



Neutral citation [2008] CAT 5

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

Case Numbers: 1083/3/3/07  
1085/3/3/07

Victoria House  
Bloomsbury Place  
London WC1A 2EB

18 March 2008

Before:

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

Sitting as a Tribunal in England and Wales

BETWEEN:

**HUTCHISON 3G UK LIMITED**  
**BRITISH TELECOMMUNICATIONS PLC**

Appellants

-v-

**OFFICE OF COMMUNICATIONS**

Respondent

supported by

**O2 (UK) LIMITED**  
**T-MOBILE (UK) LIMITED**  
**VODAFONE LIMITED**  
**ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED**

Interveners

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**RULING ON THE REFERENCE OF SPECIFIED**  
**PRICE CONTROL MATTERS TO THE COMPETITION COMMISSION**

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## APPEARANCES

Miss Dinah Rose QC, Mr. Brian Kennelly and Mr Keith Jones (instructed by Baker & McKenzie) appeared on behalf of Hutchison 3G (UK) Limited.

Mr. Peter Roth QC (instructed by the Office of Communications) appeared for the Respondent.

Mr. David Anderson QC and Miss Sarah Lee (instructed by BT Legal) appeared on behalf of British Telecommunications plc.

Miss Kelyn Bacon (instructed by S.J. Berwin) appeared on behalf of O2 (UK) Limited.

Mr. James Flynn QC (instructed by Field Fisher Waterhouse) appeared on behalf of Orange Personal Communications Services Limited.

Mr Jon Turner QC and Mr. Meredith Pickford (instructed by Miss Robyn Durie, Regulatory Counsel, T-Mobile) appeared on behalf of T-Mobile (UK) Limited.

Ms Elizabeth McKnight (Partner, Messrs Herbert Smith) appeared on behalf of Vodafone.

Mr. Tom Sharpe QC and Mr David Caplan appeared on behalf of the Competition Commission.

1. At a hearing on 25 February 2008 the Tribunal heard submissions from the parties on the formulation of questions to be referred to the Competition Commission as part of the appeals brought by Hutchison 3G UK Limited (“H3G”) and British Telecommunications plc (“BT”) under section 192 of the Communications Act 2003 (the “2003 Act”). Both appeals challenge the statement made by the Respondent, the Office of Communications (“OFCOM”), entitled “Mobile Call Termination” which was published on 27 March 2007 (“the Decision”).
2. In the Decision OFCOM imposed a price control on H3G and on the other mobile network operators (“MNOs”) who are the Interveners in these appeals. That price control came into effect on 1 April 2007 and covers the period from that date until 31 March 2011.
3. The relevant provisions of the 2003 Act provide as follows:

**“193 Reference of price control matters to the Competition Commission**

(1) Tribunal rules must provide in relation to appeals under section 192(2) relating to price control that the price control matters arising in that appeal, to the extent that they are matters of a description specified in the rules, must be referred by the Tribunal to the Competition Commission for determination.

(2) Where a price control matter is referred in accordance with Tribunal rules to the Competition Commission for determination, the Commission is to determine that matter—

- (a) in accordance with the provision made by the rules;
- (b) in accordance with directions given to them by the Tribunal in exercise of powers conferred by the rules; and
- (c) subject to the rules and any such directions, using such procedure as the Commission consider appropriate.

(3) The provision that may be made by Tribunal rules about the determination of a price control matter referred to the Competition Commission in accordance with the rules includes provision about the period within which that matter is to be determined by that Commission.

(4) Where the Competition Commission determines a price control matter in accordance with Tribunal rules, they must notify the Tribunal of the determination they have made.

(5) The notification must be given as soon as practicable after the making of the notified determination.

(6) Where a price control matter arising in an appeal is required to be referred to the Competition Commission under this section, the Tribunal, in deciding the appeal on the merits under section 195, must decide that matter in accordance with the determination of that Commission.

...

### **195 Decisions of the Tribunal**

(1) The Tribunal shall dispose of an appeal under section 192(2) in accordance with this section.

(2) The Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal.

(3) The Tribunal's decision must include a decision as to what (if any) is the appropriate action for the decision-maker to take in relation to the subject-matter of the decision under appeal.

(4) The Tribunal shall then remit the decision under appeal to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its decision.

(5) The Tribunal must not direct the decision-maker to take any action which he would not otherwise have power to take in relation to the decision under appeal.

(6) It shall be the duty of the decision-maker to comply with every direction given under subsection (4).

..."

4. Broadly speaking therefore, the procedure requires the Tribunal to identify whether an appeal raises any "specified price control matters", as defined. The price control matters to which the procedure applies have been specified in rule 3 of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (SI 2004 No. 2068) ("the 2004 Rules").
5. If the appeal does raise specified price control matters, then those matters are to be referred by the Tribunal to the Competition Commission for its determination. Matters raised by the appeal which are not specified price control matters are to be decided by the Tribunal. Once the Competition Commission has notified the Tribunal of its determination of the price control matters referred to it, the Tribunal must decide the appeal on the merits and, in relation to the price control matters, must decide those matters in accordance with the determination of the Competition Commission, unless the Tribunal decides, applying the principles applicable on an application for judicial

review, that the Competition Commission's determination would fall to be set aside on such an application.

6. All of the issues raised in the BT appeal are specified price control matters to be determined by the Competition Commission. Putting the matter very broadly, BT argues that OFCOM erred in a number of respects with the result that it set a price control for each of the MNOs at too high a level.
7. H3G challenges OFCOM's jurisdiction to set a price control at all. Those challenges were not specified price control matters and were heard by the Tribunal at an eight-day hearing commencing on 24 January 2008. The Tribunal's judgment on those matters is pending. For the purposes of this ruling it is assumed that the imposition of a price control on H3G by OFCOM was lawful. In that event, H3G argues that its own price control was set too low and that the price control of each other MNO was set too high.
8. The Tribunal must therefore refer these matters to the Competition Commission for determination. In the course of consulting the parties on the wording of the proposed questions, it became clear that there were different views among the parties as to the nature of the investigation which would be carried out by the Competition Commission and as to the range of possible outcomes of that investigation. The Tribunal concluded that these views needed to be explored before the wording of the questions could be finalised.
9. By the time of the hearing most of the concerns raised by the parties had been resolved. But there were two important issues about which we heard argument. The first was whether, in the event that the Competition Commission found that some or all of the challenges to the level of the price control were well founded, the Competition Commission should go on to determine for itself what the appropriate level of the price control should be. The second was whether the questions should allow for the Competition Commission to conclude that the prices of the Intervener MNOs should be set at a higher level than the level set in the Decision.

*(i) The setting of an alternative price control*

10. BT had initially argued that the questions referred should *require* the Competition Commission to determine the correct level of price control if BT's and/or H3G's grounds of appeal succeed in whole or in part. They point out that the United Kingdom is required by Article 4 of Directive 2002/21/EC [2002] OJ L108/33 ("the Framework Directive") to provide a right to appeal against the decision of the national regulatory authority to a body with appropriate expertise to hear such appeals. The Directive provides that "Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism".
11. BT argue that if the Competition Commission's determination identifies errors in the Decision but does not set an alternative price control, OFCOM will, once the case is remitted to it, have to conduct further inquiries and consultation before itself setting a new price control. This prolongation of the proceedings would mean that the appeal mechanism is not "effective" within the meaning of the Directive and the proceedings may well not be concluded before the period covered by the price control expires. Such a procedure would defeat the statutory purpose which is to provide for a swift but thorough review by the Competition Commission to establish whether particular criticisms by the appellants are valid and require some adjustment to the price controls.
12. At the hearing BT had modified its position and accepted that it might turn out to be impracticable for the Competition Commission to set an alternative price control. BT accepted that it would not be appropriate to word the questions in terms of *requiring* the Competition Commission to do so. However, BT maintained that the questions should make clear that the Competition Commission should certainly aim to do so unless this was impracticable. H3G and OFCOM adopted a similar stance arguing that the Competition Commission should if possible determine the new price control, recognising that whether this would in fact be possible might depend on which of the grounds of appeal (if any) were successful.
13. The Interveners, broadly, argued that it was not the task of the Competition Commission to devise the new price control. Its task was limited to determining whether OFCOM had erred in the principles and methodology applied in setting the

level of the price control. If the Competition Commission found that the Decision was flawed, the Tribunal would have to remit the Decision to OFCOM for reconsideration. That reconsideration should not be constrained and OFCOM should be free at that stage to consider additional observations by the Interveners and other third parties in arriving finally at the new price control.

14. The Competition Commission was understandably cautious about committing itself to producing an alternative price control given that the matters have not yet been referred and it does not have a clear idea about how complex the issues raised are going to be. Mr Sharpe QC on behalf of the Competition Commission resisted any formulation of the questions which would put what he described as “undue pressure” on it to come up with substitute figures. But he was able to give some reassurance as to how the Competition Commission would approach its task. Although he could not say that the Competition Commission would provide exact and precise numbers on each and every question, it will do its best to provide clear and comprehensive answers up to and including identifying the existence of an error, its magnitude and its consequences. He further accepted that as part and parcel of that exercise, if it rejects the methodology used by OFCOM in any respect, it will need to specify an alternative methodology which OFCOM can follow without having to exercise more than minimal discretion. Certainly Mr Sharpe sought to emphasise for the benefit of OFCOM and the Appellants that the Competition Commission aspired to prescribing a methodology which would enable OFCOM to arrive at answers relatively quickly – its intention was to conclude in a manner which was as helpful as possible.
15. The Tribunal accepts the arguments put forward by BT and OFCOM that the aim of the statutory provisions is that the disposal of the appeal, incorporating the determination of the price control matters by the Competition Commission, should result in as high a degree of finality as possible, having regard to the grounds of appeal and the nature of the Competition Commission’s findings. The Tribunal encourages the Competition Commission to conduct its investigation in such a manner and to express its determination in such terms as to make clear what directions the Tribunal should give in respect of the specified price control matters when remitting the decision to OFCOM. It is desirable that those directions and the disposal of the appeals should, in effect, settle the question of what the price control should be for the period covered by the

Decision. The Competition Commission should carry out their investigation with that goal firmly in mind.

16. The Tribunal recognises that it is too early in the procedure to be sure that it will be possible for the Competition Commission to set an alternative price control. Clearly BT put its case too high in its initial submissions. The Tribunal has therefore drafted the questions in a form which is intended to acknowledge this but also to ensure as far as possible that the appeal results in a revised price control being finalised without delay and avoids a situation where there are issues which require substantial further work and the exercise of judgment by OFCOM.
17. One point on which the Tribunal heard submission was whether, once the Decision was remitted to OFCOM at the disposal of the appeal, OFCOM was under a duty to engage again in the consultation process prescribed by the EU Common Regulatory Framework: see articles 6 and 7 of the Framework Directive and article 8(4) of Directive 2002/19/EC [2002] OJ L108/7 (“the Access Directive”) as implemented in the United Kingdom by sections 47 and 48 of the 2003 Act.
18. The Interveners argued that OFCOM could not simply modify the Decision in order to comply with the directions given by the Tribunal on disposing of the appeal. OFCOM would have to re-activate the consultation process with the EU Commission and the other Member States. BT and H3G disagreed, arguing that there was nothing in the Directives to indicate that the consultation procedure applied to the outcome of the appeal process envisaged by the Directives.
19. OFCOM agreed on this point with the Interveners. If the Tribunal remitted the Decision to OFCOM requiring it to be modified in order to give effect to the Competition Commission’s determination then there is no basis for shutting out the EU Commission just because the new measure proposed is the result of an appeal against an earlier measure in respect of which the EU Commission was consulted. OFCOM pointed out that the EU Commission and the other national regulatory authorities must be given an opportunity to comment upon what was in fact going to be adopted.

20. The Competition Commission also argued that the final measure adopted by OFCOM at the conclusion of these appeals would (assuming that there was some change to the current Decision) need to go through the Article 7 consultation process. Any argument to the contrary would, Mr Sharpe said, fail to give due weight to a provision of Community law which is designed to ensure harmony across Member States and to inform the EU Commission of an accurate and final settlement as opposed to something which is inaccurate and has been discarded.
21. The Tribunal considers that it is not at all clear from the Directives whether the obligation to consult applies only to the initial measure taken by the regulatory authority or whether it also applies to the adoption or modification of a measure when the authority is implementing the decision of the appeal body. A purposive construction of the Directives could point either way since the Framework Directive emphasises the importance both of an effective appeal mechanism and of the EU Commission's role in monitoring and influencing the measures adopted across the Union.
22. Further, it does not appear that the Directives themselves stipulate that the Member State must implement them in a way which provides that the appeal body *must* remit the matter to the national regulatory authority once the appeal is determined. If it is possible for a Member State to implement the Directives by allowing the appeal body to substitute its own decision for that of the regulatory authority, it is not clear how the consultation provisions could work in such a situation.
23. The Tribunal does not, however, consider that it needs to decide this issue of the proper construction of the Framework or Access Directives before formulating the questions. The fact that it may be necessary or appropriate for OFCOM to carry out some consultation at the conclusion of this appeal reinforces, in the Tribunal's judgment, the desirability of the Competition Commission giving as much guidance as possible as to the methodology to be employed in calculating, and the actual levels of, the price controls.
24. It is not necessary either to refer to the possibility of consultation in the questions, as was suggested by OFCOM. If the obligation to consult exists under the Directives and

under section 48 of the 2003 Act, then that obligation will not be overridden by the determination made by the Competition Commission or by the directions given to OFCOM by the Tribunal under section 195(4).

*(ii) Should the questions allow the Competition Commission to determine that the level of the price controls of the interveners can go up as well as down?*

25. Both BT and H3G argue that the result of the appeals before the Tribunal can result only in the price level set for the Intervener MNOs remaining the same or being reduced. Neither BT nor H3G is asking for those prices to be increased and, according to section 195(2) of the 2003 Act, the Tribunal must decide the appeal “on the merits and *by reference to the grounds of appeal* set out in the notice of appeal”. This limits, in the Appellants’ submissions, the range of potential outcomes since the grounds of appeal by reference to which the appeal must be decided point in one way only.
26. The Intervener MNOs disagree. They accept that the arguments that they raise must be limited to those which respond to issues arising from the Notices of Appeal and that they cannot, as T-Mobile’s counsel put it, run riot with horns and tail through the Tribunal’s procedures raising new points in favour of an increase in their price. But, they say, if in addressing one of the points that has been raised by an appellant the Competition Commission were to conclude not only that OFCOM had erred in its treatment of that issue but also that a proper analysis of that issue should have led to the price being higher rather than lower, then the Competition Commission should be allowed to determine this. The Tribunal would then be able, consistent with its duties under section 195(2), to give OFCOM such a direction.
27. By the time of the hearing, both OFCOM and the Competition Commission adopted the same stance on this issue as the Interveners. OFCOM argued that if consideration of the arguments and evidence on a particular ground of appeal leads the Competition Commission to conclude that the price set by OFCOM is too low or too high then the Competition Commission should not be precluded from determining that that is the case and expressing its view. This submission is based on the fact that the Tribunal’s jurisdiction and that of the Competition Commission is based on the public interest. The submission is not therefore dependent on the involvement of the interveners in this action or on the points that they make. Rather, as a matter of public interest once a

particular aspect of OFCOM's decision has been challenged and the Competition Commission has found that the method is wrong, they can say what they think the right method is even if the result of that is that the price control moves in a direction adverse to the party who has brought the appeal.

28. Mr Sharpe also argued that since the Competition Commission is a public body charged with examining price control matters, if in the course of its analysis of the issues it came to the provisional conclusion that the rates should go up, it should not be put in a position where it is obliged to ignore that and not to give effect to it. He urged that that cannot be what Parliament intended.
29. The Tribunal's provisional view when it circulated the draft questions in December 2007 was that the wording of section 195(2) of the 2003 Act did preclude a decision at the end of the day directing OFCOM to increase the prices of the Intervener MNOs. The Tribunal still considers that those words raise a substantial obstacle to the arguments put forward by the Interveners. The Tribunal does not consider that the analogy relied on by T-Mobile and OFCOM with the jurisdiction of the Tribunal to increase as well as reduce penalties in cases under the Competition Act 1998 (the "1998 Act") is helpful here. Although the wording of paragraph 3(1) of Schedule 8 to the 1998 Act which sets out the Tribunal's powers is in materially the same terms as section 195(2) of the 2003 Act, the wording of paragraph 3(2) of Schedule 8 goes on to confer an express power to impose or revoke or vary the amount of a penalty and to make any other decision which the Office of Fair Trading could itself have made. It is clear that the Tribunal's jurisdiction under section 195 of the 2003 Act is not as wide as that.
30. However, both OFCOM and the Competition Commission have urged the Tribunal not to limit the questions referred in the way initially proposed and to leave it open to the Competition Commission to conclude, if it finds that the methodology used by OFCOM was in a particular respect flawed, that the adoption of a proper methodology would result in the prices being higher.
31. Since these appeals are the first occasion on which the complex, split procedure provided for in the 2003 Act is being implemented, the Tribunal is reluctant to rule on

the construction of the statutory provisions unless or until it is necessary to do so. At present the Tribunal is considering only the formulation of the questions which are to be referred to the Competition Commission and is not considering the scope of the final directions which should be given under section 195(2).

32. The Tribunal has concluded therefore that the best way to proceed at this stage is to give the Competition Commission the flexibility that it has requested leaving open the question as to what would be the appropriate way to dispose of the appeal if the Competition Commission did indeed conclude that the mobile call termination charges of the Intervener MNOs should be raised.
33. It is true that section 193(6) provides that the Tribunal must, in deciding the appeal on the merits under section 195, decide price control matters in accordance with the determination of the Competition Commission. However, the Tribunal does not consider that this could require or empower the Tribunal to order a rise in prices if that course was in fact precluded by the proper interpretation of section 195(2).
34. The Tribunal has therefore modified the wording of the questions to remove the previous limitation and will finally determine the construction of section 195(2) if and when it becomes relevant, having regard to the Competition Commission's determination.

#### *Directions*

35. At the hearing on 25 February 2008 the Tribunal also heard submissions on the directions that should be given to the Competition Commission pursuant to rule 5 of the 2004 Rules. That rule sets a period of four months within which the Competition Commission must determine the specified price control matters referred to it, unless the Tribunal directs otherwise. All the parties accepted that the complexity of these appeals mean that we should extend the time allowed to the Competition Commission and also provide an adequate period after the delivery of the Tribunal's judgment on the non price control matters in H3G's appeal for the Competition Commission's deliberations to be able to take account, if appropriate, of the Tribunal's findings on those matters. The Tribunal considers that the Competition Commission should be directed to arrive at its determination by 31 October 2008 or no later than two months following the

handing down of the judgment on the non price control matters, whichever date is the later.

36. The Tribunal has also set a timetable for the remaining pleadings and supporting material to be served by the parties on the Competition Commission. This timetable was set out in the Tribunal's Order dated 5 March 2008.
37. In accordance with section 193(1) of the 2003 Act and rule 5 of the 2004 Rules, the Tribunal therefore refers the specified price control matters set out in the Schedule to this Ruling to the Competition Commission for determination.

Vivien Rose

Andrew Bain

Adam Scott

Charles Dhanowa  
Registrar

Date: 18 March 2008

#### **SCHEDULE**

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**REFERENCE OF SPECIFIED PRICE CONTROL MATTERS  
TO THE COMPETITION COMMISSION  
18 MARCH 2008**

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**HUTCHISON 3G UK LIMITED**

Appellant

-v-

**OFFICE OF COMMUNICATIONS**

Respondent

**BRITISH TELECOMMUNICATIONS PLC**

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**OFFICE OF COMMUNICATIONS**

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**O2 (UK) LIMITED**

**T-MOBILE (UK) LIMITED**

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**ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED**

**HUTCHISON 3G (UK) LIMITED**

Interveners

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**REFERENCE OF SPECIFIED PRICE CONTROL MATTERS**

**TO THE COMPETITION COMMISSION**

**18 MARCH 2008**

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1. Having regard to:

- (A) the Mobile Call Termination Statement and Notification issued by the Office of Communications (“OFCOM”) dated 27 March 2007 (“OFCOM’s Decision”);

- (B) the price controls set by Condition MA3, Control of Fixed to Mobile Interconnection Charges (“Condition MA3”) and by Condition MA4, Control of Mobile to Mobile Interconnection Charges (“Condition MA4”) in Annex 20, Schedule 1 part 2 of OFCOM’s Decision;
- (C) the notice of appeal dated 23 May 2007 lodged by Hutchison 3G UK Limited (“H3G”) in Case 1083/3/3/07 (and amended pursuant to the Order of the Tribunal dated 6 November 2007) and the statement therein that the Appendix to the Notice of Appeal (“the H3G Appendix”) sets out specified price control matters within the meaning of Rule 3(1) of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (“the 2004 Rules”); and
- (D) the notice of appeal dated 29 May 2007 lodged by British Telecommunications plc (“BT”) in Case 1085/3/3/07 (and amended pursuant to the Ruling of the Tribunal dated 17 December 2007) (“the BT Notice of Appeal”) challenging certain aspects of the setting of Conditions MA3 and MA4 and the statement therein that the appeal relates exclusively to specified price control matters within the meaning of Rule 3(1) of the 2004 Rules; and
- (E) the outline defence to the price control matters filed by OFCOM on 16 November 2007 and the defence and supporting evidence filed by OFCOM on 28 January 2008; and
- (F) the outline statements of intervention filed by each of the Interveners (including H3G and BT as Interveners in each other’s appeals) on 30 November 2007

the Tribunal, pursuant to Rule 3(5) of the 2004 Rules and section 193 of the Communications Act 2003, hereby refers to the Competition Commission for its determination the specified price control matters arising in these appeals.

2. By this reference the Tribunal orders the Competition Commission to determine the following questions:

**In relation to the BT Appeal**

Question 1

Whether, in relation to the BT appeal, the price controls imposed by Conditions MA3 and MA4 on any or all of the four 2G/3G Mobile Network Operators (T-Mobile, Vodafone, O2 and Orange) or as regards the 3G Mobile Network Operator (H3G) have been set at a level which is inappropriate for one or more of the following reasons:

- (i) OFCOM erred in its approach to the inclusion of spectrum costs for the reasons set out in paragraphs 83 to 148 of the BT Notice of Appeal;
- (ii) OFCOM erred in its approach to the inclusion of administration costs for the reasons set out in paragraphs 149 to 159 of the BT Notice of Appeal;
- (iii) OFCOM erred in its approach to the allowance of a network externality surcharge for the reasons set out in paragraphs 160 to 184 of the BT Notice of Appeal;
- (iv) OFCOM erred in failing to take proper account of the cost savings arising from network sharing between the MNOs when conducting its analysis for the reasons set out in paragraphs 185 to 187 of the BT Notice of Appeal.

**In relation to the H3G appeal**

Question 2

Whether the price controls imposed on H3G were too low relative to the price controls imposed on the other 2G/3G MNOs because OFCOM erred in failing to take account, or sufficient account, of the financial impact of these controls on H3G's business and on the adverse effect of that impact on competition, for the reasons set out in paragraphs 3.3 to 3.12 of the H3G Appendix.

Question 3

Whether the price controls imposed on H3G have been set at a level which is inappropriate for one or more of the following reasons:

- (i) OFCOM's welfare analysis was flawed for the reasons set out in paragraphs 3.13 to 3.15 of the H3G Appendix;
- (ii) OFCOM erred in basing its modelling of costs on Economic Depreciation methodology for the reasons set out in paragraphs 5.1 to 5.15 of the H3G Appendix;
- (iii) OFCOM erred in failing to make allowance for H3G's costs of Customer Acquisition, Retention and Service in setting the price cap for call termination for the reasons set out in paragraphs 8.1 to 8.46 of the H3G Appendix;

(iv) OFCOM erred in failing to take account of distortion created by arrangements for ported numbers for the reasons set out in paragraphs 9.1 and 9.2 of the H3G Appendix;

(v) OFCOM erred in selecting the charge to be imposed from the values generated by the scenarios it used for the reasons set out in paragraphs 10.1 to 10.4 of the H3G Appendix.

#### Question 4

Whether the level of Target Average Charge set for each of the 2G/3G MNOs (of 5.1ppm) is inappropriate because OFCOM erred in basing its modelling of costs on Economic Depreciation methodology, for the reasons set out in paragraphs 5.1 to 5.15 and 11.1 to 11.6 of the H3G Appendix;

#### Question 5

Whether OFCOM erred in setting a blended Target Average Charge for the 2G/3G MNOs rather than specifying separate rates for termination on 2G and 3G networks for the reasons set out in paragraphs 12.1 to 12.8 of the H3G Appendix.

#### Question 6

Whether OFCOM erred in setting H3G's glide path for the reasons set out in paragraphs 7.2 to 7.4 of the H3G Appendix.

#### Question 7

Whether OFCOM should have exercised its powers in such a way that net wholesale payments between MNOs were zero, with suitable cost-based price controls retained for fixed to mobile calls, either (a) for the period of the price controls or (b) pending the introduction of revised arrangements for mobile number portability, for the reasons set out in paragraphs 4.1 to 4.7 of the H3G Appendix.

### **In relation to both appeals**

#### Question 8

Having regard to the fulfilment by the Tribunal of its duties under section 195 of the Communications Act 2003 and in the event that the Competition Commission determines that the answer to any of the above questions is yes, the Competition Commission is to include in its determination:

(i) clear and precise guidance as to how any such error found should be corrected; and

(ii) insofar as is reasonably practicable, a determination as to any consequential adjustments to the level of the price controls.

3. The Competition Commission is directed to determine the issues contained in this reference by either 31 October 2008 or two months after the Tribunal delivers its judgment on the non price control matters in the H3G appeal, whichever date is the

later. The Competition Commission shall notify the parties to these appeals of its determination at the same time as it notifies the Tribunal pursuant to section 193(3) of the Communications Act 2003.

4. Should the Competition Commission require further time for making its determination it should notify the Tribunal and the parties so that the Tribunal may decide whether to extend the time set out in the previous paragraph.

5. There shall be liberty to apply for further directions.