



Wholesale mobile call termination:  
Guidance on dispute  
resolution in relation to fair and  
reasonable charges

Statement

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## Section 1

# Introduction

## March 2011 statement

- 1.1 We recently conducted a market review in relation to the provision of wholesale mobile voice call termination (MCT) on individual mobile networks in the UK, and we published our concluding statement, entitled *Wholesale Mobile Voice Call Termination* on 15 March 2011 (the March 2011 statement).<sup>1</sup>
- 1.2 In the March 2011 statement, we defined 32 separate markets for the provision of MCT on individual mobile networks and designated a particular mobile communications provider (MCP) with significant market power (SMP) in each market. Each of these markets comprises services that are provided by the named MCP to another communications provider (CP) for the termination of voice calls to UK mobile numbers which that MCP has been allocated by Ofcom, in the area served by that MCP and for which that MCP is able to set the call termination charge.
- 1.3 Annex 1 of the March 2011 statement sets out the SMP conditions imposed on the 32 designated MCPs.<sup>2</sup> Condition M1 requires, amongst other things, all designated MCPs to provide MCT on fair and reasonable terms and conditions (including charges).
- 1.4 For the four national MCPs,<sup>3</sup> we also imposed a charge control (Condition M4) which caps those MCPs' mobile termination rates (MTRs). The charge control was set on a four-year glide path such that their maximum charge for MCT will be equivalent to pure LRIC by 1 April 2014. The cap for the first year of the charge control (1 April 2011 to 31 March 2012) is 2.984 pence per minute.<sup>4</sup> The level of the maximum ceiling for each subsequent year of the charge control is calculated in accordance with the provisions of Condition M4. We intend to publish the applicable nominal maximum charge in advance of the second, third and fourth charge control years.<sup>5</sup> In the remainder of this guidance, we refer to the cap set under this charge control as the "benchmark MTR".

## Proposal for guidance

- 1.5 During the market review process, we recognised that designated MCPs which are not subject to the specific charge control (in the remainder of this statement we refer to these MCPs as "smaller MCPs") would need to agree a fair and reasonable MTR with originating CPs. We considered that it would be helpful to provide guidance for smaller MCPs as to how we would resolve any dispute as to whether MTRs are fair and reasonable. We considered that this guidance would also be helpful to CPs in their negotiations with respect to MTRs.

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<sup>1</sup> <http://stakeholders.ofcom.org.uk/consultations/mtr/statement>

<sup>2</sup> [http://stakeholders.ofcom.org.uk/binaries/consultations/mtr/statement/MCT\\_Statement\\_Annex\\_1.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/mtr/statement/MCT_Statement_Annex_1.pdf)

<sup>3</sup> O2 UK Limited (O2), Everything Everywhere Limited (EE), Hutchison 3G UK Limited (H3G) and Vodafone Limited (Vodafone).

<sup>4</sup> For the first two months of this period (1 April 2011 to 31 May 2011), the charge control caps the weighted average charge over this period at 2.984 ppm. For the remainder of this period (1 June 2011 to 31 March 2012), the charge control sets a maximum charge ceiling of 2.984 ppm.

<sup>5</sup> The nominal cap in each year of the charge control can only be calculated once relevant inflation data is available (i.e. the change in RPI for the year ending 31 December before the start of the charge control year in question). Ofcom intends to publish the applicable cap on an annual basis, once this inflation data becomes available.

- 1.6 We published a consultation on 7 January 2011 (the January 2011 consultation) containing draft guidance on how we might resolve disputes as to what constitutes a fair and reasonable MTR for the purposes of Condition M1.<sup>6</sup>
- 1.7 Having considered all comments from stakeholders, we are now publishing our guidance. This statement summarises the comments received from stakeholders, sets out our response to those comments, and describes the approach we have decided to adopt. Our guidance is set out in full in the Annex to this statement.

### The dispute resolution process

- 1.8 Section 185(1)(a) of the Communications Act 2003 (the Act) gives Ofcom jurisdiction to resolve a dispute relating to the provision of network access between different CPs. By virtue of section 185(8), this includes a dispute as to the terms or conditions on which network access is or may be provided in a particular case. Section 185(2) of the Act also gives Ofcom jurisdiction to resolve a dispute relating to rights or obligations conferred or imposed by or under Part 2 of the Act.<sup>7 8</sup>
- 1.9 Section 185(3) provides that any party to a dispute may refer it to Ofcom.
- 1.10 Section 186 of the Act provides that where a dispute is referred to Ofcom in accordance with section 185, Ofcom must decide whether or not it is appropriate to handle it. Section 186(3) provides that Ofcom must decide that it is appropriate for it to handle a dispute unless there are alternative means available for resolving a dispute, resolution of a dispute by those means would be consistent with the Community requirements set out in section 4 of the Act, and those alternative means would be likely to result in a prompt and satisfactory resolution of a dispute.
- 1.11 Where it is appropriate for Ofcom to handle the dispute, section 188 of the Act provides that Ofcom must consider the dispute and make a determination within four months, except in exceptional circumstances.
- 1.12 Ofcom's powers to resolve disputes are set out in section 190 of the Act. They include the power to make a declaration setting out the rights and obligations of the parties to the dispute, to give a direction fixing the terms or conditions of transactions between the parties to a dispute, and/or to give a direction imposing an obligation, enforceable by the parties to a dispute, to enter into a transaction on the terms and conditions fixed by Ofcom.

### How Ofcom resolves a dispute

- 1.13 Ofcom has published guidelines, which describe our dispute resolution process in detail. On 17 December 2010, we published for consultation revised dispute resolution guidelines.<sup>9</sup> Stakeholders should refer to these guidelines for information on how to refer a dispute to Ofcom, the submission requirements we will apply and the process we will follow.

<sup>6</sup> <http://stakeholders.ofcom.org.uk/consultations/mct-fair-reasonable/>

<sup>7</sup> Provided the dispute is not excluded by virtue of section 185(7) of the Act.

<sup>8</sup> We note that the Department for Business Innovation & Skills (BIS) has consulted on the implementation of revisions to the European Framework on Electronic Communications, including proposals to make changes to section 185 of the Act (see <http://www.bis.gov.uk/Consultations/revised-eu-electronic-communications-framework>). The deadline for implementation of these changes is 25 May 2011. References in this statement to disputes under section 185 of the Act are therefore subject to the outcome of this process. If appropriate, we will make any consequential amendments to this guidance in due course.

<sup>9</sup> <http://stakeholders.ofcom.org.uk/consultations/dispute-resolution-guidelines/>

- 1.14 Dispute resolution is a statutory function, which Ofcom must exercise consistently with its statutory duties, in particular as set out in sections 3 and 4 of the Act (which give effect, amongst other things, to the requirements of Article 8 of the Framework Directive).<sup>10</sup>
- 1.15 A determination made by Ofcom to resolve a dispute binds all the parties to that dispute.<sup>11</sup> Since a subsequent dispute with similar facts is likely to result in a similar decision (given our statutory duties, including our duty to have regard to the principle that regulatory activities should be consistent) we would expect dispute determinations to be read across and followed in situations where a third party is facing similar questions *vis-à-vis* one of the parties to the dispute that has been determined.
- 1.16 Ofcom's duty to resolve disputes within four months (except in exceptional circumstances) has an impact on the level of analysis that it is appropriate and feasible for Ofcom to undertake. We are very rarely, for example, able to carry out the same detailed level of analysis of costs as we would in exercising other *ex ante* regulatory powers, such as in a market review. In making a determination to resolve a dispute, Ofcom will rely on its best assessment of the available evidence within the four month statutory deadline.

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<sup>10</sup> Directive 2002/21/EC.

<sup>11</sup> Section 190(8) of the Act.

## Section 2

# Consultation and stakeholder comments

## Proposals in the April 2010 consultation

- 2.1 In our consultation entitled *Wholesale Mobile Voice Call Termination*, published on 1 April 2010<sup>12</sup> (the April 2010 consultation) we stated that there were benefits in providing MCPs with guidance as to how we would typically apply the proposed SMP condition requiring MTRs to be fair and reasonable.<sup>13</sup>
- 2.2 In the April 2010 consultation, we judged that it was unlikely to be feasible to produce a cost model to determine network-specific rates for every MCP, particularly given the difficulty in establishing the costs of new entrants. The MTRs set for the four national MCPs were based on a hypothetical efficient network cost model. This model was not intended to precisely mimic individual costs but rather to capture the network costs of an efficient national operator. We acknowledged that new entrants may have lower costs than incumbents (e.g. national MCPs) and that, insofar as symmetric MTRs create entry incentives (for MCPs that have lower costs than implied by our hypothetical efficient network cost model), it seemed that this would be beneficial for competition and consumers. Having regard to these considerations, we considered that MTRs should generally be symmetrical.

## Responses to the April 2010 consultation

- 2.3 We received a number of comments in response to this proposal.
- 2.4 Some respondents agreed with our view that symmetric rates would be fair and reasonable for smaller MCPs. Vodafone,<sup>14</sup> BT,<sup>15</sup> Talk Talk,<sup>16</sup> and Gamma,<sup>17</sup> and submissions associated with the 'Terminate the Rate' campaign,<sup>18</sup> along with that of the Communications Management Association,<sup>19</sup> generally agreed with the proposal of symmetry for smaller MCPs.
- 2.5 In contrast, O2<sup>20</sup> and EE<sup>21</sup> disagreed with our view that symmetric rates would be fair and reasonable for smaller MCPs. O2 argued that symmetric rates would distort competition between smaller MCPs and national MCPs. EE accepted that the benchmark MTR was likely to be appropriate for MCPs operating full mobile services on a national basis, such as those which have mobile virtual network operator (MVNO) or national roaming agreements (who EE accepted incur similar costs to the national MCPs). However, where costs of call termination are significantly different (due to different technologies, different coverage or vertically disintegrated business models for example), EE argued that a different MTR should apply. It also argued

<sup>12</sup> [http://stakeholders.ofcom.org.uk/binaries/consultations/wmctr/summary/wmvt\\_consultation.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/wmctr/summary/wmvt_consultation.pdf)

<sup>13</sup> The April 2010 Consultation, paragraph 7.74 *et seq.*

<sup>14</sup> Vodafone submission: <http://stakeholders.ofcom.org.uk/binaries/consultations/wmctr/responses/Vodafone.pdf>

<sup>15</sup> BT submission: <http://stakeholders.ofcom.org.uk/binaries/consultations/wmctr/responses/BT.pdf>

<sup>16</sup> Talk Talk submission:

[http://stakeholders.ofcom.org.uk/binaries/consultations/wmctr/responses/TalkTalk\\_Group.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/wmctr/responses/TalkTalk_Group.pdf)

<sup>17</sup> The Gamma submission was confidential

<sup>18</sup> Supporters of 'Terminate the Rate' submission:

[http://stakeholders.ofcom.org.uk/binaries/consultations/wmctr/responses/Supporters\\_of\\_Terminate.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/wmctr/responses/Supporters_of_Terminate.pdf)

<sup>19</sup> CMA submission: <http://stakeholders.ofcom.org.uk/binaries/consultations/wmctr/responses/CMA.pdf>

<sup>20</sup> O2 submission: <http://stakeholders.ofcom.org.uk/binaries/consultations/wmctr/responses/O2.pdf>

<sup>21</sup> EE submission:

[http://stakeholders.ofcom.org.uk/binaries/consultations/wmctr/responses/Everything\\_Everywhere.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/wmctr/responses/Everything_Everywhere.pdf)

that, as the benchmark MTR is calculated using cost-orientation, the rate for smaller MCPs should also be calculated and applied in a way that reflected the costs of providing MCT.<sup>22</sup>

## January 2011 consultation

- 2.6 Taking into account these comments, we set out our proposed draft guidance in the January 2011 consultation, which recognised that the benchmark MTR may not be appropriate in all cases.<sup>23</sup> In this draft guidance we identified three broad categories of smaller MCPs and compared the likely costs of smaller MCPs within each category with the costs of the four national MCPs, in order to determine what a fair and reasonable MTR might be for each category. We noted that this would simply generate a “starting point” and that we would retain the ability in a dispute to consider specific submissions as to why a particular case should be treated differently.
- 2.7 Our proposed categories and approach were as follows:
- 2.7.1 *Category 1:* smaller MCPs with national roaming arrangements offering national services. We considered that it was likely to be appropriate to apply the benchmark MTR to Category 1 MCPs. We considered that the costs incurred by these MCPs would be very similar to the costs incurred by the national MCPs, as the domestic roaming charges they pay would be based on the termination costs of the national MCPs.
- 2.7.2 *Category 2:* smaller MCPs without domestic roaming arrangements serving only a small area. We also considered that it was likely to be appropriate to apply the benchmark MTR to Category 2 MCPs. We considered that, in the particular area they serve, the efficient unit costs of termination would be unlikely to be lower than the efficient unit costs of the national MCPs, and even if they were lower, this would not be likely to have a material impact on competition in the retail mobile market, given the limited attractiveness of their offers in the national retail market.
- 2.7.3 *Category 3:* smaller MCPs providing over-the-top (OTT) services.<sup>24</sup> We considered that these MCPs were likely to have substantially lower costs than the national MCPs, and that a fair and reasonable MTR would more closely reflect the actual costs incurred by these MCPs. We proposed the use of proxies for these MCPs’ actual costs as a pragmatic way of setting fair and reasonable MTRs, given the inherent limitations of the four-month dispute resolution process. We considered that the cost of terminating a call using pure OTT (i.e. when the MCP does not incur any radio access network (RAN) costs to terminate the call) may be similar to the costs of switching a fixed call. We therefore considered that the benchmark fixed termination rate<sup>25</sup> (FTR) would be an appropriate proxy for MCPs that are pure OTT providers. For MCPs also providing a significant amount of MCT

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<sup>22</sup> EE response to the April 2010 consultation, pages 40 - 48.

[http://stakeholders.ofcom.org.uk/binaries/consultations/wmctr/responses/Everything\\_Everywhere.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/wmctr/responses/Everything_Everywhere.pdf)

<sup>23</sup> Paragraphs 2.19 to 2.43 of the January 2011 Consultation.

<sup>24</sup> An OTT service runs “over the top” of an existing network connection such as a fixed or wireless broadband connection. Examples of OTT services include mobile VoIP calls over 3G.

<sup>25</sup> By the “benchmark FTR”, we mean BT’s Call Termination Local Exchange (LE) rate, which is subject to a charge control as set out in Ofcom’s Explanatory Statement and Notification of 15 September 2009, entitled *Review of BT’s Network Charge Controls* (see [http://stakeholders.ofcom.org.uk/binaries/consultations/review\\_bt\\_ncc/statement/nccstatement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/review_bt_ncc/statement/nccstatement.pdf)).

using their own RAN or indirectly incurring RAN costs, we considered that a higher MTR than the benchmark FTR would likely be appropriate.

- 2.8 On this basis, we proposed the following thresholds for Category 3 MCPs:
- 2.8.1 a smaller MCP terminating less than 25% of calls using a RAN for which it incurs the costs would receive the benchmark FTR;
  - 2.8.2 a smaller MCP terminating between 25% and 75% of calls using a RAN for which it incurs the costs would receive an average of the benchmark MTR and the benchmark FTR; and
  - 2.8.3 a smaller MCP terminating more than 75% of calls using a RAN for which it incurs the costs would receive the benchmark MTR.

### Responses to the January 2011 consultation

- 2.9 We received comments on the January 2011 consultation from BT,<sup>26</sup> Cable & Wireless (C&W),<sup>27</sup> EE,<sup>28</sup> Lebara,<sup>29</sup> O2,<sup>30</sup> Stour Marine,<sup>31</sup> Vodafone<sup>32</sup> and one respondent who wished to remain confidential.
- 2.10 In general, the majority of those who responded to the January 2011 consultation agreed that (i) not all MCPs should receive the benchmark MTR (i.e. some MCPs should receive a different MTR according to their individual characteristics), and (ii) Ofcom should issue guidance in some form.

### Specific criticisms relating to the proposals in our draft guidance

- 2.11 The proposed guidance was criticised by a number of respondents. These criticisms are, broadly, directed at two distinct types of issue:
- 2.11.1 issues relating to the proposed categorisation of MCPs; and
  - 2.11.2 issues relating to thresholds for OTT MCPs within Category 3.
- 2.12 We deal with these two broad issues in turn below (there were a number of other comments made by respondents, which we address in section 3 of this statement).<sup>33</sup>

### Issues relating to categorisation of MCPs

- 2.13 A number of responses to the January 2011 consultation challenged the distinctions made between the three categories of smaller MCP described at paragraph 2.7 below and suggested that the proposed differentiation between MCPs within these categories was likely to be difficult to sustain.

<sup>26</sup> BT submission: <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/bt.pdf>

<sup>27</sup> C&W submission: <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/cww.pdf>

<sup>28</sup> EE submission: <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/ee.pdf>

<sup>29</sup> Lebara submission: <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/Lebara.pdf>

<sup>30</sup> O2 submission: <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/o2.pdf>

<sup>31</sup> Stour Marine submission: <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/StourMarine.pdf>

<sup>32</sup> Vodafone submission: <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/Vodafone.pdf>

<sup>33</sup> As noted above, there were also responses to the April 2010 Consultation that addressed the issue of fair and reasonable MTRs. To the extent these are relevant to this statement, they are also addressed in section 2 or 3.



- 2.14 EE commented that the proposed guidance set out in the January 2011 consultation made no valid distinction between a Category 2 MCP and Category 3 MCP terminating more than 75% of traffic on its own network. EE argued that, while the proposed guidance appeared to suggest that the coverage area of a MCP's own network is the primary driver of its costs, this should not be determinative when making an assessment of costs. EE also considered the proposal that it is likely to be appropriate to apply the benchmark MTR to Category 2 MCPs to be inconsistent with the rationale applied to Category 3 MCPs – namely, that MTRs should minimise distortion of competition via cross-subsidisation of services.<sup>34</sup>
- 2.15 EE argued that a materiality test should apply to Category 2 MCPs. It considered that operators with no real local network costs should not be able to obtain the benchmark MTR simply by deploying minor network infrastructure.<sup>35</sup>
- 2.16 Stour Marine observed that MCPs with national roaming arrangements may increasingly carry traffic volumes via a network for which they do not bear full costs (or any costs). By way of illustration, it referred to the example of a network based on Femtocells for which a MCP bears no cost. A MCP using this sort of network would be providing an OTT service and could carry a significant proportion of their total traffic via Femtocells, yet still be treated as a Category 1 MCP.<sup>36</sup>
- 2.17 EE made a related point, suggesting the fact that a MCP has a national roaming agreement should not mean that it will automatically receive the benchmark MTR. It suggested that a materiality test should apply such that a MCP falling within Category 1 would only receive the benchmark MTR if more than 75% of its total traffic terminates on the national roaming partner's network.<sup>37</sup>
- 2.18 C&W considered that it was not clear how we would categorise a MCP that provided both access connectivity and OTT calls in respect of an individual end-user, for example where some calls to a mobile are terminated over a broadband/wifi service provided by the same MCP.<sup>38</sup>

### Issues relating to thresholds for OTT MCPs within Category 3

- 2.19 Respondents to the January 2011 consultation also commented that our proposed guidance did not sufficiently address the likely difficulty of allocating smaller MCPs providing OTT services (particularly a new entrant MCP) to one of three possible termination rate sub-categories within Category 3 described at paragraph 2.8.
- 2.20 EE argued that the proposed Category 3 thresholds were simplistic and arbitrary. It questioned why there were two sub-categories each covering 25% of Category 3 (i.e. less than 25% and more than 75%), but one sub-category covering 50% (25% to

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<sup>34</sup> EE response, pages 2-3. <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/ee.pdf>

<sup>35</sup> EE response, pages 3-4. <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/ee.pdf>

<sup>36</sup> Stour Marine response, page 4. <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/StourMarine.pdf>

<sup>37</sup> EE response, page 3. <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/ee.pdf>

<sup>38</sup> C&W response, page 2. <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/cww.pdf>

75%). EE suggested instead that Category 3 should contain four equally sized sub-categories.<sup>39</sup>

- 2.21 Another MCP, in its confidential response, argued that the Category 3 thresholds proposed in the January 2011 consultation were appropriate provided that “*they can be adequately verified*”. However, other respondents stated that practical difficulties were likely to be encountered when seeking to verify the proportion of a MCP’s traffic terminated OTT rather than on a RAN, and to set an MTR based on this proportion of traffic.
- 2.22 Stour Marine questioned how a new entrant MCP (without historic call data) would be able to demonstrate that the majority of its traffic will be carried on its own network.<sup>40</sup>
- 2.23 Vodafone made a similar point, noting that a smaller MCP may not have the sophisticated monitoring systems needed to identify the proportion of traffic not terminating on its own network. It also noted that MCPs may be unwilling to disclose to another party the sensitive commercial information that would be required to verify in which sub-category they should be included. Vodafone stated that this would ultimately affect the ability of those parties to negotiate and agree an appropriate MTR. Vodafone noted that, in any event, traffic patterns change over time and the proportion of a MCP’s traffic terminating on its own network would need to be reassessed periodically to ensure that the sub-categorisation remained appropriate.<sup>41</sup>
- 2.24 C&W also argued that it would be difficult to distinguish a MCP’s OTT traffic from traffic terminating on its own network. It also suggested that MCPs may exaggerate the difficulties in this regard, in order to justify a higher MTR.
- 2.25 EE commented that it is necessary to clarify whether the proportion of traffic that terminates on a MCP’s network via OTT services is calculated according to total call volume or by number of calls.<sup>42</sup> It also argued that, within Category 3, any assessment of termination costs should relate only to traffic that terminates on the MCP’s own network (i.e. excluding costs of call forwarding etc).<sup>43</sup>
- 2.26 BT commented that the proposed thresholds for setting different MTRs within Category 3 create sharp discontinuities that could distort competition and incentives for investment and growth.<sup>44</sup>
- 2.27 We have revised our proposed guidance in light of these comments. In section 3, we provide an overview of our final guidance and describe how these comments have been addressed.

<sup>39</sup> EE response, page 4. <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/ee.pdf>

<sup>40</sup> Stour Marine response, page 2. <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/StourMarine.pdf>

<sup>41</sup> Vodafone response, pages 1 and 4. <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/Vodafone.pdf>

<sup>42</sup> EE response, page 5. <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/ee.pdf>

<sup>43</sup> EE response, page 4. <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/ee.pdf>

<sup>44</sup> BT response, page 2. <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/bt.pdf>

## Section 3

# Final guidance

## Overview of final guidance

- 3.1 We have considered the responses to the January 2011 consultation (and comments made in response to the April 2010 consultation, insofar as they remain relevant). We accept a number of the concerns raised by stakeholders in response to the approach proposed in the January 2011 consultation. In particular, whilst the categorisation we proposed was intended to provide some certainty to MCPs, we note the practical difficulties raised by stakeholders in response to this proposal.
- 3.2 We have also considered the guidance in the context of the four month statutory time limit for dispute resolution (which has an impact on the level of analysis it is appropriate and feasible for us to undertake in determining a dispute), and in light of our duties under sections 3 and 4 of the Act (which give effect, among other things, to the requirements of Article 8 of the Framework Directive).
- 3.3 Taking these considerations into account, we are amending our proposed guidance in a number of ways to address the concerns raised by stakeholders:
  - 3.3.1 We will not allocate smaller MCPs to a specific category or distinguish between smaller MCPs in each category.
  - 3.3.2 Our starting point in determining a dispute will be that smaller MCPs should receive the benchmark MTR (subject to the specific exception in relation to 100% OTT MCPs, described below). We recognise that it might be appropriate to depart from this starting point based on the specific facts of a particular case, and would consider any cost or other evidence, presented or available to us in the context of determining a particular dispute, which suggests that the benchmark MTR is not fair and reasonable in the circumstances (for example, where a smaller MCP's costs are demonstrably and substantially below those of a national MCP).
  - 3.3.3 We recognise that smaller MCPs which terminate all calls by means other than a network for which it incurs costs, either directly or indirectly (e.g. 100% OTT termination) are likely to have a cost base which is fundamentally different to that which underlies the cost model accompanying the March 2011 statement. We consider that the efficient costs of a smaller MCP terminating 100% of its calls OTT (a 100% OTT MCP) are likely to be far lower than the benchmark MTR. Parties might wish to consider the benchmark FTR as an appropriate starting point for their negotiations in these circumstances. Whilst recognising that the benchmark FTR is not a perfect proxy, we would nevertheless use this as a starting point in determining any dispute involving the MTRs charged by a 100% OTT MCP. As above, we would consider any cost or other evidence presented to us which suggests that this benchmark is not fair and reasonable in the circumstances.
- 3.4 Our final guidance is set out in full in the Annex to this statement.

## This approach addresses the broad concerns over categorisation

- 3.5 We consider that guidance with these features will address respondents' broad concerns in relation to categorisation (as described in section 2). In particular:
- 3.5.1 Issues relating to categorisation of MCPs: Criticisms of distinctions between the various categories proposed in the January 2011 consultation have been addressed, as we will no longer attempt to assign smaller MCPs to particular categories. In each case it will be for the parties to agree, or for Ofcom to determine in the event a dispute is brought to us for resolution, an MTR for a terminating smaller MCP, using the benchmark MTR (or, in the case of 100% OTT MCPs, the benchmark FTR) as a starting point and taking into account the individual characteristics of that MCP (which might include technology and network costs), to the extent they suggest that the benchmark MTR is not fair and reasonable. The existence, for example, of a national roaming agreement will not be the sole determinant of the level of MTR that a smaller MCP ought to receive. Likewise, comments which suggested that a materiality threshold should apply to the proposed categories are also addressed by our final guidance, as we will consider any cost or other evidence presented to us by a party in dispute which suggests that the benchmark MTR (or benchmark FTR, as applicable) is not fair and reasonable in the particular circumstances.
- 3.5.2 Issues relating to thresholds for MCPs within Category 3: We consider that our final guidance addresses the responses which criticised these thresholds as being arbitrary or creating disincentives for investment, and responses which highlighted the practical difficulties of this proposed approach. The only distinction drawn in our final guidance is in respect of 100% OTT MCPs (we will use the benchmark FTR as a starting point for these MCPs). We consider that smaller MCPs falling within this category will be relatively easy to identify.

## Comments that remain relevant to our final guidance

- 3.6 A number of comments received in response to the April 2010 consultation and January 2011 consultation remain relevant to our final guidance. In the remainder of this section we summarise these comments, and set out our view on the issues raised.

### Higher costs than the benchmark MTR

- 3.7 A MCP in its confidential response to the April 2010 consultation commented that a smaller MCP may incur higher costs in terminating calls than a national MCP. Accordingly, where a smaller MCP receives the benchmark MTR this may still be insufficient to enable it to recover its costs.
- 3.8 Several other respondents to the April 2010 consultation argued for MTRs higher than the benchmark MTR, or a glide path longer than that applied to the national MCPs under the charge control (which would result in MTRs higher than the benchmark MTR). For example, Mundio Mobile noted that new entrant MCPs should have a longer glide path, perhaps two additional years, as they generally have a more recent investment of capital.<sup>45</sup> C&W similarly submitted that an obligation to

<sup>45</sup> Mundio Mobile response to the April 2010 consultation, page 2.  
<http://stakeholders.ofcom.org.uk/binaries/consultations/wmctr/responses/mundio-mobile.pdf>

provide services on fair and reasonable terms is aimed at ensuring reciprocity of rates, but this assumes that a new entrant's cost model is the same or largely similar to that of established MCPs. C&W did not believe this assumption to be valid, as new entrants face higher costs at the start of market launch which they would struggle to recoup under the benchmark MTR.<sup>46</sup> However, we note that C&W was broadly supportive of the use of the benchmark MTR in its response to the January 2011 consultation.

#### *Ofcom's view*

- 3.9 As noted above, in resolving any future dispute we will take the benchmark MTR as our starting point for determining a fair and reasonable MTR for a smaller MCP (with the exception of 100% OTT MCPs, described above). We will consider any cost or other evidence presented to us which suggests that the benchmark MTR is not fair and reasonable in the specific circumstances of a particular dispute. We recognise that this could, in principle, result in a higher MTR in the circumstances of a particular dispute.
- 3.10 However, generally we consider it unlikely that a MTR at a level higher than the benchmark MTR will be fair and reasonable, as the benchmark MTR has been based on the modelled costs of an average efficient national MCP, taking a forward looking assessment over the next four years. In response to the comments made by these stakeholders, and in order to provide clarity to other smaller MCPs who may hold a similar view, we have included in our final guidance a section which sets out the circumstances in which we might conclude that a MTR above the benchmark MTR is fair and reasonable for a smaller MCP. We would expect the terminating smaller MCP (which is subject to Condition M1) to be able to demonstrate that, in complying with that condition:
- 3.10.1 charging a MTR equal to the benchmark MTR would deny it recovery of its actual costs of providing MCT;
  - 3.10.2 its actual costs of providing MCT are efficiently incurred; and
  - 3.10.3 charging a higher MTR than the benchmark MTR would be offset by consumer benefits, which might include lower overall end-to-end costs (not just in particular cases but in general for calls to the terminating MCP's network) or other benefits to calling parties related, for example, to the quality of the service provided.
- 3.11 We consider that in principle, applying these criteria would be appropriate because, when considered cumulatively, they identify the set of instances where a higher (asymmetric) MTR than the benchmark MTR based on the costs of an efficient national MCP would generate consumer benefits and could therefore be regarded as fair and reasonable. As noted above, whilst we will consider any dispute on its specific facts and evidence, we consider it likely that a higher MTR would only be fair and reasonable in exceptional circumstances, for the reasons set out above.

#### **Reference to the benchmark FTR**

- 3.12 Several respondents queried whether it is appropriate to refer to the benchmark FTR in the guidance. Vodafone argued that reference to the benchmark FTR is not

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<sup>46</sup> C&W response to the April 2010 consultation, page 6.  
[http://stakeholders.ofcom.org.uk/binaries/consultations/wmctr/responses/Cable\\_Wireless\\_Worldwide.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/wmctr/responses/Cable_Wireless_Worldwide.pdf)

appropriate because costs of termination on a fixed network are very different to costs of termination on a mobile network (which include a mobility premium).<sup>47</sup>

- 3.13 In addition, both Vodafone and O2 considered that any reliance on the benchmark FTR when setting a termination rate for a smaller MCP would be inconsistent with Ofcom's methodology for setting the charge control on the four national MCPs.<sup>48</sup> O2 stated that reliance on the benchmark FTR to set a termination rate for a smaller MCP may allow them to recover fixed and common costs, whereas those MCPs that receive the benchmark MTR (e.g. the four national MCPs) will not recover their fixed and common costs. O2 considers that this would be likely to distort competition and that it amounts to a significant divergence in regulatory treatment.<sup>49</sup>

#### *Ofcom's view*

- 3.14 We consider that the benchmark FTR is a reasonable proxy for the efficient costs of a 100% OTT MCP, because the costs incurred in terminating a call using pure OTT (i.e. when RAN costs are not incurred by the terminating MCP) are likely to have some similarities to the cost of switching a fixed call, as comparable network elements are used to route the call. We therefore believe that the benchmark FTR is likely to be broadly reflective of the efficient costs of a 100% OTT MCP (and much more reflective of their efficient costs than the benchmark MTR). However, we recognise that the efficient costs of termination on a fixed network will not be precisely the same as the efficient costs of a 100% OTT MCP.
- 3.15 We also recognise that the current benchmark FTR includes a contribution to fixed and common costs, whereas we have set the benchmark MTR on the basis of pure LRIC.
- 3.16 For these reasons, we accept that the FTR is an imperfect proxy, but consider it to be a pragmatic starting point for setting fair and reasonable MTRs for an 100% OTT MCP in a four month dispute resolution process. In particular, we note O2's comment that it is unaware of any other cost benchmark that might be used as an alternative to the benchmark FTR in these circumstances. We therefore remain of the view that we should refer to the benchmark FTR in our guidance as a reasonable proxy and a pragmatic starting point for determining whether the MTR charged by a 100% OTT MCP is fair and reasonable. As noted above, we would consider any cost or other evidence submitted to us by a party in a dispute which suggests that the benchmark FTR is not a fair and reasonable rate in the particular circumstances.

#### **Prospective categorisation of MCPs**

- 3.17 We have also received a number of comments suggesting that categorisation of smaller MCPs should occur prospectively, rather than following their entry into the market, or after a dispute regarding MTRs has been referred to Ofcom. For example, one confidential respondent argued that Ofcom should publish a list of smaller MCPs and state which category they fall within. EE went further, suggesting that smaller

<sup>47</sup> Vodafone response, page 4. <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/Vodafone.pdf>

<sup>48</sup> Vodafone response, page 4; <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/Vodafone.pdf> O2 response, page 3. <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/o2.pdf>

<sup>49</sup> O2 response, page 4. <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/o2.pdf>

MCPs should be required to make an annual submission setting out the category they fall within and termination rate they charge.<sup>50</sup>

- 3.18 Although we no longer intend to place smaller MCPs within the three categories described in the January 2011 consultation, we are issuing guidance that treats 100% OTT MCPs as an exception. Accordingly, comments regarding the desirability of prospective categorisation remain relevant to 100% OTT MCPs.

*Ofcom's view*

- 3.19 Our final guidance set out in the Annex to this statement reduces this concern, because it only requires us to distinguish a 100% OTT MCP from other smaller MCPs (rather than distinguishing between categories of smaller MCPs). We consider that, in practice, correctly identifying a MCP that terminates all of its traffic via OTT would be relatively straightforward and this limited categorisation exercise is very unlikely to give rise to issues that would favour prospective categorisation of MCPs. Accordingly, we consider that these issues have now been addressed and that there is scope for effective negotiation between the parties absent the prospective categorisation of MCPs.

**The position of smaller MCPs terminating a proportion of traffic via OTT**

- 3.20 Stour Marine commented that the proposed guidance set out in January 2011 consultation would allow MCPs with national roaming arrangements to provide OTT services and carry a significant proportion of total traffic via a network for which they do not bear full costs, yet still receive the benchmark MTR.<sup>51</sup>

*Ofcom's view*

- 3.21 We consider that this point is addressed by our final guidance, as our starting point in determining a dispute will be that a smaller MCP (other than a 100% OTT MCP) should charge the benchmark MTR, but we will consider any cost or other evidence which suggests that the benchmark MTR is not fair and reasonable in the circumstances of a particular dispute.

**The position of national MCPs terminating a proportion of traffic via OTT**

- 3.22 In its response to the January 2011 consultation, BT noted that national MCPs may incur lower costs by using alternative low-cost network technologies, whilst still receiving the benchmark MTR to terminate traffic via these technologies.<sup>52</sup> C&W made a similar point, arguing that a prospective OTT operator could work with a national MCP and share the benchmark MTR between them.<sup>53</sup>

*Ofcom's view*

- 3.23 The benchmark MTR is derived from the detailed cost model accompanying our March 2011 statement, which is based on our forward looking assessment of the

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<sup>50</sup> EE response, page 2. <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/ee.pdf>

<sup>51</sup> Stour Marine response, page 4. <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/StourMarine.pdf>

<sup>52</sup> BT response, page 2. <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/bt.pdf>

<sup>53</sup> C&W response, page 3: <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/cww.pdf>

costs of a hypothetical average efficient operator over the period of a four-year charge control. We have sought to ensure that this hypothetical operator reasonably matches the infrastructure deployment of the national MCPs (at an average level).<sup>54</sup> Our cost modelling takes into account the new technologies that we consider are likely to be deployed by the hypothetical operator over the period of the charge control. Although assumptions are necessarily made in relation to the nature, speed and scale of deploying new technologies, and the forward looking nature of the charge control is such that it cannot seek to predict these changes exactly, the impact of these technologies has been accounted for in setting the charge control. In particular, the information collected for the modelling exercise suggests that we do not expect the national MCPs to terminate a significant proportion of their voice traffic on alternative low-cost technologies during the charge control period.

### Practical difficulty setting MTRs

- 3.24 As noted above, several respondents highlighted the practical difficulty that may be encountered when seeking to verify the proportion of traffic that terminates on a smaller MCP's network (versus OTT traffic). Although we no longer intend to use thresholds to sub-categorise smaller MCPs which terminate less than 100% of their traffic using OTT, it is possible that this type of traffic data will remain relevant in some circumstances. In particular, this information may be relevant in the context of negotiations between parties as to whether it would be fair and reasonable for a smaller MCP to charge a different MTR from the benchmark MTR. Traffic data may also be requested by Ofcom if asked to determine a dispute.
- 3.25 In response to the January 2011 consultation, EE also queried whether the proportion of traffic that terminates on a smaller MCP's network via OTT should be calculated according to total call volume or by number of calls.<sup>55</sup>

#### *Ofcom's view*

- 3.26 If Ofcom were asked to determine a fair and reasonable MTR for a terminating smaller MCP in circumstances where precise traffic data is unavailable (or the smaller MCP is unable to provide this data), we will seek a "best estimate" from the smaller MCP concerned. We consider that it will be for that MCP to demonstrate to Ofcom that its best estimate is soundly based. Irrespective of whether a best estimate is provided, Ofcom will resolve any dispute on its specific facts and with reference to the full range of evidence before it.
- 3.27 In response to EE's specific point, although Ofcom's analysis of any dispute will be based on the specific facts at issue, in general we consider that the proportion of a smaller MCP's traffic terminating via OTT should be calculated according to total call volume (i.e. call minutes). We note that this point is likely to be of less relevance in light of the changes to our final guidance.

### Relevant termination costs

- 3.28 In response to the January 2011 consultation, EE also argued that any assessment of a smaller MCP's termination costs should relate to termination on its own network only (i.e. excluding costs of call forwarding etc).<sup>56</sup>

<sup>54</sup> *Wholesale mobile voice call termination* Statement (15 March 2011), paragraph 9.62. A more detailed description of the 2011 cost model can be found in Annex 6 and the model is published on our website at <http://stakeholders.ofcom.org.uk/consultations/mtr/statement>

<sup>55</sup> EE response, page 5. <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/ee.pdf>



### *Ofcom's view*

- 3.29 In the March 2011 statement, calls which are forwarded (either at the request of the called party, or to offer an international call-forwarding service) are included in the relevant market, since the MCP who receives the call (and 'terminates' it by forwarding it) retains control over the price paid by the originating CP for termination (and hence has SMP). In deciding whether it is fair and reasonable for a smaller MCP to charge the benchmark MTR in a particular dispute, we believe the relevant question is whether that MCP is incurring costs that are comparable to operating a RAN, not whether it is actually operating a RAN itself.

### **Conclusion**

- 3.30 Having considered all comments received from stakeholders, we have decided to issue guidance as to how we would approach any future dispute between an originating CP and a terminating smaller MCP as to whether charges for MCT are fair and reasonable. Our guidance is set out in the Annex to this statement and takes effect from the date of publication of this document.
- 3.31 We consider that our final guidance strikes an appropriate balance between:
- 3.31.1 being transparent as to how we would approach the requirement for fair and reasonable MTRs, through the use of the benchmark MTR (or, for 100% OTT MCPs, the benchmark FTR) as a starting point for negotiation and dispute resolution; and
  - 3.31.2 maintaining a sufficiently flexible approach to take into account valid differences, for example in technologies deployed and efficiently incurred costs, which might suggest that a benchmark is not fair and reasonable in the circumstances of a particular smaller MCP.
- 3.32 Overall, we consider that the approach set out in this statement and the final guidance accords with our duties under sections 3 and 4 of the Act (which give effect, amongst other things, to the requirements of Article 8 of the Framework Directive).

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<sup>56</sup> EE response, page 4. <http://stakeholders.ofcom.org.uk/binaries/consultations/mct-fair-reasonable/responses/ee.pdf>

## Annex 1

# Guidance on dispute resolution in relation to mobile call termination charges

## Scope of guidance

- A1.1 This guidance relates to wholesale mobile voice call termination (MCT). Ofcom's statement of 15 March 2011 (the March 2011 statement) defined 32 separate markets for the provision of MCT on individual mobile networks, and designated a particular mobile communications provider (MCP) with significant market power (SMP) in each market.<sup>57</sup>
- A1.2 Each of these markets comprises call termination services that are provided by the named MCP to another communications provider (CP), for the termination of voice calls to UK mobile numbers which that MCP has been allocated by Ofcom, in the area served by that MCP and for which that MCP is able to set the call termination charge.
- A1.3 Annex 1 of the March 2011 statement lists the SMP conditions imposed on the 32 designated MCPs.<sup>58</sup> All designated MCPs are required to provide MCT on fair and reasonable terms and conditions (including charges) (Condition M1). The four national MCPs<sup>59</sup> are also subject to a specific charge control (Condition M4), which is described in more detail below. Designated MCPs which are not subject to the specific charge control (in the remainder of this guidance we refer to these MCP as "smaller MCPs") will therefore need to agree a fair and reasonable mobile termination rate (MTR) with originating CPs.
- A1.4 Ofcom exercises dispute resolution powers under sections 185 to 191 of the Communications Act 2003 (the Act). This guidance describes how Ofcom would approach any future dispute between an originating CP and a terminating smaller MCP as to whether MTRs are fair and reasonable.

## The dispute resolution process

- A1.5 Section 185(1)(a) of the Act gives Ofcom jurisdiction to resolve a dispute relating to the provision of network access between different CPs. By virtue of section 185(8) this includes a dispute as to the terms or conditions on which network access is or may be provided in a particular case. Section 185(2) of the Act also gives Ofcom jurisdiction to resolve a dispute relating to rights or obligations conferred or imposed by or under Part 2 of the Act.<sup>60</sup>
- A1.6 Section 185(3) provides that any party to a dispute may refer it to Ofcom.
- A1.7 Where it is appropriate for Ofcom to handle the dispute, section 188 of the Act provides that Ofcom must consider the dispute and make a determination within four months, except in exceptional circumstances.

<sup>57</sup> [http://stakeholders.ofcom.org.uk/binaries/consultations/mtr/statement/MCT\\_statement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/mtr/statement/MCT_statement.pdf)

<sup>58</sup> [http://stakeholders.ofcom.org.uk/binaries/consultations/mtr/statement/MCT\\_Statement\\_Annex\\_1.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/mtr/statement/MCT_Statement_Annex_1.pdf)

<sup>59</sup> Everything Everywhere Limited, Hutchison 3G UK Limited, O2 (UK) Limited and Vodafone Limited.

<sup>60</sup> Provided the dispute is not excluded by virtue of section 185(7) of the Act.

- A1.8 Ofcom's powers to resolve disputes are set out in section 190 of the Act. They include the power to make a declaration setting out the rights and obligations of the parties to the dispute, to give a direction fixing the terms or conditions of transactions between the parties to a dispute, and/or to give a direction imposing an obligation, enforceable by the parties to a dispute, to enter into a transaction on the terms and conditions fixed by Ofcom.
- A1.9 Dispute resolution is a statutory function, which Ofcom must exercise consistently with its statutory duties, in particular as set out in sections 3 and 4 of the Act (which give effect, among other things, to the requirements of Article 8 of the Framework Directive).<sup>61</sup>
- A1.10 Ofcom's duty to resolve disputes within four months (except in exceptional circumstances) has an impact on the level of analysis that it is appropriate and feasible for Ofcom to undertake in determining a dispute. We are very rarely, for example, able to carry out the same detailed level of analysis of costs as we would in exercising other ex ante regulatory powers, such as in a market review. In making a determination to resolve a dispute, Ofcom will rely on its best assessment of the available evidence within the four month statutory deadline.

### The benchmark MTR

- A1.11 As noted above, in the March 2011 statement Ofcom set a charge control for the four national MCPs (Condition M4). The charge control sets a ceiling on the level of permitted MCT charges over a four-year period from 1 April 2011 to 31 March 2015. The nominal cap for the first year of the charge control (1 April 2011 to 31 March 2012) is 2.984 pence per minute.<sup>62</sup> The level of the ceiling for each subsequent year of the charge control is calculated in accordance with the provisions of Condition M4. Ofcom intends to publish the applicable nominal maximum charge in advance of the second, third and fourth charge control years.<sup>63</sup> In the remainder of this guidance, we refer to the cap set under this charge control as the "benchmark MTR".
- A1.12 The benchmark MTR is derived from the detailed cost model accompanying our March 2011 statement, which is based on our forward looking assessment of the costs of a hypothetical average efficient MCP operating a national 2G/3G network over the period of the four-year charge control. Our cost modelling takes into account the new technologies that we consider are likely to be deployed by the hypothetical MCP over the period of the charge control.
- A1.13 Ofcom considers the benchmark MTR to be a good starting point for bilateral negotiations between terminating smaller MCPs and originating CPs when seeking to establish a fair and reasonable MTR in accordance with Condition M1 (subject to paragraphs A1.17 to A1.20 below).
- A1.14 Ofcom recognises that MCPs currently operate a variety of business models, and that further new business models may develop during the period covered by the

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<sup>61</sup> Directive 2002/21/EC.

<sup>62</sup> For the first two months of this period (1 April 2011 to 31 May 2011), the charge control caps the weighted average charge over this period at 2.984 ppm. For the remainder of this period (1 June 2011 to 31 March 2012), the charge control sets a maximum charge ceiling of 2.984 ppm.

<sup>63</sup> The nominal cap in each year of the charge control can only be calculated once relevant inflation data is available (i.e. the change in RPI for the year ending 31 December before the start of the charge control year in question). Ofcom intends to publish the applicable cap on an annual basis, once this inflation data becomes available.

March 2011 statement. Originating CPs and terminating smaller MCPs may therefore negotiate a different MTR from the benchmark MTR in the context of the facts and circumstances of any specific case (subject to compliance with Condition M1, which requires a terminating MCP to provide network access on fair and reasonable terms and conditions (including charges)).

- A1.15 The limited four month dispute resolution period affects the level of analysis it is appropriate and feasible for Ofcom to undertake in determining a dispute. For example, Ofcom is normally unable to carry out the same detailed level of analysis of costs as we would in a market review. In determining any dispute as to whether MTRs are fair and reasonable, Ofcom would therefore take the benchmark MTR as its starting point for establishing a fair and reasonable MTR for a smaller MCP (subject to paragraphs A1.17 to A1.20 below). Ofcom would consider any cost or other evidence presented or available to us which suggests that the benchmark MTR is not fair and reasonable in light of the specific facts and circumstances of any dispute.
- A1.16 Ofcom may request traffic data in order to determine a dispute. In particular, where a smaller MCP terminates a proportion of its traffic using over-the-top (OTT) means,<sup>64</sup> then Ofcom may request traffic data to verify what proportion of the smaller MCP's traffic is being terminated OTT. If Ofcom is asked to determine a fair and reasonable MTR for a smaller terminating MCP in circumstances where precise traffic data is unavailable (or the smaller MCP is unable to provide this data), we will seek a "best estimate" from the smaller MCP concerned. We consider that it will be for that MCP to demonstrate to Ofcom that its best estimate is soundly based. Irrespective of whether a best estimate is provided, Ofcom will resolve any dispute on the specific facts and with reference to the full range of evidence before it.

### **MCPs terminating 100% of traffic OTT**

- A1.17 A smaller MCP which terminates 100% of its traffic using OTT means<sup>65</sup> (a 100% OTT MCP) is likely to operate a business model which is fundamentally different to that underlying our MCT cost model. In Ofcom's view, the efficient costs of a 100% OTT MCP are likely to be substantially lower than, and structurally different from, the efficient costs assumed in setting the benchmark MTR. Adopting the benchmark MTR as a starting point for a fair and reasonable MTR in these circumstances would not be appropriate.
- A1.18 Ofcom considers that an approach which more closely reflects the efficient costs of a 100% OTT MCP is more likely to provide a fair and reasonable MTR. The costs incurred in terminating a call using OTT means (i.e. when radio access network infrastructure costs are not incurred by the terminating MCP) are likely to have some similarities to the cost of switching a fixed call, as comparable network elements are used to route the call. As a result, 100% OTT MCPs and originating CPs might wish to consider the fixed termination rate (FTR) as an appropriate starting point for their negotiation of a fair and reasonable MTR.
- A1.19 The 'FTR' in this context means BT's Call Termination Local Exchange (LE) rate, which is subject to a charge control as set out in Ofcom's Explanatory Statement and Notification of 15 September 2009, entitled *Review of BT's Network Charge*

<sup>64</sup> An OTT service runs "over the top" of an existing network connection such as a fixed or wireless broadband connection. Examples of OTT services include mobile VoIP calls over 3G.

<sup>65</sup> By referring to an MCP which terminates 100% of its incoming traffic using OTT, we mean an MCP that provides MCT exclusively without operating a radio access network itself, or otherwise indirectly incurring radio access network-related costs (for example, through an MVNO agreement or national roaming agreement).

*Controls.*<sup>66</sup> It would also include a rate set to reflect the efficient cost of terminating a fixed call in any subsequent fixed call termination market review. In the remainder of this guidance, we refer to this charge as the “benchmark FTR”. As at the date of issue of this guidance, the benchmark FTR is 0.175 pence per minute in nominal terms.<sup>67</sup>

A1.20 As noted above, the limited four month time period available to Ofcom to resolve a dispute has an impact on the level of analysis it is appropriate and feasible for us to undertake. In determining any dispute as to whether MTRs charged by an 100% OTT MCP are fair and reasonable, Ofcom would therefore take the benchmark FTR as our starting point for establishing a fair and reasonable MTR. We recognise that the benchmark FTR is unlikely to precisely reflect the efficient costs of an 100% OTT MCP and there may be other reasons why the benchmark FTR is not a perfect proxy, but we nevertheless consider it to be a pragmatic starting point (and a better starting point in these circumstances than the benchmark MTR) and a reasonable proxy in light of the time-limited dispute resolution process. Ofcom would consider any cost or other evidence presented to us by a party which suggests that the benchmark FTR is not fair and reasonable in light of the specific facts and circumstances of any dispute.

### Higher than benchmark MTR

A1.21 As noted above, Ofcom intends to use the benchmark MTR as a starting point for setting a fair and reasonable MTR for smaller MCPs (with the exception of 100% OTT MCPs), taking into account any cost or other evidence which suggests that the benchmark MTR is not fair and reasonable in the circumstances of a specific dispute. Ofcom is aware that some terminating smaller MCPs might consider that a termination rate higher than the benchmark MTR would be fair and reasonable in their own specific circumstances.

A1.22 Ofcom will consider any dispute on its own facts and evidence. However, Ofcom generally considers it unlikely that an MTR at a level higher than the benchmark MTR will be fair and reasonable, as the benchmark MTR has been based on the modelled costs of an average efficient national MCP, taking a forward looking assessment over a four year period. Ofcom considers that MTRs above the benchmark MTR are only likely to be fair and reasonable where the terminating smaller MCP (which is subject to Condition M1), is able to demonstrate that, in complying with that condition:

- charging a MTR equal to the benchmark MTR would deny it recovery of its actual costs of providing MCT;
- its actual costs of providing MCT are efficiently incurred; and
- charging a higher MTR than the benchmark MTR would be offset by consumer benefits, which might include lower overall end-to-end costs (not just in particular cases but in general for calls to the terminating MCP’s network) or other benefits to calling parties related, for example, to the quality of the service provided.

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<sup>66</sup> See

[http://stakeholders.ofcom.org.uk/binaries/consultations/review\\_bt\\_ncc/statement/nccstatement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/review_bt_ncc/statement/nccstatement.pdf)

<sup>67</sup> See BT carrier price list:

[https://www.btwholesale.com/pages/cmsjsps/service\\_and\\_support/service\\_support\\_hub/online\\_pricing\\_hub/cpl\\_hub/cpl\\_pricing\\_hub/cpl\\_browsable\\_sections/cpl\\_browsable\\_sectionb\\_1.jsp](https://www.btwholesale.com/pages/cmsjsps/service_and_support/service_support_hub/online_pricing_hub/cpl_hub/cpl_pricing_hub/cpl_browsable_sections/cpl_browsable_sectionb_1.jsp)

A1.23 As noted above, whilst we will consider any dispute on its specific facts and evidence, we consider it likely that a higher MTR would only be fair and reasonable in exceptional circumstances.

### **Enforcement action**

A1.24 Whilst dispute resolution is likely to be the most common regulatory means of considering whether an MTR is fair and reasonable, it is not the only regulatory instrument available. It is open to Ofcom to investigate whether MCPs are compliant with an SMP condition, and to take enforcement action under sections 94 to 103 of the Communications Act 2003 (whether or not a dispute has been referred to us for resolution). Ofcom will also take the content of this guidance into account in any such proceedings, as appropriate.