



Notification of contravention of duty to pay administrative charge

Notice served on Primus Telecommunications Limited

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NOTIFICATION TO PRIMUS TELECOMMUNICATIONS LIMITED UNDER SECTION 40 OF THE COMMUNICATIONS ACT 2003 OF CONTRAVENTION OF ITS DUTY TO PAY AN ADMINISTRATIVE CHARGE TO OFCOM UNDER SECTION 38 OF THAT ACT

Background

(A) The duty to pay an administrative charge

1. Section 38(1) of the Communications Act 2003 (the “**Act**”) imposes a statutory duty to pay an administrative charge to Ofcom. It prescribes that a person who, at any time in a charging year (within the meaning of section 38(12) of the Act¹), is a person to whom section 38 applies shall, in respect of (among other things) the network, service or facility provided or made available by him, pay to Ofcom the administrative charge that is fixed by Ofcom.

(B) Persons on whom the duty applies

2. Section 38(2) of the Act provides that section 38 applies to a person at a time if, at that time, he is providing (among other things) an electronic communications network or an electronic communications service of a description which is, at that time, designated for the purposes of section 38.
3. Section 38(11) of the Act provides that section 34 applies in relation to the making and withdrawal of a designation for the purposes of section 38 as it applies to the making and withdrawal of a designation for the purposes of section 33. Therefore, before making or withdrawing such designation, Ofcom must consult with those likely to be affected by the designation and the Secretary of State.² A designation for these purposes may be framed by reference to any such description of networks, services or facilities, or such other factors, as Ofcom thinks fit.³
4. On 6 December 2004, Ofcom consulted on the draft statement of charging principles (see further under (C) below) that Ofcom would apply in order to set out annual administrative charges and licence fees pursuant to the Act for the charging year 2005/6 and subsequent charging years.⁴ That consultation also included a draft designation pursuant to section 38 of the Act together with draft *Guidance on Relevant Activity in the Networks and Services sector*. Having considered all of the responses to that consultation, Ofcom consulted again on the draft designation and the related draft guidance on 8 February 2005 (the “**February 2005 consultation**”) primarily to propose amendments to the definition of “relevant activity” in the designation and to propose amendments to the draft guidance in light of its proposed new designation.⁵ Ofcom received no responses to the February 2005 consultation.
5. After consulting with the Secretary of State on 3 March 2005 (who had no comments on Ofcom’s proposals), Ofcom published a final statement on 31 March 2005 (the

¹ Charging year means the period of twelve months beginning with 1st April (see sub-section (12)(b)).

² More precisely, “such of the persons who, in [Ofcom’s] opinion, are likely to be affected by [the designation] as [Ofcom] think fit” – see section 34(1) as it applies by virtue of section 38(11).

³ See section 34(4) as it applies by virtue of section 38(11)

⁴ <http://www.ofcom.org.uk/consult/condocs/socp/main/>

⁵ <http://www.ofcom.org.uk/consult/condocs/designation/>

“**2005 Statement**”) containing its designation under section 38 of the Act and the guidance in accordance with the February 2005 consultation.⁶

6. Paragraph 6 of the Notice of Designation (as set out at Annex 1 to the 2005 Statement) sets out the designation in the following terms—

“6. During each Charging Year, the Electronic Communications Network, Electronic Communications Service or Associated Facility which is designated for the purposes of section 38 of the Act is any Electronic Communications Network, Electronic Communications Service or Associated Facility where the person providing that Network or Service, or making available that Associated Facility had a Relevant Turnover from Relevant Activities of £5 million or more in the last but one calendar year prior to the charging year in question. (For example, if the relevant Charging Year commences on 1 April 2007, the relevant turnover will be for the calendar year of 2005)”

7. The terms of ‘Charging Year’, ‘Relevant Activity’ and ‘Relevant Turnover’ are defined in paragraph 3 of that Notice as follows:

“3...

‘Charging Year’ means a twelve month period ending 31 March;

‘Relevant Activity’ means any of the following:

- a. the provision of Electronic Communications Services to third parties;
- b. the provision of Electronic Communications Networks, Electronic Communications Services and Network Access to Communications Providers; or
- c. the making available of Associated Facilities to Communications Providers

‘Relevant Turnover’ means turnover made from carrying on any Relevant Activity after the deduction of sales rebates, value added tax and other taxes directly related to turnover.”

8. According to paragraph 4 of that Notice, words and expressions shall have the meaning ascribed to them in the Act.⁷ For reasons set out in the 2005 Statement, the term “third parties” was one specifically adopted by Ofcom to capture within the meaning of ‘Relevant Activity’ services such as the supply of bespoke business services. Therefore, the guidance provided in order to assist those liable to pay fees on the definition of “relevant activity” set out in Annex 2 to the 2005 Statement explains (at paragraphs 1.15 and 1.16) that:

“1.15 Provision of an ECS to a third party would include provision to business customers of a wide variety of types where they are provided with electronic communication services.

⁶ <http://www.ofcom.org.uk/consult/condocs/designation/statement/>

⁷ In particular, ‘Associated Facilities’, ‘Communications Providers’, ‘Electronic Communications Networks’, ‘Electronic Communications Services’, ‘Network Access’ and ‘provision’.

1.16 It would also include the provision of electronic communications services to groups such as members of a prison or tenants of a landlord. However, such services would only be caught if the Relevant Turnover from them exceeds the threshold in the designation, currently £5m.”

9. The statutory scheme envisages that Ofcom may not, from time to time, know the identity of each and every person falling within its designation. This is shown in the exception to the normal rule that a demand for information under section 135 of the Act in relation to ascertaining or verifying charges payable by a person under section 38 may take the form of a general demand, which need not be served on the person in question but instead may be published in an appropriate manner (see section 137(6)).
10. The general demand in relation to the Charging Year 2006/2007 is set out in **Annex 1** to the explanatory statement accompanying this Notification.
11. Pursuant to that general demand, Primus certified that its ‘Relevant Turnover’ was [~~8~~] for the Charging Year 2006/2007 in its statement signed and dated 11 November 2005, which statement is set out in **Annex 2** to the explanatory statement accompanying this Notification.

(C) The fixed administrative charge

12. Section 38(3) of the Act provides that:

“(3) OFCOM are not to fix the administrative charge for a charging year unless—

(a) at the time the charge is fixed there is in force a statement by OFCOM of the principles that OFCOM are proposing to apply in fixing charges under this section for that year; and

(b) the charge is fixed in accordance with those charging principles.”

13. Section 38 then goes on to prescribe what must be contained in Ofcom’s charging principles, particularly as regards the recovery of the estimated annual cost to Ofcom of carrying out its specified functions.
14. On 8 February 2005, Ofcom published its current Statement of Charging Principles, which principles are intended to apply to any charging year until such time they are revised.⁸ Those Principles explain, in summary (at paragraph 1.5), that in the Networks and Services sector (except for administrative charges for the electronic communications code) Ofcom charge designated providers a percentage of their relevant turnover by way of a tariff calculation, namely:

“1.5 The tariff applicable will be a percentage of turnover from relevant activities as set out in the tariff tables which will be published on or before 31st March for the following charging year;”

⁸ http://www.ofcom.org.uk/consult/condocs/socp/statement/charging_principles.pdf

15. On 31 March 2006, Ofcom published its Tariff Table for 2006/07 applicable to the Charging Year 2006/2007.⁹ Section 3 of that document fixes the administrative charges for the Networks and Services sector as follows:

“3.1 Network and Services administrative charges are payable by all Relevant Persons with a Relevant Turnover greater than £5m in the calendar year ended 31 December 2004.

3.2 Administrative charges are calculated by applying a percentage tariff to the Relevant Turnover. Where Relevant Turnover falls within a band, as set out in Table 3 below, Ofcom will use the lower figure of the turnover band to calculate the administrative charge payable.

3.3 The administration charge is based on 0.0654% of relevant turnover in the calendar year ended 31 December 2004.

Table 3: Networks and Services Administrative Charges

Bands		Relevant Turnover (£)	Fee Payable (£)
Bottom (£)	Top (£)		
0	5,000,000	0	-
5,000,000	10,000,000	5,000,000	3,270
10,000,000	25,000,000	10,000,000	6,540
25,000,000	50,000,000	25,000,000	16,350
50,000,000	75,000,000	50,000,000	32,700
75,000,000	100,000,000	75,000,000	49,050
100,000,000	150,000,000	100,000,000	65,400
150,000,000	200,000,000	150,000,000	98,100
200,000,000	300,000,000	200,000,000	130,800
300,000,000	400,000,000	300,000,000	196,200
400,000,000	500,000,000	400,000,000	261,600
500,000,000	600,000,000	500,000,000	327,000
600,000,000	750,000,000	600,000,000	392,400
750,000,000	1,000,000,000	750,000,000	490,500
Above £1,000,000,000		Actual Relevant Turnover	0.0654%

Monthly Payment

3.4 If the annual administrative charge as calculated above is more than £75,000, Ofcom will allow monthly payment of the fee.”

⁹ <http://www.ofcom.org.uk/about/accoun/tariff/0607/tariff/0607.pdf>

16. The band in Table 3 above in which Primus's self certified Relevant Turnover referred to in **paragraph 11** above falls is the band of [X] to [X] for which the fee payable is [X]. On that basis, Ofcom invoiced in April 2006 Primus (a copy of which is set out in **Annex 3** to the explanatory statement accompanying this Notification) for [X]. Payment was due with immediate effect.
17. On 7 July 2006 Primus wrote to Ofcom saying that it considered it fell under a lower charging band because the turnover figure it had self certified to Ofcom was incorrect and that it had therefore sent Ofcom a cheque in the sum of [X] corresponding in its view to the fee due in the band in question.
18. Following correspondence between Ofcom and Primus (including Primus's responses to Ofcom's two statutory notices for information under section 135 of the Act, which are set out in **Annexes 4 & 5** to the explanatory statement accompanying this Notification), it appears to Ofcom that Primus's main ground for contesting the invoiced fee is that its Relevant Turnover should not include turnover which Primus receives for terminating traffic overseas.

(D) Enforcement of non-payment of charges

19. Sections 40 to 43 of the Act enable Ofcom to take enforcement action, including the imposition of penalties, against persons contravening their duties to pay administrative charges to Ofcom. That process begins with Ofcom giving a person a Notification under section 40 of the Act where Ofcom determines that there are reasonable grounds for believing that a person is in contravention of a requirement to pay an administrative charge fixed by Ofcom under section 38 of the Act.

Determination

20. Ofcom hereby determines under section 40 of the Act that there are reasonable grounds for believing that Primus is in contravention of a requirement to pay an administrative charge fixed by Ofcom for the Charging Year 2006/2007 under section 38 of the Act.
21. The reasons for this Determination are set out in the accompanying explanatory statement to this Notification. Specifically, on the information presently before Ofcom, it remains Ofcom's view that the amount of [X] has been correctly fixed according to and under the statutory scheme set out above. Ofcom has considered, and does not accept, Primus's arguments concerning the calculation of its Relevant Turnover particularly as Primus's case involves placing a specific construction on the uncomplicated and easily understandable statutory language. Therefore, as Primus has only paid to Ofcom the sum of [X], Ofcom has decided to make this Determination.

Action required by Primus

22. Primus must pay by cleared cheque or BACS payment to Ofcom the amount outstanding in the sum of [X] for the administrative charge due for the Charging Year 2006/2007 **by no later than 5pm on 17 August 2007 (the "deadline")**.
23. Should Primus not pay to Ofcom the whole of the above-mentioned amount outstanding by the deadline, Ofcom may impose a penalty on Primus under section 41 of the Act. In addition, Ofcom may bring proceedings (whether before or after the imposition of any penalty under section 41) for the recovery of the whole of the amount due to Ofcom under section 38(1) of the Act.

Representations

24. Primus must make any representations to Ofcom about this determination **by no later than 5pm on 17 August 2007**. Such representations shall be made by Primus in writing either:

- a. by sending an electronic copy via email to david.stewart@ofcom.org.uk and ruth.gibson@ofcom.org.uk; or
- b. by sending them by recorded post; or
- c. by delivering them in person;

to David Stewart, Competition Group, 4th Floor, Ofcom, Riverside House, 2a Southwark Bridge Road, London SE1 9HA.

Interpretation

25. In this Notification:

- a. except as otherwise defined in paragraph 26 below of this Notification, words or expressions used in this Notification shall have the same meaning as they have been ascribed in, under or for the purposes of the Act;
- b. headings and titles shall be disregarded; and
- c. the Interpretation Act 1978 shall apply as if this Notification were an Act of Parliament.

26. In this Notification—

- a. “**Act**” means the Communications Act 2003 (c.21);
- b. “**Charging Year 2006/2007**” means the year commencing on 1 April 2006 and ending on 31 March 2007 in respect of Relevant Turnover for the year ending on 31 December 2004;
- c. “**Ofcom**” means the Office of Communications; and
- d. “**Primus**” means Primus Telecommunications Limited, whose registered company number is 02937312.

DAVID STEWART

Director of Investigations

A person duly authorised in accordance with paragraph 18 of the Schedule to the Office of Communications Act 2002

16 July 2007

Explanatory Statement - Section 1

Summary

- 1.1 Ofcom levies charges on (among others) communications providers, to recover Ofcom's costs of regulating the communications sectors. Ofcom sets these charges by apportioning costs appropriately between the different sectors regulated by Ofcom on an annual basis.
- 1.2 As part of that process, Ofcom assesses its costs, and decides the appropriate percentage of relevant turnover for different bands of turnover. Ofcom then publishes a tariff table each year listing the charge for each band.
- 1.3 Ofcom requires communications providers to declare their relevant turnover for the previous year through a process of statutory self-certification.
- 1.4 On 11 November 2005, Primus Telecommunications Limited ("**Primus**") provided a certificate signed by its UK Financial Controller stating Primus's relevant turnover for the year ended 31 December 2004. On that basis, Ofcom issued an invoice to Primus on 21 April 2006 for [X] in accordance with the tariff tables published earlier.
- 1.5 Primus contacted Ofcom on 7 July 2006 stating that it had "incorrectly stated" its relevant turnover, and so was submitting a cheque for [X], which was less than the amount invoiced by Ofcom. Ofcom stated in an email to Primus on 7 July 2006 that it considered that the full amount remained due.
- 1.6 The outstanding amount of [X] has still not been paid by Primus. Therefore, after considering (but rejecting) the legal issue raised by Primus for its refusal to pay the charge, Ofcom has determined that there are reasonable grounds for believing that Primus is in contravention of its duty under section 38 of the Communications Act 2003 (the "**Act**") to pay the administrative charge fixed by Ofcom.
- 1.7 Primus has until **5pm on 17 August 2007** to make representations about this notified determination and to pay the amount outstanding. Should Primus not pay to Ofcom the whole of the above-mentioned amount outstanding by the said deadline, Ofcom may impose a (financial) penalty on Primus. In addition, Ofcom may bring proceedings (whether before or after the imposition of any penalty) for the recovery of the whole of the amount due to Ofcom.

Section 2

Ofcom's investigation

Introduction

- 2.1 **This Section** sets out certain legal, regulatory and factual background relevant to Ofcom's investigation of Primus's failure to pay the whole administrative charge in question.
- 2.2 In particular, the structure of **this Section** is as follows:
- 2.2.1 matters concerning the statutory scheme for Ofcom's administrative charging;
 - 2.2.2 a broad outline of the nature of Primus's business relevant in this context; and
 - 2.2.3 a summary of the communications between Ofcom and Primus in order to bring out Primus's reasons for refusing to pay in full the administrative charges invoiced by Ofcom.

The statutory scheme for administrative charges

General

- 2.3 Ofcom is funded in part by administrative charges levied on certain designated providers of (among others) associated facilities, electronic communications networks and services. Ofcom is required by the Act to raise income from each of the sectors it regulates such that it covers the estimated costs to be incurred by Ofcom in regulating that sector together with a proper apportionment of Ofcom's 'common costs' to each of those sectors.
- 2.4 Ofcom's enabling powers relating to the fixing and collection of administrative charges for the Networks and Services sector are found in sections 38 to 44 of the Act. The main provisions comprised in this statutory scheme (together with related publications by Ofcom) are referred to in the Notification that this explanatory statement accompanies. This explanatory statement should be read in conjunction with that Notification, which together comprises Ofcom's decision for its Determination.
- 2.5 However, Ofcom sets out below further background information, particularly to address and put in context the reasons given by Primus for its refusal to pay the full amount invoiced (i.e. [X]) by Ofcom for the administrative charge it should pay for the charging year beginning on 1 April 2006 and ending on 31 March 2007 (the "**Charging Year 2006/2007**") based on the self certified Relevant Turnover by Primus for the year ending 31 December 2004.
- 2.6 To start with, it is appropriate to summarise certain aspects of the EC regulatory framework that the Act in parts seeks to implement. This is because Primus argues that a particular provision of the Framework Directive¹⁰ supports its view that Ofcom

¹⁰ Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services

should not in the calculation of Relevant Turnover include turnover which Primus receives for terminating traffic overseas. Ofcom's response to this specific point is set out in **Section 3** of this explanatory statement.

The EC regulatory framework

- 2.7 A package of directives was adopted in March 2002 to establish a harmonised framework for the regulation of electronic communications services ("**ECSSs**"), electronic communications networks ("**ECNs**"), associated facilities and associated services.
- 2.8 This single regulatory framework for all transmission networks and services in the converging telecommunications, media, and information technology sectors was set out in the following main¹¹ new EC harmonising directives which are designed to achieve that framework:
- Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (the "**Framework Directive**");
 - Directive 2002/19/EC of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (the "**Access Directive**");
 - Directive 2002/20/EC of 7 March 2002 on the authorisation of electronic communications networks and services (the "**Authorisation Directive**"); and
 - Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (the "**Universal Service Directive**").
- 2.9 These directives entered into force on 24 April 2003, when they were published in the Official Journal of the European Communities. However, Member States were required to transpose them into domestic law first by 24 July 2003 and to then apply these measures from 25 July 2003. On 17 July 2003, the Act received Royal Assent and its provisions (particularly in its Part 2) implement a significant proportion of this new regulatory EC package in the UK.
- 2.10 In short, in order to create harmonised regulation across the Community and to reducing entry barriers and foster prospects for effective competition to the benefit of consumers, the Framework Directive provides the overall structure for the new regulatory regime and sets out fundamental rules and objectives which read across the new harmonising directives. In particular, under Article 8 of the Framework Directive, national regulatory authorities ("**NRAs**"), such as Ofcom, are in effect required to take all reasonable measures aimed at achieving three key policy objectives in carrying out the regulatory tasks specified in the new harmonising directives, namely the promotion of competition, the development of the internal market and the promotion of the interests of the citizens of the European Union.

¹¹ Two additional directives were adopted later in 2002 to accompany these main directives: (1) Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector; and (2) the Commission Directive 2002/77/EC on liberalising competition in the markets for ECNs and ECSSs, which replaced and repealed a series of liberalising measures taken since the late 1980s.

- 2.11 The Framework Directive also lays down specific tasks of NRAs, such as the management of radio spectrum and telephone numbers. It further requires that Member States impose certain accounting separation and financial reporting obligations on specified undertakings. In particular, Article 13 of the Framework Directive (to which Primus refers in support of its argument, see below) provides:

“Article 13

Accounting separation and financial reports

1. Member States shall require undertakings providing public communications networks or publicly available electronic communications services which have special or exclusive rights for the provision of services in other sectors in the same or another Member State to:

(a) keep separate accounts for the activities associated with the provision of electronic communications networks or services, to the extent that would be required if these activities were carried out by legally independent companies, so as to identify all elements of cost and revenue, with the basis of their calculation and the detailed attribution methods used, related to their activities associated with the provision of electronic communications networks or services including an itemised breakdown of fixed asset and structural costs, or

(b) have structural separation for the activities associated with the provision of electronic communications networks or services.

Member States may choose not to apply the requirements referred to in the first subparagraph to undertakings the annual turnover of which in activities associated with electronic communications networks or services in the Member States is less than EUR 50 million.

2. Where undertakings providing public communications networks or publicly available electronic communications services are not subject to the requirements of company law and do not satisfy the small and medium-sized enterprise criteria of Community law accounting rules, their financial reports shall be drawn up and submitted to independent audit and published. The audit shall be carried out in accordance with the relevant Community and national rules.

This requirement shall also apply to the separate accounts required under paragraph 1(a).”

- 2.12 In the UK, that Article 13 has been implemented in the Act by requiring Ofcom to impose a privileged supplier condition under section 45(6) and 46(3) and (4) of the Act. The duty to set such condition (together with its specified subject-matter) is set out in section 77 of the Act.
- 2.13 Essentially, Ofcom must, where a public electronic communications provider enjoys *special or exclusive rights* in relation to the provision of services in other sectors (other than the provision of associated facilities), set such privileged supplier conditions as it thinks fit (unless that provider has an annual turnover in relation to all

of his communications activities of less than €50 million, in which case Ofcom is not obliged to impose a condition, but may do so if they wish). Such conditions can require such providers to keep separate accounts (all of which should be audited and published), or to have structural separation between different activities. At present, there is no operator in the UK on which Ofcom has imposed such conditions.

- 2.14 The Authorisation Directive establishes a new system whereby any person will be generally authorised to provide ECNs and/or ECSs without prior approval. Authorisation systems, such as individual or class licences, involving explicit decisions or administrative acts by NRAs permitted under the previous Licensing Directive are now prohibited.
- 2.15 Despite the fact that above-mentioned providers must be generally authorised, NRAs may impose on them certain obligations. However, under Article 6 of the Authorisation Directive, such obligations must either fall within the maximum list of conditions specified in the Annex to the Directive or constitute specific obligations permitted under the directives. The latter concern obligations specified either in the Access Directive, e.g. where providers have been designated as having significant market power (“**SMP**”), or obligations imposed on those designated to provide universal service under the USD.
- 2.16 The following permitted condition 2 (of Part A), which are set out in the said Annex’s maximum list, is particularly relevant for administrative charges:

“ANNEX

The conditions listed in this Annex provide the maximum list of conditions which may be attached to general authorisations (Part A), rights to use radio frequencies (Part B) and rights to use numbers (Part C) as referred to in Article 6(1) and Article 11(1)(a).

A. Conditions which may be attached to a general authorisation

...

2. Administrative charges in accordance with Article 12 of this Directive.

...”

- 2.17 Article 12 to which that condition 2 refers provides:

“Article 12

Administrative charges

1. Any administrative charges imposed on undertakings providing a service or a network under the general authorisation or to whom a right of use has been granted shall:

(a) in total, cover only the administrative costs which will be incurred in the management, control and enforcement of the general authorisation scheme and of rights of use and of specific obligations as referred to in Article 6(2), which may include costs for international cooperation, harmonisation and standardisation, market

analysis, monitoring compliance and other market control, as well as regulatory work involving preparation and enforcement of secondary legislation and administrative decisions, such as decisions on access and interconnection; and

(b) be imposed upon the individual undertakings in an objective, transparent and proportionate manner which minimises additional administrative costs and attendant charges.

2. Where national regulatory authorities impose administrative charges, they shall publish a yearly overview of their administrative costs and of the total sum of the charges collected. In the light of the difference between the total sum of the charges and the administrative costs, appropriate adjustments shall be made.”

- 2.18 The Access Directive mainly concerns the regulation of access to, and interconnection of, ECNs and associated facilities. It therefore establishes rights and obligations for operators and for undertakings seeking interconnection or access to their networks or associated facilities.
- 2.19 Finally, the Universal Service Directive establishes certain rights of end-users and the corresponding obligations on undertakings providing publicly available electronic communications networks and services, including the provision of a minimum set of services of specified quality to which all end-users have access, at an affordable price in the light of specific national conditions, without distorting competition (so-called ‘universal services’). It also sets out obligations with regard to the provision of certain mandatory services such as the retail provision of leased lines and carrier selection and carrier pre-selection (“**CPS**”).

Relevant definitions in the Act

- 2.20 The duty to pay an administrative charge fixed by Ofcom for the Charging Year 2006/2007 depends on whether the person in question (i.e. Primus) carries on a ‘Relevant Activity’ and, if so, that person must pay the relevant tariff corresponding to the band of turnover (if greater than £5m) made from carrying on any ‘Relevant Activity’ after the deduction of sales rebates, value added tax and other taxes directly related to turnover (i.e. the ‘Relevant Turnover’).
- 2.21 Given that words and expressions used in the definition of ‘Relevant Activity’ shall have the meaning ascribed to them in the Act¹², it is appropriate to set out in full below those definitions that appear of particular importance to Primus.
- 2.22 To start with, it is to be recalled that there are three broad categories of ‘Relevant Activity’. They are:

Category 1: *the provision of Electronic Communications Services to third parties;*

Category 2: *the provision of Electronic Communications Networks, Electronic Communications Services and Network Access to Communications Providers; or*

Category 3: *the making available of Associated Facilities to Communications Providers.*

¹² See paragraph 4 of Ofcom’s Notice of Designation under section 38 of the Act, referred to in the Notification that this explanatory statement accompanies.

2.23 While the term “third parties” was one specifically adopted by Ofcom to capture within the meaning of ‘Relevant Activity’ services such as the supply of bespoke business (and therefore not defined in the Act), the Act defines the following: ‘associated facilities’, ‘communications providers’, ‘electronic communications networks’, ‘electronic communications services’, ‘network access’ and ‘provision’. (The guidance on the definition of “relevant activity” annexed to Ofcom’s 2005 Statement, as referred to in the Notification, then goes on to provide additional clarity about these concepts.)

2.24 As seen above, the recipients of services falling within Categories 2 and 3 must be ‘communications providers’. That expression is defined under section 405(1) of the Act as follows:

““communications provider” means a person who (within the meaning of section 32(4)) provides an electronic communications network or an electronic communications service;”

2.25 The word “person” has a broad meaning and includes a body of persons corporate or unincorporated.¹³ Further, the Act¹⁴ makes clear that the word “provides” should be considered consistent with the following statements:

“... ”

(a) references to the provision of an electronic communications network include references to its establishment, maintenance or operation;

(b) references, where one or more persons are employed or engaged to provide the network or service under the direction or control of another person, to the person by whom an electronic communications network or electronic communications service is provided are confined to references to that other person; and

(c) references, where one or more persons are employed or engaged to make facilities available under the direction or control of another person, to the person by whom any associated facilities are made available are confined to references to that other person.”

2.26 Section 32(5) goes on to clarify that:

“(5) Paragraphs (a) and (b) of subsection (4) apply in relation to references in subsection (1) to the provision of a transmission system as they apply in relation to references in this Act to the provision of an electronic communications network.”

2.27 In the Act¹⁵, the expressions ECN and ECS are defined, respectively, as follows:

¹³ See Schedule 1 to the Interpretation Act 1978.

¹⁴ Section 32(4) of the Act. See also under section 405(1) which makes it plain that: “In this Act, except in so far as the context otherwise requires—...“provide” and cognate expressions, in relation to an electronic communications network, electronic communications service or associated facilities, are to be construed in accordance with section 32(4);”.

¹⁵ Section 32 of the Act. See also under section 405(1) which makes it plain that: “In this Act, except in so far as the context otherwise requires—...“electronic communications network” and “electronic communications service” have the meanings given by section 32;”.

“(1) In this Act “electronic communications network” means—

(a) a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description; and

(b) such of the following as are used, by the person providing the system and in association with it, for the conveyance of the signals—

(i) apparatus comprised in the system;

(ii) apparatus used for the switching or routing of the signals; and

(iii) software and stored data.

(2) In this Act “electronic communications service” means a service consisting in, or having as its principal feature, the conveyance by means of an electronic communications network of signals, except in so far as it is a content service.”

2.28 Those definitions should be read together with the following expressions (which are also defined in section 32 of the Act):

“(6) The reference in subsection (1) to a transmission system includes a reference to a transmission system consisting of no more than a transmitter used for the conveyance of signals.

(7) In subsection (2) “a content service” means so much of any service as consists in one or both of the following—

(a) the provision of material with a view to its being comprised in signals conveyed by means of an electronic communications network;

(b) the exercise of editorial control over the contents of signals conveyed by means of such a network.

(8) In this section references to the conveyance of signals include references to the transmission or routing of signals or of parts of signals and to the broadcasting of signals for general reception.

(9) For the purposes of this section the cases in which software and stored data are to be taken as being used for a particular purpose include cases in which they—

(a) have been installed or stored in order to be used for that purpose; and

(b) are available to be so used.

(10) In this section “signal” includes—

(a) anything comprising speech, music, sounds, visual images or communications or data of any description; and

(b) signals serving for the impartation of anything between persons, between a person and a thing or between things, or for the actuation or control of apparatus.”

2.29 In addition, the expression “associated facility” is also defined¹⁶ under section 32:

“(3) In this Act “associated facility” means a facility which—

(a) is available for use in association with the use of an electronic communications network or electronic communications service (whether or not one provided by the person making the facility available); and

(b) is so available for the purpose of—

(i) making the provision of that network or service possible;

(ii) making possible the provision of other services provided by means of that network or service; or

(iii) supporting the provision of such other services.”

2.30 It is significant that these expressions do not go on to specify to whom a communications provider shall provide its services. This is to be contrasted with other expressions used in the Act, such as “public communications provider”, which are used in or under the Act to draw regulatory boundaries between, for instance, public and private networks and services.¹⁷ Even with regard to the expression “public communications provider”, there is no express limitation in the Act’s definition that it applies only to members of the public *in the UK* (or similar). The only requirement in relation to that latter definition is that the members of the public (which is central to it being a ‘public’ ECN or ECS) are ‘customers’.¹⁸ The latter expression is, in turn, defined under section 405(1) as:

““customers”, in relation to a communications provider or a person who makes an associated facility available, means the following (including any of them whose use or potential use of the network, service or facility is for the purposes of, or in connection with, a business)—

¹⁶ See under section 405(1) which makes it plain that: “In this Act, except in so far as the context otherwise requires—...“associated facility” has the meaning given by section 32;”.

¹⁷ See under section 151(1) which makes it plain that: “In this Chapter [i.e. Chapter 1 of Part 2]—...” “public communications provider” means—(a) a provider of a public electronic communications network; (b) a provider of a public electronic communications service; or (c) a person who makes available facilities that are associated facilities by reference to a public electronic communications network or a public electronic communications service;”. The expressions “public electronic communications network” and “public electronic communications service” being defined, respectively, as follows under that section: “In this Chapter [i.e. Chapter 1 of Part 2]—...“public electronic communications network” means an electronic communications network provided wholly or mainly for the purpose of making electronic communications services available to members of the public;...“public electronic communications service” means any electronic communications service that is provided so as to be available for use by members of the public;”.

¹⁸ See under section 151(9) which makes it plain that: “For the purposes of this section a service is made available to members of the public if members of the public are customers, in respect of that service, of the provider of that service.”

(a) the persons to whom the network, service or facility is provided or made available in the course of any business carried on as such by the provider or person who makes it available;

(b) the persons to whom the communications provider or person making the facility available is seeking to secure that the network, service or facility is so provided or made available;

(c) the persons who wish to be so provided with the network or service, or to have the facility so made available, or who are likely to seek to become persons to whom the network, service or facility is so provided or made available;”

2.31 In defining “Relevant Activity”, Ofcom decided expressly against using the expression “public communications provider” and deliberately chose instead to use the wider term of “third parties”.¹⁹

2.32 Finally, as seen from **Category 2** above, the following definitions under section 405(2) to (4) of the Act of “interconnection” and “network access” are:

“(2) In this Chapter references to interconnection are references to the linking (whether directly or indirectly by physical or logical means, or by a combination of physical and logical means) of one public electronic communications network to another for the purpose of enabling the persons using one of them to be able—

(a) to communicate with users of the other one; or

(b) to make use of services provided by means of the other one (whether by the provider of that network or by another person).

(3) In this Chapter references to network access are references to—

(a) interconnection of public electronic communications networks; or

(b) any services, facilities or arrangements which—

(i) are not comprised in interconnection; but

(ii) are services, facilities or arrangements by means of which a communications provider or person making available associated facilities is able, for the purposes of the provision of an electronic communications service (whether by him or by another), to make use of anything mentioned in subsection (4);

and references to providing network access include references to providing any such services, making available any such facilities or entering into any such arrangements.

(4) The things referred to in subsection (3)(b) are—

¹⁹ See Ofcom’s 2005 Statement, as referred to in paragraph 5 of the Notification that this explanatory statement accompanies.

- (a) any electronic communications network or electronic communications service provided by another communications provider;
- (b) any apparatus comprised in such a network or used for the purposes of such a network or service;
- (c) any facilities made available by another that are associated facilities by reference to any network or service (whether one provided by that provider or by another);
- (d) any other services or facilities which are provided or made available by another person and are capable of being used for the provision of an electronic communications service.”

Nature of Primus’s business

- 2.33 Primus is a UK registered limited company²⁰ which offers a range of telecommunications services, including:
- 2.33.1 wholesale carrier services, with both UK and non-UK based customers and suppliers;
 - 2.33.2 fixed line and mobile services provided to both UK and non-UK based consumers and businesses. Fixed line services include CPS, prepaid and post-paid services; and
 - 2.33.3 calling card services, with both UK and non-UK based customers and suppliers.²¹

Primus’s reasons for refusing to pay in full the invoiced administrative charges

Chronology of events

Primus’s self certificated turnover and Ofcom’s corresponding invoice

- 2.34 In approximately October/November 2005, Ofcom issued its general demand for information requiring relevant communications providers (including Primus) to provide and certify their ‘Relevant Turnover’ for the Charging Year 2006/2007. A copy is provided in **Annex 1** to this explanatory statement.
- 2.35 On 11 November 2005 Primus submitted a ‘Statement of Relevant Turnover for the year ending 31 December 2004’ signed by Primus’s UK Financial Controller, [X]. That Statement is set out in full at **Annex 2** to this explanatory statement. The total ‘Relevant Turnover’ for Primus’s UK group was certified as follows under the column for ‘Turnover from the provision of Electronic Communications Networks’:

“Primus Telecommunications Ltd	[X]
Telegroup UK Ltd	[X]

²⁰ Company registration number 2937312.

²¹ Letter from Primus to Ofcom, dated 7 March 2007 in response to a notice from Ofcom under section 135 of the Act.

[X]”

- 2.36 Ofcom estimated its costs that were recoverable as administrative charges for 2006/07, and set the percentage of fees payable for different levels of relevant turnover, based on the completed and returned certificates of Relevant Turnover received from communications providers, including Primus.
- 2.37 As explained in the Notification that this explanatory statement accompanies, Ofcom published on 31 March 2006 its Tariff Table for its administrative charges for the Charging Year 2006/2007.
- 2.38 On the basis of the Statement of Relevant Turnover provided by Primus on 11 November 2005, Ofcom issued an invoice on 21 April 2006 to Primus for an administration fee of [X] for the Charging Year 2006/2007 (copy attached at **Annex 3**).

Primus’s subsequent objections to paying the full invoiced amount

- 2.39 On 7 July 2006 [X] (Primus’s In-House Commercial Lawyer), emailed Ofcom stating:
- “Further to our recent call I understand that Primus UK considers it now falls under a lower charging band which attracts a charge of [X] because the previous revenue figures were incorrectly stated by Primus UK. Therefore a cheque for [X] has been sent to Ofcom.”
- 2.40 Later on 7 July 2006 Tracey Reay (Ofcom’s Head of Tariffing & Income Analysis) responded by email to [X] at Primus stating:
- “I am not aware of the call you are referring to as we have not discussed you falling into a lower bracket and have only had [a] discussion on the definition of revenue to be included. The last conversation we had was that you were to send a document to highlight particular issues you wished to raise and to date I have not received this.
- I also explained that regardless of this outcome the current invoice for [X] [sic] is valid and you are obliged to pay this amount in full, as you are aware this is based on the return signed to be correct by [X] [sic] in November 2005. On this basis I am informing our accounts receivable team that the amount owing is [X] [sic] and they will follow our normal process to recover these monies in full.”
- 2.41 On 10 July 2006 Ofcom received a cheque for [X] from Primus.
- 2.42 On 14 August 2006 Ruth Gibson (an investigations manager at Ofcom) telephoned [X] and left a voicemail message explaining that the matter had been passed from Ofcom’s finance department to Ofcom’s Investigations team to pursue this case as an enforcement matter. Following a further exchange of voicemail messages on 15 and 16 August 2006, Ruth Gibson emailed [X] on 17 August 2006 stating:
- “...Briefly, and as explained in my first message, the issues relating to the administrative charges due from Primus have been passed to me to resolve.

As you may be aware, there is a formal process under the Communications Act 2003 for this. Although Ofcom will shortly write to Primus under s135 of the Communications Act to request information (so that we understand why Primus has not paid the invoice in full), it would be very helpful to have an initial chat with you first.”

2.43 On 22 August 2006 [X] spoke to Ruth Gibson on the telephone. He stated that Primus considered that its turnover relating to call traffic which terminated overseas was not ‘Relevant Turnover’ for the purposes of Ofcom’s administration charges. However, [X] did not suggest that such telecommunications traffic would not otherwise fall within the meaning of ‘Relevant Turnover’.

2.44 On 24 August 2006 [X] sent an email to Ruth Gibson to confirm the substance of their conversation on 22 August. His e-mail also stated:

“...please find attached the example I mentioned which has been produced for January 2005. This example shows the proportion of inbound revenue with the corresponding outbound termination trend, and based on this, [X] % of revenue generated took overseas outbound termination, with [X] % being terminated domestically.”

The attachment to [X] email was an Excel workbook with a number of spreadsheets which are too large to reproduce here. However, the “Revenue Summary” states:

Revenue	Termination	Revenue £
Domestic	Domestic	[X]
Domestic	Overseas	[X]
Overseas	Domestic	[X]
Overseas	Overseas	[X]
Grand Total		[X]

Percentage revenue where outbound leg is terminated overseas [X]
Percentage revenue where outbound leg is terminated domestically [X]

The “Outbound Minutes Summary” states:

Location	Data		
	Calls	Minutes	
Domestic	[X]	[X]	[X]
Overseas	[X]	[X]	[X]
Grand Total	[X]	[X]	

Based on outbound traffic usage, [X] of total traffic is terminated to overseas based carriers

2.45 On 25 August 2006 Ofcom issued its first notice under section 135 of the Act (the “1st Notice”) to Primus by both email and special delivery requesting Primus to “[e]xplain in writing why the administration charge is disputed” and requiring Primus to provide the specified information to Ofcom by noon on 11 September 2006.

2.46 On 8 September 2006 [X] at Primus wrote to David Stewart (Ofcom's Director of Investigations) in response to the 1st Notice. In summary (see **Annex 4** to this explanatory statement for the full response), Primus submitted that:

- Ofcom's general demand for information is misleading and may lead to errors (as it alleges happened in this case where Primus, as an international company, considers that its turnover has been mis-stated) because the definition of 'Relevant Activity' contains "...no express geographical limitation to the UK, with for instance the guidance stating at section 1.3.b) 'the provision of electronic networks...to communications providers'";
- when the definition of 'Relevant Activity' is read together with Ofcom's related guidance that states (at section 1.19) that "it is highly likely that telecommunications systems which have been run under licences will be viewed as ECNs", section 1.3.b) above should be read as 'Relevant Activity' only capturing an ECN if it is provided in the UK; and
- "[i]n summary then the Relevant Turnover say on a wholesale basis can only be that turnover where the outbound leg is terminated domestically to an ECN in the UK. The Relevant Turnover should not include turnover which say Primus receives for terminating wholesale traffic to ECNs overseas. For an example of the impact of this on the Primus turnover please refer to the Primus email to Ofcom dated 24 August 2006."

2.47 On 27 October 2006 Ofcom's Ruth Gibson emailed [X] at Primus explaining that Ofcom's consideration of the issue was continuing. Similar updates were provided to Primus by telephone over the following couple of months.

2.48 On 22 February 2007 Ofcom issued a further second notice under section 135 of the Act (the "**2nd Notice**") to Primus requiring Primus to provide the specified information to Ofcom by 5pm on 5 March 2007.²² The 2nd notice required Primus to:

"...

1. Describe in writing all of the activities of Primus giving rise to turnover in respect of which the administrative charge is disputed; and

2. For each such activity, explain with reference to the guidelines on the definition of "relevant activity" for the purposes of administrative charging issued by Ofcom on 31 March 2005 why Primus believes that the activity is not a Relevant Activity as defined in the notice of designation under section 38 and 34 of the Communications Act 2003 dated 31 March 2005."

2.49 On 7 March 2007 [X] at Primus wrote to David Stewart (Ofcom's Director of Investigations) in response to the 2nd Notice. In summary (see **Annex 5** to this explanatory statement for the full response), Primus made the following points:

- Primus confirmed that the disputed turnover relates to the non-UK termination aspect of its activities set out in **paragraph 2.33** above with the clarification that for each of the three main services (i.e. (i) Wholesale Carrier; (ii) Fixed

²² Primus was sent on 15 February 2007 the 2nd Notice in draft form for its comments.

line/Mobile; and (iii) Calling Cards) the traffic is terminated in the UK and internationally;

- Primus reiterated its view as stated in its letter dated 8 September 2006 responding to the 1st Notice that “the definition of ‘Relevant Activity’ is misleading because it does not make it clear that the ECN is that provided in the UK: and therefore that the Relevant Turnover can only be that Turnover where the outbound leg is terminated domestically to an ECN in the UK. The Relevant Turnover should not include turnover which Primus receives for terminating traffic overseas.”;
- Primus relies on the final paragraph of Article 13.1 of the Framework Directive to state that it “...clearly requires Member States to consider the turnover of activities associated with electronic communications networks or services in the Member States. Primus believes that this supports its view that Ofcom should not in the calculation of Relevant Turnover include turnover which Primus receives for terminating traffic overseas.”; and
- Primus suggests that Ofcom’s guidelines “clearly contemplate that Ofcom should only be concerned with the turnover of activities associated with electronic communications networks or services in the UK”, on the basis that paragraph 3.14 of the guidelines and section 1.16 of Annex to the guidelines refer to “members of the public” and “members of a prison or tenants of a landlord” respectively. Primus submits that these phrases show that Ofcom must be contemplating the provision of services to UK end-users.

2.50 On 19 March 2007, representatives of Ofcom and Primus met to discuss Primus’s failure to pay the disputed administrative charges. At the meeting, David Stewart (Ofcom’s Director of Investigations) explained to Primus’s representatives that Ofcom’s position was that ‘relevant turnover’ does include turnover relating to traffic which is terminated overseas, specifically where there are other reasons to consider that traffic relates to the activities of a UK-based communications provider, including, for example, the delivery of telephone calls originating in, or transiting, the UK. Ofcom stated that it should be assessed on a case by case basis, but factors which suggest that such turnover should be included in the calculation of relevant turnover include: the role of a UK registered company, invoices issued in UK, location of switching equipment and any other relevant information about the nature of the business being conducted.

2.51 Following that meeting, on 10 April 2007, [X] of Primus emailed Ofcom, providing a summary of Primus’s understanding of Ofcom’s position and requesting confirmation that its summary of Ofcom’s position was correct. Its summary was as follows:

“1. For Ofcom, the business context is key, in the sense that Ofcom will not look at form but at substance, and therefore the location of the relevant party’s registered office and invoice address are key.

2. Ofcom will not exclude activities outside the UK which are carried on by a network provider, if that network provider is providing network access in the UK, regardless of whether the traffic originates in the UK or overseas.

3. If the switching activity is out of UK, then Ofcom considers that it is UK turnover.”

2.52 In response, Ruth Gibson of Ofcom emailed on 18 April 2007 [X] of Primus to respond as follows:

“Thank you for your email of 10 April.

As explained previously, and most recently at the meeting on 19 March, Ofcom has not been provided with any specific evidence by Primus to suggest that the invoice issued to Primus in April 2006 for the administrative charge based on your self-certificated ‘Relevant Turnover’ for the year ending 31 December 2004 should not be paid.

Rather, we understand that Primus’s position is essentially a legal issue in that you dispute that the unpaid amount of our invoice (i.e. [X]) relates to turnover falling within the meaning of ‘Relevant Turnover’. In our understanding, this is because, while Primus appears to accept that the turnover for terminating traffic overseas wholly concerns the provision of ‘Electronic Communications Networks’, ‘Electronic Communications Services’ and ‘Network Access’ to ‘Communications Providers’ (as set out in paragraph b. of the ‘Relevant Activity’ definition in our Notice of Designation under section 38 of the Communications Act 2003 of 31 March 2005: <http://www.ofcom.org.uk/consult/condocs/designation/statement/#content>), Primus argues that this turnover falls outside the meaning of ‘Relevant Activity’ (to which ‘Relevant Turnover’ refers) because the activity takes place overseas.

As to your points 1 to 3 in your e-mail, while we consider that you have not fully characterised Ofcom’s position, we do not propose to enter into further discussion with Primus on this matter. It is Primus’s responsibility to ensure that it complies with its regulatory obligations (including its statutory duty under section 38) and, if necessary, take its own independent legal advice on compliance matters. This is particularly the case as, on the information presently before us, there is nothing to suggest that the terminating overseas traffic relating to the disputed turnover would not fall within paragraph b. of the ‘Relevant Activity’ definition set out above, which does not restrict such provision to ‘Communications Providers’ in the United Kingdom. It would therefore be turnover falling within the ‘Relevant Turnover’ definition.

While it is a matter for Primus to take its own advice as mentioned above, it suffices to point out that you will find analogous cases in other contexts. To take an example in a different context, Primus might want to consider the power to impose financial penalties for breaches of the Competition Act 1998. National competition authorities (including Ofcom) is empowered to impose such penalties up to a maximum of 10% of the worldwide turnover of the undertaking in question. This was achieved by The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (S.I. 2000/309), as amended The Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (S.I. 2004/1259).

In light of the above, we invite Primus to correct any factual issues as to Ofcom’s understanding above by no later than by 5pm on **Wednesday 25 April 2007**. Following the expiry of that deadline,

Ofcom will consider the taking of enforcement action against Primus, the first step would be the publication of a Competition Bulletin entry that Ofcom would pursue this matter.”

- 2.53 On 25 April 2007, Ofcom received a letter via email from [X] on behalf of Primus. The letter dated 20 April 2007 stated:

“We have been consulted by our client, [Primus], in connection with the Administrative Charges Ofcom is seeking to impose upon them.

The Notice of Designation which defines “*Relevant Turnover*” is simply guidance issued by Ofcom. It does not have the force of a Statutory Instrument. Section 4 of the Communications Act 2003 (the “**Act**”) provides the statutory basis for the charges Ofcom is seeking to recover from our client. Section 38(4)b of the Act provides that Ofcom’s costs are to be met by charges which are “*objectively justifiable and proportionate to the matters in respect of which they are imposed*”. They are further required (by Section 38(4)(c) of the Act) to be “*transparent*”. Fixing charges in respect of turnover earned from activities not regulated by Ofcom would not be “*objectively justifiable and proportionate*”.

Any ambiguity in construction of revenue raising powers is to be resolved in favour of the paying party.

The analogy your email seeks to draw with the penalties imposed under the Competition Act is misguided. The courts have endorsed a teleological approach to statutory interpretation [footnote: See for example *United States of America Government v Jennings* [1983] 1 AC 624 at 641]. Where a provision is varied, the courts will examine the provision before and after the variation to assist in interpreting what change has been intended. SI 2000/309 explicitly defined the turnover for calculation of penalty as being confined to activities within the UK. The removal of this limit in SI 2004/1259 should be read as allowing the imposition of penalties upon the worldwide turnover of an infringing business. Had the SI originally been enacted as it now stands, a different interpretation would be available.

We look forward to hearing from you with your confirmation that you shall not be demanding the unpaid amount of your invoice. We also look forward to discussing with you the overpayments our client has made for the last 6 years with a view to obtaining re-imburement from you.”

- 2.54 On 30 May 2007 Ofcom opened an investigation to consider whether to take action under section 40 of the Act, the first step of which is for Ofcom to determine whether there are reasonable grounds for believing that Primus is in contravention of its duty to pay the administrative charge fixed by Ofcom.
- 2.55 On 1 June 2007 Ofcom published an entry in its Competition Bulletin announcing the investigation into Primus’s non-payment of Ofcom’s administrative charges.

Summary of issues

- 2.56 In Ofcom's understanding from its responses set out above, Primus's key argument appears to relate to above-mentioned **Category 2** in the definition of 'Relevant Activity', namely the provision of Electronic Communications Networks, Electronic Communications Services and Network Access to Communications Providers. In particular, Ofcom notes that the whole of Primus's self-certified turnover has been given in respect of turnover from the provision of electronic communications networks (as opposed to, for instance, electronic communications services): see **paragraph 2.35** above.
- 2.57 Primus now argues that the definition of an "electronic communications network" in section 32(1) of the Act (see **paragraph 2.27** above) is properly viewed as "only capturing an ECN if it is provided in the UK". Primus' submission is supported by reference to Article 13 of the Framework Directive and Primus's view as to what Ofcom's associated guidelines contemplate.
- 2.58 Accordingly, Primus's position is that the 'Relevant Turnover':
- "on a wholesale basis can only be that turnover where the outbound leg is terminated domestically to an ECN in the UK. The Relevant Turnover should not include turnover which say Primus receives for terminating wholesale traffic to ECNs overseas."
- 2.59 In other words, taking into account also [X] reference to "turnover earned from activities not regulated by Ofcom" (see **paragraph 2.53** above), Ofcom understands Primus to be arguing that Ofcom would unlawfully extend the territorial application of its regulatory powers under the Act, were Ofcom to include Primus's turnover for overseas traffic in fixing the administrative charge.
- 2.60 Supporting this view, Primus cites:
- Ofcom's own guidelines on "relevant activity", particularly the references to:
 - the licensing regime relating to telecommunications systems under the now repealed Telecommunications Act 1984);
 - "members of the public";
 - "members of a prison or tenants of a landlord",show, in Primus's submission, that Ofcom must be contemplating the provision of services to UK end-users;
 - it claims that the final paragraph of Article 13.1 of the Framework Directive supports its view that Ofcom should not in the calculation of 'Relevant Turnover' include turnover which Primus receives for terminating traffic overseas.
- 2.61 In addition, [X] argues that Ofcom's revenue raising powers are "ambiguous" and, as such, any construction of them should be resolved in favour of Primus as the paying party. [X] is further suggesting that the imposition of Ofcom's charges is neither objectively justifiable nor proportionate to the matters in respect of which they are imposed. Nor in its view is the relationship between meeting the cost of carrying out those functions and the amounts of the charges transparent.

Section 3

Reasons for the Determination

Introduction

3.1 **This Section** sets out Ofcom's reasons for the determination set out in the Notification accompanying this explanatory statement in light of the matters arising from Ofcom's investigation, as explained in **Section 2** of this document.

'Relevant Activity' carried out by Primus

3.2 As explained in **Section 2**, Primus self-certified its total group 'Relevant Turnover' on 11 November 2005 and, furthermore, that this turnover relates to the provision of electronic communications networks. The issue that has since arisen is simply a legal one, which is addressed separately below.

3.3 Leaving aside for the moment that legal issue, it appears to Ofcom from:

- Primus's self certified turnover;
- Primus's confirmation in its response to Ofcom's 2nd Notice that the disputed turnover relates to the non-UK termination aspect of its activities set out in **paragraph 2.33** above with the clarification that for each of the three main services (i.e. (i) Wholesale Carrier; (ii) Fixed line/Mobile; and (iii) Calling Cards) the traffic is terminated in the UK and internationally;
- Primus's repeated submissions to its turnover received for terminating wholesale traffic to ECNs overseas,

these services fall, in light of the relevant definitions in the Act (as set out in **Section 2**) within one or more of the three categories set out above, namely:

- the wholesale carrier services may fall within **Category 1** and/or **Category 2**, largely depending on whether "customers" and "suppliers" fall within the meaning of "third parties" and "Communications Providers", respectively;
- the fixed line and mobile services appear to fall within **Category 1**;
- the calling card services may fall within **Category 1** and/or **Category 2**, largely depending on whether "customers" and "suppliers" fall within the meaning of "third parties" and "Communications Providers", respectively.

3.4 Therefore, on the information presently before Ofcom, the total self-certified turnover (regardless of whichever **Category** each and every service provided by Primus ultimately falls) is to be taken as 'Relevant Turnover' for the Charging Year 2006/2007. As a result, the outstanding amount of [£] from Ofcom's invoice to Primus remains due.

The legal issue raised by Primus

3.5 In summary, and having carefully considered Primus's arguments, Ofcom considers that the legal arguments raised by Primus are not correct.

The basis for Ofcom's charges

- 3.6 [X] (on Primus's behalf) suggests that an ambiguity is present in the construction of Ofcom's revenue raising powers and therefore this whole issue should be resolved in Primus's favour, as the paying party.
- 3.7 [X] appears to premise its argument on two points, namely:
- Ofcom's Notice of Designation (which defines "Relevant Turnover") being simply guidance issued by Ofcom, which does not have the force of a statutory instrument;
 - section 4 of the Act providing the statutory basis for the charges Ofcom is seeking to recover from Primus.
- 3.8 In Ofcom's view, that premise is incorrect and it rests on a strained (and to Ofcom's mind, unjustified) construction placed on the uncomplicated and easily understandable statutory language in the Act.
- 3.9 With respect to the first point, Ofcom's relevant statutory basis in this case is summarised in the Notification. While certain key points will be further summarised in **paragraph 3.14** below to reinforce Ofcom's position, it is clear that Ofcom's Notice of Designation has statutory force and is not merely guidance issued by Ofcom.
- 3.10 Also, contrary to [X] argument, it is further plain that it is section 38 (and not section 4²³) of the Act that provides the relevant statutory basis for Ofcom's administrative charges.
- 3.11 Furthermore, with respect to the second point, Ofcom considers that no issue arises with regard to its imposition of charges not being objectively justifiable, proportionate and transparent contrary to section 38(4) of the Act, as argued by [X]. While [X] merely asserts this to be the case, it has not provided Ofcom with any evidence for reaching this view.

The statutory language

- 3.12 As noted above, the relevant statutory language in the Act is straightforward.
- 3.13 Ofcom's Notice of Designation is itself also clear, including the definitions of 'Relevant Activity' and 'Relevant Turnover', together with the associated Ofcom guidelines. Indeed, in its response to Ofcom's 1st notice (see letter of 8 September 2006 at **paragraph 2.46** above), Primus itself acknowledges that there is no express geographical limitation to the UK in the definition of 'Relevant Activity'.
- 3.14 Turning to the statutory language itself, the following key points are to be noted:
- **section 38(1) of the Act:** a 'person' is liable to pay an administrative charge if the duty applies to him (which, in turn, depends on Ofcom's designation under section 38(2)) in respect of the network, service or facility provided or made

²³ In addition to Ofcom's general duties under section 3 of the Act, Ofcom must, in carrying out (among other things) its functions under Chapter 1 of Part 2 of the Act, act in accordance with the six Community requirements set out in section 4. But this is, of course, a different matter to that of providing the statutory basis for Ofcom's administrative charging, which is done separately under section 38 of the Act.

available by him without any express statutory geographical limitation (to use the Primus's phraseology);

- **section 38(2) of the Act:** the above-mentioned duty expressly applies to a person providing or making available a network, service or facility of a description designated by Ofcom, again without any express statutory geographical limitation;
- **section 38(3), (4) and (11)²⁴ of the Act:** in making a designation, Ofcom has wide discretion to fix administrative charges in accordance with its charging principles subject to the recovery of certain of its prescribed costs, but again without any express statutory geographical limitation; and
- **section 32 and 405 of the Act:** no express statutory geographical limitation is present in construing the meaning of the expressions ECN, ECS, associated facility, communications provider or provide.

Ofcom's Notice of Designation

- 3.15 Ofcom's Notice of Designation adopts the statutory language set out above. Therefore, it follows that no geographical limitation has been expressed in relation to a network, service or facility so designated.
- 3.16 The use of the term "third parties" in relation to **Category 1** (see **paragraph 2.22** above) does not change this position. The Notification that this explanatory statement accompanies summarises the relevant background to this particular term. As explained, it was one specifically adopted by Ofcom to capture within the meaning of 'Relevant Activity' also services such as the supply of bespoke business services.
- 3.17 The associated Ofcom guidance expands on this by making it clear that, for instance, members of a prison or tenants of a landlord would be "included" within its meaning. However, there is nothing in the language used to suggest that Ofcom's guidelines contemplated the provision of services to UK end-users only, as Primus argues. It appears to Ofcom that Primus is simply reading into its guidelines something that is not there, whether by implication or otherwise.

No extra-territorial application

- 3.18 This is not a case of Ofcom seeking to apply its regulatory functions outside the territory of the UK, as Primus appears to be suggesting. This is because Primus's duty to pay the administrative charge to Ofcom applies because it is a designated person within the territory. The inclusion of Primus's turnover for overseas traffic in fixing the administrative charge does not involve, however, any extra-territorial application for these purposes.
- 3.19 Again, as in Ofcom's email of 18 April 2007 to [X] of Primus (see **paragraph 2.52** above), Ofcom refers, by way of example, to the analogous case concerning penalties for breaches of the Competition Act 1998 to make this simple distinction in principle.
- 3.20 In this context, Ofcom does not consider that [X] has put forward any persuasive reasons in its attempt to distinguish this analogy. Specifically, [X] suggestion that "[h]ad the SI originally been enacted as it now stands, a different interpretation would

²⁴ Section 34(4) also applies by virtue of section 38(11).

be available” is based on a mere assertion. Nor does Ofcom consider that the judgment of the House of Lords in *United States of America Government v Jennings* is of any assistance in the present case.

Article 13(1) of the Framework Directive

- 3.21 Finally, Ofcom does not consider that the final paragraph of Article 13.1 of the Framework Directive supports Primus’s argument that turnover which it receives for terminating traffic overseas should be excluded in the calculation of ‘Relevant Turnover’.
- 3.22 Article 13(1) is concerned with accounting separation for very specific undertakings. As already noted in **paragraph 2.13** above, there is, at present, no operator in the UK on which Ofcom has imposed such corresponding obligations to which Article 13 refers. In any event, its final paragraph (as to EU-wide turnover of less than €50m) creates a discretion for a Member State not to impose these obligations and they are of no relevance to administrative charging.
- 3.23 Furthermore, Primus has not sought to explain to Ofcom how this provision would be relevant so as to require Ofcom to construe its domestic powers under section 38 of the Act to be consistent with the final paragraph of Article 13.1 of the Framework Directive as a matter of Community law.

Conclusion

- 3.24 For those reasons, Ofcom has determined that there are reasonable grounds for believing that Primus is in contravention of its duty under section 38 of the Act to pay in full the fixed administrative charge for the Charging Year 2006/2007.
- 3.25 Primus has until **5pm on 17 August 2007** to make representations about this notified determination and to pay the amount outstanding.

Annex 1 - Copy of General Demand



General Demand for Information required by Ofcom under Section 135 of the Communications Act 2003 and issued in accordance with Section 137 of that Act for the purposes of calculating the administrative charge for the Charging Year commencing on 1 April 2006 and ending on 31 March 2007

Advice for Completion

1. 'Relevant Turnover' has the same meaning as in the Statement of Charging Principles published with effect from 1 April 2004. 'Relevant Activity' has the same meaning as in the Statement of Charging Principles published by Ofcom with effect from 1 April 2004. Guidance on what constitutes a Relevant Activity was published on 1 August 2003 by the Director and Ofcom will normally expect to follow this guidance.
2. Revenue recognition should follow UK GAAP.
3. Details of the charging principles are set out in Ofcom's statement of charging principles published with effect from 1 April 2004. Those persons liable to pay charges are as set out in the notice of designation published by the Director on 25 July 2003 in accordance with section 38 of the Communications Act 2003.
4. If the company group comprises one or more companies carrying on relevant activities then companies must show the turnover for each of its subsidiaries making clear the name of each subsidiary where it differs from that of the company or group making the return. At least one return should incorporate all companies within a group (where applicable).

Annex 2 – Self certificate of relevant turnover provided by Primus

[X]

This annex has been redacted from the non-confidential version as it contains information that is commercially confidential

Annex 3 – Invoice issued to Primus

[X]

This Annex has been redacted from the non-confidential version as it contains information that is commercially confidential

Annex 4 – Letter from Primus to Ofcom dated 8 September 2006

[X]

This Annex has been redacted from the non-confidential version as it contains information that is commercially confidential

Annex 5 – Letter from Primus to Ofcom dated 7 March 2007

[X]

This Annex has been redacted from the non-confidential version as it contains information that is commercially confidential