



Draft 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 “[<]”.

Draft determinations

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Section 1

The Draft 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.¹ 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

¹ 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 [Draft] Determination for resolving this dispute-

Declaration of rights and obligations, etc.

1. With effect from 26 June 2006 the DCC payable by H3G to 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-
 - a) The “Act” means the Communications Act 2003;

- b) "H3G" means Hutchison 3G UK Limited, whose registered company number is 03885486 and whose registered office is at Hutchison House, 5 Hester Road, Battersea, London SW11 4AN;
- c) "O2" means O2 (UK) Limited, whose registered company number is 1743099, and whose registered office is at 260 Bath Road, Slough, Berkshire SL1 4DX;
- d) "Ofcom" means the Office of Communications;
- e) "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.

{date}

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-
- 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 Ofcom issued four determinations concerning the level of the DCC between mobile operators. At the same time Ofcom published an Explanatory Document on Mobile Number Portability Determination Requests.² 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

² 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 [Draft] Determination for resolving this dispute-

Declaration of rights and obligations, etc.

1. With effect from 28 September 2006 the DCC payable by H3G to Orange shall be 0.1 pence per minute.

Binding nature and effective date

2. This Determination is binding as between H3G and Orange.
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-
 - a) The “Act” means the Communications Act 2003;

- b) "H3G" means Hutchison 3G UK Limited, whose registered company number is 03885486 and whose registered office is at Hutchison House, 5 Hester Road, Battersea, London SW11 4AN;
- c) "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;
- d) "Ofcom" means the Office of Communications;
- e) "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.

{date}

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-

- (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.³ 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 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

³ 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;

- (E) 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;
- (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 [Draft] Determination for resolving this dispute-

Declaration of rights and obligations, etc.

1. With effect from 12 October 2006 the DCC payable by H3G to T-Mobile shall be 0.1 pence per minute.

Binding nature and effective date

2. This Determination is binding as between H3G and T-Mobile.
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-
 - a) The "Act" means the Communications Act 2003;
 - b) "H3G" means Hutchison 3G UK Limited, whose registered company number is 03885486 and whose registered office is at Hutchison House, 5 Hester Road, Battersea, London SW11 4AN;

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- c) "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;
- d) "Ofcom" means the Office of Communications;
- e) "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.

{date}

Section 2

Summary

- 2.1 Number portability is a facility that enables subscribers, who so request, to be able to retain their telephone number(s) when they change from one provider to another provider. Under the current arrangements in the United Kingdom, calls to ported numbers are routed using the Onward Routing mechanism. Under Onward Routing, 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.
- 2.2 In the Onward Routing System a charge is payable by the Recipient Network to the Donor Network to cover the costs of conveyance of the call through the Donor Network. This charge is known as the Donor Conveyance Charge (the "DCC").
- 2.3 These disputes concern the level of the DCC payable by H3G to 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 Ofel determination, is out of date and has requested Ofcom to determine a reasonable level for the DCC.
- 2.4 In 1999, following requests from both One2One and Orange for Ofel 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. Ofel also took account of the six principles of cost recovery adopted by the MMC in its inquiry into number portability in the fixed network. Ofel 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 to be split equally between both the donor and the recipient network resulting 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.
- 2.5 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.
- 2.6 H3G began to re-negotiate the level of the DCC with the other mobile network operators on a commercial basis on 26 June 2007 when it sent a Review Notice to O2. During the next few months H3G continued to endeavour to enter into commercial negotiations with O2 and T-Mobile but these operators expressed a reluctance to negotiate this issue on a bilateral basis. Orange maintained that 0.1ppm did not adequately cover costs. Consequently, 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.
- 2.7 Ofcom accepted these disputes for determination on 26 April 2007 having obtained the views of all parties. The scope was to decide whether the level of the DCC paid by H3G was compliant with GC18 and, if this proved not to be the case, determine what that level should be. Ofcom took the view that the scope of the dispute should be limited to the existing method of Mobile Number Portability ("MNP").

2.8 In resolving these disputes, Ofcom has considered, among other things:

- The application of GC18;
- The appropriate level of charges under GC18;
- Analysis of network costs associated with donor conveyance submitted by the parties in dispute;
- Analysis of donor conveyance using Ofcom's mobile call termination ("MCT") cost model;
- The appropriate period for which these determinations should apply.

2.9 In summary, based on the evidence gathered in these disputes and for the reasons set out in these draft determinations and explanatory statement Ofcom's provisional conclusion is that:

- GC18 requires that charges for donor conveyance be cost-based;
- Ofcom's view is that efficient costs are 0.2ppm;
- The costs of donor conveyance should be split equally between the donor and recipient networks in order not to distort the market or compromise the principle of effective competition;
- The Determinations shall apply from 26 June 2006 in the case of O2, 28 September 2006 in the case of Orange, and 12 October 2006 in the case of T-Mobile.

2.10 The background to this investigation is set out in section 3. The history to these disputes is set out in section 4 and the submissions of the parties are set out in section 5. Ofcom's analysis and reasoning is set out in section 6.

Section 3

Background

Mobile Number Portability

- 3.1 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.
- 3.2 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

- 3.3 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.
- 3.4 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.⁴
- 3.5 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

- 3.6 Sections 45 and 58 of the Act provide Of com with the power to set general conditions, including requiring UK communications providers to provide number portability.
- 3.7 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.
- 3.8 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

⁴ See http://www.mmc.gov.uk/rep_pub/reports/1995/fulltext/374c7.pdf, page 116. 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.”

3.9 In this determination 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 4

History of the disputes

The parties to the disputes

H3G

- 4.1 H3G is a wholly owned subsidiary of Hutchison Whampoa Ltd.
- 4.2 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.⁵

O2

- 4.3 O2 UK is part of the wider O2 group which is a wholly-owned subsidiary of Telefónica S.A.
- 4.4 O2 describes itself as 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.⁶

Orange

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

T-Mobile

- 4.7 T-Mobile is the UK subsidiary of T-Mobile International AG, which in turn is owned by Deutsche Telekom.
- 4.8 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

- 4.9 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.

⁵ <http://www.three.co.uk/aboutus/newkind.omp>

⁶ <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.

4.10 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.

4.11 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

- 4.12 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.
- 4.13 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

4.14 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 Bulletin⁷ 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

4.15 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.

⁷ http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_952/

Section 5

The submissions of the parties

H3G

- 5.1 In referring its disputes with O2, Orange and T-Mobile, H3G stated that it could see no justification for the current DCC charged by the MNOs of 0.8ppm, which it believes to be well above cost.
- 5.2 H3G believes that the current level of DCC is far in excess of both actual and efficiently incurred costs. H3G further maintains that this level of DCC guarantees revenue to the MNOs that have lost customers to their competitors of 0.8ppm for the duration of each call made by such a customer. Given that the charge exceeds the cost of routing such traffic, H3G considers that it is distorting competition by overcompensating the MNOs for the inefficient routing of traffic.
- 5.3 H3G also argues that the current methodology of routing ported numbers, i.e. the indirect routing method, is inefficient as it wastes capacity and results in an increased risk of service degradation. H3G therefore proposes a DCC of zero as *“this is reflective of the fact that direct routing has been available as a technology for some years, has been implemented in the majority of member states, and if implemented would mean that no additional conveyance costs would be incurred at all.”*
- 5.4 In responding to Ofcom’s request for information, H3G reiterated its proposals for the DCC to be set at zero because direct routing should already have been implemented in the UK. H3G believes that to do otherwise *“risks that the DCC payments would seriously distort efficient investment incentives and specifically delay the implementation of direct routing in the UK”*.
- 5.5 However, with regard to the actual costs of the indirect routing method, H3G believes the relevant cost basis for donor conveyance should include the donor network’s switching, engineering and transmission costs only. H3G concludes that on its own network, these costs result in a total cost for DCC of 0.05ppm which should be split equally between the donor and recipient networks.

O2

- 5.6 In responding to Ofcom’s request for comments on the scope of the dispute with H3G, O2 made two observations. The first was that it is generally accepted that the cost of routing ported calls is the same for each mobile operator and therefore the outcome of the investigation should apply to all mobile operators. The second observation was that the scope of any investigation undertaken by Ofcom should only cover the appropriate level of the DCC, and should not include the question of whether or not the MNOs should move towards the direct routing of ported numbers.
- 5.7 In responding to Ofcom’s request for information, O2 [§<].

Orange

- 5.8 In responding to Ofcom’s request for comments on the scope of the dispute with H3G, Orange maintained that any determination that may result from an investigation by Ofcom should not be retrospective. Orange stated that the existing charges are based on an Interconnect Agreement commercially agreed between Orange and H3G and therefore until a determination is made in this matter, this legal agreement

should stand. Orange also submitted that backdating of any new charge would be entirely arbitrary and would risk penalising some operators and benefiting others.

- 5.9 In responding to Ofcom's request for information, Orange explained that it had calculated its costs for donor conveyance by using the costs of each individual timeslot, ascertaining the relevant network costs (transmission in, switching and transmission out) and dividing these to determine the cost per timeslot. This was then multiplied by a "utilisation factor". Orange's analysis concluded a total cost for donor conveyance of [redacted] ppm, which Orange rounded up to [redacted] ppm.
- 5.10 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, stating that Orange necessarily incurs these costs "*as a result of having to onward route a call to a number ported to the H3G network*". Orange calculated these costs to be [redacted]ppm.

T-Mobile

- 5.11 In responding to Ofcom's request for comments on the scope of the dispute with H3G, T-Mobile stated that it did not consider it appropriate for Ofcom to accept the request for dispute as it should not be an administrative priority for Ofcom. This was particularly 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". T-Mobile believed the outcome of these two consultations could have an impact on this issue and should be concluded prior to an investigation into DCCs.
- 5.12 T-Mobile maintained that any determination of the DCC should examine the DCC at an industry level, as individual determinations would distort competition and likely lead to further disputes.
- 5.13 In responding to Ofcom's request for information, T-Mobile calculated costs to be [redacted].
- 5.14 T-Mobile, like Orange, believed that BT transit costs should be included in the DCC. Its average per minute cost for these was [redacted].

Section 6

Ofcom's analysis and reasoning

Introduction

6.1 In setting out its analysis and reasoning in resolving these disputes, Ofcom considers:

- Legal framework - the application of GC18;
- 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

6.2 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;
- (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.”

6.3 In this determination 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.

- 6.4 Ofcom's reasoning as to the appropriate level of the charge is set out below.
- 6.5 Ofcom has 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

- 6.6 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.

6.7 Ofcom believes 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.

6.8 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

6.9 For determining the level of the DCC, Ofcom believes 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).

6.10 However, with regard to British Telecom ("BT") transit costs, Ofcom believes that these should now be excluded as a relevant cost. All five mobile operators either have, or are close to achieving, direct interconnection with each other. Therefore Ofcom believes 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 does 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

6.11 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.⁸

6.12 This section describes Ofcom's approach to determining a reasonable unit cost estimate for donor conveyance, based on the information collected. It also includes Ofcom's views on the appropriate split of cost recovery between the donor and recipient networks.

MNO estimates of unit costs

6.13 As set out in Section 5, all four parties to the disputes responded to Ofcom's information request.

⁸ http://www.ofcom.org.uk/consult/condocs/mobile_call_term/statement/

- 6.14 H3G believes 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.
- 6.15 O2 used a fully allocated cost methodology and concluded that the cost of donor conveyance was [X] ppm.
- 6.16 Orange supplied the requested information, but stated that it was strictly confidential and commercially sensitive. 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.
- 6.17 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.
- 6.18 Ofcom has had very limited opportunity to explore the reasons for differences between the MNOs' estimates within the timeframe of this review. 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.

Independent analysis

- 6.19 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.
- 6.20 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.⁹
- 6.21 Ofcom is 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.
- 6.22 Analysys has taken steps to address the need for greater precision in the estimation of donor conveyance costs, however the estimates presented below should still be considered against a background of broader assumptions that were used in the MCT market review.
- 6.23 Ofcom is 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 costs reflects economies of scale. Given that demand itself is uncertain, Ofcom believes that its analysis should take account of the reasonable bounds of

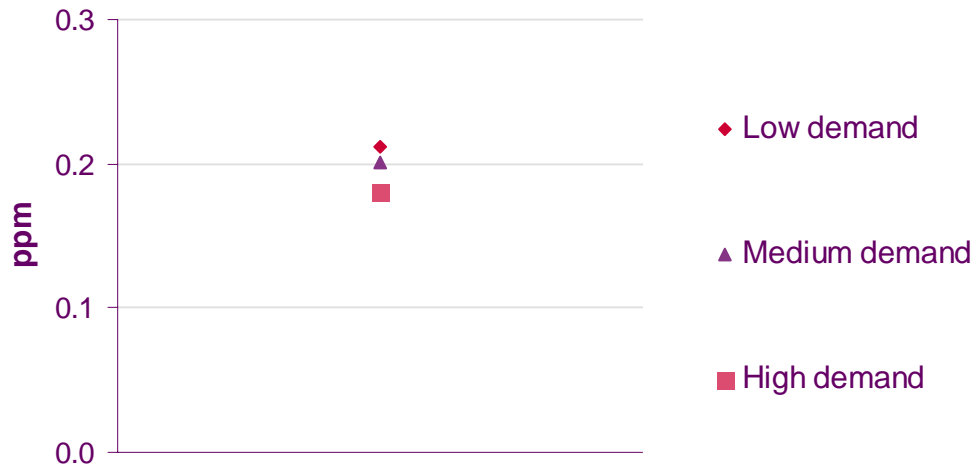
⁹ The changes described here were appropriate in the context of achieving an appropriate level of accuracy for network costs that, according to MNOs, are no greater than 0.3ppm. For clarification, none of the modifications made by Analysys would have affected the cost benchmarks that were used for the March 2007 MCT Statement.

uncertainty that are present in relation to efficient costs. Figure 6.1 provides estimates of efficient unit costs over a range of demand scenarios.

- 6.24 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

- 6.25 Ofcom has 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.
- 6.26 Figure 6.1 shows average efficient cost benchmarks in a range clustered around 0.2ppm. As noted earlier, Ofcom is 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 considers that a reasonable interpretation of Figure 6.1 is that the unit costs of donor conveyance for an average efficient operator are 0.2ppm .
- 6.27 Ofcom considers 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 represents 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.

- 6.28 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.
- 6.29 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.
- 6.30 In this case, Ofcom believes 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 believes that this estimate is not sufficiently large to warrant a special allowance, especially given the scope of uncertainty around donor conveyance costs in general. Ofcom also notes 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).
- 6.31 In light of the above, Ofcom's provisional conclusion is that the reasonable level of efficient costs incurred in providing donor conveyance is 0.2ppm.

Appropriate cost recovery

- 6.32 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. Ofcom believes that this reasoning remains valid in the current market.
- 6.33 Ofcom has 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).
- 6.34 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.

- 6.35 Ofcom believes that Oftel's reasoning remains valid. In reaching this conclusion, Ofcom notes 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 considers that donor conveyance costs should continue to be split equally between donor and recipient networks.
- 6.36 Ofcom's provisional conclusion is 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

- 6.37 H3G has requested that Ofcom backdate its decision in respect of the level of the DCC determined in these disputes. Ofcom has therefore considered the relevant period for which Ofcom's determination should apply. In considering the period for which the revised charge should apply, Ofcom has considered the relevant provisions of GC18 and the commercial negotiations which have led to disputes being referred.
- 6.38 Ofcom notes 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.
- 6.39 The 1999 determinations applied for a period up to 31 March 2000. Since such time, H3G has 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.¹⁰ 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.
- 6.40 In resolving these disputes and determining the relevant period for which Ofcom's determination should apply, Ofcom considers 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 has therefore considered the relevant contractual provisions in order to determine the point at which the parties were no longer in agreement.
- 6.41 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.¹¹ 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

¹⁰ 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.

¹¹ 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.
- 6.42 Ofcom is of the 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 has therefore considered the contractual position in place between each of the parties in determining the date from which the charge should apply.
- 6.43 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.¹² 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 is therefore proposing to uphold a DCC of 0.1ppm between O2 and H3G with effect from 28 May 2006.
- 6.44 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 considers 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 is therefore proposing to uphold a DCC of 0.1ppm between Orange and H3G with effect from 28 September 2006.
- 6.45 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 considers 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 is therefore proposing to uphold a DCC of 0.1ppm between T-Mobile and H3G with effect from 12 October 2006.
- 6.46 Ofcom has included those dates in its draft determinations set out in Section 1.

¹² 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.

Annex 1

Responding to this consultation

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 3 August 2007**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://www.ofcom.org.uk/consult/condocs/XXXX>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email sue.merrifield@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Sue Merrifield
Competition Group
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- Fax: 020 7783 4109
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact XXXX on 020 7XXXX.

Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.
- A1.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish

all responses, including those that are marked as confidential, in order to meet legal obligations.

- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

Next steps

- A1.11 Following the end of the consultation period, Ofcom intends to publish a statement in August 2007.
- A1.12 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: http://www.ofcom.org.uk/static/subscribe/select_list.htm

Ofcom's consultation processes

- A1.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash
Ofcom
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW

Tel: 0141 229 7401
Fax: 0141 229 7433

Email vicki.nash@ofcom.org.uk

Annex 2

Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will normally allow ten weeks for responses to consultations on issues of general interest.

A2.6 There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organizations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

After the consultation

A2.8 We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 3

Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at www.ofcom.org.uk/consult/.
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing

Name/contact details/job title

Whole response

Organisation

Part of the response

If there is no separate annex, which parts?

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)