. Illustrated in the table in red, is the difference between the two approaches. It is very small (0.011 pence per minute) which suggests that both approaches could be seen as equally fair and reasonable.
33. The margin derived by BT's proposed method forms part of the deemed revenue within the NTS Formula calculation. The amount allocated from the package revenue should be net of BT's costs of providing the services within the package (excluding the 0845 POLO). This is consistent with the NTS Formula, which defines BT's residual 0845 retail revenue once Retail Uplift Costs and wholesale call origination costs have been deducted.
34. BT was in error in that its Deemed Price was in effect margin only and what BT should have done was add in C_{0845} to get to the "Price" for the equation,

$$\text{POLO} = P - C$$

The resulting in Price = margin plus cost, which is consistent with the NTS Condition and NTS Formula.⁶ BT's proposed method should, as BT suggested in its response to Ofcom's information requests, that the resulting "double count" should be omitted from BT's proposed method and calculations.

⁶ The amount in question was circa 1p per customer, which is approximately 0.1% of total costs deducted when determining the margin.

35. BT's proposed method with this is adjustment (BT's proposed method) is an appropriate, fair and reasonable method for allocating package revenue to 0845 calls includes within those packages.

2.1.4 Conclusion

36. Neither of Ofcom's concerns give rise to a valid reasonable reason for rejecting BT's proposed method and Ofcom's Provisional Conclusion document fails to explain why BT's proposed method is neither fair nor reasonable in terms of either a commercial settlement or Ofcom's duties. For the avoidance of doubt, BT's erroneous inclusion of the 0845 POLO created no circularity issue. It simply reduced the margin that is used in the subsequent allocation by approximately 1p, with a resulting trivial impact on total costs deducted and therefore the resulting discount rates and POLOs.

“Question 2: Assessment of CW UK's methodology for apportioning line rental”

2.2 BT's response

37. BT accepts that all costs other than the 0845 POLO and conveyance costs should have equal prominence. The 0845 conveyance costs are recovered against the deemed revenue and the POLO cost is the product of the 0845 deemed revenue less the costs.
38. BT understands that C_{0845} consists of the wholesale costs of origination, the Retail Uplift, and the POLO, the inclusion of the 0845 POLO is inappropriate as the thing being calculated is part of its own calculation, this in effect means it itself effects the result – what has been termed “circularity”.

2.2.1 Circularity

39. CW UK's comment that “*BT is likely to take the POLO into account when setting the price of [the package]*”⁷ is trite. It would be nonsense, when setting a commercial package price, in an extremely competitive retail market, to do otherwise. Further, whilst it makes good commercial sense for BT to minimise the POLO; it equally makes good commercial sense for CW UK to seek to maximise the POLO.
40. If BT's understanding at paragraph [38] is correct, i.e. that the C_{0845} includes the POLO, then even using an historic POLO the ‘circularity issue’ is not avoided. This can be demonstrated with the following simple example:
- $R_{LR} = £30$
 - For P0 POLO = £2.50
 - For P1, $C_{0845} = £5$, this cost is the sum of (i) BT's Retail Uplift and wholesale origination costs of £2.50 (C_{BT}) and (ii) the POLO from the previous period
 - $C_{Other} = 35$

⁷ §[**]

- $C_A = 5$
- $C_{LR} = C_{0845} + C_A + C_{Other}$

For each period,⁸

$$POLO = R_{LR} \times (C_{0845} / C_{LR}) - C_{BT}$$

$$M_A = R_{LR} \times (C_A / C_{LR}) - C_A$$

$$M_{Other} = R_{LR} \times (C_{Other} / C_{LR}) - C_{Other}$$

Period :	P1	P2	P3	P4
POLO :	£5.00	£10.35	£14.37	£16.34
M _A :	£5.00	£2.57	£1.56	£0.58
M _{Other} :	£5.00	£2.57	£1.56	£0.58

- The example uses the expressions in §§3.61 and 3.73 as the basis for the calculations and applies a hypothetical POLO for Period 0, and then resulting POLOs from the previous period, for each subsequent period.⁹ The example assumes all charges and costs, other than the resulting POLOs remain constant.
- As can be seen from the example, even with no change in both the package charge and the costs of other services forming part of the package, period on period, the POLO increases. Given the purpose of the NTS formula is to ensure that for specific revenue, with specific associated costs, a specific resulting POLO is paid, it is irrational for Ofcom to introduce, through the determination of this dispute, a mechanism that increases the POLO simply due to the passage of time from one period to another. The impact of the circularity is not something that Ofcom should disregard in the way that it has done.¹⁰
- The NTS Formula simply provides: **POLO = D – C**, if D and C remain constant then any solution that is imposed by Ofcom, to meet the constraints of the regulation that Ofcom has imposed, must ensure that the POLO would also remain constant. In other words the POLO should only alter if the ‘real’ deemed retail price alters or the ‘real’ costs of providing the service alter. Ofcom’s provisional conclusion, adopting as it does an amended version of the CW UK proposal.
- As highlighted in paragraph 6 above, the Provisional Conclusions fail to mention or discuss the National Telephone Numbering Plan. The plan is a clear statement of the limits to the charge that may be made to BT’s consumers, and a clear restraint on any revenue method determined. A method which imposes a POLO increase mechanism, as a result of the circularity, without consideration of the Plan’s 0845 designation as it applies to BT, is flawed.

2.2.3 Conclusion

⁸ Assuming BT has correctly understand the Provisional Conclusions

⁹ As outlined in footnote 54 of the Provisional Conclusions

¹⁰ See §§3.67 thru 3.71

45. For the circularity reason alone the Provisional Conclusions are neither “fair” in terms of resolving the commercial dispute between the parties, nor “reasonable” in the terms of the discharge of Ofcom’s duties. No two commercial undertakings, in circumstances as those in which BT and CW UK find themselves, would expect to strike a deal, where one party receives a period on period increase in its receipts in return for no alteration or change in the services provided in return
46. Further, the Provisional Conclusions are opaque as to why Ofcom believes that BT’s amended proposed method is less preferable or of more concern than CW UK’s proposed amended method. Specifically the Provisional Conclusions contain no discussion of Ofcom’s rationale, nor an assessment of the relative strengths and weaknesses of each of the competing proposals in terms of, inter alia, Ofcom’s principal duty to further the interests of citizens in relation to communication matters and further the interests of consumers in relevant markets, where appropriate by promoting competition.
47. Moreover, any assessment of the relative merits of the methods proposed by BT and CW UK must consider what would be the headline charge for the purpose of the Plan and the 0845 designation as it applies to BT. This is an important aspect of the dispute assessment which Ofcom has mistakenly missed or has deliberately and without explanation disregarded.

Question 3: Ofcom’s assessment of the factors that should be taken into account on the dates on which BT’s historic payment is reassessed

2.3 BT’s response

48. Both BT’s and CW UK’s methods, proposed at the opening of this dispute, contained errors. As from 1 November 2009 the POLOs that previously existed, ceased to be valid and new replacement POLO was required. As such Ofcom should look to assess both BT’s and CW UK’s amended proposals on an equal footing, to determine the appropriate method for calculating the correct replacement POLO, and apply that method from 1 November 2009.
49. For the period 1 November 2009 to 1 August 2011, BT has acknowledged that it was in “error” for not apportioning an appropriate share of package revenues to 0845 calls when setting 0845 POLOs.¹¹ BT accepts, for the period 1 November 2009 thru 31 October 2011, that it should not seek any repayment from any TCP in respect of any overpayment made by BT in respect of 0845 calls in package, and that, applying an appropriate method, Ofcom should assess whether there has been any under payment by BT to CW UK.
50. For the period 1 November 2011 to the date of final determination, applying the appropriate method, Ofcom should also assess whether there has been an under or over payment and direct BT and or CW UK to repay any such over or underpayment.
51. As from 1 November 2011 CW UK has been aware, through the service of BT’s charge change notice, that BT’s is seeking a lower level of POLO than that received by CW UK – in other words that BT has been overpaying CW UK.

¹¹ §3.85

52. BT's amended methodology is consistent with the NTS Condition and the National Telephone Numbering Plan; whereas, CW UK's amended proposed method is not. It would be wrong for CW UK, against that backdrop, to be the recipient of a windfall payment, whilst at the same time requiring BT to make a repayment.
53. These under or over payment assessments should include an assessment of the sums due as a result of non-package payments, e.g. ICAs, as this part of the disputed POLOs are not in dispute between the parties and it would therefore be irrational to prevent either party from recovering these amounts.

2.3.1 Minimum POLO

54. Ofcom's references to "calculating the Minimum POLO" under the NTS condition are a misnomer. The NTS Condition when read with the Plan, requires neither a minimum nor maximum POLO, it requires the payment of the correct POLO, and that POLO is calculated in accordance with the NTS Formula. The "Minimum POLO" is essentially the correct POLO.
55. As Ofcom accepts that BT's amended proposed methodology provides for the calculation of the correct (what Ofcom calls the minimum) POLO (§3.112), BT's method should be regarded as fair and reasonable.

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56. The table above is indicative of the impact to a large terminator and is representative of the situation facing CW UK.
57. The fact is that more than one method can be deemed to be fair and reasonable
58. The material difference in BT's payments to CW UK between Ofcom's approach and BT's is very small – c.£/month is our estimate. These competing approaches deliver basically the same result therefore as the outcomes are so similar, both should be seen as fair and reasonable. Thus as mentioned above BT notified a fair and reasonable Discount rate for November 2011.
59. On this basis BT's payments should be assessed by comparing the actual POLO rate paid with that which would have been paid had Ofcom's approach been implemented from November 2009 to date. Underpayment by BT to CW UK before November 2011 being made good by BT to CW UK, under or overpayment by BT to be made good by either BT or CW UK

"Question 4: The dates on which the Polo should be recalculated"

2.4 BT's response:

BT does not object¹² to either the retrospective or prospective POLOs being calculated on rolling approach basis, rather than event-driven approach basis.

¹² Subject to the caveat in paragraph 11

“Question 5: Granularity of the comparisons between actual payments and the payments due under the Minimum POLO”

2.5 BT’s response:

60. BT accepts that it should, from 1 November 2009 to the date of final determination of the dispute, recalculate the 0845 POLOs, on a quarterly basis, for each quarter, using actual data for each quarter in question.

2.6 Sharing of information

In paragraph 3.169, Ofcom sets out requirements for BT to provide information to CW UK to validate the calculation of the POLOs. BT has serious concerns that any such sharing should be consistent with commercial and competition law and in particular article 101 of the EU Treaty. BT would be prepared to discuss with CW the data that they would require to understand the basis on which any further POLO payments were made. Any data shared would be subject to BT not providing commercially sensitive data or providing market insight that could result in a risk of anti-competitive consequences.

3 Conclusion

61. The approaches taken by BT, CW UK and Ofcom are all very similar and deliver results which are only marginally different. Ofcom has raised two minor objections to the BT methodology, which cover a very small proportion of the revenue in question, and are in any case not well founded. Given that Ofcom’s own approach also has an innate difficulty (the circularity point), it is hard to see why this should be considered “fair and reasonable” but BT’s should not.
62. Whichever approach is adopted, Ofcom has a duty to impose a solution which is fair between the parties, as well as reasonable in terms of fulfilling its statutory duties. A decision which allows one party to keep the benefit of any overpayment while avoiding any responsibility for underpayments is clearly not fair as between those parties. Ofcom should therefore restate its final conclusions to allow both parties to reclaim any overpayments made.
63. Given the significant problems with the way that Ofcom is proposing to resolve this dispute, Ofcom must reconsider its approach and direct that,
- BT’s amended method to the calculation of the revenue attributable to in package 0845 calls is fair and reasonable and should apply from the 1 November 2009;
 - BT should recalculate the level of 0845 POLOs that should have been paid for all 0845 POLOs for the period 1 November 2009 to the date of Ofcom’s Final Determination of this dispute using actual call data on a quarter by quarter basis (or such other periodicity or event trigger as Ofcom finally determines);
 - BT should pay to CW UK any resulting underpayment in 0845 POLOs for the period 1 November 2009 to the date of final determination of the dispute

- CW UK should repay to BT any resulting overpayment in 0845 POLOs for the period 1 November 2011 to the date of final determination of the dispute; and
- (from the date of the final determination) BT should calculate the revenue attributable 0845 POLOs every quarter thereafter (or such other periodicity or event trigger as Ofcom finally determines).