

*Mobile Call Termination
Ofcom Consultation on MTRs for new entrants
Response of Everything Everywhere*

Overview

Everything Everywhere broadly supports the draft guidance proposed by Ofcom. To date, a number of disputes have arisen regarding new entrant termination rates which we believe the proposed guidance may ensure can be avoided in the future. As set out by Ofcom, it is appropriate that competitors be treated similarly in so far as wholesale charges for a monopoly service should be aligned with cost in order to minimise the risk of competitive distortions. This is of renewed importance with the development of new technologies and services and the allocation of mobile numbers to a range of non-traditional mobile operators since this provides greatly increased scope for the cross-subsidisation of retail services via termination rates where these do not reflect the costs of such operators. Such cross-subsidisation will not lead to any consumer benefit.

As such, Everything Everywhere has relatively few substantive comments on the draft guidance. These can be summarised as follows:

- To the extent that a significant aim and benefit of the proposed guidelines is the avoidance of disputes between operators, and in view of the divergence between the rates implied by the guidance and the rates currently proposed by many smaller MCPs, we believe Ofcom should undertake to ensure that the terms of its guidance (when adopted) are duly publicised among smaller MCPs in order to ensure that termination rates are adjusted at the initiative of the terminating operators, rather than through the need for challenge by reference to Ofcom's position. Thereafter, to ensure that disputes can be avoided and that the confidentiality of information does not obstruct the renegotiation of termination rates in future, smaller MCPs that have been found to have SMP should be required report on their traffic mix and rates to Ofcom to ensure Ofcom has the relevant data should it be needed.
- We do not believe that there is a valid distinction between a Category 2 operator, and a Category 3 operator that terminates >75% of voice calls over its own infrastructure, or infrastructure for which it directly bears the costs at a wholesale level (e.g. national roaming). For the reasons previously submitted by T-Mobile in the MCom dispute, Everything Everywhere does not believe that an operator with localised network infrastructure has costs equivalent to a national operator or that, to the extent that this is acknowledged by Ofcom, that the localised nature of their deployment means that the potential distortion to competition that results can be ignored.
- A set of more detailed observations and suggestion which are set out in full below, notably the proposal that the subcategories within Category 3 be of equal interval.

Everything Everywhere's Comments

1) Publicity and enforcement

It is no doubt a common aspiration that Ofcom's guidance will both lower termination rates among new entrant operators that set rates unrelated to costs and avoid future disputes. However, it would be inefficient if call originating networks had to raise challenges in order to ensure that Ofcom's guidance was in fact applied by operators not previously subject to an SMP designation.

Consequently, Everything Everywhere believes that in order for the Ofcom guidance to achieve its potential in the short term, Ofcom should ensure that it draws the attention of smaller MCPs to its

terms and strongly suggests that they review their termination rates. This is all the more urgent because many such operators will in fact interconnect via BT/C&W, and will therefore have to engage at length in the finalisation and notification of revised rates on the relevant carrier price lists.

Furthermore, Everything Everywhere is concerned that, where operators do not change their rates, either initially or subsequently to reflect a change in their business, the only apparent mechanism for ensuring that Ofcom's de facto policy on the termination rates of smaller MCPs is a dispute.

First, this is potentially inefficient and second, it is potentially necessary only to the extent that a terminating operator will be reluctant to disclose confidential information on the means by which it terminates traffic. In order to ensure that the confidential nature of relevant information does not drive dispute referrals, and that termination rates are set consistent with costs generally, Everything Everywhere believes that small MCPs should be required, as part of their SMP conditions, to make an annual submission to Ofcom setting out information relevant to which category they fall within and the termination rate they charge. This seems wholly appropriate in the context of a finding of dominance, and appears proportionate given that existing SMP operators must make quarterly and annual submissions as part of market reporting and TAC compliance.

2) Category 2

Everything Everywhere does not support the distinction currently embodied in Category 2:

- A) We believe that it is anomalous to distinguish between a Category 3 operator that routes less than 25% of traffic OTT and Category 2. Ofcom has not explained on what basis it differentiates between such operators, other than that in respect of Category 2 a service is provided only in a localised area over network equipment directly owned by the operator. On the basis that termination rates are fundamentally about cost, it appears inconsistent to bring the locality of coverage in to the equation. This is more relevant to the assessment of the service provided – and therefore number range allocation – rather than the subsequent question of termination rates and cost. While locality may be reflective of costs, Everything Everywhere does not believe that it is a relevant consideration on a standalone basis. It will also give rise to problems given the differing uses to which spectrum such as the DECT guard band spectrum may be put. We note that in a dispute concerning the rates of a DECT guard band operator this was the result of the determination, but Ofcom's guidelines we believe provide a more reasonable outcome. Given the difference between Ofcom's powers in relation to disputes and following a market review we would urge Ofcom to disregard for the purpose of these guidelines its previous dispute determination.
- B) Ofcom sets out clearly that the rationale for differentiating between operators within Category 3 is the need to avoid or at least minimise the distortion of competition through the cross-subsidisation of retail services where an operators' actual termination costs provide it with a margin for cross subsidisation. However:
 - a. Ofcom fails to reconcile this with the distinction between such operators, Category 1 operators and Category 2 operators. MCPs within Category 2 are potentially equally in a position to create a margin between the termination rate they charge and their costs. Everything Everywhere refers in full to the submissions of T-Mobile in its dispute with MCom. As such, Category 2 MCPs should not automatically benefit from the full mobile benchmark where their costs are significantly lower.
 - b. Furthermore, to the extent that Ofcom recognises that some Category 2 operators may in fact have costs that are materially lower than the benchmark rate, Ofcom's conclusion that the cross-subsidised retail offers of such operators will not distort competition is flawed. It is competition at the margin which drives market prices, so distortions at the margin (and therefore price) can have a disproportionate impact on the overall performance of the market.
 - c. Moreover however, to the extent Ofcom wishes to maintain consistency between its guidance and precedent, Ofcom must ensure that there is a test of materiality for

Category 2. Failing the ability to distinguish operators with no substantial real, localised, network costs, Category 2 will be open to abuse by MCPs that are properly categorised in Category 3 but deploy minor network infrastructure in order to meet the test for Category 2.

For example, it is potentially unclear from the guidance how a company such as Stour Marine would be classified. Everything Everywhere would argue that they are an OTT operator with a small Wi-Fi network, and that they should fall within Category 3. Stour Marine on the other hand has previously compared itself to C&W and to MCom, on the basis that it has a mobile network and bears similar, if not higher, termination costs. Indeed, Ofcom's determination of the dispute between Stour Marine and O2 echoed this. Nevertheless, Everything Everywhere's view is that Stour Marine should be categorised on the basis of the service it provides on 07 numbers, which is call termination to its Greenfone VoIP service, and that it is therefore an OTT operator with negligible costs of termination. Indeed, as previously submitted by T-Mobile, even where a call to the Greenfone client terminates over Stour Marine's WiFi infrastructure the costs of this, including the soft-switch, backhaul etc, will already have been met separately through the retail charges Stour Marine levies for WiFi connectivity.

3) Further comments

Everything Everywhere has four further more general comments.

- 1) With respect to Category 1, the mere fact of there being a national roaming agreement should not automatically invoke the benchmark rate – rather this should be subject to a materiality test. To the extent that traffic terminated over the radio access network of the roaming partner forms the majority (>75%) of the terminated traffic, then the operator will fall in Category 1/the <25% Category 3 bracket. However, where this is not the case then the operator should be treated consistently with Category 3 generally and categorised accordingly. Furthermore, any national roaming agreement must be with a partner that is able to in fact provide national coverage. The basis of seeking to differentiate operators with a national roaming agreement from other smaller operators is customer perception and this is not met if the national roaming agreement is with another smaller operator.
- 2) With respect to Category 3, Ofcom should clarify that any assessment of termination costs (and thereby network costs, regardless of category) must relate to termination on the number range holder's own network only. Just as with international roaming, the costs of call forwarding should not form part of the cost assessment.
- 3) Everything Everywhere believes that the logic of Ofcom's creation of Category 3 dictates that, to a point, it is desirable to ensure that there is a degree of granularity. Everything Everywhere believes that Ofcom's distinction between only 3 categories is potentially overly simplistic and does not adequately reflect the underlying rationale for distinction between MCPs. In particular, it is unusual that Ofcom in effect creates two brackets of 25% (the <25% and the >75% categories) and one which is of 50% (i.e. that between 25% and 75%).
- 4) On the other hand, Everything Everywhere is conscious that an overly granular categorisation would both increase the risk that MCPs required re-categorisation over time, and that a very granular approach would by its nature suggest that a direct correlation between termination rates and traffic mix was required (which is plainly unsustainable).

Everything Everywhere therefore believes that an incremental, but small, increase in the degree of granularity is appropriate. We consider that the risk of an MCP requiring regular re-categorisation may be overstated, since the growth of a new entrant (for example) does not naturally suggest a change in its traffic mix. The nature of a particular MCP's call patterns and the means by which termination is achieved is likely to be determined predominantly by its business case and the nature of its service, and is unlikely to be significantly influenced by the growth of its customer base per se.

Everything Everywhere therefore proposes that four equally sized categories is an appropriate approach, i.e.

Proportion of traffic that terminates using OTT services¹	Termination rate charged for all calls to the MCP²
< 25%	Benchmark MTR
25 - 50%	63% ³ of mobile benchmark rate
50 - 75%	38% of mobile benchmark rate
75 - 100%	Benchmark FTR

Such an approach also decreases the potential for an operator to “game” the system by ensuring a closer correlation to costs than an approach that more loosely aligns charges to costs and which creates one band twice the size of the others.

While it is essentially background to the substance of the guidance, Everything Everywhere believes that in Annex 4 Ofcom should more clearly recognise that the costs of different technologies/architectures by which voice traffic may well be very different. Ofcom’s assessment of the make-up of networks, and in particular its presentation of the different network elements at Figure 4 (and to a lesser extent 1, 2 and 3), suggests that all types of core network/backhaul etc are equivalent, and therefore intimates that there is parity between operators regardless of the extent or nature of their investment in these elements and their overall network. However, this overlooks that in reality the cost and complexity of different networks may vary significantly. The core network of a small WiFi network may in effect be a soft switch on a small server, which is definitely not comparable to a GSM network with switches requiring large buildings containing a variety of HLRs etc. There are very significant differences between GSM//3GPP and non-GSM//3GPP systems that Ofcom’s summary overlooks.

¹ Ofcom should clarify whether this is by total call volume or by number of calls. Everything Everywhere would submit that it is the former which is relevant, and that volume is less open to abuse/manipulation. This is of particular significance where an operator terminates calls via a number of alternative means – it will be necessary for a distinction to be drawn between minutes terminated OTT/via national roaming etc.

² Ofcom’s draft guidance refers to “Termination rate charged for all calls by the MCP”, whereas this logically ought read the either “charged for all calls to the MCP” or “charged by the MCP for all calls”

³ i.e. the midpoint of the interval, rounded up.