



Determinations to resolve disputes between Hutchison 3G and each of O2, Orange and T-Mobile concerning donor conveyance charges

Non-confidential versions. Confidential information and data have been redacted. Redactions are indicated by “[<]”.

Explanatory Statement and Determinations

Issued on: 17 August 2007

Contents

Section	Page
1 Summary	1
2 Background	2
3 History of the disputes	4
4 Ofcom's draft determinations	7
5 Consideration of responses to the draft determinations	15
6 Conclusions	21
 Annex	 Page
1 The Determinations	22

Section 1

Summary

- 1.1 Mobile number portability enables mobile subscribers to retain their telephone number(s) when they change from one provider to another provider.
- 1.2 Under the current arrangements in the United Kingdom, a call to a ported number is delivered by the originating network to the network to which a customer originally subscribed (known as the Donor Network), which identifies that the number has been ported, to which network the number has been ported and subsequently "onward routes" the call to the network to which the customer is now subscribed (known as the Recipient Network) for termination. A charge is paid by the Recipient Network to the Donor Network to cover the costs of conveyance of the call, known as the donor conveyance charge (the "DCC").
- 1.3 These disputes concern the level of the DCC payable between H3G and each of O2, Orange and T-Mobile in respect of calls where H3G acts as the Recipient Network. H3G believes that the existing rate of 0.8ppm charged by all mobile operators, and which has been in place since 1 January 1999 following an Ofcom determination, is out of date and has requested Ofcom to determine a reasonable level for the DCC.
- 1.4 General Condition 18 ("GC18") of the General Conditions of Entitlement provides that charges for providing number portability shall be cost oriented and based on the incremental costs of providing portability. Ofcom has therefore assessed the level of the DCC in accordance with GC18.
- 1.5 In summary, based on the evidence gathered in these disputes and for the reasons set out in these determinations and explanatory statement Ofcom has concluded that:
 - GC18 requires that charges for donor conveyance be cost-based;
 - The efficient costs of donor conveyance are 0.2ppm;
 - The costs of donor conveyance should be split equally between the donor and recipient networks;
 - The Determinations shall apply from 28 May 2006 in the case of O2, 28 September 2006 in the case of Orange, and 12 October 2006 in the case of T-Mobile; and
 - The DCC should apply between the parties on a reciprocal basis.
- 1.6 The background to this investigation is set out in section 2. The history to these disputes is set out in section 3 and the analysis and reasoning underpinning the determinations is set out in section 4. A summary of the submissions of the parties to the draft determinations with Ofcom's consideration of these responses is set out in section 5. Ofcom's conclusion is set out in section 6 and Ofcom's determinations are set out in Annex 1.

Section 2

Background

Mobile Number Portability

- 2.1 MNP is a facility that enables mobile subscribers, who so request, to be able to retain their mobile numbers when they change from one provider to another provider. Mobile operators have been required to provide MNP since 1 January 1999.
- 2.2 Currently the methodology used in the UK for mobile number porting is “onward routing”. A call to a ported number is usually delivered by the originating network to the Donor Network, which identifies that the number has been ported, to which network the number has been ported and subsequently “onward routes” the call to the appropriate Recipient Network for termination to the called subscriber.

Donor Conveyance Charge

- 2.3 The DCC is the charge payable by the recipient network operator to the donating network operator for the routing of a ported call. It relates to the additional costs within the network for handling a call to a ported number.
- 2.4 In 1999, following requests from both One2One and Orange for Of tel to resolve disputes concerning the DCC between One2One and Vodafone/BTCellnet, and Orange and Vodafone/BTCellnet, the Director General made a determination in the case of each separate request. These determinations took into account the four operators’ submissions on their views of the most appropriate method of calculating a rate for the DCC. Of tel also took account of the six principles of cost recovery adopted by the MMC in its inquiry into number portability in the fixed network.¹
- 2.5 Of tel based its final decision on Vodafone’s costs, which at that time was deemed the most efficient mobile network, and concluded a rate of 1.6ppm. At that time Of tel was aware of an imbalance between the networks, with some MNOs being net donors and others net recipients of ported numbers. In order not to distort the market and in the interests of effective competition, Of tel decided that the DCC should be split equally between both the donor and the recipient network. This resulted in a final figure of 0.8ppm payable by each operator (“the 1999 Determination”). The 1999 Determination applied for a period of 1 January 1999 until 31 March 2000.

General Condition 18

- 2.6 Sections 45 and 58 of the Act provide Ofcom with the power to set general conditions, including requiring UK communications providers to provide number portability.
- 2.7 Obligations imposed on a communications provider to provide number portability to its subscribers and to provide portability to other communications providers are set out in GC18.
- 2.8 In relation to charges for the provision of number portability, GC18 states
- “18.2 The Communications Provider shall, pursuant to a request from another Communications Provider, provide Portability (other than

¹ See http://www.mmc.gov.uk/rep_pub/reports/1995/fulltext/374c2.pdf paragraphs 2.126 to 2.169. See also http://www.ofcom.org.uk/static/archive/Of tel/publications/1995_98/numbering/noport.htm

Paging Portability) as soon as is reasonably practicable in relation to that request on reasonable terms. Any charges for the provision of such Portability shall be made in accordance with the following principles:

- (a) subject always to the requirement of reasonableness, charges shall be cost oriented and based on the incremental costs of providing Portability unless:
 - (i) the Donor Provider and the Recipient Provider have agreed another basis for the charges, or
 - (ii) [Ofcom] has directed that another basis for charges should be used;
- (b) the Donor Provider shall make no charge in relation to System Set-Up Costs or Additional Conveyance Costs;
- (c) in respect of Mobile Portability, the Donor Provider shall make no charge or annual fee for ongoing costs relating to registration of a ported Telephone Number or a Subscriber;
- (d) charges levied by the Donor Provider shall be based on the reasonable costs incurred by it in providing Portability with respect to each Telephone Number.”

2.9 In these determinations Ofcom has therefore applied the obligations under GC18 to the charges for donor conveyance. Ofcom considers that the DCC amounts to a charge for the provision of Portability on the basis that it is a charge levied by the Donor Provider for providing Portability in respect of a number ported out of the network of the Donor Provider. That charge must therefore be reasonable, cost oriented and based on the incremental costs of providing Portability unless otherwise agreed between the parties or otherwise determined by Ofcom. In the absence of an alternative agreement between the parties and any direction by Ofcom, Ofcom has therefore assessed what a reasonable, cost oriented charge based on the incremental costs of Portability should be.

Section 3

History of the disputes

The parties to the disputes

H3G

- 3.1 H3G is a wholly owned subsidiary of Hutchison Whampoa Ltd.
- 3.2 H3G describes its three core areas of its UK business as being Communications (including all forms of personal communications, voice and video calling; text, picture and video messaging; mobile blogging), Media and Entertainment (including television, sport, music audio and video, user-generated content, computer games and media publishing) and Information Services (including wireless web, access to the best of the internet and a range of news and other information services).²

O2

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

Orange

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

T-Mobile

- 3.7 T-Mobile is the UK subsidiary of T-Mobile International AG, which in turn is owned by Deutsche Telekom.
- 3.8 T-Mobile's main business activities include public mobile communications network operations and the provision of mobile network communications to the public.

Chronology of events between each of the parties in dispute

- 3.9 In relation to H3G and O2
- On 26 June 2006 H3G sent a Review Notice to O2 to initiate a review of the DCC then payable. This proposal was rejected by O2 on 24 July 2006 who stated that any agreement could only be reached on an industry basis.

² <http://www.three.co.uk/aboutus/newkind.omp>

³ <http://www.o2.co.uk/abouto2/history>

- At a meeting on 11 September O2 agreed that the present level of DCC was out of date, but maintained its position that a revised rate could only be achieved through a common industry agreement.
- On 8 December 2006 H3G sent a letter to O2 proposing a DCC level of 0.1ppm. This was rejected by O2 on 21 December 2006. H3G repeated its proposal in a letter of 16 March 2007, to which O2 failed to respond.

3.10 In relation to H3G and Orange:

- On 28 September 2006 H3G sent a Review Notice to Orange to initiate review of the DCC then payable. This proposal was rejected by Orange on 7 November 2006 who stated that the DCC reflected costs.
- On 6 December H3G sent a letter to Orange proposing a revised rate of 0.1ppm. This was rejected by Orange on 21 December 2006 who asked for details of the analysis conducted by H3G. H3G supplied the analysis on 9 January 2007 to which Orange replied on 15 January 2007 that it would conduct its own analysis.
- On 27 February 2007 and 16 March 2007 H3G attempted to elicit a response from Orange who replied on 21 March 2007 stating that it did not believe 0.1ppm covered costs, but without providing its own analysis. H3G responded on 27 March 2007 stating that Orange's failure to provide any cost information had led H3G to believe that Orange was unable to justify the rate of 0.8ppm.

3.11 In relation to H3G and T-Mobile:

- On 12 October 2006, H3G sent a Review Notice to T-Mobile to initiate a review of the DCC then payable. On 24 October 2006 and 20 November 2006, T-Mobile responded stating that it agreed in principle to a reduction in the level of the DCC but that it did not consider this should be done on a bilateral basis.
- On 8 December, H3G sent a letter to T-Mobile proposing a revised DCC rate of 0.1ppm which T-Mobile rejected by letter on 19 December 2006.
- On 16 March 2007, H3G sent a variation agreement addressing the DCC issue and maintaining its stance that 0.1ppm was an appropriate level. T-Mobile responded on 21 March 2007 stating that it did not want to enter into any new arrangements before Ofcom had completed its current review of GC18. H3G responded on 27 March 2007 stating that it believed negotiations could take place in parallel with Ofcom's consultation.

Referral of the disputes

- 3.12 On 3 April 2007 H3G referred disputes with each of O2, Orange and T-Mobile to Ofcom for dispute resolution requesting a determination on the appropriate level of the DCC currently payable.
- 3.13 On 5 April 2007 Ofcom wrote to O2, Orange and T-Mobile informing them of the dispute referral and requesting comments on the scope of the issues raised.

Competition Bulletin

- 3.14 On 26 April 2007 Ofcom opened an investigation into the disputes referred by H3G and published details of the scope of the investigation for consultation on its Competition Bulletin⁴ as follows:

“The scope of the disputes is to determine whether the level of the donor conveyance charge payable by H3G to each of the MNOs is compliant with General Condition 18. If this proves not to be the case, then Ofcom will determine what that level will be. Ofcom will also consider the period for which such charges should apply.”

Information sought by Ofcom

- 3.15 On 9 May 2007 Ofcom wrote to O2, Orange, T-Mobile and H3G requesting information under section 191 of the Act. In particular, Ofcom requested:
- a detailed breakdown of the nature and level of costs incurred by each operator that each operator believed were appropriate to consider in setting a DCC. This description had to include all asset types involved in donor conveyance, and
 - a written summary of the methodology used to estimate the costs of donor conveyance and an explanation as to why this methodology was the most appropriate.
- 3.16 Ofcom received responses from each of the parties setting out the costs they considered to be incurred which were appropriate to consider in setting a DCC and the methodology used in reaching that conclusion.

The publication of the draft determinations

- 3.17 On 20 July Ofcom issued its draft determination to each of the parties in dispute, with a deadline for responses of 3 August 2007. The non-confidential versions of these draft determinations were published on Ofcom's website on 23 July 2007.
- 3.18 As part of the consultation Ofcom also provided each of the parties with a copy of the report by Analysys on its calculation of the costs of donor conveyance.

⁴ http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_952/

Section 4

Ofcom's draft determinations

Introduction

- 4.1 After consideration of submissions received from the parties, Ofcom issued draft determinations to resolve the disputes on 20 July 2007.⁵ Those draft determinations set out Ofcom's preliminary conclusions on resolution of the dispute together with Ofcom's analysis and reasoning in reaching those conclusions. For the sake of clarity, the analysis and reasoning underpinning the draft determinations is set out below.
- 4.2 In setting out its analysis and reasoning in resolving these disputes, Ofcom considered:
- The application of GC18 to the disputes;
 - The costs to be taken into account;
 - The appropriate level of those costs;
 - The period for which a revised charge will apply.

The application of GC18

- 4.3 Obligations imposed on a communications provider to provide number portability to its subscribers and to provide portability to other communications providers are set out in GC18.

"18.2 The Communications Provider shall, pursuant to a request from another Communications Provider, provide Portability (other than Paging Portability) as soon as is reasonably practicable in relation to that request on reasonable terms. Any charges for the provision of such Portability shall be made in accordance with the following principles:

- (a) subject always to the requirement of reasonableness, charges shall be cost oriented and based on the incremental costs of providing Portability unless:
 - (i) the Donor Provider and the Recipient Provider have agreed another basis for the charges, or
 - (ii) [Ofcom] has directed that another basis for charges should be used;
- (b) the Donor Provider shall make no charge in relation to System Set-Up Costs or Additional Conveyance Costs;
- (c) in respect of Mobile Portability, the Donor Provider shall make no charge or annual fee for ongoing costs relating to registration of a ported Telephone Number or a Subscriber;

⁵ These draft determinations were issued to the parties on 20 July 2007 and published on Ofcom's website on 23 July 2007.

- (d) charges levied by the Donor Provider shall be based on the reasonable costs incurred by it in providing Portability with respect to each Telephone Number.”

- 4.4 In the draft determinations, Ofcom therefore applied the obligations under GC18 to the charges for donor conveyance. Ofcom considered that the DCC amounts to a charge for the provision of Portability on the basis that it is a charge levied by the Donor Provider for providing Portability in respect of a number ported out of the network of the Donor Provider. That charge must therefore be reasonable, cost oriented and based on the incremental costs of providing Portability unless otherwise agreed between the parties or otherwise determined by Ofcom. In the absence of an alternative agreement between the parties and any direction by Ofcom, Ofcom therefore assessed what a reasonable, cost oriented charge based on the incremental costs of Portability should be.
- 4.5 Ofcom noted T-Mobile’s argument that resolution of these disputes should not be an administrative priority for Ofcom due to two Ofcom consultations already underway: Ofcom’s consultation on General Condition 18 – Number Portability, and Ofcom’s consultation “Amendment to charge control on Mobile Network Operators”. However, under section 185 of the Act, Ofcom does not have a discretion to reject a dispute referral on the grounds of administrative priority. Where Ofcom receives a dispute referral which satisfies the conditions set out in section 185 and 186 of the Act, Ofcom must determine those disputes.

The costs to be taken into account

- 4.6 The Explanatory Document that accompanied the Oftel 1999 determinations on DCC took account of the following economic principles for the recovery of the relevant reasonable costs:
- **Cost causation** – the reasonable costs of MNP should be recovered from those who cause them to be incurred. This gives the right price signals to encourage economically efficient behaviour. In the case of MNP, two parties could be considered to cause costs to be incurred. First, the call recipient, by porting to another network, makes it necessary for calls to be ported when other operators’ customers wish to contact him. Second, the calling party, by initiating the call, causes the relevant parts of the network to be used. However, the calling party is unable to engage in any behaviour, other than not making the call, which would enable costs to be avoided, while the recipient has the choice of whether or not to port his number, and hence whether or not the cost of porting should be incurred. The principle of cost causation therefore implies that costs should be borne by mobile customers who port their numbers to a greater extent than call originators.
 - **Cost minimisation** – the costs of MNP should be recovered so as to give operators an incentive to minimise the costs of providing MNP. This suggests that it would be appropriate to limit the costs which the donor network operator, who has a degree of control over the level of the costs, can recover from the recipient network.
 - **Distribution of benefits** – costs of MNP should be recovered from those who benefit from it. Benefits from MNP accrue both to customers porting their numbers and also to mobile customers in general through increased competition in the mobile market. Customers calling from a fixed line would only benefit indirectly from MNP if the mobile operator would compete more fiercely on call charges to mobiles. This suggests that, on the Distribution of Benefits principle, costs should be recovered from mobile customers generally,

with possibly some costs being recovered from mobile customers who port their numbers.

- **Effective competition** – the costs of MNP should be recovered in a way which promotes effective competition. This means that the charging structure should not distort competition.
- **Reciprocity and symmetry** – reciprocal charging implies that the charges relating to a customer porting from one operator to another should apply to a customer porting in the opposite direction.
- **Practicality** – the outcome should be easy to implement as a general principle.

4.7 Ofcom considered in the draft determinations that these six economic principles continue to be relevant to the analysis of the DCC and in deciding what reasonable costs should be included, even though the volume of ported numbers has significantly increased since this issue was last examined and a fifth operator has entered the market. Ofcom therefore considered the analysis undertaken for the 1999 determinations to understand whether it was still relevant to today's MNP market.

4.8 In the 1999 determinations, Oftel determined that the relevant costs to be recovered for the DCC were as follows:

- The donor network's switching costs
- Relevant engineering costs
- Transmission and transit costs related to an outgoing call

4.9 For determining the level of the DCC, Ofcom set out its view that the network costs incurred by the donor network in conveying calls (e.g. switching costs) continue to be relevant. Ofcom sought the views of parties to the disputes and an independent consultant in relation to the details of these costs (see the following section).

4.10 However, with regard to British Telecom ("BT") transit costs, Ofcom indicated that these should now be excluded as a relevant cost. Four of the five mobile operators either have, or are close to achieving, direct interconnection with each other. Therefore Ofcom considered that BT transit costs are no longer efficiently incurred costs in relation to donor conveyance and to include them would be against the principle of cost minimisation. Ofcom did not therefore consider transit costs via BT associated with portability to be reasonable costs for the purposes of GC18.

The appropriate level of donor conveyance costs

4.11 In order to estimate reasonable costs associated with donor conveyance, Ofcom:

- Collected unit cost estimates from all four operators who were party to these disputes; and
- Engaged an independent consultant to develop a specific module to estimate efficient unit costs that are consistent with the cost model used by Ofcom in its review of mobile call termination ("MCT") markets.⁶

⁶ http://www.ofcom.org.uk/consult/condocs/mobile_call_term/statement/

MNO estimates of unit costs

- 4.12 As set out above, all four parties to the disputes responded to Ofcom's information request.
- 4.13 H3G believed that efficient unit costs should be zero for donor conveyance. However, with regard to the actual costs of the indirect routing method, H3G concluded that on its own network, these costs would be 0.05ppm.
- 4.14 O2 used a fully allocated cost methodology and concluded that the cost of donor conveyance was [X] ppm.
- 4.15 Orange calculated a total cost of [X] ppm for donor conveyance costs which Orange rounded up to [X] ppm. Orange also believed that BT transit costs paid by Orange for carrying ported traffic from Orange's network to H3G's network should be included, and calculated these costs to be [X] ppm.
- 4.16 T-Mobile's cost estimate was [X] ppm. T-Mobile, like Orange, believed that BT transit costs should be included in the DCC, and calculated an average per minute cost of [X] ppm.
- 4.17 The MNOs provided varying levels of detail in relation to the build-up of their estimates, and overall the information available allowed only a high level comparison to be made.

Independent analysis

- 4.18 Ofcom also engaged Analysys to advise on estimating the reasonable costs of donor conveyance. This gave Ofcom independent analysis of efficient unit costs to consider alongside MNO estimates. In order to maximise consistency with previous Ofcom cost modelling, Analysys' work was based on Ofcom's MCT cost model.
- 4.19 The level of detail (in relation to the specific assets used for donor conveyance) that is necessary to model efficient costs is greater than that required for an accurate estimate of MCT costs overall (for which Ofcom's model was developed). Analysys identified some modifications to the MCT cost model that are needed to arrive at a more accurate estimate of donor conveyance costs that is appropriate for this determination. These modifications are put into effect by using specific routing factors that reflect the particular asset utilisation of the donor conveyance service.⁷
- 4.20 Ofcom was mindful that Analysys had to work within the context of a model that was built to examine a much broader set of network assets for the purpose of setting a charge for call termination. In setting MCT charges, Ofcom presented efficient cost benchmarks and the final levels to one decimal place in order to avoid the impression that greater levels of accuracy for these estimates were reliable.
- 4.21 Analysys took steps to address the need for greater precision in the estimation of donor conveyance costs, however Ofcom indicated in the draft determinations that the estimates presented below should still be considered against a background of broader assumptions that were used in the MCT market review.
- 4.22 Ofcom was also mindful of the need to take account of uncertainty in relation to demand levels. As with MCT costs generally, the modelling of donor conveyance

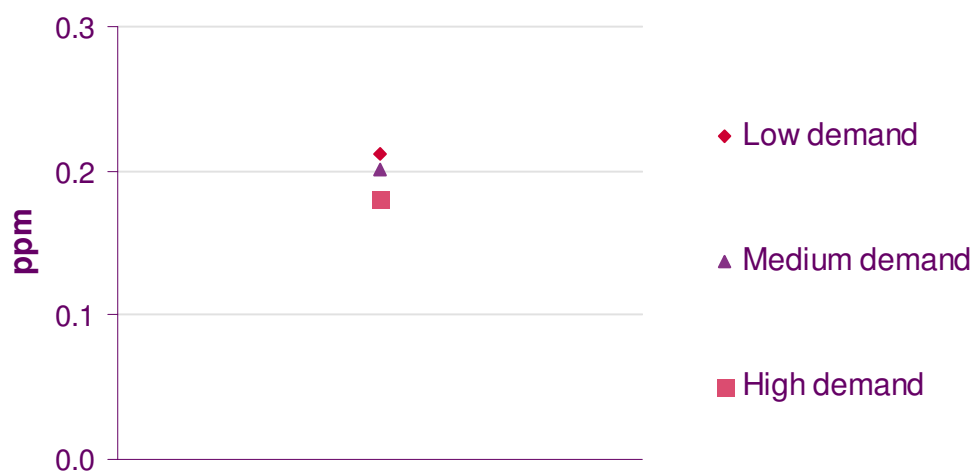
⁷ The changes described here were appropriate in the context of achieving an appropriate level of accuracy for network costs that, according to MNOs, are no greater than 0.3ppm. For clarification, none of the modifications made by Analysys would have affected the cost benchmarks that were used for the March 2007 MCT Statement.

costs reflects economies of scale. Given that demand itself is uncertain, Ofcom considered that its analysis should take account of the reasonable bounds of uncertainty that are present in relation to efficient costs. Figure 6.1 provides estimates of efficient unit costs over a range of demand scenarios.

- 4.23 The benchmarks in Figure 6.1 were calculated by Ofcom using a module developed by Analysys that can operate in conjunction with the MCT cost model. The benchmarks are based on the efficient costs of a 2G/3G operator.

Figure 6.1 – Ofcom efficient donor conveyance cost estimates

2G/3G Operator, nominal terms



Selection of an efficient cost level

- 4.24 In the draft determinations, Ofcom considered the benchmarks in Figure 6.1 and the cost estimates provided by the MNOs in order to establish a reasonable level for the efficient unit costs of donor conveyance. As with Ofcom's general approach to setting charge controls for mobile call termination, its objective in this case is to establish the costs that would be incurred by an average efficient operator.
- 4.25 Figure 6.1 shows average efficient cost benchmarks in a range clustered around 0.2ppm. As noted earlier, Ofcom was mindful that these estimates are drawn from a model that was built to examine a much broader set of network assets, and that some caution is appropriate when considering the accuracy of estimates beyond one decimal place. On this basis, Ofcom considered that a reasonable interpretation of Figure 6.1 is that the unit costs of donor conveyance for an average efficient operator are 0.2ppm.
- 4.26 Ofcom considered that this estimate, based on the module developed by Analysys, has a number of advantages over the cost information presented by the MNOs. First, it is based on independent analysis. Second, the analysis that underpins it is the most transparent of the estimates that Ofcom collected. Third, it is consistent with Ofcom's MCT cost model. This model represented Ofcom's view of the appropriate level of mobile network costs, including the long run path of cost recovery. Therefore consistency with the MCT cost model when determining donor conveyance costs is desirable. Fourth, it takes account of the uncertainty associated with demand levels by considering the potential impact on efficient costs of three alternative demand scenarios.

- 4.27 Further, the MNOs provided varying levels of detail in relation to the build-up of their estimates, and overall the information available has allowed only a high level comparison. However, Ofcom notes that 0.2ppm is within the range of cost estimates provided by the MNOs (which was 0.05ppm to 0.3ppm). Two of the MNOs had estimates that were lower than 0.2ppm and two had estimates that were higher.
- 4.28 Ofcom considered whether to make a specific allowance for administration costs within its efficient cost estimate. The March 2007 MCT Statement stated that administration costs are common and would be recovered across all of an MNOs' activities.
- 4.29 In this case, Ofcom indicated its view in the draft determinations that an additional allowance is not necessary. For MCT an allowance of 0.3ppm was made for administration costs in 2010/11 in addition to total network costs (including spectrum) for a 2G/3G combined operator of 4.5ppm. Applying the same proportion (less than 7%) to the unit cost of 0.2ppm for donor conveyance would lead to an administration cost allowance of around 0.01ppm. Ofcom considered that this estimate was not sufficiently large to warrant a special allowance, especially given the scope of uncertainty around donor conveyance costs in general. Ofcom also noted that the MCT cost model allocated MNO administration costs in full across the services included in that model (which did not specifically include donor conveyance).
- 4.30 In light of the above, Ofcom's provisional conclusion set out in the draft determinations was that the reasonable level of efficient costs incurred in providing donor conveyance is 0.2ppm.

Appropriate cost recovery

- 4.31 Based on the economic principles of cost causation, distribution of benefits, and cost minimisation, in its 1999 determinations Oftel decided that donor conveyance costs should be recovered from mobile network customers rather than fixed network customers. In the draft determinations, Ofcom indicated its view that this reasoning remains valid in the current market.
- 4.32 Ofcom also considered how the costs of donor conveyance should be borne within the mobile networks. In its 1999 determinations Oftel noted, based on the economic principles outlined earlier, that the costs of donor conveyance could potentially be recovered from:
- customers who port their number/recipients of ported calls (based on the principle of cost causation and the distribution of benefits);
 - originators of ported calls – but to a lesser extent than call recipients (based on the principle of cost causation);
 - donor network operators (based on the principle of cost minimisation); and
 - mobile customers generally (based on the distribution of benefits).
- 4.33 In this context, Oftel decided that donor conveyance costs should be split equally between the donor and recipient networks. In doing so, Oftel noted that there was an imbalance between the mobile networks, with some being net donors and others net recipients of ported numbers. This meant that the principle of effective competition could be compromised if the DCC was payable entirely by either the donor network or the recipient network. Oftel also noted that the approach of dividing the costs between donor and recipient networks was desirable in that it retained an incentive for donor networks to ensure that conveyance costs were minimised.

- 4.34 In the draft determinations, Ofcom indicated its view that Oftel's reasoning remains valid. In reaching this conclusion, Ofcom noted that in the current mobile market there continues to be an imbalance of ported call traffic between the mobile networks, with some networks being net donors and others net recipients. Consequently Ofcom considered that donor conveyance costs should continue to be split equally between donor and recipient networks.
- 4.35 Ofcom's provisional conclusion set out in the draft determinations was that a reasonable level of efficient costs incurred in providing donor conveyance is 0.2ppm. On the basis that those costs should be split equally between donor and recipient networks, an appropriate level for the DCC is therefore 0.1ppm.

The period for which the revised charge should apply

- 4.36 H3G requested that Ofcom backdate its decision in respect of the level of the DCC determined in these disputes. Ofcom therefore considered the relevant period for which Ofcom's determination should apply. In considering the period for which the revised charge should apply, Ofcom considered the relevant provisions of GC18 and the commercial negotiations which have led to disputes being referred.
- 4.37 Ofcom noted that GC18 requires charges for the provision of Portability to be cost oriented and based on the incremental costs of providing Portability unless the Donor Provider and the Recipient Provider have agreed another basis for the charges or Ofcom has directed that another basis for charges should be used.
- 4.38 The 1999 determinations applied for a period up to 31 March 2000. Since such time, H3G contractually agreed with each of O2, Orange and T-Mobile a level of DCC of 0.8ppm payable between it and the other party to the dispute.⁸ During the period in which those charges were subject to agreement between the parties, they were consistent with the provisions of GC18 insofar as an alternative basis for charges (i.e. other than a cost oriented charge) had been agreed between the Donor Provider and Recipient Provider.
- 4.39 In resolving these disputes and determining the relevant period for which Ofcom's determination should apply, Ofcom considered in the draft determinations that, until such time as the parties were no longer in agreement as to the appropriate level of the DCC, the contractually agreed charges should remain in place. This position is consistent with GC18 which requires charges to be cost oriented "*unless the Donor Provider and the Recipient Provider have agreed another basis for charges*". Ofcom therefore considered the relevant contractual provisions in order to determine the point at which the parties were no longer in agreement.
- 4.40 H3G decided to re-negotiate the level of the DCC by issuing Review Notices to each of O2, Orange and T-Mobile during the period June to September 2006 in accordance with the relevant contractual provisions for Review Notices to be served.⁹ More specifically, H3G served Review Notices on the parties as follows:
- 26 June 2006 in the case of O2;
 - 28 September 2006 in the case of Orange; and

⁸ see Clause 9 and Annex B of the Interconnect Agreement between T-Mobile and H3G dated 17 September 2002; Clause 5.9 and Schedule 3 of the Interconnect Agreement between Orange and H3G dated 30 August 2002; Clause 5.4.1 and Annex B of the Interconnect Agreement between O2 and H3G dated 28 May 2002.

⁹ see Clause 32.4 of the Interconnect Agreement between T-Mobile and H3G dated 17 September 2002; Clause 17.4 of the Interconnect Agreement between Orange and H3G dated 30 August 2002; Clause 19.1.4 of the Interconnect Agreement between O2 and H3G dated 28 May 2002.

- 12 October 2006 in the case of T-Mobile.

- 4.41 In the draft determinations, Ofcom set out its view that the appropriate date from which the charge of 0.1ppm should apply is the earliest date on which any change could have taken effect under the relevant Review Notice procedure. Ofcom therefore considered the contractual position in place between each of the parties in determining the date from which the charge should apply.
- 4.42 In the case of O2, Clause 19.9 of the Interconnect Agreement dated 28 May 2002 provides that, where a variation of charges is agreed following the issue of a Review Notice, that variation shall take effect as of the Review Date. For the purposes of the present dispute, the Review Date is defined in clause 19.10 as being the relevant anniversary date of the agreement.¹⁰ The earliest date on which the charge of 0.1ppm could therefore have come into effect is 28 May 2006 being the relevant anniversary date of the agreement. Ofcom therefore proposed to uphold a DCC of 0.1ppm between O2 and H3G with effect from 28 May 2006.
- 4.43 In the case of Orange, Clause 17.4 of the Interconnect Agreement dated 30 August 2002 provides that a party may initiate a general review of the agreement by serving a Review Notice within one month of the anniversary of the agreement. The parties shall then negotiate in good faith with a view to agreeing relevant amendments to the agreement however it does not contain a clause which provides for the effective date of any amendments agreed between the parties. Ofcom considered that the earliest date on which the charge of 0.1ppm could therefore have come into effect is 28 September 2006, the date on which H3G served a Review Notice on Orange, as the earliest date upon which a new agreed DCC could have come into effect. Ofcom therefore proposed to uphold a DCC of 0.1ppm between Orange and H3G with effect from 28 September 2006.
- 4.44 In the case of T-Mobile, Clause 32.4 of the Interconnect Agreement dated 17 September 2002 provides that a party may initiate a general review of the agreement by serving a Review Notice during the period of one month from an anniversary date of the agreement. The parties shall then negotiate in good faith with a view to agreeing relevant amendments to the agreement. However it does not contain a clause which provides for the effective date of any amendments agreed between the parties. Ofcom considered that the earliest date on which the charge of 0.1ppm could therefore have come into effect is 12 October 2006, the date on which H3G served a Review Notice on T-Mobile, as the earliest date upon which a new agreed DCC could have come into effect. Ofcom therefore proposed to uphold a DCC of 0.1ppm between T-Mobile and H3G with effect from 12 October 2006.

¹⁰ Under clause 19.2, a Review Notice pursuant to clause 19.1.4 may only be issued within one month of any anniversary date of the agreement.

Section 5

Consideration of responses to the draft determinations

5.1 For ease of reference, Ofcom sets out its consideration of responses to the draft determinations in accordance with the following headings:

- The DCC should be set closer to 0.025ppm;
- Ofcom should explicitly state that the determined DCC should be reciprocal;
- The Analysys model on mobile call termination is not appropriate to use to calculate the costs of DCC;
- BT transit costs should be included in the DCC;
- Ofcom's view on the period for which the revised charge should apply is inconsistent with contract law;
- The determinations should be applied on an industry-wide basis.

The DCC should be set closer to 0.025pmm

5.2 In its response to the draft determinations H3G stated that, while Ofcom's proposal to set the DCC at 0.1ppm was much closer to H3G's own estimate of actual costs, H3G's strict view remained that the DCC should be set at zero. H3G maintained that a Modern Equivalent Asset exists, and has existed throughout the relevant period, in the form of direct routing which renders the DCC obsolete.

5.3 Ofcom does not agree that a charge of zero would be appropriate. As noted in the draft determinations, Ofcom has taken the view that the scope of the disputes should be limited to the existing method of MNP¹¹. A zero charge would not be consistent with a cost-based approach to establishing an appropriate DCC.

5.4 H3G stated that a cost-based approach for the existing method of MNP could be reduced below 0.1ppm. H3G questioned "the propriety of applying the long-run methodology implied by a mobile LRIC model to DCC given that it is likely that the DCC will be abolished in the near future". In particular, H3G referred to Ofcom's recent proposed modifications to GC18 set out in its consultation entitled "Arrangements for porting phone numbers when customers switch supplier - A review of General Condition 18"¹² ("the Consultation"). H3G argued that "this provides an additional reason why an average cost approach...is more appropriate" than the costing approach used by Ofcom in the draft determination.

5.5 Ofcom does not agree that the proposals made in the Consultation invalidate the use of its MCT cost model to estimate the efficient costs of donor conveyance. The donor conveyance service utilises network assets for which Ofcom has established, during the MCT market review, an appropriate long run path of cost recovery. There are no network assets that are used specifically for donor conveyance, such that cost recovery ought to be accelerated due to the prospect of effective asset lifetimes being cut short by Ofcom's proposals. Therefore, Ofcom maintains that a reasonable

¹¹ Paragraph 2.7 of the draft determinations

¹² <http://www.ofcom.org.uk/consult/condocs/gc18review/numberportability.pdf>

approach to estimating efficient costs is to use the long run path of cost recovery that is used in the MCT cost model. In any event, the proposals set by Ofcom in the Consultation are not final and it would be inappropriate for Ofcom to pre-judge the outcome of the consultation process in resolving this dispute.

- 5.6 H3G also stated that it “does not accept that the costs (especially the long run costs) of MSCs will be more than 100% higher for a 2G/3G operator compared to a 3G operator”. This comment was made in the context of a quote from the report prepared by Analysys, which included an example of cost estimates for a 2G/3G combined operator using a medium demand scenario. Using this example, MSC costs were estimated to be 0.187ppm for the 2G component and 0.087ppm for the 3G component. In line with this view, H3G then suggests that “[a]ssuming the 3G Operator cost is the correct one to apply against MSC, then the cost of donor conveyance would be just over 0.1 pence per minute”. It notes that this would produce a DCC of 0.05ppm, which is “much closer to H3G’s own view of 0.025ppm”.
- 5.7 H3G has misinterpreted the figures in the Analysys report to which it refers in this case. The figures do not represent “the costs of a 2G/3G operator compared to a 3G operator”. Rather, they are donor conveyance cost estimates for the 2G and 3G components of a 2G/3G combined operator. Further, the estimates from Analysys were derived from a single demand scenario. Ofcom was clear in the draft determinations that estimating donor conveyance costs from a single demand scenario in the MCT cost model is not appropriate, because it fails to take account of the uncertainty associated with demand forecasts.
- 5.8 Ofcom does not agree that the 3G component estimate of MSC costs is the most appropriate measure for estimating that component of donor conveyance costs. It has used the blended cost estimate for a 2G/3G combined operator because this approach was the most consistent with the estimation of costs for an average efficient operator in the UK market (where only one of the five MNOs does not have a 2G network). Further, the use of a blended charge is appropriate in the context of the uncertainty surrounding efficient unit cost benchmarks for donor conveyance services because it is likely to be more stable than its separate 2G and 3G components. This is mainly because the individual components are sensitive to assumptions about the migration of subscribers from 2G to 3G services.
- 5.9 H3G also suggests that 0.1ppm represents a DCC which is greater than the Average Porting Conveyance Charge (“APCC”) of 0.013ppm used in the Consultation.
- 5.10 Ofcom does not agree that the APCC provides a useful benchmark for estimating the costs of donor conveyance. The APCC is levied on a service that is specific to fixed networks, and H3G has not offered any reasons to suggest that this charge should be similar to the DCC on a mobile network. In any event, the figure of 0.013ppm was only used as part of a sensitivity analysis in the Consultation, and Ofcom does not endorse this figure as the correct APCC.

Ofcom should explicitly state that the determined DCC should be reciprocal

- 5.11 Each of O2, Orange and T-Mobile stated in their responses to the draft determinations that they consider that the level of the DCC which Ofcom has determined to be applicable in these disputes should be applied on a reciprocal basis as between H3G and each of O2, Orange and T-Mobile respectively.
- 5.12 O2 considers that H3G had only ever requested a reduction in the level of the DCC payable by both H3G and O2 and it would therefore be perverse for Ofcom to impose a reduction in the charges that only one party pays given the nature of the dispute.

- 5.13 Orange argued that H3G's dispute reference did not suggest that the rate to be applied should not be reciprocal and that the general conclusion reached by Ofcom in the draft determinations "strongly suggests that Ofcom considers that the same DCC should apply in both directions as the alternative would be to create exactly the type of distortions and perverse incentives which Ofcom is trying to avoid." Orange considers that it is clear from the interconnect agreement between it and H3G that the rate should be reciprocal and that Ofcom's determination should reflect this.
- 5.14 Under section 190 of the Act, Ofcom's main power in relation to the resolution of disputes includes giving a direction fixing the terms or conditions of transactions between the parties to a dispute. Ofcom determined the scope of the disputes to be the determination of whether the level of the DCC payable by H3G to each of the MNOs is compliant with GC18 and, in the draft determinations, proposed to resolve the disputes by requiring that the DCC payable by H3G to each of the MNOs be set at 0.1ppm thus fixing the terms and conditions of the transactions between the parties.
- 5.15 Ofcom recognises that one of the six principles of cost recovery elaborated by Oftel and followed by the MMC is that of reciprocity. Under this principle, where services are provided reciprocally, charges should also be reciprocal. In the 1999 Determination, Oftel therefore considered that the charge of 0.8ppm should be applied on a reciprocal basis as between operators. Ofcom has requested the views of H3G on this and H3G has agreed that this is appropriate.
- 5.16 In light of the responses received and the principle of reciprocity and symmetry, Ofcom therefore confirms that the charge determined should apply on a reciprocal basis. Ofcom has amended the final determinations in order to clarify this issue.

The Analysys model on mobile call termination is not appropriate to use to calculate the costs of DCC

- 5.17 In its response to the draft determinations T-Mobile stated that it did not believe that the Analysys model was appropriate for the calculation of the DCC because it was created for the purpose of analysing the costs of mobile call termination. T-Mobile believes that Ofcom should therefore not use the model for other purposes. T-Mobile also stated that Ofcom had not provided an adequate explanation to justify why the call termination model was appropriate in the context of the DCC.
- 5.18 Ofcom agrees that the MCT cost model was not constructed for the purposes of determining the DCC. For example, it noted in the draft determinations that the level of detail (in relation to the specific assets used for donor conveyance) that is necessary to model efficient costs is greater than that required for an accurate estimate of MCT costs overall.
- 5.19 However, Ofcom believes that the MCT cost model is a reasonable source of information for estimating the efficient costs of donor conveyance with suitable modifications, as it analyses the costs of the assets relevant to donor conveyance. As explained in paragraph 4.26 above, Ofcom set out four clear advantages of the estimate that was based on the MCT cost model over the cost information presented by the MNOs and sees no reason to revise this view. In addition, T-Mobile has not put forward reasons to use alternative sources of cost information.
- 5.20 T-Mobile also suggests that the charge for an "average efficient operator" is not appropriate in this case, because Ofcom is "neither applying this model to all operators nor to all charges".

- 5.21 Ofcom notes that T-Mobile's preference is for "reciprocity and symmetry" in the costs of MNP arrangements across all operators, and believes that an average efficient operator is consistent with this goal. As set out at paragraphs 5.33 and 5.34 below, Ofcom cannot impose an industry wide level of DCC in the context of a dispute. Whilst Ofcom recognises therefore that the model developed in the context of these disputes does not apply to all operators and charges, Ofcom would expect all operators to take full account of this determination in negotiating appropriate rates for the DCC. In any case, even if it were not to apply to the charges of all operators, Ofcom considers that the cost of an average efficient operator still provides an appropriate standard to set the charges in dispute. Ofcom therefore considers that it is appropriate in this regard to adopt the costs of an average efficient operator as the basis for the setting of the DCC.

BT transit costs should be included in the DCC

- 5.22 T-Mobile stated that it strongly disagreed with Ofcom's decision that BT transit costs should be excluded as a relevant cost. T-Mobile does not have direct interconnection with H3G and stated that, while it has explored the option of direct interconnection, it had ruled this out on the grounds that it is not the more efficient option on the basis of traffic volumes. Therefore, with regard to T-Mobile, BT transit costs are efficiently incurred costs.
- 5.23 Ofcom notes this information from T-Mobile, but does not believe that inclusion of transit costs in the estimation of the DCC would be a reasonable or proportionate response. To make an allowance for transit costs would overstate the efficient costs incurred by the other pairs of MNOs in providing a donor conveyance service. Ofcom does not believe that this would be consistent with its approach of estimating the costs incurred by an average efficient operator.

Ofcom's view on the period for which the revised charge should apply is inconsistent with contract law

- 5.24 T-Mobile has argued that, as at 12 October 2006, the date from which Ofcom proposed that the revised DCC should apply as between T-Mobile and H3G, the parties had not even started negotiation. Therefore, Ofcom's conclusion in the draft determination that the appropriate date for amendment of the DCC was the date when the parties were no longer in agreement is incorrect. T-Mobile considers that the only relevant provision of the agreement between it and H3G in this context is clause 32.1.3 of its Interconnect Agreement with H3G which provides that a party may only seek to amend the agreement by serving a Review Notice if the Agreement makes express provision for a review or the parties agree in writing that there should be a review.
- 5.25 T-Mobile argues that its contract with H3G contains no provision for backdating and that there is therefore no justification for determining that a change should take place prior to the other contractual party responding to the dispute. T-Mobile considers that, in backdating the payment of the DCC, Ofcom has sought to amend its contract with H3G in a manner inconsistent with that contract as well as with the law on the interpretation of contracts.
- 5.26 Furthermore, T-Mobile considers that Ofcom's proposal to backdate payments would exacerbate the anticompetitive effects of the draft determination, is disproportionate and is inconsistent with Ofcom duties under section 3 of the Act. T-Mobile considers that Ofcom's consultation on the scope of the dispute did not make it clear that it was considering retrospection and it is not clear on what basis Ofcom is able to apply its determination retroactively.

- 5.27 In resolving a dispute, Ofcom is not bound by the terms of a contract between the parties. Whilst those terms may be instructive in informing Ofcom's analysis leading to the determination of the dispute, Ofcom is not required to adhere strictly to the contractual terms in place.
- 5.28 Ofcom's main power in relation to the resolution of disputes, as set out in section 190(2) of the Act, includes giving a direction fixing the terms or conditions of transactions between the parties to the dispute. This may include a determination of fixing the terms and conditions of transactions with retrospective effect where Ofcom considers it appropriate to do so. In the present case, the scope of the disputes was determined to be:
- “to determine whether the level of the donor conveyance charge payable by H3G to each of the MNOs is compliant with General Condition 18. If this proves not to be the case, then Ofcom will determine what that level will be. Ofcom will also consider the period for which such charges should apply.”
- 5.29 Ofcom clearly set out in the scope of the dispute that it would consider the period for which charges would apply. As set out in the draft determination, Ofcom considers that the parties were no longer in agreement as to the level of the DCC which should apply as from the date on which H3G served a Review Notice on T-Mobile. Ofcom's view, as set out in the draft determinations, is that, as from this date, the level of the DCC in place between the parties was no longer compliant with GC18 as it was not cost oriented and based on the incremental costs of providing MNP. In the absence of agreement of alternative charges between the parties, Ofcom therefore proposed that a cost based charge of 0.1ppm should be in place. Ofcom sees no reason to depart from this conclusion in the final determination irrespective of the contractual provisions in place.
- 5.30 Ofcom does not consider that its approach is disproportionate in that it reflects the period for which the level of DCC in place was no longer compliant with GC18. Ofcom has sought to address this by determining both an appropriate level for the DCC and the period for which it should apply. It is not clear to Ofcom why T-Mobile considers that Ofcom's determination of the disputes on the basis of a charge to be applied from a date in the past would amount to a breach of its duties under section 3 of the Act.

The determinations should be applied on an industry-wide basis

- 5.31 In its response to the draft determinations T-Mobile stated that it believed the Analysys report to be factually incorrect in that the current UK solution for MNP was imposed by Oftel rather than a solution agreed by the mobile operators. T-Mobile felt that it was important to clarify this point, particular to demonstrate that the changes Ofcom was proposing should be applied to all mobile operators on an industry-wide basis and not just those directly involved in H3G's dispute.
- 5.32 T-Mobile considered that Ofcom had failed to properly consider the impact of its determination on payments between operators and the effect this will have on competition. T-Mobile agrees that the costs of MNP should be recovered in a way which promotes effective competition and that there should be reciprocity and symmetry. However, it considers that the draft determination is inconsistent with those principles and Ofcom's duties under section 3 of the Act and in particular, Ofcom's duty to further the interests of consumers where appropriate by promoting competition. It states that, to change the DCC in relation to the bilateral arrangements of one operator can only distort the market generally and, in not

making the DCC reciprocal, the determination will distort competition between competitors specifically.

- 5.33 Ofcom recognises that it may be preferable for an industry wide charge to apply in respect of the DCC. However, Ofcom's powers in resolving disputes are limited to those set out in section 190 of the Act. Under that section, Ofcom is able to resolve a dispute between the parties by, inter alia, making a declaration of the rights and obligations of the parties or fixing the terms and conditions of transactions between the parties. Those powers do not extend to the ability to fix terms and conditions of transactions between operators who are not parties to the dispute. Ofcom cannot therefore impose an industry wide DCC in the context of the present disputes. Ofcom would, however, expect operators to take into account this determination when negotiating an appropriate level of DCC as between themselves.
- 5.34 As set out at paragraph 5.15 above, Ofcom has concluded that rates should apply on a reciprocal basis as between the parties. It is not clear to Ofcom the basis upon which T-Mobile considers that Ofcom would be breaching its duties under section 3 of the Act by not imposing an industry wide DCC. Ofcom does not consider that its determination is inconsistent with its duty to further the interests of consumers by promoting competition, since T-Mobile has not provided any evidence that Ofcom's proposed determination would have a detrimental effect on competition in the market.

Section 6

Conclusions

6.1 For the reasons set out in sections 4 and 5 above, Ofcom has concluded that:

- GC18 requires that charges for donor conveyance be cost-based;
- The efficient costs of donor conveyance are 0.2ppm;
- The costs of donor conveyance should be split equally between the donor and recipient networks;
- The Determinations shall apply from 28 May 2006 in the case of O2, 28 September 2006 in the case of Orange, and 12 October 2006 in the case of T-Mobile; and
- The DCC should apply between the parties on a reciprocal basis.

6.2 These conclusions are reflected in the determinations set out in Annex 1.

Annex 1

The Determinations

1.1 Dispute between H3G and O2

Determination under sections 188 and 190 of the Communications Act 2003 (the “Act”) for resolving a dispute between Hutchison 3G UK Limited (“H3G”) and O2 (UK) Limited (“O2”) concerning the charges for donor conveyance.

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 23 November 1999 Oftel issued four determinations concerning the level of the DCC between mobile operators. At the same time Oftel published an Explanatory Document on Mobile Number Portability Determination Requests.¹³ This document supplied an explanation of the outcome of the four disputes between mobile operators regarding DCC and stipulated that the level of the DCC should be 1.6ppm, shared equally between the donor and recipient networks. These determinations applied for the period 1 January 1999 until 31 March 2000;
- (D) On 26 June 2006 H3G sent a Review Notice to O2 to initiate a review of the DCC then payable. This proposal was rejected by O2 on 24 July 2006 who stated that any agreement could only be reached on an industry basis. At a meeting on 11

¹³ http://www.ofcom.org.uk/static/archive/oftel/ind_info/numbering/mnpdetre.pdf

September O2 agreed that the present level of DCC was out of date, but maintained its position that a revised rate could only be achieved through a common industry agreement. On 8 December 2006 H3G sent a letter to O2 proposing a DCC level of 0.1ppm. This proposal was rejected by O2 on 21 December 2006. H3G repeated its proposal in a letter of 16 March 2007, to which O2 failed to respond;

- (E) On 3 April 2007 H3G referred a dispute with O2 to Ofcom for dispute resolution requesting a determination on the appropriate level of the DCC currently payable;
- (F) On 26 April 2007, after receiving the views of all parties, Ofcom decided pursuant to section 186(2) of the Act that it was appropriate for it to handle the dispute and informed the parties of this decision. Ofcom set the scope of the issues in dispute to be resolved as follows-

“The scope of the disputes is to determine whether the level of the donor conveyance charge payable by H3G to each of the mobile network operators is compliant with General Condition 18. If this proves not to be the case, then Ofcom will determine what that level will be. Ofcom will also consider the period to which such charges should apply.”

- (G) 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;
- (H) 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; and

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. With effect from 28 May 2006 the DCC payable between H3G and O2 shall be 0.1 pence per minute.

Binding nature and effective date

2. This Determination is binding as between H3G and O2.
3. This Determination shall take effect on the date it is published.

Interpretation

4. For the purpose of interpreting this Determination-
 - a) Headings and titles shall be disregarded; and
 - b) The Interpretation Act 1978 shall apply as if this Determination were an Act of Parliament
5. In this Determination-
 - c) The “Act” means the Communications Act 2003;

- d) "H3G" means Hutchison 3G UK Limited, whose registered company number is 03885486 and whose registered office is at Hutchison House, 5 Hester Road, Battersea, London SW11 4AN;
- e) "O2" means O2 (UK) Limited, whose registered company number is 1743099, and whose registered office is at 260 Bath Road, Slough, Berkshire SL1 4DX;
- f) "Ofcom" means the Office of Communications;
- g) "DCC" means the donor conveyance charge payable by the recipient network operator to the donating network operator for the routing of a ported call.

David Stewart
Director of Investigations

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

17 August 2007

1.2 Disputes between H3G and Orange

Determination under sections 188 and 190 of the Communications Act 2003 (the “Act”) for resolving a dispute between Hutchison 3G UK Limited (“H3G”) and Orange Personal Communications Services Limited (“Orange”) concerning the charges for donor conveyance.

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-
- ii) making a declaration setting out the rights and obligations of the parties to the dispute;
 - iii) giving a direction fixing the terms or conditions of transactions between the parties to the dispute;
 - iv) 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
 - v) 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 23 November 1999 Oftel issued four determinations concerning the level of the DCC between mobile operators. At the same time Oftel published an Explanatory Document on Mobile Number Portability Determination Requests.¹⁴ This document supplied an explanation of the outcome of the four disputes between mobile operators regarding DCC and stipulated that the level of the DCC should be 1.6ppm, shared equally between the donor and recipient networks. These determinations applied for the period 1 January 1999 until 31 March 2000;
- (D) On 28 September 2006 H3G sent a Review Notice to Orange to initiate review of the DCC then payable. This proposal was rejected by Orange on 7 November 2006 who stated that the DCC reflected costs. On 6 December H3G sent a letter to Orange proposing a revised rate of 0.1ppm. This proposal was rejected by Orange on 21 December 2006 who asked for details of the analysis conducted by H3G. H3G supplied the analysis on 9 January 2007 to which Orange replied on 15 January 2007 that it would conduct its own analysis. On 27 February 2007 and 16 March 2007

¹⁴ http://www.ofcom.org.uk/static/archive/oftel/ind_info/numbering/mnpdetre.pdf

H3G attempted to elicit a response from Orange who replied on 21 March 2007 stating that it did not believe 0.1ppm covered costs, but without providing its own analysis. H3G responded on 27 March 2007 stating that Orange's failure to provide any cost information had led H3G to believe that Orange was unable to justify the rate of 0.8ppm;

- (E) On 3 April 2007 H3G referred a dispute with Orange to Ofcom for dispute resolution requesting a determination on the appropriate level of the DCC currently payable;
- (F) On 26 April 2007, after receiving the views of all parties, Ofcom decided pursuant to section 186(2) of the Act that it was appropriate for it to handle the dispute and informed the parties of this decision. Ofcom set the scope of the issues in dispute to be resolved as follows-

“The scope of the disputes is to determine whether the level of the donor conveyance charge payable by H3G to each of the mobile network operators is compliant with General Condition 18. If this proves not to be the case, then Ofcom will determine what that level will be. Ofcom will also consider the period to which such charges should apply.”

- (G) 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;
- (H) 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; and

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.

- 6. With effect from 28 September 2006 the DCC payable between H3G and Orange shall be 0.1 pence per minute.

Binding nature and effective date

- 7. This Determination is binding as between H3G and Orange.
- 8. This Determination shall take effect on the date it is published.

Interpretation

- 9. For the purpose of interpreting this Determination-
 - b) Headings and titles shall be disregarded; and
 - c) The Interpretation Act 1978 shall apply as if this Determination were an Act of Parliament
- 10. In this Determination-
 - d) The “Act” means the Communications Act 2003;

- e) "H3G" means Hutchison 3G UK Limited, whose registered company number is 03885486 and whose registered office is at Hutchison House, 5 Hester Road, Battersea, London SW11 4AN;
- f) "Orange" means Orange Personal Communications Services Limited, whose registered company number is 2178917 and whose registered office is at St. James Court, Great Park Road, Almondsbury Park, Bradley Stoke, Bristol BS32 4QJ;
- g) "Ofcom" means the Office of Communications;
- h) "DCC" means the donor conveyance charge payable by the recipient network operator to the donating network operator for the routing of a ported call.

David Stewart
Director of Investigations

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

17 August 2007

1.3 Disputes between H3G and T-Mobile

Determination under sections 188 and 190 of the Communications Act 2003 (the “Act”) for resolving a dispute between Hutchison 3G UK Limited (“H3G”) and T-Mobile (UK) Limited (“T-Mobile”) concerning the charges for donor conveyance.

WHEREAS-

- (I) 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;
- (J) 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-
 - ii) making a declaration setting out the rights and obligations of the parties to the dispute;
 - iii) giving a direction fixing the terms or conditions of transactions between the parties to the dispute;
 - iv) 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
 - v) 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.
- (K) On 23 November 1999 Oftel issued four determinations concerning the level of the DCC between mobile operators. At the same time Oftel published an Explanatory Document on Mobile Number Portability Determination Requests.¹⁵ This document supplied an explanation of the outcome of the four disputes between mobile operators regarding DCC and stipulated that the level of the DCC should be 1.6ppm, shared equally between the donor and recipient networks. These determinations applied for the period 1 January 1999 until 31 March 2000;
- (L) On 12 October 2006, H3G sent a Review Notice to T-Mobile to initiate a review of the DCC then payable. On 24 October 2006 and 20 November 2006, T-Mobile responded stating that it agreed in principle to a reduction in the level of the DCC but that it did not consider this should be done on a bilateral basis. On 8 December, H3G sent a letter to T-Mobile proposing a revised DCC rate of 0.1ppm which T-Mobile rejected by letter on 19 December 2006. On 16 March 2007, H3G sent a variation agreement addressing the DCC issue and maintaining its stance that 0.1ppm was an appropriate level. T-Mobile responded on 21 March 2007 stating that it did not want

¹⁵ http://www.ofcom.org.uk/static/archive/oftel/ind_info/numbering/mnpdetre.pdf

to enter into any new arrangements before Ofcom had completed its current review of GC18. H3G responded on 27 March 2007 stating that it believed negotiations could take place in parallel with Ofcom's consultation;

(M) On 3 April 2007 H3G referred a dispute with T-Mobile to Ofcom for dispute resolution requesting a determination on the appropriate level of the DCC currently payable;

(N) On 26 April 2007, after receiving the views of all parties, Ofcom decided pursuant to section 186(2) of the Act that it was appropriate for it to handle the dispute and informed the parties of this decision. Ofcom set the scope of the issues in dispute to be resolved as follows-

"The scope of the disputes is to determine whether the level of the donor conveyance charge payable by H3G to each of the mobile network operators is compliant with General Condition 18. If this proves not to be the case, then Ofcom will determine what that level will be. Ofcom will also consider the period to which such charges should apply."

(O) 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;

(P) 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; and

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.

11. With effect from 12 October 2006 the DCC payable between H3G and T-Mobile shall be 0.1 pence per minute.

Binding nature and effective date

12. This Determination is binding as between H3G and T-Mobile.

13. This Determination shall take effect on the date it is published.

Interpretation

14. 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

15. In this Determination-

c) The "Act" means the Communications Act 2003;

d) "H3G" means Hutchison 3G UK Limited, whose registered company number is 03885486 and whose registered office is at Hutchison House, 5 Hester Road, Battersea, London SW11 4AN;

Determinations to resolve disputes between Hutchison 3G and each of O2, Orange and T-Mobile concerning donor conveyance charges

- e) "T-Mobile" means T-Mobile (UK) Limited, whose registered company number is 2382161 and whose registered office is at Hatfield Business Park, Hatfield, Hertfordshire, AL10 9BW;
- f) "Ofcom" means the Office of Communications;
- g) "DCC" means the donor conveyance charge payable by the recipient network operator to the donating network operator for the routing of a ported call.

David Stewart
Director of Investigations

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

17 August 2007