



Neutral citation [2008] CAT 19

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case Numbers: 1089/3/3/07  
1090/3/3/07  
1091/3/3/07  
1092/3/3/07

Victoria House  
Bloomsbury Place  
London WC1A 2EB

15 August 2008

Before:

VIVIEN ROSE  
(Chairman)  
PROFESSOR ANDREW BAIN OBE  
ADAM SCOTT TD

Sitting as a Tribunal in England and Wales

BETWEEN:

**T-MOBILE (UK) LIMITED**

-and-

**BRITISH TELECOMMUNICATIONS PLC**

-and-

**HUTCHISON 3G UK LIMITED**

-and-

**CABLE & WIRELESS & ORS**

Appellants /Interveners

**VODAFONE LIMITED**

**ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED**

Interveners

-v-

**OFFICE OF COMMUNICATIONS**

Respondent

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**JUDGMENT ON THE RATES IN DISPUTE (Non-confidential version)**

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Note: Excisions in this judgment marked “[...][C]” relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002

## I. INTRODUCTION

1. On 20 May 2008 the Tribunal handed down its judgment on the core issues raised in these appeals ([2008] CAT 12 “the main judgment”). The Tribunal found that OFCOM had erred in a number of respects in its reasoning in the decisions under challenge. That judgment set out the background to the appeals in some detail and we do not repeat that background here. In this judgment we use the same abbreviations as are used in the main judgment.
2. The appeals concerned the decisions taken by OFCOM resolving a series of disputes referred to it under the dispute resolution powers in section 185 of the 2003 Act. OFCOM had resolved the disputes by upholding substantial increases in MCT rates proposed by the MNOs. The Tribunal found that OFCOM’s reasoning was seriously flawed and held that many of the grounds of appeal were well founded. As well as identifying the respects in which OFCOM had misdirected itself, the Tribunal gave guidance as to how such disputes ought properly to be resolved: see paragraphs [175] *et seq* of the main judgment. This guidance identified four elements as particularly important:
  - (a) an evaluation of the arguments put forward by the parties in support of the rates for which they are contending in the dispute;
  - (b) a consideration of how the rates contended for compare with information available about the costs incurred by a reasonably efficient MNO in providing the service to which the disputed charge relates;
  - (c) a comparison of the proposed rates with appropriate benchmarks; and
  - (d) consideration of the regulatory objectives to which OFCOM is required to have regard in carrying out its functions, including its function of resolving disputes under section 185 of the 2003 Act.
3. At paragraph [190] of the main judgment the Tribunal indicated that it was minded to remit the disputes to OFCOM with clear directions as to the rates which should be set between the parties rather than remitting the disputes more generally for OFCOM to carry out a further investigation. As the Tribunal noted in that paragraph, these disputes relate to a limited and specific period and must be resolved in that context, having regard to the matters that were placed before OFCOM and before us. In a letter dated 20 May 2008, the Tribunal invited the parties to provide evidence showing what consideration had been given within the company to the setting of the rates proposed and to provide the Tribunal with any contemporaneous correspondence between the

parties to the dispute that evidenced the arguments put forward at the time for proposing or rejecting the rates in dispute. The parties were given a further opportunity to comment on the information provided by the others.

4. The 1092 Appellants provided the Tribunal with contemporaneous evidence surrounding their own relationship with the MNOs at the time when the MNOs proposed increases to their rates for MCT. However, since the rates charged to the 1092 Appellants were not referred to OFCOM and hence did not form part of these proceedings, we have left the evidence provided by them entirely out of our deliberations.
5. H3G submitted in its letter of 24 June 2008 that it would be erroneous for the Tribunal to reach a decision on the appropriate rates without first giving the parties an opportunity to make submissions. H3G asserts that it has a right to be heard on the issues and identified three areas in particular where it would wish to make submissions. None of the other parties objected to the Tribunal proceeding to set the rates. We have considered carefully how best to dispose of these appeals, having regard to our overriding objective set out in rule 19(1) of The Competition Appeal Tribunal Rules 2003 (SI 2003 No 1372) to secure the just, expeditious and economical conduct of these proceedings. We have concluded that further submissions from the parties are not necessary and that there is no disadvantage to the parties in refusing to allow another exchange of submissions. There is a wealth of material before the Tribunal and the Tribunal and the parties have become fully familiar with all the issues in this case. Although mindful of the importance of these issues to the parties because of the large sums of money at stake, the Tribunal is concerned at the length of time that has already elapsed since these disputes were referred to OFCOM. The dispute resolution procedure is intended to be a rapid and relatively informal means of breaking a commercial deadlock between the parties. These particular disputes have, for entirely understandable reasons, already generated a large volume of documentation and hard fought legal issues. The Tribunal has concluded that it is time now for the rates to be set.
6. In this judgment therefore the Tribunal sets out the reasons for the directions it intends to give to OFCOM, pursuant to section 195(4) of the 2003 Act, for resolving these disputes.
7. There were in total seven disputes resolved by OFCOM in the Disputes Determinations published on 7 July and 10 August 2007. Although, as will become apparent, there are

many themes shared by all seven disputes, we have considered them in the following order:

- (a) The disputes between BT and T-Mobile and between BT and O2;
- (b) The disputes between BT and Vodafone and between BT and Orange;
- (c) The dispute between BT and H3G; and
- (d) The disputes between H3G and Orange and between H3G and O2.

**II. THE DISPUTES BETWEEN BT AND T-MOBILE AND BETWEEN BT AND O2**

*(i) BT and T-Mobile*

8. The MCT rates prevailing under the contract between BT and T-Mobile were non-blended rates agreed by BT at 9.092 ppm (daytime), 4.0 ppm (evening) and 4.0 ppm (weekend). These rates had been proposed by T-Mobile to BT on 31 May 2006 and had been accepted by BT on 19 June and came into effect on 1 August 2006.
9. In an OCCN dated 5 July 2006, T-Mobile proposed new, blended rates of 9.5 ppm (daytime), 4.181 ppm (evening) and 4.181 ppm (weekend) to come into effect on 1 September 2006. This proposal was rejected by BT.
10. In a second OCCN served on 1 December 2006, T-Mobile proposed blended rates but with a different balance as between times of day – 8.0 ppm (daytime), 6.15 ppm (evening) and 6.15 ppm (weekend). The effect of this OCCN would have been to increase the overall payments as compared with first OCCN. The date set in the OCCN for these rates to come into effect was 1 January 2007. BT also rejected this OCCN but has not served its own OCCN seeking a change from the August 2006 rates.
11. There is a dispute about why T-Mobile served the second, December, OCCN. This dispute was one of the non-core issues which was raised in T-Mobile’s appeal but which was not considered at the hearing which took place in early 2008.
12. The ambit of the dispute between the parties was therefore as follows (all rates expressed as ppm):

BT/T-Mobile	Actual Rate			Underlying 2G rate			Underlying 3G rate		
	day	eve	w/e	day	eve	w/e	day	eve	w/e

1/8/06 rate (prevailing)	9.092	4.00	4.00	9.092	4.00	4.00	x	x	x
T-Mobile 1st OCCN as from 1/9/06	9.50	4.181	4.181	[7-10]	[0-5]	[0-5]	[15-20]	[7-10]	[7-10]
T-Mobile 2nd OCCN as from 1/1/07	8.00	6.15	6.15	[7-10]	[5-10]	[5-10]	[20-25]	[15-20]	[15-20]

13. Contemporaneous evidence as to discussions between T-Mobile and BT over the OCCNs was contained in the witness statement of Mr Max Miller who was at the material time Head of the Carrier Services department at T-Mobile.
14. In response to the service of the OCCN by T-Mobile on 5 July 2006, BT sent an email on 17 July saying that it intended to reject the OCCN on the grounds that the increased termination costs proposed by blending 2G and 3G network costs brought no tangible benefits to BT's customers. BT stated that it did not, therefore, believe that the prices proposed were "appropriate for the call termination service provided by your company".
15. T-Mobile's response to these concerns focussed on an assertion that BT's rejection of the OCCN was discriminatory because BT had agreed to pay blended rates to Vodafone and Orange. T-Mobile referred to the fact that BT had hinted in discussions that they intended to take steps to put right this apparent difference in treatment but were not prepared to disclose this in advance to T-Mobile. T-Mobile complained that these "cryptic hints" at how BT was going to remedy the apparent difference in treatment were "no more than a delaying tactic". Another interpretation placed on BT's conduct by T-Mobile was that rejecting the OCCN was "clear evidence of BT's countervailing buyer power".
16. None of the further correspondence between T-Mobile and BT addressed the points raised by BT about the lack of additional functionality in voice termination nor did it deal with whether T-Mobile's costs of termination calls on its 3G network are in fact greater than 2G and if so by how much.
17. After the service and rejection of the second OCCN in December 2006, the dispute was referred to OFCOM on 21 December 2006. In the document referring the dispute to OFCOM there is very little said to justify the increase in rates. T-Mobile states that the

3G network “exhibits different unit costs to the 2G network”. Under the section in the Reference of the Dispute headed “Issues in Dispute”, T-Mobile states:

“1.3 the reason why T-Mobile decided to change its charges for voice call termination was the fact that T-Mobile was gradually terminating more voice traffic on its 3G network”.

18. T-Mobile refers to the fact that all other 2G/3G MNOs have also sought to increase their MCT charges to reflect the increasing amount of calls being terminated on their 3G networks. It states that the Vodafone and Orange rates have been accepted but that BT has declined to accept the T-Mobile blended rates “which are based on what appears to be an identical methodology”.
19. In response to a request for information by OFCOM, T-Mobile explained how it had calculated the new blended rates in 10 steps. The first seven steps concern the proportions of the blend between 3G and 2G termination. Step 9 is the key step for our purposes and states simply “3G Termination rates were based on a conservative costs assumption (3G opex costs) divided by the forecast number of 3G minutes”.
20. T-Mobile provided some further contemporaneous evidence to the Tribunal on 30 May 2008 and explained in their letter how the rates in the OCCNs had been calculated. The letter explains that initially T-Mobile planned to propose rates which were simply taken from the Vodafone rate because T-Mobile did not have sufficient information about its own costs to arrive at a new price. But before the actual service of the first OCCN, it had in fact acquired some costs information which T-Mobile describe in the letter as “overall network opex figures”. Using this and an estimate of the number of minutes on the 3G network they arrived at an overall average rate per minute on the 3G network of 14 ppm. The weighting of the underlying daytime / evening / weekend rates in the first OCCN of [15-20] ppm / [7-10] ppm / [7-10] ppm resulted in an average rate 3G rate of 14 ppm.
21. T-Mobile then explains how they revisited the exercise in December 2006 and used revised costs to set an average rate of 18 ppm to be collected by underlying 3G rates of [20-25] ppm / [15-20] ppm / [15-20] ppm.
22. T-Mobile provided contemporaneous spreadsheets supporting the 14 and 18 ppm average rates for 3G termination. T-Mobile also provided a copy of slides from a management presentation given on 4 July 2006. These show that T-Mobile intended to follow Vodafone whom they described as having “pulled a fast one... and got away

with it”. They refer to Vodafone “exploiting a loophole in the regulation by charging a blended rate” and propose adopting the Vodafone rates as the highest available market rate.

(ii) *BT and O2*

23. So far as O2 is concerned the rates which prevailed before the service of the disputed OCCNs were [...] [C] ppm (daytime), [...] [C] ppm (evening) and [...] [C] ppm (weekend). These were not blended rates.
24. On 3 July 2006, O2 proposed blended termination rates to BT of [...] [C] ppm (daytime), [...] [C] ppm (evening) and [...] [C] ppm (weekend). These were intended to be effective as from 1 September 2006. These rates were rejected by BT. BT has not served its own OCCN.
25. On 30 November 2006, O2 served a further OCCN seeking a further increase in the blended rates of [...] [C] ppm (daytime), [...] [C] ppm (evening) and [...] [C] ppm (weekend). These were supposed to come into effect on 1 January 2007. These rates were also rejected by BT and on 16 February 2007, O2 referred the dispute with BT to OFCOM.
26. The position as regards BT and O2 was therefore as follows (all rates expressed as ppm):

<b>BT/O2</b>	<b>Actual Rate</b>			<b>Underlying 2G rate</b>			<b>Underlying 3G rate</b>		
	<b>day</b>	<b>eve</b>	<b>w/e</b>	<b>day</b>	<b>eve</b>	<b>w/e</b>	<b>day</b>	<b>eve</b>	<b>w/e</b>
Prevailing rate	[C]	[C]	[C]	[C]	[C]	[C]	x	x	x
O2 OCCN as from 1/9/06	[C]	[C]	[C]	[C]	[C]	[C]	[C]	[C]	[C]
O2 OCCN as from 1/1/07	[C]	[C]	[C]	[C]	[C]	[C]	[C]	[C]	[C]

27. There is little contemporaneous evidence before the Tribunal because O2 did not itself appeal against the BT Disputes Determinations and did not intervene in any of the appeals. Following the handing down of the main judgment, O2 wrote to the Tribunal indicating that it did not intend to apply for permission to intervene in the proceedings

in order to serve any additional contemporaneous evidence relevant to the settling of the rates in dispute.

28. We have seen a letter dated 3 August 2006 which was included in the exhibits to the witness statement of Mr Mark Amoss the then Business Manager, Regulatory Sales in the Wholesale Markets division of BT Wholesale. In the letter BT refers to points that BT apparently made in a telephone conversation with O2 on 18 July, following BT's rejection of the first OCCN. Those points include the complaint that O2 "has made no effort to provide the necessary transparency" as regards its calculation of the new rate. Given that the price of 2G call termination had, in compliance with the price control set in the 2004 Statement, been falling year on year, BT could not accept that an increase in the price was justified. Also in the exhibit to Mr Amoss's witness statement was a letter from O2 of 30 November 2006 stating that O2 was still awaiting a response from BT to its OCCN of 3 July, so that it is not entirely clear whether O2 received the 3 August letter from BT. That letter of 30 November set out the proposed higher rates in the second OCCN said to be "due to higher 3G volumes and our revised cost assumptions".

*(iii) The Tribunal's decision as regards BT / T-Mobile and BT / O2*

29. The Tribunal has no hesitation in upholding BT's rejection of the OCCNs served by T-Mobile and O2. The starting point, as indicated in paragraph [177] of the main judgment, is to consider the dispute in the context of the commercial negotiations between the parties. The position here was that call termination was being provided under an existing agreement. The onus lies on the party proposing the variation to provide the other party with sufficient justification for a change in the terms. Moreover, the change proposed was an increase in the price of the service in circumstances where there was no discernible improvement, so far as BT was concerned, in the service being provided and where the price had gradually been falling rather than rising over the preceding years. In an ordinary commercial negotiation, any supplier would need good evidence to persuade an existing purchaser to pay more for a service where the proposed increase in price arises from the seller's decision to use a new means of supplying essentially the same service even if that new means were more expensive.
30. BT made clear its objections to the proposed increases both as a matter of principle and on the basis that no information had been provided to support the claims that the costs incurred for 3G termination were higher than the costs of 2G termination. We accept

that T-Mobile and O2 had formed the view that their costs in providing termination on their 3G networks were higher than their costs of providing termination on their 2G networks. Whether, and if so to what extent, this is in fact the case is one of the matters currently being investigated by the Competition Commission in the context of the determination of the specified price control matters referred in the course of BT's and H3G's challenges to the 2007 Statement (Cases 1083/3/3/07 and 1085/3/3/07). But it is striking that neither T-Mobile nor O2 appears to have made any attempt to grapple with BT's arguments. They focussed instead on the fact that BT had agreed to pay blended rates to Vodafone and Orange (in circumstances which we discuss further below) and that OFCOM had not objected to the introduction of blended rates.

31. Even putting on one side the question of principle as to whether the price for 3G voice call termination should be higher than that for 2G termination, there is no evidence to suggest that T-Mobile and O2 made any attempt properly to reflect a sensible assessment of the additional costs in the prices that they proposed to charge BT. On the contrary, as regards T-Mobile, the 4 July 2006 management presentation makes it clear that T-Mobile's priority was to introduce the price increase as soon as possible to take advantage of the "loophole" in regulation identified by Vodafone before that loophole was closed by the new price control at the beginning of April 2007.
32. The costs figures on the two sheets that T-Mobile provided to the Tribunal on 30 May 2008, purporting to justify the first OCCN average price of 14 ppm and the second OCCN average price of 18 ppm do not in fact provide a realistic assessment of the costs of 3G termination. The Tribunal explained in paragraphs [136] to [140] and [148] *et seq* of the main judgment why it considered that OFCOM had erred in rejecting information about costs gathered during the course of its review of Market 16 (as it then was). OFCOM's findings as regards 2G and 3G unit costs under the medium voice and data traffic scenario were set out in Annex 13 to the 2007 Statement. They set out the figures on two alternate bases as regards 3G spectrum costs. If no spectrum costs are included, the unit cost benchmark of 3G termination in 2006/07 is shown as under 4 ppm. On the basis which includes spectrum costs of £4 billion, the 2006/07 unit cost benchmark is just over 6 ppm. We recognise that certain aspects of these cost calculations are the subject of challenge by BT and H3G in their appeals against the 2007 Statement. But T-Mobile has not brought an appeal challenging OFCOM's findings in the 2007 Statement. These findings indicate that T-Mobile's cost figures were substantially out of line with what could be considered a reasonable assessment.

33. The Tribunal has considered whether the prices proposed by T-Mobile and O2 appear reasonable when compared with relevant benchmarks. We consider that comparisons both with the regulated 2G rate at the time of the proposed OCCN and with the rate set in the 2007 Statement are relevant here.
34. As regards the comparison between the rates in the OCCNs and the prevailing 2G regulated rate, we explained in paragraphs [127] *et seq* of the main judgment why the correct comparison is between the underlying 3G rate and the 2G rate, not between the blended rate and the 2G rate. That comparison of the rates underlying the proposed blended rates shows the following:

<b>T-Mobile 1st OCCN</b>					
<b>2G day</b>	<b>2G eve</b>	<b>2G w/e</b>	<b>3G day</b>	<b>3G eve</b>	<b>3G w/e</b>
[7-10]	[0-5]	[0-5]	[15-20]	[7-10]	[7-10]
<b>T-Mobile 2nd OCCN</b>					
<b>2G day</b>	<b>2G eve</b>	<b>2G w/e</b>	<b>3G day</b>	<b>3G eve</b>	<b>3G w/e</b>
[7-10]	[5-10]	[5-10]	[20-25]	[15-20]	[15-20]

<b>O2 1st OCCN</b>					
<b>2G day</b>	<b>2G eve</b>	<b>2G w/e</b>	<b>3G day</b>	<b>3G eve</b>	<b>3G w/e</b>
[C]	[C]	[C]	[C]	[C]	[C]
<b>O2 2nd OCCN</b>					
<b>2G day</b>	<b>2G eve</b>	<b>2G w/e</b>	<b>3G day</b>	<b>3G eve</b>	<b>3G w/e</b>
[C]	[C]	[C]	[C]	[C]	[C]

35. We have not seen any information which could justify T-Mobile or O2 asking BT to pay double for 3G termination compared with 2G termination as was proposed in the first OCCNs or over three times as much as was proposed in the second OCCNs.
36. The second relevant comparison is with the first year target rate in the price control set by the 2007 Statement and the blended rates proposed. This comparison is set out in paragraphs [151] and [152] of the main judgment where the Tribunal explained the

adjustments which would need to be made to the headline figures in order to ensure a proper comparison. The Tribunal confirms that a comparison of the rates does not support T-Mobile's or O2's contention that the rates are reasonable.

37. Therefore even if the Tribunal were convinced, which it is not, that it was appropriate for there to be some increase in price to take account of higher termination costs on the 3G networks, the Tribunal finds that the rates proposed by T-Mobile and O2 were excessive.
38. We have nevertheless considered what amount *would* have been reasonable to reflect the MNOs' additional costs if such an element were to be included. The Tribunal notes that OFCOM in setting the 2007 – 2011 price control did accept that an element to reflect costs of 3G termination should be included in the blended rate price control that they set for the period 2007 – 2011. This aspect of OFCOM's decision is the subject of BT's appeal against the 2007 Statement and is currently being considered by the Competition Commission (Case 1085/3/3/07).
39. However, although OFCOM decided to set a blended rate in the new price control, it used as the starting point for the glide path of that blended rate, the 2G regulated rate as it applied during the final year of the price control set by the 2004 Statement. The result of this was that the blended rates fixed for the first year of the new price control were arrived at by taking the rates applying in the last year of the 2004 price control and reducing them by the appropriate percentage required to get from that starting point to the 2010-2011 TAC in four equal steps.
40. For O2 the average regulated 2G rate for the final year of the 2004 price control was 5.63 ppm and for T-Mobile it was 6.31 ppm (2006/07 prices). This generated a first year rate for the new price control (at 2007/08 prices) of 5.7 ppm for O2 and 6.2 ppm for T-Mobile once the rates had been decreased by the appropriate glide path percentage and then increased to account for inflation.
41. We therefore consider that in upholding BT's rejection of the OCCNs we are not prejudging any conclusion that the Competition Commission might draw as to whether it is right to include an uplift to reflect higher 3G termination costs. OFCOM found in the 2007 Statement that it was right that there should be a blended rate for 2G and 3G termination including such an uplift. But it also considered that, having regard to what it had discovered in its investigation of efficiently incurred costs, an appropriate starting point was the last year of the 2G regulated rate under the 2004 price control. In other

words, OFCOM treated 2G termination rates in the final year of the 2004 Statement as the appropriate starting blended rate for the 2007 Statement price control. The Tribunal therefore concludes that whether or not it is correct to include an additional element in the MCT price to reflect the allegedly higher costs of using the 3G network for terminating calls, the reasonable price to charge for termination was in fact no higher than the previous year's rate for 2G termination.

42. The Tribunal has considered whether such a result accords with OFCOM's regulatory objectives. We explained in paragraphs [107] *et seq* of the main judgment that consistency on the part of the regulator is an important principle but that OFCOM had erred in placing too much weight on the need to be consistent with its decision in the 2004 Statement not to impose a price control in respect of termination on 3G networks.
43. Given the changes in the market since the 2004 Statement was issued (as described in paragraph [110] of the main judgment) and the counterbalancing need to be consistent with the 2007 Statement, the Tribunal concludes that setting a rate which corresponds to the final year of the 2G price control under the 2004 Statement is consistent with OFCOM's regulatory position in both the 2004 and 2007 Statements. As noted in paragraph [41] above, this is the case whatever view one takes of the issue of principle as to whether any additional amount should be included in the price to take account of the costs of 3G termination.
44. We therefore uphold BT's rejection of the OCCNs. OFCOM should resolve the disputes between these parties by setting rates for T-Mobile and O2 which are compatible with their respective 2G termination rates under the price control applicable over the relevant period.

### **III. THE DISPUTES BETWEEN BT AND VODAFONE AND BETWEEN BT AND ORANGE**

45. As appears from the main judgment, these disputes differed from the two disputes considered above in that BT had initially accepted blended rates and the disputes referred to OFCOM related to BT's OCCNs attempting to revert to an unblended 2G rate.
  - (i) *BT and Vodafone*
46. Vodafone first introduced a blended rate on 1 September 2004. It changed its rates by an OCCN dated 13 April 2005 which took effect from 1 June 2005. On 23 January

2006 Vodafone wrote to BT saying that the rates then prevailing comprised blended rates and setting out the underlying 2G rate. At that time the prevailing blended rate was 8.50 ppm (daytime), 3.45 ppm (evening) and 2.83 ppm (weekend). The rates were reduced by an OCCN from Vodafone which was accepted by BT and which took effect on 1 September 2006. This set the rates at 8.22 ppm (daytime) 3.34 ppm (evening) and 2.74 ppm (weekend).

47. BT issued an OCCN on 19 July 2006 seeking to reduce the rates as from 1 October 2006 to 7.91 ppm (daytime), 3.22 ppm (evening) and 2.66 ppm (weekend). These rates were the underlying 2G rate of the prevailing blended rate. That OCCN was rejected by Vodafone. The disputed rates were therefore as follows (all rates expressed as ppm):

BT/Vodafone	Actual Rate			Underlying 2G			Underlying 3G		
	day	eve	w/e	day	eve	w/e	day	eve	w/e
BT rate (OCCN 19/7/06 to have effect 1/10/06)	7.91	3.22	2.66	7.91	3.22	2.66	x	x	x
Vodafone blended prevailing rate as from 1/9/06	8.22	3.34	2.74	[5-10]	[0-5]	[0-5]	[10-15]	[0-5]	[0-5]

48. The contemporaneous evidence concerning the Vodafone dispute is found in the annexes to the document by which BT referred the dispute to OFCOM. BT made clear when sending the OCCN that the purpose of the proposed rate change was to reduce the MCT charge to that for 2G termination.

49. Vodafone's response sent on 1 August 2006 explained that:
- (a) the rates that Vodafone was charging as from 1 September 2006 represented a reduction from the earlier charges and so did not contribute to the increased cost base of which BT had complained;
  - (b) Vodafone rejected BT's characterisation of the blended charge as "bundling" and referred to OFCOM's acknowledgement that MNOs can charge a blended rate;
  - (c) BT had been aware of the fact of blending 2G and 3G rates since January 2006 and had not questioned this before.

50. BT responded on 23 August 2006. They accepted that the rates operating as from 1 September 2006 were a reduction from the earlier prices because of substantial price reductions on the 3G rates. BT acknowledged that it agreed to pay blended rates before but argued that it was entitled to change its commercial stance. The letter maintained the position that BT considered that it was being asked to pay for costs where it receives no additional network functionality and reiterated BT's assertion that it should pay 2G termination rates for all calls. BT characterised its stance as requiring that Vodafone charge "for efficient termination of calls on a mobile network, whatever underlying technology is used".
51. The response from Vodafone dated 8 September 2006 did not add anything to the debate, reiterating that BT had not challenged the rate since 23 January 2006 when it became aware of blending and referring to the fact that OFCOM had not objected to the charging of blended rates. A meeting between the parties took place on 7 December 2006 and Vodafone summarised its thoughts after the meeting in a letter to BT of 15 December. Vodafone set out its view that in the absence of an ex ante price cap, the only other requirement which could apply is that Vodafone's blended charge is "not excessive as defined by competition law". They rejected the idea that there was any obligation to limit the charge to a reasonable charge. Therefore it was open to BT to bring a competition law case against Vodafone. Vodafone also discussed the risks, as Vodafone saw them, for BT invoking the OFCOM dispute procedure.
52. Vodafone provided the Tribunal with copies of the slides that were used during that 7 December meeting. These refer to the fact that the consultation document issued by OFCOM in its Market 16 review indicated that 3G termination costs are higher than 2G termination costs.

(ii) *BT and Orange*

53. So far as the dispute between BT and Orange is concerned, Orange first introduced a blended rate by service of an OCCN on 23 May 2006. That OCCN was accepted by BT and the rate became effective on 1 August 2006. Those blended rates were 7.5 ppm (daytime), 5.7312 ppm (evening) and 5.7312 ppm (weekend). The unblended rates which had prevailed prior to 1 August 2006 were 7.6010 ppm (daytime), 5.4470 ppm (evening) and 4.354 ppm (weekend).
54. On 19 July 2006, BT issued an OCCN to Orange proposing a reduction of the rates to 7.4 ppm (daytime), 5.1464 ppm (evening) and 5.1464 ppm (weekend) as from 1

October 2006. These rates were not therefore seeking to revert to the 2G rate which had prevailed before the introduction of the blended rate but rather sought to apply the 2G rate underlying the blended rates as set out in the 23 May 2006 OCCN which BT had accepted.

55. The relevant figures for this dispute are therefore as follows:

BT/Orange	Actual Rate			Underlying 2G			Underlying 3G		
	day	eve	w/e	day	eve	w/e	day	eve	w/e
BT rate from 1/10/06	7.4	5.1464	5.1464	7.4	5.1464	5.1464	x	x	x
Orange rate as from 1/8/06	7.500	5.7312	5.7312	7.4	5.1464	5.1464	19.90	14.15	14.15

56. The contemporaneous evidence concerning the dispute between Orange and BT was served by Orange on 20 June 2008.

57. There was an internal meeting followed by an email of 2 May 2006 between two Orange personnel. The email refers to a discussion with OFCOM at which OFCOM acknowledged that there was a short term loophole that Vodafone was exploiting and that OFCOM intended to close in the next round of regulation by setting a rate which applied equally to 2G and 3G termination. At the end of the email, the author sought guidance from one of the recipients as to whether Orange was able to capture the volumes of inbound traffic termination on their 2G and 3G networks up to 31 March 2007 when it must be assumed that “the window of opportunity” for setting an unregulated rate for 3G termination would close.

58. Orange issued the OCCN on 23 May 2006 and in response to queries from BT confirmed that this was a blended rate and that this was the first time that Orange was seeking to introduce a blended rate. BT raised further questions on 2 June 2006, asking what additional functionality BT would be purchasing for the 2G/3G blended rate increase. BT also asked Orange to split out the price of 2G and 3G termination. BT’s letter initially rejecting the OCCN made the point that the blended rate contained costs for component services that BT’s terminated calls do not use and which they therefore do not wish to purchase – the proposed increase in BT’s cost base with no associated increment in the value added for BT was of great concern to BT. The response by Orange on 13 June 2006 was that “The practice of bundling 2G and 3G costs to derive a

blended voice termination rate is already in existence and is an established industry practice.” They referred to the fact that OFCOM was aware of this practice and appeared to be content with it. BT accepted the rates by letter of 3 July 2006.

59. However, BT served its own OCCN on 19 July 2006 the purpose of which was explained in a letter of the same date “to reduce the termination costs charged by Orange to BT down to 2G only termination costs.” The reasons for this about turn were described in the Tribunal’s judgment on the preliminary issue in the Orange v OFCOM appeal (Case 1080/3/3/07 [2007] CAT 36, at paragraph [24]). There the Tribunal quotes from the witness statement filed in those proceedings on behalf of BT by Mr Colin Annette who was at the time Director of Regulatory Affairs BT Wholesale:

“I should make clear that BT was influenced to take this decision of 3rd July 2006 by two factors. Firstly BT was in commercial negotiations with Orange over a completely separate and very substantial project. BT was therefore inclined in all the circumstances not unnecessarily to “rock the boat” with Orange. There were also other commercial reasons why BT thought it might in all the circumstances be appropriate to accept the rates. However the second major factor was that only Vodafone and Orange had so far sought a price rise. In particular O2 and T-Mobile had not sought to raise their rates. BT therefore felt financially it could accommodate Orange’s rate rises provided O2 and T-Mobile did not also try to go to a blended rate charge.

“However all of that changed within literally the next few days when O2 and T-Mobile served OCCNs on BT. Whatever the previous commercial reasons for agreeing Orange’s original OCCN, BT felt it had no option but to challenge all the MNOs which were moving to a blended rate. Thus on 19th July, BT served an OCCN on Vodafone. On the same day BT served an OCCN on Orange. This was all a direct response to the fact that all the MNOs were now seeking to move to a blended rate”.

60. The charges proposed in BT’s OCCN were based on the most recent 2G information made available to BT by Orange. Thus BT was not seeking to change the rates to what they had been before the 23 May increase but rather based their OCCN on an email of 5 June from Orange (which we have not seen) which set out the 2G rate included in the blended rate set by the 23 May OCCN. These underlying 2G rate figures were repeated in a letter to OFCOM of 27 July 2006.
61. The OCCN was rejected by Orange saying that BT had accepted the blended rates only a few days earlier and it was unreasonable to seek to alter the rates so soon after. Orange disagreed with BT’s characterisation of what it was doing as “bundling”. In a letter of 23 August, BT complained that Orange’s stance meant in effect that Orange could use whatever technology it chose to deliver BT’s calls and include whatever technology costs it felt relevant, with BT having no right under the SIA to question the rates charged. No further substantive discussion of the issues took place.

62. In their letter to the Tribunal of 30 May 2008 Orange stated that the underlying 3G rate that they chose for the 23 May 2006 OCCN was “a rate which was based on what was then thought to be the market rate”.
63. The disputes between BT and Vodafone and between BT and Orange were referred to OFCOM on 22 January 2007 by BT in a joint document. In that referral document, BT argued that there is no justification for such high MCT rates and that it believed that it was being required to pay a “premium” over 2G termination rates for the purchase of 3G termination which brings no benefit to fixed network callers. BT also referred to the September 2006 Consultation in the investigation which ultimately led to the 2007 Statement. In that consultation document, OFCOM stated that within their respective blended charges, each of the 2G/3G MNOs had sought to levy 3G termination charges which are between double and triple OFCOM’s assessment of the cost of 3G termination by an MNO with both a 2G and 3G network. BT inferred from this that Vodafone’s and Orange’s 3G charges are so significantly in excess of OFCOM’s assessment of cost as to be unreasonable.

*(iii) The Tribunal’s decision in the BT / Vodafone and BT / Orange disputes*

64. Although the disputes arose in a different way from BT’s disputes with T-Mobile and O2 in that BT was trying to undo, rather than to resist, the setting of blended rates, the issue raised in the disputes was essentially the same. That was the issue of principle as to whether BT should pay an amount above the regulated 2G rate to reflect the fact that some calls were being terminated on the MNOs’ 3G networks.
65. The findings of the Tribunal in relation to T-Mobile’s and O2’s failure to provide proper justification to BT for their proposed introduction of the blended rates (paragraphs [29] *et seq* above) do not apply in the same way to the disputes with Vodafone and Orange. The Tribunal has not seen any contemporaneous material produced by Vodafone or Orange to explain to BT how they had arrived at the underlying 3G rate in the blended rates. In the case of Vodafone, the blended rate was introduced without BT being made aware of it and it was only in January 2006, after prompting by OFCOM, that Vodafone disclosed this fact to its call termination customers. However, as Vodafone pointed out to BT, it was open to BT at that stage to challenge the imposition of the blended rate and BT did not do so. In the case of Orange, we have seen that BT initially accepted the blended rate because other business imperatives overrode, for a short time, their concern at the price increase in the 23 May

2006 OCCN. In neither case did BT require detailed information or justification in terms of the MNO's costs to support the blended rate.

66. The Tribunal has considered carefully the question whether the fact that BT was initially prepared, for its own commercial reasons, to accept blended rates from Vodafone and Orange leads to the conclusion that those rates should not be disturbed and that BT's OCCNs should be rejected.
67. The Tribunal's judgment is that that would not be the appropriate way to resolve these disputes. Although it is always important to consider the underlying commercial position of the parties to the dispute, there are other factors at play here. Once BT had decided to contest the imposition of blended rates, it was entitled to raise that point of principle in relation to all those suppliers who had set or were seeking to set such rates. The SIA between BT and each of the MNOs does not place any restriction on the timing of service of OCCNs or set any minimum period during which accepted new rates must be allowed to run. Each party is entitled to serve an OCCN at any time and to refer a dispute to OFCOM if that OCCN is not accepted.
68. It is entirely understandable that once all four of the 2G/3G MNOs had decided to move to blended rates, BT would need to deal consistently with each of them. We have referred earlier to the emphasis that T-Mobile and O2 placed on the accusation that BT was discriminating against them by having rejected their blended rate OCCNs at the same time as it was paying blended rates to Vodafone and Orange. We do not consider therefore that BT can be criticised for serving its own OCCNs on Vodafone and Orange once it realised that its commercial interests in challenging the concept of the blended rate overrode its initial acceptance of the Vodafone and Orange rates.
69. Whatever the Tribunal decides as regards these two disputes, Vodafone's and Orange's position vis-à-vis BT is still different from the position of T-Mobile and O2. There is a period during which BT paid blended rates to Vodafone and Orange that cannot be affected by the resolution of these disputes even if the BT OCCNs are upheld. BT will still have paid blended rates to Vodafone between 1 September 2004 and 30 September 2006 and to Orange between 1 August 2006 and 30 September 2006. To that extent the advantage gained by Vodafone and Orange from the fact that BT considered that it was in its commercial interests not to challenge the blended rate remains. But the Tribunal does not consider that that advantage should be perpetuated once issue had been joined.

70. We therefore conclude that the Vodafone and Orange disputes should be approached in the same way as the T-Mobile and O2 disputes.
71. Considering the rates proposed, Vodafone’s underlying 3G rates were more modest – relatively speaking – than those of the other three 2G/3G MNOs:

<b>Vodafone prevailing rate</b>					
<b>2G day</b>	<b>2G eve</b>	<b>2G w/e</b>	<b>3G day</b>	<b>3G eve</b>	<b>3G w/e</b>
[5-10]	[0-5]	[0-5]	[10-15]	[0-5]	[0-5]

<b>Orange prevailing rate</b>					
<b>2G day</b>	<b>2G eve</b>	<b>2G w/e</b>	<b>3G day</b>	<b>3G eve</b>	<b>3G w/e</b>
7.4	5.1464	5.1464	19.90	14.15	14.15

72. However, even the Vodafone rates represent a substantial percentage uplift for 3G termination compared with 2G termination in circumstances where no additional functionality is provided. Orange has not purported to justify its proposed increase by reference to any assessment of its costs of providing 3G termination. Vodafone did not engage with BT on the issue that BT was raising, preferring to rest on the fact that it had managed to introduce the blended rate without challenge by BT and that OFCOM had indicated that it did not consider it appropriate to intervene. In so far as Vodafone’s stance may have been based on an assumption that BT’s only redress was a competition law challenge to Vodafone’s rates, the Tribunal has explained in the main judgment why that assumption was wrong.
73. Comparing the prevailing blended rate with the rate set in the first year of 2007 Statement price control also confirms that the prices charged by Vodafone and Orange were not reasonable: see paragraphs [151] and [152] of the main judgment and paragraph [36] above.
74. The Tribunal therefore upholds BT’s OCCNs served on Vodafone and Orange. The rates payable should be the rates proposed in those OCCNs over the period up to 31 March 2007.

#### IV. THE DISPUTE BETWEEN BT AND H3G

75. H3G does not operate its own 2G network. Where possible it terminates its calls on its own 3G network but it also has roaming arrangements whereby other calls can be terminated through another MNO's 2G network. H3G has charged a single set of rates for termination however that termination is achieved. So the question of H3G introducing the blending of rates in the same way as the 2G/3G MNOs does not arise, though the issue of the proper relationship between H3G's 3G rate and the regulated 2G rates of the other MNOs may still be important. Prior to the issue of any OCCN in the BT/H3G relationship, H3G charged the same rates for its 3G termination from the time that the service was introduced on 1 September 2003. Those rates were 15.62 ppm (daytime), 10.78 ppm (evening) and 2.51 ppm (weekend) and had originally reflected the 2G MCT rates of one of the 2G/3G MNOs.
76. By 2006, the regulated 2G MCT rates were significantly lower and BT issued an OCCN to H3G on 17 August 2006, proposing a substantial reduction in the rates payable to H3G lowering them to 9.092 ppm (daytime), 4.00 ppm (evening) and 4.00 ppm (weekend). The effective date set in the OCCN was 1 November 2006. H3G rejected the OCCN.
77. H3G wrote to BT on 22 November 2006 proposing new rates of 19.9 ppm (daytime), 14.15 ppm (evening) and 14.15 (weekend) to start from that date.
78. The rates in dispute between the parties were therefore:

<b>BT/H3G</b>	<b>Actual rate (3G termination)</b>		
	<b>daytime</b>	<b>evening</b>	<b>weekend</b>
BT rate in OCCN as from 1/11/06	9.092	4.00	4.00
H3G rate as prevailing up to 22/11/06	15.62	10.78	2.51
H3G rate as per 22/11/06 proposal	19.9	14.15	14.15

79. The contemporaneous evidence concerning the dispute between BT and H3G was contained in the annexes to H3G's notice of appeal. BT acknowledged when issuing its OCCN on 17 August 2006 that it was proposing a very substantial reduction in the rates

which had prevailed since 1 September 2003. The rates proposed by BT were, it said, based on the T-Mobile termination rates as shown in the BT Carrier Price List. This comparator was chosen because H3G had aligned its charges with this T-Mobile chargeband when it initially agreed termination rates with BT before the launch of its service. However, BT recognised that the OCCN rates might not be acceptable to H3G and so the OCCN gave a long lead time so that the parties could negotiate.

80. H3G responded on 30 August 2006 rejecting the OCCN and stating that the proposed prices were not reflective of H3G's efficiently incurred costs of terminating voice calls on its network. They proposed a meeting with BT to discuss the rates. BT wrote to H3G on 13 September 2006 referring to a conversation the previous day. BT recorded the fact that H3G had not made a counter-offer as H3G believed that the current contractual rates reflect H3G's actual cost base. H3G replied the following day saying they were willing to give BT an overview of the information that BT required to demonstrate that H3G was not over-recovering its efficiently incurred costs at the prevailing rates.
81. The proposed meeting took place on 29 September 2006. It is not clear what happened at the meeting other than that the parties did not reach a commercial agreement and BT proposed to invoke the statutory dispute resolution procedure. It appears (from H3G's letter of 25 October 2006) that H3G gave a presentation about the OFCOM cost modelling which had been included in the September 2006 Consultation published as part of the Market 16 review.
82. There was further correspondence, with BT pressing H3G to make a counter proposal and H3G responding at length repeating its stance that since it did not believe that its current rates covered its costs it saw no justification for lowering its rates. Finally H3G wrote to BT on 22 November 2006. The letter stated that BT had not provided any justification for seeking to reduce the rates other than reliance on the costs benchmarks in the consultation exercise. This reliance was wrong because, in its response to the consultation, H3G was disputing the appropriateness of the cost modelling and was still arguing that their existing charges were not excessive. But since BT was insisting on a counter proposal, H3G provided one – proposing to move to the higher rates that BT had agreed to pay Orange for 3G call termination.
83. The dispute over the BT OCCN of 17 July 2006 was referred to OFCOM by BT on 22 January 2007. The dispute over the H3G proposed increase was referred to OFCOM by H3G on 19 March 2007.

84. The BT dispute referral document dealt with the reasons for the price reduction, referring to a statement in OFCOM's September 2006 Consultation indicating that Vodafone and Orange's 3G charges were significantly in excess of the costs of 3G termination. In particular BT referred to the paragraph in that Consultation document which states that the proposed 3G rates of the 2G/3G MNOs were between two and three times as much. BT said that it had no reason to believe that H3G's costs are substantially different from those of the 2G/3G MNOs so that H3G's charges must also be significantly in excess of their costs.

*(iii) The Tribunal's decision in the BT / H3G dispute*

85. The essence of the dispute between the parties was that BT considered that the fact that MCT rates charged by the 2G/3G MNOs had been declining year on year under the 2004 Statement price control should be reflected in a reduction in the H3G rate which had remained static for several years. H3G's case was that no such reduction was appropriate because its efficiently incurred costs were not covered by the prevailing rates so that in fact an increase in the rates was appropriate.

86. In considering whether BT's argument has merit, the Tribunal has taken into account a number of factors. First, it is important to acknowledge that in the 2004 Statement OFCOM considered and rejected the need to impose *ex ante* regulation on 3G call termination by H3G – at that time the only operator providing such termination. The Tribunal recognises that one factor which should be taken into account in resolving a dispute about H3G's MCT charges is that OFCOM did not set a price control in the 2004 Statement and that BT is not entitled to anticipate the introduction of the price control in the 2007 Statement. To some extent the point discussed by the Tribunal in paragraph 186 of the main judgment is therefore relevant here. To set against this, the Tribunal indicated in paragraph 110 of the main judgment that BT's evidence suggested that there had been considerable changes in the market since the 2004 Statement. The Tribunal agrees with this point and reiterates that it is important for the resolution of the dispute to be consistent with both the 2004 and the 2007 Statements.

87. The second factor is that it is apparent from the 2007 Statement that OFCOM did not agree with the assertions put forward by H3G in its negotiation with the BT that the prevailing prices did not cover its efficiently incurred costs. On the contrary, OFCOM found that H3G's prices were significantly above OFCOM's estimate of reasonably incurred costs for 2007/08 (see paragraph 9.171 of the 2007 Statement). In Annex 13 to the 2007 Statement, OFCOM compared the blended efficient charge benchmark

comparing the 2G/3G MNOs with the 3G only MNO in an indicative scenario which included £4 billion of 3G spectrum costs. This showed a figure for the 3G operator in 2006/07 of about 7 ppm, considerably below the prevailing average rate of 10.7 ppm.

88. We accept that in its appeal against the 2007 Statement (Case 1083/3/3/07), H3G is challenging some of the elements of OFCOM's cost modelling, arguing for example that a large allowance for CARS costs should have been included. Nonetheless we find that there is considerable force in BT's argument that, H3G's prices having remained static for three years during which the prices of the other MNOs had fallen considerably, it was time for some reduction in H3G's rates.
89. Thirdly, BT made clear that its OCCN represented an opening bid intended to trigger negotiations. BT expected to arrive at some reduction but not a reduction as large as it proposed in its OCCN. In these circumstances it would be inappropriate to uphold the BT OCCN and resolve the dispute by setting prices at that level.
90. In the light of how the Tribunal has decided to resolve the disputes between BT and the 2G/3G MNOs, we have considered what assistance we can derive from looking at how OFCOM set the glide path for H3G's rates in the 2007 Statement. Because H3G's prices were so far above the price that was set as the TAC in the 2007 Statement, OFCOM decided that there should be a sharp one off reduction of prices between prevailing prices and the first year of the control and then three equal reductions in the subsequent years of the price control. OFCOM therefore set the start of the glide path at 8.5 ppm (2006/7 prices) which represented a reduction of about 20 per cent of current prices (see paragraph 9.190 of the 2007 Statement). The percentage reductions year on year were then calculated to be 11.8 per cent for H3G.
91. OFCOM then applied an inflation uplift to the 8.5 ppm to arrive at a nominal rate for 2007/08 of 8.8 ppm. There was then an adjustment to take account of the fact that OFCOM was introducing the new rate with almost immediate effect whereas it was general practice to give 60 days notice of the introduction of a new rate. OFCOM therefore adjusted the first year rate to a rate which represented 10 months at the new rate of 8.8 ppm and two months at the average prevailing rate. This brought the first year rate set for H3G to 9.1 ppm (see paragraph 9.243 of the 2007 Statement).
92. Taking into account all the circumstances of this dispute, the Tribunal has concluded that a fair and reasonable price to apply between BT and H3G over the relevant period can be calculated as follows. The figure taken by OFCOM as the start of the glide path

was 8.5 ppm (in 2006/7 prices). Adding an uplift of 11.8 per cent to that (being the Controlling Percentage used to arrive at the TAC in 2010/11) strikes, in the Tribunal's judgment, the right balance between consistency with the 2004 and 2007 Statements, the need not to anticipate *ex ante* regulation and the appropriateness of some reduction in the rates to reflect the overall price trends in the market.

93. In the Tribunal's judgment, the dispute between BT and H3G should be resolved by setting, for the period 1 November 2006 until 31 March 2007 the average MCT price chargeable to BT on H3G's network at 9.64 ppm.

## V. THE DISPUTES BETWEEN H3G AND O2 AND BETWEEN H3G AND ORANGE

### (i) H3G and O2

94. On 28 July 2006 O2 sent H3G a notification of change to the rates which O2 charged H3G for terminating H3G calls on the O2 network. The new rates were to take effect from 1 September 2006. Before the change the rates were unblended 2G termination rates of [...] [C] ppm (daytime), [...] [C] ppm (evening) and [...] [C] (weekend). The proposed new rates were blended rates resulting in [...] [C] ppm (daytime), [...] [C] ppm (evening) and [...] [C] ppm (weekend). On 30 November 2006 O2 served notice of another proposed change increasing the rates to [...] [C] ppm (daytime), [...] [C] ppm (evening) and [...] [C] ppm (weekend) with an effective date of 1 January 2007. Both these increases were disputed by H3G.
95. Thus the rates in contention are the same as the rates that were set out in the OCCNs served by O2 on BT (see paragraphs [24] and [25] above) and the rates that H3G contended for are the same as the rate that BT is seeking in its dispute with O2:

H3G/O2	Actual Rate			Underlying 2G			Underlying 3G		
	day	eve	w/e	day	eve	w/e	day	Eve	w/e
H3G seeks rate pre before 1/9/06	[C]	[C]	[C]	[C]	[C]	[C]	x	x	x
O2 OCCN as from 1/9/06	[C]	[C]	[C]	[C]	[C]	[C]	[C]	[C]	[C]

O2 OCCN as from 1/1/07	[C]								
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96. The contemporaneous correspondence relating to this dispute was annexed to H3G’s notice of appeal. In response to the change notice of 28 July, H3G wrote to O2 stating that while H3G appreciated that costs for 3G may well be higher than costs of 2G termination, it wanted clarification of the assumptions that had been made in the calculation of the proposed rates.
97. On 11 August 2006 O2 replied saying that the blended rate is based on the proportion of minutes estimated to be terminated on each of their networks during the last four months of the calendar year. H3G replied on 8 September saying that this was not sufficiently detailed information and that until O2 made a reasonable case that the rates are in line with its costs and based on reasonable traffic assumptions, H3G was not prepared to pay any amount over and above the prevailing charges.
98. We have not seen any response by O2 to this letter, other than the further notification of an increase on 30 November 2006. H3G responded on 20 December repeating its request for credible data on traffic assumptions and for further explanation in support of the rates.
99. Finally on 8 March 2007 H3G wrote to O2 giving them a “final opportunity” to agree a rate and to avert a reference of the matter to OFCOM. There was a meeting between the parties on 14 March 2007 after which H3G set out what information it required from O2 about the cost basis for the rates. O2 declined to provide this saying that they would await the outcome of the existing OFCOM determinations of H3G’s rate.
100. H3G referred the dispute with O2 to OFCOM on 19 March 2007.

(ii) *H3G and Orange*

101. Orange sent a notice to H3G on 4 July 2006 advising of a change to the rates with effect from 1 August 2006. The pre-existing rate was 7.601 ppm (daytime), 5.447 ppm (evening) and 4.354 ppm (weekend). The new proposed rates were blended rates of 7.5 ppm (daytime), 5.7312 ppm (evening) and 5.7312 ppm (weekend). This letter was replaced by a letter on 11 July setting out the same rates but giving also the underlying 2G and 3G rates. The second letter provided for the rates to come into effect on 15 August 2006.

102. These rates were rejected by H3G and there followed a dispute about whether there was any contractual entitlement to reject them or whether the rates automatically became binding.

103. The rates that the parties were seeking were as follows:

H3G/Orange	Actual Rate			Underlying 2G			Underlying 3G		
	day	eve	w/e	day	eve	w/e	day	eve	w/e
H3G seeks rate pre before 15/8/06	7.601	5.447	4.354	7.601	5.447	4.354	x	x	x
Orange Notice as from 15/8/06	7.50	5.7312	5.7312	7.40	5.1464	5.1464	19.90	14.15	14.15

104. Thus again, the rate that H3G was seeking to maintain is the unblended rate that was the same as the rate that BT was paying before it accepted briefly the Orange OCCN and then served its own OCCN to lower the rate to the underlying 2G rate. The rate for which Orange contended was the same as the rate set out in the OCCN it had served on BT and which BT had accepted (see paragraph [58] above).

105. There is some contemporaneous evidence of the negotiations leading up to the referral of the dispute appended to H3G’s notice of appeal. Following the letter of 11 July 2006 from Orange (which substituted different rates for the rates notified on 4 July), H3G asked for details of the basis on which the blended rate had been calculated. Orange wrote on 4 August stating that the rate was based on the percentage of 3G traffic on Orange’s network “at the time of the calculation” and with a “very conservative projection” of the evolution of the percentage of 3G traffic over the remainder of the charge control period. That letter did not refer to Orange’s costs of 3G termination.

106. On 12 September 2006 H3G wrote again sending what it said was a Review Notice in accordance with Clause 17.1.3 of the Interconnect Agreement. This Notice asked for details including whether the traffic percentage includes origination, on-net or video calls. It also stated that H3G had estimated that the average underlying termination rate for 3G calls in the blend must be in the region of 17.0 – 17.5 ppm and asked for relevant cost justification for setting the rate at this level.

107. Orange wrote back on 17 October repeating what it had set out in the earlier letter about traffic estimates and not referring to H3G's question regarding Orange's costs. In response to further requests for information from H3G, Orange simply wrote saying that the rates applicable were those set out in the 11 July 2006 letter.

*(iii) The Tribunal's decision on the disputes between H3G / O2 and H3G / Orange*

108. As described above, the rates that O2 and Orange were seeking to set for H3G were the same rates as they were contending for in their dispute with BT. This is understandable because although each of the different MNOs may charge different MCT rates, it is established industry practice for each MNO to operate a single rate for interconnection for voice calls with other MNOs and with BT.

109. There are two main reasons for this. The first is because of the role that BT plays as a transit operator. BT directly interconnects with approximately 180 communications providers in the UK and the charges it can impose for transit are regulated. Many operators therefore rely on BT to terminate their calls on other networks under BT's interconnection agreement with that network rather than having to negotiate their own agreement with each of the 180 communications providers. In such a case BT pays the MCT charge imposed by the terminating network and charges the transiting operator that MCT charge plus the transit fee and an additional circuit charge for conveyance. The effect of this is that any difference between the rate the MNO charges BT and the rate that it charges any other MNO affects the scale of BT's transit traffic: if the rate for BT is cheaper then other network operators will route their calls via BT in order to take advantage of the better rate. If the network operator can obtain a better price by direct contract with the MNO then they will abandon the use of BT as a transit operator.

110. The second factor, which is linked to the first, is that terminating MNOs are not able to identify in respect of calls coming from BT whether the call comes from a BT subscriber or whether the call originates with a subscriber of another operator who is using BT's transit services to route the call. This means that they cannot maintain a differential between the rates because they currently have no means of identifying or discouraging the kind of "arbitrage" described in the previous paragraph.

111. The Tribunal therefore concludes that the set of rates that are fixed for the supply of MCT by Orange to BT should also prevail for the supply of MCT by Orange to H3G and that the set of rates that are fixed for the supply of MCT by O2 to BT should also prevail for the supply of MCT by O2 to H3G.

112. The Tribunal recognises that in the dispute between H3G and Orange, the Tribunal’s conclusion results in setting a price which is outside the range sought by the parties. This arises because unlike BT, H3G did not serve a counter Notice of Variation on Orange seeking to reduce the MCT rates to the underlying 2G rate in Orange’s proposed rate, that underlying 2G rate being lower than the previous unblended 2G rate. The Tribunal considered the question whether it would ever be appropriate for the regulator to resolve a dispute at a level outside the range for which the parties were contending and concluded that it could (see paragraph [181] of the main judgment). The Tribunal is satisfied that the circumstances of this case are an occasion where it is right to set a charge which is slightly below the rate for which the party disputing the change in rate was contending.

## **VI. CONSEQUENTIAL MATTERS**

113. Some further matters call for decision. Section 190 of the 2003 Act sets out the powers which OFCOM may exercise in resolving disputes:

### **“190 Resolution of referred disputes**

(1) Where OFCOM make a determination for resolving a dispute referred to them under this Chapter, their only powers are those conferred by this section.

(2) Their main power (except in the case of a dispute relating to rights and obligations conferred or imposed by or under the enactments relating to the management of the radio spectrum) is to do one or more of the following-

(a) to make a declaration setting out the rights and obligations of the parties to the dispute;

(b) to give a direction fixing the terms or conditions of transactions between the parties to the dispute;

(c) to give 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 of the dispute to the other, to give a direction, enforceable by the party to whom the sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment.”

114. As the Tribunal made clear in the discussion of construction of the SIA in the main judgment, an order under section 190(2)(d) should generally follow on the setting of a rate when a dispute is resolved (see paragraph [169] of the main judgment). The Tribunal will therefore direct OFCOM to make an order under section 190(2)(d) to ensure that the rates which are set pursuant to the Tribunal’s decisions apply for the

appropriate period and that the parties are ordered to make such payments or repayments as result from that backdating.

115. Clearly there is a substantial arithmetical task ahead to work out what sums of money would have fallen due if the rates had been set as the Tribunal has now determined and to compare those with the amounts in fact paid over the period. The parties are in a better position than OFCOM to carry out these calculations. The Tribunal therefore encourages the parties to negotiate with each other as to the payments which need to be made so that this places as small a burden on OFCOM's resources as possible.
116. The Tribunal also invites the parties to consider whether any of the non-core issues which were raised in the Notices of Appeal but not considered at the hearing earlier this year are to be pursued. The parties should notify the Tribunal as soon as possible whether they intend to pursue the non-core issues.

## **VII. CONCLUSION**

117. The Tribunal is unanimous in deciding that the appropriate action for OFCOM to take in relation to the disputes which have been the subject of these appeals is as follows:
- (a) in relation to the dispute between BT and T-Mobile, OFCOM should resolve the dispute by determining a set of rates for T-Mobile which is compatible with T-Mobile's 2G termination rates under the price control applicable over the relevant period;
  - (b) in relation to the dispute between BT and O2, OFCOM should resolve the dispute by determining a set of rates for O2 which is compatible with O2's 2G termination rates under the price control applicable over the relevant period;
  - (c) in relation to the dispute between BT and Vodafone, OFCOM should resolve the dispute by setting rates in accordance with the OCCN served by BT on Vodafone 19 July 2006 to take effect between 1 October 2006 and 31 March 2007;
  - (d) in relation to the dispute between BT and Orange, OFCOM should resolve the dispute by setting rates in accordance with the OCCN served by BT on Orange on 19 July 2006 to take effect between 1 October 2006 and 31 March 2007;

- (e) in relation to the dispute between BT and H3G, OFCOM should resolve the dispute by setting the average MCT price at 9.64 ppm for the period 1 November 2006 to 31 March 2007;
- (f) in relation to the dispute between H3G and O2, OFCOM should resolve the dispute by determining a set of rates for the supply of MCT by O2 to H3G which is the same as the set of rates fixed for the supply of MCT by O2 to BT;
- (g) in relation to the dispute between H3G and Orange, OFCOM should resolve the dispute by determining a set of rates for the supply of MCT by Orange to H3G which is the same as the set of rates fixed for the supply of MCT by Orange to BT.

118. These appeals can only finally be disposed of once all the issues raised in the grounds of appeal are either resolved or withdrawn. Following that, the parties will be given an opportunity to comment on the form of a draft order remitting the disputes to OFCOM pursuant to section 195(4) of the 2003 so as to ensure that the directions made by the Tribunal give effect to the decisions set out in this judgment.

Vivien Rose

Andrew Bain

Adam Scott

Charles Dhanowa  
Registrar

Date: 15 August 2008