



Dispute about per-customer line transaction charges for Carrier Pre-Selection

Non-confidential version

Determination
and statement with
consultation on
repayment

Issue date: 13 February 2009

Publication date: 17 February 2009

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Section 1

Summary

- 1.1 Carrier Pre-Selection (CPS) is a mechanism that allows consumers who have a BT line to select, in advance, alternative communications providers to carry some or all of their telephone calls without having to dial a prefix.
- 1.2 This dispute is about the charge British Telecommunications plc (BT) makes to CPS operators (CPSOs) when it applies CPS to a line (except where CPS is provided in combination with Wholesale Line Rental (WLR), when a different charge applies). This charge is listed in BT's Carrier Price List as "Set-Up – Switch change effected" and referred to in this document as the "CPS set-up charge".¹
- 1.3 Ofcom has determined that BT has significant market power (SMP) in various narrowband wholesale markets and imposed a number of SMP conditions on BT including a requirement to provide CPS under SMP Condition AA8.² This SMP condition, among other things, entitles BT to recover from other communications providers the reasonable costs it incurs in providing CPS.
- 1.4 The current CPS set-up charge of £2.47 has been in effect since 1 November 2007, when BT introduced new charges for various CPS and WLR transactions.
- 1.5 On 23 September 2008 Cable & Wireless (C&W), on behalf of itself, THUS plc (THUS), Gamma Telecom Ltd (Gamma) and Opal Telecom Ltd (Opal), together "the CPSOs", referred a dispute between the CPSOs and BT to Ofcom for resolution.
- 1.6 In its submission, C&W argues that the CPS set-up charge is, and has been, set at a level that enables BT to recover certain retail costs. C&W argues that BT is not entitled to recover its retail costs from CPSOs. C&W therefore asked Ofcom:
 - to determine the proper amount of the CPS set-up charge from 28 November 2003 to the date of the determination of this dispute;
 - to determine the proper amount of the CPS set-up charge going forward; and
 - to require BT to make any necessary repayments to the CPSOs in dispute.
- 1.7 Ofcom's duty and powers to resolve certain disputes are set out at sections 185-191 of the Communications Act 2003 ("the 2003 Act"). On 15 October 2008 Ofcom decided that it was appropriate for Ofcom to resolve this dispute and informed the parties to the dispute of its decision.
- 1.8 In resolving this dispute, Ofcom has considered its general statutory duties and community obligations under section 3 and 4 of the 2003 Act. In the context of this

¹ The section of the BT Carrier Price list that includes the CPS set-up charge is published at: http://www.btwholesale.com/pages/downloads/service_and_support/pricing_information/carrier_price_list_browsable/b7_01.rtf

² See *Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets*, 28 November 2003. Note that prior to 29 December 2003, the Director General of Telecommunications ("the Director") exercised the powers under the 2003 Act. Therefore, any reference in this draft determination and explanatory statement to Ofcom exercising powers prior to this date should be read as meaning they were exercised by the Director. Also, any references to the Director in the SMP conditions should be read as references to Ofcom.

dispute, Ofcom has had particular regard to its duty under section 3(1)(b) of the 2003 Act to further the interests of consumers in relevant markets, where appropriate by promoting competition, in line with its duty under section 4 of the 2003 Act to promote competition in communications markets in accordance with the policy objectives of Article 8 of the Framework Directive.³

- 1.9 Having considered the submissions of the parties and the evidence it had gathered, Ofcom's provisional conclusion was that:
- i) BT is not entitled to recover through the CPS set-up charge the costs it incurs in sending the notification of transfer letter and handling the resulting inbound customer calls;
 - ii) BT is required to reduce the CPS set-up charge by 78p to remove the recovery of the costs it incurs in sending the notification of transfer letter and handling the resulting inbound customer calls; and
 - iii) it is proportionate and reasonable as between the parties to require BT to pay to the CPSOs a sum by way of an adjustment for the overpayment of the CPS set up charge from 1 November 2007 to the date of Ofcom's final determination, to include interest at standard contract rates.
- 1.10 On 30 December 2008 Ofcom issued to each of the parties in dispute and to a party that asked to be considered as an interested party a non-confidential version of its draft determination and explanatory statement (referred to in this document as "the Consultation"). On 6 January 2009 Ofcom published the Consultation on its website.⁴ Ofcom asked for comments from all stakeholders by close of business on 16 January 2009.
- 1.11 Ofcom's conclusion, in light of stakeholders' responses and further analysis of relevant statements made by Ofcom, is that BT is not entitled to recover the costs associated with sending the notification of transfer letter and handling the resulting inbound customer calls through the CPS set-up charge and is required to reduce the CPS set-up charge by 78p.
- 1.12 Following responses to our draft determination, Ofcom considers that we have not, until now, made any clear statement that these costs were not costs of providing CPS facilities under SMP Condition AA8. As this alters our position from the draft determination we invite the parties to provide any further comments they have on an earlier date in response to the reasoning in this document at section 7.30 onwards.
- 1.13 The background to this dispute is set out in section 2. The history of this dispute is set out in section 3. Ofcom's dispute resolution powers, statutory obligations and regulatory principles are set out in section 4. Ofcom's proposals for resolving the dispute are summarised at section 5. Stakeholders' comments are summarised at section 6. Ofcom's further analysis and conclusions are set out at section 7.
- 1.14 Ofcom's determination, which takes effect on 16 February 2009, is set out at annex 1.

³ Directive 2002/21/EC of the European parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

⁴ http://www.ofcom.org.uk/consult/condocs/dispute_percustomer/summary/draftdet060109.pdf.

Section 2

Background

2.1 This dispute is about the charge BT makes to CPSOs when it applies CPS to a line (except where CPS is provided in combination with WLR, when a different charge applies). This charge is listed in BT's Carrier Price List as "Set-Up – Switch change effected" and referred to in this decision as the "CPS set-up charge".⁵

History of CPS

- 2.2 CPS is a mechanism that allows consumers who have a BT line to select, in advance, alternative communications providers to carry some or all of their calls without having to dial a prefix.⁶
- 2.3 CPS can be provided either on its own, in which case the consumer pays a CPS service provider for calls but continues to pay BT for line rental, or in combination with WLR, in which case the consumer no longer has a billing relationship with BT. WLR allows alternative suppliers to rent access lines on wholesale terms from BT, and resell the lines to customers, providing a single bill that covers both line rental and telephone calls. The calls are provided using either CPS or end-to-end wholesale calls purchased from BT.
- 2.4 EC Directive 98/61/EC required Member States to ensure that CPS was made available by those providers with SMP in the provision of fixed telephony. To fulfil this requirement in relation to BT, a new condition (Condition 50A) was added to the operating Licence granted to BT under section 7 of the Telecommunications Act 1984 ("the 1984 Act").
- 2.5 BT first made CPS available from 1 April 2000 in the form of interim CPS (which used a piece of equipment called an auto-dialler attached to the customer's telephone to route calls via the CPSO). Permanent CPS (which uses intelligent switching to route calls) was made available in phases from 12 December 2000.
- 2.6 Licence condition 50A.4(2)(3) empowered the Director, when he considered that the cost basis of any charges for CPS in any preceding period had been inaccurately estimated, to make an adjustment to such a charge determined by him as he considered appropriate for rectifying the matter. The Director set the appropriate charges for the provision of CPS by BT in determinations dated 18 January 2001, 26 November 2001 and 2 September 2002.⁷
- 2.7 A new regulatory regime was introduced by the 2003 Act. The 2003 Act implemented the new European regulatory package in the UK. The new regulatory package

⁵ See footnote 1 above.

⁶ When CPS was first introduced, customers could subscribe to the services of one or more CPS service providers and choose the type of calls (e.g. national calls, international calls or all calls) to be routed through the network of a CPSO. Today, however, most CPS customers are on an "all calls" package and many CPS service providers do not offer any other option.

⁷ See: *Final determination on costs and charges for permanent carrier pre-selection*, 18 January 2001; *Final Determination on costs and charges for provision by BT of permanent carrier pre-selection standard services for FeatureNet, FeatureLine and Embark customers*, 26 November 2001 and *Final Determination on costs and charges for the provision of permanent carrier pre selection*, 2 September 2002, published at: <http://www.ofcom.org.uk/static/archive/oftel/publications/carrier/index.htm>

comprises the Framework Directive⁸ together with three specific directives covering licensing and authorisations (the Authorisation Directive)⁹, access and interconnection (the Access Directive)¹⁰ and universal service and users' rights (the Universal Services Directive).¹¹ These are known collectively as the EC Communications Directives.

- 2.8 The licensing regime of the 1984 Act was replaced by conditions of entitlement made under the 2003 Act. BT is now subject to a number of SMP Conditions that relate to the provision of CPS, which are set out in the following section.

BT's SMP obligations

- 2.9 In line with the requirements of the new EC Communications Directives and the 2003 Act, the Director undertook a review of the call origination market and published his market review statement ("the Market Review") on 28 November 2003.¹²

- 2.10 The Market Review concluded that BT had SMP in a number of markets including the market for call origination on fixed public narrowband networks in the UK excluding Hull.

- 2.11 Under section 90 of the 2003 Act, Ofcom is required to impose on a provider that it has found to be dominant such SMP conditions relating to CPS and Indirect Access (IA) as it thinks fit.¹³ The Director therefore imposed a number of SMP conditions on BT in the wholesale call origination market including:

- a requirement to provide Network Access on reasonable request (SMP Condition AA1);
- a requirement not to unduly discriminate (SMP Condition AA2);
- a cost orientation obligation (SMP Condition AA3);
- a requirement to provide CPS on request (SMP Condition AA8); and
- a direction imposing restrictions on BT's use of Save and Cancel Other (*Direction: Carrier pre-selection 'Save' and 'Cancel Other' activities*).

- 2.12 Ofcom notes that the wording of SMP Condition AA8 reflects the wording in Article 19(3) of the Universal Service Directive which requires that:

"[Ofcom] shall ensure that pricing for access and interconnection related to the provision of [CPS] is cost oriented and that direct

⁸ See footnote 3 above.

⁹ Directive 2002.20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services.

¹⁰ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities.

¹¹ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services.

¹² *Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets*, 28 November 2003,

http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/nwe/fixednarrowbandstatement.pdf

¹³ Indirect access (IA) is a mechanism that allows users to select alternative communications providers to their access line provider on a call-by-call basis by dialling a short pre-fix before each number they wish to dial.

charges to subscribers, if any do not act as a disincentive for the use of these facilities.”

2.13 Additionally, Article 13(3) of the Access Directive states that:

“[Ofcom] may require an operator to provide full justification for its prices [for providing Network Access, which includes CPS], and may, where appropriate, require prices to be adjusted.”

2.14 SMP Conditions AA1, AA2, AA3 and AA8 are reproduced at Annex 2 below.

The Cancel Other Direction

2.15 Cancel Other is a functionality that allows BT to cancel a customer’s order for CPS during the 10 day period between the confirmation of an order for CPS and the transfer date of this service.

2.16 On 8 July 2003, the Director issued a Direction in accordance with the provisions of regulation 6(3) of the Telecommunications (Interconnection) Regulations 1997 that required changes to the CPS Industry End-to-End Process Description (see paragraph 2.40 below) in relation to BT’s use of Cancel Other. In order to ensure that the obligations imposed in that Direction continued to be enforceable against BT, the Director issued *Direction: Carrier pre-selection ‘Save’ and ‘Cancel Other’ activities* (the “Cancel Other Direction”) at Annex C of the Market Review (see paragraph 2.9 and footnote 12 above).¹⁴

2.17 The Cancel Other Direction imposed a number of restrictions on BT’s use of Cancel Other. BT is only allowed to use Cancel Other in certain circumstances and if certain criteria are met, as set out at paragraphs 1 and 2 of the Cancel Other Direction:

“[BT] shall be permitted to use Cancel Other in the following circumstances only:

(a) Slamming;

(b) Internal Customer Miscommunications;¹⁵

(c) Line Cease; and

(d) any other situations agreed by the CPS Process Group, subject to the Director having given his written consent to any such changes.

2. Before using Cancel Other, [BT] shall ensure that the following conditions are fulfilled:

(a) in the case of Slamming or Internal Customer Miscommunication, the Dominant Provider shall take reasonable steps to ensure that

¹⁴ Ofcom withdrew the original Cancel Other Direction and replaced it with a new Cancel Other Direction on 21 January 2005 (<http://www.ofcom.org.uk/consult/condocs/cancel-other/codir/codir.pdf>). A further Direction on 28 July 2005 (<http://www.ofcom.org.uk/consult/condocs/cancel-other/amendment2direction/>) made some amendments to the 21 January 2005 direction.

¹⁵ “Internal customer miscommunication” means the situation where a request for CPS has been made by someone other than the authorised decision-maker.

Slamming or Internal Customer Miscommunication has actually taken place; and

(b) the Dominant Provider shall take reasonable steps to ensure that it is talking to the authorised decision-maker in the organisation or household.”

BT's charges for CPS

- 2.18 Condition 50A of the operating Licence granted to BT under the 1984 Act required BT to set charges for CPS on the basis of the long run incremental cost (LRIC) of providing the service.
- 2.19 In February 1999, the Director published a statement, *Implementation of Carrier Pre-Selection in the UK*, which considered how the costs of providing CPS should be recovered.¹⁶ The Director identified three broad categories of costs:
- i) system setup costs;
 - ii) per operator costs; and
 - iii) per line costs.
- 2.20 The Director concluded that costs associated with (i) should be recovered across all “relevant” minutes originating on BT’s network, while costs associated with (ii) and (iii) should be recovered from the individual CPSOs concerned.
- 2.21 In January 2001, the Director published his *Determination on Costs and Charges for Permanent Carrier Pre-selection* (“the 2001 Determination”).¹⁷ The 2001 Determination concluded that the charges that BT had proposed for CPS were not LRIC-based and set revised charges. The Director recognised that some of the figures used in calculating the charges were estimates and forecasts and undertook to consider reviewing the charges within two years.¹⁸
- 2.22 Following changes to the CPS ordering process, the Director determined new CPS transaction charges in September 2002.¹⁹ In determining these charges, the Director used the same costs (apart from those related to the revised ordering process) and methodology as he had in the 2001 Determination. The Director stated that he would address other concerns raised by CPSOs (including the relevant volumes to be used in calculations) in a further review at a later date.
- 2.23 As set out at paragraphs 2.9-2.11 above, in November 2003 the Director published the Market Review and imposed on BT a number of SMP Conditions. SMP Condition AA8 carried over the existing requirement for BT to set its charges for CPS on a forward looking LRIC basis and set out the four broad headings into which BT was required to categorise its CPS costs. These categories are: (i) CPS per-provider set-up costs; (ii) CPS per-provider on-going costs; (iii) CPS per customer line set-up costs; and (iv) CPS system set-up costs. The Director did not review the costs and charges for CPS in the Market Review.

¹⁶ http://www.ofcom.org.uk/static/archive/oftel/publications/1995_98/competition/cps298.htm

¹⁷ <http://www.ofcom.org.uk/static/archive/oftel/publications/carrier/pcps0101.htm>

¹⁸ See paragraphs 98 and 99 of the 2001 Determination.

¹⁹ <http://www.ofcom.org.uk/static/archive/oftel/publications/carrier/2002/pcps0902.htm>

- 2.24 Following the publication of the Market Review, Ofcom reviewed costs and charges for CPS. Ofcom consulted on its proposals in March 2005.²⁰ Some respondents to the consultation expressed concern about the cost basis of some of BT's CPS charges – in particular, the fact that BT appeared to be recovering some of its retail costs. For example, UKCTA (the UK Competitive Telecommunications Association, on behalf of the UK's major fixed telecommunications providers other than BT) urged Ofcom to:

“remove the BT Retail incurred costs from these BT Wholesale charges – ie postage costs for [notification of transfer] letters and related inbound call costs. The issue of recovery of these costs should then be discussed more generally among retail providers offering calls service who will all face similar costs “caused” by gaining operators.”²¹

- 2.25 Ofcom published its conclusions in its statement and direction on *Per-provider and per customer line costs and charges for Carrier Pre-selection* of 18 August 2005 (“the August 2005 Direction”), which re-determined BT's CPS charges.²²

- 2.26 In the August 2005 Direction, Ofcom notified its intention to carry out a further review of the appropriate costs and charges for CPS transaction activities in 2006.²³ Ofcom explained at paragraph 2.27 of the August 2005 Direction that it had not addressed stakeholders' concerns about the cost basis of certain of BT's CPS charges, and that:

“the principal reason for not doing so is to avoid delaying implementation of the charges set out in the Direction at Annex 1. CPS charges are presently out of line with costs and Ofcom considers, therefore, that it should revise these charges as soon as possible. Any further delays in setting revised charges would not be beneficial to CPS Providers and nor would it benefit citizen-consumers.”

- 2.27 In particular, Ofcom noted at paragraph 3.30 of the statement accompanying the August 2005 Direction that:

“Ofcom has also considered CPS Providers' comments in relation to the charges that they pay to BT that include certain costs that are incurred by BT Retail as a result of BT's obligation to provide CPS. However, for the same reasons as those set out in paragraph 2.27 and also for the reasons set out in 3.31 and 3.32, Ofcom considers that it is appropriate to consider these matters in its 2006 review.”²⁴

- 2.28 Ofcom did not carry out its planned review in 2006, as a result of an internal review of its administrative priorities.

²⁰ *Per provider and per-customer line costs and charges for Carrier Pre-Selection*, 24 March 2005, <http://www.ofcom.org.uk/consult/condocs/carrier/>

²¹ UKCTA response of 28 April 2005 to Ofcom's March 2005 consultation. See comments made by UKCTA, Tele2 and Scottish and Southern Energy plc in their responses to the consultation at

<http://www.ofcom.org.uk/consult/condocs/carrier/responses/>
²² <http://www.ofcom.org.uk/consult/condocs/carrier/statement>

²³ See paragraph 1.8 of the August 2005 Direction.

²⁴ Paragraph 3.30 of the August 2005 Direction.

- 2.29 On 23 December 2005 Opal asked Ofcom to resolve a dispute between it and BT about BT's charges for the provision of CPS between 1 October 2002 and 18 August 2005. Opal argued that BT's charges over that period were not consistent with SMP Condition AA8.4(a) and that BT had overcharged Opal for the provision of CPS over that period, and sought reimbursement of the overpayments it had made.
- 2.30 Ofcom accepted the dispute referred by Opal (the "Opal dispute") for resolution. A number of other parties subsequently joined the dispute. On 16 May 2006, Ofcom made a determination that BT was required to pay to Opal and the other parties to the dispute an adjustment for the period 28 November 2003 to 17 August 2005, equal to the difference between the payments made by the parties to BT based on the old charges, and the payments they would have made based on the charges set by Ofcom in the August 2005 Direction.
- 2.31 BT told the industry at the CPS/WLR Commercial Group meeting on 22 November 2007 that it was going to announce a number of new CPS charges shortly, noting that the new charges would take effect from 1 November 2007.²⁵ On 10 December 2007 BT issued Access Charge Change Notice 835 (ACCN 835) which notified new CPS charges including the CPS set-up charge of £2.47.

General Condition 14.5

- 2.32 The General Conditions of Entitlement apply to anyone who provides an electronic communications service or an electronic communications network (together, "communications providers"). General Condition 14 sets out the requirements on communications providers related to codes of practice and dispute resolution.
- 2.33 In April 2004, Ofcom published a consultation document on the effectiveness of safeguards designed to protect consumers from mis-selling of fixed-line telecommunications services.²⁶
- 2.34 In the light of comments received from stakeholders, Ofcom concluded that existing safeguards did not provide satisfactory consumer protection against mis-selling of fixed line telecommunications services.
- 2.35 Ofcom therefore published a statement and further consultation document in November 2004 proposing changes to General Condition 14 that would require communications providers offering fixed line telecommunications services to establish and comply with codes of practice governing their sales and marketing activities.²⁷ Following this further consultation, Ofcom published a statement on 13 April 2005 confirming that it was amending General Condition 14 to give effect to its proposals.²⁸
- 2.36 Following that amendment, General Condition 14.5 provides that:

²⁵ The CPS/WLR Commercial Group is the primary means for industry stakeholders to be involved in the policy discussions and implementation of processes for IA, CPS and WLR.

²⁶ *Protecting citizen-consumers from mis-selling of fixed-line telecoms services*, consultation document, 29 April 2004, http://www.ofcom.org.uk/consult/condocs/mis_selling/

²⁷ *Protecting citizen-consumers from mis-selling of fixed-line telecoms services*, statement and notification, 22 November 2004, http://www.ofcom.org.uk/consult/condocs/mis_selling/

²⁸ *Protecting citizen-consumers from mis-selling of fixed-line telecoms services*, Notification of modification to a General Condition, 13 April 2005, http://www.ofcom.org.uk/consult/condocs/mis_selling/.

“Those Communications Providers who provide Fixed-line Telecommunications Services shall:

(a) establish and thereafter maintain a Code of Practice for Sales and Marketing for dealing with its Domestic and Small Business Customers, which conforms with the Guidelines set out in Annex 3 to this Condition; and

(b) comply with the provisions of the Code of Practice for Sales and Marketing established according to Condition 14.5(a) above.”

- 2.37 Initially, the requirement on communications providers to establish and comply with sales and marketing codes of practice was subject to a “sunset clause” that meant it would lapse two years after introduction unless Ofcom considered that it needed to reinstate the requirement. In 2007, Ofcom conducted a further consultation to establish whether the mis-selling of fixed line telecommunications services had been addressed to the extent that it was appropriate to remove current regulatory obligations, or whether mis-selling remained a problem requiring regulatory intervention by Ofcom. Ofcom concluded from this exercise that in light of continued high levels of mis-selling it was appropriate to retain the requirement on communications providers to establish and comply with sales and marketing codes of practice and to extend the obligation to cover telecommunications services provided using LLU (local loop unbundling). On 21 May 2007, Ofcom notified a number of further amendments to General Condition 14.5 (GC14.5), one of which was to make permanent the requirement to publish and comply with sales and marketing codes of practice.²⁹ This amendment came into effect on 26 May 2007.
- 2.38 General Condition 14, Annex 3 specifies what communications providers need to include in their sales and marketing codes of practice.
- 2.39 Of particular relevance in the context of this dispute are paragraphs 6.11-6.12 of Annex 3 which make it a requirement for providers to send ‘notification of transfer’ letters (see paragraph 2.42 below).

“6.11 Providers to send a mandatory letter in accordance with the industry-agreed process informing the customer of the details of the transfer, and the following to be clearly communicated:

- date of notification;
- [telephone numbers] affected;
- list of services affected/unaffected, e.g. IA call barring;
- date of switchover;
- the sender’s contacts details for any queries.

6.12 The notification will be by letter although may be sent electronically where Customers have initiated contact by applying online, and have confirmed online that they wish all future correspondence to be sent electronically. Otherwise Customers

²⁹ *Protecting consumers from mis-selling of telecommunications services*, statement and notification, 21 May 2007, <http://www.ofcom.org.uk/consult/condocs/mis-sellingprotection/statement/>

would need to positively request by written correspondence that information be sent electronically.”

CPS processes

- 2.40 The industry has agreed a set of processes for CPS which are defined in a document called the *CPS Industry End to End Process Description* (the “CPS Process Description”). This document is published on Ofcom’s website and regularly updated to reflect changes in technology and practice.³⁰
- 2.41 The CPS Process Description explains what the communications providers involved need to do where:
- a customer transfers some or all of his calls from BT to another provider;
 - a customer transfers between two non-BT providers for some or all of his calls; and
 - a customer transfers some or all of his calls from a non-BT provider to BT.
- 2.42 The process that the communications providers involved need to follow is the same for all three of these transfer scenarios. The customer makes an agreement with his new provider (referred to as the “gaining service provider” or GSP). The GSP (on its own behalf where it has its own network, or via its CPSO where it does not) places a wholesale order for CPS with BT. There is a transfer period of 10 working days, during which the GSP and the provider that the customer is transferring away from (referred to as the “losing service provider” or LSP) send out “notification of transfer” letters telling the customer that a request has been made to transfer some or all of their calls to another provider.
- 2.43 The notification of transfer letter acts as a safeguard against mis-selling and slamming, because it tells the consumer that someone has made a request to take over some or all of his calls, and gives him the opportunity to contact the GSP and/or LSP to cancel the transfer if he thinks he has been mis-sold or has never had any contact with the provider that made the transfer request.³¹ The notification of transfer letter process was agreed by the industry and has been used since 2002 (and therefore predates the requirement in Annex 3 to GC14).³²

CPS trends

- 2.44 Since the introduction of CPS, the share of providers (BT or CPSO) gaining and losing from CPS has shifted significantly. In 2003, BT was, by far, the highest net loser and lowest net gainer from CPS. In the most recent month for which Ofcom has data, BT was the gaining operator in [x] per cent of CPS transactions and the losing operator [y] per cent of the time (see Table 1 and Figure 1 below).

³⁰ http://www.ofcom.org.uk/telecoms/groups/pre/cps_industry/ind_docs/cps_e2e_process.pdf. See also

http://www.btwholesale.com/pages/downloads/service_and_support/contractual_information/docs/nsi_a/nsch143.rtf

³¹ The term ‘mis-selling’ covers a range of sales and marketing activities that can work against the interests of both consumers and competition and undermines confidence in the industry as a whole. ‘Slamming’ is an extreme form of mis-selling, where customers are simply switched from one company to another without their knowledge or consent.

³² See page 7, paragraph 1.1 of the CPS Process Description.

Table 1: losing and gaining shares of CPS transactions 2004-2008

	Oct-04	Apr-05	Oct-05	Apr-06	Oct-06	Apr-07	Oct-07	Apr-08	Oct-08
% transfer from									
CPSO to BT	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
BT to CPSO	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
CPSO to CPSO	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]

Source: BT

Figure 1: losing and gaining shares of CPS transactions 2004-2008

[X]

Source: BT³³

³³ On 11 April 2006, Carphone Warehouse launched its “free broadband” offer (http://www.cpwplc.com/phoenix.zhtml?c=123964&p=irol-newsArticle_Print&ID=960632&highlight=). This led to significant growth in take-up of WLR, coinciding with the spike in CPS transactions in early 2006.

Section 3

The dispute

History of the dispute

- 3.1 BT told the industry at the CPS/WLR Commercial Group (see paragraph 2.31 and footnote 25 above) meeting on 22 November 2007 that it was going to announce a number of new CPS charges, which would take effect from 1 November 2007.
- 3.2 On 10 December 2007, BT issued Access Charge Change Notice 835 (ACCN 835) which notified new CPS charges including the CPS set-up charge of £2.47. While the CPS set-up charge fell from £2.72 to £2.47, the differential between the CPS set-up charge and the equivalent charge where CPS is provided together with WLR increased from 60p to 78p.³⁴
- 3.3 At the CPS/WLR Commercial Group meeting of 24 January 2008, CPSOs noted the increased differential between CPS and WLR set-up charges. BT agreed to find out why the differential had increased. BT duly emailed CPSOs on 27 February 2008 explaining that the difference between the CPS and WLR charges was due to the fact that BT recovered an element of retail cost through the CPS set-up charge that it does not recover where CPS is provided in combination with WLR:

“1/ Is the BTR cost still in the cost stack, why?”

Yes, the BTR cost is still in the cost stack [...]. In Ofcom’s August 2005 statement it was stated that it was reasonable for BT to recover these costs and in BT’s view it remains appropriate as the level of misselling (which drives significant BT costs) is still a concern.”

- 3.4 Ofcom did not make such a statement in the August 2005 statement. The relevant paragraphs of the August 2005 statement are set out at paragraphs 2.26 and 2.27 above.
- 3.5 On 26 March 2008, CPSOs wrote to BT stating that they believed BT’s position (as represented in the email quoted in the preceding paragraph) did not accurately reflect Ofcom’s 2005 Direction. CPSOs invited BT to consider its position, proposing that BT reduce the CPS set-up charge with immediate effect and:

“BTW reimburses each CPSO for the element of its CPS set-up charges that represent the Retail charges that have been inappropriately recovered since 28 November 2003, at a rate of 60 pence/transaction between 28 November 2003 and 31 October 2007 and a rate of 78 pence/transaction from 1 November 2007 to the date the revised rate is implemented.”³⁵

- 3.6 On 8 May 2008 BT met CPSOs to discuss the issue. BT stated that it did not intend to reduce the CPS set-up charge as CPSOs had proposed, and the parties:

³⁴ See table after paragraph 2.22 of C&W’s submission of 23 September 2008.

³⁵ Letter from [redacted] (C&W) to [redacted] (BT), 26 March 2008, at Annex 4 of C&W’s submission.

“agreed that there was little point in having any further discussions, as it was clear that only Ofcom could answer the key questions.”³⁶

3.7 On 21 May 2008 BT responded to CPSOs, stating that it believed:

“the best way forward is for BT and Industry to agree a new methodology for the way costs (driven by mis-selling) are attributed.”³⁷

3.8 CPSOs responded that:

“CPSOs do not believe it is appropriate for any costs of managing mis-selling to be recovered from other parties”;

and concluded that:

“given the divergence of views between the industry and BT in respect of industry’s [request to BT to reduce the CPS set-up charge], it is clear that further discussion is unlikely to progress this matter further.”³⁸

3.9 On 25 June 2008 C&W wrote to BT asking it again to remove retail costs from the CPS cost stack, and saying that it felt it had no option but to refer the matter to Ofcom as a dispute. C&W asked BT to confirm that its position remained unchanged.³⁹ In the absence of a response from BT, C&W repeated this request on 23 July 2008, saying that if it had heard nothing from BT by 25 July it would assume that BT was in dispute with C&W and other CPSOs.⁴⁰

3.10 On 24 July 2008 BT wrote back to C&W stating that it was “currently working on a new proposal to Industry relating to the CPS transaction charges issue”, and would provide further details once this proposal had been signed off within BT.⁴¹ On 15 August 2008 BT said that it was continuing to work on this proposal, which had taken longer than anticipated to finalise.⁴²

3.11 On 12 September 2008 BT wrote to C&W stating that:

“I can now confirm that BT believes it is entitled to recover these costs and intends to carry on doing so until Ofcom decides that such entitlement is no longer appropriate.”⁴³

3.12 BT confirmed that it was also intending to carry out a review of its costs.⁴⁴

Referral of the dispute

3.13 On 23 September 2008 C&W, on behalf of the CPSOs in dispute, referred a dispute between the CPSOs in dispute and BT to Ofcom for resolution.

³⁶ email from [redacted] (C&W) to members of the CPS/WLR Commercial Group, 9 May 2008.

³⁷ email from [redacted] (BT) to [redacted] (C&W), 21 May 2008.

³⁸ email from [redacted] (C&W) to [redacted] (BT), 2 June 2008.

³⁹ email from [redacted] (C&W) to [redacted] (BT), 25 June 2008.

⁴⁰ email from [redacted] (C&W) to [redacted] (BT), 23 July 2008.

⁴¹ email from [redacted] (BT) to [redacted] (C&W), 24 July 2008.

⁴² email from [redacted] (BT) to [redacted] (C&W), 15 August 2008.

⁴³ email from [redacted] (BT) to [redacted] (C&W), 12 September 2008.

⁴⁴ *Ibid.*

- 3.14 C&W's submission of 23 September 2008 (referred to below as "C&W's submission") sets out the chronology of events and the attempts of the parties to resolve the matters in dispute through negotiation. C&W's submission includes documentation (minutes of meetings and email correspondence) of the events described at paragraphs 3.1-3.12 above.
- 3.15 Ofcom wrote to BT on 25 September 2008 informing them that C&W had asked it to resolve this dispute and inviting BT to comment on C&W's submission. BT provided initial comments on C&W's submission on 2 October 2008. BT does not dispute C&W's account of the parties' attempts to resolve the matters in dispute through negotiation.
- 3.16 Ofcom met C&W and BT on 9 October 2008 and BT on 13 October 2008.
- 3.17 Sections 185 to 191 of the 2003 Act set out Ofcom's dispute resolution powers. They apply to disputes relating to the provision of network access and to other disputes relating to the rights and obligations conferred or imposed by or under Part 2 of the Act. Section 186 of the Act requires Ofcom to resolve a dispute referred to it under section 185 once it has decided in accordance with section 186(2) to handle the dispute. Ofcom's remedial powers for resolving disputes are set out in section 190 of the 2003 Act.
- 3.18 Having considered C&W's submission and BT's comments, Ofcom was satisfied that the dispute that C&W had asked it to resolve is a dispute between communications providers relating to network access, and that the matters in dispute would not be resolved through further negotiation between the parties. On 15 October 2008, Ofcom decided that it was appropriate for it to handle this dispute for resolution. Ofcom informed the parties of this decision and published details of the dispute on its website. At the same time, Ofcom noted that in resolving this dispute, it was considering how each of its duties (in particular under sections 3 and 4 of the 2003 Act) is relevant and invited the parties to comment on Ofcom's duties and how the parties believe they are relevant to this dispute.

Scope of the dispute

- 3.19 Ofcom originally said that the scope of the dispute was to determine:
- i) whether it is appropriate for BT to recover through the CPS set-up charge the costs it incurs in sending the [notification] of transfer letter and handling the resulting inbound customer calls; and, if not,
 - ii) the date from which any new charge that is agreed between the parties to reflect Ofcom's determination of point (i) above should apply.
- 3.20 In line with its standard procedures in disputes, Ofcom invited comments from stakeholders on the scope of the dispute as originally published.
- 3.21 In light of stakeholders' comments, Ofcom made two changes to the wording of the published scope to clarify the issues that it intended to address in resolving the dispute.
- 3.22 First, stakeholders asked Ofcom to clarify that it would only consider C&W's request to Ofcom to require BT to make payments to the CPSOs in dispute in respect of any adjustment in the CPS set-up charge in the event that it determines BT should not be

able to recover retail costs through the CPS set-up charge. Ofcom amended the wording of the scope to make it clear that this was the case.

- 3.23 Second, stakeholders expressed concern with Ofcom's statement that the level of the CPS set-up charge is not within the scope of this dispute, taking this to mean that Ofcom did not intend to assess the level of retail cost, if any, currently being recovered by BT.
- 3.24 While Ofcom's view remains that the level of the CPS set-up charge is not within the scope of this dispute, Ofcom amended the wording of the scope to make it clear that it was going to analyse in more detail the current CPS set-up charge and to establish precisely what proportion of the charge relates to retail cost and how this is calculated, and that, if it were to determine that BT was not entitled to recover its retail costs through the CPS set-up charge, its determination would therefore establish by how much the current charge would need to be reduced.
- 3.25 Ofcom published an update on its website on 5 November 2008 confirming that the scope of this dispute is therefore to determine:
- i) whether it is appropriate for BT to recover through the CPS set-up charge the costs it incurs in sending the notification of transfer letter and handling the resulting inbound customer calls; and, if not,
 - ii) the amount by which the CPS set-up charge should be reduced to remove the recovery of the costs BT incurs in sending the notification of transfer letter and handling the resulting inbound customer calls; and
 - iii) the date from which Ofcom's determination of points (i) and (ii) above should apply.⁴⁵

Information provided by the parties

- 3.26 As noted at paragraph 3.18 above, Ofcom invited the parties to comment on Ofcom's duties and how the parties believe they are relevant to this dispute.
- 3.27 In response, C&W referred Ofcom to paragraphs 2.58-2.65 of its submission, which explain how C&W believes Ofcom's duties are relevant to this dispute. C&W refers in particular to paragraph 2.59 of its submission which states:

“Firstly, Ofcom should exercise its discretion to require BT to reimburse the CPSOs in the interests of promoting competition in the provision of retail fixed line telephone calls services, in line with [...] the Community requirements set out in section 4(3)(a) of the Act to promote competition in the provision of electronic communications services, and sections 4(7) and 4(8)(a) to encourage the provision of network access and service interoperability for the purpose of securing efficiency and sustainable competition in the markets for electronic communications services.”

- 3.28 C&W noted that the footnote to the paragraph quoted above said that:

“Resolving the dispute in this way would also be consistent with Ofcom's general duties in sections 3(1)(b) – to further the interests of

⁴⁵ http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_999/

consumers by promoting competition, 3(2)(b) - to secure the availability throughout the UK of a wide range of electronic communications services, and 3(3)(a) to have regard to the regulatory principle of proportionality.”

3.29 C&W also mention section 90 of the 2003 Act, which requires that:

“Where Ofcom set a condition requiring the dominant provider to make a relevant connection facility available, they shall also set such SMP conditions as they consider appropriate –

(a) with respect to the relationship to costs of any price fixed for the use of the facility; and

(b) for the purpose of securing that prices and other charges imposed....do not constitute a disincentive to the use of the facility”.

3.30 C&W concluded that the only outcome that will satisfy Ofcom’s duties in this dispute:

“is to find that BT has recovered these retail charges inappropriately, to confirm the amount of this inappropriate over-recovery, to require BT to refund CPSOs these overpayments from 28 November 2003 to the date of its determination and to require that BT remove this charge from any cost recovery in the future.”

3.31 BT wrote to Ofcom on 20 November 2008, stating that:

“In essence we do not believe that such a reduction in the charge would be reasonable from the point of the relevant regulatory objectives. We believe that all of Ofcom’s regulatory objectives are relevant, to a greater or lesser extent, and should be considered when resolving this dispute.”⁴⁶

3.32 BT confirmed on 21 November 2008 that it was not in a position to comment further on Ofcom’s duties at that time.⁴⁷

3.33 On 12 November 2008, Ofcom sent BT a notice under section 191 of the 2003 Act requiring it to provide documents and information in connection with this dispute. In particular, Ofcom asked BT:

- to confirm what the CPS set-up charge was over the period in dispute;
- to explain how it calculates the CPS set-up charge and to provide a copy of the model that it uses for this purpose; and
- to provide data on the number of CPS set-ups (transactions where CPS is applied to a line that does not also have WLR applied) from November 2003.

3.34 BT responded to Ofcom’s notice on 17 and 19 November 2008.

⁴⁶ *Ibid.*

⁴⁷ Email from [redacted] (BT) to [redacted] (Ofcom), 21 November 2008.

- 3.35 In addition to its response to Ofcom's notice, BT wrote to Ofcom on 20 November 2008 setting out its position on the repayment of overpayments in this dispute and on BT's entitlement to recover the retail costs that are the subject of this dispute.
- 3.36 BT emailed Ofcom on 11 December 2008 with further comments on BT's entitlement to recover the retail costs that are the subject of this dispute.

C&W's arguments

- 3.37 The following paragraphs set out C&W's arguments, as set out in its original submission (made before Ofcom published its Consultation). Note that for the purpose of summarising C&W's arguments we have adopted the headings used in C&W's submission.

The regulatory framework

- 3.38 C&W argues that the relevant *ex ante* obligations are the SMP conditions imposed on BT as a result of its SMP in (*inter alia*) call origination on fixed public narrowband networks. C&W submits that the following SMP conditions are relevant to this dispute:
- SMP Condition AA8: requirement to provide CPS etc;
 - SMP Condition AA2: requirement not to unduly discriminate; and
 - SMP Condition AA3: basis of charges.
- 3.39 C&W notes that these SMP conditions are complementary, so that BT's charges for CPS are subject to SMP Conditions AA2 and AA3 as well as SMP Condition AA8.⁴⁸

The amount by which BT has overcharged CPSOs

- 3.40 C&W has provided figures for the CPS set-up charge and the equivalent charge where CPS is applied with WLR, for the period 28 November 2003 to 31 October 2007 and for BT's charges since 1 November 2007 (see Table 3 below).⁴⁹
- 3.41 C&W submits that BT has stated to the industry that it recovers, through the CPS set-up charge, the cost of sending notification of transfer letters (where BT is LSP) and handling calls from customers who have received those letters (referred to in the following discussion as "inbound calls").⁵⁰ C&W refers to the email of 27 February 2008 from BT to members of the CPS/WLR Commercial Group responding to questions about retail cost recovery:

"1/ Is the BTR cost still in the cost stack, why?

Yes, the BTR cost is still in the cost stack [...]. In Ofcom's August 2005 statement it was stated that it was reasonable for BT to recover

⁴⁸ Paragraph 2.15 of C&W's submission.

⁴⁹ Paragraph 2.22 of C&W's submission.

⁵⁰ Paragraph 2.23 of C&W's submission.

these costs and in BT's view it remains appropriate as the level of misselling (which drives significant BT costs) is still a concern.⁵¹

2/ If the BTR cost is in the stack, why do BT charge for costs in cases of CPS to CPS changes?

Analysis of the CPS orders shows that a little over 11% are CPS to CPS orders. BT have adopted the methodology of allocating the appropriate BTR costs across the full range of CPS A type orders as the BTW billing systems do not have the capability to differentiate these instances from BTR to CPS orders to make a differentiated charge. No margin is made on the charge.⁵²

C&W's arguments made prior to Ofcom's draft determination as to why BT is not entitled to recover retail costs

3.42 C&W states that the CPSOs in dispute consider BT's recovery of retail costs in this case to be inappropriate for a number of reasons, which are set out in the following paragraphs.⁵³

The retail costs are not part of the cost of providing CPS facilities

3.43 C&W argues that the costs of sending the notification of transfer letter and fielding inbound customer calls:

"are part of the normal cost of doing business as a retail service provider in a competitive market. [...]. Retailers of [transferable] products need to be prepared to deal with departing customers, confused customers and on occasions with customers who have been mis-sold."⁵⁴

3.44 C&W goes on to argue that:

"It is inappropriate and unreasonable for such *retail* costs (which are common to all retailers) to be viewed as part of the *wholesale* cost of providing the transferable product, particularly when [...] the transferable product in question is not subject to EoI [equivalence of inputs] and the costs fall asymmetrically on BT's competitors."⁵⁵

3.45 C&W notes that Ofcom has previously described "per customer line set-up costs" (identified by Ofcom as one of the categories of costs that BT is entitled to recover from CPSOs – see SMP Condition AA8 at Annex 2 below) as "the costs of implementing CPS for individual lines". C&W argues that:

⁵¹ Ofcom did not make such a statement in the August 2005 statement. The relevant paragraphs of the August 2005 statement are set out at paragraphs 2.26-2.27 above.

⁵² email from [redacted] (BT) to CPS/WLR Commercial Group, 27 February 2008, enclosed as Annex 3 to C&W's submission.

⁵³ Paragraphs 1.3 and 2.26 of C&W's submission. C&W notes that in its discussion "CPSO" should be taken to refer to the vertically integrated model of a communications provider that both operates a network and offers retail calls services to end consumers.

⁵⁴ Paragraph 2.29 of C&W's submission.

⁵⁵ Paragraph 2.30 of C&W's submission (emphasis in original).

“BT Retail’s front-office costs do not arise from the cost of implementing CPS for individual customer lines, but rather the costs of managing the relationship with the outgoing customer.”⁵⁶

The charges are anomalous compared with those for other BT transferable products

- 3.46 C&W includes in its submission a table setting out arrangements for recovering the cost of mis-selling safeguards for different types of migrations. C&W argues that only for CPS standalone transfers (i.e. where CPS is provided on its own and not in combination with WLR) is the cost of the mis-selling safeguard (the notification of transfer letter, and any calls it generates) recovered from the GSP – in other words “the gaining service provider is obliged to pay the losing service provider’s costs”. In all the other scenarios it refers to, the losing provider assumes the cost of the mis-selling safeguards currently mandated.⁵⁷
- 3.47 C&W argues that BT is not entitled to recover retail costs in its charges for WLR or LLU transactions, even though the transfer process for both of these products mandates notification of transfer letters (which may generate inbound calls to the losing provider), just like the transfer process for CPS. Similarly, C&W notes that for broadband transfers for which the MAC (migration authorisation code) process applies, “the retail costs of issuing the MAC code are borne by the losing provider.”⁵⁸
- 3.48 C&W notes the Competition Appeal Tribunal’s (CAT’s) suggestion in the TRD core issues judgment that Ofcom should consider international benchmarking where appropriate, but states that:

“we doubt international comparisons will be particularly helpful in the current context, given the different approaches to the prevention of mis-selling adopted in different EU member states.”⁵⁹

The charges put CPS providers at an unfair competitive disadvantage relative to BT

- 3.49 C&W argues that the current arrangement puts CPSOs at a competitive disadvantage relative to BT, “since BT Retail is reimbursed for costs incurred as a result of CPSO orders but CPSOs are not reimbursed for costs they incur as a result of BT Retail orders. This has the effect of distorting competition in favour of BT Retail and is therefore in breach of SMP Condition AA2”.⁶⁰
- 3.50 C&W estimates the total value of overpayments since November 2003 to be [£<] million, shared among all CPSOs, and argues that the effect of the current arrangement may have caused them to incur additional cost that cannot easily be quantified.⁶¹

⁵⁶ Paragraph 2.31 of C&W’s submission.

⁵⁷ Table after paragraph 2.32 of C&W’s submission.

⁵⁸ Paragraph 2.34 of C&W’s submission. For details of the MAC process see Annex 1 to General Condition 22, http://www.ofcom.org.uk/telecoms/loi/g_a_regime/gce/cvogc150807.pdf

⁵⁹ Paragraph 2.35 of C&W’s submission. The reference is to the CAT’s judgment dated 20 May 2008 in relation to Ofcom’s determination of disputes between T-Mobile and BT, O2 and BT, Hutchison 3G and BT and BT and each of Hutchison 3G, Orange Personal Communications Services and Vodafone relating to fixed to mobile and mobile to mobile termination (the “TRD core issues judgement”), [2008] CAT 12 at www.cattribunal.org.uk/documents/Judgment_TRDs_200508.pdf.

⁶⁰ Paragraph 2.36 of C&W’s submission.

⁶¹ Paragraph 2.37 of C&W’s submission.

The charges are levied on transactions where the relevant costs are not incurred.

- 3.51 C&W states that the CPS set-up charge is payable by CPSOs for all migrations where CPS is provided on a standalone basis including transfers from one CPSO to another, where BT is neither the GSP nor the LSP.⁶² C&W states that BT has argued “that if it did not recover costs from CPSO to CPSO transactions, it would have to charge more for [BT] to CPSO transactions”.⁶³

BT is the main beneficiary from inbound calls

- 3.52 C&W notes that as a result of the Director’s November 2003 CPS Save Notification (“the CPS Save Notification”), BT is not permitted to make outgoing CPS Save calls.⁶⁴ C&W argues that inbound calls generated by the notification of transfer letter give BT an additional save opportunity to prevent customers leaving BT.⁶⁵
- 3.53 [S<]. C&W also refers in this context to research carried out by Ofcom into alleged incidents of mis-selling, which suggested that not all of the customer calls generated by notification of transfer letters relate to genuine mis-selling. C&W concludes from this evidence that “the main beneficiary of inbound calls associated with the [notification of transfer] letter is BT [...] so even if the cost of these calls was in principle recoverable from the CPSO, it would be unreasonable in practice”.

The charges do not provide an effective or fair disincentive to mis-selling

- 3.54 C&W submits that “BT has argued that CPSOs should bear the retail costs on the basis of a “polluter pays” principle”. C&W argues that this argument is flawed as:

“there is no direct linkage between slamming/mis-selling activity and the charges paid by the gaining service provider: a ‘good’ CPSO pays the same as a ‘bad’ CPSO; and as BT does not incur any penalty for misuse of Cancel Other.”⁶⁶

- 3.55 C&W argues that the cost of mis-selling is “part of the cost of doing business”, but that even if the “polluter pays” principle was an appropriate way of allocating costs any cost recovery system would likely be a “complex and fraught process that would absorb time and resources that could more usefully be deployed elsewhere.”⁶⁷

The current arrangement is contrary to Ofcom’s cost recovery principles

- 3.56 C&W argues that the current arrangement is contrary to all of Ofcom’s six principles of cost recovery (see discussion at paragraph 5.22-5.40 below), for the following reasons:

⁶² Paragraph 2.38 of C&W’s submission.

⁶³ Paragraph 2.39 of C&W’s submission.

⁶⁴ *Notification of Contravention of General Condition 1.2 under Section 94 of the Communications Act 2003*, 7 November 2003, published at:

<http://www.ofcom.org.uk/static/archive/oftel/publications/licensing/2003/contra1103.pdf>. “Save” activity is an attempt to persuade a customer not to transfer to another provider during the transfer period.

⁶⁵ Note that C&W’s submission describes this opportunity as an “alternative win-back channel”. However, “winback” means an attempt by an LSP to regain a customer’s business *after* he has successfully transferred away, as opposed to “save” activity which refers to retention activity within the transfer period.

⁶⁶ Paragraph 2.47 of C&W’s submission. Ofcom notes that in fact BT’s use of Cancel Other is subject to the limitations set out in the Cancel Other Direction (see paragraphs 2.15-2.17 above).

⁶⁷ Paragraph 2.48 of C&W’s submission.

“(a) *Cost causation*: the fact that these costs are being recovered from all CPSOs, against all orders, in their entirety, irrespective of whether or not that CPSO and/or specific transaction resulted in any or all of these costs being incurred, is contrary to the principle of cost causation.

(b) *Distribution of benefits*: measures designed to reduce mis-selling benefit all consumers whether or not they purchase CPS, and the costs should not therefore be recovered solely from CPS customers; furthermore, inbound calls prompted by the [notification of transfer] letter benefit [BT] through creating [Save] opportunities.

(c) *Effective competition*: the recovery of retail costs via the CPS transaction charges increases CPSO providers’ costs and puts them at a competitive disadvantage relative to [BT] (which does not have to pay reciprocal costs); this weakens the pressures for effective competition and is contrary to the third principle.

(d) *Cost minimisation*: the mechanism for recovering the costs does not incentivise [BT] to minimise those costs;

(e) *Reciprocity*: All CPSOs incur costs for managing customers who are leaving them, including sending the [notification of transfer] letters and the management of mis-selling and the mis-use of Cancel Other. However, only BT is currently recovering these costs from other providers. There is therefore an absence of reciprocity.

(f) *Practicability*: The current cost-recovery mechanism is flawed for the reasons above. Our proposed alternative cost recovery mechanism (in which the costs lie where they fall) would be practicable and easy to implement – as well as being fairer.”⁶⁸

Adjustment for overpayment

- 3.57 C&W asks Ofcom to determine the appropriate CPS set-up charge from 28 November 2003 to date.⁶⁹
- 3.58 C&W notes that Section 190(d) of the 2003 Act gives Ofcom specific powers to direct the repayment of overpayments in resolving disputes.
- 3.59 C&W argues that it would be fair as between the parties to the dispute, and reasonable from the point of view of the regulatory Framework objectives, for Ofcom to require BT to reimburse the CPSOs in dispute for any adjustment in the CPS set-up charge from 28 November 2003.⁷⁰
- 3.60 C&W argues that requiring BT to make payments to CPSOs for overpayments since 28 November 2003 would:

⁶⁸ Paragraph 2.49 of C&W’s submission.

⁶⁹ Paragraph 2.56 of C&W’s submission.

⁷⁰ This reference is taken from paragraph 178 of the CAT’s TRD core issues judgment which states that “Ofcom must have regard to what is fair as between the parties and what is reasonable from the point of view of the regulatory objectives set out in the Common Regulatory Framework Directives and in the 2003 Act.” See section 5 below.

- promote competition in the provision of retail fixed line telephone calls (in line with Ofcom's duty set out in section 4(3)(a) of the 2003 Act;
- promote competition in the provision of electronic communications services; and
- encourage the provision of network access and service interoperability (in line with sections 4(7) and 4(8)(a) of the 2003 Act).

3.61 C&W notes, referring to two recent disputes, that:

"There is also precedent for Ofcom ordering reimbursement where BT's charges have not been cost-oriented."⁷¹

3.62 C&W notes that Ofcom argued in its resolution of the 2006 WLR ISDN2 charges dispute (see paragraph 5.73-5.79 below) that requiring BT to repay overpayments, in that case, encouraged BT to comply with SMP obligations imposed under the Market Review to promote competition.

3.63 C&W submits that given the representations made by stakeholders at the time of Ofcom's August 2005 Direction and Ofcom's commitment to consider this issue in the review of charges originally planned for 2006:

"it would be unreasonable for BT to claim to have any expectation that a retrospective adjustment would not at some point be made to rectify its overcharging and to reimburse CPS customers."⁷²

3.64 C&W notes that "CPSOs met with Ofcom during the review [that led to the August 2005 Direction] and both during those meetings and in written submissions [see footnote 21] challenged the inclusion of BT Retail costs in the cost stack."⁷³

3.65 C&W states that it did not challenge Ofcom's decision not to address the issue of retail cost recovery in the August 2005 Direction "given Ofcom's commitment to address the issue via its proposed 2006 review of CPS charges".

3.66 C&W asks Ofcom to order BT to pay interest on any repayments to CPSOs.⁷⁴

BT's arguments

BT's arguments made prior to Ofcom's draft determination as to why it is entitled to recover retail costs

3.67 BT argues that it is entitled to recover the costs of the notification of transfer letter and inbound calls via the CPS set-up charge because:

"These costs are part of the provision of BT Wholesale's SMP CPS service because BT has an obligation to send the losing service provider letter as part of its obligation to provide CPS as a remedy to SMP in Call Origination."⁷⁵

⁷¹ Paragraph 2.62 of C&W's submission.

⁷² Paragraph 2.61 of C&W's submission.

⁷³ Paragraph 2.17 of C&W's submission.

⁷⁴ Paragraph 2.56 of C&W's submission and letter from [redacted] (C&W) to [redacted] (Ofcom), 23 October 2008.

⁷⁵ Letter from [redacted] (BT) to [redacted] (Ofcom), 20 November 2008.

- 3.68 BT notes that C&W's submission characterises the costs of the notification of transfer letter and inbound call as "BT Retail's costs" and argues that:

"the use of the words "BT Retail's costs" [...] is misleading if it leads one to the conclusion that these costs are not part of the cost of providing CPS. The fact that BT Retail sends the [notification] of transfer letter and handles the subsequent inbound calls does not by definition mean that these two categories of costs relate to the provision of BT Retail's services..."⁷⁶

- 3.69 BT notes that:

"In section 2 of [the Cancel Other Direction (see paragraph 2.16 above)] Ofcom requires that, before BT uses the Cancel Other activity, BT shall ensure that in the case of slamming or internal customer miscommunication [...] it has taken reasonable steps to ensure that slamming or internal customer miscommunication has not actually taken place."⁷⁷

- 3.70 BT goes on to note that:

"...CPS Process Description sets out what are the reasonable steps BT should practically take to comply with the [Cancel Other] Direction. Notification to the customer of Switchover is defined as the mechanism [...] agreed within the industry to protect customers against unauthorised change to their service. It involves letters being sent to the customer prior to switchover by both the losing and gaining operators advising of the date and details of the CPS switchover."⁷⁸

- 3.71 BT states that:

"The CPS Process Description has formed part of BT's CPS regulatory obligations since CPS was first introduced."⁷⁹

- 3.72 BT concludes that:

"In summary, as BT has been sending the [notification of transfer letter] in line with the CPS Process Description the associated costs of this and handling the subsequent calls have been included in the costs stack for provision of CPS....These costs are in fact legitimate costs incurred for the provision of CPS and not to support BT's retail activities."⁸⁰

- 3.73 BT has provided further comments on the interaction between BT's SMP obligations, in particular the Cancel Other Direction. BT states that:

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

“...we believe that the requirement to send [the notification of transfer letter] is a result of both the SMP obligation and the [Cancel Other] Direction that is an important part of these obligations.”⁸¹

3.74 BT states that it “must send the [notification of transfer] letter because of SMP Condition AA1(a)” (see Annex 4 below), and that the Cancel Other Direction “is part of the SMP Condition”.⁸²

3.75 BT notes that in making the Cancel Other Direction the Director stated that:

"The Director considers that BT's use of 'Cancel Other' in conjunction with 'Save' activity gives rise to increased mistrust between BT and Pre-Selected Providers, damages the reputation of CPS and creates increased reluctance of consumers to try alternative operators. By preventing BT from using 'Cancel Other' in conjunction with 'Save' activity, and by requiring greater transparency in the use of 'Cancel Other' in other circumstances, the Director is of the view that this will have a **positive impact on the further development of CPS** [emphasis added] and will thus help to promote competition to the benefit of retail consumers.”⁸³

3.76 BT concludes that:

“in light of the above the obligation to send the [notification of transfer letter] is triggered by BT's SMP obligation set out in Condition AA1(a).”⁸⁴

BT's comments on reducing the CPS set-up charge

3.77 In its letter of 20 November 2008 BT argues that:

“Reducing the charge so that BT could not recover its legitimate costs would not strike a fair balance between the parties to this dispute...Whilst we recognise that other CPSOs are now experiencing the loss of end users, BT is by far the biggest loser, and so will incur the highest level of costs.”⁸⁵

3.78 BT notes that it proposed to develop an alternative cost recovery mechanism but that this proposal was rejected by the industry (see paragraph 3.7 above).

3.79 BT concludes:

“In essence we do not believe that such a reduction in the charge would be reasonable from the point of the relevant regulatory objectives. We believe that all of Ofcom's regulatory objectives are relevant, to a greater or lesser extent, and should be considered when resolving this dispute.”⁸⁶

⁸¹ email from [redacted] (BT) to [redacted] (Ofcom), 11 December 2008.

⁸² *Ibid.*

⁸³ *Ibid.*, quoting paragraph 10.6 of the market review.

⁸⁴ email from [redacted] (BT) to [redacted] (Ofcom), 11 December 2008.

⁸⁵ Letter from [redacted] (BT) to [redacted] (Ofcom), 20 November 2008.

⁸⁶ *Ibid.*

- 3.80 In its section 191 information request of 12 November 2008, Ofcom asked BT to set out the impact that reducing the CPS set-up charge would have on BT's business. BT replied that:

"The impact of removing these retail costs will mainly be financial. However, there may also be an impact on BT's business caused by a possible increase in the levels of mis-selling if the principle of charging people for alleged mis-selling activities is no longer applied.

"Looking first at the financial impact, this will depend on the volume of transactions that BT handles, and the associated call volumes generated into BT Retail. [...] the annual revenue earned by BT from this element of the transaction cost was [3<].

"If Ofcom decides that BT cannot continue to recover these costs as part of the CPS transaction charge, then we would be in a loss making situation. To avoid this, the only two options available would be to either recover the costs elsewhere, or somehow not incur them in the first place. Options for either of these would be limited.

"Secondly, the key point is that the majority of these costs are incurred as a result of alleged mis-selling. By removing this element of the charge there would be less incentive for those carrying out mis-selling activities to cease them. This could also lead to further increases in mis-selling, which would be detrimental to the industry as a whole, and may have negative impacts for consumers."⁸⁷

Adjustment for overpayment

- 3.81 In its initial comments on C&W's submission, BT has argued that Ofcom should consider the CPS set-up charge from 1 November 2007 only:

"BT [...] does not agree that the scope of the dispute should cover the recovery of the costs related to sending out a [notification] of transfer letter and to inbound customer calls from 28 November 2003. The CPS per-customer line transaction charges, together with the other CPS charges, were set by Ofcom in August 2005 by means of [the 2005 statement] following an extensive review. Having set those charges as of the date of publication of the Determination, Ofcom deferred future consideration of the charges for a further review in 2006. This review never happened, so the CPS per customer line transaction charges remained effective as set by Ofcom in its [August 2005 Direction]. No CPS Operator questioned this decision, or exercised their right to raise an appeal against the charges set by Ofcom. As such the prices set by Ofcom were legally binding until BT carried out a review in 2007. The revised charges for CPS transactions became effective on 1 November 2007. It was after this date that discussions between the named parties and BT began. As a result it is only from this date that CPS charges can be subject to an investigation of the type requested by the CPSOs in dispute. Therefore the scope of the dispute should only examine

⁸⁷ *Ibid.*

whether BT's CPS transaction charges effective from 1 November 2007 onwards should cover these two cost components."⁸⁸

3.82 BT goes on to note that:

"the fact that by means of further regulatory intervention the August 2005 charges became applicable as of an earlier date does not have any bearing on whether the complainants or Ofcom can lawfully open an investigation into the August 2005 charges today."⁸⁹

3.83 Ofcom asked BT to set out in more detail its position as set out in paragraphs 3.81-3.82 above, notably its statement (see paragraph 3.81 above) that the charges set by Ofcom were legally binding until BT's review. BT set out its position as requested in its letter to Ofcom of 20 November 2008. Referring to the Competition Appeal Tribunal Rules, BT concluded that:

"a decision that has not been appealed, cannot subsequently be reversed by either the parties or Ofcom in relation to the period, the parties and the matter it has decided upon...

"No-one appealed the [August 2005 Direction] and as a result the [August 2005 Direction] binds the parties and Ofcom for the period and on the matter it has decided upon."⁹⁰

3.84 BT went on to note Ofcom's statement in the statement accompanying the August 2005 Direction that it intended to review charges again in 2006, and argued that setting charges in the context of such a review could be forward looking only:

"Ofcom said that the reason for [its decision not to address the retail cost recovery issue in 2005] was that it found more appropriate to consider the inclusion of these costs only in the future as part of a Market Review, which is by virtue of the Act forward looking only, and not as part of the dispute resolution at hand that looked into the past."⁹¹

The draft determination

3.85 Having assessed the submissions of the parties and the evidence it gathered in considering the dispute, Ofcom's provisional conclusion was:

- i) that BT is not entitled to recover from CPSOs the costs it incurs in sending the notification of transfer letter and handling the resulting inbound customer calls;
- ii) that BT is required to reduce the CPS set-up charge by 78p to remove the recovery of the costs it incurs in sending the notification of transfer letter and handling the resulting inbound customer calls; and
- iii) that it is proportionate and reasonable as between the parties to require BT to pay to the CPSOs a sum by way of an adjustment for the overpayment of the

⁸⁸ Letter from BT to Ofcom 2 November 2008.

⁸⁹ *Ibid.*

⁹⁰ Letter from BT to Ofcom, 20 November 2008.

⁹¹ Letter from BT to Ofcom, 20 November 2008.

CPS set up charge from 1 November 2007 to the date of Ofcom's final determination, to include interest at standard contract rates.

- 3.86 On 30 December 2008 Ofcom issued to each of the parties in dispute and to a party that asked to be considered as an interested party a non-confidential version of the Consultation.
- 3.87 On 6 January 2009 Ofcom published the Consultation on its website.⁹² Ofcom asked for comments from all stakeholders by close of business on 16 January 2009. Ofcom received six responses, which are discussed in section 6 below.

⁹² http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_999/.

Section 4

Ofcom's dispute resolution powers, statutory obligations and regulatory principles

- 4.1 Sections 3 and 4 of the 2003 Act set out, respectively, the general statutory duties of Ofcom and Ofcom's duties for the purpose of fulfilling Community obligations with respect to, among other things, Ofcom's dispute resolution function under Chapter 3 of Part 2 of the 2003 Act.
- 4.2 Section 3(1) of the 2003 Act sets out Ofcom's principal duties in carrying out its functions:
- “(a) to further the interests of citizens in relation to communications matters; and
 - (b) to further the interests of consumers in relevant markets, where appropriate, by promoting competition.”
- 4.3 The things which, by virtue of its principal obligations, Ofcom is required to secure in the carrying out of its functions include, according to section 3(2) of the 2003 Act:
- “(a) the optimal use for wireless telegraphy of the electro-magnetic spectrum;
 - (b) the availability throughout the United Kingdom of a wide range of electronic communications services;
 - (c) the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests;
 - (d) the maintenance of a sufficient plurality of providers of different television and radio services;
 - (e) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services; and
 - (f) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both –
 - (i) unfair treatment in programmes included in such services; and
 - (ii) unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.”
- 4.4 Section 3(3) of the 2003 Act provides that in performing its principal duties, Ofcom must have regard, in all cases, to:

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

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

- 4.5 Section 3(4) of the 2003 Act sets out a number of principles which Ofcom must have regard to in performing its principal duties where it appears to Ofcom that they are relevant, including the desirability of promoting competition in the relevant markets and the desirability of encouraging investment and innovation in the relevant markets.
- 4.6 In performing the principal duty of furthering the interests of consumers specifically, section 3(5) of the 2003 Act provides that Ofcom must have regard, in particular, to the interests of those consumers in respect of choice, price, quality of service and value for money.
- 4.7 Section 4 of the 2003 Act provides that, in determining disputes referred to it under section 185 of the 2003 Act, Ofcom must act in accordance with the six Community requirements which give effect, amongst other things, to the requirements of Article 8 of the Framework Directive. In summary, those requirements are:
- to promote competition in communications markets;
 - to secure that Ofcom contributes to the development of the European internal market;
 - to promote the interests of all European Union citizens;
 - to act in a manner which, so far as practicable, is technology-neutral; and
 - to encourage, to the extent Ofcom considers it appropriate, the provision of network access and service interoperability for the purposes of securing efficiency and sustainable competition in communications markets and the maximum benefit for the customers of communications network and services providers; and
 - to encourage such compliance with certain international standards as is necessary for facilitating service interoperability and securing freedom of choice for the customers of communications providers.
- 4.8 Where it appears to Ofcom that any of its general duties under section 3 of the 2003 Act conflict in the resolution of a dispute, Ofcom has the discretion to secure that the conflict is resolved in the manner it thinks best in the circumstances.⁹³ Similarly, Ofcom has the discretion to secure that any conflict of the Community requirements set out in section 4 of the 2003 Act are resolved in the manner it thinks best in the

⁹³ Section 3(7) of the 2003 Act. Note that where Ofcom resolves a conflict in an important case between the duties in sections 3(1)(a) and 3(1)(b) it must publish a statement setting out the nature of the conflict; the manner in which they have resolved to resolve it; and the reasons for their decision to resolve it in that manner (section 3(8) 2003 Act). A matter is “important” if it involves a major change in the activities carried on by Ofcom; or it is likely to have a significant impact on persons carrying on businesses in any of the relevant markets; or it is likely to have a significant impact on the general public in the UK or a part of the UK; or it otherwise appears to Ofcom to have been of unusual importance.

circumstances.⁹⁴ Where it appears to Ofcom in the exercise of its dispute resolution functions that any of its general duties under section 3 of the 2003 Act conflict with one or more of its duties under section 4 of the 2003 Act, priority is given to the duties set out in section 4 of the 2003 Act.⁹⁵

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

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

Table 2: The relevant statutory obligations and regulatory principles in this dispute

Obligation/Goal	Application to this case
<p>PRINCIPAL DUTY: further the interests of citizens in relation to communications matters</p> <p>Section 3(4) of the 2003 Act sets out a number of principles which Ofcom must have regard to in performing its principal duties where it appears to Ofcom that they are relevant, including the desirability of promoting competition in the relevant markets and the desirability of encouraging investment and innovation in the relevant markets.</p>	<p>Ofcom considers that its determination of this dispute, by promoting competition (as set out at paragraphs 7.23-7.24 and 7.69 -7.70 below), are supportive of this duty.</p>
<p>PRINCIPAL DUTY: further the interests of consumers in relevant markets, where appropriate, by promoting competition</p>	<p>As set out at paragraphs 7.23-7.24 and 7.69-7.72 below, Ofcom considers that its determination of this dispute promotes BT's compliance with its SMP obligations (a key</p>

⁹⁴ Section 4(11) of the 2003 Act.

⁹⁵ Section 3(6) of the 2003 Act.

Obligation/Goal	Application to this case
<p>Section 3(4) of the 2003 Act sets out a number of principles which Ofcom must have regard to in performing its principal duties where it appears to Ofcom that they are relevant, including the desirability of promoting competition in the relevant markets and the desirability of encouraging investment and innovation in the relevant markets.</p> <p>In performing the principal duty of furthering the interests of consumers specifically, section 3(5) of the 2003 Act provides that Ofcom must have regard, in particular, to the interests of those consumers in respect of choice, price, quality of service and value for money.</p>	<p>aim of which is to promote competition) and that it promotes competition more generally by enabling other providers to compete with BT in the provision of retail calls to consumers. Promoting competition in this case will lead to benefits for consumers in the form of increased consumer choice, downward pressure on retail prices and improved quality of service.</p>
<p>RELEVANT OFCOM GOAL/S:</p> <p>(a) the optimal use for wireless telegraphy of the electro-magnetic spectrum;</p> <p>(b) the availability throughout the United Kingdom of a wide range of electronic communications services;</p> <p>(c) the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests;</p> <p>(d) the maintenance of a sufficient plurality of providers of different television and radio services;</p> <p>(e) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services; and</p> <p>(f) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other</p>	<p>As set out at paragraph 7.27 and 7.71 below, Ofcom considers that its determination of this dispute in particular, supports its goal of ensuring the availability throughout the United Kingdom of a wide range of electronic communications services, since they support competition in the provision of retail calls by providers other than BT, leading to increased consumer choice, downward pressure on retail prices and improved quality of service.</p>

Obligation/Goal	Application to this case
<p>persons from both –</p> <p>(i) unfair treatment in programmes included in such services; and</p> <p>(ii) unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.”</p>	
<p>COMMUNITY GOALS:</p> <ul style="list-style-type: none"> • to promote competition in communications markets; • to secure that Ofcom contributes to the development of the European internal market; • to promote the interests of all European Union citizens; • to act in a manner which, so far as practicable, is technology-neutral; and • to encourage, to the extent Ofcom considers it appropriate, the provision of network access and service interoperability for the purposes of securing efficiency and sustainable competition in communications markets and the maximum benefit for the customers of communications network and services providers; and • to encourage such compliance with certain international standards as is necessary for facilitating service interoperability and securing freedom of choice for the customers of communications providers. 	<p>Ofcom considers that its determination of this dispute supports the community goal of promoting competition in communications markets, for the reasons set out at paragraphs 7.23-7.24 and 7.69, 7.70 and 7.72 below.</p> <p>As set out at paragraph 7.25 below, in ensuring that cost recovery arrangements are consistent with BT’s obligation to provide Network Access, Ofcom considers that its determination also support the community goal of encouraging the provision of network access. Ofcom further considers (as also set out at paragraph 7.25 below) that its determination is technology neutral in that it brings CPS into line with other BT transferable products.</p>
<p>REGULATORY PRINCIPLES:</p> <p>Ofcom will regulate with a clearly articulated and publicly reviewed annual plan, with stated policy objectives;</p> <p>Ofcom will intervene where there is a specific statutory duty to work towards a public policy goal which markets alone cannot achieve;</p>	<p>As set out at paragraphs 7.29 and 7.74 below, Ofcom considers that this document clearly sets out the parties’ arguments and Ofcom’s reasoning that leads to this determination. Ofcom notes that the parties had an opportunity to comment on Ofcom’s proposals, and that this supports Ofcom’s duty to ensure that its regulatory activities are transparent, accountable, evidence-based and consistent. Ofcom considers that its determination is proportionate, in that it</p>

Obligation/Goal	Application to this case
<p>Ofcom will operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required;</p> <p>Ofcom will strive to ensure its interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome;</p> <p>Ofcom will always seek the least intrusive regulatory mechanisms to achieve its policy objectives;</p> <p>Ofcom will research markets constantly and will aim to remain at the forefront of technological understanding; and</p> <p>Ofcom will consult widely with all relevant stakeholders and assess the impact of regulatory action before imposing regulation upon a market.</p>	<p>strikes a fair balance between the parties to the dispute, and targeted in that it is binding on the parties to the dispute.</p>

Section 5

Ofcom's draft determination

Introduction

- 5.1 After consideration of submissions received from the parties and evidence gathered during the dispute, Ofcom sent the Consultation to the parties to the dispute and to an interested party on 30 December 2008 and published the Consultation on its website on 6 January 2009. Ofcom's Consultation set out Ofcom's preliminary conclusions on resolution of the dispute together with Ofcom's analysis and reasoning in reaching its provisional conclusions.
- 5.2 For clarity, this section sets out the original analysis and reasoning underpinning Ofcom's draft determination (which also appeared at section 5 of the Consultation) where it remains relevant to our conclusion. The analysis and reasoning set out at section 5 of the Consultation remains unchanged except where our reasoning has changed. Where this is the case this is clearly noted in this section and explained in the subsequent sections of this statement.
- 5.3 As set out at paragraph 3.25 above, the scope of this dispute is to determine:
- whether it is appropriate for BT to recover through the CPS set-up charge the costs it incurs in sending the notification of transfer letter and handling the resulting inbound customer calls; and, if not,
 - the amount by which the CPS set-up charge should be reduced to remove the recovery of the costs BT incurs in sending the notification of transfer letter and handling the resulting inbound customer calls; and
 - the date from which Ofcom's determination of points (i) and (ii) above should apply.
- 5.4 In this discussion, the term "retail costs" is used to refer to the costs associated with the notification of transfer letter and inbound customer calls, which C&W argue that BT is not entitled to recover from CPSOs through the CPS set-up charge.

Is it appropriate for BT to recover retail costs through the CPS set-up charge?

- 5.5 In order to assess this element of the scope Ofcom has considered:
- the arguments of the parties: why do the CPSOs argue that BT should not be able to recover retail costs through the CPS set-up charge and why does BT argue that it should?;
 - the regulatory framework;
 - Ofcom's cost recovery principles;
 - the approach to cost recovery for other BT transferable products;
 - benchmarking; and

- Ofcom's regulatory principles, statutory duties and community obligations, including the impact on consumers.

If BT is not entitled to recover retail costs from CPSOs, by how much should the CPS set-up charge fall?

5.6 Ofcom has considered the facts as submitted by the parties to establish that BT is indeed recovering retail costs from CPSOs, and what those retail costs are. If Ofcom determines that BT is not entitled to recover its retail costs, this information will tell us by how much the CPS set-up charge should fall.

If BT is not entitled to recover retail costs, from what date should the CPS set-up charge be reduced?

5.7 In order to assess this element of the scope Ofcom has considered:

- Ofcom's powers to require payments by way of adjustment to an overpayment;
- the arguments of the parties;
- Ofcom's approach to overpayments in other disputes;
- the options: what dates might be appropriate;
- whether BT should be required to pay interest on any repayments; and
- Ofcom's regulatory principles, statutory duties and community obligations, including the impact on consumers.

Is it appropriate for BT to recover retail costs through the CPS set-up charge?

The arguments of the parties prior to Ofcom's Consultation

5.8 C&W's arguments as to why BT is not entitled to recover retail costs are set out at paragraphs 3.42-3.56 above. C&W argues that:

- the retail costs are not part of the cost of providing CPS facilities. Ofcom addresses this argument at paragraph 5.11-5.21 below;
- the charges are anomalous compared with those for other BT transferable products. Ofcom addresses this argument at paragraph 5.41-5.49 below;
- the charges put CPS providers at an unfair competitive disadvantage relative to BT Retail. Ofcom addresses this argument at paragraph 7.26 below;
- the charges are levied on transactions where the relevant costs are not incurred. Ofcom addresses this argument at paragraph 5.26 to 5.30 below;
- BT is the main beneficiary from inbound calls;
- the charges do not provide an effective or fair disincentive to mis-selling. Ofcom addresses this argument at paragraph 5.33 below (in the context of BT's argument that removing the retail costs could lead to an increase in mis-selling);

- the current arrangement is contrary to Ofcom's cost recovery principles. Ofcom addresses this argument at paragraph 5.22-5.40 below.
- 5.9 BT's arguments as to why BT is entitled to recover retail costs from CPSOs are set out at paragraphs 3.67-3.76 above.
- 5.10 In summary, BT argues that it is entitled to recover from CPSOs the costs of sending the notification of transfer letter and handling inbound customer calls since these costs are incurred in providing CPS, in line with BT's SMP obligations.

The regulatory framework

- 5.11 The regulatory framework to this dispute is set out at paragraph 2.9-2.39 above.
- 5.12 Briefly, there are two obligations that are relevant in this context:
- BT's SMP obligations; and
 - General Condition 14.5.
- 5.13 SMP Condition AA8 (see Annex 2 below) entitles BT to recover from CPSOs the costs it incurs in "providing Carrier Pre-selection Facilities", and states that BT shall categorise its costs as falling in one of four categories: per provider set-up costs, per provider ongoing costs, per customer line set-up costs and system set-up costs.
- 5.14 SMP Condition AA8 does not expressly mention whether or not BT is entitled to recover the costs it incurs in sending the notification of transfer letter and handling any resulting customer calls.
- 5.15 As set out at paragraph 2.32-2.39 above General Condition 14.5 provides that all communications providers offering fixed line telecommunications services must establish and comply with a code of practice for sales and marketing which conforms with the Guidelines set out in Annex 3 to General Condition 14.
- 5.16 Annex 3 requires communications providers to send notification of transfer letters, in accordance with industry-agreed processes, whether they are the LSP or the GSP in a particular transaction.⁹⁶
- 5.17 General Condition 14.5 does not specify where communications providers are expected to recover the costs of complying with this provision.
- 5.18 Ofcom does not believe that the costs of sending the notification of transfer letter and handling the resulting inbound calls from customers currently fall into any of the four categories listed in paragraph 5.13 above. The other costs that BT recovers through the CPS set-up charge can be classified as "per customer line set-up costs", as they are incurred in setting up an individual line for CPS. However, the notification of transfer letter and inbound calls are not associated with setting up the line for CPS, but with establishing and maintaining a relationship with the end customer. Ofcom therefore considers that the costs of sending the notification of transfer letter and handling the resulting inbound calls from customers do not constitute a cost of "providing Carrier Pre-Selection Facilities".

⁹⁶ Unless the customer has initiated contact by applying online, and have confirmed online that they wish all future correspondence to be sent electronically, or has specifically requested that correspondence be sent electronically.

- 5.19 In its comments, BT refers to the Cancel Other Direction being a part of SMP Condition AA(1)(a). Ofcom notes that the Cancel Other Direction requires BT, before it uses Cancel Other:
- to take reasonable steps to ensure that slamming or internal customer miscommunication has taken place; and
 - to take reasonable steps to ensure that it is talking to the authorised decision-maker in the organisation or household.
- 5.20 Ofcom notes, however, that the Cancel Other Direction does not specifically require BT to send notification of transfer letters. The requirement to send notification of transfer letters (imposed by General Condition 14.5 and Annex 3 to General Condition 14) applies equally to all communications providers that offer fixed line telecommunications services. The cost of sending the notification of transfer letter and handling any calls it generates are therefore faced by all providers offering fixed line telecommunications services, and Ofcom agrees with C&W that they are “part of the normal cost of doing business as a retail service provider in a competitive market.”
- 5.21 Ofcom therefore proposed to conclude that BT is not currently subject to any obligation that specifically entitles it to recover retail costs from CPSOs.

Ofcom’s cost recovery principles

- 5.22 As noted at paragraph 3.56 above, C&W argues that the current arrangement is “contrary to all of Ofcom’s six principles of cost recovery”. Ofcom proposed to conclude that BT is not entitled, under its various regulatory obligations, to recover through the CPS set-up charge the costs of the notification of transfer letter and inbound customer calls. In light of C&W’s comments, however, Ofcom has also considered whether the current arrangement is consistent with Ofcom’s cost recovery principles. If it is not, then this will be relevant to Ofcom’s consideration of what outcome would achieve a fair balance as between the parties to the dispute.
- 5.23 The six principles of cost recovery were originally developed by the Director in developing policy on number portability.⁹⁷ They were used when the Director first set charges for CPS, and in other policy decisions including the 2006 WLR charge setting exercise.⁹⁸
- 5.24 The six principles are:
- **Cost causation:** costs should be recovered from those whose actions cause the costs to be incurred where there are externalities;
 - **Distribution of benefits:** costs should be recovered from the beneficiaries especially where there are externalities;
 - **Effective competition:** the mechanism for cost recovery should not undermine or weaken the pressures for effective competition;

⁹⁷ <http://www.ofcom.org.uk/static/archive/oftel/publications/numbering/2002/nupo0602.htm>

⁹⁸ *Wholesale Line Rental: Reviewing and setting charge ceilings for WLR services*, <http://www.ofcom.org.uk/consult/condocs/wlrcharge/statement/statement.pdf>

- **Cost minimisation:** the mechanism for cost recovery should ensure that there are strong incentives to minimise costs;
- **Reciprocity:** where services are provided reciprocally, charges should also be reciprocal; and
- **Practicability:** the mechanism for cost recovery needs to be practicable and relatively easy to implement.

5.25 Ofcom has assessed the current arrangement against the six cost recovery principles. Ofcom's analysis is set out below.

Cost causation

5.26 The cost causation principle states that costs should be recovered from those whose actions cause the costs to be incurred at the margin.

5.27 One interpretation is that the retail costs that are the subject of this dispute are caused by the service provider requesting the transfer (acting on behalf of a customer). Under the current arrangement, BT recovers costs from all CPSOs, against all transactions, even where it is neither the LSP nor the GSP (i.e. for transfers between two CPSOs). However, CPSOs do not currently recover these costs from BT when the transfer has been requested by BT. According to this interpretation, the existing CPS set-up charge is not consistent with the cost causation principle.

5.28 Another interpretation of this principle is that the costs that are the subject of this dispute arise as a result of industry agreed processes (now mandated by GC14.5) that all providers must follow.⁹⁹ The losing retail provider should therefore bear the retail costs since it causes the costs to be incurred by fulfilling its legal obligations and the costs of dealing with departing customers are part of the normal cost of doing business as a retail service provider in a competitive market. According to this interpretation, the existing CPS set-up charge is not consistent with the cost causation principle.

5.29 Alternatively, it might be argued that since GC14.5 was introduced to protect consumers from mis-selling, the costs are caused by whoever is mis-selling, which would indicate that the mis-sellers should pay. According to this interpretation, the existing CPS set-up charge is not consistent with the cost causation principle, because the costs are borne by all CPSOs whether or not they have engaged in mis-selling behaviour.

5.30 Ofcom proposed to conclude, on the basis of the analysis set out at paragraphs 5.26-5.29 above that the current arrangement is not consistent with the principle that costs should be recovered from those whose actions cause them to be incurred at the margin. Ofcom has considered several different interpretations in this case, none of which support the current arrangement whereby BT recovers the costs of the notification of transfer letter and inbound calls from all CPSOs.

⁹⁹ While, as noted at paragraph 2.35 above, GC14.5 came into effect in 2005, the industry agreed the notification of transfer letter process in 2002 and has followed it ever since.

Distribution of benefits

- 5.31 The benefits of the availability of CPS are in the form of greater competition, leading to downward pressure on prices, availability of a wider range of services, and improved quality of service. The benefits of CPS accrue to all consumers, not just those requesting CPS transfers (although the main beneficiaries of retail CPS set-up services may be the customers requesting the transfer).
- 5.32 The notification of transfer letter process protects consumers from mis-selling. Where this process is successful, victims of mis-selling avoid the unwanted transfer. However, the CPS set-up charge is only payable in respect of successful transfers (where either there was no mis-selling, or the notification of transfer letter was ineffective). While the benefits associated with the notification of transfer letter process where transfers are successful are likely to be more indirect, the process in general (with costs incurred by the operator requesting the transfer) acts as a disincentive to mis-sell. The current arrangement is not therefore strictly consistent with the distribution of benefits principle.
- 5.33 Ofcom notes BT's comment (see paragraph 3.80 above) that removing the disputed retail costs from the charge might lead to an increase in mis-selling, as "by removing this element of the charge there would be less incentive for those carrying out mis-selling activities to cease them". Ofcom does not agree that reducing the charge payable in respect of successful transfers is likely to lead to increased levels of mis-selling, because the cost is currently recovered from all CPSOs regardless of their behaviour (in other words, it is not recovered on a "polluter pays" basis), and because reducing the charge by the amount proposed by C&W is unlikely to have a sufficient financial impact on those who pay it to influence their behaviour. Conversely, the notification of transfer letter process will continue to protect consumers from mis-selling, irrespective of the cost recovery mechanism.
- 5.34 Ofcom proposed to conclude, on the basis of the analysis set out at paragraphs 5.31-5.33 above that the current arrangement is not consistent with the principle that costs should be recovered from those who benefit, as all consumers, and not only those requesting CPS transfers, benefit from CPS and from the role of the notification of the transfer letter process in deterring mis-selling.

Effective competition

- 5.35 While BT currently recovers retail costs from CPSOs, CPSOs are not reimbursed (by BT or by other CPSOs as appropriate) for their equivalent costs. Therefore, CPSOs are paying a higher cost for CPS transfers than BT, putting them at a competitive disadvantage relative to BT (although Ofcom does not consider that it is within the scope of this dispute to undertake a detailed assessment of the impact of the current arrangement on competition). Ofcom therefore proposed to conclude that the current arrangement is not consistent with this principle, as it puts CPSOs at a competitive disadvantage relative to BT.

Cost minimisation

- 5.36 Under the current arrangement, BT has little incentive to minimise the retail costs associated with CPS transactions, since it does not bear these costs itself. In fact, inefficiently high retail costs (if passed through in charges) could benefit BT by affecting the business case for CPSOs seeking transfers. To incentivise cost minimisation the cost of retail activities should be borne by the provider incurring the

cost. The current arrangement is not therefore consistent with this principle, as costs incurred by BT are borne by other providers.

Reciprocity

5.37 As a result of GC14.5, all providers of fixed line telecommunications services incur costs of sending notification of transfer letters and fielding inbound calls. However, only BT is currently recovering these costs from other providers. So, while retail costs are common to all providers, the CPS set-up charge charges are not recovered reciprocally. The current arrangement is not therefore consistent with this principle.

Practicability

5.38 The final principle requires that the mechanism for cost recovery is relatively easy to implement. Recovering the cost of the notification of transfer letter and inbound calls from those requesting the transfer (the GSP or the GSP's customer) would involve developing a complex set of bilateral agreements. Ofcom notes that BT proposed to the industry that such a system be developed (see paragraph 3.7 above), but that BT's proposal was rejected by CPSOs, who felt that the costs of managing mis-selling (which is how BT had characterised the notification of transfer letter) should not be recovered from other parties (see paragraph 3.8 above). Ofcom notes C&W's view, however, that BT's preferred solution would be "a complex and fraught process for claiming and challenging costs that would absorb time and resources that could more usefully be deployed elsewhere". Ofcom considers that the simplest approach to cost recovery is likely to be recovery of retail costs by the LSP through its retail prices, and that this approach is likely to be relatively simple to implement. The current arrangement appears to be consistent with this principle, as does C&W's preferred solution whereby each provider recovers its own retail costs.

Conclusion on Ofcom's cost recovery principles

- 5.39 The analysis set out at paragraphs 5.26-5.38 above suggests the costs of the notification of transfer letter and resulting inbound customer calls should be recovered from all providers in the same way. This rules out the current arrangements, which only allows BT to recover its retail costs from CPSOs via the CPS set-up charge.
- 5.40 Ofcom notes on the basis of the analysis set out at paragraphs 5.26-5.38 above that there appear to be two options for cost recovery – that BT recovers its costs through its retail prices, and that for each transaction the LSP recovers its costs from the GSP. It is not within the scope of this dispute for Ofcom to determine which of these alternative arrangements BT and the industry should adopt. However, analysis of the cost recovery principles supports Ofcom's proposed conclusion that BT is not entitled to recover these costs through the CPS set-up charge.

Approach to cost recovery for other BT transferable products

5.41 BT (BT Wholesale and Openreach¹⁰⁰) offers a range of transferable products that enable other providers to offer services to consumers fully or partly over BT's

¹⁰⁰ Openreach was created in January 2006 after Ofcom accepted legally binding Undertakings from BT, rather than referring BT to the Competition Commission. This resulted in the creation of Openreach as an operationally separate business unit which provides wholesale access telecommunications services to all communications providers on an equivalent basis.

network. The most significant (in terms of volume and competitive impact) of these products are:

- CPS;
- WLR;
- LLU; and
- IPStream.

5.42 Ofcom has therefore considered cost recovery arrangements for WLR, LLU and IPStream as these may provide a useful comparison for the purposes of making a proposal for resolving this dispute, by indicating whether the arrangements for CPS are consistent with those for other products.

5.43 Each of these products has its own migration process, which will include some mechanism for protecting consumers against mis-selling and slamming. CPS, WLR and MPF (“full LLU”) all use the notification of transfer letter process, while SMPF (“shared LLU”) and IPStream use the MAC (Migration Authorisation Code) process, which ensures that consumers are protected from mis-selling by requiring them to contact the LSP to arrange the transfer.

WLR

5.44 BT’s WLR charges were initially set by the Director in June 2002 in the statement *Protecting consumers by promoting competition*¹⁰¹ The Director’s detailed views on cost recovery in respect of WLR migrations are set out at paragraphs E.15-E.17 of that document. In January 2006, Ofcom published the statement *Reviewing and setting the charge ceilings for WLR services*, which increased the migration charge for WLR.¹⁰² Ofcom’s views on cost recovery are set out at paragraphs 3.64-3.66.

5.45 In neither case does BT’s cost stack include any costs associated with serving end customers, including the cost of consumer safeguards against mis-selling, and neither statement includes any analysis of whether BT would have been entitled to recover such costs from its wholesale customers. Only the costs to BT (and later Openreach) of technically establishing WLR on the line were taken into account in setting the WLR transfer charges.

LLU

5.46 LLU is a process by which a dominant provider’s local loops (the telephone line between the customer’s home or business and the exchange) are physically disconnected from its network and connected to competing provider’s networks. This enables other providers to use the local loop to provide services directly to customers. There are two types of LLU. SMPF (Shared Metallic Path Facility) allows a competing provider to provide the customer with broadband services, while the dominant provider continues to provide the customer with conventional narrowband communications (i.e. telephone calls). MPF (Metallic Path Facility) allows a competing provider to provide the customer with both voice and data services.

¹⁰¹ See *Protecting consumers by promoting competition*, <http://www.ofcom.org.uk/static/archive/oftel/publications/pricing/2002/pcr0602.pdf>

¹⁰² See *Reviewing and setting the charge ceilings for WLR services*, <http://www.ofcom.org.uk/consult/condocs/wlrcharge/statement/statement.pdf>

- 5.47 Ofcom set the MPF and SMPF transfer charge (the equivalent of the CPS set-up charge for LLU) in December 2004 in its *Review of the wholesale local access market*.¹⁰³ Paragraphs 8.26-8.42 of that document set out how Ofcom applied the cost recovery principles to LLU. Ofcom did not take into account the costs of consumer protection in setting LLU charges – connection charges for MPF and SMPF are therefore the same although the consumer protection mechanisms (the notification of transfer letter and the MAC process respectively) are different. The only costs discussed are those incurred in the unbundling of the line and supporting activities (i.e. the costs of serving BT's wholesale customers, rather than end consumers). This view is strengthened by the connection charge being identical for MPF and SMPF.

IPStream

- 5.48 IPStream is a wholesale broadband access product sold by BT to providers of retail broadband services. BT charges £30.46 for an IPStream connection charge, which the same amount that BT is charged by Openreach. No additional costs are added to the connection charge – either additional costs incurred in serving BT's wholesale customers, or costs associated with consumer protection mechanisms.

Conclusion on cost recovery for other BT transferable products

- 5.49 Ofcom proposed to conclude, on the basis of the analysis set out at paragraphs 5.41-5.48 above, that BT does not recover any of its retail costs from CPSOs through its charges for other comparable transferable products. Ofcom has not seen any evidence that CPS should be treated differently from the other BT transferable products considered above. Ofcom therefore considers that it would be consistent with its approach elsewhere to conclude that BT is not entitled to recover its retail costs through the CPS set-up charge.

Benchmarking

- 5.50 At paragraph 186 of its TRD core issues judgment the CAT states that:

“Benchmarking is a useful tool and OFCOM should consider the value of comparisons put forward by the parties and what they show about the reasonableness of the charges or other terms and conditions being proposed.”

- 5.51 As noted at paragraph 3.48 above, C&W suggests in its submission that international comparisons are unlikely to be helpful in this case as different countries have taken different approaches to preventing mis-selling. BT did not comment on what benchmarks it thought might be relevant in this dispute.
- 5.52 As part of its ongoing policy work on migrations and mis-selling, in March 2007, Ofcom asked the consultants Deloitte to develop a broad picture of the costs and benefits of the changes required to deliver a single migrations process for transferable communications services. As part of this piece of work, Deloitte was asked to review and evaluate proposals against experiences and practice abroad and in other sectors. Deloitte's report is published on Ofcom's website.¹⁰⁴ Ofcom has reviewed Deloitte's report to see whether its consideration of other industries and other countries offers any useful comparisons for this dispute, i.e. whether Deloitte

¹⁰³ <http://ofcom.org.uk/consult/condocs/rwlam/statement/rwlam161204.pdf>

¹⁰⁴ <http://www.ofcom.org.uk/telecoms/ioi/mbp/deloitte/>

considers how the costs of the transfer process (particularly the costs of consumer safeguards against mis-selling and slamming) are recovered, and from whom.

- 5.53 Ofcom concludes that the limited international comparisons available do not help Ofcom to reach a view on the reasonableness of the charge in this case, as it is not clear from the information available whether in other industries and in other countries dominant providers are able to recover from their wholesale customers costs they incur in serving retail customers, or whether other regulators have considered the question of retail cost recovery.
- 5.54 In this case, a more appropriate comparison that fulfils the same function of benchmarking may be between cost recovery arrangements for CPS and for other BT transferable products, as set out at paragraphs 5.41-5.49 above.
- 5.55 Ofcom proposed to conclude on the basis of the analysis set out at paragraphs 5.11-5.54 above:
- that the costs BT incurs in sending the advice of transfer letter and handling the resulting inbound customer calls should not now be a cost of “providing Carrier Pre-selection Facilities”, and that BT is no longer therefore entitled to recover these costs as a result of its SMP obligations;
 - that in any case Ofcom’s analysis suggests that the current arrangement is not consistent with Ofcom’s cost recovery principles;
 - that the current arrangement is inconsistent with the cost recovery arrangements adopted in respect of other BT transferable products;
 - the limited benchmarking information available does not suggest that there is any cost recovery arrangement in other sectors or other countries that would suggest BT should be entitled to recover these costs through the CPS set-up charge; and therefore
 - that BT is not entitled from this time to recover through the CPS set-up charge the costs it incurs in sending the advice of transfer letter and handling the resulting inbound customer calls.¹⁰⁵

ii) How far does the CPS set-up charge need to fall?

- 5.56 Ofcom found that, as submitted by C&W, 78p of the current CPS set-up charge of £2.47 represents costs associated with the notification of transfer letter and inbound calls from customers. [✗ text sets out a breakdown of the 78p].
- 5.57 C&W has argued that Ofcom should require BT to make payments to the CPSOs in dispute to correct overpayments from 28 November 2003. Table 3 below sets out the level of the CPS set-up charge since 28 November 2003 and the proportion of the charge made up of retail costs over each period:

¹⁰⁵ From paragraph 5.62 below we set out Ofcom’s proposed conclusions on the repayment date.

Table 3: CPS set-up charge and retail cost element over the period of the dispute

Applicable date	CPS set-up charge	Retail cost element
1 November 2007-present	£2.47	78p
28 November 2003- 31 October 2007	£2.72	60p

Source: C&W submission, table after paragraph 2.2.

5.58 Ofcom proposed to conclude that BT is not entitled to recover from CPSOs the costs it incurs in sending notification of transfer letters and handling the resulting inbound customer calls and that BT is required to reduce the current CPS set-up charge by 78p from the date of Ofcom's final determination.

Ofcom's conclusion on retail cost recovery and the amount of the retail cost

5.59 Ofcom's conclusions in relation to the first element of this dispute (whether BT is entitled to recover the disputed costs through the CPS set-up charge) remains as set out at paragraphs 5.11-5.55 above. Ofcom's further analysis and reasoning in relation to the first element of the dispute, in light of stakeholders' responses, is set out at paragraphs 7.4-7.20 below.

5.60 Ofcom's conclusions in relation to the second element of this dispute (by what amount the CPS set-up charge should be reduced) remains as set out at paragraphs 5.56-5.58 above. None of the respondents to the Consultation disagreed with Ofcom's conclusion on the second element of this dispute. Four parties expressly agreed with Ofcom's proposal that BT should reduce the CPS set-up charge by 78p. Ofcom has not therefore considered the second element of the dispute any further.

5.61 Ofcom considered its statutory duties and regulatory principles in relation to recovery of the retail costs at paragraphs 5.54-5.63 of the Consultation. Ofcom has reviewed and where appropriate updated this analysis in light of its final conclusion. Ofcom's analysis of its statutory duties and regulatory principles in relation to recovery of the retail costs is set out at paragraphs 7.21-7.29 below.

iii) From what date have CPSOs made overpayments to BT?

5.62 Since Ofcom's provisional conclusion on the first point of the scope was that BT is not entitled to recover from CPSOs the costs it incurs in sending notification of transfer letters and handling the resulting inbound customer calls, Ofcom went on to consider from what date BT should be required to make repayments to CPSOs, and proposed on the basis of its analysis that BT should be required to make repayments from 1 November 2007.

5.63 As we explain in section 7 below, Ofcom has changed its view on this element of the dispute in light of stakeholders' responses and further analysis of relevant statements made by Ofcom. We now consider that BT is not required to make repayments to CPSOs.

5.64 The rest of this section repeats in full those sections of Ofcom's analysis that are still relevant for its conclusion, and summarises (from paragraph 5.80 below) Ofcom's

analysis and provisional views on appropriate date for repayments, which were set out in full in section 5 of the Consultation.

Ofcom's powers to require adjustment of an overpayment

5.65 At paragraphs 5.69-70 of the Consultation, Ofcom discussed its power under section 190(2)(d) of the 2003 Act to require a party to a dispute to make payments by way of adjustment to an overpayment or underpayment. Since Ofcom now considers that BT is not required to make repayments to CPSOs in this case, we do not set out our view on this point again here.

Arguments of the parties prior to Ofcom's Consultation on the repayment date

5.66 As set out at paragraph 3.57-3.65 above, C&W argues that Ofcom should require BT to make repayments to CPSOs from 28 November 2003.

5.67 As set out at paragraphs 3.81-3.84 above, BT argued that the earliest date from which Ofcom should consider repayments is 1 November 2007.

Ofcom's approach to overpayments in other disputes

5.68 Ofcom has exercised its power to require overpayments in a number of other disputes. We have reviewed these cases to see whether they offer us any guidance as to how we should resolve this dispute.

The Opal dispute

5.69 As set out at paragraph 2.30 above, Ofcom's determination of the Opal dispute was published on 16 May 2006 but took effect from 28 November 2003.¹⁰⁶

5.70 The Opal dispute related to BT's recovery of the costs of CPS Facilities (including CPS Per Provider Set-up Costs, CPS Per Provider On-going Costs and CPS Per Customer line Set-up Costs, including transaction charges). Ofcom found that BT had been under-recovering its Per-provider costs and over-recovering its Per-customer costs and, on that basis, was able to calculate the point at which BT broke even. Ofcom concluded that BT had recovered its costs of providing CPS Facilities at the end of November 2003, and that an offer by BT to backdate its charges to 28 November 2003 was therefore reasonable. Ofcom required BT to make repayments by way of adjustment to the other charges in dispute to the same date.

5.71 The current dispute relates to costs that BT incurs (and recovers from other providers) on a transaction-by-transaction basis. As BT has consistently recovered these costs over the period in dispute, there is no "break even" point. We cannot therefore adopt the methodology that we used in resolving the Opal dispute in deciding whether BT should be required to make payments to CPSOs in this case.

5.72 Opal did not ask Ofcom to modify or withdraw the CPS charges Ofcom had set in the earlier August 2005 Direction. Rather, Opal asked for the "retrospective application" of certain of BT's charges for the provision of CPS as set by Ofcom in the 2005 Direction. The facts in the current dispute are different, as C&W's request to Ofcom to require BT to make payments to the CPSOs by way of adjustment for

¹⁰⁶ *Determination to resolve a dispute regarding the retrospective application of CPS charges*, published at: http://www.ofcom.org.uk/consult/condocs/cps_charges/determination.pdf

overpayments since 28 November 2003 can arguably be seen as a request to modify or withdraw the August 2005 Direction.

WLR ISDN2 charges dispute

- 5.73 In its determination of a dispute relating to BT's charges for WLR ISDN2 ("the WLR ISDN2 charges dispute") Ofcom concluded that BT had over-recovered from its wholesale customers the costs it incurred in providing WLR ISDN2 between 28 November 2003 and 30 September 2004.¹⁰⁷ Ofcom's determination of 9 March 2005 required BT to make repayments by way of adjustment to the charges that applied over that period.
- 5.74 In the WLR ISDN2 charges dispute, Ofcom concluded that for a period of time BT's charges for WLR ISDN2 services were not based on the forward-looking LRIC of providing those services and that BT was therefore over-recovering its costs. Ofcom therefore required BT to make repayments in respect of the period for which it was over-recovering its costs, 28 November 2003-30 September 2004.
- 5.75 In the WLR ISDN2 charges case, Ofcom had never set BT's charges. BT was therefore responsible for ensuring that it was complying with its cost orientation obligations without a signal from Ofcom as to what level of charge would be appropriate. The current dispute, by contrast, relates to a charge that was originally set by the Director in 2002 and revised by Ofcom in 2005.
- 5.76 In its determination of the WLR ISDN2 charges dispute, Ofcom stated that requiring BT to make repayments:

"is promoting competition in the provision of network and business fixed line communications services."¹⁰⁸

Conclusions on Ofcom's approach to overpayments from other disputes

- 5.77 In the Opal dispute, Ofcom determined the appropriate date from which its determination should take effect by identifying the point at which BT broke even. As the costs incurred in the CPS set-up charge are recovered on a per-transaction basis, and as Ofcom is not considering in this case whether the charge accurately reflects BT's costs, we cannot adopt the same approach here. In this dispute, Ofcom has arguably been asked to modify a previous Direction, which was not the case in the Opal dispute.
- 5.78 In the WLR ISDN2 charges dispute, Ofcom was considering whether BT's charges were cost-oriented. As noted in the previous paragraph, as Ofcom is not considering in this case whether the charge accurately reflects BT's costs, we cannot adopt the same approach here. In addition, the WLR ISDN2 charges dispute did not relate to a charge that had originally been set by Ofcom.
- 5.79 Having reviewed the Opal dispute and the WLR ISDN2 charges dispute, we have concluded that the facts in both these cases are different to the facts of the current dispute and that we therefore need to adopt a different approach to C&W's request to Ofcom to require BT to make payments to CPSOs in this case.

¹⁰⁷ *Resolution of a dispute between Energis and BT relating to BT's charges for WLR ISDN2 from 28 November 2003 until 1 October 2004*, <http://www.ofcom.org.uk/consult/condocs/energis-bt/resolution/resolution.pdf>

¹⁰⁸ *Ibid.*, paragraphs 66-69.

Possible repayment dates considered in Ofcom's Consultation

- 5.80 As set out at paragraph 5.69 of the Consultation, Ofcom has the power to require the repayment of overpayments in resolving a dispute. In exercising this power, Ofcom is required to take into account its statutory duties, community obligations and regulatory principles (as set out in section 4 above) and to:

“...have regard to what is fair as between the parties and what is reasonable from the point of view of the regulatory objectives set out in the Common Regulatory Framework Directives and in the 2003 Act.”¹⁰⁹

- 5.81 In this context Ofcom considered a number of options which are summarised in the following paragraphs.

A date between 28 November 2003 and 1 November 2007

- 5.82 Ofcom acknowledged that in resolving this dispute one option would be to order repayments from 28 November 2003, but considered that this was not the option that is most fair between the parties or reasonable from the point of view of Ofcom's regulatory objectives.
- 5.83 Ofcom had, in the August 2005 Direction (which was not challenged by any of the parties), set charges for CPS at a level that enabled BT to recover its retail costs from CPSOs, and had not carried out its planned 2006 review of CPS charges, which would have included the issue of retail cost recovery. Ofcom therefore considered that, following the August 2005 Direction, it was reasonable for BT to continue to recover retail costs, subject always to its ongoing obligation to comply with its SMP Conditions.

1 November 2007

- 5.84 Ofcom considered that, in light of stakeholders' responses to the 2005 Consultation and Ofcom's clear statement in its August 2005 Direction that it intended to revisit the issue of retail cost recovery, and in light of further developments in the interim period, namely Ofcom's WLR charge setting exercise (see paragraph 7.39 below), BT should have reconsidered the assumptions it used in setting the charge, which it did not do. Ofcom therefore proposed in the Consultation that it was proportionate and reasonable to require BT to make repayments to the CPSOs from 1 November 2007. Ofcom's provisional view was that, for the same reason, it was not appropriate for its determination of this dispute to apply on a forward looking basis only.

Ofcom's proposed conclusion on repayments

- 5.85 Ofcom therefore proposed to conclude that it is proportionate and reasonable as between the parties to require BT to pay to the CPSOs a sum by way of an adjustment for the overpayment of the CPS set-up charge for the period from 1 November 2007 to the date of Ofcom's final determination of this dispute, to include interest at standard contract rates.
- 5.86 Ofcom has now changed its view on this element of the dispute in light of stakeholders' responses and further analysis of relevant statements made by Ofcom. Ofcom's revised analysis is set out from paragraph 7.30 below. Ofcom's revised

¹⁰⁹ Paragraph 178 of the CAT's TRD core issues judgment.

consideration of its statutory duties and regulatory principles relevant to this element of the dispute (as set out at paragraphs 5.109-5.116 of the Consultation), is set out from paragraph 7.65-7.81 below.

Section 6

Responses to the draft determination

6.1 Ofcom received six responses to its Consultation, from:

- BT;
- C&W;
- Global Crossing;
- UKCTA;
- Verizon Business; and
- another respondent who asked not to be named.

6.2 In this section, we first address stakeholders' comments on whether BT is entitled to recover the retail costs through the CPS set-up charge. Stakeholders' comments on this issue are summarised at paragraphs 6.4-6.23 below. Second, we address stakeholders' views on the date from which BT must make repayments to CPSOs to rectify overpayments. Stakeholders' comments on this issue are summarised at paragraphs 6.25-6.57 below and addressed at paragraphs 7.4-7.20 below.

6.3 Ofcom's consideration of stakeholders' comments, revised analysis and conclusion are set out in section 7 below.

Is it appropriate for BT to recover retail costs through the CPS set-up charge?

BT's comments on recovery of the retail costs

6.4 BT "strongly disagrees" with Ofcom's proposal that BT is not entitled to recover the retail costs through the CPS set-up charge for the reasons set out in the following paragraphs.

BT incurs the retail costs as a result of its SMP obligations

6.5 BT argues that "these costs should not be excluded from recovery simply because they are retail related". BT goes on to argue that "SMP Condition AA8 is not solely a wholesale obligation", in that it applies to BT plc (and not to any business unit of BT, i.e. BT Retail and/or BT Wholesale).

6.6 BT states that:

"as the Universal Service Directive and Ofcom's explanatory statement imposing the condition make clear, the condition arises as a result of BT's SMP designation in retail markets".

6.7 BT argues that:

"therefore it [is] reasonable to view the provision of CPS as having both wholesale and retail elements, and it is also not unreasonable

or inappropriate for BT to recover retail-related costs associated with the provision of CPS.”

6.8 BT notes that it is the only retail provider that is “obliged to allow other CPs’ calls packages to be applied to its customers’ lines”, and therefore has no option but to incur the retail costs.

6.9 BT states that:

“In BT’s view, the specified costs are incurred as a direct result of our obligation to provide CPS on individual lines”.

6.10 BT notes that it is required by industry-agreed processes and by General Condition 14 to send notification of transfer letters. BT goes on to say that it:

“would not incur the cost of sending the notification of transfer letter, or the cost of handling the resulting inbound customer [call]s, were it not for its obligation to provide CPS”.

6.11 BT concludes that the retail costs should be seen as “inextricably linked to BT’s obligation to provide CPS”, and “must be viewed as costs of implementing CPS for individual customer lines (i.e. per customer line set-up costs)”.

6.12 BT argues that the current arrangement is therefore consistent with the cost causation principle (see paragraphs 5.25-5.29 of the Consultation, repeated at paragraphs 5.26-5.30 above) in that the retail costs are recovered from those who cause them to be incurred, i.e. the CPSO placing the order. BT argues that the current arrangement is also consistent with “the other cost recovery principles”.

6.13 BT argues that the fact that CPSOs incur similar costs is irrelevant, since “BT incurs these costs as a direct result of its CPS obligation, and obligation which other CPs do not have.”

6.14 BT adds that:

“as the retail line provider BT incurs a number of other costs resulting from being the default provider for calls and lines, such as bad debt and additional customer service costs when “line only” customers call BT. These are not currently recovered through the CPS charge, but, in our view, could be appropriately recovered as well”.

The retail costs are not associated with “establishing and maintaining a relationship with the end customer”

6.15 BT states that:

“Ofcom’s position has long been that the purpose of the losing provider notification of transfer letter is not to preserve that provider’s relationship with the end customer, but primarily to protect customers from mis-selling and to inform them of any outstanding contractual obligations”.

- 6.16 BT points out that if a losing provider included “marketing language” in a notification of transfer letter, it would be in breach of General Condition 1.2.¹¹⁰
- 6.17 BT states that Ofcom is therefore incorrect when it suggests (see paragraph 5.17 of the Consultation, repeated at paragraph 5.18 above) that the retail costs are associated with “establishing and maintaining a relationship with the end customer”.

Recovering the retail costs from retail consumers

- 6.18 BT states that BT Retail does not have a contractual relationship with “other operators” so that, were Ofcom to go ahead with its proposals:

“BT Retail would [...] instead have to consider recovering these costs from the end user, which would be unfair to consumers, given that the costs arise from regulatory obligations”.

- 6.19 BT notes that it has proposed alternative arrangements for cost recovery (see paragraph 5.38 of the Consultation, repeated at paragraph 5.39 above) that were rejected by other providers. BT states that it believes that the correct principle for recovering costs from other providers is on a “polluter pays” basis and that it would be happy to work with CPSOs to develop such a solution.

Other comments on recovery of the retail costs

- 6.20 The other respondents support Ofcom’s provisional conclusion on this element of the dispute. However, C&W expresses concern that Ofcom’s proposals only address the recovery of the retail costs *through the CPS set-up charge*, and that the solution proposed does not prevent BT attempting to recover the retail costs from CPSOs by another route.

- 6.21 C&W reminds Ofcom that it expressed this concern in its comments on the scope of the dispute as originally drafted and that Ofcom reassured it that:

“...we expect that in determining whether BT is entitled to recover its retail costs via the CPS set-up charge, we will reach a view on whether it is appropriate for BT to recover retail costs from CPSOs as a matter of principle”.¹¹¹

- 6.22 C&W states that it has been “unable to find any such assurance in either Ofcom’s analysis and proposed decision, or in the draft determination itself”, and that:

“without any statement on the recovery of these retail costs *per se*, Ofcom is paving the way for BT to find an alternative method of recovering these costs from CPSOs which ultimately can only lead to a further dispute”.

- 6.23 None of the respondents to the Consultation disagreed with Ofcom’s conclusion on the second element of this dispute (by what amount the CPS set-up charge should be reduced). Four parties expressly agreed with Ofcom’s proposal that BT should reduce the CPS set-up charge by 78p.

¹¹⁰ See *Notification of Contravention of General Condition 1.2 under Section 94 of the Communications Act 2003*, 7 November 2003, published at:

<http://www.ofcom.org.uk/static/archive/oftel/publications/licensing/2003/contra1103.pdf>

¹¹¹ Letter from [redacted] (Ofcom) to [redacted] (C&W), 5 November 2008.

If BT is not entitled to recover the retail costs, from what date should the CPS set-up charge be reduced?

6.24 None of the respondents agreed with Ofcom's provisional conclusion that BT should be required to pay to the CPSOs a sum by way of an adjustment for the overpayment of the retail costs from 1 November 2007 to the date of the determination. BT considers that it should not be required to make any repayments to CPSOs and that Ofcom's determination of this dispute should be forward-looking only. The five other respondents argue that BT should be required to make payments by way of an adjustment for the overpayment of the retail costs from 23 November 2003 to the date of the determination.

Period of repayments: BT's comments

6.25 BT states that it "has been recovering these costs in good faith" and that:

"BT had no reason to foresee Ofcom's present decision and we therefore disagree that Ofcom's reasoning on regulatory certainty is persuasive for the period from 28 November 2003 to 31 October 2007 but it is less persuasive for the period from 1 November 2007 to the publication date of this determination".

The August 2005 Direction

6.26 BT suggests that:

"we do not agree that Ofcom's statement in the August 2005 Direction that it would review the issue of retail cost-recovery should have signalled to BT that the outcome of this review would not favour the inclusion of the disputed costs".

6.27 BT states that:

"If a further review of the CPS costs had indeed taken place in 2006 as Ofcom planned, then there was no indication in the 2005 Direction as to which way the decision would have been made"

6.28 In response to Ofcom's comment (see paragraph 5.98 of the Consultation) that in light of stakeholders' responses to the consultation that led to the August 2005 Direction, BT should have reconsidered the assumptions used when it came to review its charges in 2008, BT states that:

"Whilst we always consider customers' feedback, [...] we firmly believe the charges were to be valid, so there was no reason to change this opinion when reviewing the costs in 2007".

6.29 BT notes that "Ofcom acknowledges [...] that the issue of retail cost recovery was not discussed by CPSOs and BT between August 2005 and early 2008, so it was hardly a burning issue with industry. This reinforces in our mind that the stakeholders' responses in August 2005 should not be relied upon to justify a direction to BT to make refund payments since November 2007."

Ofcom's January 2006 WLR Statement

6.30 BT states that:

“In fact Ofcom said in the WLR January 2006 decision that it had removed sales and marketing costs from the WLR costs stack. The disputed CPS costs are not related to sales and marketing activities”.

- 6.31 BT concludes that it “had no reason to interpret the WLR January 2006 decision as a signal that Ofcom took a particular view on the recovery of the retail costs”.

Period of repayments: other respondents’ comments

Possible repayment dates

- 6.32 C&W questions Ofcom’s statement at paragraph 5.88 of the Consultation that:

“Ofcom has not identified any specific ‘step change’ in the market on or since 28 November 2003 [...] which would have necessitated or justified a change in cost recovery arrangements.”

- 6.33 C&W argues that:

“there are at least three points between (and including) 28 November 2003 which could be considered ‘step changes’ to the same or greater extent that 1 November 2007 can be considered such a change:

- 28 November 2003: date from which revised CPS charges, as determined by Ofcom’s August 2005 review, were applied
- 26 May 2005: Application of GC14.5
- 18 August 2005: Ofcom Direction on CPS charges”

28 November 2003

- 6.34 C&W considers that 28 November 2003 is the “most relevant” of the dates it proposes as “step changes” in the market. C&W notes that Ofcom’s August 2005 Direction was “at least as significant a change as the price changes that came into effect on 1 November 2003” and that Ofcom subsequently required BT to apply the changes set in the August 2005 Direction to 28 November 2003. C&W concludes that “as such, this must be the logical date from which Ofcom’s current determination is applied”.

- 6.35 Another respondent argues that 23 November 2003 has always been “the rather logical focal point in the negotiations between CPSOs and BT” as it is the date on which Ofcom introduced the SMP conditions on BT as a result of the Market Review.

- 6.36 UKCTA considers that:

“as Ofcom (through the dispute [...] brought by Opal) required BT to backdate the CPS charges set out in the August 2005 Direction to 28 November 2003, it must be a fair and reasonable outcome to backdate the revised CPS set-up charge in this dispute to the same date”.

- 6.37 Another respondent suggests that “Using the same logic as in [the Opal determination], if one strips out the retail costs from the CPS cost stack, the break-even date would also be 28 November 2003”.
- 6.38 C&W questions Ofcom’s suggestion¹¹² that “had it considered the issue of retail costs at the time of the August 2005 review, it may have reached a different conclusion”, on the basis that “all the reasons that justify why BT is not entitled to recover these costs were as true in 2005 as they are today.” C&W also suggests that:

“it is reasonable to assume therefore that had Ofcom considered the issue of retail costs at that time [2005] and concluded that BT was not entitled to recover these costs, CPSOs would have benefited from repayment back to 28 November 2003 without recourse to a (further) formal dispute”.

25 May 2005

- 6.39 C&W notes that the introduction of GC14.5 (on 25 May 2005) might also be considered a step change, as it placed all providers of retail telecommunications services to consumers on the same footing. C&W states however that it considers the arguments for 28 November 2003 to be “more persuasive” than those for the date that GC14.5 was introduced.

Developments following the August 2005 Direction

- 6.40 C&W states that CPSOs “believed their concerns would be addressed without the need to challenge the [August 2005] Direction”, as a result of Ofcom’s statement that it would undertake a further review of CPS charges in 2006.
- 6.41 C&W states that “It is inappropriate for Ofcom to infer that the lack of any challenge by CPSOs [in 2005] suggest an acceptance of the status quo”. Verizon Business makes a similar comment that “This does not mean that the CPSOs accepted the practice of retail recovery by BT, just that the anticipated mechanism to address the issue never materialised”.
- 6.42 UKCTA considers that the fact no-one challenged the 2005 Direction is “irrelevant” since BT is still required to comply with its regulatory obligations. Global Crossing states that the absence of any challenge to the 2005 Direction (particularly since Ofcom did not go ahead with its planned 2006 review) was “not in our view sufficient reason to determine that a date of November 2007 would be reasonable”.
- 6.43 Another respondent argues that it should be obvious to Ofcom that the reason the 2005 Direction was not challenged was because Ofcom had committed to carry out a review of CPS charges (and specifically to address the issue of retail cost recovery) in 2006.
- 6.44 C&W states that:
- “it is not clear that Ofcom ever formally advised industry that it was not going to conduct a further review of CPS charges, making it difficult for CPSOs to challenge this change in ‘administrative priorities’.”

¹¹² See for example paragraph 5.91 of the consultation.

- 6.45 C&W states that “further discussion with BT would have been inappropriate” in light of Ofcom’s assurance that the issue would be dealt with as part of the review originally planned for 2006.
- 6.46 C&W states that BT’s indication to CPSOs in the summer of 2007 that it was going to conduct its own review “again left CPSOs in limbo on the issue of challenging the charges”. Another respondent states that, after the 2005 Direction, the next opportunity for CPSOs to raise the issue was BT’s introduction of new charges from 1 November 2007.

1 November 2007

- 6.47 C&W questions Ofcom’s statement at paragraph 5.92 of the Consultation that:

“Given that Ofcom set the CPS charges in its 2005 Direction, Ofcom considers that it was reasonable for BT to continue to recover retail costs, subject always to its ongoing obligation to comply with its SMP Conditions.

- 6.48 C&W considers that Ofcom’s statements elsewhere in the Consultation contradict this statement:

- paragraph 5.92, where Ofcom states that BT was not entitled to assume that the charges set in 2005 would apply until Ofcom made a further Direction
- paragraph 5.96, where Ofcom states that BT could not assume that the 2006 review, had it taken place, would have determined that BT was entitled to recover the retail costs;
- paragraph 5.98, where Ofcom states that in light of clear signals that the issue of cost recovery would be addressed at some point, BT should have taken this into account in setting new charges; and
- paragraph 5.101, where Ofcom notes that, contrary to statements made by BT, the 2005 Direction did not expressly state that it was reasonable for BT to recover the retail costs.

Effect of Ofcom’s proposed determination

- 6.49 C&W questions Ofcom’s proposal:

“that BT can retain this significant over-recovery for four of the five years in dispute, on the basis of ‘what is fair and reasonable as between the parties’.”

- 6.50 Verizon Business echoes these comments, stating that:

“As Ofcom have determined that BT is not entitled to recover the referenced costs, then surely the over recovery should be repaid in full”.

- 6.51 C&W considers that Ofcom’s proposed determination would “[send] clear signals to BT that it is acceptable – and indeed, commercially prudent – as the likelihood is that they will get to ‘keep the cash’”. This view is echoed by another respondent, who

considers that Ofcom's proposed determination "in effect allows BT to "keep the proceeds of the crime" – hardly any incentive to discourage them in future", and that:

"by failing to require BT to remedy the consequences of its breach Ofcom would leave CPS operators to bear the financial loss of BT's illegal actions and effectively set a future policy which says it is acceptable to breach regulatory obligations unless or until challenged."

6.52 C&W does not accept that requiring BT to make repayments from 1 November 2007 is in line with Ofcom's statutory objectives, which "can only be met if any non-compliance issue is rectified in full".

6.53 UKCTA and Verizon Business make similar comments, Verizon Business suggesting that:

"..surely Ofcom's prime duty is to uphold the regulatory framework and ensure compliance is maintained by all operators; this to promote competition and benefit consumers. If the draft decision stands, then Ofcom will have undermined the regulatory certainty they strive to create, which can only have a detrimental effect on competition and ultimately consumers."

6.54 UKCTA states that, by contrast, requiring BT to make repayments from 28 November 2003 "would provide a strong incentive on BT to actively seek to comply with its regulatory obligations at all times. Unlike Ofcom's proposal, such an outcome would thereby promote effective competition in this market". Global Crossing states that it fully supports UKCTA's submission on this point and states that it considers the "most equitable" outcome would be "one which restored in full the financial equilibrium since the date of the breach".

6.55 C&W considers that contrary to Ofcom's statement that its draft determination promotes regulatory certainty (paragraph 5.92 of the Consultation), "allowing BT to ignore its SMP obligations creates massive uncertainty for the rest of industry".

Ofcom's power to modify or withdraw a direction

6.56 BT makes the following points responding to Ofcom's statement at paragraphs 5.69 and 5.93 of the Consultation, that the 2003 Act gives Ofcom the power to modify or withdraw a direction with retrospective effect:

- section 49 of the 2003 Act is silent as to whether Ofcom can modify or withdraw directions retrospectively, and it is Ofcom that adds the words "with retrospective effect" to the meaning of section 49;
- since the 2005 Direction was not appealed (although it could have been appealed under section 192 of the Act), for Ofcom to subsequently withdraw or modify the 2005 Direction "would undermine the applicability of section 192 [of the 2003 Act]"; and
- Ofcom states (see paragraphs 5.69 and 5.70 of the Consultation) that section 190 of the 2003 Act does not contain anything that limits Ofcom's discretion when determining from what date repayments should be made. BT states that it wants "to clarify that Ofcom powers for making directions under section 190(2)(d) is also

limited by the determination to which they want to give effect by means of the overpayment direction, i.e. the content of this determination is relevant”.

- 6.57 C&W agrees that its submission can be seen as a request to Ofcom to modify or withdraw its 2005 Direction, but that it “can see no issue with such a request”.

Section 7

Consideration of responses, revised analysis and conclusion

- 7.1 This section responds to the comments made by stakeholders in their responses to the Consultation and sets out Ofcom's conclusions.
- 7.2 Paragraphs 7.4-7.20 below set out Ofcom's views on whether BT is entitled to recover the retail costs and our final conclusion on this point. Ofcom's conclusion is based on the analysis and reasoning set out in the Consultation and at paragraphs 5.11-5.61 above, and was reached in light of stakeholders' comments as discussed at paragraphs 6.4-6.22 above. Ofcom's analysis of its statutory duties and regulatory principles in relation to recovery of the retail costs is set out at paragraphs 7.21-7.29 below.
- 7.3 Paragraphs 7.30-7.64 below set out Ofcom's revised analysis on whether BT is required to make repayments to CPSOs, in light of stakeholders' comments as discussed at paragraphs 6.24-6.55 above. Ofcom's revised consideration of its statutory duties and regulatory principles relevant to this element of the dispute (as set out at paragraphs 5.109-5.116 of the Consultation), is set out at paragraphs 7.65-7.81 below.

Recovery of the retail costs: Ofcom's view

The retail costs are not a cost of providing CPS facilities

- 7.4 Ofcom did not, as BT appears to suggest (see paragraph 6.5 above), propose that BT is not entitled to recover the costs of the notification of transfer letter and inbound calls "simply because they are retail related".
- 7.5 BT is correct in stating (see paragraph 6.7 above) that SMP Condition AA8 was imposed on BT as a result of its SMP designation in retail markets.
- 7.6 At paragraph 6.5 of the Market Review the Director explained that:
- "6.5 The Universal Service Directive requires the Director to impose an obligation on providers with SMP in markets relating to the provision of fixed services that requires them to allow their customers access to CPS and IA services. On the basis that the Director has found [BT] to have SMP in retail access and calls [...] and also in the fixed call origination market, it is therefore necessary to require that BT [...] ensure that CPS services and IA services are available to their customers."
- 7.7 However, BT does not explain why it considers that the fact SMP Condition AA8 derives from BT's SMP in retail markets means "it is not unreasonable or inappropriate for BT to recover retail-related costs".
- 7.8 Article 19(3) of the Universal Service Directive places an obligation on Ofcom to ensure that pricing for access and interconnection related to the provision of CPS is cost oriented. In implementing Article 19, SMP Condition AA8 entitles BT, subject to the requirement of reasonableness, to recover the forward-looking long run

incremental costs that it incurs in providing “Carrier Pre-Selection Facilities” through its charges to CPSOs. Carrier Pre-Selection Facilities are defined at Schedule 1 to the Market Review as facilities that “enable the Pre-selected Provider to provide Carrier Pre-selection to Subscribers”. Therefore, BT is only entitled to recover through its charges to CPSOs the costs of the facilities that enable CPSOs to offer retail telecommunications services to consumers.

7.9 Supporting this assertion is the statement at paragraph 6.7 of the Market Review, where the Director stated that:

"6.7 [SMP Condition AA8] requires CPS to be provided at the request of any customer and that **relevant wholesale interconnection facilities** are provided to CPSOs on reasonable terms and in accordance with the CPS Functional Specification. It further provides that the charges for such interconnection facilities are reasonably derived from the costs of providing those services and that the costs must be calculated on a forward looking long run incremental cost approach. The CPS condition also sets out the principles for the recovery of costs incurred in the provision of CPS”.

7.10 BT does not explain why it believes the retail costs are “costs of providing Carrier Pre-Selection Facilities” as defined in SMP Condition AA8. Ofcom does not believe that the retail costs are costs of providing CPS facilities as defined in SMP Condition AA8, since they do not relate to the provision of a wholesale service that enables BT’s competitors to offer retail telecommunications services to consumers.

7.11 Ofcom does not agree with BT that the fact CPSOs also face these costs is “irrelevant”. Ofcom acknowledges that only BT is required to provide CPS, and that the costs of the notification of transfer letter and inbound calls would not arise were it not for BT’s obligation to provide CPS. However, this does not imply that the retail costs are costs of providing CPS Facilities within the meaning of SMP Condition AA8. The retail costs are incurred by all providers of retail telephony services to consumers, because they are required by GC14.5 to follow the notification of transfer letter process.

7.12 BT argues that its recovery of the retail costs is consistent with the cost causation principle and Ofcom’s other five cost recovery principles. As addressed at paragraph 5.26 of the Consultation (repeated at paragraph 5.27 above), one interpretation of the cost causation principle is that it is CPSOs who cause the costs of the notification of transfer letter and inbound customer calls to be incurred. However, even if we accept this interpretation, the current arrangement is not consistent with the cost causation principle as it does not enable CPSOs to recover their equivalent costs where BT’s actions (placing an order for calls on a particular line to revert to BT) cause them to be incurred. Ofcom therefore rejects BT’s assertion that its recovery of the retail costs through the CPS set-up charge is consistent with the cost causation principle. As BT does not explain why it considers the current arrangement is also consistent with the other five cost recovery principles, we do not consider it necessary to set out our position on the application of these principles (as set out at paragraphs 5.22-5.40 above) again.

The retail costs are incurred in managing a relationship with the consumer

7.13 BT is correct when it states that Ofcom considers that the purpose of the notification of transfer letter process is to protect consumers from mis-selling (we mention this at, for example, paragraphs 2.43, 3.40, 5.31-33 and 5.42 of the Consultation).

- 7.14 The notification of transfer letter process requires both the LSP and GSP to write to the customer. Where a GSP sends a notification of transfer letter, although this step is a requirement of GC 14.5, it is also part of the overall process of establishing a relationship with a new customer. Where the LSP letter alerts a consumer to attempted mis-selling, this will help an LSP to maintain an ongoing relationship with that customer. Where a customer has chosen to change providers, the letter is part of the LSP's process of managing a relationship with a departing customer (for example, by making him aware of any contractual obligations he is still under).
- 7.15 Ofcom does not therefore think it is inaccurate to refer to a relationship with the end customer. Ofcom agrees that for the LSP to use the notification of transfer letter process as a marketing opportunity may constitute a breach of GC1.2.

Recovery of the retail costs from retail consumers

- 7.16 BT suggests that recovery of the retail costs from retail consumers would be “unfair [...] given that the costs arise from regulatory obligations”. To be clear, Ofcom has not suggested that BT is required to recover the retail costs from retail consumers, although we acknowledge that this is one outcome of Ofcom's determination of this dispute. However, we do not consider that it is inappropriate for communications providers to recover from end users the costs associated with serving those end users, whether or not those costs are associated with a regulatory obligation. As set out at paragraph 5.26 of the Consultation, repeated at paragraph 5.28 above, the retail costs are part of the normal cost of doing business as a retail service provider in a competitive market. It is likely that communications providers other than BT currently recover these costs through their retail charges.
- 7.17 Ofcom acknowledges BT's willingness to explore possible alternative cost recovery arrangements, for example a system based on the “polluter pays” principle, whereby the costs incurred in protecting consumers from mis-selling would be recovered from providers engaging in mis-selling. Ofcom considers that it may be possible to develop alternative cost recovery arrangements that involve some element of the retail costs being incurred from some or all CPSOs and BT, that are consistent with BT's SMP obligations.

Ofcom's conclusion on recovery of the retail costs

- 7.18 Having considered stakeholders' comments on recovery of the retail costs, Ofcom concludes that BT is not entitled to recover the retail costs that are the subject of this dispute through the CPS set-up charge.
- 7.19 C&W has asked Ofcom to clarify that if BT is not entitled to recover the retail costs through the CPS set-up charge, nor is it entitled to recover them from CPSOs by any other route. As set out above, SMP Condition AA8 entitles BT to recover from CPSOs the reasonable costs that BT incurs in providing “Carrier Pre-Selection Facilities”. Since the costs of the notification of transfer letter and inbound customer calls are not costs of providing CPS facilities under SMP Condition AA8, BT is not entitled to recover them from CPSOs either through the CPS set-up charge or by any other route.
- 7.20 C&W has asked Ofcom to explain whether BT is entitled “to recover retail costs from CPSOs as a matter of principle”. Ofcom's determination of this dispute does not rest on whether or not the costs in question are “retail costs”, but on whether or not they are costs of providing “CPS Facilities”. We note that BT is required (by SMP Condition AA8.3) to ensure that the prices and other charges imposed on

subscribers do not constitute a disincentive to the use of CPS. Ofcom considers that its determination of this dispute should provide clear guidance as to whether or not retail costs other than the costs we have considered in this dispute (the costs of the notification of transfer letter and inbound calls from customers) are costs of providing "CPS Facilities". Ofcom will consider any further requests for dispute resolution in relation to other retail costs on a case-by-case basis, but expects that this is now a clear statement.

Ofcom's statutory obligations and regulatory principles

- 7.21 In resolving this dispute Ofcom is required to consider what is fair and reasonable as between the parties, taking into account its regulatory principles, statutory duties and community obligations, as set out in sections 3 and 4 of the 2003 Act (see section 4 above). This will include a consideration of section 3 (3) and the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed.
- 7.22 Ofcom considers that the following are relevant to its consideration of whether BT is entitled to recover through the CPS set-up charge the costs of sending the advice of transfer letter and handling the resulting inbound customer calls.
- 7.23 Ofcom considers that to require a change to the current arrangement, so that BT is no longer recovering its retail costs through the CPS set-up charge, supports Ofcom's obligation to further the interests of consumers, where appropriate by promoting competition, since one of the primary purposes of BT's obligations is to promote competition, in this case by enabling other providers to compete with BT in the provision of retail calls to consumers. The availability of CPS (which is now used by four million customers, either on its own or in combination with WLR) has led to increased consumer choice, downward pressure on retail prices and incentives on providers to offer an improved quality of service.
- 7.24 Determining that BT is not entitled to recover through the CPS set-up charge the costs it incurs in sending the advice of transfer letter and handling the resulting inbound customer calls, by ensuring the provision of network access and promoting competition in retail calls markets, in particular supports Ofcom's principal duty at Section 3(1)(b) of the 2003 Act, as well as its duty under section 4 of the 2003 Act to promote competition in communications markets in accordance with the Framework Directive.
- 7.25 In ensuring that cost recovery arrangements are consistent with BT's obligation to provide network access, Ofcom considers that its determination also supports the community goal of encouraging the provision of network access since it will give BT's network access customers fairer and more transparent charges. Ofcom further considers that, by determining that BT is required to bring cost recovery arrangements for the CPS set-up charge into line with those for other BT transferable products (see paragraphs 5.41-5.49 above), it is acting in a manner that is technology-neutral, in line with its community goals.
- 7.26 C&W has argued (see paragraph 3.49 above) that the current arrangement puts CPSOs at a competitive disadvantage to BT.¹¹³ Ofcom therefore considers that its

¹¹³ C&W has argued that the current arrangement therefore constitutes a breach of SMP Condition AA2. Ofcom has not assessed whether this discrimination has any impact on competition such that it would be contrary to SMP Condition AA2, although it considers that this is unlikely to be the case given the relatively low sums involved.

determination for resolving this dispute in relation to the recovery of retail costs through the CPS set-up charge is in line with one of the policy objectives of Article 8 of the Framework Directive which states that the contribution to the development of the internal market is to be achieved by, *inter alia*, ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services. It could be argued that allowing BT to recover its retail costs from CPSOs, when CPSOs cannot recover their retail costs from BT or anyone else, would be discriminatory.¹¹⁴

- 7.27 In addition, Ofcom considers that its determination, by clarifying how BT should treat the recovery of the retail costs, and thereby helping to level the playing field for BT's competitors, supports its obligation at section 3(2)(b) of the 2003 Act to secure the availability of a wide range of communications services, as well as its duty under section 4 of the 2003 Act to encourage the provision of network access (here, CPS) for the purposes of securing efficiency and sustainable competition, for the benefits of consumers. As set out at paragraph 7.23 above, CPS enables other providers to compete with BT in the provision of retail calls to consumers. The availability of CPS (which is now used by four million customers, either on its own or in combination with WLR) has led to increased consumer choice, downward pressure on retail prices and incentives on providers to offer an improved quality of service.
- 7.28 Ofcom's determination, by supporting the competition-related duties set out above, also supports Ofcom's principal duty to further the interests of consumers, as competition has led to the consumer benefits set out in the previous paragraph.
- 7.29 Ofcom considers that its resolution of this dispute in relation to the recovery of retail costs through the CPS set-up charge is transparent, in that Ofcom's intention is clearly to achieve a fair balance as between the parties to the dispute. Ofcom also considers that its resolution of this dispute in relation to the recovery of retail costs through the CPS set-up charge is transparent in that this document clearly sets out the parties' arguments and Ofcom's reasoning that leads to this conclusion, and notes that the parties have had an opportunity to comment on Ofcom's proposals. Ofcom further considers that its resolution of this dispute in relation to the recovery of retail costs through the CPS set-up charge is proportionate, as it is binding only on BT and on the other parties to this dispute. Ofcom therefore considers that the conclusion set out in this document fulfils its duty to ensure that its regulatory activities are transparent, accountable, proportionate, consistent and targeted.

Period of repayments – further analysis and consultation

- 7.30 In the Consultation, we considered a number of possible repayment dates and proposed that BT should be required to make repayments from 1 November 2007.
- 7.31 BT has argued that Ofcom's position on recovery of the retail costs had not been made clear to it or to industry previously. C&W has argued that it should always have been clear to BT that it was not entitled to recover retail costs through the CPS set-up charge. C&W has not identified any clear statement by Ofcom (to BT or industry) on this matter. Rather, it recognises, as does Ofcom, that Ofcom had proposed to carry out a review of CPS charges that would address the issue of the retail costs. Ofcom did not carry out its planned review, as a result of an internal review of its administrative priorities.

¹¹⁴ See footnote 113 above.

- 7.32 Ofcom has now reviewed its proposal in light of stakeholders' responses and previous Ofcom statements relevant to recovery of the retail costs. Based on the analysis set out in the following paragraphs, Ofcom now proposes that its determination of this dispute will apply on a forward-looking basis only.
- 7.33 As discussed in paragraph 7.8 (and see also paragraphs 2.9-2.14) above, BT is subject to SMP Condition AA8 (which implements the requirements of the Universal Service Directive, specifically, the requirement that pricing for the provision of CPS is cost oriented).
- 7.34 SMP Condition AA8.4 defines what BT, as the dominant provider, has to do to ensure that its charges for CPS are cost oriented. The specific requirement in SMP condition AA8.4 is that the charges for CPS shall be based on the long-run incremental costs of providing CPS facilities.
- 7.35 The first element of this dispute is to determine whether it is appropriate for BT to recover the retail costs. While our analysis of this point draws on the provisions in SMP Condition AA8, it has not been necessary, in reaching a view, to establish whether or not the retail costs are reflective of BT's long run incremental cost – our focus in resolving the first element of this dispute has been on whether the disputed costs constitute a cost of providing CPS facilities.
- 7.36 In considering from what date the CPS charge should be reduced, Ofcom has examined at what point BT could reasonably be expected to know that the retail costs in its cost stack for CPS did not meet the requirement of SMP condition AA8, i.e. that the retail costs were not costs of providing CPS facilities.
- 7.37 When SMP condition AA8 was introduced in 2003, Ofcom did not give any guidance (in the Market Review) as to how it would interpret SMP Condition AA8 in relation to the recovery of the retail costs. It is therefore our view that, at this time, BT could not reasonably be expected to know that the retail costs were not costs of providing CPS facilities under SMP condition AA8.
- 7.38 In the August 2005 Direction, Ofcom set BT's charges for CPS. The retail costs were included in the cost stack used to set those charges. Although Ofcom stated that it was appropriate for it to consider stakeholders' concerns in relation to the retail costs in its planned 2006 review of CPS charges, it did not indicate what the result of this review might be. In Ofcom's view, the August 2005 Direction did not indicate to BT that the retail costs were not costs of providing CPS under SMP condition AA8.
- 7.39 On 24 January 2006, Ofcom published the statement *Reviewing and setting the charge ceilings for WLR services* ("the WLR Statement")¹¹⁵. The cost stack that Ofcom used to calculate the charges set out in the WLR Statement did not include any end user costs. In particular, it did not include the equivalent of the retail costs that we are considering in this case, which are incurred by BT and other providers for WLR transfers in the same way that they are for CPS transfers (the consumer protection mechanism for WLR and CPS is the same). However, Ofcom did not expressly state in the WLR Statement that BT should similarly remove end user costs, including the retail costs, from the CPS cost stack. While the WLR Statement may have suggested to BT that Ofcom would at some point adopt a similar decision in relation to CPS, we do not consider that the WLR Statement alone was sufficient

¹¹⁵ *Wholesale Line Rental: Reviewing and setting charge ceilings for WLR services*, <http://www.ofcom.org.uk/consult/condocs/wlrcharge/statement/statement.pdf>

to move the burden of reassessing the CPS cost stack (and removing the retail costs) from Ofcom onto BT.

- 7.40 Further, Ofcom's determination of the Opal dispute on 16 May 2006 was based on the charges set by Ofcom in the August 2005 Direction, and Ofcom did not make any statement at this time to suggest that the retail costs should be removed from the CPS charges, in line with the position taken by Ofcom in the WLR Statement. At the end of 2006, Ofcom had not carried out its planned review of CPS charges due to an internal review of its administrative priorities. Therefore, by the end of 2006, Ofcom had not made any statement that would have indicated to BT that the retail costs were not costs of providing CPS facilities under SMP Condition AA8 and that BT should therefore remove them from the CPS cost stack.
- 7.41 Based on our review of statements made by Ofcom between 28 November 2003 and now, we have concluded that by 1 November 2007, when BT changed its CPS charges, Ofcom had not indicated with sufficient clarity to BT, that it was not appropriate for it to include the retail costs in the CPS cost stack. While the WLR Statement, and Ofcom's commitment to review the inclusion of the retail costs in its planned 2006 review, may have suggested that Ofcom would at some point conclude that BT was not entitled to recover the retail costs from CPSOs, these statements together are insufficient for us to conclude that it is reasonable to expect BT to have proactively removed the retail costs from the CPS cost stack when it came to review its CPS charges in November 2007. Further, Ofcom has not made any statements between 1 November 2007 and the date of the draft determination that would have given BT any further clarification regarding this issue.
- 7.42 Based on the analysis above, Ofcom now proposes to conclude that its determination of this dispute will apply on a forward-looking basis only. Ofcom invites any further comments on this proposal by 5pm, Friday 27 February 2009.

Period of repayments – stakeholders' comments

- 7.43 In the following paragraphs, we consider the dates suggested by the respondents, their comments on Ofcom's proposal as set out in the draft determination, and our views on these comments, in light of the analysis set out at paragraphs 7.30 to 7.42 above.

Alternative dates proposed by C&W

- 7.44 Ofcom acknowledges (see paragraph 5.89 of the Consultation) that it stated that in resolving this dispute one option would be to order repayments from 28 November 2003. One respondent notes that 28 November 2003 is the "logical starting point", being the date that SMP Condition AA8 came into effect (as also noted by C&W in its original submission).
- 7.45 Ofcom considers that the fact that the relevant SMP Condition came into effect on this date is in itself insufficient to establish that it is appropriate to require BT to make repayments from this date. As discussed at paragraph 7.37 above, the Market Review did not include any guidance as to how Ofcom would interpret SMP Condition AA8 in relation to the recovery of the retail costs. In the absence of any indication from Ofcom that it was not acceptable for BT to recover the retail costs as at 28 November 2003, it would not therefore be fair to BT to require it to make repayments to the CPSOs from this date. This is supported by the fact that the August 2005 Direction set charges at a level that enabled BT to recover the retail costs.

- 7.46 C&W, UKCTA and another respondent argue for 28 November 2003 on the basis that the charges set in the August 2005 Direction were subsequently backdated to 28 November 2003 as a result of Ofcom's determination of the Opal dispute, and that Ofcom should therefore apply the same logic in this case as it did in resolving the Opal dispute.
- 7.47 As set out at paragraphs 5.74-5.77 of the Consultation, repeated at paragraphs 5.69-5.72 above, the methodology used in determining the appropriate repayment date in the Opal dispute is not appropriate in this case. In the Opal dispute, Ofcom was concerned with identifying a point at which BT "broke even" and recovered its costs (calculated on the basis of underlying transaction volumes). Here, there is no "break even" point, and the same logic cannot therefore be applied in this dispute. As set out at paragraph 7.37 above, Ofcom did not provide any guidance in the Market Review as to how it would interpret SMP Condition AA8 in relation to the recovery of the retail costs, and so it is not appropriate to require BT to make repayments to 28 November 2003. Ofcom did not, in the Opal dispute, require BT to remove the retail costs from the CPS cost stack.
- 7.48 Nor does Ofcom agree with C&W's suggestion (see paragraph 6.38 above) that it is "reasonable to assume" that, had Ofcom considered the issue of retail cost recovery in 2005 and reached the conclusion that BT was not entitled to recover the retail costs, it would have required BT to make repayments to 28 November 2003. Ofcom did not consider the issue in 2005, and had it done so it may well have reached the same view that it has in this dispute, i.e. that it is not appropriate to require BT to make repayments to 28 November 2003 because at that time Ofcom had not provided guidance as to how it would interpret SMP Condition AA8 in relation to the recovery of the retail costs.
- 7.49 C&W mentions 25 May 2005, which was when GC14.5 came into effect, as a possible date for repayments. Ofcom does not consider that it is appropriate to require BT to make repayments from 25 May 2005, as Ofcom did not provide any guidance at this time as to how it expected BT to apply SMP Condition AA8 in relation to the recovery of the retail costs.

The August 2005 Direction

- 7.50 While C&W mentions 18 August 2005, the date of the August 2005 Direction, as one "step change" in the period under consideration, it does not appear to be arguing that Ofcom should consider requiring BT to make repayments from this date. However, as discussed at paragraph 7.38 above, the August 2005 Direction did not indicate to BT that the retail costs were not costs of providing CPS facilities under SMP Condition AA8. It is not therefore appropriate to require BT to make repayments from 18 August 2005.
- 7.51 BT argues that Ofcom's comments in the August 2005 Direction on recovery of the retail costs, and Ofcom's commitment to review CPS charges in 2006, did not suggest to BT that, had such a review taken place, Ofcom would have determined in 2006 that BT was not entitled to recover the retail costs from CPSOs.
- 7.52 Ofcom acknowledges that it did not, in the August 2005 Direction, take a view on whether or not BT was entitled to recover the retail costs from CPSOs. In light of the fact that the August 2005 Direction set BT's CPS charges at a level that enabled BT to recover the retail costs through the CPS set-up charge, Ofcom considers (as argued at paragraph 5.92 of the Consultation) it was reasonable for BT to continue to recover the retail costs through the CPS set-up charge following the 2005 Direction.

- 7.53 While C&W has questioned this interpretation, Ofcom does not consider that the other statements in the Consultation that C&W has highlighted (see C&W's comments at paragraph 6.48 above) suggest that BT should have been expected to foresee the conclusions that Ofcom has reached in considering this dispute.
- 7.54 Ofcom's statements in the 2005 Direction put BT on notice that Ofcom intended to consider this issue at some point in the future, and that Ofcom might at some point change the approach it had adopted in the August 2005 Direction. As set out at paragraph 5.92 of the Consultation, repeated above (and noted by C&W at paragraph 6.48 above) BT could not assume that the charges set in 2005 would apply until Ofcom made a further Direction. Ofcom therefore considers that it was consistent with BT's SMP obligations for it to review its CPS charges. However, the comments made by Ofcom in the August 2005 Direction, on their own, were insufficient to have indicated that BT should have changed its approach to cost recovery and excluded the retail costs from the CPS cost stack when it came to review its charges in 2007.

The January 2006 WLR statement

- 7.55 BT notes that in the WLR Statement Ofcom removed BT's sales and marketing costs from the WLR cost stack. BT submits (see paragraphs 6.30-6.31 above) that, since the retail costs are not sales and marketing costs, it could not have inferred from the WLR Statement that it was not entitled to recover the retail costs through the CPS set-up charge.
- 7.56 At paragraphs 3.64-3.66 of the WLR Statement, Ofcom stated that it had used the costs of BT's PSTN takeover activity as a starting point for estimating the reasonable cost of analogue WLR migrations, as the two activities were similar. As part of this exercise, Ofcom considered that it was not appropriate to include all of BT's costs in the cost stack for WLR charges, and excluded all costs associated with serving end users – not only sales and marketing costs, but also the costs of the notification of transfer letter and inbound calls. The fact that the retail costs are not sales and marketing costs is therefore irrelevant.
- 7.57 While Ofcom considers that the WLR Statement acted as a signal to BT that Ofcom would take the same approach to the retail costs when it came to review CPS charges, we consider that it did not expressly state that Ofcom would take a similar approach to the retail costs in the CPS cost stack. We do not consider that the WLR Statement alone was sufficient to move the burden of reassessing the CPS cost stack (and removing the retail costs) from Ofcom onto BT.

Developments following the August 2005 Direction

- 7.58 C&W questions Ofcom's statement that, had it considered the issue of retail cost recovery in 2005, it might have reached a different view, as "all the reasons that justify why BT is not entitled to recover these costs were as true in 2005 as they are today." While this may be true, the fact remains that Ofcom has not, until now, reviewed the inclusion of the retail costs in the CPS cost stack or made any clear statement as to whether BT is entitled under SMP Condition AA8 to recover the retail costs from CPSOs.
- 7.59 Ofcom does not dispute C&W's explanation that it did not challenge the August 2005 Direction because Ofcom had committed to carrying out a review of CPS charges in 2006. In response to Global Crossing's comment (see paragraph 6.42 above), Ofcom clarifies that it was not arguing in the Consultation that the absence of a

challenge to the August 2005 Direction is, in itself “sufficient reason to determine that a date of November 2007 would be reasonable”.

- 7.60 Nevertheless, none of the parties to this dispute could infer from the August 2005 Direction that Ofcom’s planned 2006 review of CPS charges would conclude that BT was not entitled to recover the retail costs. It was still open to C&W and the other parties to the dispute to exercise their right to challenge the August 2005 Direction.
- 7.61 Ofcom acknowledges that it did not formally notify the parties of the review of its administrative priorities that led to the cancellation of the planned 2006 review of CPS charges. However, Ofcom does not agree with C&W and others that CPSOs had no further opportunity to raise the issue until BT introduced new charges and were therefore “in limbo” until BT announced those new charges on 10 December 2007. C&W or any other party could have brought the issue to Ofcom formally at any time.

1 November 2007

- 7.62 In the absence of any challenge to the August 2005 Direction or further discussion between the parties of recovery of the retail costs, the next step change after the WLR Statement that is relevant for resolving this dispute was on 1 November 2007, when the revised CPS set-up charge (announced by BT on 10 December 2007 but applied with retrospective effect) came into effect. As discussed at paragraph 5.72 above, the Opal dispute (which concluded in May 2006) is not a relevant precedent for Ofcom’s consideration of this dispute, and the date at which Ofcom resolved the Opal dispute is not therefore a relevant benchmark.
- 7.63 By this time, BT was aware that stakeholders had concerns with BT’s recovery of the retail costs and that Ofcom had acknowledged those concerns and undertaken to review CPS charges. In the meantime, Ofcom had also set new charges for WLR that did not enable BT to recover the retail costs through WLR charges. Ofcom therefore remains of the view, as set out at paragraph 5.98 of the Consultation, that BT should have reconsidered the assumptions it used in setting new CPS charges in 2007.
- 7.64 However, Ofcom accepts that the statements made in the August 2005 Direction and the WLR Statement were insufficient to have suggested to BT, in the absence of any further discussion with the industry and Ofcom, that it should have removed the retail costs from the CPS cost stack.

Ofcom’s statutory obligations and regulatory principles

- 7.65 C&W and others suggest in their responses that as BT is not entitled to recover the retail costs, BT should be required to make repayments for overpayments made by CPSOs since 28 November 2003, and that it is not in line with Ofcom’s regulatory objectives to determine otherwise.
- 7.66 As noted at paragraph 5.86 of the Consultation, the CAT states in its TRD core issues judgment that:

“Ofcom must have regard to what is fair as between the parties and what is reasonable from the point of view of the regulatory objectives set out in the Common Regulatory Framework Directives and in the 2003 Act.”

- 7.67 Ofcom has concluded that BT is not entitled to recover the retail costs from CPSOs. However, Ofcom has not previously made any clear statements (that the retail costs were not costs of providing CPS facilities under SMP Condition AA8) that would have enabled BT to know it should proactively remove the retail costs from the CPS cost stack. Ofcom considers, therefore, that it would not be appropriate to order BT to make repayments from a date at which it could not have known what view Ofcom would take on the recovery of the retail costs. In Ofcom's view, such an order would undermine regulatory certainty for all stakeholders.
- 7.68 Ofcom considers that its conclusion of this dispute is consistent with Ofcom's regulatory objectives, as set out in the following paragraphs and at Table 2 above.
- 7.69 Ofcom considers that to resolve this dispute supports its obligation to further the interests of consumers, where appropriate by promoting competition, since, in this statement, Ofcom has now provided guidance that BT's retail costs should be removed from the CPS cost stack. Ofcom's determination of this dispute therefore supports Ofcom's principal duty at section 3(1)(b) of the 2003 Act, as well as its duty under section 4 of the 2003 Act to promote competition in communications markets in accordance with the Framework Directive
- 7.70 Ofcom considers that, by providing guidance that BT's retail costs should be removed from the CPS cost stack, its conclusion of this dispute is in line with one of the policy objectives of Article 8 of the Framework Directive (see paragraph 5.112 of the Consultation), which states that the contribution to the development of the internal market is to be achieved by, *inter alia*, ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services.
- 7.71 Ofcom considers that this will also help to level the playing field for BT's competitors. This supports Ofcom's obligations at section 3(2)(b) of the 2003 Act to secure the availability of a wide range of communications services, as well as its duty under section 4 of the 2003 Act to encourage the provision of network access (here, CPS) for the purposes of securing efficiency and sustainable competition for the benefit of consumers.
- 7.72 By providing clarity as to how BT's regulatory obligations will operate in practice, Ofcom considers that its conclusion of this dispute, by supporting the competition-related duties set out above, also supports Ofcom's principal duty to further the interests of consumers. By clarifying BT's SMP obligations for all parties, Ofcom's determination of this dispute increases regulatory certainty which will support competition between communications providers, benefiting consumers in the form of greater competition, leading to downward pressure on prices, availability of a wider range of services, and improved quality of service.
- 7.73 For the reasons set out at paragraph 7.29 above, Ofcom considers that its conclusion of this dispute is fair and reasonable as between the parties to the dispute, and that this is in line with Ofcom's duty to ensure that its regulatory activities are transparent, accountable, proportionate, consistent and targeted.
- 7.74 Finally, Ofcom considers that this statement clearly sets out the parties' arguments, Ofcom's response to stakeholders' responses to the Consultation, and Ofcom's reasoning that leads to its conclusion. Ofcom considers that this supports its duty to ensure that its regulatory activities are transparent, accountable, proportionate, consistent and targeted.

- 7.75 Ofcom therefore considers that its clear statement in this determination on the recovery of retails costs through the CPS set-up charge is consistent with its regulatory objectives, given that no clear statement had been made by Ofcom previously to clarify its approach.
- 7.76 Ofcom does not accept C&W's assertion that its conclusion in this case will suggest to BT that it is "acceptable to breach regulatory obligations unless or until challenged". BT remains under an obligation to meet its SMP obligations at all times. In reaching its conclusion in this dispute, Ofcom has considered all the factors, including the regulatory framework and, in particular, guidance provided by Ofcom as to how that regulatory framework would operate in practice.
- 7.77 As set out above we have considered the statements made by Ofcom and accept that it was not made clear to BT until this dispute that we would take the policy approach we have confirmed in this dispute.
- 7.78 We have considered whether this change in our position from the Consultation on the date for payment back requires further consultation with the Parties to ensure fairness. We have decided that in the circumstances of this case that it is in the interests of all the Parties for us to proceed to determine the dispute but with a consultation on the period of repayments issue only. This will require BT to immediately remove the disputed costs with immediate regulatory clarity on our position on the disputed costs which had not been given earlier.
- 7.79 We consider that this further consultation on the period of repayments only will enable all Parties to make additional argument on why an earlier date would be justified but will not delay the implementation of this confirmation of our policy.
- 7.80 We have set out our reasons for considering that we had not provided sufficiently clear statements to industry (in particular to BT) prior to this dispute and therefore that we accept that BT had included the costs in good faith. We invite all parties to provide any further comments on repayments only by 5pm, Friday 27 February 2009.
- 7.81 Ofcom considers that its conclusion is the option that provides the greatest regulatory certainty, because it clarifies the application of BT's SMP Condition AA8, and the charges that will apply, on a forward-looking basis.

Ofcom's power to modify or withdraw a Direction

- 7.82 Both C&W and BT address, in their responses, the issue of Ofcom's power to modify or withdraw a Direction as set out at section 49 of the 2003 Act.
- 7.83 Ofcom acknowledges stakeholders' comments on this point, However, we do not think it is necessary to address the interpretation of section 49 in this decision.

Conclusion

- 7.84 Ofcom concludes that:
- i) BT is not entitled to recover through the CPS set-up charge the costs it incurs in sending the notification of transfer letter and handling the resulting inbound customer calls;

Determination to resolve a dispute about per-customer line transaction charges for CPS

- ii) BT is required to reduce the CPS set-up charge by 78p to remove the recovery of the costs it incurs in sending the notification of transfer letter and handling the resulting inbound customer calls.

7.85 Ofcom's determination is at Annex 1 below and takes effect on 16 February 2009.

Annex 1

The determination

Determination under sections 188 and 190 of the Communications Act 2003 (“the 2003 Act”) for resolving a dispute between Cable & Wireless plc (“C&W”), THUS plc (“THUS”), Gamma Telecom Ltd (“Gamma”), Opal Telecom Ltd. (“Opal”) and British Telecommunications plc (“BT”) concerning BT’s per-customer line transaction charges for Carrier Pre Selection (“CPS”)

WHEREAS

- (A) section 188(2) of the 2003 Act provides that, where Ofcom has decided pursuant to section 186(2) of the 2003 Act that it is appropriate for it to handle a dispute, Ofcom must consider the dispute and make a determination for resolving it. The determination that Ofcom makes for resolving the dispute must be notified to the parties in accordance with section 188(7) of the 2003 Act, together with a full statement of the reasons on which the determination is based, and publish so much of its determination as (having regard, in particular, to the need to preserve commercial confidentiality) they consider appropriate to publish for bringing it to the attention of the members of the public, including to the extent that Ofcom considers pursuant to section 393(2)(a) of the 2003 Act that any such disclosure is made for the purpose of facilitating the carrying out by Ofcom of any of its functions;
- (B) section 190 of the 2003 Act sets out the scope of Ofcom’s powers in resolving a dispute which may, in accordance with section 190(2) of the 2003 Act, include:
 - a) making a declaration setting out the rights and obligations of the parties to the dispute;
 - b) giving a direction fixing the terms or conditions of transactions between the parties to the dispute;
 - c) giving a direction imposing an obligation, enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by Ofcom; and
 - d) for the purpose of giving effect to a determination by Ofcom of the proper amount of a charge in respect of which amounts have been paid by one of the parties to the dispute to the other, giving a direction, enforceable by the party to whom sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment;
- (C) on 23 September 2008 C&W, on behalf of itself, THUS, Gamma and Opal (together “the CPSOs”) referred a dispute between the CPSOs and BT to Ofcom for resolution;
- (D) on 15 October 2008 Ofcom decided that it was appropriate for it to handle the dispute, and informed the parties of this decision;
- (E) on 15 October 2008 Ofcom published details of the dispute on its website and invited comments from stakeholders on the scope of the dispute;
- (F) having considered representations on the scope of the dispute, on 5 November 2008 Ofcom set the scope of the dispute to be resolved as follows:

- i) whether it is appropriate for BT to recover through the CPS set-up charge the costs it incurs in sending the notification of transfer letter and handling the resulting inbound customer calls; and, if not,
 - ii) the amount by which the CPS set-up charge should be reduced to remove the recovery of the costs BT incurs in sending the notification of transfer letter and handling the resulting inbound customer calls; and
 - iii) the date from which Ofcom's determination of points (i) and (ii) above should apply.
- (G) a non-confidential draft determination was sent to the parties on 30 December 2008 and published on Ofcom's website on 6 January 2009;
- (H) in order to resolve this dispute, Ofcom has considered (among other things) the information provided by the parties and Ofcom has further acted in accordance with its general duties set out in section 3 of, and the six Community requirements set out in section 4 of the 2003 Act;
- (I) a fuller explanation of the background to the dispute and Ofcom's reasons for making this determination are set out in the explanatory statement accompanying this determination; and

NOW, therefore, Ofcom makes, for the reasons set out in the accompanying explanatory statement, this determination for resolving this dispute:

Declaration of rights and obligations, etc

1. BT is not entitled to recover through the CPS set-up charge the costs it incurs in sending the notification of transfer letter and handling the resulting inbound customer calls;
2. BT must reduce the CPS set-up charge by 78p to remove the recovery of the costs it incurs in sending the notification of transfer letter and handling the resulting inbound customer call;

Binding nature and effective date

3. This determination is binding on BT, C&W, THUS, Gamma and Opal in accordance with section 190(8) of the 2003 Act;
4. This determination takes effect on 16 February 2009;

Interpretation

5. For the purpose of interpreting this determination
 - a) headings and titles shall be disregarded; and
 - b) the Interpretation Act 1978 shall apply as if this determination were an Act of Parliament.
6. In this determination:
 - a) **'2003 Act'** means the Communications Act 2003 (c.21);

- b) **'BT'** means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989;
- c) **'C&W'** means Cable & Wireless plc;
- d) **'CPS'** means Carrier Pre-Selection;
- e) **'CPSO'** means Carrier Pre-Selection Operator;
- f) **'CPS set-up charge'** means the "Set-Up – Switch change effected" charge that appears in the BT Carrier Price list;
- g) **'Gamma'** means Gamma Telecom Limited;
- h) **'Notification of transfer letter'** means a letter sent in line with paragraph 3.2.9 of the CPS Industry End to End Process Description;
- i) **'Ofcom'** means the Office of Communications;
- j) **'Opal'** means Opal Telecommunications Limited; and
- k) **'THUS'** means THUS plc.

Neil Buckley

Director of Investigations

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

13 February 2009

Annex 2

The SMP Conditions

- A2.1 This Annex reproduces for ease of reference those of BT's SMP Conditions that are relevant to Ofcom's consideration of this dispute.
- A2.2 The following SMP Conditions are all set out in Ofcom's statement *Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets* of 28 November 2003 (referred to throughout this document as "the Market Review"), which is published on Ofcom's website at:
http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/nwe/fixednarrowbandstatement.pdf.

Condition AA1(a)

Requirement to provide Network Access on reasonable request

AA1(a).1 Where a Third Party reasonably requests in writing Network Access, the Dominant Provider shall provide that Network Access. The Dominant Provider shall also provide such Network Access as the Director may from time to time direct.

AA1(a).2 The provision of Network Access in accordance with paragraph AA1(a).1 above shall occur as soon as it is reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as the Director may from time to time direct.

AA1(a).3 The Dominant Provider shall comply with any direction the Director may make from time to time under this Condition AA1(a).

Condition AA2

Requirement not to unduly discriminate

AA2.1 The Dominant Provider shall not unduly discriminate against particular persons or against a particular description of persons in relation to matters connected with Network Access.

AA2.2 In this Condition AA2, the Dominant Provider may be deemed to have shown undue discrimination if it unfairly favours to a material extent an activity carried on by it so as to place at a competitive disadvantage persons competing with the Dominant Provider.

Condition AA3

Basis of charges

AA3.1 Unless the Director directs otherwise from time to time, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of the Director, that each and every charge offered, payable or proposed for Network Access covered by Condition AA1(a) is reasonably derived from the costs of provision based on a forward looking long-run

incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed.

AA3.2 For the avoidance of any doubt, where the charge offered, payable or proposed for Network Access covered by Condition AA1(a) is for a service which is subject to a charge control under Condition AA4, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of the Director, that such a charge satisfies the requirements of paragraph AA3.1 above.

AA3.3 The Dominant Provider shall comply with any direction the Director may from time to time direct under this Condition AA3.

AA3.4 This Condition AA3 shall not apply to the markets set out in paragraphs 1(a)(ii) and 1(a)(v) of this Notification.

Condition AA8

Requirement to provide Carrier Pre-selection etc.

AA8.1 The Dominant Provider shall provide Carrier Pre-selection as soon as it is reasonably practicable on reasonable terms in accordance with the Carrier Pre-selection Functional Specification to any of its Subscribers upon request.

AA8.2 Pursuant to a request under paragraph AA8.1 above, the Dominant Provider shall provide Carrier Pre-selection Interconnection Facilities as soon as it is reasonably practicable on reasonable terms in accordance with the Carrier Pre-selection Functional Specification to the Pre-selected Provider. The Dominant Provider shall also provide such Carrier Pre-selection Facilities as the Director may from time to time direct.

AA8.3 The Dominant Provider shall ensure that prices and other charges imposed upon Subscribers do not constitute a disincentive to the use of Carrier Pre-selection.

AA8.4 The Dominant Provider shall ensure that charges for the provision of the respective facilities mentioned below shall be made by the Dominant Provider as follows:

- a) subject always to the requirement of reasonableness, charges shall be based on the forward looking long-run incremental costs of providing Carrier Pre-selection Facilities unless:
 - i) the Dominant Provider and the Pre-selected Provider have agreed another basis for the charges; or
 - ii) any other basis for such charges be used as directed by the Director from time to time;
- b) the Dominant Provider shall categorise its costs as falling within one of the following categories:
 - iii) Carrier Pre-selection Per Provider Set-up Costs;
 - iv) (Carrier Pre-selection Per Provider On-going Costs;

- v) Carrier Pre-selection Per Customer Line Set-up Costs; or
- vi) Carrier Pre-selection System Set-up Costs,

and, where the Dominant Provider either fails to categorise its costs in such a manner or the Director considers that any individual item of cost cannot reasonably be categorised in the manner in which the Dominant Provider has made the categorisation, the cost in question shall fall within one of the categories in sub-paragraphs (i) to (iv) above or, as the case may be, in any new category of cost, as the Director may direct;

- c) the Dominant Provider shall recover the costs for any new category of cost that the Director has directed under sub-paragraph (b) above in the manner in which the Director may direct;
- d) the Dominant Provider shall recover the costs incurred in providing Carrier Pre-selection Per Provider Set-up Facilities, Carrier Pre-selection Per Provider On-going Facilities and Carrier Pre-selection Per Customer Line Set-up Facilities by means of direct charges to Pre-selected Providers;
- e) the Dominant Provider shall recover the costs incurred in providing Carrier Pre-selection System Set-up Facilities by means of a separate surcharge on all Relevant Calls; and
- f) the Dominant Provider shall modify any of its charges for the provision of Carrier Pre-selection Facilities in the manner in which the Director may direct.

AA8.5 The Dominant Provider shall comply with any direction that the Director may make from time to time under this Condition AA8.

AA8.6 This Condition is without prejudice to the generality of the provisions in Conditions AA1(a) to AA7 above.

Annex 3

Responding to this consultation

How to respond

- A3.1 Ofcom invites written views and comments on the issues raised on repayment in paragraphs 7.30 onwards in this document, to be made **by 5pm, Friday 27 February 2009**.
- A3.2 Ofcom strongly prefers to receive responses using the online web form at [<http://www.ofcom.org.uk/consult/condocs>], as this helps us to process the responses quickly and efficiently. We would also be grateful if you could complete a response cover sheet (see Annex 5), to indicate whether or not your response includes information that you believe to be confidential. This response coversheet is incorporated into the online web form.
- A3.3 For larger consultation responses – particularly those with supporting charts, tables or other data – please email louise.marriage@ofcom.org.uk attaching your response as a Microsoft Word or pdf document, together with a consultation response coversheet.
- A3.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Louise Marriage
Competition Policy Manager
Fourth Floor
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- Fax: 020 7783 4109
- A3.5 We do not need a hard copy in addition to an electronic version. We will acknowledge receipt of responses submitted using the online web form but not otherwise.

Further information

- A3.6 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Louise Marriage on 020 7783 4333.

Confidentiality

- A3.7 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your response should be kept confidential, please specify what part of your response should be kept confidential, and why. Please also place such parts in a separate annex.

- A3.8 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A3.9 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

Next steps

- A3.10 Following the end of the consultation period, Ofcom intends to publish a further statement in March 2009.
- A3.11 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: http://www.ofcom.org.uk/static/subscribe/select_list.htm

Ofcom's consultation processes

- A3.12 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 4.
- A3.13 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A3.14 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

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

Tel: 0141 229 7401
Fax: 0141 229 7433

email vicki.nash@ofcom.org.uk

Annex 4

Ofcom's consultation principles

A4.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A4.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A4.3 We will be clear about who we are consulting, why, on what questions and for how long.

A4.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A4.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.

A4.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A4.7 If we are not able to follow one of these principles, we will explain why.

After the consultation

A4.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 5

Consultation response cover sheet

- A5.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- A5.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A5.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A5.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the Consultations section of our website at www.ofcom.org.uk/consult/.
- A5.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing Name/contact details/job title

Whole response Organisation

Part of the response If there is no separate annex, which parts?

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)