



Determinations to resolve mobile call termination rate disputes between Hutchison 3G and each of O2 and Orange

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Determinations

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Section 1

The Determinations

1.1 Dispute between H3G and Orange

Determination under sections 188 and 190 of the Communications Act 2003 (“2003 Act”) for resolving a dispute between Hutchison 3G UK Limited (“H3G”) and Orange Personal Communications Services Limited (“Orange”) concerning the charges for wholesale mobile call termination on Orange’s network

WHEREAS—

(A) section 188(2) of the 2003 Act provides that, where Ofcom has decided pursuant to section 186(2) of the 2003 Act that it is appropriate for it to handle the dispute, Ofcom must consider the dispute and make a determination for resolving it. The determination that Ofcom makes for resolving the dispute must be notified to the parties in accordance with section 188(7) of the 2003 Act, together with a full statement of the reasons on which the determination is based, and publish so much of its determination as (having regard, in particular, to the need to preserve commercial confidentiality) they consider appropriate to publish for bringing it to the attention of the members of the public, including to the extent that Ofcom considers pursuant to section 393(2)(a) of the 2003 Act that any such disclosure is made for the purpose of facilitating the carrying out by Ofcom of any of its functions;

(B) section 190 of the 2003 Act sets out the scope of Ofcom’s powers in resolving a dispute which may, in accordance with section 190(2) of the 2003 Act, include—

- a) making a declaration setting out the rights and obligations of the parties to the dispute;
- b) giving a direction fixing the terms or conditions of transactions between the parties to the dispute;
- c) giving a direction imposing an obligation, enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by Ofcom; and
- d) for the purpose of giving effect to a determination by Ofcom of the proper amount of a charge in respect of which amounts have been paid by one of the parties to the dispute to the other, giving a direction, enforceable by the party to whom sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment;

(C) on 1 June 2004, Ofcom published a statement entitled *Mobile Call Termination*¹ which found that Orange held significant market power in the market for wholesale voice call termination provided by Orange (such termination being provided via Orange’s 2G and 3G mobile network). Whilst Ofcom imposed certain charge controls upon Orange in respect of charges for calls terminated on Orange’s 2G network, it elected not to impose charge controls upon Orange in respect of calls terminated on Orange’s 3G network;

¹ see http://www.ofcom.org.uk/consult/condocs/mobile_call_termination/wmvct/wmvct.pdf

(D) on 11 July 2006, Orange issued a Notice of Variation to H3G for termination of call traffic on Orange's network with an effective date of 15 August 2006. H3G disputed the higher charges proposed by Orange and withheld payments from Orange;

(E) on 21 March 2007 H3G referred disputes with each of Orange and O2 to Ofcom for dispute resolution. On 12 April 2007, Ofcom decided it was appropriate for it to handle the disputes referred by H3G together.

(F) having considered the submissions of all the parties to the disputes referred by H3G, Ofcom set the scope of the issues in dispute to be resolved as follows—

“to assess the charges proposed to H3G for call termination by O2 and Orange during the periods covered by the respective disputes. Specifically, Ofcom will consider whether there is any reason why H3G should not have been charged on the basis of the disputed call termination charges.

If Ofcom establishes that the answer to this question is ‘yes’, Ofcom will consider whether it is appropriate to determine call termination charges in this case, and if so, will determine what these charges should be. Ofcom will also consider whether it is appropriate to require that any repayments be made in respect of the disputed call termination charges.”.

(G) On 27 March 2007, Ofcom published a statement² concluding a market review into mobile call termination charges which found that Orange had significant market power in the market for wholesale mobile voice call termination provided to other Communications Providers by Orange in the United Kingdom and imposed SMP services conditions on Orange, including Condition MA3 which controls Fixed-to-Mobile Interconnection charges as from 1 April 2007;

(H) in order to resolve this dispute, Ofcom has considered (among other things) the information provided by the parties and Ofcom has further acted in accordance with its general duties set out in section 3 of, and the six Community requirements set out in section 4 of the 2003 Act;

(I) a fuller explanation of the background to the dispute and Ofcom's reasons for making this Determination is set out in the explanatory statement accompanying this Determination; and

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

I Declaration of rights and obligations, etc.

- 1 That H3G was and is required to pay for mobile call termination from Orange at the disputed charges contained in the Notice of Variation issued by Orange on 11 July 2006 with effect from 15 August 2006 until such time as alternative charges are in place;
- 2 Interest shall be payable in respect of the disputed charges set out in paragraph 1 above at the standard contract rate for the period.

II Binding nature and effective date

² Mobile call termination, Statement, 27 March 2007 at http://www.ofcom.org.uk/consult/condocs/mobile_call_term/statement/statement.pdf

2 This Determination is binding on H3G and Orange in accordance with section 190(8) of the 2003 Act.

3 This Determination shall take effect on the day it is published.

III Interpretation

4 For the purpose of interpreting this Determination—

- a) headings and titles shall be disregarded; and
- b) the Interpretation Act 1978 shall apply as if this Determination were an Act of Parliament.

5 In this Determination—

- a) “**2003 Act**” means the Communications Act 2003 (c.21);
- b) “**H3G**” means Hutchison 3G UK Limited, whose registered company number is 03885486 and whose registered office is at Hutchison House, 5 Hester Road, Battersea, London SW11 4AN;
- c) “**Ofcom**” means the Office of Communications;
- d) “**Orange**” means Orange Personal Communications Services Limited, whose registered company number is 02178917 and whose registered office is at St James Court, Great Park Road, Almondsbury Park, Bradley Stoke, Bristol BS32 4QJ; and
- e) the “**Notice of Variation**” means the notice issued by Orange to H3G on 11 July 2006 setting out increased charges for call termination on Orange’s network.

David Stewart

Director of Investigations

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

10 August 2007

1.2 Dispute between H3G and O2

Determination under sections 188 and 190 of the Communications Act 2003 (“2003 Act”) for resolving a dispute between Hutchison 3G UK Limited (“H3G”) and O2 (UK) Limited (“O2”) concerning the charges for wholesale mobile call termination on O2’s network

WHEREAS—

(A) section 188(2) of the 2003 Act provides that, where Ofcom has decided pursuant to section 186(2) of the 2003 Act that it is appropriate for it to handle the dispute, Ofcom must consider the dispute and make a determination for resolving it. The determination that Ofcom makes for resolving the dispute must be notified to the parties in accordance with section 188(7) of the 2003 Act, together with a full statement of the reasons on which the determination is based, and publish so much of its determination as (having regard, in particular, to the need to preserve commercial confidentiality) they consider appropriate to publish for bringing it to the attention of the members of the public, including to the extent that Ofcom considers pursuant to section 393(2)(a) of the 2003 Act that any such disclosure is made for the purpose of facilitating the carrying out by Ofcom of any of its functions;

(B) section 190 of the 2003 Act sets out the scope of Ofcom’s powers in resolving a dispute which may, in accordance with section 190(2) of the 2003 Act, include—

- a) making a declaration setting out the rights and obligations of the parties to the dispute;
- b) giving a direction fixing the terms or conditions of transactions between the parties to the dispute;
- c) giving a direction imposing an obligation, enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by Ofcom; and
- d) for the purpose of giving effect to a determination by Ofcom of the proper amount of a charge in respect of which amounts have been paid by one of the parties to the dispute to the other, giving a direction, enforceable by the party to whom sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment;

(C) on 1 June 2004, Ofcom published a statement entitled *Mobile Call Termination*³ which found that O2 held significant market power in the market for wholesale voice call termination provided by O2 (such termination being provided via O2’s 2G and 3G mobile network). Whilst Ofcom imposed certain charge controls upon O2 in respect of charges for calls terminated on O2’s 2G network, it elected not to impose charge controls upon O2 in respect of calls terminated on O2’s 3G network;

(D) on 28 July 2006, O2 issued a Notice of Variation to H3G for termination of call traffic on O2’s network with an effective date of 1 September 2006. O2 issued a further Notice of Variation to H3G on 30 November 2006 proposing further increases in the charges payable by H3G for termination of call traffic on O2’s network. H3G disputed the higher charges proposed by O2 in both Notices of Variation and withheld payments from O2;

³ see http://www.ofcom.org.uk/consult/condocs/mobile_call_termination/wmvct/wmvct.pdf

(E) on 21 March 2007 H3G referred disputes with each of Orange and O2 to Ofcom for dispute resolution. On 12 April 2007, Ofcom decided it was appropriate for it to handle the disputes referred by H3G together.

(F) having considered the submissions of all the parties to the disputes referred by H3G, Ofcom set the scope of the issues in dispute to be resolved as follows—

“to assess the charges proposed to H3G for call termination by O2 and Orange during the periods covered by the respective disputes. Specifically, Ofcom will consider whether there is any reason why H3G should not have been charged on the basis of the disputed call termination charges.

If Ofcom establishes that the answer to this question is ‘yes’, Ofcom will consider whether it is appropriate to determine call termination charges in this case, and if so, will determine what these charges should be. Ofcom will also consider whether it is appropriate to require that any repayments be made in respect of the disputed call termination charges.”.

(G) On 27 March 2007, Ofcom published a statement⁴ concluding a market review into mobile call termination charges which found that Orange had significant market power in the market for wholesale mobile voice call termination provided to other Communications Providers by Orange in the United Kingdom and imposed SMP services conditions on Orange, including Condition MA3 which controls Fixed-to-Mobile Interconnection charges as from 1 April 2007;

(H) in order to resolve this dispute, Ofcom has considered (among other things) the information provided by the parties and Ofcom has further acted in accordance with its general duties set out in section 3 of, and the six Community requirements set out in section 4 of the 2003 Act;

(I) a fuller explanation of the background to the dispute and Ofcom’s reasons for making this Determination is set out in the explanatory statement accompanying this Determination; and

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

I Declaration of rights and obligations, etc.

- 1** That H3G was required to pay for mobile call termination from O2 at the disputed charges contained in the First Notice of Variation with effect from 1 September 2006 until 31 December 2006;
- 2** That H3G was and is required to pay for mobile call termination from O2 at the disputed charges contained in the Second Notice of Variation with effect from 1 January 2007 until such time as alternative charges are in place;
- 3** Interest shall be payable in respect of the disputed charges set out in paragraphs 1 and 2 above at the standard contract rate for the period.

II Binding nature and effective date

⁴ Mobile call termination, Statement, 27 March 2007 at http://www.ofcom.org.uk/consult/condocs/mobile_call_term/statement/statement.pdf

2 This Determination is binding on H3G and O2 in accordance with section 190(8) of the 2003 Act.

3 This Determination shall take effect on the day it is published.

III Interpretation

4 For the purpose of interpreting this Determination—

- a) headings and titles shall be disregarded; and
- b) the Interpretation Act 1978 shall apply as if this Determination were an Act of Parliament.

5 In this Determination—

- a) **“2003 Act”** means the Communications Act 2003 (c.21);
- a) **“H3G”** means Hutchison 3G UK Limited, whose registered company number is 03885486 and whose registered office is at Hutchison House, 5 Hester Road, Battersea, London SW11 4AN;
- b) **“Ofcom”** means the Office of Communications;
- c) **“O2”** means O2 (UK) Limited, whose registered company number is 1743099 and whose registered office is at 260 Bath Road, Slough, Berkshire SL1 4DX;
- d) the **“First Notice of Variation”** means the notice issued by O2 to H3G on 28 July 2006 setting out increased charges for call termination on O2’s network;
- e) the **“Second Notice of Variation”** means the notice issued by O2 to H3G on 30 November 2006 setting out increased charges for call termination on O2’s network.

David Stewart

Director of Investigations

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

10 August 2007

Section 2

Summary

- 2.1 These disputes concern blended mobile call termination rates proposed by O2 and Orange to Hutchison 3G (“H3G”). These rates were proposed in Notices of Variation issued by Orange in July 2006 and by O2 in July 2006 and November 2006 respectively. A blended termination rate is a rate that incorporates each mobile operator’s (“MNO”) 2G and 3G voice call termination services into a single charge, and is charged irrespective of whether the call terminates on each MNO’s 2G or 3G network.
- 2.2 H3G does not consider that it was appropriate for it to pay these blended termination rates, and has referred disputes to Ofcom stating that:
- the termination rates payable by H3G to O2 and Orange during the periods in question should be no more than the existing rates for terminating calls on their second generation (‘2G’) networks that were in place during this time;
- and, in the alternative:
- that the termination rates should be determined at an appropriate implementation of the mobile call termination cost model that Ofcom has developed in the context of its review of mobile call termination markets.
- 2.3 Ofcom opened an inquiry into this matter on 22 March 2007. On 12 April 2007 Ofcom opened its investigation, the scope of which was initially published for comment on its on-line Competition Bulletin.
- 2.4 This investigation was in addition to a previous investigation that had been opened on 9 February 2007 in relation to disputes between T-Mobile and BT, O2 and BT, Hutchison 3G and BT and BT and each of Hutchison 3G, Orange Personal Communications Services and Vodafone relating to call termination rates.⁵
- 2.5 On 27 March 2007, Ofcom published a statement concluding a market review into mobile call termination charges which outlined the future regulation of mobile call termination (“the 2007 CTM Review”).⁶ The 2007 CTM Review was undertaken as part of the regulatory process for addressing the question of market power in mobile call termination markets as envisaged by the Framework Directive⁷ and the Communications Act 2003. In this statement Ofcom confirmed, among other things, that charge controls would be imposed on the supply of mobile call termination by each of the MNOs and that these controls should apply without distinction to voice call termination whether on 2G or 3G networks for 4 years from 1 April 2007. The result of this is that O2 and Orange (as well as the other MNOs) can no longer set unregulated blended termination charges.

⁵ Further details of these disputes can be found at http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_942/

⁶ Mobile call termination, Statement, 27 March 2007 at http://www.ofcom.org.uk/consult/condocs/mobile_call_term/statement/statement.pdf. This statement has been appealed to the Competition Appeal Tribunal and full details are available at <http://www.catribunal.org.uk/archive/casedet.asp?id=132>.

⁷ Directive 2002/21/EC

- 2.6 Prior to 1 April 2007 Ofcom regulated 2G termination charges (in the form of a charge control) and had decided in the previous market review in 2004 (“the 2004 CTM Review”) not to regulate 3G termination charges.⁸
- 2.7 This investigation does not consider whether the regulated 2G element of the blended charge is compliant with each MNO’s 2G charge control, as this issue was not referred by H3G as being in dispute and is not within the scope of these disputes (for further details please see section 4). The MNOs’ compliance with their 2G charge controls is assessed by Ofcom on an annual basis as part of a separate exercise, distinct from the dispute resolution process.
- 2.8 In summary, based on the evidence gathered in these disputes and for the reasons set in these determinations and explanatory statement, Ofcom’s conclusion is that:
- It is appropriate for Orange and O2 to set blended termination charges which apply irrespective of whether the call terminates on a 2G or a 3G network;
 - It is appropriate for the blended charge to be higher than the regulated charge for 2G termination; and
 - For reasons of certainty and consistency Ofcom will not resolve these disputes by setting alternative termination charges (whether cost based or otherwise) to those proposed by Orange and O2 respectively in circumstances where Ofcom has decided not to impose SMP type price regulation of the blended charges.
- 2.9 Ofcom has not therefore departed from the conclusion contained in the draft determination to uphold the charges that have been proposed by O2 and Orange to H3G. Ofcom has, however, taken account of responses to the draft determinations that interest should be included in respect of any repayment and has amended the determinations accordingly.
- 2.10 Ofcom therefore makes the following directions in respect of each of the disputes:
- In relation to O2:
- That H3G was required to pay for mobile call termination from O2 at the disputed charges contained in the Notice of Variation of 28 July 2006 with effect from 1 September 2006 until 31 December 2006; and
 - That H3G was and is required to pay for mobile call termination from O2 at the disputed charges contained in the Notice of Variation of 30 November 2006 with effect from 1 January 2007 until such time as alternative charges are in place between the parties.
- In relation to Orange:
- That H3G was and is required to pay for mobile call termination from Orange at the disputed charges contained in the Notice of Variation of 11 July 2006 with effect from 15 August 2006 until such time as alternative charges are in place between the parties.

⁸ Wholesale mobile voice call termination, Statement, 1 June 2004 at http://www.ofcom.org.uk/consult/condocs/mobile_call_termination/wmvct/

- 2.11 The background to this investigation is set out in **section 3**. The history to these disputes is set out in **section 4** and the analysis and reasoning underpinning the draft determinations is set out in **section 5**. A summary of the submissions of the parties in response to the draft determinations and Ofcom's responses to these submissions is set out in **section 6**. Ofcom's conclusion is set out in **section 7**.

Section 3

Background

Wholesale mobile call termination

- 3.1 Wholesale mobile voice call termination (referred to throughout this document as “mobile call termination” for ease of reference) is the service necessary for a network operator to connect a caller with the intended mobile recipient of a call on a different network. This service is referred to as wholesale because it is sold and purchased by network operators rather than retail customers.
- 3.2 Mobile call termination can be provided on 2G or 3G networks. A 3G network offers higher transmission rates than a 2G network and therefore subscribers to a 3G network can obtain additional functionality such as video and multimedia. In 2000 the UK Government awarded 3G mobile telephony licences now held by H3G, O2, Orange, T-Mobile and Vodafone.
- 3.3 Mobile call termination is provided by Orange, O2, Vodafone and T-Mobile on both their 2G and 3G networks. H3G operates only a 3G network and uses national roaming to terminate calls on O2’s and Orange’s 2G network when H3G customers are not somewhere they can connect to H3G’s own 3G network.

The regulation of mobile call termination

- 3.4 These disputes concern the blended mobile call termination rates (“the disputed charges”) that O2 and Orange have attempted to charge to H3G.
- 3.5 Ofcom (and before it, the Director General of Telecommunications (“OfTel”)) has undertaken a number of regulatory reviews in relation to the provision of mobile call termination.⁹ Ofcom’s consideration of whether any person holds significant market power in relation to mobile call termination markets, as envisaged by Articles 15 and 16 of the Framework Directive, has resulted in the following outcomes:
 - For the period 1 June 2004 – 31 March 2007, Ofcom imposed a charge control on 2G call termination but did not regulate 3G call termination. Ofcom recognised at that time that MNOs were likely to blend their 2G and 3G call rates on the basis of the relative weighting of 2G and 3G traffic and offer a single blended charge for mobile call termination; and
 - For the period 1 April 2007 – 31 March 2011, Ofcom imposed a charge control on both 2G and 3G call termination. The result of this is that MNOs can no longer set unregulated blended termination charges.

⁹ For a history of previous reviews (dating back to the review undertaken by the Monopolies and Mergers Commission (now the Competition Commission) in 1988, please see Chapter 1 of the December 2003 Wholesale Mobile Voice Call Termination consultation document at http://www.ofcom.org.uk/consult/condocs/mobile_call_termination/mct_consultation/?a=87101

Market review activity that led to regulatory remedies being imposed for the period 1 June 2004 – 31 March 2007

- 3.6 On 25 July 2003 a new regulatory framework for electronic communications networks and services entered into force in the UK. The basis for the new framework was five new EU Communications Directives which were designed to create harmonised regulation across Europe. These Directives required national regulatory authorities (“NRAs”) such as Ofcom, amongst other things, to carry out reviews of competition in communications markets, in accordance with the Framework Directive to ensure that regulation remains appropriate in the light of changing market conditions. In the UK, these provisions have been implemented in the Communications Act 2003.
- 3.7 As part of this process Ofcom reviewed the market for mobile voice call termination. During this period Ofcom issued two consultation documents (on 15 May 2003¹⁰ and 19 December 2003¹¹ respectively) in which it set out its proposals to identify separate economic markets for mobile call termination (covering both 2G and 3G call termination) on each MNO’s network, in which each of the MNOs held a position of significant market power (‘SMP’).
- 3.8 Ofcom proposed not to regulate 3G termination at this time, in particular because the market was nascent, 3G services were new and innovative, take-up was uncertain and costs were unclear.¹² For example, paragraph 6.34 of the consultation document issued on 15 May 2003 stated as follows (in the context of comparing the need for regulation of 3G services vis-à-vis 2G services):

“However the position with respect to 3G services is rather different. These are new and innovative services, where take-up is uncertain, and costs are unclear. In general, and consistent with what has been stated in the past, [Ofcom] does not normally apply regulatory controls to such new services as regulation could deter continued investment and development of new services, ultimately disadvantaging consumers. Furthermore, it is also presently unclear how charges for 3G voice call termination services will develop and [Ofcom] will be seeking further information on this during this consultation. In the absence of such information and as 3G services are new and innovative services to which regulatory controls might have a detrimental effect, [Ofcom] considers that ex- ante regulation would be disproportionate”.

- 3.9 This position was further elaborated on in the second consultation document issued by Ofcom on 19 December 2003, in which Ofcom stated at paragraph 5.98:

“Charge controls in respect of 3G voice call termination services may be considered disproportionate. 3G retail services are new and innovative and as such are only taken by a relatively small number of subscribers at the moment, although this may be expected to change over the period of this review. As stated elsewhere in this document regulation of such services is likely to have an adverse impact on continued investment in to new 3G services, which may limit consumer choice in the

¹⁰ Review of mobile wholesale call termination markets, 15 May 2003 at

http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/ctm/ctm0503.pdf

¹¹ Wholesale Mobile Voice Call Termination Proposals for the identification and analysis of markets, determination of market power and setting of SMP Conditions, Explanatory Statement and Notification, 19 December 2003, at

http://www.ofcom.org.uk/consult/condocs/mobile_call_termination/mct_consultation/?a=87101

¹² Review of mobile wholesale call termination markets, 15 May 2003

longer term. [Ofcom] currently therefore still considers that it would be disproportionate to make termination on 3G networks subject to charge controls”.

- 3.10 As a result, Ofcom retained its proposal that the mobile operators should be subject to certain regulatory remedies only in respect of 2G call termination.
- 3.11 After considering representations on the proposals set out in these consultation documents, on 1 June 2004 Ofcom published the statement *Wholesale Mobile Voice Call Termination* (“the 2004 CTM Review”). In the 2004 CTM Review Ofcom confirmed its decision not to regulate 3G call termination because it considered that it would be disproportionate to impose ex ante obligations on 3G voice call termination at that time.¹³ For example, paragraphs 5.30-5.32 of this statement confirmed as follows:

“At such an early stage of roll-out, the costs of 3G voice call termination are unclear, and robust cost information is difficult to ascertain. Thus, in terms of the charges set for 3G voice call termination, there is currently insufficient evidence to conclude that such charges are excessive.

Ofcom also considers that any adverse effects to consumers associated with charges for 3G voice call termination are likely to be small, given the very limited size of ‘3’s mobile subscriber base relative to the wider mobile sector. In Ofcom’s view, the lack of evidence of excessive charging, combined with the modest effect any charges have on consumers as a whole, mean that it would be disproportionate to impose ex ante obligations on 3G voice call termination at this time. Ofcom does, however, intend to keep this position under review, and will retain the ability to bring forward proposals for regulation if warranted.

Ofcom therefore remains of the view that no specific ex ante regulation of 3G voice call termination services is at present required”.

- 3.12 The result of this review was that Ofcom designated Vodafone, O2, T-Mobile, Orange and H3G as having SMP in relation to the termination of voice calls on their own networks¹⁴. Various conditions were imposed on the MNOs, including charge controls on O2, Orange, T-Mobile and Vodafone in relation to the termination of calls on 2G networks¹⁵. The charge controls imposed on those MNOs during this review expired on 31 March 2006.
- 3.13 In June 2005 Ofcom issued a consultation which proposed that the charge controls on mobile call termination on 2G networks should be extended to 31 March 2007¹⁶.

¹³ Section 5 of the 2004 CTM Review at

http://www.ofcom.org.uk/consult/condocs/mobile_call_termination/wmvct/wmvct.pdf

¹⁴ H3G subsequently appealed Ofcom’s finding that it had SMP to the Competition Appeal Tribunal (“the CAT”). The CAT found that Ofcom had erred in its determination and ordered Ofcom to reconsider whether H3G had SMP in light of its judgment. On 27 March 2007, Ofcom issued a statement concluding that H3G has SMP in the market for wholesale mobile voice call termination on its network during the period 1 June 2004 to 31 March 2007.

¹⁵ In its statement of 27 March 2007, Ofcom imposed a transparency requirement on H3G but did not impose charge controls in relation to its termination of calls on its 3G network.

¹⁶ “Wholesale Mobile Voice Call Termination Markets – a proposal to modify the charge control conditions” at <http://www.ofcom.org.uk/consult/condocs/wholesale/wholesale.pdf>

On 16 December 2005 Ofcom published a statement confirming the extension of the 2G charge controls until 31 March 2007¹⁷.

Market review activity that led to regulatory remedies being imposed for the period 1 April 2007 – 31 March 2011

3.14 On 7 June 2005 Ofcom began a market review into wholesale mobile voice call termination with publication of the document *Wholesale mobile voice call termination – a preliminary consultation* (the “Preliminary Consultation”)

3.15 In the Preliminary Consultation Ofcom confirmed that the MNOs might set blended charges, stating as follows:

“The MNOs are not prevented from setting a 3G termination charge above the regulated 2G rate and charging a blended rate for termination”¹⁸;

and:

“Where the MNO is subject to a 2G charge control, the termination rate is a blended average, weighted by volumes of 2G and 3G terminations, of a 2G rate which is compliant with the charge control and an unregulated implicit rate for termination on 3G networks. Logically, this arrangement would allow MNOs to set a blended rate of their choice, unfettered by regulation, by adjusting the unregulated implicit rate for 3G termination within the blending formula”¹⁹.

3.16 On 30 March 2006, having considered responses to the Preliminary Consultation, Ofcom published a more detailed consultation document *Wholesale mobile voice call termination* (“the March 2006 Consultation”). The March 2006 Consultation set out Ofcom’s initial view that there are separate markets for mobile voice call termination on each of the networks of the five MNOs (covering both 2G and 3G networks), and that the prima facie evidence indicated that each of these mobile operators has SMP in the market in which it supplies mobile call termination.

3.17 The March 2006 Consultation also considered the harm which may arise from the exercise of SMP in these markets, and explored a number of regulatory options for addressing that harm. Ofcom indicated an initial view that, in the presence of SMP, some form of charge control might be appropriate and that there may be merit in applying a “technology-neutral” charge control to each MNO (e.g. in the case of MNOs with both 2G and 3G networks a single control applying irrespective of which network is used to terminate a specific call). The March 2006 Consultation noted that as Ofcom had not yet concluded its cost modelling work it was unable also to express a view as to whether the same or different charge controls should be imposed on each of the five MNOs.

3.18 On 13 September 2006, having considered responses to the March 2006 Consultation, Ofcom published a third consultation *Mobile call termination –*

¹⁷ “Statement and Notification extending the charge controls” at

http://www.ofcom.org.uk/consult/condocs/wholesale/wmvct_statement/

¹⁸ Paragraphs 1.11 and 2.22 of June 2005 consultation “Wholesale mobile voice call termination – preliminary consultation of future regulation” at

<http://www.ofcom.org.uk/consult/condocs/termination/wholesaleprelim.pdf>

¹⁹ Paragraph 4.17 of June 2005 consultation “Wholesale mobile voice call termination – preliminary consultation of future regulation” at

<http://www.ofcom.org.uk/consult/condocs/termination/wholesaleprelim.pdf>

Proposals for consultation ("the September 2006 Consultation"). In the September 2006 Consultation Ofcom set out its view that there are separate markets for mobile voice call termination supplied by each of the five MNOs and each of these mobile operators has SMP in the market in which they supply mobile voice call termination. The September 2006 Consultation also set out Ofcom's view of the harm likely to arise from the exercise of that SMP, and the remedies which Ofcom proposed. These remedies included charge controls to apply to each of the five MNOs for four years from 1 April 2007 to 31 March 2011, obligations to meet reasonable demand for mobile call termination on fair and reasonable terms, a prohibition on undue discrimination and obligations concerning the transparency of charges and contract terms.

3.19 On 27 March 2007, Ofcom concluded the 2007 CTM Review, setting out its findings as a result of this market review in the document *Mobile call termination – Statement*.

3.20 In the 2007 CTM Review, and in relation to O2 and Orange, as well as H3G, Vodafone and T-Mobile (the five MNOs), Ofcom outlined the following conclusions:

- There are separate markets for the provision of wholesale mobile voice call termination in the UK to other Communications Providers by each of Vodafone, O2, Orange, T-Mobile and H3G;
- Each of the five MNOs has SMP in the market for termination of voice calls on its network(s);
- Charge controls were imposed on the supply of mobile call termination by each of the five MNOs, and those controls apply without distinction to voice call termination whether on 2G or 3G networks;
- The charge control applies for 4 years from 1 April 2007;
- Average charges of H3G will be reduced to 5.9 ppm (2006/7 prices) by the final year of the charge control (1 April 2010 to 31 March 2011). The change to be implemented by an initial reduction to 8.5ppm (2006/7 prices) in 2007/8 followed by three reductions each of equal (percentage) change across the next three years (ie from April 2008 to March 2011); and
- Average charges of Vodafone, O2, Orange and T-Mobile will be reduced to 5.1 ppm (2006/7 prices) by the final year of the charge control period (1 April 2010 to 31 March 2011). The reduction should be implemented in 4 equal (percentage) steps across the four years.

3.21 In relation to the call termination charges of new entrants to the market, Ofcom confirmed that it considered it likely to be desirable for new entrants' MCT charges to be aligned with those of incumbent suppliers.²⁰ Ofcom also stated that:

- a consistent and non discriminatory approach to regulation of such new entrants should be applied;
- it will continue to monitor the market and, in light of developments, will consider what, if any, steps to take, including whether it is appropriate to conduct a further market review in order to define appropriately new markets for mobile termination

²⁰ Para 9.29, at http://www.ofcom.org.uk/consult/condocs/mobile_call_term/statement/statement.pdf

provided by other operators and to consider whether such providers have SMP in those markets and if so what regulatory remedies are appropriate; and

- In judging what action to take, and the timing of that action, Ofcom will take all relevant circumstances into account, including the prices charged by other operators providing mobile termination, and the prima facie evidence that may as a result exist of potential detriment to consumers.²¹

3.22 Therefore, as a result of the technology-neutral charge control introduced from 1 April 2007 in the 2007 CTM Review, the rate charged by MNOs for call termination is regulated, regardless of whether the networks used to carry the call are 2G or 3G. Therefore, MNOs who elected to offer a blended rate are no longer able to offer a single charge that is a mix of the regulated 2G charge and the unregulated 3G charge.

3.23 Therefore, as previously noted, Ofcom's consideration of these disputes is limited to charges for mobile voice call termination on each of the five MNOs networks for services provided for the period prior to 1 April.

Description of blended call termination rates

3.24 At various times prior to the 2007 CTM Review, O2, Orange, T-Mobile and Vodafone all set or attempted to set a single termination charge for their mobile call termination services (for both 2G and 3G traffic). This 'blended' rate combines an underlying regulated 2G and an unregulated 3G charge weighted by volumes of each over a measurable period.

3.25 The contractual blended charges for mobile termination were set commercially. The underlying 2G maximum average charge was subject to the relevant charge control imposed by Ofcom in the 2004 CTM Review. Each of the MNOs specified a set of underlying 3G charges by time of day within the blend. The MNO then used forecasts of the ratio of 2G to 3G termination minutes within a contractual billing period as the weights to apply to the underlying 2G and 3G charges to derive the contractual blended charges.

²¹ Para 3.128 at http://www.ofcom.org.uk/consult/condocs/mobile_call_term/statement/statement.pdf

Section 4

History of the disputes

The parties to the disputes

H3G

- 4.1 H3G forms part of the 3 Group. 3 UK is a wholly owned subsidiary of Hutchison Whampoa Ltd
- 4.2 H3G describes the three core areas of the 3 UK business as being Communications (including all forms of personal communications, voice and video calling; text picture and video messaging; and mobile blogging), Media and Entertainment (including television, sport, music audio and video, user-generated content, computer games and media publishing) and Information services - including wireless web, access to the best of the internet and a range of news and other information services.²²

O2

- 4.3 O2 UK is part of the wider O2 group which is a wholly-owned subsidiary of Telefónica S.A.
- 4.4 O2 describes itself as being a provider of mobile services to consumers and businesses in the UK. It provides non-voice services, including text, media messaging, games, music and video, as well as data connections via GPRS, 3G and WLAN.²³

Orange

- 4.5 Orange is a wholly-owned subsidiary of France Telecom Group.
- 4.6 Orange offers mobile, fixed and broadband products to both business and residential customers. It is a vertically integrated company which owns and operates its own network. It offers wholesale and retail services.

Chronology of events between each of the parties in dispute

- 4.7 The facts of these disputes differ according to the operators concerned. An outline of the disputed charges as taken from the Notices of Variation issued to H3G (including when the charges were proposed and when the charges would have taken effect) is set out at Table 4.1 below.

Table 4.1 The disputed termination charges

Date of Notice	Issuing Operator	Receiving Operator	Proposed charges (daytime/evening/weekend ppm)			Effective date	Date rejected
28/07/06	O2	H3G	[REDACTED]	[REDACTED]	[REDACTED]	01/09/06	15/03/07

²² <http://www.three.co.uk/aboutus/newkind.omp>

²³ <http://www.o2.co.uk/abouto2/history>

11/07/06	Orange	H3G	[redacted]	[redacted]	[redacted]	15/08/06	14/03/07
30/11/06	O2	H3G	[redacted]	[redacted]	[redacted]	01/01/07	15/03/07

4.8 In relation to H3G and O2:

- On 28 July O2 informed H3G that it would charge increased, blended rates from 1 September 2006. O2 provided H3G with a breakdown of the underlying 2G and 3G rates underpinning these blended rates.
- H3G asked O2 for a specific breakdown of how it had calculated these rates. O2 stated that its blended rate was based upon the proportion of traffic which O2 expected to be terminated on its networks between September and December 2006.
- H3G then requested that O2 provide an explanation of whether O2's 3G rate reflected the costs of terminating calls on O2's 3G network. H3G stated that it would not pay any more than the prevailing 2G termination charge until O2 had demonstrated that its 3G rate was in line with costs and based on reasonable traffic assumptions.
- On 30 November 2006 O2 informed H3G of a further increase in its termination charges, with effect from 1 January 2007. H3G also queried this increase [redacted].
- An exchange of correspondence followed between the parties, who were unable to agree and therefore a dispute was referred to Ofcom.
- The amounts disputed by H3G in the period September 2006 to March 2007 are as follows:

Invoice period	Value	
Sep 06	£[redacted]	Disputed - [redacted]
Oct 06	£[redacted]	Disputed - [redacted]
Nov 06	£[redacted]	Disputed - [redacted]
Dec 06	£[redacted]	Disputed - [redacted]
Jan 07	£[redacted]	Disputed - [redacted]
Feb 07	£[redacted]	Disputed - [redacted]
Mar 07	£[redacted]	Disputed - [redacted]

Source: H3G's response to Ofcom's Section 191 Notice of 20 June 2007

4.9 In relation to H3G and Orange:

- On 4 July 2006 Orange informed H3G that it intended to introduce blended rates from 1 August 2006.
- H3G asked Orange for details of the underlying 3G element of the blended rate. On 11 July Orange sent H3G a revised price notification setting out the underlying 3G rates, with an effective date of 15 August 2006.
- H3G subsequently wrote to Orange expressing concern that Orange had not set out the basis on which the new blended rates had been calculated. Orange responded with certain additional information on their rates, including that the rate

is based on the percentage of 3G traffic on Orange's network at the time of calculation and also a very conservative projection of the evolution of the percentage of 3G traffic on Orange's network for the remainder of the charge control period. Orange stated that it would track 3G volumes and adjust the rates accordingly from time to time.

- H3G stated that it still requested clarification from Orange on the following:
 - whether the rate was based on the percentage of 3G traffic which was termination only, or whether it was based on 3G traffic which included origination, on-net or video calls;
 - Orange's projections for the forward looking percentage of 3G traffic on Orange's network; and
 - Justification for Orange setting its daytime termination rate at [X]ppm (as H3G had estimated that based on its current traffic profile to Orange, Orange's 3G rate should be in the region of [X]ppm – [X]ppm).
- A further exchange of correspondence followed between the parties. During this time Orange stated the outstanding amounts owed by H3G (relating to the increased termination rates) were owed under the terms of the interconnect agreement between H3G and Orange and there was no dispute between H3G and Orange on this issue.
- An exchange of correspondence followed between the parties, who were unable to agree and therefore a dispute was referred to Ofcom.
- The amounts disputed by H3G in the period August 2006 to March 2007 are as follows:

Invoice period	Value	
August 06	£[X]	Disputed –[X]
Sept 06	£[X]	Disputed –[X]
Oct 06	£[X]	Disputed –[X]
Nov 06	£[X]	Disputed –[X]
Dec 06	£[X]	Disputed –[X]
Jan 07	£[X]	Disputed –[X]
Feb 07	£[X]	Disputed –[X]
Mar 07	£[X]	Disputed –[X]

Source: H3G's response to Ofcom's Section 191 Notice of 20 June 2007

Referral of the disputes

4.10 On 21 March 2007 H3G referred its disputes with O2 and Orange to Ofcom for dispute resolution. In referring these disputes H3G stated that Ofcom should resolve the disputes by determining a reasonable price for call termination in each dispute. Specifically, H3G requested that :

- the rates payable by H3G to O2 and Orange should be no more than the existing rates for terminating calls on their second generation ('2G') networks (in so doing H3G referred to the fact that this is what BT had requested in referring disputes to

Ofcom on blended termination rates and confirmed that it did not consider that it should be paying any more than BT does for the same service²⁴);

and, in the alternative:

- that the rates should be determined at an appropriate implementation of the mobile call termination cost model that Ofcom has developed in the context of its review of mobile call termination markets.

Competition Bulletin

4.11 On 12 April 2007 Ofcom opened an investigation into the disputes referred by H3G and published details of the scope of the investigation for consultation on its on-line Competition Bulletin.²⁵

4.12 The scope of the investigation was confirmed as follows:

“The scope of the disputes is to assess the charges proposed to H3G for call termination by O2 and Orange during the periods covered by the respective disputes. Specifically, Ofcom will consider whether there is any reason why H3G should not have been charged on the basis of the disputed call termination charges.

If Ofcom establishes that the answer to this question is ‘yes’, Ofcom will consider whether it is appropriate to determine call termination charges in this case, and if so, will determine what these charges should be. Ofcom will also consider whether it is appropriate to require that any repayments be made in respect of the disputed call termination charges”

Information sought by Ofcom

4.13 On 11 June 2007 Ofcom sent H3G a draft formal information request under Section 191 of the Act. This request was finalised on 20 June 2007. On 27 June 2007 and 27 July 2007²⁶ H3G provided responses to this information request.

²⁴ See footnote 5 for details of these disputes.

²⁵ http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_952/

²⁶ H3G provided a response on 27 July 2007 subsequent to Ofcom confirming to H3G on 13 July 2007 that it was no longer enforcing the questions set out in the information request to which H3G had not yet provided a response. In this response H3G confirmed that it did not consider that the information requested was relevant to Ofcom’s determination of the disputes (as previously outlined in its letter to Ofcom of 14 June 2007), but given that it could not predict other responses to the draft determinations and in light of the resources it had expended in gathering the information in question, it considered it appropriate to provide this information.

Section 5

Ofcom's Draft Determinations

Introduction

- 5.1 After consideration of submissions received from the parties, Ofcom issued draft determinations to resolve the disputes on 13 July 2007. Those draft determinations set out Ofcom's preliminary conclusions on resolution of the disputes together with Ofcom's analysis and reasoning in reaching those conclusions. For the sake of clarity, the analysis and reasoning underpinning the draft determinations is set out below.
- 5.2 In referring these disputes H3G has asked Ofcom to determine that the rates charged by O2 and Orange should be the same as their underlying 2G rates. H3G has also requested that, in the alternative, Ofcom should determine these rates via an appropriate implementation of the mobile call termination cost model that Ofcom has developed in the context of its review of mobile call termination markets.
- 5.3 Therefore in setting out its analysis and reasoning in the draft determinations, Ofcom first considered whether it was appropriate for mobile operators to set blended call termination rates during the period concerned and, if so, whether the blended rate should have been no higher than each operator's regulated 2G termination rate. Ofcom then considered H3G's request for Ofcom to determine these rates.

H3G's request that the disputed termination charges should be set at the same level as the existing regulated 2G charges

- 5.4 In the draft determinations Ofcom first considered two questions:
- Is it appropriate for Orange and O2 to set blended termination charges which are the same irrespective of whether the call terminates on a 2G or a 3G network?; and
 - Should the blended charges be no higher than the regulated charges for 2G termination?

Is it appropriate for Orange and O2 to set blended termination charges which are the same irrespective of whether the call terminates on a 2G or 3G network?

- 5.5 In the draft determinations, Ofcom outlined that prior to 1 April 2007 Ofcom decided not to regulate 3G mobile call termination. Ofcom further noted that in doing so Ofcom made a number of public statements concerning blended termination charges, and did not preclude the mobile operators setting mobile termination charges on a blended basis.
- 5.6 Ofcom noted the fact that MNOs have not offered, and originating operators were unable to purchase, 2G call termination or 3G call termination as separate services. MNOs only offered mobile call termination to which (where appropriate) the blended rate applies irrespective of the technology used for terminating any given call.

- 5.7 In the context of these disputes, in the draft determinations Ofcom explained why blending is acceptable, both for practical reasons and also for reasons of economic efficiency, and therefore why it was appropriate for the mobile operators to set blended termination rates during the periods in question.

Practical reasons why it is appropriate to blend mobile call termination charges

- 5.8 In the draft determinations, Ofcom set out the fact that subscribers to 3G services are given a dual mode handset that works on both 2G and 3G networks and will receive voice calls on both networks. However, the network on which the call is terminated is dictated by the terminating operator, currently with reference to the availability of 3G network coverage.
- 5.9 MNOs cannot currently directly control which network they use to terminate calls to their subscribers on a call by call basis. Dual mode (2G/3G) phones cannot standby to receive calls in both modes simultaneously. Therefore they are programmed to default to the 3G mode where 3G coverage exists as, otherwise, the user would be unable to make and receive advanced 3G services.
- 5.10 Whenever a dual mode phone is within 3G coverage any incoming voice call is terminated on the MNO's 3G network. All calls to 2G-only phones and all calls to dual mode phones which are outside the 3G coverage area are terminated using an MNO's 2G network.
- 5.11 In future it is possible that MNOs may develop the technology that will provide them with discretion in deciding on which network to terminate a call and therefore may introduce different charges for originating operators for termination supplied using a 2G or 3G network. However this technology is not currently available, and was not available during the periods covered by these disputes.
- 5.12 As neither the originating operator nor the calling party is able to affect the choice of terminating network, and neither is likely even to be aware of whether the 2G or the 3G network has been used for termination, this indicates that there are practical reasons why it is appropriate for MNOs to set blended termination rates.

Economic efficiency reasons why it is appropriate to blend mobile call termination charges

- 5.13 Ofcom further set out in the draft determinations that the inability of the originating operator or caller to affect whether the call is terminated on the terminating MNO's 2G or 3G network means that it would serve little or no useful function, in terms of economic efficiency, for originating operators or callers to pay separate and different charges for mobile call termination for each of 2G and 3G termination, as explained below.
- 5.14 Price signals are fundamental to efficient decision-making in a market economy. In an efficiently functioning market, prices reflect the resource cost of supplying the product or service and consumers respond to this price signal by choosing whether to buy more or less of the product or service, depending on their willingness to pay.
- 5.15 However, as between 2G and 3G termination, for the reasons set out above, neither callers nor originating operators have the ability to affect this choice. Setting different prices for 2G and 3G termination does not, therefore, further an economically efficient choice between them.

- 5.16 In developing its policy on mobile call termination Ofcom has endeavoured to promote efficient choice as between 2G networks and 3G networks, for example as regards traffic migration. In setting a charge control covering both 2G and 3G voice call termination from 1 April 2007 onwards Ofcom has sought to avoid distorting MNOs' incentives to minimise costs and choose the most efficient technology by having a single (blended) regulated charge.²⁷

Conclusion

- 5.17 In the light of this reasoning, and consistent with its previous statements, Ofcom considered that MNOs may set blended charges for mobile voice call termination whether or not that particular minute of termination is terminated on the MNO's 2G network or 3G network.
- 5.18 In the draft determinations Ofcom indicated that this conclusion has an important implication for Ofcom's approach to these disputes, specifically why it is only necessary to consider whether it was appropriate for O2 and Orange to set the blended charge (i.e. the output from the way the charge is calculated), not the way in which the blended charge was calculated (in particular the underlying 3G charge). This is because the blended charge is what H3G actually pays for each minute of termination (i.e. it is the contractually applicable charge). The underlying 3G rate is not paid in any commercially realistic sense on any minute of termination – instead its relevance is only that it contributes to the derivation of the blended charge, which is the charge that is paid by H3G.

Should Orange and O2's blended charges be no higher than the regulated charges for 2G termination?

- 5.19 During the period in dispute (i.e. up until 1 April 2007, when MNOs' blended charges became subject to charge controls) only 2G termination charges were regulated. The issue of whether the underlying regulated 2G element of each MNO's blended termination charge is compliant with their respective charge control is not in dispute.
- 5.20 In referring its disputes, H3G has requested that the disputed charges be aligned with the 2G termination rate in order to ensure consistency with the outcome requested by BT in its dispute referral²⁸. H3G has further stated that it should pay no more than BT for termination charges during the period in question.
- 5.21 In the draft determinations, Ofcom noted that in resolving the recent disputes between BT and each of the MNOs relating to the price paid for mobile call termination²⁹, Ofcom considered the application of the End-to-end connectivity obligation³⁰, which requires that BT purchases wholesale narrowband call termination on reasonable terms and conditions (including charges). Therefore in considering BT's request, Ofcom assessed what constitutes a "reasonable" charge in the context of a dispute relating to BT's End-to-end connectivity obligation, which required consideration of the purpose of that obligation.
- 5.22 As the End-to-end connectivity obligation applies to BT only, it is not relevant to the disputes that H3G has referred against Orange and O2. Therefore, unlike the

²⁷ See further the March 2007 calls to mobile statement, paragraphs 9.11 – 9.20

²⁸ See footnote 5

²⁹ See http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_all/cw_942/

³⁰ See End-to-end connectivity – Statement, at http://www.ofcom.org.uk/consult/condocs/end_to_end/statement/statement.pdf

situation in the BT disputes, there is no obligation that the disputed termination charges must be purchased by H3G on reasonable terms and conditions as envisaged in the End-to-end connectivity obligation. H3G has recognised that the End-to-end connectivity obligation is not relevant to its disputes with O2 and Orange.³¹

- 5.23 Therefore in the draft determinations Ofcom stated that, in the circumstances of these disputes, the only regulation in place during the period in question was the charge control on 2G termination. This was implemented as a result of the 2004 CTM Market Review, which clearly distinguished between 2G termination and 3G termination (although each of the MNOs was found to have SMP in both). Unlike 2G termination, no SMP price obligations were placed on 3G termination and a deliberate decision was made to impose no controls on 3G termination charges. As set out in section 3, Ofcom took this view because it would have been disproportionate to do so (as set out at paragraphs 3.8–3.11 above)³². As previously mentioned (as set out at paragraph 3.15 above), Ofcom has recognised that MNOs were likely to blend their 2G and 3G call rates on the basis of the expected relative weighting of 2G and 3G traffic and offer a single blended charge for mobile call termination, which would be different from the regulated charge for 2G termination.
- 5.24 In the draft determination Ofcom also noted that H3G has identified cost differences in 2G and 3G termination and the impact that this will have on termination charges in correspondence with both O2 and Orange. On 8 August 2006 H3G stated in a letter to O2 that *“While we appreciate that your costs for 3G may well be higher than your 2G costs, and that appropriate rates for 3G termination are likely to be different as a result, we note that Ofcom is at the present time reviewing both 2G and 3G call termination rate issues and whether to impose a price control as an SMP condition”*. Ofcom also noted H3G’s letter to Orange of 12 September 2006 in which it states that *“While we appreciate that your costs of terminating 3G calls may currently be higher than your 2G costs, and that appropriate rates for 3G termination are likely different than those for 2G as a result, we cannot currently accept the proposed changes without further justification”*.
- 5.25 The draft determinations outlined that it would be contrary to Ofcom’s clearly stated position in the 2004 CTM Review if Ofcom now considered that blended charges must be the same as the regulated 2G charges for the period prior to 1 April 2007. The blended charges offered by O2 and Orange during this period can be different from and higher than the regulated charge for 2G termination and the underlying 3G charge for 3G termination during this period can be different from and higher than the regulated charge for 2G termination.

Conclusion

- 5.26 In light of the above, in the draft determinations Ofcom stated that the relevant regulatory framework to be applied to consideration of these charges is that set out in the 2004 CTM Review, namely that MNOs (including O2 and Orange) are free to set the charges that they offer to purchasers of their 3G call termination services. Blended charges, combining a regulated and unregulated element, are also not subject to any SMP conditions, other than to the extent that the regulated element must comply with the relevant charge control or SMP condition. MNOs (including O2

³¹ In its letter to Ofcom of 25 April 2007 H3G states that “H3G recognises that [the end-to-end connectivity statement] is relevant to BT in certain circumstances but did not expect Ofcom to use this statement in determining these disputes”.

³² see paragraphs 5.45 to 5.47 of the statement.

and Orange) are therefore able to set such blended rates as they consider appropriate, subject to competition law.

- 5.27 Therefore Ofcom set out its provisional view that the charges proposed by O2 in its Notices of Variation of 28 July 2006 and 30 November 2006 and the charges proposed by Orange in its Notice of Variation of 11 July 2006 should not be the same as the regulated 2G charges that were in place during this time, and does not propose to determine that this should be the case.

H3G's request that Ofcom should set cost based charges in resolving these disputes

- 5.28 In the draft determinations Ofcom stated that the considerations outlined in the paragraphs 5.19-5.27 above apply equally to H3G's request that Ofcom should set cost based charges in resolving these disputes. Ofcom set out its view that it did not consider it appropriate to use the dispute resolution process as a substitute for (or in a manner that is inconsistent with) decisions already taken under the appropriate regulatory processes for addressing the question of significant market power as set out in Articles 15 and 16 of the Framework Directive.
- 5.29 Ofcom considered that it would not be appropriate therefore to effectively retrospectively impose regulation on providers in a situation in which it has explicitly chosen not to impose SMP-type price regulation. This is in order to ensure regulatory certainty and consistency.

Conclusion

- 5.30 Therefore Ofcom's provisional view, as outlined in the draft determinations, was that Ofcom does not intend to determine cost based charges for the termination service offered by Orange and O2 during the period in question. Ofcom considered that it was appropriate for Orange and O2 to charge blended termination rates and recognised that those rates may be higher than the regulated 2G rates. Ofcom therefore reached a provisional conclusion that H3G should be required to pay for mobile call termination on the networks of O2 and Orange at the rates set out in the respective Notices of Variation.

Consistency with the Community Requirements and Ofcom's duties

- 5.31 The decision taken during the 2004 CTM Review was itself consistent with the Community Requirements and Ofcom's duties. Ofcom concluded during the 2004 CTM Market Review that, given the position of SMP held by all providers of mobile voice call termination services – i.e. their ability to behave to an appreciable extent independently of competitors, customers and ultimately consumers – it was appropriate to impose certain SMP conditions in relation to 2G mobile call termination services, because, among other things, in the absence of regulation the SMP of the MNOs would lead to excessive termination charges. Ofcom also concluded at that time that there should be no ex-ante regulation of 3G mobile call termination services, because, among other things, at that stage the adverse effects to consumers associated with charges for 3G voice call termination were likely to be small (as set out in paragraphs 3.8–3.11 above). As a result Ofcom considered that it would be disproportionate to impose ex ante obligations on 3G voice call termination at that time. In order to ensure certainty, it is not appropriate for Ofcom to adopt an approach which would be inconsistent with its previous policy decision.

Determinations to resolve mobile call termination rate disputes between Hutchison 3G and each of Orange and O2

5.32 In the draft determinations Ofcom stated that its approach to resolving these disputes effectively avoids imposing SMP-type obligations on MNOs with retrospective effect. Ofcom further noted its statutory duty under Section 3(3) (a) of the Act to have regard to the principles under which regulatory activities should be consistent in carrying out its duties.

Conclusion

5.33 For the reasons set out above, Ofcom's provisional conclusion in the draft determinations was that:

- It was appropriate for Orange and O2 to set blended termination charges during the periods in question which were the same irrespective of whether the call terminates on a 2G or a 3G network;
- It was appropriate for the blended charge to be different from and higher than the regulated charge for 2G termination; and
- For reasons of consistency with Ofcom's clearly stated policy of not regulating 3G termination services of combined 2G/3G MNOs, Ofcom does not propose to resolve these disputes by setting alternative termination charges (whether cost-based or otherwise) to those proposed by Orange and O2 respectively in circumstances where Ofcom has decided not to impose SMP type price regulation of the blended charges.

Ofcom's provisional conclusion on the appropriate and proportionate determination of the disputes

The disputed Orange and O2 Notices of Variation

5.34 O2 issued Notices of Variation to H3G on 28 July 2006 and 30 November 2006 (with effective dates of 1 September 2006 and 1 January 2007 respectively). Orange issued a Notice of Variation to H3G on 11 July 2006 (with an effective date of 15 August 2006).

5.35 In the draft determinations Ofcom stated that it does not propose to resolve these disputes by setting alternative termination charges (whether cost-based or otherwise) to those proposed by Orange and O2 respectively in circumstances where Ofcom has decided not to impose SMP type price regulation of the blended charges. Therefore Ofcom's provisional conclusion was to uphold the charges that have been proposed by O2 and Orange to H3G.

5.36 Ofcom considered that this is a proportionate outcome, given that Ofcom's decision not to regulate 3G was explicitly set out in the 2004 CTM Review and that Ofcom has recognised that MNOs were not prevented from setting a 3G termination charge above the regulated 2G rate and charging a blended rate for termination.

Section 6

Responses to the draft determinations and Ofcom's response

H3G

Ofcom has erred in its approach to dispute resolution

- 6.1 H3G has stated in response to the draft determinations that Ofcom's approach in resolving these disputes is inconsistent with its legal obligations and has illogical consequences that are detrimental to consumers.
- 6.2 H3G has outlined that Section 188(5) of the Act provides for disputes to be properly determined on their merits within 4 months and that "*Ofcom should not blatantly seek to circumvent this by way of producing a decision that wholly disregards the interests of consumers so as to justify regulation through SMP Conditions*". H3G has argued that Ofcom's position in the draft determinations is that any rate (no matter how high or unrelated to cost) requested by an operator (which is not subject, with respect to those rates, to an explicit SMP price control obligation) must be determined by Ofcom to be reasonable.

Ofcom's response

- 6.3 Ofcom has not "circumvented" its requirement to resolve disputes in this case. Ofcom has chosen, for the reasons set out in this determination, to uphold the charges proposed by O2 and Orange to H3G and this amounts to a resolution of the dispute.
- 6.4 Ofcom has taken this approach in the circumstances of this dispute which concerns a service which, prior to 31 March 2007, Ofcom has explicitly chosen not to regulate. Therefore this outcome is consistent with previous regulatory decisions. Ofcom does not consider it appropriate to use the dispute resolution process as a substitute for (or in a manner that is inconsistent with) decisions already taken under the appropriate regulatory processes for addressing the question of significant market power as set out in Articles 15 and 16 of the Framework Directive.
- 6.5 Ofcom has not stated that *any* rate requested by an operator would be reasonable. Ofcom has determined in the context of these disputes that the specific charges proposed by Orange and O2 should be upheld. Any further disputes on similar issues will be resolved applying Ofcom's regulatory principles and policies then operative to the facts of each individual case.
- 6.6 H3G asserts that Ofcom has failed to take into account the interests of consumers in its approach. As set out in paragraphs 3.8 – 3.11 above, one of Ofcom's reasons for not regulating 3G termination at the time of the 2004 CTM Review was that regulating such a new service could deter investment and development of new services, ultimately disadvantaging consumers. Ofcom has now sought to address concerns relating to the protection of consumers through its 2007 CTM Review and as of 1 April 2007 2G and 3G termination are now regulated. The result of this is that O2 and Orange (as well as the other MNOs) can no longer set unregulated blended charges. Ofcom considers that this outcome is consistent with the protection of consumers, and ensures that appropriate protection of retail customers arising from

the exercise of market power is addressed under market reviews and SMP conditions.

Consistency with the CAT judgment in the H3G appeal

6.7 H3G has also argued that Ofcom's position in the draft determinations is a "*stronger version of the position (or at least de facto the same as) which Ofcom maintained in H3G's previous appeal of its SMP designation*".³³ In this respect H3G has argued that the "*CAT found that Ofcom could determine disputes where there was no SMP, which must a fortiori apply where SMP has been found but no price control remedy was originally determined to be appropriate. Yet Ofcom has in the draft determinations, de facto, failed to do so*". H3G has argued that Ofcom's approach is contrary to the position set out by the CAT in its judgment in the context of this appeal and invited Ofcom to correct this matter in the final determination in this dispute.

6.8 H3G states that "*Ofcom is effectively abrogating its dispute resolution responsibilities in all situations. Even where a party does have SMP Ofcom is not taking this in to account in dispute resolution*". H3G argues that this position is not present in either the UK or EU legislation, leaves consumers exposed and creates uncertainty for the industry.

Ofcom's response

6.9 Section 190 of the Act sets out Ofcom's powers in resolving a dispute. Ofcom is resolving this dispute by making a declaration setting out the rights and obligations of the parties to the dispute, namely that H3G is required to pay each of O2 and Orange the termination charges set out in their respective Notices of Variation.

6.10 It follows that Ofcom is not "abrogating" its obligation to resolve disputes. Ofcom has resolved the disputes between H3G and each of O2 and Orange in accordance with its duties and the Community Requirements by upholding the charges proposed by O2 and Orange.

6.11 It is not clear to Ofcom the basis upon which (as has been alleged by H3G) Ofcom is not taking into account the SMP (or lack thereof) of an operator in resolving disputes. Ofcom has considered the relevant SMP regulation in place as a result of the 2004 CTM Review and has concluded that for reasons of certainty and consistency Ofcom will not resolve these disputes by setting alternative termination charges (whether cost based or otherwise) to those proposed by O2 and Orange respectively in circumstances where Ofcom has decided not to impose SMP type price regulation of the blended charges.

Rationale for not regulating 3G termination in the 2004 CTM Review

6.12 H3G has stated in response to the draft determinations that, in justifying its approach not to intervene in the context of these disputes to effectively retrospectively impose regulation on providers in a situation in which it has explicitly chosen not to impose SMP-type regulation, Ofcom refers to the 2004 Market Review statement. However H3G argues that Ofcom's justification for not imposing specific ex ante regulation of 3G call termination at this time was that "*the costs of 3G voice call termination [were] unclear and robust cost information [was] difficult to ascertain*".

³³ Hutchison 3G(UK) Limited v Ofcom [2005] CAT [39] at [134]

Ofcom's response

- 6.13 H3G is incorrect in suggesting that the only reason why Ofcom chose not to impose SMP-type price regulation of 3G termination was the absence of reliable cost information. The availability of cost information at the time of the 2004 CTM Review was only one of the reasons why Ofcom decided not to regulate 3G call termination in the period 1 June 2004 – 31 March 2007.
- 6.14 Ofcom's reasons for not proposing to regulate 3G termination were set out in the consultation document issued by Ofcom on 15 May 2003 regarding the regulation of mobile wholesale voice call termination markets (further details of Ofcom statements made during this time on the regulation of 3G termination are set out at paragraphs 3.8-3.11 above).³⁴ For example, paragraph 6.34 of this consultation stated as follows (in the context of comparing the need for regulation of 3G services vis-à-vis 2G services):

"However the position with respect to 3G services is rather different. These are new and innovative services, where take-up is uncertain, and costs are unclear. In general, and consistent with what has been stated in the past, [Ofcom] does not normally apply regulatory controls to such new services as regulation could deter continued investment and development of new services, ultimately disadvantaging consumers. Furthermore, it is also presently unclear how charges for 3G voice call termination services will develop and [Ofcom] will be seeking further information on this during this consultation. In the absence of such information and as 3G services are new and innovative services to which regulatory controls might have a detrimental effect, [Ofcom] considers that ex- ante regulation would be disproportionate".

- 6.15 This position was subsequently confirmed in Ofcom's statement of 1 June 2004, following consideration of responses to this consultation and a subsequent consultation issued on 19 December 2003. Ofcom's statement of 1 June 2004 confirmed as follows:

"In Ofcom's view, the lack of evidence of excessive charging, combined with the modest effect any charges have on consumers as a whole, mean that it would be disproportionate to impose ex ante obligations on 3G voice call termination at this time. Ofcom does, however, intend to keep this position under review, and will retain the ability to bring forward proposals for regulation if warranted"

Whether it is appropriate to focus on the blended charge in resolving these disputes

- 6.16 H3G also argues that it is not appropriate for Ofcom to only consider whether the blended charge is appropriate, as both Orange and O2 both specified a separate 3G rate which was part of the blended charge and that determining whether these 3G rates are appropriate is part and parcel of determining whether the blended charge is appropriate.

Ofcom's response

³⁴ This document was issued by Oftel, prior to the creation of Ofcom, for ease of reference all references are to Ofcom.

- 6.17 Ofcom's reasons for considering the blended termination charges in resolving these disputes (as opposed to the underlying 3G rates) were set out in full in the draft determination (see paragraphs 5.5-5.18 above). Having considered H3G's submission, Ofcom reaffirms the view expressed in the draft determination, irrespective of whether or not terminating operators have specified the underlying 3G rate.
- 6.18 In summary, it is appropriate to focus on the blended charge in determining these disputes because the blended charge is what H3G actually pays for each minute of termination (i.e. it is the contractually applicable charge). The underlying 3G rate is not paid in any commercially realistic sense on any minute of termination – instead its relevance is only that it contributes to the derivation of the blended charge, which is the charge that is paid by H3G.

Circumstances have changed since the previous market review

- 6.19 H3G argues that Ofcom now has sufficient information to ascertain the correct costs of 3G mobile call termination (which it argues is crucially relevant given the justification provided by Ofcom for not imposing a price control in 2004). H3G states that Ofcom did not previously determine the relevant 3G rates to be reasonable but only that it lacked the information to justify action at that time, and that action now is not in any sense inconsistent with the outcome of the market review.
- 6.20 H3G also argues that at the time of the 2004 CTM Review Orange and O2 were not charging a different 3G rate blended into their overall rate and that *“the very fact that O2 and Orange have specified separate 3G rates in their overall blended rates constitutes a change in circumstances from those at the time of the previous market review when neither of these operators had even launched 3G services”*.

Ofcom's response

- 6.21 Availability of cost information was not the only reason that Ofcom chose not to impose price regulation on charges for 3G termination, as set out in paragraph 3.8 – 3.11 above.
- 6.22 For the reasons outlined, Ofcom does not propose to set charges for this period in the context of a dispute, because to do so would be inconsistent with its previous policy decision not to regulate 3G.
- 6.23 Ofcom does not agree with H3G's argument to the extent that the fact that O2 and Orange have specified separate 3G rates constitutes a change in circumstance from the previous market review justifying the setting of cost based charges. Even if it were the case that the charging of blended rates together with the publication of underlying 3G rates amounted to a sufficient change in circumstances from the previous market review, the appropriate place to address that change and the concerns arising from it would be through the setting of SMP conditions pursuant to a market review and not via the dispute resolution process.

Mobile LRIC Modelling was initiated with the specific aim of resolving disputes

- 6.24 In its response H3G refers to correspondence from Ofcom to H3G of 10 February 2005 in which Ofcom stated that *“the 3G cost model would be used by Ofcom to investigate a complaint or dispute on the reasonableness of 3G termination charges”* and that Ofcom has not to date explained why or when it resiled from this.

Ofcom's response

- 6.25 The correspondence referred to by H3G was sent at a time when there was no dispute before Ofcom. Ofcom can only take a considered view on how to deal with a dispute after it has received a formal referral.
- 6.26 The correspondence quoted by H3G does not state that Ofcom would set cost-based termination charges in the event of a dispute; it confirms that in the event of a dispute it would be advantageous for Ofcom to have an understanding of the underlying costs. Ofcom did not commit to a position where it would set cost based charges but merely indicated that an understanding of 3G costs would be necessary. The position which Ofcom adopted was that charges for termination on 3G networks should not be subject to price regulation and Ofcom has acted consistently with this position in resolving the dispute.
- 6.27 Ofcom's position during the period, as set out in previous public statements, is that consideration of the regulation of 3G termination would be undertaken in the context of ex-ante regulatory obligations (for example, as set out in the June 2004 CTM Market Review, Ofcom stated that "*it would be disproportionate to impose ex ante obligations on 3G voice call termination at this time. Ofcom does, however, intend to keep this position under review, and will retain the ability to bring forward proposals for regulation if warranted*"). This position did not change during the period in question.

Alleged discrimination and imbalance of payments between H3G and other MNOs

- 6.28 H3G states that if the position in the draft determinations is confirmed, H3G will be in the position of being required to pay O2 and Orange more for 3G call termination than it has received from those operators in the relevant period and that such "discrimination imposed by regulation is inconsistent with Ofcom's statutory duties (especially those to promote competition and to ensure that Ofcom's functions are not carried out in a way which favours one electronic communications provider over another)".
- 6.29 H3G also argues that the "actual rates" are above what Ofcom has subsequently determined to be appropriate in its Mobile Call Termination Statement of 27 March 2007 and are "significantly higher than H3G's rate imposed by BT at launch". H3G argues that that the position in the draft determination "merely exacerbates the imbalance of payments H3G currently experiences between it and the other Mobile Operators and the fact that H3G is effectively subsidising its competitors.

Ofcom's response

- 6.30 Ofcom does not accept that it has failed to take account of its statutory duties. Ofcom's decision taken during the 2004 CTM Review (as outlined at paragraph 5.31 above) was itself consistent with the Community Requirements and Ofcom's duties.
- 6.31 H3G has stated that the position in the draft determination, if retained, will constitute discrimination contrary to Section 4(6) of the Act. In this regard, Ofcom notes that Section 4(6) of the Act sets out Ofcom's duties for the purpose of fulfilling the fourth Community Requirement, which is the obligation to act in a manner which, so far as

practicable, is technology- neutral.³⁵ That provision does not require that the payments (or indeed charges) that H3G pay O2 and Orange for terminating calls on their networks must be the same as the payments (or charges) that O2 and Orange pay H3G for terminating calls on its network.

- 6.32 Ofcom fails to understand the relevance of the balance of payments experienced by H3G to the resolution of the dispute. H3G has put forward no reason why this should be the case and neither has H3G shown that such an outcome would be inconsistent with Ofcom's duties in resolving disputes.
- 6.33 Ofcom notes H3G's comments that the disputed rates are above the charges that Ofcom has set under SMP obligations as part of the 2007 CTM Review. However, during the period in question, Ofcom adopted an explicit decision not to regulate charges for 3G termination and therefore the SMP conditions imposed as part of the 2007 CTM Review are not applicable to that period where no SMP price regulation was in place.
- 6.34 Ofcom further notes that the outcome of the dispute referred by H3G against BT and determined by Ofcom on 7 July 2007 is that for the period in question H3G receives a higher blended rate than the other MNOs i.e. H3G receives a higher rate on each minute of termination.
- 6.35 Ofcom's approach to resolving these disputes effectively avoids imposing SMP-type obligations on MNOs with retrospective effect. Ofcom notes its statutory duty under Section 3(3) (a) of the Act to have regard to the principles under which regulatory activities should be consistent in carrying out its duties.

Time period of the disputes

- 6.36 H3G also queries why Ofcom in the draft determination extends the period to which the disputed rates apply beyond 1 April and states that Ofcom does not sufficiently explain why this should be the case.

Ofcom's response

- 6.37 In the draft determinations Ofcom outlined that the disputed charges should remain until such time as alternative charges are in place. As set out in the draft determinations, Ofcom's consideration of these disputes is limited to charges for mobile voice call termination on each of the five MNOs networks for services provided for the period prior to 1 April 2007. After that date, Ofcom recognises that the MNOs may need to set new charges in order to comply with the charge controls set out in the 2007 CTM Review. Nevertheless, it would be unclear to the parties at which rates they were required to transact if Ofcom's determination were limited to the period up to 1 April 2007 and further disputes could arise.

³⁵ In accordance with Section 4(6) Ofcom must "take account of the desirability of OFCOM's carrying out their functions in a manner which, so far as practicable, does not favour one form of electronic communications network, electronic communications service or associated facility; or one means of providing or making available such a network, service or facility, over another". The obligation to act in a technology-neutral manner is set out in Section 8 of the Framework Directive (Directive 2002/21/EC). Recital 18 of the Framework Directive describes technologically neutral regulation as regulation that "neither imposes nor discriminates in favour of the use of a particular type of technology".

- 6.38 Ofcom therefore considers it appropriate to make clear to the parties which rates will apply until such time as alternative charges are in place to ensure compliance with the respective charge control obligations of each MNO as set out in the 2007 CTM Review.

Gains from trade approach

- 6.39 H3G also states that Ofcom does not apply a “gains from trade test” in resolving the disputes between H3G and each of O2 and Orange. Although H3G confirms that it does not consider that such an approach is appropriate in the context of its disputes with each of O2 and Orange it further states that Ofcom is creating additional uncertainty by using two different approaches to resolving similar disputes, which H3G states is “apparently solely on the basis of the e2e obligation placed on BT”.

Ofcom’s response

- 6.40 Ofcom notes H3G’s view that a gain from trade analysis is not appropriate in the context of its dispute with each of O2 and Orange.
- 6.41 When resolving disputes, Ofcom will take into account all regulation in place relevant to the resolution of that dispute. As set out above, no charge regulation was applicable to the level of blended charges during the period covered by the disputes. In the case of the BT disputes, the e2e obligation is a distinct piece of regulation which applies to BT and should be taken into account. Ofcom has resolved both the present disputes and the disputes involving BT in the context of the relevant regulation applicable to the two sets of disputes.

Effective date of Orange’s Notice of Variation of 11 July 2006

- 6.42 H3G has stated that in the draft determination Ofcom refers to the dispute period with respect to Orange as effective from 1 September 2006. H3G states that the notification from Orange of 11 July 2006 indicated an effective date of 15 August 2006 and this date was subsequently reflected in the August 2006 call termination invoice H3G received from Orange.

Ofcom’s response

- 6.43 Ofcom has amended the determination to clarify that the effective date of Orange’s Notice of Variation of 11 July 2006 is 15 August 2006.

O2

- 6.44 In response to the draft determinations O2 has stated that it supports the approach Ofcom is proposing to take in this dispute. O2 stated that Ofcom’s proposed determination is entirely consistent with its decisions in respect of the recent disputes between BT and each of the mobile operators (including H3G itself). O2 stated that given Ofcom’s decisions in those disputes, it would be perverse for Ofcom to arrive at any other decision in relation to this dispute.

Orange

- 6.45 Orange has stated that the determination should specify that any amount owed by H3G should be repaid with interest.

Ofcom's response

- 6.46 Ofcom confirms in the determination that interest should be paid in accordance with the standard contract rate for the period.

BT

- 6.47 BT considers that there is a clear overlap between some of the issues in these dispute and the disputes between BT and each of Vodafone, O2, Orange, T-Mobile and H3G.
- 6.48 BT has asked Ofcom to take into account certain aspects of its response to the draft determinations in respect of the BT disputes in reaching its final view on the disputes between H3G and each of O2 and Orange. BT has stated that it does not specifically accept Ofcom's conclusions in paragraphs 6.30 to 6.32 of the draft determination (which outlined the proposed resolution to these disputes and the consistency of this approach with the Community Requirements and Ofcom's duties).

Ofcom's response

- 6.49 Ofcom has noted BT's comments which refer to its response to the draft determinations in CW/00942/12/06. Ofcom has addressed those comments in the final determinations of those disputes and does not propose to address again the points raised by BT in its response to those draft determinations.

Section 7

Conclusion

- 7.1 Ofcom has not departed from the conclusion contained in the draft determination to uphold the charges that have been proposed by O2 and Orange to H3G. Ofcom has, however, taken account of responses to the draft determinations that interest should be included in respect of any repayment and has amended the determination accordingly.
- 7.2 For the reasons set out in sections 5 and 6 above, Ofcom's conclusion in these determinations is therefore that:
- It was appropriate for Orange and O2 to set blended termination charges during the periods in question which were the same irrespective of whether the call terminates on a 2G or a 3G network;
 - It was appropriate for the blended charge to be different from and higher than the regulated charge for 2G termination; and
 - For reasons of consistency with Ofcom's clearly stated policy of not regulating 3G termination services of combined 2G/3G MNOs, Ofcom does not propose to resolve these disputes by setting alternative termination charges (whether cost-based or otherwise) to those proposed by Orange and O2 respectively in circumstances where Ofcom has decided not to impose SMP type price regulation of the blended charges.

Action required by H3G

- 7.3 O2 issued Notices of Variation to H3G on 28 July 2006 and 30 November 2006 (with effective dates of 1 September 2006 and 1 January 2007 respectively). Orange issued a Notice of Variation to H3G on 11 July 2006 (with an effective date of 15 August 2006).
- 7.4 Ofcom's conclusion is to uphold the charges that have been proposed by O2 and Orange to H3G and H3G is required to purchase termination at the rates set out in the abovementioned Notices of Variation.
- 7.5 Ofcom considers that this is a proportionate outcome, given that Ofcom's decision not to regulate 3G was explicitly set out in the 2004 CTM Review and that Ofcom has recognised that MNOs were not prevented from setting a 3G termination charge above the regulated 2G rate and charging a blended rate for termination.

Annex 1

Comparison of charges with underlying 2G and 3G charges

	Daytime (ppm)	Evening (ppm)	Weekend (ppm)
Orange			
Existing	[X]	[X]	[X]
Proposed	[X]	[X]	[X]
Underlying 2G	[X]	[X]	[X]
Underlying 3G	[X]	[X]	[X]
O2			
Existing	[X]	[X]	[X]
Proposed (28/07/06)	[X]	[X]	[X]
Underlying 2G	[X]	[X]	[X]
Underlying 3G	[X]	[X]	[X]
Proposed (30/11/06)	[X]	[X]	[X]
Underlying 2G	[X]	[X]	[X]
Underlying 3G	[X]	[X]	[X]