

# Wholesale Mobile Voice Call Termination charge controls – request for Consent

**Explanatory  
statement**

**1 September 2004**

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## Section 1

# Contents

- S.1 On completion of the market review concerning wholesale mobile voice call termination services, the Office of Communications (“Ofcom”) issued a statement (the “market review statement”) on 1 June 2004 that included a notification published pursuant to sections 48(1) and 79(4) of the Communications Act 2003 (the “Act”).
- S.2 In that notification, Ofcom identified wholesale voice call termination provided by each of the mobile network operators (“MNOs”) as the relevant services markets, made market power determinations to the effect that each MNO has significant market power (“SMP”) in the respective relevant market, and set SMP conditions accordingly.
- S.3 These SMP conditions include a requirement for each of O2, Orange, T-Mobile and Vodafone to meet controls for the charges set for 2G voice call termination for two periods (namely, 1 September 2004 to 31 March 2005 and 1 April 2005 to 31 March 2006).
- S.4 These requirements include two traffic-specific sets of controls with which each MNO has to comply – one each for termination of fixed-to-mobile calls and off-net mobile-to-mobile calls. However, in setting these two controls, Ofcom recognised that some MNOs may, for operational reasons, find themselves unable to comply with such traffic-specific requirements. Ofcom therefore included a provision in these requirements that in such circumstances and with Consent in writing from Ofcom, MNOs could switch from traffic-specific to total volume controls.
- S.5 Following publication of the market review statement, O2, Orange, T-Mobile and Vodafone each formally requested such Consents<sup>1</sup> for both periods of the control.

## Consultation

- S.6 Ofcom’s provisional view was that such Consents should be given. As part of its duties under section 49 of the Act, on 8 July 2004 Ofcom consulted on the proposed draft Consents and published a consultation document entitled *Wholesale mobile voice call termination charge controls – request for Consent* (referred to throughout this document as the “Consent consultation”).
- S.7 In order for the relevant SMP conditions to reflect the proposed Consents, Ofcom also proposed modifications to these SMP conditions under section 48(2) of the Act.
- S.8 Ofcom sought views from interested parties on its proposals to give Consents and on the proposed modifications to the relevant SMP conditions by no later than 9 August 2004.
- S.9 Ofcom received four responses to the Consent consultation.

## Summary of conclusions

- S.10 Having considered all responses, and for the reasons set out below – in particular in Chapter 2 - Ofcom has concluded that it is appropriate to give the Consents

<sup>1</sup> Requests were received for a switch to total volume controls for both periods from Vodafone on 11 June, Orange on 22 June, O2 on 25 June and T-Mobile on 25 June 2004.

proposed in the Consent consultation and to modify the relevant SMP conditions accordingly.

- S.11 Ofcom has therefore set out the modifications made to the relevant SMP services conditions in the Schedule to the Notification at Annex A. Furthermore Ofcom has given, under those modified services conditions, Consents to O2 and Vodafone (as set out at Annex B) and to Orange and T-Mobile (as set out at Annex C).

## Section 1

# Introduction

## Background

### Regulatory framework

- 1.1 A new regulatory framework of five regulatory Directives for electronic communications networks and services entered into force on 25 July 2003. The new framework is designed to create harmonised regulation across Europe and is aimed at reducing entry barriers and fostering prospects for effective competition to the benefit of consumers.
- 1.2 The first of the new Directives, the Framework Directive provides the overall structure for the new regulatory regime. Article 8 of the Framework Directive sets out three key policy objectives (see as implemented in section 4 of the Communications Act 2003, the “Act”) which have been taken into account in the preparation of this explanatory statement; namely promotion of competition, development of the internal market and the promotion of the interests of the citizens of the European Union.
- 1.3 The new framework was implemented in the UK via the Communications Act 2003 (the “Act”).

### Market reviews

- 1.4 The new framework requires national regulatory authorities (“NRAs”) such as the Office of Communications (“Ofcom”) and previously the Director General of Telecommunications (referred to in this document as “the Director” or “Of tel”) to carry out reviews of competition in communications markets to ensure that regulation remains appropriate in the light of changing market conditions.
- 1.5 Of tel carried out two consultations concerning the market review of wholesale mobile voice call termination. The Director’s proposals were set out in documents published on 15 May 2003 and 19 December 2003, respectively. Ofcom assumed powers under the Act on 29 December 2003 and concluded the market review of wholesale mobile voice call termination with the publication of a statement on 1 June 2004<sup>2</sup> (the ‘market review statement’).
- 1.6 This market review statement included the following conclusions:
  - a. That Ofcom has identified, amongst others, the markets set out below and has concluded that each MNO has SMP in the market for the provision of wholesale voice call termination on its respective individual network(s):
    - wholesale voice call termination provided by O2 (such termination provided via O2’s 2G and 3G mobile network);
    - wholesale voice call termination provided by Orange (such termination provided via Orange’s 2G and 3G mobile network);
    - wholesale voice call termination provided by T-Mobile (such termination provided via T-Mobile’s 2G and 3G mobile network); and

<sup>2</sup> “Wholesale mobile voice call termination” <http://www.ofcom.org.uk/consultations/past/wmvct/>

- wholesale voice call termination provided by Vodafone (such termination provided via Vodafone's 2G and 3G mobile network).
  - b. That in relation to 2G voice termination, Vodafone, O2, Orange and T-Mobile (the "four MNOs") should be subject to a charge control, to last until 2006.

## Charge Control requirements

- 1.7 Full details of the charge controls can be found in Chapter 6 of the market review statement, but in summary Ofcom concluded that:
- a. the charge controls should apply until 31 March 2006 and operate over two periods: in both the first period (1 September 2004 to 31 March 2005) and the second and final period (1 April 2005 to 31 March 2006) the target average charge should be set as a specified figure<sup>3</sup>;
  - b. there should be two separate sets of controls – one each for termination of fixed-to-mobile calls and off-net mobile-to-mobile calls;
  - c. the weights in each charge control should be based on the profile and volumes of minutes of the relevant traffic experienced by each MNO during the previous year;
  - d. call minutes to ported-in mobile numbers should be excluded from the weights and therefore from the controls; and
  - e. since the efficient charge levels for the combined 900/1800MHz and the 1800MHz operators are different, the controls on these two types of operators should be set at different levels.
- 1.8 These charge controls have been imposed on the four MNOs in the form of obligations under certain SMP services conditions, which are set out in Schedules 3 and 4 to the notification published pursuant to sections 48(1) and 79(4) of the Act (see notification at Annex A of the market review statement). The relevant SMP services conditions in this context are Conditions MC3 and MC4, in relation to O2 and Vodafone, and Conditions MD3 and MD4, in relation to Orange and T-Mobile.

## Request for Consent

- 1.9 In response to proposals to impose charge controls, Ofcom was advised by Orange that it may not be able to comply with two separate sets of controls described in 1.7(b) above (this is discussed in paragraphs 6.33 to 6.34 of the market review statement).
- 1.10 In paragraph 6.35 of the market review statement, Ofcom concluded that:
- "... where an MNO was unable to meet the two separate controls, Consent for compliance with a charge control to change from traffic-specific to total traffic volumes would be expected to be given for the period requested where an MNO is unable to identify the origin of the calls it terminates on its network."*
- 1.11 Conditions MC3, MC4, MD3 and MD4 of the notification referred to in 1.8 above, include provisions to this effect, whereby the four MNOs are not required to derive

<sup>3</sup> subject to changes in time of day weights for the final period target average charge (see paragraphs 6.36 – 6.45 of the market review statement)

the weighting of profile and volumes from the sum of minutes of fixed-to-mobile and mobile-to-mobile calls if Ofcom has otherwise provided Consent in writing.

- 1.12 In written requests to Ofcom dated 11 June 2004, 22 June 2004, 25 June 2004 and 25 June 2004 from Vodafone, Orange, O2 and T-Mobile respectively, the four MNOs have formally requested such Consents.

### **Consultation process**

- 1.13 Sections 48(2) and 49(4) of the Act requires that, before modifying the SMP conditions and giving the Consents, Ofcom must publish notifications:
- i. stating that it is proposing to modify the SMP conditions specified therein and proposing to give the Consents set out therein;
  - ii. setting out the effects of those conditions and Consents;
  - iii. giving its reasons for making those proposals; and
  - iv. specifying the period within which representations may be made to Ofcom about its proposals.
- 1.14 As required by sections 48(3) and 49(5) of the Act, that period must not be less than one month after the day of the publication of the notification.
- 1.15 Ofcom set a period of consultation for the proposals set out in the Consent consultation to last one month, ending on 9 August 2004.

### **Ofcom's decision on the requests for Consent**

- 1.16 As set out in more detail in Chapter 2 of this document, Ofcom has concluded that Consents should be given to the four MNOs and that the necessary modifications to the relevant SMP conditions be made to enable the giving of these Consents.

### **Outline of this document**

- 1.17 For full details of the review on wholesale mobile voice call termination completed by Ofcom, including details of the charge control, this document should be read in conjunction with the Consent consultation and market review statement<sup>4</sup>.
- 1.18 This explanatory statement is structured as follows:
- Chapter 2 sets-out the initial arguments advanced by the MNOs, responds to issues raised during the consultation and sets out Ofcom's final decision;
  - Annex A contains a notification of the modifications to the SMP services conditions under section 48(1) of the Act;
  - Annex B contains the Consents given to O2 and Vodafone under; and
  - Annex C contains the Consents given to Orange and T-Mobile.

<sup>4</sup> Wholesale mobile voice call termination" 01 June 2004  
<http://www.ofcom.org.uk/consultations/past/wmvct/>

## Section 2

# Ofcom's decision on the requests for Consent

## Background

- 2.1 As outlined in Chapter 1, each of the four MNOs has requested Consents to not be required to derive weightings and volumes of minutes on a traffic-specific (i.e. separate fixed-to-mobile and mobile-to-mobile) basis, when meeting mobile call termination charge controls.
- 2.2 Ofcom consulted on the possibility of granting (or not) Consents and, the requisite modifications to the SMP services conditions in July of this year. In its consultation, referred to in Chapter 1, Ofcom set out the basis on which it would consider the requests for Consent and the legal tests relevant to the modifications of the SMP services conditions and the giving of Consents. This Chapter sets out the initial arguments advanced by the MNOs, responds to issues raised during the consultation and sets out Ofcom's final decision.

## Consideration of requests for Consent

- 2.3 In making its decision on whether to give Consent to switch from traffic-specific volumes to total traffic volumes, for each period of the charge control, Ofcom has taken the following factors into consideration:
- a. the ability of the MNO to meet the charge control without Consent being granted;
  - b. the effect granting Consent would have on the charge control itself; and
  - c. the alternatives to granting Consent.

### **Ability of MNOs to meet the charge control requirements without Consent being granted**

#### *Orange*

- 2.4 Orange's submission in response to the Oftel notification and explanatory statement of 19th December 2003<sup>5</sup> (the "December consultation") advised that

*"It is not practically possible for Orange to comply with both charge control conditions, as it does not separately record mobile voice termination services by reference to the originating network."*

- 2.5 In response, Ofcom included in the provision in the relevant conditions that MNOs are not required to derive volumes from the sum of minutes of fixed-to-mobile and mobile-to-mobile calls if Ofcom has otherwise provided Consent in writing.

<sup>5</sup> Wholesale mobile voice call termination: Proposals for the identification and analysis of markets, determinations of market power and setting of SMP conditions. Explanatory statement and notification, 19 December 2003  
[http://www.ofcom.org.uk/consultations/past/mobile\\_call\\_termination/mct\\_consultation/?a=87101](http://www.ofcom.org.uk/consultations/past/mobile_call_termination/mct_consultation/?a=87101)



- 2.6 In correspondence to Ofcom dated 25 June 2004, Orange advises that whilst it should be technically possible to identify originating networks, Orange's billing system is not designed to record and analyse such details. Further, Orange advises that it has

*"...no plans, or indeed motivation, to introduce differential termination charges dependant on the technical nature of the originating network."*

- 2.7 In addition, in its response to the Consent consultation, Orange noted that the costs of reconfiguring its systems to enable it to differentiate between fixed-to-mobile and mobile-to-mobile terminated calls would substantially outweigh the benefits:

*"The costs involved would be significant and no benefit to customers would result."*

#### *T-Mobile*

- 2.8 Whilst Orange was the only MNO to raise this issue in response to the December consultation, T-Mobile did discuss the ability to meet two separate controls in paragraphs 8.11 and 8.12 of its response to the Ofcom consultation of 15 May 2003<sup>6</sup>, advising Ofcom that:

*"..T-Mobile is not able to differentiate between mobile-to-mobile and fixed-to-mobile traffic and would therefore charge the same price for both and would use the aggregate to satisfy the price control."*

*"T-Mobile would not be able to satisfy the [charge control] condition if Consent was not given for this...it might be preferable in T-Mobile's case to amalgamate these 2 conditions as the position is not likely to change over the term of the charge control."*

- 2.9 In advice to Ofcom of 25 June 2004, T-Mobile states that it is unable to determine separately the number of Fixed-to-Mobile and Mobile-to-Mobile minutes that it terminates. Ofcom has considered confidential information discussing this issue.

- 2.10 T-Mobile re-iterated its position by saying:

*"T-Mobile considers the granting of Consent for the use of total call volumes in the charge controls to be essential for T-Mobile to be able to comply with such controls."*

- 2.11 T-Mobile also noted that were Consents not granted the establishment of the necessary information systems would be at substantial cost and deliver no benefit:

*"...information systems ...at substantial cost and significant delay... [and] be wholly disproportionate as [it] would impose a cost without any benefit."*

#### *Vodafone*

- 2.12 Following publication of the Statement, Vodafone was the first to formally request Consent to move from traffic-specific volumes to total traffic volumes in order to meet the charge control, issuing a letter to Ofcom on 11 June 2004.

<sup>6</sup> Review of mobile wholesale voice call termination markets – EU market review, 15 May 2003  
[http://www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/2003/ctm/ctm0503.pdf](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/ctm/ctm0503.pdf)

- 2.13 In requesting Consent, Vodafone explains that it does not have mechanisms in place
- “..to be able to bill operators for calls that terminate on the Vodafone network but transit another operator...”*
- 2.14 Vodafone used this as the basis for requesting Consent and Ofcom has considered confidential information discussing this issue.
- 2.15 Vodafone advises that it does not have reliable data to be able to meet the requirements of the two separate controls for the first period and might not be able to meet the requirements of the two separate controls for the second period.
- 2.16 Ofcom has also considered confidential information further to the concerns regarding the absence of reliable data to ensure compliance with two separate controls.
- O2
- 2.17 Advice from O2 dated 25 June 2004 confirmed that it seeks Consent for both periods of the charge control.
- 2.18 In advice dated 2 July 2004, O2 informs Ofcom that its interconnect billing systems are unable to know the proportion of calls that come from BT but originate from mobile networks. O2 adds that to change systems so that such a distinction would be made would
- “..represent... investment which we [O2] believe would be significant, and, we [O2] believe wholly disproportionate.”*
- 2.19 O2 adds that regardless, as O2 is required to derive prices based on traffic received during the previous period, such an investment would confer no benefits.

### **Effect granting Consent has on the charge control**

- 2.20 As noted above and in the Consent consultation the basis on which the four MNOs request Consents is that they are unable to distinguish between calls originating from fixed networks and mobile networks. As such, the four MNOs are unable to determine separately the volumes of fixed-to-mobile and mobile-to-mobile minutes terminated on their respective networks in order to meet the current requirements of the charge controls. Giving Consents to switch from network-specific to total call volumes would enable the MNOs to meet the charge controls due to take effect from 1 September 2004 to 31 March 2006 (as set out in Chapter 6 of the market review statement).
- 2.21 Giving Consents to move to a total volumes control would maintain the two separate charge controls (fixed-to-mobile and mobile-to-mobile controls), but using total call volumes for the purposes of compliance, rather than the current requirement to use separate call volumes for fixed-to-mobile and mobile-to-mobile.
- 2.22 On the basis that MNOs are unable to distinguish between calls originating from fixed networks and mobile networks, it follows that MNOs would in practice find being able to deliberately price discriminate between the two groups (fixed networks and mobile networks) difficult, and impossible to monitor.
- 2.23 In any event, giving Consents would not blend the two separate controls (resulting in the potential for MNOs to bias one over the other). MNOs could not, for example,

raise fixed-to-mobile calls in order to lower mobile-to-mobile calls, as this would breach the fixed-to mobile charge control. Such behaviour might also be likely to breach the requirements of the no undue discrimination condition (Conditions MC2 and MD2 set out in the notification attached to the market review statement).

- 2.24 Furthermore, in this context it is relevant to note that Ofcom has imposed certain transparency obligations placed on the four MNOs (Conditions MC5 & MC6 and MD5 & MD6 set out in the notification attached to the market review statement) which require that they issue Ofcom with details of access contracts and termination charges.

### **Alternatives to granting Consent**

- 2.25 The alternative to giving Consent might be for Ofcom to require that MNOs adapt their billing systems to be able to meet the existing requirements of the charge controls.
- 2.26 A requirement to adapt systems in order to distinguish between mobile and fixed calls would only allow MNOs to comply with the 2005/06 period of the charge control, and only then if the systems were producing sufficiently reliable data several months in advance of the second period of the charge control.
- 2.27 Even if the four MNOs were able to adapt systems to produce reliable data distinguishing between fixed- and mobile-originated calls in time to be able to meet the second period of the charge control without Consents, Ofcom would first need to be satisfied that the costs incurred in meeting such a mandate would be outweighed by any benefits.
- 2.28 However, as noted above, three of the four MNOs have commented that such a requirement would incur significant costs and delays to achieve and deliver no benefit to consumers. One MNO also raises concerns over the reliability of any data that may be collected were changes to its systems made to enable it to identify the origin of a call that terminates on its network.
- 2.29 Furthermore, in its correspondence with Ofcom dated 25 June 2004, Orange argues that:

*“...Given that [Orange’s] charging practice, which is consistent with the obligation of no undue discrimination, does not discriminate between fixed and mobile originating networks, the concerns motivating Ofcom to impose two separate controls are not relevant. Consequently it would be disproportionate to require Orange to expend resource and money to re-configure its billing system for zero benefit.”*

- 2.30 Given the arguments raised by MNOs, Ofcom continues to believe that systems could not be in place in time for the four MNOs to be able to meet the second period of the charge control. And even if they were, Ofcom does not believe that an obligation to force the four MNOs to introduce such systems (that in some cases may also be redundant after the period of the charge control) is likely to satisfy the tests set out in the Communications Act 2003, in particular regarding proportionality.
- 2.31 For these reasons, Ofcom maintains its provisional view that requiring the MNOs to alter their current systems to be able to distinguish between fixed-to-mobile and mobile-to-mobile calls in order to meet the requirements of the charge control is not a viable alternative to the granting of Consents.

## **Amendment to relevant SMP conditions**

- 2.32 In giving Consents, Ofcom considers it necessary to first modify SMP conditions concerning the charge control obligation (relevant SMP Conditions being MC3, MC4, MD3 and MD4, as discussed in paragraph 1.07 above). In particular, Ofcom has noted that the relevant conditions of the notification have been drafted in a way which may suggest that Ofcom may give Consents only with respect to ‘the volumes by month or part-month’ (Part (b)) and not for ‘the profile by Charging Period’ (Part (a)).
- 2.33 However, as mentioned in the Consent consultation, Ofcom considers that the Consents be given for the use of total traffic volume weights in both Parts (a) and (b). As if an MNO is unable to comply with the charge controls due to an inability to differentiate between fixed-to-mobile and mobile-to-mobile traffic volumes, it is unlikely that granting Consent for Part (b) only, without granting Consent for Part (a), would mean the MNO is any more capable of satisfying compliance. Ofcom has therefore sought to clarify this point in the modifications to the relevant SMP services conditions enabling the Consents to be given for the use of total traffic volume weights in place of traffic-specific weights in both Part (a) and Part (b).
- 2.34 In its response to the consultation, Orange agrees with Ofcom that it is necessary to modify the SMP services conditions in the way described, so that the Consent applies to both part (a) ‘the profile of the Charging Period’ and Part (b) ‘the volumes by month or part month’ of the charge control obligation.
- 2.35 Annex A to this document sets out the modifications to the existing SMP services conditions by way of publication of a notification pursuant to section 48(1) of the Act.

## **Legal tests**

- 2.36 In Chapter 5 of the market review statement, Ofcom explained why it considered that the imposition of charge controls in the form of obligations under SMP services conditions have met all relevant legal tests under the Act. The section below sets out Ofcom’s reasons why it considers that the relevant legal tests under the Act are met in modifying the SMP conditions and in granting the Consents requested by the MNOs. This section should be read in light of the relevant considerations and Ofcom’s conclusions as set out in Chapter 5 of the market review statement.

## **Relevant tests**

- 2.37 Ofcom is required to be satisfied that the giving of Consents is in accordance with the requirements of section 49(2) of the Act. In respect of modifying the SMP conditions, Ofcom has to be satisfied that the requirements in sections 47(2) and 86(4) of the Act have been satisfied. In addition, both in the case of granting Consents and of modifying the SMP services conditions, Ofcom has to consider and act in accordance with its general duties in section 3 of the Act and the six Community requirements in section 4 of the Act.
- 2.38 Furthermore, as noted in paragraph 1.13 of Chapter 1 of this document, Ofcom has to publish certain notifications under sections 48(2) and 49(4) of the Act addressing matters set out therein.

## **Sections 48(2) and 49(4) – publication of notifications**

- 2.39 Section 48(2) of the Act requires that before modifying an SMP condition, OFCOM must publish a notification:

- a. stating that they are proposing to set, modify or revoke the conditions that are specified in the notification;*
- b. setting out the effect of those conditions, modifications or revocations;*
- c. giving their reasons for making the proposal; and*
- d. specifying the period within which representations may be made to OFCOM about their proposal.*

2.40 Similarly, section 49(4) of the Act requires that before giving a Consent, OFCOM must publish a notification:

- a. stating that there is a proposal to give, modify or withdraw it;*
- b. identifying the person whose proposal it is;*
- c. setting out the direction, approval or Consent to which the proposal relates;*
- d. setting out the effect of the direction, approval or Consent or of its proposed modification or withdrawal;*
- e. giving reasons for the making of the proposal; and*
- f. specifying the period within which representations may be made about the proposal to the person whose proposal it is.*

2.41 Ofcom published notifications of its proposals in accordance with the above mentioned provisions to modify the relevant SMP services conditions and to give Consents in its July 2004 Consent consultation. Following this consultation, Ofcom is now publishing the final notifications to modify the relevant SMP services conditions and grant Consents to the four MNOs, in this document.

2.42 The notification of Ofcom's modifications to the SMP services conditions under section 48(1) of the Act is set out at Annex A to this document. The SMP services conditions modified are specified in the Schedule to that notification. The effect of, and reasons for making, these modifications are set out in this Chapter.

2.43 The Consents to be given to the four MNOs discussed above are at Annex B in respect of O2 and Vodafone, and at Annex C in respect of Orange and T-Mobile, to this document. The Schedules to those respective notifications set out the Consents. The effect of, and reasons for making, those proposals are set out in this Chapter.

### **Section 3 and 4 – general duties & the six Community requirements**

2.44 Section 3 of the Act sets out the general duties of Ofcom in carrying out its functions, in particular that it furthers the interests of citizens in relation to communications and furthers the interests of consumers in relevant markets.

2.45 Section 4 of the Act requires that Ofcom acts in accordance with the six Community requirements concerning: the promotion of competition; the development of the European internal market; the promotion of the interests of all EU citizens; non-discrimination; promoting efficiency and sustainable competition and the maximum

benefit for consumers; and facilitating service interoperability and securing freedom of choice for consumers.

- 2.46 As explained in this Chapter, and which is clear from the modifications to the SMP services conditions as specified in the notification at Annex A, these modifications are merely clarificatory in nature and the broad nature of the problem that they were intended to address was addressed at the time Ofcom set the charge controls in the market review statement. Therefore, for reasons set out in Chapter 5 of the market review statement (in particular, paragraph 5.161), Ofcom in making the said modifications has considered and acted in accordance with its general duties in section 3 of the Act and the six Community requirements in section 4 of the Act.

### **Sections 47(2) and 49(2) – general tests**

- 2.47 Section 49(2) of the Act requires that Ofcom must not give a Consent unless it satisfied that to do so is:
- a. objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;*
  - b. not such as to discriminate unduly against particular persons or against a particular description of persons;*
  - c. proportionate to what it is intended to achieve; and*
  - d. in relation to what it is intended to achieve, transparent.*
- 2.48 Section 47(2) of the Act sets out a similarly worded test in respect of modifying SMP conditions.
- 2.49 Having taken account of the responses to the consultation and for the reasons set out in this document – and in particular the arguments set out in this Chapter, Ofcom remains of the view that its reasons for modifying the SMP services conditions and to give Consents meet the requirements of sections 47(2) and 49(2) of the Act. In respect of the modifications to the SMP conditions, Ofcom considers for reasons set out in paragraph 2.46 above that its reasoning in Chapter 5 of the Statement applies also in this regard.
- 2.50 Furthermore, in respect of the Consents, Ofcom believes that they are objectively justifiable and proportionate in that they meet the requests of the MNOs to be able to comply with existing charge controls without imposing any additional requirements. As Ofcom gives each of the four MNOs Consents with similar effects, the Consents do not discriminate between the MNOs in their application. The Consents are transparent in that it is clear (as set out in the notifications at Annexes B and C, respectively) what is required from the MNOs in terms of complying with the charge controls.

### **Section 86 – no material change in the markets concerned**

- 2.51 Section 86(2) of the Act requires that modifications of SMP conditions cannot be made except in a case falling within subsection (3) or subsection (4). Subsection (4) states that

*(4) The second case is where Ofcom are satisfied that there has not –*

- a. *in the case of an unmodified condition, since the condition was set; or*
- b. *in any other case, since the condition was last modified,*

*been a material change in the market identified or otherwise used for the purposes of the market power determination by reference to which the condition was set or last modified.*

2.52 Given the very short passage of time since 1 June 2004 (when the market review statement was published) and the stable nature of the relevant markets<sup>7</sup>, Ofcom considers that there has been no material change in those markets since that date. Ofcom considers therefore that the modifications to the SMP services conditions satisfy the requirements set out section 86(4) of the Act.

### Other issues raised during consultation

2.53 The following comments were also made in response to the Consent consultation.

2.54 T-Mobile seeks clarification over the length of time the Consents will be in place, so as to remove any uncertainty as to the risk that the Consents may be withdrawn at any time, leaving the MNOs in violation of their regulatory obligations.

*“..Ofcom leaves open the possibility that separate volumes may be required at some future date [...] thus [the] mobile operators are left facing significant uncertainty [and may be] left in violation of their regulatory obligations”*

2.55 Ofcom does not agree that the wording of the Consents as they appeared in the Annexes to the Consent consultation require alteration. Based on the information currently available, it appears unlikely that the Consents will be removed over the period of the current controls, however, given the pace of change in available technologies it may be that changes allow MNOs to alter their systems more easily than is currently the case. In such an event, Ofcom may want to reconsider the applicability of the Consents as granted in this document.

2.56 Furthermore, were Ofcom to consider that the Consents should be removed, it would open dialogue with the appropriate interested parties to ensure that it was acting in an appropriate and proportionate manner and in line with its statutory duties and obligations.

### Conclusions

2.57 For the reasons set out in this document, Ofcom has concluded that Consents should be given to the four MNOs and that the necessary modifications to the relevant SMP services conditions be made to enable the granting of these Consents.

2.58 The Consents are granted to each of the four MNOs (O2, Orange, T-Mobile and Vodafone) to calculate its compliance with the charge control on fixed-to-mobile termination (Conditions MC3 and MD3) on the basis of total traffic volume weights in

<sup>7</sup> Relevant markets in question are:

- o wholesale voice call termination provided by O2 (such termination provided via O2's mobile network);
- o wholesale voice call termination provided by Orange (such termination provided via Orange's mobile network);
- o wholesale voice call termination provided by T-Mobile (such termination provided via T-Mobile's mobile network); and
- o wholesale voice call termination provided by Vodafone (such termination provided via Vodafone's mobile network).

place of fixed-to-mobile traffic volume weights, and similarly, with regards to the charge control on mobile-to-mobile termination (Conditions MC4 and MD4), to calculate compliance on the basis of total traffic volume weights in place of mobile-to-mobile traffic volume weights. The Consents are included as Annex B to this document in respect of O2 and Vodafone and Annex C to this document in respect of Orange and T-Mobile.

- 2.59 Ofcom is also making the necessary modifications to the relevant SMP services conditions of the four MNOs to enable Ofcom to grant Consents for the use of total traffic volume weights in place of traffic-specific weights. These modifications are set out in Annex A to this document.
- 2.60 Ofcom is satisfied that, in giving the Consents and modifying the relevant SMP conditions, it has met all relevant tests.



## Annex A

### NOTIFICATION PURSUANT TO SECTION 48(1) OF THE COMMUNICATIONS ACT 2003

**Modifications of SMP services conditions MC3 and MC4 in relation to O2 (UK) Limited and Vodafone Limited, on the one hand, and SMP services conditions MD3 and MD4 in relation to Orange Personal Communications Services Limited and T-Mobile (UK) Limited, on the other hand, which conditions are set out in Schedules 3 and 4, respectively, to the notification published by the Office of Communications on 1 June 2004 pursuant to sections 48(1) and 79(4) of the Communications Act 2003**

#### WHEREAS:

- A. on 1 June 2004, Ofcom published a notification pursuant to sections 48(1) and 79(4) of the Act (which notification is set out at Annex A of the Statement entitled “Wholesale Mobile Voice Call Termination” published on the same day by Ofcom) and thereby imposed certain SMP services conditions on O2, Vodafone, Orange and T-Mobile as a result of the market power determinations made by Ofcom that each of the MNOs has significant market power in wholesale voice call termination provided by each of them via their own respective mobile networks as set out in that notification;
- B. the above-mentioned SMP services conditions include a requirement for each of the MNOs to meet controls for the charges set for 2G voice call termination for two periods (namely, 1 September 2004 to 31 March 2005 and 1 April 2005 to 31 March 2006) in respect of fixed-to-mobile calls, on the one hand, and mobile-to-mobile calls, on the other hand; however, these SMP services conditions include provisions whereby the four MNOs may, in effect, derive the weighting according to volumes from the sum of minutes of fixed-to-mobile and mobile-to-mobile calls if Ofcom so Consent in writing;
- C. following the publication of the Market Review Notification, each of the MNOs formally requested in June certain Consents for both periods of the control;
- D. having considered those requests, Ofcom’s initial views were that the requested Consents should be given; in addition, Ofcom considered that the SMP services conditions needed to be modified to deal fully with the Consents requested by the MNOs;
- E. on 8 July 2004, Ofcom published a consultation document “Wholesale Mobile Voice Call Termination charge controls – request for Consent” setting out the proposed modifications to the SMP services conditions in question in a notification pursuant to section 48(2) of the Act in Annex A thereto, and Ofcom invited representations about any of the proposals set out therein by 9 August 2004;
- F. a copy of the July Notification was sent to the Secretary of State in accordance with section 50(1)(a) of the Act, and to the European Commission and to the regulatory authorities of every other Member State in accordance with sections 50(3) of the Act;
- G. by virtue of section 48(5) of the Act, Ofcom may give effect to any proposals to modify SMP services conditions as set out in the July Notification, with or without modification, where:
  - i. they have considered every representation about the proposals made to them within the period specified in the July Notification; and

- ii. they have had regard to every international obligation of the United Kingdom (if any) which has been notified to them for this purpose by the Secretary of State;
- H. Ofcom received four responses to the July Notification and have considered every such representation duly made to them in respect of the proposals set out in the July Notification and the accompanying explanatory statement; and the Secretary of State has not notified Ofcom of any international obligation of the United Kingdom for this purpose;

**NOW, therefore:**

1. Ofcom hereby make, in accordance with section 48(1) of the Act, the following modifications of SMP services conditions MC3 and MC4 in relation to O2 and Vodafone, on the one hand, and SMP services conditions MD3 and MD4 in relation to Orange and T-Mobile, on the other hand, which conditions are set out in Schedules 3 and 4, respectively, to the Market Review Notification.
2. Ofcom modify the SMP service conditions referred to in paragraph 1 above in the manner and form set out in the Schedule to this notification.
3. In making the above-mentioned modifications, Ofcom are satisfied for reasons set out in Chapter 2 of the accompanying explanatory statement that, in accordance with section 86(4)(a) of the Act, there has not, since the SMP service conditions referred to in paragraph 1 above were set, been a material change in the markets identified or otherwise used for the purposes of the above-mentioned market power determinations by reference to which the said SMP service conditions were set.
4. The effect of, and Ofcom's reasons for making, the above-mentioned modifications to the SMP services conditions are set out in Chapter 2 of the accompanying explanatory statement.
5. Ofcom consider that the modifications to the SMP services conditions referred to in paragraph 1 above comply with the requirements of sections 45 to 50 and sections 78 to 88 of the Act, as appropriate and relevant to each such a modification.
6. In making the above-mentioned modifications to the SMP services conditions, for the reasons set out in Chapter 2 of the accompanying explanatory statement, Ofcom have considered and acted in accordance with their general duties in section 3 of the Act and the six Community requirements in section 4 of the Act.
7. Copies of this Notification and the accompanying explanatory statement have been sent to the Secretary of State in accordance with section 50(1)(a) of the Act, and to the European Commission in accordance with sections 50(2) of the Act.
8. For the purposes of interpreting this Notification (including its recitals above), the following definitions shall apply:
  - i. **"Act"** means the Communications Act 2003 (c. 21);
  - ii. **"July Notification"** has the meaning given to it in recital (E) to this Notification;
  - iii. **"Market Review Notification"** has the meaning given to it in recital (A) to this Notification;

- iv. **“MNOs”** means O2, Orange, T-Mobile and Vodafone collectively.
  - v. **“O2”** means O2 (UK) Limited, whose registered company number is 1743099, and any O2 (UK) Limited subsidiary or holding company, or any subsidiary of that holding company, all as defined by section 736 of the Companies Act 1985 as amended by the Companies Act 1989;
  - vi. **“Ofcom”** means the Office of Communications;
  - vii. **“Orange”** Orange Personal Communications Services Limited, whose registered company number is 2178917, and any Orange Personal Communications Services Limited subsidiary or holding company, or any subsidiary of that holding company, all as defined by section 736 of the Companies Act 1985 as amended by the Companies Act 1989
  - viii. **“Secretary of State”** means the Secretary of State for Trade and Industry;
  - ix. **“T-Mobile”** means T-Mobile (UK) Limited, whose registered company number is 2382161, and any T-Mobile (UK) Limited subsidiary or holding company, or any subsidiary of that holding company, all as defined by section 736 of the Companies Act 1985 as amended by the Companies Act 1989; and
  - x. **“Vodafone”** means Vodafone Limited, whose registered company number is 1471587, and any Vodafone Limited subsidiary or holding company, or any subsidiary of that holding company, all as defined by section 736 of the Companies Act 1985 as amended by the Companies Act 1989.
9. Except as otherwise defined in this Notification, words or expressions used in this Notification (excluding the Schedule hereto) shall have the meaning ascribed to them in the Act.

**Philip Rutnam**  
**Partner, Competition & Strategic Resources**

A person duly authorised on behalf of Ofcom in accordance with paragraph 18 of the Schedule to the Office of Communications Act 2002

01 September 2004

## Schedule

**Modifications of SMP services conditions MC3 and MC4 in relation to O2 (UK) Limited and Vodafone Limited, on the one hand, and SMP services conditions MD3 and MD4 in relation to Orange Personal Communications Services Limited and T-Mobile (UK) Limited, on the other hand, which Conditions are set out in Schedules 3 and 4, respectively, to the notification published by the Office of Communications on 1 June 2004 pursuant to sections 48(1) and 79(4) of the Act**

1. In this Schedule, the term “**Notification**” means the notification published by the Office of Communications (“Ofcom”) on 1 June 2004 pursuant to sections 48(1) and 79(4) of the Act, which imposed SMP services conditions MC3 and MC4 in relation to O2 (UK) Limited and Vodafone Limited, on the one hand, and SMP services conditions MD3 and MD4 in relation to Orange Personal Communications Services Limited and T-Mobile (UK) Limited, on the other hand, as a result of the market power determinations made by Ofcom that each of them has significant market power in wholesale voice call termination provided by each of them via their own respective mobile networks as set out therein.

2. Paragraph MC3.2 of Condition MC3 as set out in Part 2 of Schedule 3 to the Notification shall be substituted by the following **new paragraph MC3.2**:

*‘MC3.2 In this Condition, the Average Interconnection Charge means the average of the Fixed-to-Mobile Interconnection Charges during the Relevant Year in question, which shall be weighted according to:*

- a. *the profile by Charging Period of the Dominant Provider’s minutes of Fixed-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the profile by Charging Period of the Dominant Provider’s sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls); and*
- b. *the volumes by month or part-month of the Dominant Provider’s minutes of Fixed-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the volumes by month or part month of the Dominant Provider’s sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls),*

*in the Base Year.’*

3. Paragraph MC3.3 of Condition MC3 as set out in Part 2 of Schedule 3 to the Notification shall be substituted by the following **new paragraph MC3.3**:

*‘MC3.3 For the purposes of calculating the Average Interconnection Charge where any Fixed-to-Mobile Interconnection Charges are in force during a part only of the Relevant Year (commencing or ending at a date in the course of the Relevant Year), the weighting shall be derived from:*

- a. *the profile by Charging Period of the Dominant Provider’s minutes of Fixed-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the profile by Charging Period of the Dominant Provider’s sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls); and*

- b. *the volumes by month or part-month of the Dominant Provider's minutes of Fixed-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the volumes by month or part month of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls),*

*in the corresponding part of the Base Year.'*

- 4. Paragraph MC3.5 of Condition MC3 as set out in Part 2 of Schedule 3 to the Notification shall be substituted by the following **new paragraph MC3.5**:

*'MC3.5 In paragraph MC3.4:*

- a. *the Weights Adjustment Factor means the Average Revenue divided by the Average Interconnection Charge in the First Relevant Year; and*
- b. *the Average Revenue means the average of the Fixed-to-Mobile Interconnection Charges during the First Relevant Year, weighted according to:*
  - i. *the profile by Charging Period of the Dominant Provider's minutes of Fixed-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the profile by Charging Period of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls); and*
  - ii. *the volumes by month or part-month of the Dominant Provider's minutes of Fixed-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the volumes by month or part month of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls),*

*in the First Relevant Year.'*

- 5. Paragraph MC3.6 of Condition MC3 as set out in Part 2 of Schedule 3 to the Notification shall be substituted by the following **new paragraph MC3.6**:

*'MC3.6 For the purposes of calculating the Average Revenue where any Fixed-to-Mobile Interconnection Charges are in force during a part only of the First Relevant Year (commencing or ending at a date in the course of the First Relevant Year), the weighting shall be derived from:*

- a. *the profile by Charging Period of the Dominant Provider's minutes of Fixed-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the profile by Charging Period of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls); and*
- b. *the volumes by month or part-month of the Dominant Provider's minutes of Fixed-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the volumes by month or part month of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls),*

*in that part of the First Relevant Year.'*

6. Paragraph MC4.2 of Condition MC4 as set out in Part 2 of Schedule 3 to the Notification shall be substituted by the following **new paragraph MC4.2**:

*‘MC4.2 In this Condition, the Average Interconnection Charge means the average of the Mobile-to-Mobile Interconnection Charges during the Relevant Year in question, which shall be weighted according to:*

- a. the profile by Charging Period of the Dominant Provider’s minutes of Mobile-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the profile by Charging Period of the Dominant Provider’s sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls); and*
- b. the volumes by month or part-month of the Dominant Provider’s minutes of Mobile-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the volumes by month or part month of the Dominant Provider’s sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls),*

*in the Base Year.’*

7. Paragraph MC4.3 of Condition MC4 as set out in Part 2 of Schedule 3 to the Notification shall be substituted by the following **new paragraph MC4.3**:

*‘MC4.3 For the purposes of calculating the Average Interconnection Charge where any Mobile-to-Mobile Interconnection Charges are in force during a part only of the Relevant Year (commencing or ending at a date in the course of the Relevant Year), the weighting shall be derived from:*

- a. the profile by Charging Period of the Dominant Provider’s minutes of Mobile-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the profile by Charging Period of the Dominant Provider’s sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls); and*
- b. the volumes by month or part-month of the Dominant Provider’s minutes of Mobile-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the volumes by month or part month of the Dominant Provider’s sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls),*

*in the corresponding part of the Base Year.’*

8. Paragraph MC4.5 of Condition MC4 as set out in Part 2 of Schedule 3 to the Notification shall be substituted by the following **new paragraph MC4.5**:

*‘MC4.5 In paragraph MC4.4:*

- a. the Weights Adjustment Factor means the Average Revenue divided by the Average Interconnection Charge in the First Relevant Year; and*
- b. the Average Revenue means the average of the Mobile-to-Mobile Interconnection Charges during the First Relevant Year, weighted according to:*

- i. *the profile by Charging Period of the Dominant Provider's minutes of Mobile-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the profile by Charging Period of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls); and*
- ii. *the volumes by month or part-month of the Dominant Provider's minutes of Mobile-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the volumes by month or part month of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls),*

*in the First Relevant Year.'*

9. Paragraph MC4.6 of Condition MC4 as set out in Part 2 of Schedule 3 to the Notification shall be substituted by the following **new paragraph MC4.6:**

*'MC4.6 For the purposes of calculating the Average Revenue where any Mobile-to-Mobile Interconnection Charges are in force during a part only of the First Relevant Year (commencing or ending at a date in the course of the First Relevant Year), the weighting shall be derived from:*

- a. *the profile by Charging Period of the Dominant Provider's minutes of Mobile-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the profile by Charging Period of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls); and*
- b. *the volumes by month or part-month of the Dominant Provider's minutes of Mobile-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the volumes by month or part month of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls),*

*in that part of the First Relevant Year.'*

10. Paragraph MD3.2 of Condition MD3 as set out in Part 2 of Schedule 4 to the Notification shall be substituted by the following **new paragraph MD3.2:**

*'MD3.2 In this Condition, the Average Interconnection Charge means the average of the Fixed-to-Mobile Interconnection Charges during the Relevant Year in question, which shall be weighted according to:*

- a. *the profile by Charging Period of the Dominant Provider's minutes of Fixed-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the profile by Charging Period of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls); and*
- b. *the volumes by month or part-month of the Dominant Provider's minutes of Fixed-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the volumes by month or part month of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls),*

*in the Base Year.'*

11. Paragraph MD3.3 of Condition MD3 as set out in Part 2 of Schedule 4 to the Notification shall be substituted by the following **new paragraph MD3.3**:

*'MD3.3 For the purposes of calculating the Average Interconnection Charge where any Fixed-to-Mobile Interconnection Charges are in force during a part only of the Relevant Year (commencing or ending at a date in the course of the Relevant Year), the weighting shall be derived from:*

- a. the profile by Charging Period of the Dominant Provider's minutes of Fixed-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the profile by Charging Period of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls); and*
- b. the volumes by month or part-month of the Dominant Provider's minutes of Fixed-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the volumes by month or part month of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls),*

*in the corresponding part of the Base Year.'*

12. Paragraph MD3.5 of Condition MD3 as set out in Part 2 of Schedule 4 to the Notification shall be substituted by the following **new paragraph MD3.5**:

*'MD3.5 In paragraph MD3.4:*

- a. the Weights Adjustment Factor means the Average Revenue divided by the Average Interconnection Charge in the First Relevant Year; and*
- b. the Average Revenue means the average of the Fixed-to-Mobile Interconnection Charges during the First Relevant Year, weighted according to:*
  - i. the profile by Charging Period of the Dominant Provider's minutes of Fixed-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the profile by Charging Period of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls); and*
  - ii. the volumes by month or part-month of the Dominant Provider's minutes of Fixed-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the volumes by month or part month of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls),*

*in the First Relevant Year.'*

13. Paragraph MD3.6 of Condition MD3 as set out in Part 2 of Schedule 4 to the Notification shall be substituted by the following **new paragraph MD3.6**:

*'MD3.6 For the purposes of calculating the Average Revenue where any Fixed-to-Mobile Interconnection Charges are in force during a part only of the First Relevant*



*Year (commencing or ending at a date in the course of the First Relevant Year), the weighting shall be derived from:*

- a. the profile by Charging Period of the Dominant Provider's minutes of Fixed-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the profile by Charging Period of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls); and*
- b. the volumes by month or part-month of the Dominant Provider's minutes of Fixed-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the volumes by month or part month of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls),*

*in that part of the First Relevant Year.'*

14. Paragraph MD4.2 of Condition MD4 as set out in Part 2 of Schedule 4 to the Notification shall be substituted by the following **new paragraph MD4.2:**

*'MD4.2 In this Condition, the Average Interconnection Charge means the average of the Mobile-to-Mobile Interconnection Charges during the Relevant Year in question, which shall be weighted according to:*

- a. the profile by Charging Period of the Dominant Provider's minutes of Mobile-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the profile by Charging Period of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls); and*
- b. the volumes by month or part-month of the Dominant Provider's minutes of Mobile-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the volumes by month or part month of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls),*

*in the Base Year.'*

15. Paragraph MD4.3 of Condition MD4 as set out in Part 2 of Schedule 4 to the Notification shall be substituted by the following **new paragraph MD4.3:**

*'MD4.3 For the purposes of calculating the Average Interconnection Charge where any Mobile-to-Mobile Interconnection Charges are in force during a part only of the Relevant Year (commencing or ending at a date in the course of the Relevant Year), the weighting shall be derived from:*

- a. the profile by Charging Period of the Dominant Provider's minutes of Mobile-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the profile by Charging Period of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls); and*
- b. the volumes by month or part-month of the Dominant Provider's minutes of Mobile-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the volumes by month or*

*part month of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls),*

*in the corresponding part of the Base Year.'*

16. Paragraph MD4.5 of Condition MD4 as set out in Part 2 of Schedule 4 to the Notification shall be substituted by the following **new paragraph MD4.5**:

*'MD4.5 In paragraph MD4.4:*

- a. the Weights Adjustment Factor means the Average Revenue divided by the Average Interconnection Charge in the First Relevant Year; and*
- b. the Average Revenue means the average of the Mobile-to-Mobile Interconnection Charges during the First Relevant Year, weighted according to:*
  - i. the profile by Charging Period of the Dominant Provider's minutes of Mobile-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the profile by Charging Period of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls); and*
  - ii. the volumes by month or part-month of the Dominant Provider's minutes of Mobile-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the volumes by month or part month of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls),*

*in the First Relevant Year.'*

1. Paragraph MD4.6 of Condition MD4 as set out in Part 2 of Schedule 4 to the Notification shall be substituted by the following **new paragraph MD4.6**:

*'MD4.6 For the purposes of calculating the Average Revenue where any Mobile-to-Mobile Interconnection Charges are in force during a part only of the First Relevant Year (commencing or ending at a date in the course of the First Relevant Year), the weighting shall be derived from:*

- a. the profile by Charging Period of the Dominant Provider's minutes of Mobile-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the profile by Charging Period of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls); and*
- b. the volumes by month or part-month of the Dominant Provider's minutes of Mobile-to-Mobile Calls (except in so far as Ofcom otherwise Consent in writing that the weighting shall be derived from the volumes by month or part month of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls),*

*in that part of the First Relevant Year.'*

## Annex B

# Consents: O2 & Vodafone

**Consents to Vodafone Limited and O2 (UK) Limited under paragraphs MC3.2, MC3.3, MC3.5(b) and MC3.6 of Conditions MC3, on the one hand, and paragraphs MC4.2, MC4.3, MC4.5(b) and MC4.6 of Condition MC4, on the other hand, both Conditions of which are set out in Schedule 3 to the notification published by the Office of Communications (“Ofcom”) on 1 June 2004 pursuant to sections 48(1) and 79(4) of the Act, as modified by Ofcom by way of publication of a further notification pursuant to section 48(1) of the Act on 01 September 2004**

### WHEREAS:

- A. as a result of a market review carried out by the Director, he proposed on 15 May 2003 and on 19 December 2003 in accordance with section 80 of the Act that each of O2 and Vodafone has significant market power in wholesale voice call termination provided by each of them via their own respective mobile networks;
- B. the Director was able to exercise powers under the Act pursuant to section 408 of the Act and Article 3(1) of the Communications Act 2003 (Commencement No. 1) Order 2003 until Ofcom assumed those powers on 29 December 2003;
- C. Ofcom having considered every representation duly made, and thereafter on 1 June 2004 pursuant to sections 48(1) and 79(4) of the Act by way of publication of a notification identified the relevant services markets, made market power determinations to the effect referred to in recital (A) above and set certain SMP conditions on O2 and Vodafone to take effect on 1 June 2004, unless otherwise is stated in Schedule 3 thereto, such as Conditions MC3 and MC4 concerning charge controls of Fixed-to-Mobile and Mobile-to-Mobile Interconnection Charges, respectively;
- D. on 8 July 2004, Ofcom proposed to modify Conditions MC3 and MC4 by way of publication of a notification pursuant to section 48(2) of the Act to make it clear the extent to which Ofcom have power to give Consents thereunder;
- E. Ofcom having considered every representation duly made, and thereafter on 01 September 2004 pursuant to section 48(1) of the Act by way of publication of a further notification modified Conditions MC3 and MC4 in the manner and form proposed by Ofcom;
- F. these Consents concern matters to which Conditions MC3 and MC4, as modified by the Amending Notification, relate and, in particular, the manner in which the Average Interconnection Charge and the Average Revenue shall be weighted;
- G. at paragraph 6.35 of the explanatory statement accompanying the Notification, Ofcom state that: “In terms of an inability to meet two separate controls, as set out in paragraph 6.24 of the December consultation, Consent for compliance with a charge control to change from traffic-specific to total traffic volumes would be expected to be given for the period requested where an MNO is unable to identify the origin of the calls it terminates on its network. This would avoid the potential problem identified by Orange.”;

- H. on 11 and 25 June 2004, Vodafone and O2, respectively, requested such Consents under Conditions MC3 and MC4 to cover both respective charge control periods, that is to say for the purposes of the First Relevant Year and the Second Relevant Year;
- I. for the reasons set out in the explanatory statement accompanying these Consents, Ofcom are satisfied that, in accordance with section 49(2) of the Act, these Consents are:
- i. objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
  - ii. not such as to discriminate unduly against particular persons or against a particular description of persons;
  - iii. proportionate to what they are intended to achieve; and
  - iv. in relation to what it is intended to achieve, transparent;
- J. for the reasons set out in the explanatory statement accompanying these Consents, Ofcom have considered and acted in accordance with their general duties in section 3 of the Act and the six Community requirements in section 4 of the Act;
- K. on 8 July 2004 Ofcom published a notification of the proposed Consents in accordance with section 49(4) of the Act;
- L. Ofcom have considered every representation about the proposed Consents duly made to them; and

**NOW, therefore, pursuant to paragraphs MC3.2, MC3.3, MC3.5(b) and MC3.6 of Condition MC3, on the one hand, and paragraphs MC4.2, MC4.3, MC4.5(b) and MC4.6 of Condition MC4, on the other hand, both Conditions of which are set out in Schedule 3 to the Notification, as modified by the Amending Notification, Ofcom give the following Consents:**

*Condition MC3 – Average Interconnection Charge*

1. For the purposes of complying with their respective obligations under Condition MC3 in the First Relevant Year and the Second Relevant Year, Ofcom Consent to Vodafone and O2 under paragraphs MC3.2 and MC3.3 of that Condition that, until these Consents have been withdrawn, the average of their respective Fixed-to-Mobile Interconnection Charges during the Relevant Year in question shall be weighted according to:
- a. the profile by Charging Period of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls; and
  - b. the volumes by month or part-month of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls,

in the Base Year and, where any Fixed-to-Mobile Interconnection Charges are in force during a part only of the Relevant Year (commencing or ending at a date in the course of the Relevant Year), in the corresponding part of the Base Year, and the term "Average Interconnection Charge" shall, where references are made in

Condition MC3 to the meaning given to it in paragraphs MC3.2 and/or MC3.3, be interpreted and read accordingly.

*Condition MC3 – Average Revenue*

2. For the purposes of complying with their respective obligations under Condition MC3 in the Second Relevant Year, Ofcom Consent to Vodafone and O2 under paragraphs MC3.5(b) and MC3.6 of that Condition that, until these Consents have been withdrawn, the average of their respective Fixed-to-Mobile Interconnection Charges during the First Relevant Year shall be weighted according to:
  - a. the profile by Charging Period of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls; and
  - b. the volumes by month or part-month of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls,

in the First Relevant Year and, where any Fixed-to-Mobile Interconnection Charges are in force during a part only of the First Relevant Year (commencing or ending at a date in the course of the First Relevant Year), in that part of the First Relevant Year, and the term "Average Revenue" shall, where references are made in Condition MC3 to the meaning given to it in paragraphs MC3.5 and/or MC3.6, be interpreted and read accordingly.

*Condition MC4 – Average Interconnection Charge*

3. For the purposes of complying with their respective obligations under Condition MC4 in the First Relevant Year and the Second Relevant Year, Ofcom Consent to Vodafone and O2 under paragraphs MC4.2 and MC4.3 of that Condition that, until these Consents have been withdrawn, the average of their respective Mobile-to-Mobile Interconnection Charges during the Relevant Year in question shall be weighted according to:
  - a. the profile by Charging Period of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls; and
  - b. the volumes by month or part-month of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls,

in the Base Year and, where any Mobile-to-Mobile Interconnection Charges are in force during a part only of the Relevant Year (commencing or ending at a date in the course of the Relevant Year), in the corresponding part of the Base Year, and the term "Average Interconnection Charge" shall, where references are made in Condition MC4 to the meaning given to it in paragraphs MC4.2 and/or MC4.3, be interpreted and read accordingly.

*Condition MC4 – Average Revenue*

4. For the purposes of complying with their respective obligations under Condition MC4 in the Second Relevant Year, Ofcom Consent to Vodafone and O2 under paragraphs MC4.5(b) and MC4.6 of that Condition that, until these Consents have been withdrawn, the average of their respective Mobile-to-Mobile Interconnection Charges during the First Relevant Year shall be weighted according to:

- a. the profile by Charging Period of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls; and
- b. the volumes by month or part-month of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls,

in the First Relevant Year and, where any Mobile-to-Mobile Interconnection Charges are in force during a part only of the First Relevant Year (commencing or ending at a date in the course of the First Relevant Year), in that part of the First Relevant Year, and the term "Average Revenue" shall, where references are made in Condition MC4 to the meaning given to it in paragraphs MC4.5 and/or MC4.6, be interpreted and read accordingly.

#### *Interpretation*

5. For the purpose of interpreting these Consents (including their recitals above), the following definitions shall apply:
  - a. "**Act**" means the Communications Act 2003 (c. 21);
  - b. "**Amending Notification**" means the notification referred to in recital (E) of these Consents above;
  - c. "**Director**" means the Director General of Telecommunications as appointed under section 1 of the Telecommunications Act 1984;
  - d. "**Notification**" means the notification referred to in recital (C) of these Consents above;
  - e. "**O2**" means O2 (UK) Limited, whose registered company number is 1743099, and any O2 (UK) Limited subsidiary or holding company, or any subsidiary of that holding company, 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; and
  - g. "**Vodafone**" means Vodafone Limited, whose registered company number is 1471587, and any Vodafone Limited subsidiary or holding company, or any subsidiary of that holding company, all as defined by section 736 of the Companies Act 1985 as amended by the Companies Act 1989.
6. Except insofar as the context otherwise requires, words or expressions used in these Consents (including their recitals above) shall have the meaning ascribed to them in paragraph 5 above and otherwise any word or expression shall have the same meaning as it has in the Notification or, if the context so permits, in Schedule 3 thereto, as modified by the Amending Notification, as appropriate.
7. For the purpose of interpreting these Consents:
  - a. headings and titles shall be disregarded; and
  - b. the Interpretation Act 1978 (c. 30) shall apply as if this direction were an Act of Parliament.

*Effective date*

8. Each and every Consent set out above shall take effect on the day it is published.

**Philip Rutnam**  
**Partner, Competition & Strategic Resources**

A person duly authorised on behalf of Ofcom in accordance with paragraph 18 of the  
Schedule to the Office of Communications Act 2002

01 September 2004

## Annex C

# Consents: Orange & T-Mobile

**Consents to Orange Personal Communications Services Limited and T-Mobile (UK) Limited under paragraphs MD3.2, MD3.3, MD3.5(b) and MD3.6 of Conditions MD3, on the one hand, and paragraphs MD4.2, MD4.3, MD4.5(b) and MD4.6 of Condition MD4, on the other hand, both Conditions of which are set out in Schedule 4 to the notification published by the Office of Communications (“Ofcom”) on 1 June 2004 pursuant to sections 48(1) and 79(4) of the Act, as modified by Ofcom by way of publication of a further notification pursuant to section 48(1) of the Act on 01 September 2004**

### WHEREAS:

- A. as a result of a market review carried out by the Director, he proposed on 15 May 2003 and on 19 December 2003 in accordance with section 80 of the Act that each of Orange and T-Mobile has significant market power in wholesale voice call termination provided by each of them via their own respective mobile networks;
- B. the Director was able to exercise powers under the Act pursuant to section 408 of the Act and Article 3(1) of the Communications Act 2003 (Commencement No. 1) Order 2003 until Ofcom assumed those powers on 29 December 2003;
- C. Ofcom having considered every representation duly made, and thereafter on 1 June 2004 pursuant to sections 48(1) and 79(4) of the Act by way of publication of a notification identified the relevant services markets, made market power determinations to the effect referred to in recital (A) above and set certain SMP conditions on Orange and T-Mobile to take effect on 1 June 2004, unless otherwise is stated in Schedule 4 thereto, such as Conditions MD3 and MD4 concerning charge controls of Fixed-to-Mobile and Mobile-to-Mobile Interconnection Charges, respectively;
- D. on 8 July 2004, Ofcom proposed to modify Conditions MD3 and MD4 by way of publication of a notification pursuant to section 48(2) of the Act to make it clear the extent to which Ofcom have power to give Consents thereunder;
- E. Ofcom having considered every representation duly made, and thereafter on 01 September 2004 pursuant to section 48(1) of the Act by way of publication of a further notification modified Conditions MD3 and MD4 in the manner and form proposed by Ofcom;
- F. these Consents concern matters to which Conditions MD3 and MD4, as modified by the Amending Notification, relate and, in particular, the manner in which the Average Interconnection Charge and the Average Revenue shall be weighted;
- G. at paragraph 6.35 of the explanatory statement accompanying the Notification, Ofcom state that: “In terms of an inability to meet two separate controls, as set out in paragraph 6.24 of the December consultation, Consent for compliance with a charge control to change from traffic-specific to total traffic volumes would be expected to be given for the period requested where an MNO is unable to identify the origin of the calls it terminates on its network. This would avoid the potential problem identified by Orange.”;



- H. on 22 and 25 June 2004, Orange and T-Mobile, respectively, requested such Consents under Conditions MD3 and MD4 to cover both respective charge control periods, that is to say for the purposes of the First Relevant Year and the Second Relevant Year;
- I. for the reasons set out in the explanatory statement accompanying these Consents, Ofcom are satisfied that, in accordance with section 49(2) of the Act, these Consents are:
  - i. objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
  - ii. not such as to discriminate unduly against particular persons or against a particular description of persons;
  - iii. proportionate to what they are intended to achieve; and
  - iv. in relation to what it is intended to achieve, transparent;
- J. for the reasons set out in the explanatory statement accompanying these Consents, Ofcom have considered and acted in accordance with their general duties in section 3 of the Act and the six Community requirements in section 4 of the Act;
- K. on 8 July 2004, Ofcom published a notification of the proposed Consents in accordance with section 49(4) of the Act;
- L. Ofcom have considered every representation about the proposed Consents duly made to them; and

**NOW, therefore, pursuant to paragraphs MD3.2, MD3.3, MD3.5(b) and MD3.6 of Condition MD3, on the one hand, and paragraphs MD4.2, MD4.3, MD4.5(b) and MD4.6 of Condition MD4, on the other hand, both Conditions of which are set out in Schedule 4 to the Notification, as modified by the Amending Notification, Ofcom give the following Consents:**

*Condition MD3 – Average Interconnection Charge*

- 1. For the purposes of complying with their respective obligations under Condition MD3 in the First Relevant Year and the Second Relevant Year, Ofcom Consent to Orange and T-Mobile under paragraphs MD3.2 and MD3.3 of that Condition that, until these Consents have been withdrawn, the average of their respective Fixed-to-Mobile Interconnection Charges during the Relevant Year in question shall be weighted according to:
  - a. the profile by Charging Period of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls; and
  - b. the volumes by month or part-month of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls,in the Base Year and, where any Fixed-to-Mobile Interconnection Charges are in force during a part only of the Relevant Year (commencing or ending at a date in the course of the Relevant Year), in the corresponding part of the Base Year, and the term "Average Interconnection Charge" shall, where references are made in

Condition MD3 to the meaning given to it in paragraphs MD3.2 and/or MD3.3, be interpreted and read accordingly.

*Condition MD3 – Average Revenue*

2. For the purposes of complying with their respective obligations under Condition MD3 in the Second Relevant Year, Ofcom Consent to Orange and T-Mobile under paragraphs MD3.5(b) and MD3.6 of that Condition that, until these Consents have been withdrawn, the average of their respective Fixed-to-Mobile Interconnection Charges during the First Relevant Year shall be weighted according to:
  - a. the profile by Charging Period of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls; and
  - b. the volumes by month or part-month of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls,

in the First Relevant Year and, where any Fixed-to-Mobile Interconnection Charges are in force during a part only of the First Relevant Year (commencing or ending at a date in the course of the First Relevant Year), in that part of the First Relevant Year, and the term "Average Revenue" shall, where references are made in Condition MD3 to the meaning given to it in paragraphs MD3.5 and/or MD3.6, be interpreted and read accordingly.

*Condition MD4 – Average Interconnection Charge*

3. For the purposes of complying with their respective obligations under Condition MD4 in the First Relevant Year and the Second Relevant Year, Ofcom Consent to Orange and T-Mobile under paragraphs MD4.2 and MD4.3 of that Condition that, until these Consents have been withdrawn, the average of their respective Mobile-to-Mobile Interconnection Charges during the Relevant Year in question shall be weighted according to:
  - a. the profile by Charging Period of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls; and
  - b. the volumes by month or part-month of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls,

in the Base Year and, where any Mobile-to-Mobile Interconnection Charges are in force during a part only of the Relevant Year (commencing or ending at a date in the course of the Relevant Year), in the corresponding part of the Base Year, and the term "Average Interconnection Charge" shall, where references are made in Condition MD4 to the meaning given to it in paragraphs MD4.2 and/or MD4.3, be interpreted and read accordingly.

*Condition MD4 – Average Revenue*

4. For the purposes of complying with their respective obligations under Condition MD4 in the Second Relevant Year, Ofcom Consent to Orange and T-Mobile under paragraphs MD4.5(b) and MD4.6 of that Condition that, until these Consents have been withdrawn, the average of their respective Mobile-to-Mobile Interconnection Charges during the First Relevant Year shall be weighted according to:

- a. the profile by Charging Period of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls; and
- b. the volumes by month or part-month of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls,

in the First Relevant Year and, where any Mobile-to-Mobile Interconnection Charges are in force during a part only of the First Relevant Year (commencing or ending at a date in the course of the First Relevant Year), in that part of the First Relevant Year, and the term "Average Revenue" shall, where references are made in Condition MD4 to the meaning given to it in paragraphs MD4.5 and/or MD4.6, be interpreted and read accordingly.

### *Interpretation*

5. For the purpose of interpreting these Consents (including their recitals above), the following definitions shall apply:
  - a. "**Act**" means the Communications Act 2003 (c. 21);
  - b. "**Amending Notification**" means the notification referred to in recital (E) of these Consents above;
  - c. "**Director**" means the Director General of Telecommunications as appointed under section 1 of the Telecommunications Act 1984;
  - d. "**Notification**" means the notification referred to in recital (c) of these Consents above;
  - e. "**Ofcom**" means the Office of Communications;
  - f. "**Orange**" Orange Personal Communications Services Limited, whose registered company number is 2178917, and any Orange Personal Communications Services Limited subsidiary or holding company, or any subsidiary of that holding company, all as defined by section 736 of the Companies Act 1985 as amended by the Companies Act 1989; and
  - g. "**T-Mobile**" means T-Mobile (UK) Limited, whose registered company number is 2382161, and any T-Mobile (UK) Limited subsidiary or holding company, or any subsidiary of that holding company, all as defined by section 736 of the Companies Act 1985 as amended by the Companies Act 1989.
6. Except insofar as the context otherwise requires, words or expressions used in these Consents (including their recitals above) shall have the meaning ascribed to them in paragraph 5 above and otherwise any word or expression shall have the same meaning as it has in the Notification or, if the context so permits, in Schedule 4 thereto, as modified by the Amending Notification, as appropriate.
7. For the purpose of interpreting these Consents:
  - a. headings and titles shall be disregarded; and
  - b. the Interpretation Act 1978 (c. 30) shall apply as if this direction were an Act of Parliament.

*Effective date*

8. Each and every Consent set out above shall take effect on the day it is published.

**Philip Rutnam**  
**Partner, Competition & Strategic Resources**

A person duly authorised on behalf of Ofcom in accordance with paragraph 18 of the  
Schedule to the Office of Communications Act 2002

01 September 2004