



Determinations to resolve  
Disputes between BT and each of  
Cable & Wireless, Gamma, Colt,  
Verizon and Opal regarding the  
repayment by BT of certain  
charges for the transit of traffic

Final determinations

Issued: 20 October 2010



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## Section 1

# Introduction and Background

## Introduction

- 1.1 These Determinations set out our final determinations of the disputes submitted by each of:
- Cable & Wireless Worldwide plc (“C&W”) on 21 May 2010;
  - Gamma Telecom Holdings Limited (“Gamma”) on 27 May 2010;
  - Colt Technology Services (“Colt”) on 18 May 2010;
  - Verizon UK Limited (“Verizon”) on 10 May 2010; and
  - Opal Telecom (part of TalkTalk Telecom Group PLC) (“Opal”) on 18 June 2010,
- against British Telecommunications plc (“BT”), each requesting Ofcom to resolve a dispute between the party in question and BT.
- 1.2 We refer to these disputes as the “Disputes” and C&W, Gamma, Verizon, Colt and Opal together as the “Transit Customers” and the Transit Customers and BT together as the “Parties”.
- 1.3 The Disputes relate to the alleged obligation on BT partly to reimburse the Transit Customers for payments made for the transit of traffic to particular Mobile Network Operators (“MNOs”) during various periods between 1 September 2006 and 31 March 2007 (the “Relevant Period”). More specifically, the Transit Customers claim that they are owed a reimbursement of the difference between what they were charged for transit services (both single transit traffic and inter tandem transit traffic) during the Relevant Period and the MCT rates set by the CAT in its judgments of 20 May 2008 (the “TRD Judgment”) and 15 August 2008 (the “Rates Judgment”).
- 1.4 We set out our statutory and regulatory duties and powers in resolving disputes in Annex 2.
- 1.5 This section sets out the introduction and background to the Disputes, and how we have handled the Disputes to date.

## The Parties

- 1.6 C&W provides voice, data and internet services throughout the UK and internationally. It was formally part of Cable & Wireless plc and now exists as an independent plc following a demerger in March 2010. In 2008, C&W acquired THUS plc but during the Relevant Period, THUS was an independent company. Negotiations with BT in respect of the issues in dispute have been conducted subsequent to the acquisition and cover both companies. Any reference to C&W also includes Energis, unless indicated otherwise.
- 1.7 Gamma is a network operator that provides wholesale fixed and mobile telephony and data services mainly to resellers who sell to the small to medium enterprise sector throughout the UK.

- 1.8 Colt specialises in providing data, voice and managed services to major businesses, medium businesses (via resellers and telesales activity) and wholesale customers.
- 1.9 Verizon offers communications services in the UK using a combination of its own high speed fibre optic network and wholesale services provided by other communication providers.
- 1.10 Opal is a telecommunications network operator who supplies telecommunications services to wholesale and retail customers across the UK. Opal is a wholly-owned subsidiary of TalkTalk Telecom Group PLC
- 1.11 BT is an integrated telecommunications group that provides voice and data services in the UK and elsewhere. Its principal activities include local, national and international telecommunications services, broadband and Internet products and services, and IT solutions.
- 1.12 KC, a KCOM Group PLC business, (“KCOM”) wrote to us on 25 June 2010 to state that it is interested in these Disputes.

### **Transit services and charging arrangements**

- 1.13 During the Relevant Period, the Transit Customers used BT to transit calls via its network to terminate on certain MNO networks (“BT Transit Services”).
- 1.14 BT’s charges for transit services are shown in section B1.12 of the Carrier Price List (“CPL”) <sup>1</sup>. Each charge is made up of the following three charge components:
  - i) Transit services – this is the charge for the transit of call traffic to the MNOs. It includes single transit services or inter tandem transit services. Single transit is the service a transit operator provides at a single tandem exchange to switch a call from one network to another when a call originates and terminates on networks other than its own. Inter tandem transit is a service that conveys traffic between tandem exchanges <sup>2</sup>.
  - ii) MCT – the termination rate on the mobile network.
  - iii) Product management, policy and planning (“PPP”) – this is the charge for the administration costs of having a team managing the regulated product set. PPP can be recovered on a once per call basis. At the time of the Disputes, PPP for single transit was charge controlled <sup>3</sup>.

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<sup>1</sup> Link to BT’s Carrier Price List:

[http://www.btwholesale.com/pages/static/service\\_and\\_support/service\\_support\\_hub/online\\_pricing\\_hub/cpl\\_hub/cpl\\_pricing\\_hub.html](http://www.btwholesale.com/pages/static/service_and_support/service_support_hub/online_pricing_hub/cpl_hub/cpl_pricing_hub.html)

<sup>2</sup> During the Relevant Period, BT had Significant Market Power (“SMP”) in the market for the provision of single transit and was subject to a number of conditions including the requirement not to unduly discriminate and a requirement that each and every charge offered is reasonably derived from the costs of provision. See Ofcom’s review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets as published 28 November 2003.

<sup>3</sup> PPP is regulated due its status as a component of the services in which BT has SMP. For the Relevant Period single transit was charge controlled, as was the PPP component for such traffic. The relevant terms of the charge control were set by Ofcom in the August 2005 statement: *Review of BT’s network charge controls* available at:

[http://stakeholders.ofcom.org.uk/binaries/consultations/charge/statement\\_ncc.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/charge/statement_ncc.pdf)

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- 1.15 BT charges its transit customers one single price for transit services in the CPL, combining the charges for transit, MCT and PPP.

## **Background to the Disputes**

### **The Original Invoices**

- 1.16 BT issued certain invoices to the Transit Customers in respect of its BT Transit Services in 2006 (“the Original Invoices”). The Original Invoices charged the Transit Customers one single price including the three component charges for the transit of call traffic to the MNOs, PPP and the MCT charge paid by BT to the MNOs for the relevant traffic. Ofcom understands that the Original Invoices do not set out the component charges separately and the Transit Customers are charged a single price for the BT Transit Service.

### **The 2007 Determinations**

- 1.17 On 7 July 2007, Ofcom determined five disputes (the “2007 Determinations”) between BT and each of T-Mobile, O2, H3G, Orange and Vodafone concerning the increased MCT rates charged by each of the mobile operators to BT for direct interconnection for the following periods:

- 1 September 2006 to 31 March 2007 with respect to T-Mobile and O2;
- 1 October 2006 to 31 March 2007 with respect to Vodafone and Orange; and
- 1 November 2006 to 31 March 2007 with respect to H3G.

- 1.18 In each case, Ofcom upheld the MCT rate charged by the mobile operator to BT for the relevant period.

### **The Supplementary Invoices**

- 1.19 Following the 2007 Determinations, BT sought to impose retrospective charges (“the Supplementary Invoices”) on each of the Transit Customers in order to recover the higher MCT charges it was required to pay.
- 1.20 The Transit Customers refused to pay these Supplementary Invoices.

### **The Appeals**

- 1.21 On 6 and 7 September 2007, BT, T-Mobile, H3G and a group of fixed network operators lodged four separate appeals against the 2007 Determinations with the CAT.
- 1.22 On 20 May 2008, the CAT issued its TRD Judgment upholding all four appeals. The CAT concluded that the 2007 Determinations should be quashed and remitted to Ofcom with a direction specifying the MCT rates to be set between the parties to resolve the disputes.
- 1.23 On 15 August 2008, the CAT issued its judgment (the “Rates Judgment”) on the MCT rates to be set between BT and each of T-Mobile, O2, H3G, Orange and Vodafone for the relevant periods in order to resolve the disputes.

- 1.24 On 17 November 2008 the CAT issued its final Order (the “CAT’s Order”), remitting the 2007 Determinations to Ofcom pursuant to section 195(4) of the Act. The CAT’s Order included a direction that Ofcom should resolve the disputes between BT and each of T-Mobile, O2, H3G, Orange and Vodafone by setting the rates set out in its Rates Judgment.
- 1.25 The CAT further directed that Ofcom should order interest to be paid on any sums payable pursuant to the CAT’s Order at such rate and for such period as it considers appropriate having regard to the terms of the contracts between the parties.

### **The 2009 Re-determinations**

- 1.26 On 16 January 2009 Ofcom issued re-determinations (the “2009 Re-determinations”) setting out the per-minute rates that should have been charged, and the total amounts to be re-paid as directed by the CAT and agreed with the Parties. Following this, BT received repayments from all the MNOs equivalent to the difference between the MCT charges actually paid by BT during the Relevant Period and the MCT charges reset by the CAT for the Relevant Period (“MNO MCT Repayments”).
- 1.27 The 2009 Re-determinations did not determine directly whether any money BT recovered from the MNOs for transit traffic should be passed back to BT’s transit customers. Payments that were owed as a result of transit arrangements were outside the scope of the original disputes and the TRD Judgment and the Rates Judgment, as confirmed by the CAT in its letter to the parties on 17 November 2008. However, Ofcom stated in its 2009 Re-determinations that it “*would expect parties to agree among themselves payments to be made in relation to transit arrangements for the relevant periods, based on the revised rates set out in the re-determinations*”.

### **Reimbursements by BT**

- 1.28 In July 2009, BT decided to pass on the reimbursement it had received from the MNOs for MCT during the Relevant Period to its customers who had paid the Supplementary Invoices. BT made the commercial decision not to reimburse the Transit Customers because they had refused to pay the Supplementary Invoices.

### **The Transit Customers’ request for resolution of the Disputes**

- 1.29 The Transit Customers submit that, by not reimbursing them, BT is in breach of the following SMP conditions in the market for single transit:
- i) BT has failed to exercise its discretion to make retrospective amendments to the CPL according to the Standard Interconnect Agreement (“SIA”) in a fair and reasonable way, in breach of SMP condition AA1(a).
  - ii) BT is unduly discriminating against the Transit Customers by only reimbursing its transit customers that paid the Supplementary Invoices, in breach of SMP condition AA2.
  - iii) BT’s single transit services are not cost orientated, in breach of SMP condition AA3.
- 1.30 The Transit Customers are asking for a direction by Ofcom requiring that certain repayments be made as an adjustment for overpayments, plus interest.

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- 1.31 The Disputes cover the period 1 October 2006 to 31 March 2007 for traffic relating to Vodafone and Orange, and 1 November 2006 to 31 March 2007 for traffic relating to H3G.

### Opening of the Disputes

- 1.32 Ofcom opened an investigation on 21 June 2010 on the basis that the Transit Customers are each in dispute with BT within the meaning of section 185 of the Act. Our reasoning in this regard is set out in more detail in section 2 below.
- 1.33 Ofcom met with BT on 16 June 2010 to discuss its comments on the Disputes referrals and with most of the Transit Customers to discuss their submissions (C&W on 30 June, Gamma on 7 July, Verizon on 8 July and Colt on 12 July).
- 1.34 Following these meetings, Ofcom wrote to the Parties on 15 July with its preliminary view on the Disputes referrals. Verizon responded with its comments on 28 July, C&W responded with its comments on 29 July, and BT responded with its comments on 30 July.

### The scope of the Disputes

- 1.35 After consideration of the submissions received from the parties, the scope of the Disputes is whether BT is required under the regulatory framework to repay the Transit Customers certain charges for the transit of traffic to particular MNOs for different periods between September 2006 and March 2007.

### The Draft Determinations

- 1.36 Ofcom issued Draft Determinations to the Parties and one interested party on 27 September 2010 and published a version on the CCEB on 28 September 2010. We asked for responses to the Draft Determinations by 5 pm on 6 October 2010.
- 1.37 We received responses to our consultation on the Draft Determinations from BT, C&W, Colt, Gamma, Opal and Verizon as Parties to the Disputes. We also received a response from KCOM as an interested party.
- 1.38 In addition we met with C&W on 7 October 2010.

### Structure of this document

- 1.39 The remainder of this document is structured as follows:
- Further detail on the history of the Disputes and the arguments of the Parties is set out in **Section 2**.
  - Our assessment of the Disputes and provisional conclusions are set out in **Section 3**.
  - The Parties responses to the Draft Determinations are set out in **Section 4**.
  - Our final conclusions are set out in **Section 5**.
  - Our final Determinations for resolving the Disputes are set out at **Annex 1**.



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- **Annex 2** sets out Ofcom's dispute resolution powers, statutory obligations and regulatory principles.

## Section 2

# The Disputes

## History of Commercial Negotiations between the Parties

- 2.1 Following the 2009 Re-determinations, the Transit Customers attempted to agree with BT payments they alleged were due as a result of overcharging for transit services during the Relevant Period. BT refused to offer a complete credit to reflect the new rates for mobile termination as set out in the 2009 Re-determinations.
- 2.2 The Transit Customers have provided evidence to us in their submissions of negotiations with BT since the date of the 2009 Re-determinations. Despite these commercial negotiations, the Parties have not been able to agree on whether or not a reimbursement is due to each of the Transit Customers by BT in respect of the Original Invoices. Between 10 May and 21 June 2010 the Transit Customers submitted their Disputes to Ofcom.
- 2.3 On the basis of the submissions and the evidence presented, Ofcom decided that the Transit Customers are each in dispute with BT within the meaning of section 185 of the Act<sup>4</sup>.

## Ofcom's decision to open the Disputes

- 2.4 Section 186(2) of the Act provides that where a dispute is referred to Ofcom in accordance with section 185, Ofcom must decide whether or not it is appropriate to handle it. Section 186(3) of the Act provides that Ofcom must decide that it is appropriate for it to handle the dispute unless it considers (a) that there are alternative means available for resolving the dispute, (b) that a resolution of the dispute by those means would be consistent with the Community requirements set out in section 4 of the Act, and (c) that a prompt and satisfactory resolution of the dispute is likely if those alternative means are used for resolving it.
- 2.5 BT has argued that the dispute is a contractual issue about the interpretation of paragraph 12.3 of the SIA and has sought declaratory relief in respect of the issue in the High Court. BT believes that its action before the High Court to determine the proper interpretation of Clause 12 of the SIA constitutes an 'alternative means' to resolve the dispute within the meaning of section 186(3) of the Act. According to BT, any ruling from the Court will establish whether BT has the discretion to decide not to reimburse the Transit Customers for transit services for the Relevant Period.
- 2.6 Whilst the SIA is relevant to any determination of the Disputes, it cannot be determinative in this case since parties may have rights and obligations under the regulatory framework that go beyond their agreed contractual position, in particular where one of the contracting parties has SMP in the relevant market. The CAT has previously held that dispute resolution is a regulatory restraint that operates in addition to other ex ante obligations and ex post competition law<sup>5</sup> and section 190(2) expressly provides us with a power to fix the terms or conditions of transactions

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<sup>4</sup> The CAT has confirmed that Ofcom has the jurisdiction under s. 185(1) of the Act to determine historic disputes – see *British Telecommunications Plc v Office of Communications*, [2010] CAT 15, paragraph 111.

<sup>5</sup> See paragraph 88 of the TRD Judgment

between the parties to a dispute. As such we consider that the SIA must be subject to and not determinative of our dispute resolution function

- 2.7 In light of this, and the fact that the evidence submitted demonstrates sufficiently that all avenues of commercial negotiation have failed, we consider that it is appropriate for Ofcom to handle the dispute according to section 186(2) of the Act.

## The scope of the Disputes

- 2.8 The Transit Customers all submit that BT has refused to make certain repayments to them in respect of the Original Invoices which include higher MCT rates than those ultimately paid by BT to the MNOs following the 2009 Re-determinations. While we understand that BT has provided credit notes for part of the Supplementary Invoices to some of the Transit Customers, it has refused to offer full reimbursement to reflect the new rates set out in the 2009 Re-determinations on the basis that the Transit Customers refused to pay the Supplementary Invoices. However, BT has fully reimbursed its other customers for transit who paid the Supplementary Invoices at the relevant time.
- 2.9 The Transit Customers consider that BT is in breach of the SMP conditions that apply to BT's single transit services and that the SIA requires BT to make the repayments.

### BT's SMP conditions

- 2.10 In 2003 Oftel carried out a review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets. In that review Oftel held that BT had a position of Significant Market Power ("SMP")<sup>6</sup> in the market for the provision of single transit and inter tandem transit services and imposed a number of conditions on BT.
- 2.11 In 2005, Ofcom carried out a further review of certain markets (local-tandem conveyance and transit and inter-tandem conveyance and transit) due to significant developments that were occurring in these markets<sup>7</sup>. This led to the deregulation of the inter-tandem conveyance and transit market. However, BT retained SMP within the market for single transit and has the following SMP obligations in that market:

*Condition AA1(a) - Requirement to provide Network Access on reasonable request*

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

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

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

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<sup>6</sup> Oftel's Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets, 28 November 2003

<sup>7</sup> Explanatory Statement and Notification of decisions on BT's SMP status and charge controls in narrowband wholesale markets, 18 August 2005

*Condition AA2 - Requirement not to unduly discriminate*

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

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

*Condition AA3 - Basis of charges*

*AA3.1 Unless the Director directs otherwise from time to time, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of the Director, that each and every charge offered, payable or proposed for Network Access covered by Condition AA1(a) is reasonably derived from the costs of provision based on a forward looking long-run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed.*

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

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

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

2.12 All of the Transit Customers submit that BT is in breach of three of its SMP conditions in the market for the provision of single transit, as set out above. Specifically, the Transit Customers submit that BT's failure to reimburse them for the Relevant Period is in breach of:

- SMP condition AA1(a)2 which provides in particular that BT must provide single transit on fair and reasonable terms, conditions and charges.
- SMP condition AA2 which provides in particular that BT must not unduly discriminate against particular persons or against a particular description of persons in relation to matters connected with single transit.
- SMP condition AA3 which provides in particular that BT will ensure that each and every charge for single transit services is reasonably derived from the costs of provision based on a forward looking long-run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed.

2.13 In particular, the Transit Customers submit that BT has not provided the services on fair and reasonable terms contrary to SMP condition AA1(a)2. BT should provide credits based upon the MCT rates actually paid by BT in all cases.

- 2.14 In addition, it is argued that the fact that BT has reimbursed some of its transit customers and not others means that BT is in breach of its SMP obligation AA2 not to unduly discriminate. The Transit Customers submit that BT having reimbursed other customers whilst not reimbursing them means that in effect some customers have paid a different price for their transit services compared to others. However there is no material difference in the cost of providing transit services to the Transit Customers compared with any other large operator. They each submit that BT's obligation is for each and every charge to be reasonably derived from cost and that cannot be met if materially different prices are charged to different operators where no material difference in costs exists.
- 2.15 Further, condition AA3 requires that each and every charge must be reasonably derived from the cost of provision. The Transit Customers consider that where the termination charges on the destination network reduce, so BT's costs of providing the transit service reduce. The effect of the reimbursement is to increase BT's profits for the transit service.
- 2.16 More specifically, Colt submits that BT has received a windfall gain at Colt's business expense. Through not passing on the rebate charges it has received from the MNOs relating to Colt's originated traffic it has failed to provide a transit service within the charge control and thereby breached its SMP conditions. Under SMP Condition AA2 BT is required not to unduly discriminate between its customers for Network Access and yet has treated Colt differently in terms of issuing refunds and credit notes in connection with the additional monies that BT has received as a result of the 2009 Re-determinations.
- 2.17 C&W and Opal argue that even if BT is correct that clause 12.3 of the SIA gives it a discretion in deciding whether to reimburse retrospective changes to charges, SMP Condition AA1(a)2 still requires BT to exercise that discretion in a fair and reasonable manner.
- 2.18 They submit that the approach BT has taken in providing a partial credit note in respect of the Supplementary Invoices shows that BT has adopted different approaches for the calculation of the credits depending in part upon what was best for its own business. For example, they say that BT maintained the higher blended rates upheld by 2007 Determinations for April 2007 (T-Mobile and O2) and May 2007 (O2) as they were outside the scope of the disputes and therefore not reduced by the Rates Judgment and the 2009 Re-determinations. They say that whilst this issue is not in dispute it demonstrates that in cases where the MCT rates are retrospectively increased (as opposed to reduced), BT maintains that it is able to retrospectively invoice its transit customers.
- 2.19 C&W and Opal submit that the different approaches used illustrate that BT has used the discretion that it believes it has under clause 12.3 of the SIA to make decisions that favour its own business to the detriment of its customers (who are also its competitors). They state that this approach benefits BT's business as it maintains the windfall gain that resulted from the 2009 Re-Determinations (in the case of H3G, Vodafone and Orange) but passes on the higher charges retrospectively wherever the 2009 Re-determinations did not reduce them (for specific instances for T-Mobile and O2 traffic). Such an approach cannot be considered fair and reasonable.
- 2.20 C&W and Opal consider that a fair and reasonable approach would be to provide credits based upon the rates that BT actually ended up paying in all cases and therefore where the 2009 Re-determinations did not reduce the charges BT would have passed on the additional cost it incurred and where the charges were reduced

BT would have passed on the benefit associated with the specific traffic sent by its transit customers.

- 2.21 C&W and Opal each submit that BT's basis for discrimination in this case cannot be objectively justified in that it amounts to differing treatment of otherwise similar customers on the basis simply of how they chose to respond to a particular invoice in specific circumstances at a specific point in time.
- 2.22 Verizon submits that BT's approach is contrary to Condition AA3 because it has achieved a windfall gain in respect of the charges in dispute – a return far in excess of its reasonable cost. In respect of Condition AA2, Verizon submits that BT has given rebates to other operators in the same position as Verizon. The only distinction between Verizon and those operators is that Verizon disputed the Supplementary Invoices and did not pay them.
- 2.23 Gamma submits that in order for BT to avoid being in breach of SMP conditions AA1 and AA3, BT must take account of the retrospective reduction in its costs of provision during the relevant periods and reduce its charges for the combined transit and termination services accordingly.
- 2.24 BT considers that it is fully compliant with its SMP conditions. BT considers that the MCT charge component of the MNOs' charges for transit services does not fall within the scope of BT's SMP obligations for single transit. According to BT, the only issue raised by the dispute concerns the proper construction of the SIA.

## The SIA

- 2.25 BT and each of the Transit Customers have entered into the BT Standard Interconnect Agreement ("SIA"), which sets out the various interconnection charges applicable between BT and each of the Transit Customers, including the charges for transit services.
- 2.26 Clause 12 sets out the charging and payment obligations in respect of BT Services, which covers transit services under which the Secondary Charges apply:

### *"12. BT SERVICES*

*12.1 For a BT service or facility the Operator shall pay to BT the charges specified from time to time in the Carrier Price List.*

*12.2 BT may from time to time vary the charge for a BT service or facility by publication in the Carrier Price List and such new charge shall take effect on the Effective Date, being a date not less than 28 calendar days after the date of such publication, unless a period other than 28 calendar days is expressly specified in a Schedule.*

*12.3 Notwithstanding the provisions of paragraph 12.2, BT may vary the charge which has retrospective effect for a BT service or facility by publication in the Carrier Price List if the variation is as a result of:*

*12.3.1 a variation of a charge which has retrospective effect payable by or to BT in respect of any Third Party Operator or an Authorised Overseas System; or*

*12.3.2 an order, direction, determination or requirement of OFCOM or any other regulatory authority or body of competent jurisdiction.*

12.4 *The date of publication in the Carrier Price List shall be the date that BT first makes the contents of the Carrier Price List available on the Internet or commences e-mail distribution of the Carrier Price List containing the relevant entries to persons other than BT including, without limitation the Operator, whichever is earlier.*

12.5 *As soon as reasonably practicable following an order, direction, determination or consent (for the purposes of this paragraph 12 a “determination” which expression includes a re-determination referred to in paragraph 12.6) by OFCOM of a charge (or the means of calculating that charge) for a BT service or facility, BT shall make any necessary alterations to the Carrier Price List so that it accords with such determination.*

12.6 *If a determination referred to in paragraph 12.5 is subject to a legal challenge, the Parties shall, without prejudice, treat the determination as valid until the conclusion of the legal proceedings, unless the court otherwise directs. If the court finds the determination to be unlawful then the Parties agree to revert to the charges payable immediately prior to such determination being made and BT shall make any necessary alterations to the Carrier Price List. As soon as reasonably practicable following a re-determination by OFCOM (as a result of a legal challenge) of a charge (or the means of calculating that charge) for a BT service or facility, BT shall make any necessary alterations to the Carrier Price List so that it accords with such re-determination.*

12.7 *If any charge (or the means of calculating that charge) for a BT service or facility has retrospective effect (for whatever reason) then BT shall, as soon as reasonably practicable following publication in the Carrier Price List, adjust and recalculate the charges in respect of such service or facility using the new charge and calculate the interest for any sum overpaid or underpaid at the Oftel Interest Rate.”*

- 2.27 Each of the Transit Customers refers to Clause 12 of the SIA, in particular clauses 12.3 and 12.5.
- 2.28 Opal and C&W accept that Clause 12.3 appears to provide BT with a considerable degree of discretion as to whether or not it may vary a charge which has retrospective effect. However, they submit that the exercise of any discretion under this clause must be carried out in a way that is consistent with BT’s regulatory obligations to provide access network services on fair and reasonable terms. It should not be exercised in a manner which leads to inequitable outcomes for BT’s transit customers.
- 2.29 Opal and C&W submit that BT has not exercised its discretion in a way that is fair and reasonable. They state that BT has interpreted the clause to provide it with a wide discretion as to whether or not it can retrospectively vary the charges for transit services to ensure that it gains maximum benefit for itself in each case. They state that BT argued in the first place that Clause 12.3 provided it with the discretion to issue the Supplementary Invoices, when this was clearly to BT’s benefit, and then later, following the 2009 Re-determinations, used the same clause to provide it with the discretion to reimburse only some of its transit customers. This is inconsistent with BT’s regulatory obligations to provide transit services on fair and reasonable terms.
- 2.30 Further, Opal, C&W and Colt submit that BT’s exercise of its discretion in Clause 12.3 is inconsistent with the requirements of Clause 12.5, which provides that as soon as reasonably practicable following a determination of a charge (or the means

of calculating that charge) for a BT service or facility, BT shall make any necessary alterations to the CPL so that it accords with such a determination.

- 2.31 Colt submits that under Clause 12.6 of the SIA, in the event of a successful legal challenge of that determination, the CPL should then be adjusted again to reflect the re-determination. Under Clause 12.7 of the SIA, where a charge for a BT service or facility has retrospective effect, for example because the CPL has to be adjusted retrospectively to make it accord with a re-determination, BT is required to adjust and recalculate the charges previously levied using the new charge.
- 2.32 Colt states that whilst, in accordance with Clause 12.5, BT amended the CPL to accord with Ofcom's 2007 Determinations and proceeded to issue invoices to reflect the higher charges of the mobile operators, BT has failed to comply either with its obligation under Clause 12.6 to re-adjust the CPL to accord with Ofcom's 2009 Re-determinations and the lower charges set out therein or with its obligation under Clause 12.7 to then adjust and recalculate the charges paid by Colt during the relevant periods, resulting in a refund of the difference.
- 2.33 Verizon submits that Clause 12 in general and Clause 12.5 in particular creates an obligation on BT to amend its charges to reflect the terms of the 2009 Re-determinations.
- 2.34 Gamma submits that BT is required to adjust and recalculate the charges under Clause 12.7.
- 2.35 BT considers that under the relevant terms of the SIA, it is entitled to use discretion as to whether or not to make a reimbursement to the Transit Customers.
- 2.36 BT considers the dispute is a contractual issue about the interpretation of paragraph 12.3 of the SIA and has sought declaratory relief in respect of the issue in the High Court.

### **Conclusion on the scope of the Disputes**

- 2.37 On basis of the arguments above, Ofcom considers that the scope of the Disputes is whether BT is required under the regulatory framework to repay the Transit Customers certain charges for the transit of traffic to particular MNOs for different periods between September 2006 and March 2007. This includes the question of whether BT is in breach of its SMP obligations in relation to single transit, as well as whether there is any broader regulatory requirement on BT to reimburse the Transit Customers.



## Section 3

# Ofcom's assessment

## Introduction

- 3.1 The Disputes require us to consider whether BT should pass on the reimbursements it has received from the relevant MNOs for MCT charges (the MNO MCT Repayments) during the Relevant Period to the Transit Customers.
- 3.2 The Transit Customers have asked us to determine whether:
- BT is in breach of its SMP obligations in the market for single transit services as a result of its actions to only partially repay certain of its customers for the reductions in MCT rates which resulted from the 2009 Re-determination.
  - As a result of the combination of its regulatory and contractual obligations BT should be obliged to repay the Transit Customers for calls sent via BT where the MCT rates were subsequently reduced.
- 3.3 We have carefully considered the Parties' submissions and our statutory duties and objectives in reaching our preliminary views in these Draft Determinations.

## Fairness and reasonableness as between the Parties

- 3.4 Our preliminary view in our Draft Determinations was that, irrespective of whether or not BT is in breach of its SMP obligations in the market for single transit, it would be fair and reasonable for BT to reimburse its Transit Customers for both single and inter tandem transit on the basis of the rates and periods set out by the CAT in its Rates Judgment<sup>8</sup>.
- 3.5 In the TRD Judgment, the CAT stated that the outcome of those disputes referred to Ofcom must be fair and reasonable as between the parties, taking into account all the circumstances of the case in light of Ofcom's statutory duties and objectives<sup>9</sup>. That judgment is clear that dispute resolution is a regulatory restraint that operates in addition to other ex ante obligations (e.g. SMP obligations) and ex post competition law<sup>10</sup>.
- 3.6 On the facts, the CAT held that the MCT rates upheld in Ofcom's 2007 Determinations were not fair and reasonable, in particular with regard to Ofcom's duties in sections 3 and 4 of the Act. The CAT emphasised the potential for the higher MCT rates to distort competition or harm downstream customers and consumers<sup>11</sup>.
- 3.7 We understand that the Transit Customers have agreed to the terms of the SIA, which may give BT the discretion to withhold the MNO MCT Repayments. However, Ofcom's duties and powers regarding dispute resolution are independent of the

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<sup>8</sup> Ofcom communicated in its letters of 15 July 2010 to each of the Parties that fairness and reasonableness would be a key consideration in resolving the Disputes.

<sup>9</sup> See TRD Judgment, paragraphs 101 and 117.

<sup>10</sup> See TRD Judgment, paragraph 88.

<sup>11</sup> See TRD Judgment, paragraph 125.

parties' private law contractual rights to each other<sup>12</sup>. Ofcom must consider the full regulatory context, including the rights and obligations of the parties and consumers under the regulatory framework.

- 3.8 In the 2009 Re-determinations, Ofcom expressly stated at paragraph 1.16 that while the re-determinations did not cover the amounts payable between BT and the MNOs as a result of transit arrangements, Ofcom expected the *"...parties to agree among themselves payments to be made in relation to transit arrangements for the relevant periods, based on the revised rates set out in the re-determinations."*
- 3.9 Ofcom considered that, irrespective of any contractual agreement, it would be unfair and unreasonable for BT merely to absorb a windfall reimbursement from the MNOs without passing it downstream to its transit customers that have similarly been overcharged for the relevant period, where, as identified by the CAT, the higher MCT rates might have adversely affected consumers<sup>13</sup> and/or distorted competition<sup>14</sup>. BT appeared to agree with this and proceeded to reimburse some of its transit customers. However, BT withheld the reimbursements to the Transit Customers for commercial reasons, i.e., on the basis that the Transit Customers did not pay the Supplementary Invoices in 2007. Ofcom considers that it is unfair and unreasonable for BT to discriminate between its transit customers in this way without any objective justification.
- 3.10 Whilst factors such as evidence of a lack of credit worthiness or different costs in providing transit services to different transit customers could in some circumstances count as an objective justification to charge some customers more than others, BT has not in this case been able to provide any proper objective justification in the regulatory context for treating transit customers in similar positions differently.

## Ofcom's statutory duties and obligations

- 3.11 The TRD Judgment emphasises the importance that Ofcom should attach to its duties under sections 3 and 4 of the Act in resolving the original disputes<sup>15</sup>. Of particular relevance here is the principal duty of Ofcom under section 3(1) of the Act to further the interests of consumers in relevant markets, where appropriate by promoting competition. In finding the original MCT rates in dispute not to be reasonable vis-a-vis Ofcom's statutory duties, the TRD Judgment implies that the original rates in dispute would not have been in the interests of consumers. The judgment is explicit about the potential for undesirable competition effects in transit services<sup>16</sup>. Article 8(3)(c) Framework Directive also provides that Ofcom must ensure that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services.
- 3.12 BT told us in its letter dated 18 June 2010 that if the MNO MCT Repayments were paid back to its Transit Customers, it seems unlikely that they would be passed on, in turn, to the customers of the Transit Customers. Ofcom would therefore not be acting in a way that benefited consumers if it resolved the Disputes in favour of the Transit Customers.

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<sup>12</sup> See TRD Judgment, paragraphs 169-174 and 171-181.

<sup>13</sup> See TRD Judgment, paragraph 125

<sup>14</sup> See TRD Judgment, paragraph 98 regarding the potential distortion between interconnection and transit and paragraph 125 regarding the distortion between fixed line and mobile services

<sup>15</sup> See TRD Judgment, paragraph 99 and 187

<sup>16</sup> See TRD Judgment, paragraph 98

3.13 BT further argues in its letter dated 18 June 2010 that:

“The disputing parties do not appear to offer any evidence whatsoever of any competitive harm resulting from this differentiation, apart from making vague and non-specific broad statements of competitive disadvantage. In any event, in BT’s view no competitive harm can be shown. This is because the disputing parties are in no less competitive positions than the other operators to whom BT did rebate the difference between Charge X and Charge Y.”

3.14 Accordingly, BT considered that C&W’s claim that BT’s conduct places it “*at a competitive disadvantage vis a vis those transit customers who have received the benefit of the lower charges*” is simply not credible.

3.15 However, Ofcom notes the CAT’s reasoning in the TRD Judgment in respect of the original disputes (paragraphs 98 and 99):

“...the lack of pass through is relevant only to the question of whether the proposed prices had an adverse effect on end-users. This did not affect the question whether the effect of the price rises would be to favour mobile networks over fixed networks or whether the charges were consistent with the other regulatory duties which were engaged. This point is therefore linked to the point raised by the 1092 Appellants who, in their evidence, pointed to the effect of the increase in transit prices would have on their business. As BT pointed out at the hearing, the BT Disputes Determinations have the potential to distort interconnection because the result favours direct interconnection rather than transit through BT. If BT can be forced to elevate its prices vis-a-vis the MNOs, it makes it much less attractive to people to interconnect with BT rather than seeking a direct interconnection elsewhere. BT referred to the very fact that the 1092 Appellants intervened in these appeals “with some vehemence” as demonstrating the problems that OFCOM’s approach actually generates.

The Tribunal therefore holds that OFCOM erred in failing to appreciate that the objectives set in sections 3 and 4 of the 2003 Act should have been central to its approach in interpreting and applying the section 185 procedure and to its assessment of the figures arrive at [...].”

3.16 For the reasons set out by the CAT above, we consider that if BT merely absorbs the reimbursement without passing it on to the Transit Customers, this would have the potential to distort competition in favour of direct interconnection rather than transit. Ofcom further considers that it is in the longer-term interests of consumers to ensure the MNO MCT Repayments are reimbursed to the Transit Customers. Whilst Ofcom notes BT’s argument that monies repaid may not reach the end consumer, Ofcom applies the basic principle that ordering repayments following an overcharge back as far as possible down the chain towards the end consumer is most likely to be in the longer term interest of consumers. This is because a failure to order the MNO Repayments to be reimbursed to the Transit Customers in this instance could give BT (or other CPs in a similar situation going forward) an incentive to act in future in a similar manner to the detriment of competition and consumers.

- 3.17 In our Draft Determinations we therefore provisionally considered that an outcome that is fair as between the parties and reasonable from the point of view of the regulatory objectives set out in the EU regulatory framework and the Act is for BT to pass on the reduced MCT rates (now reimbursed to BT) to the Transit Customers. This position is also consistent with the approach taken by the CAT in its TRD Judgment.

## **BT's SMP obligations**

- 3.18 As explained in section 2, BT was subject to SMP obligations during the Relevant Period (and remains subject to those conditions) in respect of the market for single transit to: provide Network Access services on fair and reasonable terms (Condition AA1(a)); to not unduly discriminate (Condition AA2); and to ensure each and every charge offered, payable or proposed for Network Access covered by Condition AA1(a) was reasonably derived from the costs of provision (Condition AA3).
- 3.19 The Transit Customers have argued that BT is in breach of those SMP obligations by failing to pass on the MNO MCT Repayments.
- 3.20 We consider that, by not passing on the relevant repayments in this matter, BT may be in breach of these SMP obligations in the market for single transit. The purpose of the SMP obligations in the market for single transit is to ensure that BT does not exploit its market position to the detriment of its customers and, ultimately, consumers. BT's proposal that it should be allowed to vary the MCT rate component of the charge for single transit services regardless of the SMP obligations runs directly counter to this objective. Transit customers are charged a single price for single transit, combining the charges for transit, MCT and PPP. They cannot buy transit services without incurring the additional cost of MCT and PPP. The same principle applies with respect to the MCT charge as was set out in our 2010 Narrowband Statement in relation to the PPP charge component:

“we consider that use of the PPP charge to manipulate prices within the ST market (e.g. by charging a higher PPP when there is no justification to do so, or by offering a discount by removing the PPP charge) in a manner that could be seen as affecting the pricing of the ST service could be a breach of conditions applied to that market.”<sup>17</sup>

- 3.21 However, we do not consider that it is necessary for us to reach a formal view on these issues in order to resolve the Disputes since, as explained above, we provisionally consider that it is fair and reasonable for BT to pass on the MNO MCT Repayments, consistent with Ofcom's statutory duties and objectives.

## **Provisional Conclusions**

- 3.22 Having had regard to all of our relevant statutory duties and Community requirements our preliminary view in our Draft Determinations was that, on balance, it was appropriate to order BT to reimburse the Transit Customers.
- 3.23 This is because, as explained above, we considered that it would be fair and reasonable for BT to reimburse its Transit Customers for both single and inter tandem transit services on the basis of the rates and periods set out by the CAT in its Rates Judgment.

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<sup>17</sup> Ofcom's Review of the fixed narrowband services wholesale markets, 5 Feb 2010, paragraph 5.120

- 3.24 In summary, the reasons why we considered that it would be fair and reasonable for BT to reimburse its Transit Customers were as follows:
- We consider that an appropriate application of the principles set out in the TRD Judgment provides that any reduction in the charges for MCT paid by BT during the Relevant Period should be passed on to BT's transit customers.
  - It is moreover unfair and unreasonable for BT to discriminate between its transit customers with regard to the passing on of the MNO MCT Repayments and BT has not provided any objective justification for this conduct.
  - Repayment of the MNO MCT Repayments by BT to the Transit Customers will ensure that the transit operators paid the same lower MCT rates determined by the CAT during the Relevant Period.
  - This outcome would also be consistent with that envisaged by Ofcom in its 2009 Re-determinations. At paragraph 1.16 we stated that while the re-determinations did not cover the amounts payable between BT and the MNOs as a result of transit arrangements, we expected the *"...parties to agree among themselves payments to be made in relation to transit arrangements for the relevant periods, based on the revised rates set out in the re-determinations."*
- 3.25 Our preliminary view was that, by not passing on the relevant repayments in this matter, BT may also be in breach of its SMP obligations. However, we did not consider that it was necessary for us to reach a view on this in order to resolve the Disputes, given our view that BT should pass on the MNO MCT Repayments to its Transit Customers on the grounds of fairness and reasonableness, in line with the TRD Judgment and the Rates Judgment.
- 3.26 Our preliminary view was that it was not necessary for Ofcom to quantify the level of reimbursement for each Transit Customer, given that we considered the Draft Determinations set down a general principle in respect of the transfer of MNO MCT Repayments. We therefore considered that it was for the Transit Customers to provide evidence to BT of the level of reimbursement which they considered that they were entitled to based on the transit traffic each sent to BT for the Relevant Period.
- 3.27 For the avoidance of doubt, and consistent with the principles set out above, we stated that Ofcom would expect the Transit Customers in turn to pass on any reimbursement to their own customers for transit, to the extent they were overcharged for the Relevant Period.
- 3.28 We considered that these provisional conclusions were consistent with our statutory duties and obligations, as set out in more detail in Annex 2.
- 3.29 In particular, we considered that requiring BT to reimburse its Transit Customers was likely to be in the longer term interests of consumers and competition, and hence in accordance with Ofcom's principal duty to further the interests of consumers, where appropriate by promoting competition – as set out in section 3(1) of the Act.
- 3.30 We also considered that requiring BT to reimburse the Transit Customers would address our concern that by only reimbursing some customers BT was discriminating between them without objective justification, such that some customers were in a more favourable position than others.

## Section 4

# Responses to our consultation on the Draft Determinations

## Introduction

- 4.1 We received responses to our consultation on the Draft Determinations from BT, C&W, Colt, Gamma, Opal and Verizon as Parties to the Disputes. We also received a response from KCOM as an interested party. In addition we met with C&W at its request on 7 October 2010.
- 4.2 In this Section we summarise the key issues raised in response to the Draft Determinations, and provide our view on each issue. In light of this, we go on to set out our final conclusions in Section 5. Our final Determinations to resolve the Disputes are set out in Annex 1.

## Response from BT

- 4.3 BT raised a number of procedural and substantive issues in its response to our consultation on the Draft Determinations.

## Scope of the disputes

- 4.4 BT argued that Ofcom has unfairly deviated from the scope of the disputes as submitted by the disputing parties. BT stated that the Transit Customers defined the legal basis for reimbursement as either SMP or contractual, but that Ofcom has decided the disputes on different grounds. In addition, BT told us that Ofcom was wrong to require reimbursement for single and inter-tandem transit as in its view the dispute submissions were clear that the Disputes between the parties were limited in scope to single transit only.
- 4.5 As noted at paragraph [1.35], the scope of the Disputes was set at the outset to be whether BT is required under the regulatory framework to repay the Transit Customers certain charges for the transit of traffic to particular MNOs for different periods between September 2006 and March 2007. We consider that this is wide enough to cover regulatory grounds as well as contractual and SMP grounds. In any event, dispute resolution is a regulatory function, and when we resolve disputes we do so as the regulator in light of our statutory duties. If there are regulatory factors which are relevant to our resolution of a dispute, we are obliged to take them into account as not to do so would risk failing to meet our statutory duties.
- 4.6 With regard to BT's point that the Disputes are limited in scope to single transit only, Gamma and Verizon have confirmed that they are seeking reimbursement in respect of inter-tandem transit as well as single transit. As the reimbursements following the 2009 Re-determinations did not specify just single tandem traffic, Ofcom believes these Determinations should cover what each Transit Customer requested in its submission.

## **Ofcom reached a preliminary view before receiving final submissions**

- 4.7 BT argued that Ofcom had originally set a date of 14 July for substantive submissions, but on 12 July discouraged BT from making submissions until after hearing from Ofcom in a few days' time. BT said that Ofcom's subsequent letter of 15 July announced Ofcom's proposed resolution of the disputes, a view reached despite not having received and considered BT's arguments and reasoning.
- 4.8 It is important to understand that our preliminary view, as set out in our letters to the Parties of 15 July 2010, followed meetings with BT and most of the Transit Customers during which Ofcom discussed the issues with each of the relevant parties. By setting out our preliminary view in this way following those interactions with the Parties, Ofcom gave BT and all of the Transit Customers an opportunity to make a further written submission, following their submissions on the scope of the Disputes. BT and the Transit Customers also had the opportunity to respond to the Draft Determinations.

## **There is no evidence to support Ofcom's proposed outcome**

- 4.9 BT stated that the Transit Customers were not required by Ofcom to provide any evidence to demonstrate their legal grounds for reimbursement. BT also said that the Transit Customers and Ofcom have failed to show how the proposed outcome would meet the statutory objectives in sections 3 and 4 of the Act that Ofcom ultimately relies upon.
- 4.10 We have considered the submissions of all Parties to the Disputes and consider that we have properly applied the principles laid down by the CAT in the TRD Judgment and the Rates Judgment<sup>18</sup>. We do not consider that there was any need for us to seek further evidence from the Parties in order to resolve the Disputes as in our view the information provided to us by the Parties is sufficient for us properly to resolve the Disputes.

## **It was fair and reasonable for BT not to reimburse the disputing operators**

- 4.11 BT does not agree that it has acted unfairly and/or unreasonably in treating its transit customers differently. It justifies that differential treatment on the basis that the Transit Customers refused to pay the higher termination rates during the dispute period whilst other transit customers did pay these higher charges. BT argues that those operators who paid the higher charges risked that BT would be successful in the appeal, resulting in their reimbursement. The Transit Customers, however, decided not to take the same risk, choosing not to pay the higher charges, assuming that even if BT was unsuccessful in the appeal, it would not be able to pursue them for the high rates during the dispute period.
- 4.12 Ofcom does not accept BT's arguments that it was fair and reasonable for it to treat its transit customers differently in this way:
- 4.12.1 First, our understanding of the Supplementary Invoices is that they are not directly relevant to the Transit Customers' claims for repayment as BT provided credit notes that substantially offset them following the TRD Judgment and the 2009 Re-determinations.

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<sup>18</sup> See paragraphs 3.4 to 3.10 above

- 4.12.2 Second, The Transit Customers only learned about the MNOs' OCCNs charging BT higher MCT charges when the 2007 TRD disputes were published on Ofcom's website. Given that they did not agree with these higher charges it was understandable that they waited to see the outcome of the disputes. They then decided themselves to appeal the 2007 Determinations. We consider this conduct by the Transit Customers was reasonable.
- 4.12.3 Third, we recognise that it is possible that those transit customers that paid the higher charges were exposed to an overcharge if BT was successful in the appeal of the 2007 Determinations whilst the Transit Customers were not exposed. However, if BT had been unsuccessful, then those that paid the higher charges would not have been exposed to a further invoice, but BT would no doubt have sought to charge the Transit Customers for the balance. That is, since interactions in the transit market are ongoing – because interconnecting networks can bring disputes to Ofcom – committing to a particular charge or payment at a given point in time is not a one-sided risk.
- 4.13 To expand on the third point above, we understand that the Supplementary Invoices which related to O2 and T-Mobile were in the main settled between the Parties following the rates being overturned by the TRD Judgment and BT providing credit notes following agreement between the Parties. With regard to Vodafone and Orange, no supplementary invoices were raised as Ofcom's 2007 determinations did not give rise to any reason for BT to bill its transit customers any additional charges. However, calls to these operators do form the subject of the Disputes as BT refused to make repayments resulting from the lower re-determined rates.
- 4.14 However, in the case of H3G, calls were the subject of the Supplementary Invoices and are subject to the Disputes because the TRD Judgment determined H3G's termination rate at a lower level than the original rate and it is the difference between the original rate and the finally determined rate that is in dispute.
- 4.15 Consequently, we consider that BT's justification for treating different transit customers differently relates primarily to transactions that are not relevant to the Disputes.

### **Ofcom's legal rationale for disregarding the SIA is flawed**

- 4.16 BT argued that the key issue raised by the Disputes is contractual in nature. BT considers that the issue is whether BT lawfully exercised its discretion under the SIA in deciding to make reimbursements to certain of its transit customers, but not to others. It said that Ofcom's apparent view is that even in the absence of a specific regulatory obligation in relation to the traffic in question, Ofcom can ignore the SIA and determine the Disputes on the basis of what it considers to be "fair and reasonable" in light of Ofcom's statutory duties and objectives.
- 4.17 BT further argued that Ofcom's dispute resolution powers, while a form of regulatory restraint, do not in and of themselves create regulatory obligations on communications providers. It said that the only type of obligation that Ofcom has the power to impose under section 190 of the Act is an obligation to enter into a transaction on terms and conditions fixed by Ofcom, but that pertains only to disputes where parties cannot agree the terms and conditions of their agreement. BT said that in the case of the Disputes, the Parties have already agreed the terms and



conditions of the SIA and the issue is simply a question of whether BT exercised its rights in accordance with the contract.

- 4.18 We do not agree that the legal rationale behind our treatment of the SIA is flawed. The SIA cannot be determinative in this case since we consider the parties to it have rights and obligations under the regulatory framework that cannot effectively be contracted out of through the SIA. The CAT has previously held that dispute resolution is a regulatory restraint that operates in addition to other ex ante obligations and ex post competition law<sup>19</sup> and section 190(2) expressly provides us with a power to fix the terms or conditions of transactions between the parties to a dispute. As such we consider that the SIA must be subject to and not determinative of our dispute resolution function.

### **Ofcom has mis-applied its statutory duties and objectives**

- 4.19 BT said that it does not agree with Ofcom that if BT does not pass the reimbursement on to its Transit Customers, this would (a) distort competition in favour of direct interconnection rather than transit and (b) incentivise BT and other communications providers to act in a similar manner in the future to the detriment of the interests of consumers.
- 4.20 BT stated that Ofcom provides no economic evidence to support either of these conclusions but simply relies on the CAT's statement in the TRD Judgment which refers to BT's evidence in the Appeal that the 2007 Determinations had the potential to distort interconnection because the result favours direct interconnection rather than transit through BT. BT said that this reasoning is flawed because the CAT itself did not express a view on whether the 2007 Determinations would potentially distort interconnection.
- 4.21 BT told us that the distortion referred to in paragraphs 98 and 99 of the TRD Judgment related to the impact of MCT increases on the transit market, with the point being that as BT only makes a very small regulated profit on its transit business it would be forced to pass MCT increases through to its transit customers while, where BT is the originator and its regulated profits are higher, it could absorb the increase. This would then favour direct interconnection over transit. BT said that in contrast with the facts of the TRD judgment, the windfall at issue in the Disputes is a one-off, applicable to a narrow period of time and of minor value. Therefore, BT does not see how its failure to pass through the windfall will drive its transit customers from transit services to direct interconnection thereby creating a distortionary impact on interconnection. BT added that in any event, Ofcom points to no evidence demonstrating this possible outcome.
- 4.22 BT further argued that if Ofcom is concerned about the reimbursements benefiting consumers, then as part of its determinations it should order the Transit Customers to pass on any reimbursement to their end consumers, otherwise those reimbursements will simply become windfalls for the Transit Customers.
- 4.23 In reaching our preliminary conclusions in our Draft Determinations, we applied the principle of fairness and reasonableness from the TRD Judgment<sup>20</sup>. We considered that failure to ensure operators comply with their regulatory obligations could provide them with an incentive not to act in a compliant manner in future to the potential detriment of competition and ultimately consumers.

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<sup>19</sup> See paragraph 88 of the TRD Judgment

<sup>20</sup> See paragraphs 3.4 to 3.10 above

- 4.24 Our recognition in the Draft Determinations<sup>21</sup> that in this context the monies repaid may not ultimately reach end consumers, is entirely consistent with the situation which held during the original TRD disputes appeal. In the original TRD disputes appeal Ofcom had attempted to argue that the disputed MCT rates had applied for a finite and historic period when there:

*“...was no evidence that BT or H3G had increased their prices over that period specifically to reflect the possible increase in costs which would occur if the MNOs’ proposed prices were upheld. This meant that there could be no adverse effect on consumers because, in effect, BT and H3G had decided to absorb any temporary increase in price arising prior to the price control set in the 2007 Statement commencing on 1 April 2007.”<sup>22</sup>*

The CAT did not regard that this was a legitimate argument for Ofcom to make because, among other reasons:

*“...even if the Dispute Determinations covered only a finite and concluded period, the difference in the prices proposed by the parties amounted to substantial sums of money in absolute terms. If, putting aside the fact that the price control in the 2007 Statement started to operate on 1 April 2007, the prices proposed by the MNOs were not reasonable prices, they cannot become reasonable simply because they apply only for a short period of time.”<sup>23</sup>*

- 4.25 Therefore, we remain of the view that it is fair and reasonable to require BT to reimburse the Transit Customers, since to do so will more likely promote effective competition in future to the ultimate benefit of consumers. We consider that this view is consistent with our duties in sections 3 and 4 of the Act.
- 4.26 With regard to BT’s arguments on pass-through we expect, where practicable, the Transit Customers to pass on the reimbursements to their own transit customers, to the extent they were overcharged for the Relevant Period.

## Responses from the Transit Customers

- 4.27 The Transit Customers were in general supportive of the Draft Determinations and believed them to be consistent with Ofcom’s powers and duties under the Act. Colt and Gamma stated that they were happy with the Draft Determinations and had no particular comment. Verizon stated that BT had clearly demonstrated the propensity to discriminate and would no doubt do so again if its actions were unchecked. Therefore determining the disputes in the way Ofcom proposed would act as a strong deterrent to BT from acting in such a manner in the future.
- 4.28 C&W, Opal, Verizon and KCOM raised the following specific issues.

### **Ofcom should have carried out a full analysis of BT’s SMP obligations**

- 4.29 Although the Transit Customers were happy with the outcome of our Draft Determinations, both C&W and Verizon believe that it would be preferable for Ofcom to have carried out a full analysis of the SMP arguments put forward by the Parties to demonstrate why the Disputes were being resolved in the manner chosen by Ofcom. This view is also supported by KCOM as an interested party in the Disputes.

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<sup>21</sup> See paragraph 3.16 above

<sup>22</sup> See paragraph 96 of the TRD judgment

<sup>23</sup> See paragraph 97 of the TRD judgment

- 4.30 It is important to understand that BT's SMP obligations solely cover the single transit market. Whilst C&W's submission only referred to single transit traffic in their submissions, Verizon and Gamma included inter-tandem transit as well. We consider that it is appropriate for Ofcom to resolve the Disputes on the basis of an analysis of whether all of its relevant charges were fair and reasonable, as set out in the TRD Judgment. As a result, we do not need to reach a conclusion on the SMP obligations which only cover part of the monies claimed.

### **Pass through by Transit Customers**

- 4.31 C&W told us in its response to the Draft Determinations that it is not always practical to pass on monies to its customers as there are a number of different charging mechanisms and contractual relationships which exist between different customers.
- 4.32 As stated at paragraph 4.26, where it is practical to do so, we expect the Transit Customers to pass on the reimbursements to their own transit customers.

### **Amounts to be repaid**

- 4.33 C&W and Opal told us that Ofcom should set clear guidelines on the amount to be repaid under the final Determinations and the timescales within which the monies should be passed to the Transit Customers by BT.
- 4.34 We do not consider it is necessary or practicable for Ofcom to quantify the level of reimbursement for each of the Transit Customers, and consider instead that each such Transit Customer should provide evidence to BT of the level of reimbursement which they consider that they are entitled to based on the transit traffic each sent to BT for the Relevant Period. However, we do agree that it is sensible to set a clear timescale for this, and so have given a deadline of one month from the date of these final Determinations for BT and each Transit Customer to reach agreement on the level of reimbursement and for BT to reimburse the Transit Customers.

### **Reimbursement of non-disputing parties**

- 4.35 KCOM told us that the Draft Determinations imply that Ofcom would expect BT to treat all transit customers in the same manner with reference to reimbursement of the mobile termination charges in dispute regardless of whether a particular communications provider is a party to the dispute.
- 4.36 Whilst we do expect BT, in light of these Determinations, to make reimbursements to all of its transit customers, we note that pursuant to section 190(8) of the Act, these Determinations are only binding as between the Parties to the Disputes.

## Section 5

# Final Conclusions

- 5.1 In reaching our final conclusions we have taken account of the arguments made to us and have carefully considered the responses to the Draft Determinations in the light of our statutory duties.
- 5.2 Our final conclusions are that it would be fair and reasonable to require BT to reimburse its Transit Customers as follows:
- We consider that an appropriate application of the principles set out in the TRD Judgment provides that any reduction in the charges for MCT paid by BT during the Relevant Period should be passed on to BT's transit customers.
  - We consider that BT has not provided any objective justification for treating different transit customers in different ways with regard to the passing on of the MNO MCT Repayments, and has therefore discriminated between its transit customers in any unfair and unreasonable manner.
  - Repayment of the MNO MCT Repayments by BT to the Transit Customers will ensure that all transit operators paid the same lower MCT rates determined by the CAT during the Relevant Period.
  - This outcome is consistent with that envisaged by Ofcom in its 2009 Re-determinations. At paragraph 1.16 of those Re-determinations, we stated that while the re-determinations did not cover the amounts payable between BT and the MNOs as a result of transit arrangements, we expected the *"...parties to agree among themselves payments to be made in relation to transit arrangements for the relevant periods, based on the revised rates set out in the re-determinations."*
- 5.3 We are also of the view that by not passing on the relevant repayments in this matter, BT may be in breach of its SMP obligations. However, we do not consider that it is necessary for us to reach a view on this in order to resolve the Disputes, given our view that BT should pass on the MNO MCT Repayments to its Transit Customers on the grounds of fairness and reasonableness, in line with the TRD Judgment and the Rates Judgment.
- 5.4 We do not consider that it is necessary for Ofcom to quantify the level of reimbursement for each Transit Customer, given that we consider these Determinations set down a general principle in respect of the transfer of MNO MCT Repayments. We therefore consider that it is for the Transit Customers to provide evidence to BT of the level of reimbursement which they consider that they are entitled to based on the transit traffic each sent to BT for the Relevant Period.
- 5.5 In order to ensure that this matter is resolved in a timely manner, we have given a deadline of one month from the date of these final Determinations for BT and each Transit Customer to reach agreement on the level of reimbursement and for BT to reimburse the Transit Customers.
- 5.6 Consistent with the principles set out above, Ofcom would expect (where practicable) the Transit Customers in turn to pass on any reimbursement to their own transit customers, to the extent they were overcharged for the Relevant Period.

- 5.7 We consider that these conclusions are consistent with our statutory duties and obligations, as set out in more detail in Annex 2.
- 5.8 In particular, we consider that requiring BT to reimburse its Transit Customers is likely to be in the longer term interests of consumers and competition, and hence in accordance with Ofcom's principal duty to further the interests of consumers, where appropriate by promoting competition – as set out in section 3(1) of the Act.
- 5.9 We also consider that requiring BT to reimburse the Transit Customers addresses our concern that by only reimbursing some customers BT has discriminated between them without objective justification, such that some customers are in a more favourable position than others.

## Annex 1

# The Determinations

## A1.1 Dispute between C&W and BT

**Determination under sections 188 and 190 of the Communications Act 2003 (the “Act”) for resolving a dispute between British Telecommunications plc (“BT”) and Cable & Wireless Worldwide plc (“C&W”) concerning the issue of whether BT should reimburse C&W for calls sent via BT to each of H3G, Vodafone and Orange between 1 October 2007 and 31 March 2007 (the “Relevant Period”), where the mobile call termination (“MCT”) rates were subsequently reduced by Ofcom below the level of the rates originally paid by C&W.**

*WHEREAS-*

- (A) Section 188(2) of the Act provides that, where Ofcom has decided pursuant to section 186(2) of the 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 Act, together with a full statement of the reasons on which the determination is based, and publish to 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 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 Act sets out the scope of Ofcom’s powers in resolving a dispute which may, in accordance with section 190(2) of the Act, include-
- i) making a declaration setting out the rights and obligations of the parties to the dispute;
  - ii) giving a direction fixing the terms or conditions of transactions between the parties to the dispute;
  - iii) 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
  - iv) 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 21 May 2010, C&W submitted a dispute with BT to Ofcom for resolution, claiming that BT should make a repayment of monies to C&W on the basis that BT should have reduced its single tandem transit (“single transit”) charges for the relevant period in line with the reduction in MCT charges set out by the CAT in its Rates Judgment of August 2008 and applied by Ofcom in its re-determinations dated 16 January 2009.

- (D) On 21 June 2010, Ofcom decided pursuant to section 186(2) of the Act that it was appropriate for it to handle this dispute and informed the parties of this decision. Ofcom set the scope of the issues to be resolved in the dispute as follows:

Whether BT is required under the regulatory framework to repay the Transit Customers certain charges for the transit of traffic to particular MNOs for different periods between September 2006 and March 2007. The Transit Customers are asking for a direction by Ofcom requiring certain repayments be made as an adjustment for overpayments, plus interest.

- (E) A draft determination was sent to the parties on 27 September 2010 and published on Ofcom's website on 28 September 2010.
- (F) 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 Act.
- (G) A fuller explanation of the background to the disputes and Ofcom's reasons for making this Determination is set out in the explanatory statement accompanying this Determination.

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

***Declaration of rights and obligations, etc.***

2. Within one month from the date of this Determination:
  - (a) C&W shall provide evidence to BT of the level of reimbursement to which it considers that it is entitled in respect of single transit services on the basis of the rates and periods set out by the CAT in its Rates Judgment and as confirmed in the 2009 Re-determinations, for the period from 1 October 2006 to 31 March 2007;
  - (b) C&W and BT shall agree the level of reimbursement to be paid; and
  - (c) BT shall reimburse C&W accordingly.
3. Interest shall be payable on the reimbursement set out in paragraph 1 above at the standard contract rate for the period which is the "Ofcom Interest Rate" referred to in section 13.13 of BT's Standard Interconnect Agreement.

***Binding nature and effective date***

4. This Determination is binding as between BT and C&W in accordance with section 190(8) of the Act.
5. This Determination shall take effect on the date it is published.

***Interpretation***

6. 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.

7. In this Determination-

- a) the “2009 Re-determinations” means Ofcom’s re-determinations of January 2009 for calls sent via single tandem transit;
- b) The “Act” means the Communications Act 2003;
- c) “BT” means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989;
- d) “CAT” means the Competition Appeal Tribunal;
- e) “C&W” means Cable & Wireless Worldwide plc, whose registered company number is 07029206, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989;
- f) “Ofcom” means the Office of Communications;
- g) “Rates Judgment” means the judgment of the CAT dated 15 August 2008.
- h) “Transit Customers” means C&W, Gamma, Verizon, Colt and Opal together.

**Neil Buckley**  
**Director of Investigations**

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

**20 October 2010**



## **A1.2 Dispute between Colt and BT**

**Determination under sections 188 and 190 of the Communications Act 2003 (the “Act”) for resolving a dispute between British Telecommunications plc (“BT”) and Colt Technology Services (“Colt”) concerning the issue of whether BT should reimburse Colt for calls sent via BT to each of H3G, Vodafone and Orange between 1 October 2007 and 31 March 2007 (the “Relevant Period”), where the mobile call termination (“MCT”) rates were subsequently reduced by Ofcom below the level of the rates originally paid by Colt.**

*WHEREAS-*

- (A) Section 188(2) of the Act provides that, where Ofcom has decided pursuant to section 186(2) of the 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 Act, together with a full statement of the reasons on which the determination is based, and publish to such 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 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 Act sets out the scope of Ofcom’s powers in resolving a dispute which may, in accordance with section 190(2) of the Act, include-
- i) making a declaration setting out the rights and obligations of the parties to the dispute;
  - ii) giving a direction fixing the terms or conditions of transactions between the parties to the dispute;
  - iii) 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
  - iv) 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 18 May 2010, Colt submitted a dispute with BT to Ofcom for resolution, claiming that BT should make a repayment of monies to Colt on the basis that BT should have reduced its single tandem transit (“single transit”) charges for the relevant period in line with the reduction in MCT charges set out by the CAT in its Rates Judgment of August 2008 and applied by Ofcom in its re-determinations dated 16 January 2009.
- (D) On 21 June 2010, Ofcom decided pursuant to section 186(2) of the Act that it was appropriate for it to handle this dispute and informed the parties of this decision. Ofcom set the scope of the issues to be resolved in the dispute as follows:

Whether BT is required under the regulatory framework to repay the Transit Customers certain charges for the transit of traffic to

particular MNOs for different periods between September 2006 and March 2007. The Transit Customers are asking for a direction by Ofcom requiring certain repayments be made as an adjustment for overpayments, plus interest.

- (E) A draft determination was sent to the parties on 27 September 2010 and published on Ofcom's website on 28 September 2010.
- (F) 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 Act.
- (G) A fuller explanation of the background to the disputes and Ofcom's reasons for making this Determination is set out in the explanatory statement accompanying this Determination.

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

***Declaration of rights and obligations, etc.***

1. Within one month from the date of this Determination:
  - (a) Colt shall provide evidence to BT of the level of reimbursement to which it considers that it is entitled in respect of single transit services on the basis of the rates and periods set out by the CAT in its Rates Judgment and as confirmed in the 2009 Re-determinations, for the period from 1 October 2006 to 31 March 2007;
  - (b) Colt and BT shall agree the level of reimbursement to be paid; and
  - (c) BT shall reimburse Colt accordingly.
2. Interest shall be payable on the reimbursement set out in paragraph 1 above at the standard contract rate for the period which is the "Ofcom Interest Rate" referred to in section 13.13 of BT's Standard Interconnect Agreement.

***Binding nature and effective date***

3. This Determination is binding as between BT and Colt in accordance with section 190(8) of the Act.
4. This Determination shall take effect on the date it is published.

***Interpretation***

5. For the purpose of interpreting this Determination-
  - a) headings and titles shall be disregarded; and
  - b) The Interpretation Act 1978 shall apply as if this Determination were an Act of Parliament.
6. In this Determination-

- a) the “2009 Re-determinations” means Ofcom’s re-determinations of January 2009 for calls sent via single tandem transit;
- b) The “Act” means the Communications Act 2003;
- c) “BT” means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989;
- d) “CAT” means the Competition Appeal Tribunal;
- e) “Colt” means Colt Technology Services Limited whose registered company number is 02452736, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989;
- f) “Ofcom” means the Office of Communications;
- g) “Rates Judgment” means the judgment of the CAT dated 15 August 2008.
- h) “Transit Customers” means C&W, Gamma, Verizon, Colt and Opal together.

**Neil Buckley**  
**Director of Investigations**

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

**20 October 2010**

### **A1.3 Dispute between Gamma and BT**

**Determination under sections 188 and 190 of the Communications Act 2003 (the “Act”) for resolving a dispute between British Telecommunications plc (“BT”) and Gamma Telecom Holdings Limited (“Gamma”) concerning the issue of whether BT should reimburse Gamma for calls sent via BT to each of H3G, Vodafone and Orange between 1 October 2007 and 31 March 2007 (the “Relevant Period”), where the mobile call termination (“MCT”) rates were subsequently reduced by Ofcom below the level of the rates originally paid by Gamma.**

*WHEREAS-*

- (A) Section 188(2) of the Act provides that, where Ofcom has decided pursuant to section 186(2) of the 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 Act, together with a full statement of the reasons on which the determination is based, and publish to such 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 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 Act sets out the scope of Ofcom’s powers in resolving a dispute which may, in accordance with section 190(2) of the Act, include-
- i) making a declaration setting out the rights and obligations of the parties to the dispute;
  - ii) giving a direction fixing the terms or conditions of transactions between the parties to the dispute;
  - iii) 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
  - iv) 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 27 May 2010, Gamma submitted a dispute with BT to Ofcom for resolution, claiming that BT should make a repayment of monies to Gamma on the basis that BT should have reduced its single tandem transit (“single transit”) charges for the relevant period in line with the reduction in MCT charges set out by the CAT in its Rates Judgment of August 2008 and applied by Ofcom in its re-determinations dated 16 January 2009.
- (D) On 21 June 2010, Ofcom decided pursuant to section 186(2) of the Act that it was appropriate for it to handle this dispute and informed the parties of this decision. Ofcom set the scope of the issues to be resolved in the dispute as follows:

Whether BT is required under the regulatory framework to repay the Transit Customers certain charges for the transit of traffic to particular MNOs for different periods between September 2006 and March 2007. The Transit Customers are asking for a direction by Ofcom requiring certain repayments be made as an adjustment for overpayments, plus interest.

- (E) A draft determination was sent to the parties on 27 September 2010 and published on Ofcom's website on 28 September 2010.
- (F) 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 Act.
- (G) A fuller explanation of the background to the disputes and Ofcom's reasons for making this Determination is set out in the explanatory statement accompanying this Determination.

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

***Declaration of rights and obligations, etc.***

1. Within one month from the date of this Determination:
  - (a) Gamma shall provide evidence to BT of the level of reimbursement to which it considers that it is entitled in respect of both single and inter-tandem transit services on the basis of the rates and periods set out by the CAT in its Rates Judgment and as confirmed in the 2009 Re-determinations, for the period from 1 October 2006 to 31 March 2007;
  - (b) Gamma and BT shall agree the level of reimbursement to be paid; and
  - (c) BT shall reimburse Gamma accordingly.
2. Interest shall be payable on the reimbursement set out in paragraph 1 above at the standard contract rate for the period which is the "Ofcom Interest Rate" referred to in section 13.13 of BT's Standard Interconnect Agreement.

***Binding nature and effective date***

3. This Determination is binding as between BT and Gamma in accordance with section 190(8) of the Act.
4. This Determination shall take effect on the date it is published.

***Interpretation***

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

6. In this Determination-

- a) the “2009 Re-determinations” means Ofcom’s re-determinations of January 2009 for calls sent via single tandem transit;
- b) The “Act” means the Communications Act 2003;
- c) “BT” means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989;
- d) “CAT” means the Competition Appeal Tribunal;
- e) “Gamma” means Gamma Telecom Holding Limited, whose registered company number is 04287779, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989;
- f) “Ofcom” means the Office of Communications;
- g) “Rates Judgment” means the judgment of the CAT dated 15 August 2008.
- h) “Transit Customers” means C&W, Gamma, Verizon, Colt and Opal together.

**Neil Buckley**  
**Director of Investigations**

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

**20 October 2010**

## **A1.4 Dispute between Opal and BT**

**Determination under sections 188 and 190 of the Communications Act 2003 (the “Act”) for resolving a dispute between British Telecommunications plc (“BT”) and Opal Telecom Limited (part of TalkTalk Telecom Group plc) (“Opal”) concerning the issue of whether BT should reimburse Opal for calls sent via BT to each of H3G, Vodafone and Orange between 1 October 2007 and 31 March 2007 (the “Relevant Period”), where the mobile call termination (“MCT”) rates were subsequently reduced by Ofcom below the level of the rates originally paid by Opal.**

*WHEREAS-*

- (A)** Section 188(2) of the Act provides that, where Ofcom has decided pursuant to section 186(2) of the 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 Act, together with a full statement of the reasons on which the determination is based, and publish to such 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 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 Act sets out the scope of Ofcom’s powers in resolving a dispute which may, in accordance with section 190(2) of the Act, include-
- i) making a declaration setting out the rights and obligations of the parties to the dispute;
  - ii) giving a direction fixing the terms or conditions of transactions between the parties to the dispute;
  - iii) 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
  - iv) 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 18 June 2010, Opal submitted a dispute with BT to Ofcom for resolution, claiming that BT should make a repayment of monies to Opal on the basis that BT should have reduced its single tandem transit (“single transit”) charges for the relevant period in line with the reduction in MCT charges set out by the CAT in its Rates Judgment of August 2008 and applied by Ofcom in its re-determinations dated 16 January 2009.
- (D)** On 21 June 2010, Ofcom decided pursuant to section 186(2) of the Act that it was appropriate for it to handle this dispute and informed the parties of this decision. Ofcom set the scope of the issues to be resolved in the dispute as follows:

Whether BT is required under the regulatory framework to repay the Transit Customers certain charges for the transit of traffic to particular MNOs for different periods between September 2006 and March 2007. The Transit Customers are asking for a direction by Ofcom requiring certain repayments be made as an adjustment for overpayments, plus interest.

- (E) A draft determination was sent to the parties on 27 September 2010 and published on Ofcom's website on 28 September 2010.
- (F) 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 Act.
- (G) A fuller explanation of the background to the disputes and Ofcom's reasons for making this Determination is set out in the explanatory statement accompanying this Determination.

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

***Declaration of rights and obligations, etc.***

1. Within one month from the date of this Determination:
  - (a) Opal shall provide evidence to BT of the level of reimbursement to which it considers that it is entitled in respect of single transit services on the basis of the rates and periods set out by the CAT in its Rates Judgment and as confirmed in the 2009 Re-determinations, for the period from 1 October 2006 to 31 March 2007;
  - (b) Opal and BT shall agree the level of reimbursement to be paid; and
  - (c) BT shall reimburse Opal accordingly.
2. Interest shall be payable on the reimbursement set out in paragraph 1 above at the standard contract rate for the period which is the "Ofcom Interest Rate" referred to in section 13.13 of BT's Standard Interconnect Agreement.

***Binding nature and effective date***

3. This Determination is binding as between BT and Colt in accordance with section 190(8) of the Act.
4. This Determination shall take effect on the date it is published.

***Interpretation***

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



6. In this Determination-
- a) the “2009 Re-determinations” means Ofcom’s re-determinations of January 2009 for calls sent via single tandem transit;
  - b) The “Act” means the Communications Act 2003;
  - c) “BT” means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989;
  - d) “CAT” means the Competition Appeal Tribunal;
  - e) “Opal” means Opal Telecom Limited whose registered company number is 03849133, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989;
  - f) “Ofcom” means the Office of Communications;
  - g) “Rates Judgment” means the judgment of the CAT dated 15 August 2008.
  - h) “Transit Customers” means C&W, Gamma, Verizon, Colt and Opal together.

**Neil Buckley**  
**Director of Investigations**

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

**20 October 2010**

## **A1.5 Dispute between Verizon and BT**

**Determination under sections 188 and 190 of the Communications Act 2003 (the “Act”) for resolving a dispute between British Telecommunications plc (“BT”) and Verizon UK Limited (“Verizon”) concerning the issue of whether BT should reimburse Verizon for calls sent via BT to each of H3G, Vodafone and Orange between 1 October 2007 and 31 March 2007 (the “Relevant Period”), where the mobile call termination (“MCT”) rates were subsequently reduced by Ofcom below the level of the rates originally paid by Verizon.**

*WHEREAS-*

- (A)** Section 188(2) of the Act provides that, where Ofcom has decided pursuant to section 186(2) of the 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 Act, together with a full statement of the reasons on which the determination is based, and publish to such 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 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 Act sets out the scope of Ofcom’s powers in resolving a dispute which may, in accordance with section 190(2) of the Act, include-
- i) making a declaration setting out the rights and obligations of the parties to the dispute;
  - ii) giving a direction fixing the terms or conditions of transactions between the parties to the dispute;
  - iii) 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
  - iv) 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 10 May 2010, Verizon submitted a dispute with BT to Ofcom for resolution, claiming that BT should make a repayment of monies to Verizon on the basis that BT should have reduced its single tandem transit (“single transit”) charges for the relevant period in line with the reduction in MCT charges set out by the CAT in its Rates Judgment of August 2008 and applied by Ofcom in its re-determinations dated 16 January 2009.
- (D)** On 21 June 2010, Ofcom decided pursuant to section 186(2) of the Act that it was appropriate for it to handle this dispute and informed the parties of this decision. Ofcom set the scope of the issues to be resolved in the dispute as follows:

Whether BT is required under the regulatory framework to repay the Transit Customers certain charges for the transit of traffic to particular MNOs for different periods between September 2006 and March 2007. The Transit Customers are asking for a direction by Ofcom requiring certain repayments be made as an adjustment for overpayments, plus interest.

- (E) A draft determination was sent to the parties on 27 September 2010 and published on Ofcom's website on 28 September 2010.
- (F) 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 Act.
- (G) A fuller explanation of the background to the disputes and Ofcom's reasons for making this Determination is set out in the explanatory statement accompanying this Determination.

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

***Declaration of rights and obligations, etc.***

1. Within one month from the date of this Determination:
  - (a) Verizon shall provide evidence to BT of the level of reimbursement to which it considers that it is entitled in respect of both single and inter tandem transit services on the basis of the rates and periods set out by the CAT in its Rates Judgment and as confirmed in the 2009 Re-determinations, for the period from 1 October 2006 to 31 March 2007;
  - (b) Verizon and BT shall agree the level of reimbursement to be paid; and
  - (c) BT shall reimburse Verizon accordingly.
2. Interest shall be payable on the reimbursement set out in paragraph 1 above at the standard contract rate for the period which is the "Ofcom Interest Rate" referred to in section 13.13 of BT's Standard Interconnect Agreement.

***Binding nature and effective date***

3. This Determination is binding as between BT and Verizon in accordance with section 190(8) of the Act.
4. This Determination shall take effect on the date it is published.

***Interpretation***

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

6. In this Determination-

- a) the “2009 Re-determinations” means Ofcom’s re-determinations of January 2009 for calls sent via single tandem transit;
- b) The “Act” means the Communications Act 2003;
- c) “BT” means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989;
- d) “CAT” means the Competition Appeal Tribunal;
- e) “Verizon” means Verizon UK Limited, whose registered company number is 02776038, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989;
- f) “Ofcom” means the Office of Communications;
- g) “Rates Judgment” means the judgment of the CAT dated 15 August 2008.
- h) “Transit Customers” means C&W, Gamma, Verizon, Colt and Opal together.

**Neil Buckley**  
**Director of Investigations**

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

**20 October 2010**

## Annex 2

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

- A2.1 Sections 185 to 191 of the Act set out our dispute resolution powers. They apply to disputes relating to the provision of network access and to other disputes relating to the rights and obligations conferred or imposed by or under Part 2 of the Act. Section 186 of the Act requires us to resolve a dispute referred which meets the requirements of section 185. Our powers to impose remedies to resolve disputes are set out in section 190 of the Act.
- A2.2 Our dispute resolution powers in the Act derive from the European Common Regulatory Framework ("CRF"), in particular, the Framework Directive and the Access Directive.<sup>24</sup> In accordance with Article 5(4) of the Access Directive, Ofcom is required to resolve disputes in relation to access and interconnection in accordance with the policy objectives of Article 8 of the Framework Directive. In accordance with Article 20(1) of the Framework Directive, Ofcom is required to resolve disputes (consistently with the policy objectives of Article 8 of the Framework Directive) that arise in connection with obligations imposed under by of the CRF Directives between undertakings providing electronic communications networks and services.
- A2.3 Article 5(4) of the Access Directive and Article 20(1) of the Framework Directive are implemented through the dispute resolution procedures set out in section 185 to 191 of the Act and Article 8 of the Framework Directive has been implemented in section 4 of the Act. Under section 4(2) of the Act, we are required to act in accordance with the six Community requirements when exercising our functions under the Act in relation to disputes referred to us under section 185. The six Community requirements set out in section 4(3) – (10) give effect, among other things, to the requirements of Article 8 of the Framework Directive and are to be read in accordance with them.
- A2.4 In summary, the Community requirements are requirements:
- to promote competition in communications markets.
  - to ensure that Ofcom contributes to the development of the European internal market;
  - to promote the interests of all European Union citizens;
  - to act in a manner which, so far as practicable, is technology neutral;

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<sup>24</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive): [http://eur-lex.europa.eu/pri/en/oj/dat/2002/l\\_108/l\\_10820020424en00330050.pdf](http://eur-lex.europa.eu/pri/en/oj/dat/2002/l_108/l_10820020424en00330050.pdf); Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive): [http://eur-lex.europa.eu/pri/en/oj/dat/2002/l\\_108/l\\_10820020424en00070020.pdf](http://eur-lex.europa.eu/pri/en/oj/dat/2002/l_108/l_10820020424en00070020.pdf)

- to encourage, to the extent Ofcom considers it appropriate, the provision of network access and service interoperability for the purposes of securing efficiency and sustainable competition in communications markets and the maximum benefit for the customers of communications network and services providers; and
- to encourage such compliance with certain international standards as is necessary for facilitating service interoperability and securing freedom of choice for the customers of communications providers.

A2.5 In the context of this dispute, the following aspects of the policy objectives of Article 8 of the Framework Directive are of particular note:

- the promotion of competition is to be achieved by, *inter alia*, ensuring that users derive maximum benefit in terms of choice, price and quality and that there is no distortion or restriction of competition; and
- the contribution to the development of the internal market is to be achieved by, *inter alia*, ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services.

A2.6 Section 3 of the Act sets out our general statutory duties which must be taken into account in carrying out our dispute resolution function under Chapter 3 of Part 2 of the Act.

A2.7 Section 3(1) of the Act sets out our principal duties to be taken into account in carrying out our functions:

“(a) to further the interests of citizens in relation to communications matters; and

(b) to further the interests of consumers in relevant markets, where appropriate, by promoting competition.”

A2.8 The things which, by virtue of its principal obligations, we are required to secure in the carrying out of our functions include, according to section 3(2) of the Act:

“(a) the optimal use for wireless telegraphy of the electro-magnetic spectrum;

(b) the availability throughout the United Kingdom of a wide range of electronic communications services;

(c) the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests;

(d) the maintenance of a sufficient plurality of providers of different television and radio services;

(e) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services; and

- (f) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both –
- (i) unfair treatment in programmes included in such services; and
  - (ii) unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.”

A2.9 Section 3(3) of the Act provides that in performing our principal duties, we must have regard, in all cases, to:

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

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

A2.10 Section 3(4) of the Act sets out a number of principles which we must have regard to in performing our principal duties where it appears to Ofcom that they are relevant, including the desirability of promoting competition in the relevant markets and the desirability of encouraging investment and innovation in the relevant markets.

A2.11 In performing the principal duty of furthering the interests of consumers specifically, section 3(5) of the Act provides that Ofcom must have regard, in particular, to the interests of those consumers in respect of choice, price, quality of service and value for money.

A2.12 Where it appears to us that any of our general duties under section 3 of the Act conflict in a particular case, we must secure that the conflict is resolved in the manner we consider best in the circumstances.<sup>25</sup> Similarly, we must secure that any conflict between the Community requirements set out in section 4 of the Act is resolved in the manner we consider best in the circumstances.<sup>26</sup> Where it appears that a general duty under section 3 of the Act conflicts with one or more duties under section 4 of the Act, priority is given to the duties set out in section 4 of the Act.<sup>27</sup>

A2.13 We also exercise our regulatory functions according to the following regulatory principles:<sup>28</sup>

- We will regulate with a clearly articulated and publicly reviewed annual plan, with stated policy objectives;
- We will intervene where there is a specific statutory duty to work towards a public policy goal which markets alone cannot achieve;
- We will operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required;

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<sup>25</sup> Section 3(7) of the Act.

<sup>26</sup> Section 4(11) of the Act.

<sup>27</sup> Section 3(6) of the Act.

<sup>28</sup> [http://www.ofcom.org.uk/consult/condocs/plan/annual\\_plan/regulatory\\_principles.pdf](http://www.ofcom.org.uk/consult/condocs/plan/annual_plan/regulatory_principles.pdf)

Determinations to resolve Disputes between BT and each of C&W, Gamma, Colt, Verizon and Opal regarding the repayment by BT of certain charges for the transit of traffic

- We will strive to ensure its interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome;
- We will always seek the least intrusive regulatory mechanisms to achieve its policy objectives;
- We will research markets constantly and will aim to remain at the forefront of technological understanding; and
- We will consult widely with all relevant stakeholders and assess the impact of regulatory action before imposing regulation upon a market.