Neutral citation [2008] CAT 12

IN THE COMPETITION APPEAL TRIBUNAL

Case Numbers: 1089/3/3/07
1090/3/3/07
1091/3/3/07
1092/3/3/07

Victoria House
Bloomsbury Place
London WC1A 2EB

20 May 2008

Before:

VIVIEN ROSE
(Chairman)
PROFESSOR ANDREW BAIN OBE
ADAM SCOTT TD

Sitting as a Tribunal in England and Wales

BETWEEN:

T-MOBILE (UK) LIMITED

-and-

BRITISH TELECOMMUNICATIONS PLC

-and-

HUTCHISON 3G UK LIMITED

-and-

CABLE & WIRELESS UK & ORS

Appellants / Interveners

-and-

VODAFONE LIMITED

ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED

Interveners

-v-

OFFICE OF COMMUNICATIONS

Respondent

Heard at Victoria House from 24 January to 5 February 2008

JUDGMENT ON THE CORE ISSUES

APPEARANCES

Mr. Graham Read QC and Miss Anneli Howard (instructed by BT Legal) appeared on behalf of British Telecommunications plc.

Mr. Matthew Cook (instructed by Olswang) appeared on behalf of Cable & Wireless UK and Ors.

Mr. Jon Turner QC and Mr. Meredith Pickford (instructed by Miss Robyn Durie, Regulatory Counsel, T-Mobile) appeared on behalf of T-Mobile (UK) Limited.

Miss Dinah Rose QC and Mr. Brian Kennelly (instructed by Baker & McKenzie) appeared on behalf of Hutchison 3G (UK) Limited.

Mr. Peter Roth QC, Mr. Josh Holmes and Mr. Ben Lask (instructed by the Office of Communications) appeared for the Respondent.

Mr. Stephen Wisking (Solicitor, Herbert Smith) appeared on behalf of Vodafone Limited.

Miss Marie Demetriou (instructed by Field Fisher Waterhouse) appeared on behalf of Orange Personal Communications Services Limited.

I. INTRODUCTION

1. On 7 July 2007, the Respondent ("OFCOM") issued determinations in five disputes between British Telecommunications plc ("BT") and each of the five mobile network operators ("MNOs"). The determinations were set out in a document called *Determinations to resolve mobile call termination rate disputes between T-Mobile and BT, O2 and BT, Hutchison 3G and BT and BT and each of Hutchison 3G, Orange and Vodafone* and we refer to that document in this judgment as "the BT Disputes Determinations".[1] Four appeals have been lodged against the BT Disputes Determinations, by BT, T-Mobile (UK) Limited ("T-Mobile"), Hutchison 3G UK Limited ("H3G") and by a group of fixed network operators.

2. On 10 August 2007 OFCOM issued its determination of two disputes, one between H3G and Orange Personal Communications Services Ltd ("Orange") and one between H3G and O2 (UK) Ltd ("O2"). That document was called *Determinations to resolve mobile call termination rate disputes between Hutchison 3G and each of O2 and Orange* and we refer to it as "the H3G Disputes Determinations". H3G's appeal against the BT Disputes Determinations also includes a challenge to the H3G Disputes Determinations. In this judgment we shall refer to the BT Disputes Determinations and the H3G Disputes Determinations collectively as "the Disputes Determinations".

3. Following a case management conference on 31 October 2007 the Tribunal ordered that certain issues in these appeals, referred to as the "core issues", should be heard separately from the other issues and that hearing took place between 24 January and 5 February 2008. This is the judgment of the Tribunal on those core issues.

4. The appeals concern prices that the MNOs charge for mobile call termination ("MCT"). MCT is the process of connecting a voice call from the caller's network to the recipient's mobile network. Consumers expect to be able to make calls from their fixed line or mobile phone to any other retail customer irrespective of the

[1] A version with corrected typographical errors was issued by OFCOM on 19 July 2007.

service provider (fixed or mobile) to which the receiving party subscribes. Network operators enter into contractual arrangements with each other for the provision of access to each other's networks. Under those arrangements, the terminating network operator makes a charge for each call terminated on its network, known as the mobile call termination charge. The charge for mobile call termination is expressed in pence per minute or "ppm". Usually the MNOs set different prices for terminating day time, evening and weekend minutes. There are tens of billions of minutes terminated on the networks of the MNOs each year so that changes of a fraction of a penny in the rates make a difference of many millions of pounds in the income and expenditure of these companies.

5. In the United Kingdom there are two main forms of mobile network commonly known as '2G' and '3G'. Second Generation or 2G networks were originally designed to support mobile voice calls and text messaging services using a radio transmission technology known as Global System for Mobile Communications (GSM). 2G networks were subsequently enhanced to support low speed mobile data services such as mobile internet access and picture and multimedia messaging services. Third Generation or 3G networks are aimed at supporting higher speed call services (for video telephony) and higher speed mobile data services for faster internet access and multimedia messaging. The radio technology for 3G is different from that used within 2G but many of the services delivered over the technologies are similar. The key difference is that 2G networks cannot offer the higher speed data services now possible on 3G networks.

6. In 2000 the Government held an auction for licences to operate 3G spectrum. At that time there were four main MNOs in the mobile market using 2G technology: the company now known as O2, Orange, Vodafone Limited ("Vodafone") and T-Mobile. To ensure that there was sufficient competition to encourage the roll out and adoption of 3G technology, the Government designed the auction so that one licence was reserved for a new entrant. The new entrant who acquired the fifth licence was H3G. There are three main spectrum bands used by the five MNOs each of whom has allocations of spectrum within these bands. The sums paid by the MNOs for these licences were considerable. The MNOs differed in the amount

of spectrum they were allocated but they all paid more than £4 billion for their allocation, with one of them paying almost £6 billion.

7. The four MNOs operating in the UK who used to operate only 2G networks now operate both 2G and 3G networks. They are all substantial companies belonging to groups which operate across Europe. They are commonly referred to collectively as the "2G/3G MNOs". H3G, which entered the market as the fifth licensee of the 3G spectrum operates a 3G network only but it has always had roaming arrangements in place so that in areas of the country which are not covered by H3G's 3G network, its customers can interconnect using a 2G network.

8. The dates on which the MNOs began to offer their 2G and 3G services are as follows:

Operator	**2G service**	**3G service**
Vodafone	December 1991	November 2004[2]
Orange	April 1994	March 2004
O2	July 1994	February 2005[3]
T-Mobile	September 1993	October 2005[4]
H3G	n/a	March 2003

9. In addition to the MNOs there are the fixed network operators or FNOs, the largest of which is BT. Fixed network subscribers also need to be able to interconnect with subscribers to mobile networks and BT has in general paid the same mobile call termination charges to the MNOs as the MNOs pay to each other. More than 15 billion fixed to mobile call minutes are originated every year of which BT's share is about 50 per cent. The FNOs also charge each other, and the MNOs, for terminating calls on their fixed networks. The charges that BT can impose for termination are fixed by OFCOM at a level such that, we were told, the average

[2] Vodafone carried out commercial trials of its 3G voice services before the November 2004 launch date and launched its 3G data card services in April 2004.
[3] O2 began to offer 3G data services for business customers in September 2004 and offered 3G voice and data services for post pay customers from February 2005.
[4] T-Mobile began using its 3G spectrum in 2004 but the first 3G specific service was launched in October 2005.

charge is about 0.4 ppm. One of the four appeals lodged against the BT Disputes Determinations is brought by a group of FNOs in Case No 1092/3/3/07; Cable & Wireless UK, Colt Telecommunications, Gamma Telecom Limited, Global Crossing (UK) Telecommunications Ltd, KCOM Group plc, Opal Telecom Limited, Thus plc and Verizon (UK) Limited. We refer to the appellants in that case as "the 1092 Appellants".

10. The UK operates a "calling party pays" ("CPP") system which means that the entire cost of the call is paid for by the calling party. Mobile call termination charges are paid in the first instance by the originating network operator to the terminating operator and thus form an element of the costs which determine the charge collected by the originating operator from its retail subscriber customer.

11. BT is important not only as the major FNO in the UK but also because it provides transit services to other fixed and mobile operators. Cable & Wireless also transits a limited amount of traffic to MNOs. BT directly interconnects with approximately 180 communications providers in the United Kingdom and is under a regulatory obligation as regards certain parts of its transit business - in particular charges it can impose for transit are regulated. Many operators therefore rely on BT to terminate calls with networks under its interconnection agreement rather than having to negotiate their own agreement with each of the 180 communications providers. In such a case BT pays the MCT charge imposed by the terminating network and charges the transiting operator that MCT charge plus the transit fee and an additional circuit charge for conveyance. The MNOs are not able to identify in respect of calls coming from BT whether that comes from a BT subscriber or whether the call originates on the network of an operator who is using BT's transit services to route the call.

12. Because of the transit services offered by BT, other operators can choose either to connect directly with a terminating MNO and negotiate an interconnection agreement and charge directly or to interconnect indirectly via BT, effectively allowing BT to negotiate on its behalf alongside all the other operators who transit their traffic via BT. The option that they choose depends on the termination charge that BT agrees with the terminating MNOs and BT's own charge for transit and the

termination charge that the operator would be able to negotiate directly with the terminating MNO.

13. BT charges its retail subscribers a range of retail price bands for calls from fixed to mobile telephones. In recent years, BT has increased the variety of fixed to mobile bands and has consolidated its retail charges so that calls to each of the four 2G/3G MNOs are now charged at rates that do not discriminate between the four of them. BT has kept a different retail rates band for calls from its network to H3G.

II. REGULATORY BACKGROUND

(i) The EU Legislation

14. Regulation of electronic communications across Europe is now based on the European Common Regulatory Framework ("CRF") which was promulgated in April 2002 and had to be implemented by the Member States by July 2003. This superseded earlier EU regulatory instruments. The CRF comprises (amongst other instruments) Directive 2002/21/EC on the common regulatory framework for electronic communications networks and services [2002] OJ L108/33 ("the Framework Directive") and four other directives referred to in the Framework Directive as the Specific Directives. The most relevant Specific Directive as regards these appeals is Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities [2002] OJ L108/7 ("the Access Directive").

15. Under the Framework Directive the Member States must designate a national regulatory authority ("NRA") to carry out the regulatory tasks set out in the CRF. Such NRAs must be independent of the government of the Member State and must exercise their powers impartially and transparently.

16. These appeals concern the exercise by OFCOM of its dispute resolution powers. These powers derive from two provisions in the CRF, article 20 of the Framework Directive and article 5 of the Access Directive. Article 20 of the Framework Directive provides as follows:

> "1. In the event of a dispute arising in connection with obligations arising under this Directive or the Specific Directives between undertakings providing electronic communications networks or services in a Member State, the national regulatory authority concerned shall, at the request of either party, and without prejudice to the provisions of paragraph 2, issue a binding decision to resolve the dispute in the shortest possible time frame and in any case within four months except in exceptional circumstances. The Member State concerned shall require that all parties cooperate fully with the national regulatory authority.
>
> 2. Member States may make provision for national regulatory authorities to decline to resolve a dispute through binding decision where other mechanisms, including mediation, exist and would better contribute to resolution of the dispute in a timely manner in accordance with the provisions of Article 8. …
>
> 3. In resolving a dispute, the national regulatory authority shall take decisions aimed at achieving the objectives set out in Article 8. Any obligations imposed on an undertaking by the national regulatory authority in resolving a dispute shall respect the provisions of this Directive or the Specific Directives".

17. Article 20 thus covers all disputes arising in connection with obligations under the Framework Directive and the Specific Directives without distinguishing between disputes relating to the provision of network access and other disputes. The 32nd Recital to the Framework Directive describes what Article 20 is meant to achieve. It states:

> "32. In the event of a dispute between undertakings in the same Member State in an area covered by this Directive or the Specific Directives, for example relating to obligations for access and interconnection or to the means of transferring subscriber lists, an aggrieved party that has negotiated in good faith but failed to reach agreement should be able to call on the national regulatory authority to resolve the dispute. National regulatory authorities should be able to impose a solution on the parties. The intervention of a national regulatory authority in the resolution of a dispute between undertakings providing electronic communications networks or services in a Member State should seek to ensure compliance with the obligations arising under this Directive or the Specific Directives."

18. Article 5 of the Access Directive deals with the NRA's functions in respect of interconnection. The CRF recognises that the ability of competitors and potential competitors in the telecoms sector is entirely dependent on their ability to interconnect with the networks of the other market participants – if a service provider cannot offer his customers the ability to call subscribers on other networks he is unable to enter the retail market. Article 5 therefore requires Member States to confer on the NRA the power to require networks to enter into interconnection agreements with each other. Article 5(1) provides:

> "National Regulatory Authorities shall, acting in pursuit of the objectives set out in Article 8 of the Framework Directive encourage and, where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and interoperability of services, exercising their responsibility in a way that promotes efficiency, and sustainable competition and gives the maximum benefit to end-users.
>
> In particular, without prejudice to measures that may be taken regarding undertakings with significant market power in accordance with Article 8, national regulatory authorities shall be able to impose:
>
> (a) to the extent that is necessary to ensure end-to-end connectivity, obligations on undertakings that control access to end-users including in justified cases the obligation to interconnect their networks where this is not already the case; … "

19. Article 5(4) goes on to deal, amongst other things, with the power of the NRA to resolve disputes which arise with regard to access and interconnection:

> "With regard to access and interconnection, Member States shall ensure that the national regulatory authority is empowered to intervene at its own initiative where justified or, in the absence of agreement between undertakings, at the request of either of the parties involved, in order to secure the policy objectives of Article 8 of [the Framework Directive], in accordance with the provisions of this Directive and the procedures referred to in Articles 6 and 7, 20 and 21 of [the Framework Directive]."

20. Article 5(4) thus requires Member States to confer two powers on the national regulatory authority; the power to intervene either on its own initiative or at the request of the parties to a dispute in order to secure the policy objectives referred to. Both articles 20 and 5(4) refer to the policy objectives set out in Article 8 of the Framework Directive. Article 8 of the Framework Directive sets out the policy objectives and regulatory principles of which the NRAs are required to take the utmost account in carrying out their tasks under the Framework Directive and the Specific Directives. We will need to look at these objectives in more detail later but at present they can be summarised as including promoting competition in the provision of electronic communications networks and services by *inter alia* –

(a) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price and quality;

(b) ensuring that there is no distortion or restriction of competition;

(c) encouraging efficient investment in infrastructure and promoting innovation; and

(d) encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources.

(ii) Implementation of OFCOM's dispute resolution powers in the United Kingdom

21. The relevant provisions of the Framework Directive and the Access Directive were implemented in the United Kingdom by the Communications Act 2003 ("the 2003 Act"). OFCOM's dispute resolution powers were set out in section 185 of the 2003 Act. That section applies to disputes relating to the provision of network access and to other disputes relating to rights and obligations conferred or imposed by or under Part 2 of the 2003 Act.

22. OFCOM's task once a dispute has been referred to it is set out in section 188 of the 2003 Act:

> **"188. Procedure for resolving disputes**
>
> (1) This section applies where-
>
> (a) OFCOM have decided under section 186(2) that it is appropriate for them to handle a dispute; or
>
> (b) a dispute is referred back to OFCOM under section 186(6).
>
> (2) OFCOM must-
>
> (a) consider the dispute; and
>
> (b) make a determination for resolving it.
>
> (3) The procedure for the consideration and determination of the dispute is to be the procedure that OFCOM consider appropriate.
>
> (4) In the case of a dispute referred back to OFCOM under section 186(6), that procedure may involve allowing the continuation of a procedure that has already been begun for resolving the dispute by alternative means.
>
> (5) Except in exceptional circumstances and subject to section 187(3), OFCOM must make their determination no more than four months after the following day-
>
> (a) in a case falling within subsection (1)(a), the day of the decision by OFCOM that it is appropriate for them to handle the dispute; and

(b) in a case falling within subsection (1)(b), the day on which the dispute is referred back to them.

(6) Where it is practicable for OFCOM to make their determination before the end of the four month period, they must make it as soon in that period as practicable.

(7) OFCOM must-

(a) send a copy of their determination, together with a full statement of their reasons for it, to every party to the dispute; and

(b) publish so much of their determination as (having regard, in particular, to the need to preserve commercial confidentiality) they consider it appropriate to publish.

(8) The publication of information under this section must be in such manner as OFCOM consider appropriate for bringing it to the attention, to the extent that they consider appropriate, of members of the public."

23. Finally, the remedies that OFCOM can impose on determining a dispute are set out in section 190 of the 2003 Act which, so far as relevant provides:

"190 Resolution of referred disputes

(1) Where OFCOM make a determination for resolving a dispute referred to them under this Chapter, their only powers are those conferred by this section.

(2) Their main power (except in the case of a dispute relating to rights and obligations conferred or imposed by or under the enactments relating to the management of the radio spectrum) is to do one or more of the following-

(a) to make a declaration setting out the rights and obligations of the parties to the dispute;

(b) to give a direction fixing the terms or conditions of transactions between the parties to the dispute;

(c) to give a direction imposing an obligation, enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by OFCOM; and

(d) for the purpose of giving effect to a determination by OFCOM of the proper amount of a charge in respect of which amounts have been paid by one of the parties of the dispute to the other, to give a direction, enforceable by the party to whom the sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment.

(3) Their main power in the excepted case is just to make a declaration setting out the rights and obligations of the parties to the dispute."

24. Sections 185 to 190 implement the dispute resolution powers in both article 20 of the Framework Directive and article 5(4) of the Access Directive. The power to intervene on its own initiative which is also referred to in article 5(4) is implemented by section 105 of the 2003 Act. Section 105 applies where it appears to OFCOM that a "network access question" has arisen and needs to be determined and where they consider that, for the purpose of determining that question, it would be appropriate for them to exercise certain of their powers to set, modify or revoke conditions imposed on communications providers. A "network access question" is defined as "a question relating to network access or the terms or conditions on which it is or may be provided in a particular case".

25. The regulatory objectives set for OFCOM as an NRA are reflected in sections 3 and 4 of the 2003 Act and are discussed below (see paragraphs [84]-[101]).

(iii) OFCOM's market review functions

26. Among the tasks conferred by the Common Regulatory Framework on the NRAs is an obligation to carry out an analysis of relevant markets in the telecoms sector. Once the NRA has identified the relevant markets in its own territory it must determine whether each of those markets is "effectively competitive". Where an NRA determines that a relevant market is not "effectively competitive" it must identify undertakings with "significant market power" ("SMP") on that market and must then impose on such undertakings appropriate specific regulatory obligations or maintain or amend such obligations where they already exist. Those obligations, commonly referred to as the "SMP conditions", include the setting of price controls, as provided for in article 13 of the Access Directive. That article provides that the NRA may set a price control where "a market analysis indicates that a lack of effective competition means that the operator concerned might sustain prices at an excessively high level, or apply a price squeeze, to the detriment of end-users."

27. In February 2003 the EC Commission published a Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation ("the Recommendation on Market Definition"). Market 16 in the Annex to the Recommendation defined "voice call termination on

individual mobile networks" as one of the markets which the NRA ought to analyse to see if it is effectively competitive within that NRA's territory.[5] These obligations were also implemented by provisions in the 2003 Act. Section 45 of the 2003 Act empowers OFCOM to set conditions of various kinds, including SMP conditions. Sections 87 and 88 deal with the setting of price controls.

(iv) Regulation of the market for MCT charges in the United Kingdom

28. The CRF and the 2003 Act superseded the pre-existing regulatory regime in the telecoms sector which had been implemented in the United Kingdom by the Telecommunications Act 1984. In 1999 the former Monopolies and Mergers Commission concluded that the mobile call termination charges of two of the MNOs might be expected to operate against the public interest and recommended the imposition of price controls on termination charges. The former Director General of Telecommunications amended the two MNOs' licences to include charge controls. In 2003 charge controls were imposed in respect of the mobile call termination charges of the four 2G/3G MNOs. Following the coming into force of the 2003 Act and the publication by the Commission of its Recommendation on Market Definition, OFCOM conducted its analysis of Market 16. OFCOM's determinations were set out in its statement dated 1 June 2004 on *Wholesale Mobile Call Termination* ("the 2004 Statement"). Broadly, the 2004 Statement concluded –

(a) that there were separate relevant services markets for mobile call termination on each of the MNOs' networks, regardless of whether termination took place on the 2G or 3G network;

(b) that all MNOs had 100 per cent share of the market for termination on their own network and there were absolute barriers to entry which precluded the possibility of any other undertaking providing mobile call termination services on those markets;

(c) that a price control should be imposed on the price of mobile call termination charges of the MNOs using the 2G spectrum;

[5] In the Recommendation which was updated and reissued in December 2007, the market for voice call termination on individual mobile networks is market 7 rather than market 16.

(d) that there should be no price control in respect of termination using 3G spectrum – at the time this affected only H3G since the other MNOs had not yet launched their 3G services;

(e) the regulatory obligation imposed on H3G did not include a price control in respect of either termination on its 3G spectrum or of termination via its roaming arrangements on 2G spectrum.

29. The price control in the 2004 Statement was set to apply until 31 March 2006. The price control set was based on a cost model of costs incurred by a reasonably efficient 2G network operator. This built upon the previous experience of OFCOM in modelling costs of an FNO.

30. The MNOs who had been made the subject of the price control did not appeal against the 2004 Statement. However, H3G appealed against the 2004 Statement on grounds that OFCOM had erred in finding that it had SMP. The Tribunal's judgment delivered in November 2005 in *Hutchison 3G (UK) Limited v Office of Communications* [2005] CAT 39 ("*H3G (1)*") found that OFCOM had erred in its analysis of market power and remitted the case back to OFCOM. On 27 March 2007, OFCOM published its *Assessment of whether H3G holds a position of SMP in the market for wholesale mobile voice call termination on its network Statement*" ("the Reassessment Statement") confirming its earlier conclusion that H3G had in 2004, and still has, SMP.

31. Meanwhile, on 7 June 2005 OFCOM published a consultation document proposing a one year extension of the price controls set in the 2004 Statement for a further year, until 31 March 2007. On the same day, in parallel with that proposal, OFCOM published a Preliminary Consultation to initiate consideration of the issues which would need to be addressed during the next review of Market 16 for the period after March 2007. Towards the end of 2005, OFCOM issued a statement extending the price control in the 2004 Statement for a further year up to 31 March 2007, making it clear that the extension was not intended to limit in any way the range of conclusions that might be drawn from the consultation that had commenced for the review of the market for the period thereafter.

32. On 27th March 2007, following further consultation, OFCOM published the final statement ("the 2007 Statement") concluding its review of Market 16:

(a) OFCOM confirmed the view it had taken in the 2004 Statement that there are separate markets for the provision of wholesale mobile voice call termination in the UK to other Communications Providers by each of Vodafone, O2, Orange, T-Mobile and H3G;

(b) It also found again that each of the five MNOs has SMP in the market for termination of voice calls on its network(s);

(c) OFCOM decided to impose price controls on the supply of MCT by each of the five MNOs, and that those controls should apply without distinction to voice call termination whether on 2G or 3G networks;

(d) The charge control should apply for 4 years from 1 April 2007 to 31 March 2011;[6]

(e) Average charges of Vodafone, O2, Orange and T-Mobile should be reduced to 5.1 ppm (2006/7 prices) by the final year of the charge control period (1 April 2010 to 31 March 2011). The reduction should be implemented in 4 equal (percentage) steps across the four years starting from the regulated 2G rate which applied in 2006/7 pursuant to the extended price control in the 2004 Statement;

(f) Average charges of H3G should be reduced to 5.9 ppm (2006/7 prices) by the final year of the charge control (1 April 2010 to 31 March 2011). This level reflected cost differences between H3G and the 2G/3G MNOs. The change was to be implemented by an initial reduction to 8.5ppm (2006/7 prices) followed by three reductions each of equal (percentage) change across the next three years (i.e. from April 2008 to March 2011);

(g) Further conditions were imposed requiring provision of voice call termination on fair and reasonable terms and conditions (including

[6] The actual first year rates were adjusted to take account of the fact that the new capped rates came into effect part way into the first year.

contract terms), prohibiting undue discrimination, and requiring charge transparency.

33. The price caps set for the MNOs were based on OFCOM's cost models for 2G and 3G termination. The rates set took account of the differences in costs that OFCOM calculated existed as between 2G and 3G termination and reflected those in the price control, weighting 2G and 3G termination by the forecasts of call volumes.

III. BT'S END-TO-END CONNECTIVITY OBLIGATION AND THE STANDARD INTERCONNECTION AGREEMENT

(i) BT's end-to-end connectivity obligation

34. Another piece of the regulatory jigsaw which is important in this case is BT's end-to-end connectivity obligation. "End-to-end connectivity" describes the process of enabling retail customers to make calls to other customers on the same network or on other providers' networks. We have referred earlier to the importance that is attached in the CRF to access and interconnection and the NRA's task in imposing access requirements to ensure that end-to-end connectivity is achieved.

35. Before September 2006, OFCOM had not imposed an explicit obligation on BT aimed at ensuring end-to-end connectivity. However, it appears that the industry in general and BT in particular acted on the basis that BT was bound, whether formally or informally, to provide interconnection because of BT's obligations as a universal service provider (in accordance with Guidance issued by the former Director General of Telecommunications on "End-to-end connectivity" dated 27 May 2003) and before that, because of a condition in BT's licence under the old regulatory regime. On 13 September 2006 OFCOM imposed a condition on BT under section 74(1) of the 2003 Act requiring it to provide "end-to-end connectivity", that is to say, a condition which obliged BT to purchase wholesale MCT services on reasonable terms from any MNO requesting it to do so ("the E2E Statement"). The end-to-end connectivity obligation is an "access-related condition" for the purposes of section 73(2) of the 2003 Act and that subsection provides that OFCOM may impose such conditions as appears to it appropriate for the purpose of securing efficiency on the part of communications

providers, sustainable competition between them and the greatest possible benefit for the end-users. As we shall see, OFCOM regarded the date on which it imposed the formal obligation as important in its reasoning in the BT Disputes Determinations and this is one of the aspects of the Determinations which is challenged by the appellants.

36. OFCOM explained in the E2E Statement why it decided to impose an end-to-end connectivity obligation only on BT and not on all the MNOs. OFCOM noted that once a communications provider has secured an agreement to connect calls to and through BT's network, they are in a position to connect calls with all other networks (thereby securing end-to-end connectivity for their subscribers) because of BT's position as a transit provider. This meant that imposing an obligation on all providers was neither appropriate nor proportionate.

37. OFCOM further explained its decision as regards the terms and conditions under which BT would be obliged to contract with a public electronic communications network ("PECN"):

> "3.32 Ofcom is also proposing that *BT is not obliged to purchase wholesale narrowband call termination services at any price, but to do so where requested by a PECN and where the terms and conditions offered by that PECN are reasonable.* Whether a particular term or condition (including charge) is reasonable will depend on the particular circumstances relating to any decision not to purchase in the context of the need to ensure end to end connectivity and may lie within a broader range of outcomes than that which might be considered in the circumstances of SMP. In particular, as Ofcom has to ensure that any charges it imposes are proportionate, it is unlikely to set charges at a level set in the context of addressing a finding of SMP." (emphasis added; paragraph [3.32] of the OFCOM consultation document - *End-to-End Connectivity* dated 14 July 2006 is quoted at paragraph [3.53] of the E2E Statement)

38. Condition 1.2 of the end-to-end connectivity obligation therefore qualified BT's obligation to interconnect by providing that the purchase of mobile call termination shall be on "reasonable terms and conditions (including charges)". We refer to this as the "E2E Proviso".

(ii) BT's Standard Interconnection Agreement and dispute resolution

39. When BT enters into an interconnection agreement with another operator it does so on the terms of its Standard Interconnection Agreement or "SIA". This SIA is a

substantial document which sets out a wide range of services provided by BT to the counterparty and by the counterparty to BT. The SIA is entered into for an indefinite term and can be terminated only on 24 months' notice. Clause 12 of the SIA deals with the provision of services by BT to other operators and clause 13 deals with the provision of services by other operators to BT. Both clauses stipulate that the charges payable by the recipient of the services are the charges specified from time to time in a document known as the Carrier Price List. Both clauses also contain provision for the variation of those charges though these are not the same in both clauses.

40. Clause 13 sets out the mechanism whereby the parties can seek to vary the price charged for the services that the MNO provides to BT. It provides that the Operator may from time to time send BT a Charge Change Notice proposing a new charge. BT must then notify the Operator whether it accepts or rejects the proposed variation. Conversely, BT may also propose a change in the Operator's charge and may also serve a Charge Change Notice to which the MNO must then respond. If the party receiving a Charge Change Notice accepts the Charge Change Proposal the parties modify the SIA accordingly. If the party receiving a Charge Change Notice rejects the Charge Change Proposal then the parties must negotiate in good faith. If they fail to reach agreement then either party may refer the matters in dispute to OFCOM; in default of a referral, the charge continues at the prevailing rate. If OFCOM upholds the proposed charge then it may direct that the charge takes effect on the date specified in the Charge Change Notice and the parties must enter into an agreement to modify the Agreement accordingly. If OFCOM does not uphold the proposed change then that Charge Change Notice ceases to be of any effect. The parties to these SIA agreements with BT refer to a Charge Change Notice served under either paragraph 13.2 or 13.3 of the SIA as an "Operator Charge Change Notice" or "OCCN" to distinguish them from a notice concerning a proposed change in BT's prices served under clause 12 of the SIA. It is common ground that when a dispute is referred to OFCOM under clause 13 of the SIA, its jurisdiction to determine the dispute is the jurisdiction now set out in section 185 of the 2003 Act.

41. No information was provided to the Tribunal about the contractual provisions concerning proposed changes to mobile call termination rates as between parties other than BT.

IV. THE BACKGROUND TO THE DISPUTES AND THESE APPEALS

(i) The BT Disputes

42. During the period covered by these disputes, it is important to bear in mind that the rate that the MNOs could charge for termination on their 2G networks was capped by the price controls set in the 2004 Statement. We were told that all the 2G/3G MNOs set their prices at the maximum that they were permitted to do under those price controls. In September 2004, Vodafone began to charge a "blended rate" that is a rate for mobile call termination which incorporates an additional charge in respect of calls which were being terminated on Vodafone's 3G network. The introduction of this blended rate meant that the overall price to the other operators exceeded the cap imposed by the 2004 Statement for 2G termination. Vodafone did not notify the other operators that this was what they had done and the introduction of the charge for 3G termination was not apparent to BT or to the other operators because they do not have access to the information needed about the breakdown of traffic by minutes for different times of day which would have made the blended charge clear.

43. One of the 2G/3G MNOs complained to OFCOM about this with the result that OFCOM directed that Vodafone write to its wholesale customers clarifying the basis of the charges. Vodafone wrote to its customers in January 2006 saying that Vodafone has invested "significant sums" so as to be able to identify separately the total volume of voice traffic termination on its 3G or 2G networks respectively. Vodafone said in the letter:

> "As you will be aware, Ofcom regulates charges for 2G voice termination only and has anticipated the possibility of blending in its formal consultation on termination charge controls. Ofcom is fully aware of Vodafone's blending policy, and has confirmed that for the purposes of assessing compliance with the charge control, it would need to consider just the 2G element of the blended rate".

Thus, we were told that BT first became aware of the fact that the rates being charged included a separate element for 3G termination in January 2006.

44. Orange served an OCCN to introduce its own blended rate in May 2006. BT, after some negotiation, accepted this rate which therefore came into effect as between BT and Orange. But Orange's OCCN was shortly followed by OCCNs from O2 and T-Mobile also seeking to increase the rates by introducing a blended rate. In mid July 2006 BT decided to challenge the introduction of blended rates. It therefore rejected the OCCNs from O2 and T-Mobile and on 19 July 2006 BT served its own OCCNs on Vodafone and Orange seeking lower termination charges which in effect excluded the blended element. On 17 August 2006 BT also served an OCCN on H3G proposing a substantial lowering of the rates that were currently being charged to BT for termination on H3G's 3G network. This OCCN was rejected by H3G and in November 2006, H3G served its own OCCN on BT seeking an increase in its rates over the prevailing rate. At the end of November, BT rejected this OCCN.

45. During the course of December 2006, January and February 2007 these disputes between BT and the five MNOs were referred to OFCOM for determination. The disputed rates were as follows:

    (a) BT and T-Mobile: the rates prevailing as from 1 August 2006 were non-blended rates agreed by BT at 9.092 ppm (daytime), 4.0 ppm (evening) and 4.0 ppm (weekend). In an OCCN of 5 July 2006, T-Mobile proposed new, blended rates of 9.5 ppm (daytime), 4.181 ppm (evening) and 4.181 ppm (weekend). This proposal was rejected by BT. In a second OCCN served on 1 December 2006, T-Mobile issued a further OCCN also proposing blended rates but with a different balance as between times of day – 8.0 ppm (daytime), 6.15 ppm (evening) and 6.15 ppm (weekend). BT also rejected this OCCN. T-Mobile referred the dispute arising from the rejection of these OCCNs to OFCOM on 21 December 2006.

    (b) BT and Orange: the rates prevailing before the service of the disputed OCCNs were blended rates of 7.5 ppm (daytime), 5.7312 ppm (evening) and 5.7312 ppm (weekend). On 19 July 2006, BT issued an OCCN to

Orange proposing a reduction of the rates to 7.4 ppm (daytime) 5.1464 ppm (evening) and 5.1464 ppm (weekend). Orange rejected the proposed reduction and on 22 January 2007, BT referred this dispute to OFCOM.

(c) BT and Vodafone: the rates which the parties had agreed prior to the service of the disputed OCCN were 8.22 ppm (daytime) 3.34 ppm (evening) and 2.74 ppm (weekend). These were blended rates. In an OCCN of 19 July 2006, BT proposed lower termination charges of 7.91 ppm (daytime), 3.22 ppm (evening) and 2.66 ppm (weekend). This proposal was rejected by Vodafone and on 22 January 2007, BT referred this dispute to OFCOM.

(d) BT and O2: the rates which prevailed before the service of the disputed OCCNs were 6.373 ppm (daytime), 6.31 ppm (evening) and 3.14 ppm (weekend). These were not blended rates. On 3 July 2006, O2 proposed blended termination rates to BT of 6.53 ppm (daytime), 6.47 ppm (evening) and 3.22 ppm (weekend). These rates were rejected by BT. On 30 November 2006, O2 served a further OCCN seeking a further increase in the blended rates of 6.845 ppm (daytime), 6.778 ppm (evening) and 3.422 ppm (weekend). These rates were also rejected by BT and on 16 February 2007, O2 referred the dispute with BT to OFCOM.

(e) BT and H3G: the rates prevailing between the parties before the service of the OCCNs were 15.62 ppm (daytime), 10.78 ppm (evening) and 2.51 ppm (weekend). These were not blended rates in the sense of combining different charges for 2G and 3G termination since H3G operates only a 3G network and charges the same MCT rate for calls terminated on its own 3G network as for calls terminated on the 2G network under its roaming arrangements.[7] On 17 August 2006 BT issued an OCCN to H3G in which it proposed lower charges namely 9.09 ppm (daytime), 4.0 ppm (evening) and 4.0 ppm (weekend). These charges were rejected by H3G.

[7] H3G pointed out in argument that by 2010/11 the volume of traffic that is terminated by H3G on the 2G roaming partner's network is expected to be very small, so that any adjustment to the termination charge to take account of that traffic would be negligible. For this reason, OFCOM concluded that altering the model to account for national roaming would not impact its final conclusions on charge levels: see paragraph 9.30 of the 2007 Statement.

Following correspondence between the parties, H3G proposed an increase in charges, though without formally serving an OCCN. The charges proposed by H3G on 22 November were 19.9 ppm (daytime), 14.15 ppm (evening) and 14.15 ppm (weekend). BT rejected these proposed increases and on 22 January 2007 BT referred to OFCOM the dispute arising from H3G's rejection of its August OCCN. On 19 March 2007, H3G asked OFCOM to determine the dispute arising from BT's rejection of the price increases proposed on 22 November 2006.

46. As can be seen from this,[8] the disputes involving Vodafone and Orange concerned BT's proposed reduction of the rate from the pre-existing blended rate and the disputes between BT and T-Mobile and O2 concerned the MNOs' proposed increase of the rate to introduce a blended rate. For ease of exposition, however, this judgment refers to the 2G/3G MNOs' "proposed rates" as being the blended rate that the 2G/3G MNO wishes to receive even though in the case Vodafone and Orange that rate was actually being paid by BT rather than simply proposed by the operator. Similarly in referring to H3G, the H3G proposed rate is the rate proposed by H3G on 22 November 2006, although the dispute between BT and H3G involves both those rates and the reduction in rates proposed by BT in August 2006.

(ii) The H3G Disputes

47. Both the dispute between H3G and Orange over Orange's mobile call termination rate and the dispute between H3G and O2 over O2's rates, concern Notices of Variation, which we assume have the same effect as OCCNs, proposed by Orange and O2 under their respective contracts with H3G, seeking to introduce a blended rate for 2G and 3G termination:

    (a) As between H3G and Orange: in July 2006 Orange informed H3G that it intended to introduce blended rates. On 11 July Orange sent H3G a Notice of Variation setting out the underlying 3G rates. H3G rejected these proposed rates and on 21 March 2007 referred the dispute with Orange to OFCOM.

[8] The prevailing and disputed rates were set out in a Table in paragraph 3.1 of the BT Disputes Determinations.

(b) As between H3G and O2: on 28 July 2006 O2 issued a notice of variation to H3G proposing a blended rate and on 30 November issued a further notice with a further increase in the rates. H3G again rejected these rates and referred the dispute to OFCOM on 21 March 2007.

48. In relation to both these disputes, H3G requested OFCOM to set the rates payable to Orange and O2 at no more than the existing rates for 2G termination because H3G was aware that this was the stance that BT was taking in its disputes with the 2G/3G MNOs and H3G did not want to pay more for termination than BT was paying. In the alternative, H3G argued that the rates should be determined on the basis of the cost model that OFCOM had developed in the context of the SMP market review which led to the 2007 Statement.

(iii) OFCOM's procedure in determining the disputes

49. So far as the BT Disputes were concerned, during February 2007, OFCOM opened its investigation into the disputes referred to it by O2, T-Mobile and BT (that is, BT's disputes with Orange, Vodafone, O2 and the H3G dispute relating to the OCCN issued by BT to H3G on 17 August 2006). The scope of the investigation was confirmed by an announcement on OFCOM's on-line Competition Bulletin. Subsequently the H3G dispute with BT relating to H3G's increased rates proposed on 22 November 2006 was added into the investigation. Orange launched an appeal against various aspects of OFCOM's decision to accept jurisdiction over the disputes between Orange and BT. The Tribunal's judgment on the preliminary issues raised by that appeal was delivered on 21 December 2007: see *Orange Personal Communications Services Limited v Office of Communications* [2007] CAT 36. The Tribunal dismissed Orange's challenge to OFCOM's jurisdiction and, with the permission of the Tribunal, the remainder of Orange's appeal was later withdrawn.

50. On 10 May 2007, following its consideration of responses from the parties, OFCOM issued draft determinations to each of the parties to the disputes and non-confidential versions of these were published on OFCOM's website on 14 May 2007. Later in May BT sent corrected versions of some of the data it had provided and this prompted OFCOM to extend the period during which the disputes

were resolved. The BT Disputes Determinations were published on 7 July 2007. In April 2007, OFCOM opened a separate investigation into the H3G Disputes with Orange and O2 and details of these were also published in the Competition Bulletin. Again, following consideration of submissions from the parties, OFCOM published draft determinations in July 2007 and the final Determinations were published on 10 August 2007.

51. Part way through OFCOM's investigations into these disputes OFCOM published the 2007 Statement setting the price control as a result of its market review for the period 1 April 2007 until 31 March 2011. This did not render the dispute resolution procedure redundant because there was still a period of several months between the date that the various disputed OCCNs were due to take effect, if upheld by OFCOM, and the coming into effect of the price controls set by the 2007 Statement. The imposition of the price controls in the 2007 Statement did not mean that the MNOs were bound to reduce their prices on 1 April 2007 to come into line with the first year target charge but rather that their overall pricing policy as from that date was governed by the requirement imposed on them to ensure that the average charges over the following twelve months accorded with the first year target.

(iv) The appeals against the Disputes Determinations

52. Four appeals have been lodged against the BT Disputes Determinations; H3G's appeal also challenges the lawfulness of the H3G Disputes Determinations. We have referred to them collectively as the Termination Rate Dispute Appeals:

    (a) BT lodged its appeal on 7 September 2007 challenging the BT Disputes Determinations. The relief sought was for the Tribunal to set aside the Determination, to declare that the disputed 3G rates were unreasonable and excessive and to remit the matter to OFCOM with specific directions as to how it should reconsider resolving the disputes;

    (b) The 1092 Appellants lodged their appeal on 7 September 2007 challenging the BT Disputes Determinations. They asked the Tribunal to quash the Determinations and remit the matter to OFCOM with guidance

from the Tribunal as to, amongst other things, the principles applicable to the dispute resolution procedure;

(c) T-Mobile lodged its appeal on 6 September 2007. T-Mobile challenged the determination of the dispute between BT and H3G because it uses BT as a transit for its calls to the H3G network. It also challenged one aspect of the determination of the dispute between BT and T-Mobile relating to OFCOM's decision not to uphold a second OCCN served by T-Mobile. That latter issue was not one of the core issues heard and is not part of this judgment. T-Mobile asked the Tribunal to set aside the H3G/BT determination and to require OFCOM to reassess the reasonableness of the rates proposed by H3G taking into account such factors as the Tribunal may determine as appropriate;

(d) H3G lodged its appeal on 7 September 2007. It challenged both the BT Disputes Determinations and the H3G Disputes Determinations and asked for them to be set aside.

53. Each of the appellants was granted permission to intervene in the three other appeals and Orange and Vodafone were granted permission to intervene in all four appeals. In a ruling handed down on 20 November 2007, the Tribunal refused to extend the time limit for Software Cellular Network Limited (trading as Truphone) to intervene in the proceedings: see [2007] CAT 31.

54. By the time these appeals were lodged, the Tribunal was already seised of two challenges to the 2007 Statement. The first appeal was brought by H3G (Case No. 1083/3/3/07) ("the H3G MCT Appeal"). BT, Orange, O2, Vodafone and T-Mobile were granted permission to intervene in the H3G MCT Appeal in July 2007. The second of those appeals was brought by BT (Case No. 1085/3/3/07). Orange, H3G, O2, Vodafone and T-Mobile were granted permission to intervene in that appeal also in July 2007. There was a certain degree of overlap between the issues raised by those appeals and the issues raised by the Termination Rate Dispute appeals. By an order dated 31 October 2007 in the Termination Rate Dispute appeals and an order dated 20 November 2007 in the H3G MCT Appeal,

the Tribunal ordered that the overlapping issues in those cases be heard at a combined hearing in January and February 2008.

55. Some of the appellants lodged statements from witnesses of fact:

BT's witnesses

(a) At the time of the disputes Mr Mark Amoss, who is Business Manager, Regulatory Sales in the Wholesale Markets division of BT Wholesale, is responsible for managing all commercial mobile interconnection issues, managing interconnection payments and collecting revenues from MNOs for BT call termination and transit traffic. He gave evidence describing BT's transit business; explaining the background to the introduction of the blended rates and BT's response to them and describing the effects on BT's transit business of the rates approved by OFCOM in the BT Disputes Determinations.

(b) Mr Richard Budd, who is a Regulatory Economics Manager of BT, is an economist and has been involved in advising BT on its responses to OFCOM consultations on MCT rates. He gave evidence about the changes in the mobile call termination market between the date of the 2004 Statement and the resolution of the BT disputes; explained BT's objections to OFCOM's reasoning in the BT Disputes Determinations and provided information about benchmarks to which BT argues OFCOM should have had regard in its decisions.

(c) Dr Geoffrey Haigh who is Chief Technology Officer for Convergence, BT Retail works in BT on the development of a range of fixed and mobile convergence products within BT Retail. He gave technical evidence about how mobile networks work and the different uses of 2G and 3G spectrum.

(d) Mr Timothy Keyworth who is an economic consultant who gave evidence commenting on the use by OFCOM of the gains from trade test discussed below.

(e) Mr Robert Jeffrey Richardson who is the Director of Strategy in BT Retail gave evidence on a number of aspects of BT's appeal including BT's arguments that there was ample material available to OFCOM showing that the proposed rates were too high, criticising the use of the gains from trade test and emphasising that BT does not perceive any advantage for its customers in terminating voice calls on 3G spectrum.

Other witnesses

(f) Mr Maxwell Miller who was at the material time Head of the Carrier Services department at T-Mobile, Mr Nicholas Harding who is Senior Regulatory Manager for Cable & Wireless and Mr Ulf Granberg who is Head of Telecoms Regulation for Carphone Warehouse Group plc all gave evidence about the effect on BT's transit customers of OFCOM's approval of the rates proposed by the MNOs.

56. None of these witnesses was cross examined and accordingly their evidence was unchallenged so far as it related to primary factual matters. All the parties emphasised at the hearing that they relied not only on the points made in their oral submissions but on the points raised in their pleadings, witness statements and their skeleton arguments. The Tribunal has carefully considered all the written material submitted by the parties as well as the oral argument, in arriving at the conclusions set out in this judgment.

V. OFCOM'S REASONING IN THE DISPUTE DETERMINATIONS

57. The appellants in these four appeals take issue with almost every aspect of the way in which OFCOM approached its task of resolving these disputes. It is necessary therefore to describe in some detail the reasoning set out in the Determinations.

(i) The BT Disputes Determinations

58. Looking first at the BT Disputes Determinations, OFCOM divided the period covered by the dispute into two parts – the period before 13 September 2006, that being the date on which OFCOM imposed the end-to-end connectivity obligation

on BT, and the period after that date. OFCOM regarded the disputes between the MNOs and BT after that date as effectively being disputes about whether BT was obliged under its end-to-end connectivity obligation to interconnect on the terms being offered by the MNOs – in other words whether the terms and conditions on offer were "reasonable" within the meaning of the E2E Proviso.

59. As regards the period before 13 September 2006 OFCOM said it had to consider what the relevant framework for the resolution of the disputes should be. OFCOM referred back to the 2004 Statement in which it had decided not to impose regulation on the price of 3G termination for the period covered by that market review. OFCOM went on to say:

> "4.19 Consistent with and giving effect to its decision in the [2004 Statement], OFCOM does not consider it appropriate to effectively impose SMP type regulation on 3G voice call termination charges in the context of the present disputes.
>
> 4.20 Ofcom adopted an explicit position in 2004 with regards to the regulation of 3G termination and does not propose to act in a manner contrary to the position adopted. In the absence of existing regulatory obligations, Ofcom set out in the draft determinations that it sees no overriding policy objective to impose new regulatory obligations retrospectively in the present circumstances where Ofcom has explicitly chosen not to regulate 3G termination charges. As set out in the [2004 Statement], the absence of regulation on 3G termination rates means that the MNOs are free to determine the appropriate level of charges for 3G termination on their own network, subject to ex-post competition law.
>
> 4.21 To the extent that MNOs have set a blended charge for call termination on their respective networks which include a 2G and a 3G element, only the 2G element is regulated, and neither the 3G charges nor those blended charges are subject to regulation. Therefore, subject to ex-post competition law, MNOs may set the level of blended charges for call termination on their respective networks as they consider appropriate, provided that the 2G element of their charges complies with their SMP conditions and the relevant charge controls.
>
> 4.22 Ofcom indicated in the draft determinations that, in any event, even if Ofcom were to have imposed a requirement on BT to provide end-to-end connectivity for the period *prior* to 13 September 2006, Ofcom did not consider that this would have a material bearing on the outcome of the present disputes. The period of time involved is short and the same conclusion would be reached.
>
> 4.23 In light of the above, Ofcom set out its conclusion that, for the period prior to 13 September 2006, the relevant regulatory framework to be applied is that set out in the [2004 Statement], namely that MNOs are free to set the charges that they offer to purchasers of their 3G call termination services. Blended charges, combining a regulated and unregulated element, are also not subject to any SMP conditions, other than to the extent that the regulated element must comply with the relevant charge control or SMP condition. MNOs are therefore able to set such blended rates as they consider appropriate, subject to competition law". (emphasis in original)

60. OFCOM went on to consider whether it was reasonable for the MNOs to set a termination charge which is the same irrespective of whether the particular call in fact terminates on the 2G or 3G network. OFCOM referred to having made a "number of public statements" concerning blended termination charges, citing as an example the preliminary consultation document issued in July 2005 as part of the market review which led to the 2007 Statement. OFCOM explained that for practical reasons and for reasons of economic efficiency, it was reasonable to charge a blended rate, rather than setting a price for 2G termination and a price for 3G termination and then charging the appropriate price for a particular call depending on whether that call was terminated on the 2G or 3G network.

61. OFCOM went on:

> "4.39 Ofcom indicated that this conclusion has an important implication for Ofcom's approach to considering the reasonableness of the blended termination charges in these disputes, specifically why it is only necessary to focus on the blended charge in resolving the disputes. It is only necessary to consider the reasonableness of the blended charge (i.e. the output from the way the charge is calculated), not the way in which the blended charge was calculated (in particular the underlying 3G charge). This is because the blended charge is what BT actually pays for each minute of termination (i.e. it is the contractually applicable charge). The underlying 3G rate is not paid in any commercially realistic sense on any minute of termination – instead its relevance is only that it contributes to the derivation of the blended charge, which is the charge that is paid by BT."

62. OFCOM then considered whether the blended charge should be no higher than the rate for 2G termination since BT's reason for referring the disputes was its belief that the most appropriate charge for call termination was the regulated 2G rate, regardless of whether termination took place on the 2G or 3G network. OFCOM noted again that during the period covered by the 2004 Statement, only 2G call termination was regulated. This meant that "the only ex-ante regulation in place which is relevant to an assessment of the blended termination charges during this time is BT's End-to-End Connectivity Obligation in the period following 13 September 2006". OFCOM therefore considered the purpose of the end-to-end connectivity obligation and what that indicated about the proper test for establishing the reasonableness of the charges proposed by the MNOs. OFCOM said:

> "4.43 The purpose in the End-to-End Obligation of the requirement for "reasonable charges" is so that BT's obligation to purchase is not completely unbounded. The purpose is not to regulate terminating operators because of competition problems in the markets for the supply of mobile call termination. There is a separate set of powers and processes to address questions relating to the exercise of significant market power by terminating operators, specifically via market reviews of termination markets and SMP obligations. In Ofcom's view as a matter of policy, these would be the appropriate way to address significant market power, not by using the End-to-End Obligation imposed on BT, the purchaser of termination in these disputes, to control the charges of the MNOs."

63. Given the purpose of the end-to-end connectivity obligation, OFCOM did not consider that the strictly cost based regulated 2G charge set by the 2004 Statement should act as a price ceiling in assessing the reasonableness of the charges to be paid by BT under that obligation. Thus the blended charge could be higher than the regulated 2G charge without being unreasonable.

64. Having rejected the use of the 2G regulated rate as a ceiling, OFCOM went on to consider what test it should apply to determine whether the prices proposed were reasonable. It rejected setting "a strictly cost based charge" first, because it was unnecessary and disproportionate to achieve the purpose underlying the end-to-end connectivity obligation and secondly, because it was not appropriate, as a matter of policy, "to use the dispute resolution process as a substitute for (or in a manner that is inconsistent with) decisions already taken under the appropriate regulatory processes for addressing the question of significant market power…".

65. The primary test that OFCOM decided to apply in assessing "reasonableness" in these disputes was a "gains from trade" test. Given the purpose of the end-to-end connectivity obligation, which is to ensure that connectivity is achieved, OFCOM considered that it would be reasonable to require BT to purchase call termination from the MNOs so long as BT would make a profit from connectivity with each MNO at the price that the MNO wished to charge. Applying the gains from trade test in this context meant determining whether BT would be making a profit (relative to incremental cost) when providing fixed to mobile calls to the MNO in question at the proposed disputed charges. If it could be shown that BT would be making a profit at the proposed disputed charges, then OFCOM considered that the charges should be upheld as reasonable. If, however, BT made no profit, or a loss, then it would appear that BT would derive no gains from trade with the MNO in

question. In that situation, OFCOM would have to consider whether BT could pass through the increased charges to its customers and make a gain from trade from such higher prices.

66. OFCOM set out the method for applying the gains from trade test in some detail and, having been provided by BT with the necessary information, found that BT was profitable under all the actual and proposed charges from the MNOs except for the charges proposed by H3G in November 2006. Those proposed H3G charges (see paragraph [45(e)] above) were expressed as a weighted average charge of 16.6 ppm and that was shown to be above the price at which BT would break even, given BT's retail prices prevailing over the relevant period. OFCOM dealt with this point as follows:

> "4.89 Ofcom noted that BT did not pass through this increased charge (i.e. increase its retail prices) in response to H3G's proposed increase. This was evidenced by an analysis of BT's monthly revenues from fixed-to-mobile calls to H3G. These revenues did not indicate that BT increased its retail price for calls to H3G to cover a proposed increase in costs (termination outpayments to H3G) of almost 6 ppm on average.
>
> 4.90 In the draft determinations Ofcom stated that BT could have passed through the increased charges arising out of the November 2006 charge increase to its customers. If BT had taken this opportunity, Ofcom considered that it would have passed the gains from trade test. BT could have raised its retail prices and increased its average revenue for calls to H3G, to at least cover its incremental costs.
>
> 4.91 Ofcom therefore considered that there was evidence that the charges proposed by H3G in November 2006 would be reasonable for the purposes of the End-to-End Obligation."

In other words, because BT could pass the price increase on to its own customers prospectively, it could make a profit on the trade with H3G and so this price too passed the gains from trade test.

67. As well as applying the gains from trade test OFCOM considered whether there were any benchmarks against which it could measure the reasonableness of the proposed charges. Given that the charges of all five MNOs were in dispute it was not possible to compare the charges of one against the other. So far as overseas comparisons were concerned, OFCOM said that these were "unlikely to be sufficiently relevant to enable a robust conclusion to be drawn".

68. As to a comparison between the proposed charges and the regulated 2G rate as set in the 2004 Statement, OFCOM compared the blended disputed average termination charges of the 2G/3G MNOs with the regulated 2G termination charges. All the disputed termination charges which it proposed to uphold were less than 10 per cent higher. This demonstrated, in OFCOM's view, that the blended charges "were sufficiently close to the regulated 2G termination charges to provide evidence that the blended charges are reasonable". Although the rates proposed in November 2006 by H3G were "substantially higher" than the regulated 2G charges of the 2G/3G MNOs, OFCOM did not consider that any reliable inference could be drawn from this comparison that H3G's charges were unreasonable.

69. OFCOM described the responses it had received to the draft BT Disputes Determinations that it had published in May 2007 and set out its response to them. It is apparent that BT raised many of the points that it has raised in this appeal. OFCOM however confirmed the appropriateness of the gains from trade analysis and the benchmarking analysis of relevant comparators and stated its conclusions in the following terms:

> "8.1 … Ofcom considers that the disputed charges are reasonable in the context of the End-to-End Obligation, for the following reasons:
>
> • BT would have obtained historic gains from trade in relation to charges proposed by each of T-Mobile and O2 and did obtain gains from trade in relation to the charges that were in place with H3G, Orange and Vodafone up until 1 April 2007;
>
> • BT would not have been profitable in delivering calls to H3G's network on the basis of the charges proposed by H3G in November 2006, however, BT could have passed through these increased charges to its retail and transit customers and so would have obtained gains from trade at this charge, even though it chose not to do so;
>
> • The charges proposed by T-Mobile and O2 and also the charges that were in place with Orange and Vodafone up until 31 March 2007 are all within 10% of each MNO's regulated 2G charges; and
>
> • There would also be gains from trade at these charges for the terminating MNOs."

70. OFCOM therefore made the following determinations:

    (a) As between BT and T-Mobile, OFCOM declared that the charges contained in the OCCN issued by T-Mobile to BT on 5 July 2006 were

reasonable charges and should apply until such time as alternative charges are put in place. It also ordered BT to pay to T-Mobile, by way of adjustment of an underpayment, the difference between the amounts paid and the OCCN charges dating back to 1 September 2006 which was the date set by the OCCN for those charges to come into effect. OFCOM did not uphold the charges in the second OCCN which had been served by T-Mobile on BT on 1 December 2006. OFCOM stated that based on the evidence available, its understanding was that the second OCCN would not have been issued had BT accepted the first OCCN. Since BT was being ordered to pay charges on the basis of the first OCCN, it was not appropriate to order BT to pay the second uplift.[9]

(b) As between BT and Orange, OFCOM declared that the charges proposed by Orange to BT in its proposal of 23 May 2006 were reasonable charges and should apply until such time as alternative charges are in place. Since BT had been paying these charges over the relevant period, no adjustment for underpayment was necessary.

(c) As between BT and Vodafone, OFCOM declared that the charges proposed by Vodafone to BT on 30 June 2006 were reasonable charges and should apply until alternative charges were put in place. Again, as BT had been paying these charges in the interim, no adjustment was required.

(d) As between BT and O2, OFCOM declared that the charges in both the OCCN issued by O2 on 3 July 2006 and that issued on 30 November 2006 were reasonable and that the charges set by the latter OCCN remained effective between the parties until such time as an alternative price was put in place. BT was ordered to make payments to O2 by way of adjustment of an underpayment to make up the differences between the rates actually paid and the charges which should have been paid as from the dates at which OFCOM determined the increased rates should have taken effect.

[9] T-Mobile's appeal has challenged this rejection by OFCOM of the 1 December 2006 OCCN but that issue was not considered during the hearing in January/February 2008.

(e) As between BT and H3G, OFCOM considered representations from BT that the letter sent by H3G on 22 November setting out the new proposed rates did not comply with the contractual requirements for an OCCN. OFCOM concluded that it would not be appropriate to determine that the dispute between BT and H3G did not exist because of the invalidity of the proposed charge increase (see paragraph [6.45] of the BT Disputes Determinations). In the draft determinations published in May 2007 OFCOM had proposed that because it had found first that BT would not make a gain from trade at the proposed prices and also that BT had acted reasonably in not in fact passing on the increase to its own customers during the period of the investigation, OFCOM would not order BT to make an adjustment payment backdating the November OCCN in full. For reasons which we explain later in this judgment, OFCOM revised this approach by the time of the issue of the BT Disputes Determinations and ordered BT to make a full adjustment payment of the difference between the charges proposed on 22 November 2006 and the rates that BT had been paying in the interim.

(ii) The H3G Disputes Determinations

71. OFCOM noted that in referring the disputes, H3G had asked OFCOM to determine that the rates charged by Orange and O2 should be the same as their underlying 2G rates. In the alternative, H3G had asked that the rates should be determined "via an appropriate implementation of the mobile call termination cost model that OFCOM has developed in the context of its review of mobile call termination markets". OFCOM therefore considered first whether it was appropriate to set a blended charge which results in charging the same price irrespective of whether the call is in fact terminated on the 2G or 3G network. OFCOM concluded that for practical reasons and for reasons of economic efficiency it was appropriate to do so. OFCOM also referred to "a number of public statements concerning blended termination rates" in which it "did not preclude" the MNOs from setting blended rates.

72. Turning to the question whether the blended rate should in fact be the same as the 2G regulated rate, OFCOM noted that H3G had said that it does not want to pay

more for termination than BT. In the BT Disputes Determinations, OFCOM had focused on the end-to-end connectivity obligation. OFCOM continued:

> "5.22 As the End-to-end connectivity obligation applies to BT only, it is not relevant to the disputes that H3G has referred against Orange and O2. Therefore, unlike the situation in the BT disputes, there is no obligation that the disputed termination charges must be purchased by H3G on reasonable terms and conditions as envisaged in the End-to-end connectivity obligation. H3G has recognised that the End-to-end connectivity obligation is not relevant to its disputes with O2 and Orange.
>
> 5.23 Therefore in the draft determinations Ofcom stated that, in the circumstances of these disputes, the only regulation in place during the period in question was the charge control on 2G termination. This was implemented as a result of the [2004 Statement], which clearly distinguished between 2G termination and 3G termination (although each of the MNOs was found to have SMP in both). Unlike 2G termination, no SMP price obligations were placed on 3G termination and a deliberate decision was made to impose no controls on 3G termination charges. As set out in section 3, Ofcom took this view because it would have been disproportionate to do so (…). As previously mentioned … Ofcom has recognised that MNOs were likely to blend their 2G and 3G call rates on the basis of the expected relative weighting of 2G and 3G traffic and offer a single blended charge for mobile call termination, which would be different from the regulated charge for 2G termination.
>
> 5.24 In the draft determination Ofcom also noted that H3G has identified cost differences in 2G and 3G termination and the impact that this will have on termination charges in correspondence with both O2 and Orange. On 8 August 2006 H3G stated in a letter to O2 that "*While we appreciate that your costs for 3G may well be higher than your 2G costs, and that appropriate rates for 3G termination are likely to be different as a result, we note that Ofcom is at the present time reviewing both 2G and 3G call termination rate issues and whether to impose a price control as an SMP condition*". Ofcom also noted H3G's letter to Orange of 12 September 2006 in which it states that "*While we appreciate that your costs of terminating 3G calls may currently be higher than your 2G costs, and that appropriate rates for 3G termination are likely different than those for 2G as a result, we cannot currently accept the proposed changes without further justification*".
>
> 5.25 The draft determinations outlined that it would be contrary to Ofcom's clearly stated position in the [2004 Statement] if Ofcom now considered that blended charges must be the same as the regulated 2G charges for the period prior to 1 April 2007. The blended charges offered by O2 and Orange during this period can be different from and higher than the regulated charge for 2G termination and the underlying 3G charge for 3G termination during this period can be different from and higher than the regulated charge for 2G termination." (emphasis in original)

73. As regards H3G's request that OFCOM should set a cost based charge OFCOM repeated what it had said in the BT Disputes Determination that "it did not consider it appropriate to use the dispute resolution process as a substitute for (or in a manner that is inconsistent with) decisions already taken under the appropriate regulatory processes for addressing the question of significant market power".

OFCOM therefore considered it would not be appropriate "to effectively retrospectively impose regulation on providers in a situation in which it has explicitly chosen not to impose SMP-type regulation". This was, OFCOM stated, in order to ensure regulatory certainty and consistency.

74. There was then a paragraph headed "Consistency with the Community Requirements and OFCOM's duties" in which OFCOM stated that since the decision taken in the 2004 Statement not to regulate 3G termination was consistent with the Community requirements and OFCOM's duties, it was not appropriate for it to adopt an approach to the present disputes which was inconsistent with that. OFCOM therefore upheld the increases in rates proposed by Orange and O2.

VI. THE CORE ISSUES RAISED BY THE APPELLANTS' CHALLENGES TO THE DISPUTES DETERMINATIONS

(i) The main grounds of appeal

75. All of the Termination Rate Dispute appeals raised similar arguments alleging errors of law by OFCOM in the way it went about determining the disputes. In this judgment we will focus on the BT appeal. BT's challenge to the BT Disputes Determination can be summarised as follows. First BT contends that OFCOM has refused properly to exercise its powers for determining disputes. This is because:

(a) OFCOM failed to take account of its wider regulatory obligations. BT argues that OFCOM focused too much on BT's end-to-end connectivity obligation and ignored or gave insufficient attention to the regulatory framework as a whole;

(b) OFCOM wrongly compartmentalised its regulatory role and rejected any form of cost based analysis of the reasonableness of the price comparison because it regarded that as usurping the function of SMP regulation. OFCOM not only rejected arguments that it should set a strictly cost based price but also failed to consider whether any comparison of price to cost, falling short of setting a strictly cost based price, was appropriate;

(c) OFCOM placed undue weight on the need for consistency with what it regarded as having been settled by the 2004 Statement.

76. Secondly, BT criticises the methodology adopted by OFCOM in assessing reasonableness in four ways:

(a) BT argues that the use of the gains from trade test is "manifestly flawed and inconsistent with the EC Directives";

(b) BT contends that OFCOM wrongly dismissed out of hand relevant benchmarking comparators;

(c) in carrying out even the limited benchmarking exercise, OFCOM wrongly treated the comparison with the 2G regulated rates as a "one-way test" and wrongly focused on a comparison between the blended rate and the 2G regulated rates rather than between the underlying 3G rate and the 2G regulated rate;

(d) OFCOM disregarded relevant material in particular the information about the MNOs' costs which it had gathered in the course of the SMP review leading to the March 2007 Statement.

77. Thirdly, BT argues that the mobile call termination rates proposed by the MNOs were unreasonable in any event. There was a range of reference points that OFCOM could have used to assess the reasonableness and all of them indicated that the rates were outside the range of what could be considered reasonable.

78. So far as concerns the core issues to which this judgment relates the other appellants made the following points:

(a) H3G complained that OFCOM had misinterpreted the statutory framework and its relevant regulatory powers and duties, particularly the duties to promote competition and protect consumers under sections 3 and 4 of the 2003 Act. H3G's position in this appeal was different from that of the other appellants and was consistent with the stance that it adopted in the H3G MCT Appeal against the 2007 Statement. H3G accepted that

OFCOM had been right to focus on BT's end-to-end connectivity obligation as relevant in determining what was the "reasonable" price for H3G to charge. However, OFCOM erred in construing too narrowly the purpose of the E2E Proviso and in failing to give sufficient weight to the importance of OFCOM's statutory duties under sections 3 and 4 of the 2003 Act when applying that Proviso.

(b) T-Mobile also contended that OFCOM had failed to comply with its duties under the 2003 Act and under the Common Regulatory Framework. It also asserted that OFCOM had breached general principles of Community law and general principles of domestic administrative law. T-Mobile also criticised the gains from trade test which, it alleged did not provide an effective bound on charges to BT's retail or wholesale customers. T-Mobile further contends that, whilst strict cost-orientation is not mandated by the need for disputed charges to be reasonable, OFCOM should have taken into account cost as a relevant consideration in its determination of the upper bound on setting reasonable charges.

(c) The 1092 Appellants alleged that OFCOM erred in adopting the BT Disputes Determinations because it did not determine reasonable and proportionate charges. In particular OFCOM failed to consider the effects of the Determinations on the appellants who are transit customers of BT. OFCOM also fettered its legal powers to resolve disputes because of its incorrect interpretation of the relationship between those powers and OFCOM's powers to impose SMP conditions. The 1092 Appellants also raised various points about alleged lack of proper consultation but these were non-core issues which were not covered by the hearing in January/February 2008.

79. The interveners, Orange and Vodafone, in general supported all of OFCOM's arguments save in respect of the SIA Construction Issue (discussed in section VII below), although their formulation of the arguments differed in some respects from that used by OFCOM. Orange put forward arguments along similar lines as it had argued in relation to the preliminary issue in its own appeal (Case No. 1080/3/3/07), namely that on a proper interpretation of the Common

Regulatory Framework, OFCOM's dispute resolution powers do not provide a free-standing basis for the imposition of regulatory obligations.

(ii) The test to be applied by the Tribunal in considering these appeals

80. OFCOM accepts, as it must, that the Tribunal's jurisdiction in this appeal is to determine the issues "on the merits" in according with section 192 of the 2003 Act. However, they argue that it would be inappropriate for the Tribunal to allow a complete opening up of the subject matter of the disputes going beyond the confines of the matters that had been raised by the parties in the course of OFCOM's investigations of these disputes. Moreover, OFCOM says, the Tribunal should be "slow to interfere" where errors of appreciation are alleged as opposed to errors of fact or law.

81. The Tribunal notes that its jurisdiction to consider these appeals on the merits is conferred by the statute in order to implement the requirement imposed on the United Kingdom by article 4 of the Framework Directive that there should be an effective appeal mechanism against decisions by OFCOM. The Tribunal recognises – and this was common ground among the parties – that the section 185 procedure is intended to provide a relatively swift and certain solution to disputes between the participants in this sector.

82. It is also common ground that there may, in relation to any particular dispute, be a number of different approaches which OFCOM could reasonably adopt in arriving at its determination. There may well be no single "right answer" to the dispute. To that extent, the Tribunal may, whilst still conducting a merits review of the decision, be slow to overturn a decision which is arrived at by an appropriate methodology even if the dissatisfied party can suggest other ways of approaching the case which would also have been reasonable and which might have resulted in a resolution more favourable to its cause.

83. But the challenges raised by the Appellants in these appeal are more fundamental. It was not suggested by OFCOM that the points raised by the parties were points which it had not been asked to consider during the consultation process. The grounds of appeal go far beyond alleging errors of appreciation. This is not,

therefore, a case in which the Tribunal needs to explore further the circumstances in which it is or is not appropriate for it to interfere with the exercise by OFCOM of its discretion.

(iii) OFCOM's alleged failure to have regard to its statutory obligations

84. OFCOM accepts that the approach it adopted to resolving the BT disputes focused primarily on the BT's end-to-end connectivity obligation. This accorded with its view that it is appropriate to look at what relevant regulatory constraints have been placed on the parties in respect of the charges in dispute. OFCOM denies that this means that it failed to have regard to its wider statutory obligations under sections 3 and 4 of the 2003 Act and asserts that the Appellants have themselves failed to appreciate the distinction between looking at the regulatory obligations placed on the parties to the disputes and the regulatory obligations placed on OFCOM.

85. OFCOM points to references in the BT Disputes Determinations to OFCOM's regulatory obligations. In paragraph [4.49] of the BT Disputes Determinations OFCOM says:

> "4.49 The approach that Ofcom took in the draft determinations for resolving these disputes reflects the purpose underlying BT's End-to-End Obligation and also the six Community requirements that give effect to Article 8 of the Framework Directive (as implemented in section 3 of the Communications Act), and also Ofcom's duties under Section 3 of the Communications Act."

86. At paragraph [6.26] of the BT Disputes Determinations, OFCOM "notes its statutory duty under Section 3(3)(a) of the Act to have regard to the principles under which regulatory activities should be consistent in carrying out its duties". OFCOM also refers later to the fact that BT and H3G argued in response to the draft determinations that OFCOM had not set out why its application of the end-to-end connectivity obligation and its decision not to set cost based termination charges was consistent with its duties. OFCOM answers this criticism by referring to the "explicit policy decision" in 2004 not to regulate 3G termination and to the need not to act inconsistently with that position. Since the decision taken in the 2004 Statement not to regulate 3G termination charges complied with the Community requirements set out in section 4 of the 2003 Act and with OFCOM's duties in section 3 of that Act, then OFCOM argues, since the decision it was now

taking was consistent with the result of the 2004 Statement, that decision must be consistent with the statutory objectives. Similarly, since the decision to impose the end-to-end connectivity obligation was consistent with OFCOM's statutory duties, its application of that obligation in the manner set out in the Disputes Determination was also consistent with those duties.

87. In the Tribunal's judgment, the reasoning set out in the Disputes Determinations clearly shows that OFCOM failed to have sufficient regard to its statutory obligations under sections 3 and 4 of the 2003 Act. The initial error is expressed early on in OFCOM's Defence (paragraph [23]) where it states that in exercising its discretion as to the manner in which it resolves disputes:

> "OFCOM is guided by the basic principle that undertakings should be free to negotiate and set the terms and conditions (including prices) on which they transact. This freedom is subject to two regulatory constraints: (a) *ex ante* regulatory obligations imposed in accordance with the CRF; and (b) *ex post* competition law under Arts. 81 and 82 EC and the [Competition Act 1998]. In considering a dispute OFCOM identifies the relevant regulatory framework and, in particular any existing *ex ante* obligations applicable to the parties. The methodology applied by OFCOM seeks to ensure that the parties' freedom to determine their price is curtailed only insofar as necessary and proportionate to fulfil the objectives of such obligations. OFCOM will, however, also consider whether there are any overriding policy objectives which should be taken into account". (emphasis added)

88. In other words OFCOM approached the dispute by asking itself whether, looking at the existing regulatory constraints imposed on the parties, there was any reason why BT (or H3G) should **not** pay the charges proposed by the MNOs. Any other considerations arising from OFCOM's statutory duties were therefore relegated to the consideration of whether there were "overriding policy objectives" which should be taken into account. This approach represented, in the Tribunal's judgment, a fundamental error as to the task facing OFCOM in determining these disputes. OFCOM failed to recognise that dispute resolution is itself a third potential regulatory restraint that operates in addition to other *ex ante* obligations and *ex post* competition law.

89. The fact that dispute resolution is intended to be an additional form of regulation exercised in parallel with SMP regulation and general competition law is clear from the Common Regulatory Framework. First, article 5(4) of the Access Directive requires a national regulatory authority to be given the power to intervene not only

to resolve disputes with regard to access and interconnection but also on the authority's own initiative where this is justified. The fact that these two powers are included in the same provision indicates that they are both intended to be regulatory tasks and not as in some way ancillary to other regulatory functions or to general competition law rules. Secondly, article 20(3) of the Framework Directive expressly directs NRAs in resolving disputes to take decisions "aimed at achieving the objectives set out in Article 8" and article 5 (4) of the Access Directive also refers to NRAs securing the policy objectives of article 8 of the Framework Directive. Again, it is plain that those policy objectives are intended to be central to the regulator's consideration of the issues so that it is quite wrong to approach the task by assuming that the charges proposed are to be upheld unless there is another inconsistent regulatory constraint.

90. This was also made clear by the Tribunal's judgment in the *H3G (1)* challenge to the 2004 Statement. One of the issues raised in that case was whether OFCOM's power to resolve disputes about the reasonableness of terms being offered to BT for interconnection resulted in BT having sufficient countervailing buyer power to offset H3G's market power over interconnection to H3G's network. OFCOM argued in that case that it would not have the power to determine a dispute under section 185 of the 2003 Act unless it had first made a finding that the party seeking to impose the charge had significant market power. The Tribunal recorded that:

> "[Counsel for OFCOM] went so far as to submit that in the absence of an SMP designation, OFCOM would have to decide the pricing dispute in favour of H3G, because to do otherwise would be to impose forbidden price control. He based his argument on the true construction of the Access Directive." (*H3G (1)*, paragraph [129])

91. The Tribunal rejected this submission holding that under the Access Directive the NRAs have at least two sorts of powers. The first are powers to take steps to ensure end-to-end connectivity; the second are powers to intervene where SMP has been found. A power to determine a dispute as to connection is capable of falling within both, so it is certainly capable of falling within the former. If it does, the Tribunal held that article 5 of the Access Directive makes it plain that an SMP finding is not necessary.

92. OFCOM pointed to Recital (32) of the Framework Directive which provides that "The intervention of a national regulatory authority in the resolution of a dispute …. should seek to ensure compliance with the obligations arising under this Directive or the Specific Directives". We were also referred to Recital (5) of the Access Directive which provides that "In an open and competitive market, there should be no restrictions that prevent undertakings from negotiating access and interconnection arrangements between themselves …". Again OFCOM relied on this provision as supporting their approach of leaving the MNOs free to set whatever price they choose for termination subject to any *ex ante* obligations in place and to competition law.

93. We do not interpret either these specific recitals or the scheme of the CRF as a whole as requiring or justifying OFCOM's approach in this case. That provision does not mean that dispute resolution should be directed only at bolstering pre-existing regulatory constraints imposed on specific parties but rather emphasises that dispute resolution is an autonomous regulatory process which forms part and parcel of the overall regulatory framework. Similarly, we consider that the fact that the dispute resolutions powers referred to in article 20 of the Framework Directive are conferred in relation to disputes which arise in connection with obligations imposed under the Framework Directive or under the Specific Directives does not mean that the resolution of the dispute is limited to supporting those pre-existing obligations.

94. T-Mobile and OFCOM referred us to the case of *Derbyshire Waste Limited v Blewett* [2004] EWCA (Civ) 1508 in which the Court of Appeal considered the influence that the objectives set out in the EC Waste Framework Directives should have on the decision whether to grant planning permission for a landfill proposal. Auld LJ with whom both the other judges agreed, described the objectives in the Directives as having "the status of important considerations, but not necessarily of overriding weight as against all other considerations in a waste planning permission application". He also approved of the way that the first instance judge Stephen Richards J (as he then was) had expressed the position:

> "What matters is that the objectives should be taken into consideration (or had regard to) *as objectives*, as ends at which to aim. If a local planning authority

> understands their status as objectives and takes them into account as such when reaching its decision, then it seems to me that the authority can properly be said to have reached the decision 'with' those objectives. The decision does not cease to have been reached with those objectives merely because a large number of other considerations have also been taken into account in reaching the decision and some of those considerations militate against the achievement of the objectives". (emphasis in the original, see [2004] EWCA (Civ) 1508, paragraph [90])

95. OFCOM argued that the objectives set out in article 8 of the Framework Directive are of a different status than the objectives under consideration in *Blewett* because the CRF establishes a detailed harmonised framework whereas the Waste Directives leave it up to the Member States to take appropriate steps to encourage attainment of those objectives. Whether or not that is the case, if the Dispute Determinations had set out a careful analysis of the relevant objectives and Community requirements and gone on to describe valid countervailing reasons for adopting an inconsistent approach, then the Tribunal might have concluded that this ground of appeal was not well founded. As it is, there is insufficient reasoning in the Disputes Determinations as to which objectives – other than the need for the regulator to be consistent – OFCOM considered. We do not therefore consider that the *Blewett* case assists OFCOM.

96. In its pleaded Defence and at the hearing OFCOM put forward an additional argument as regards the consistency of its reasoning with its statutory duties. It argued that its investigation of these disputes took place in very particular and rather unusual circumstances because they related to calls made over a finite period (that is before the price control in the 2007 Statement came into operation). There was no evidence that BT or H3G had increased their prices over that period specifically to reflect the possible increase in costs which would occur if the MNOs' proposed prices were upheld. This meant that there could be no adverse effect on consumers because, in effect, BT and H3G had decided to absorb any temporary increase in price arising prior to the price control set in the 2007 Statement commencing on 1 April 2007.

97. The Tribunal does not regard this as a legitimate argument for OFCOM to make. First it does not accord with the factual position since, as BT point out in their Reply served in the TRD appeal, BT was already paying the blended rates of Vodafone and Orange and the dispute arose from their rejection of BT's OCCN

seeking to reduce the rate to the 2G regulated level. Since BT makes only a very small regulated profit on its transit business, it is likely that it will adjust its prices in response to increases in charges agreed with the MNOs. This was the case, BT says, with the increased, blended rates that BT had accepted from Vodafone and Orange so that these new rates did indeed have a direct pass through effect. Secondly, it is too simplistic to examine merely whether there has been an increase in the retail price immediately following the imposition or threat of increased wholesale charges or to argue that BT's retail price in the retail market is already set at the profit-maximising level. It cannot be assumed that just because BT did not immediately increase its transit or retail prices in the face of the OCCNs from T-Mobile, O2 and H3G, that it had decided to absorb those costs indefinitely. Thirdly, this approach means that an undertaking faced with an increase in charges which it decides to challenge will have every incentive to anticipate the application of those charges by increasing its own retail prices. Not only will it thereby safeguard its own financial position in the event that the increase is upheld and backdated but it can then also point to this adverse effect on consumers as part of its argument against allowing the increase. If it is successful in resisting the increase it is unlikely to redistribute the additional charges to those who paid them, resulting in a windfall. Finally, even if the Disputes Determinations covered only a finite and concluded period, the difference in the prices proposed by the parties amounted to substantial sums of money in absolute terms. If, putting aside the fact that the price control in the 2007 Statement started to operate on 1 April 2007, the prices proposed by the MNOs were not reasonable prices, they cannot become reasonable simply because they apply only for a short time.

98. In any event, the lack of pass through is relevant only to the question of whether the proposed prices had an adverse effect on end-users. This did not affect the question whether the effect of the price rises would be to favour mobile networks over fixed networks or whether the charges were consistent with the other regulatory duties which were engaged. This point is therefore linked to the point raised by the 1092 Appellants who, in their evidence, pointed to the effect of the increase in transit prices would have on their business. As BT pointed out at the hearing, the BT Disputes Determinations have the potential to distort interconnection because the result favours direct interconnection rather than transit through BT. If BT can be

forced to elevate its prices vis-à-vis the MNOs, it makes it much less attractive to people to interconnect with BT rather than seeking a direct interconnection elsewhere. BT referred to the very fact that the 1092 Appellants intervened in these appeals "with some vehemence" as demonstrating the problems that OFCOM's approach actually generates.

99. The Tribunal therefore holds that OFCOM erred in failing to appreciate that the objectives set in sections 3 and 4 of the 2003 Act should have been central to its approach to interpreting and applying the section 185 procedure and to its assessment of the figures arrived at. It was not right for OFCOM to argue that because it complied with its statutory duties in carrying out the review which resulted in the 2004 Statement and applied the results of that Statement to these disputes, that it had therefore effectively complied with its statutory objectives in resolving these disputes. We consider later the question whether OFCOM was right to adhere to the decisions taken in the 2004 Statement. Here it suffices to say that given the length of time that had elapsed since the publication of the 2004 Statement and the important changes that had occurred in the market OFCOM should have looked afresh at whether approval of the rates proposed was consistent with its wider duties.

100. Because OFCOM focused on the existence or absence of other regulatory constraints, it distinguished in the BT Disputes Determinations between the period after 13 September 2006 when the formal end-to-end connectivity obligation was imposed on BT and the period before that date. OFCOM accepted that because of the E2E Proviso, the appropriate question for the period after 13 September 2006 was to determine whether the charges proposed were "reasonable" although, as described below, it gave a particular meaning to that word in this context. For the period before 13 September 2006, and in relation to the H3G Disputes Determination where the end-to-end connectivity obligation did not apply, OFCOM does not seem to have regarded its task as determining what would be a fair or reasonable price as between the parties. It is true that the statutory provisions establishing the dispute resolution procedure do not expressly provide that OFCOM must resolve a dispute by setting reasonable terms and conditions. They do not give any guidance to OFCOM as to how it is to approach its task. However, the absence

of any provision in section 185 of the 2003 Act as to how OFCOM is to approach its task does not leave a lacuna, because dispute resolution is one of the functions covered by the duties in sections 3 and 4 of the 2003 Act. The answer to the question: what kinds of terms and conditions should OFCOM set when resolving a dispute under section 185 therefore lies in the application of those sections, having regard to the objectives set out in article 8 of the Framework Directive.

101. We consider that the test which OFCOM should have applied in these disputes should have been no different for the periods before or after 13 September 2006 or as between the BT and the H3G disputes. That test can be expressed as requiring OFCOM to determine what are reasonable terms and conditions as between the parties. The word "reasonable" in this context means two things. First it requires a fair balance to be struck between the interests of the parties to the connectivity agreement. It therefore requires the same kind of adjudication that any arbitrator appointed by the parties to determine a dispute about the reasonable rate would carry out. But secondly, because OFCOM is a regulator bound by its statutory duties and the Community requirements it also means reasonable for the purposes of ensuring that those objectives and requirements are achieved. OFCOM did not approach resolving these disputes on this basis and it therefore committed an error of law.

(iv) The relationship between dispute resolution powers and the power to impose SMP conditions

102. BT argued that OFCOM applied a rigid and immutable division between its dispute resolution powers and its wider regulatory powers for addressing SMP and that as a result OFCOM rejected all requests from the appellants to carry out a cost based assessment of the charges proposed. In the BT Disputes Determinations OFCOM recorded that BT, H3G and the 1092 Appellants had all questioned OFCOM's rationale for not setting cost based prices. In rejecting these criticisms in section 6 of the BT Disputes Determinations, OFCOM states that it would not be appropriate to set strictly cost based charges as this would be unnecessary and disproportionate to achieve the purpose underlying the end-to-end connectivity obligation. The end-to-end connectivity obligation is one which applies to BT and "should not be used as a means of effectively imposing regulatory burdens on other providers" who are

not subject to that obligation. BT argued that the charges proposed would have an adverse effect on retail customers because BT will pass the costs of increased termination charges through to its transit and retail customers. OFCOM stated (in paragraph [6.13]) that retail customers were protected in relation to the aims of the end-to-end connectivity obligation which are to ensure interconnection: "Appropriate protection of retail customers arising from the exercise of market power by terminating operators is addressed under market reviews and SMP conditions". This echoed OFCOM's earlier comment in paragraph [4.43] when considering the E2E Proviso:

> "4.43 The purpose in the End-to-End Obligation of the requirement for "reasonable charges" is so that BT's obligation to purchase is not completely unbounded. The purpose is not to regulate terminating operators because of competition problems in the markets for the supply of mobile call termination. There is a separate set of powers and processes to address questions relating to the exercise of significant market power by terminating operators, specifically via market reviews of termination markets and SMP obligations. In Ofcom's view as a matter of policy, these would be the appropriate way to address significant market power, not by using the End-to-End Obligation imposed on BT, the purchaser of termination in these disputes, to control the charges of the MNOs."

103. The Tribunal notes that OFCOM's statements in the Disputes Determinations were made in the context of rejecting arguments put forward by the FNOs and H3G that OFCOM should set a cost based price. The Tribunal agrees with OFCOM to the extent that it decided that it was not bound, in the course of resolving a dispute referred to it under section 185, to set a price reflecting the costs of providing the service. However, the Tribunal accepts BT's argument that the Determinations went further than this and that OFCOM erred in drawing too rigid a boundary between the exercise of its dispute resolution powers and its SMP-related powers.

104. OFCOM was wrong to disregard entirely the relationship between prices and costs in this case. There is an underlying assumption in the Disputes Determinations that there is no middle ground between eschewing analysis of the relationship of price to cost completely on the one hand and a full investigation of costs of the kind carried out as part of the SMP market review on the other. The Tribunal does not accept that there is such a strict dichotomy. It should be possible to carry out some investigation of costs to form a broad idea of what that relationship is. Such an assessment may or may not give rise to a cost based price. It may simply result in

OFCOM concluding that the price proposed is a reasonable one even though that price was not arrived at on a cost basis. The costs are not only relevant when setting a "strictly cost based price" but are likely to be a factor to a greater or lesser extent in most cases where the dispute between the parties concerns price.

105. The Tribunal recognises that there is a risk that although all the appellants accepted that the dispute resolution procedure is meant to provide a quick answer to the dispute, the parties to a dispute may be tempted to swamp OFCOM with the same level of economic and accountancy information that they generally provide in market reviews. This could prevent OFCOM from complying with the time limit set for the exercise of this function. There are a number of answers to such a concern. The first is that the parties to the dispute may well also have an interest in ensuring that the dispute can be resolved rapidly and should tailor the information they provide and the level of detail to which they expect OFCOM to descend accordingly. The second is that OFCOM is entitled to prepare in anticipation of disputes in relation to sectors of the market where it sees, from its overall monitoring role, that disputes may arise. We shall see later that they proposed to do this in relation to modelling the costs of 3G termination. Thirdly, as we also describe below, OFCOM is entitled to, and should, use such information as it has at its disposal from the exercise of its other regulatory functions. So OFCOM should not start each dispute resolution exercise from scratch. The need to avoid OFCOM getting bogged down in arguments about how to measure costs was raised by the Tribunal with the parties during the hearing. The Tribunal expects parties to future disputes to behave responsibly and be realistic in their expectations. Similarly we expect OFCOM to adopt a firm stance with the parties as regards the information it seeks and receives during the course of its investigation.

106. Such an approach would not amount to using dispute resolution powers as an alternative means for addressing SMP. Rather it should be considered as an appropriate way by which OFCOM ensures that the objectives set out in sections 3 and 4 of the 2003 Act are fulfilled.

(v) Consistency with the 2004 Statement

107. One of the main planks of OFCOM's reasoning in the Disputes Determinations was that it would have been inconsistent with the decision taken in the 2004 Statement not to regulate 3G termination for OFCOM now to limit the price that the MNOs can charge for termination on their 3G networks. OFCOM maintained this position in these appeals although it noted carefully that it neither asserted nor accepted that the 2004 Statement created a legitimate expectation as a matter of public law that 3G charges would not be regulated.

108. The Tribunal agrees that it is good practice for the regulator to be consistent in its approach to issues in the sector. This is recognised in section 3(4)(a) of the 2003 Act which provides that OFCOM must have regard to "the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed". Consistency is important because companies need to be able to plan their business on the basis of how they reasonably anticipate the regulator is going to act. But in the Tribunal's judgment OFCOM placed far too much weight on this need for consistency and fell into error in relying on the conclusions of the 2004 Statement without properly weighing the factors which the appellants argued meant that the conclusions of that Statement were no longer valid.

109. It is important to examine precisely what was decided in the 2004 Statement in order to assess the appropriate weight to place on its conclusions. As was described earlier, the 2004 Statement found that at the time the Statement was produced only H3G was offering voice call termination over a 3G network. The reported subscribers to H3G's services, and thus the total number of subscribers using 3G voice services in the UK by the end of March 2004 was in the region of between 384,300 and 420,000 amounting to about 0.75 per cent of the total mobile subscribers in the United Kingdom. OFCOM commented that costs of 3G voice call termination were unclear at this early stage of the roll out so that there was insufficient evidence to conclude that the level of charges was excessive. OFCOM also concluded that any adverse effects to consumers associated with charges for 3G voice call termination were likely to be small given the very limited size of the

subscriber base. Therefore it would be disproportionate to impose *ex ante* obligations on 3G voice call termination at this time. OFCOM said at paragraph [5.31] of the 2004 Statement: "Ofcom does, however, intend to keep this position under review, and will retain the ability to bring forward proposals for regulation if warranted". OFCOM went on to say:

> "5.47 For the period covered by the market review, Ofcom thus considers its approach to the ex ante regulation of 3G voice call termination to be proportionate. However, whilst there are currently insufficient grounds to impose additional ex ante regulation, it is possible that during the period of the next formal review of mobile voice call termination markets, 3G voice call termination may establish itself to such an extent that Ofcom may need to reconsider its position. Subject to satisfying the relevant tests (such as section 47(2) of the Act), OFCOM retains the power to impose an SMP condition(s) to address concerns with 3G voice call termination charges at a point after the publication of this statement. In line with paragraph 5.113 of the December consultation, Ofcom's position will be kept under review".

110. BT points out that all of the market conditions relied on in the 2004 Statement as justifying leaving 3G termination rates unregulated had changed considerably by the time OFCOM came to consider these disputes. Mr Budd, in his witness statement on behalf of BT, contrasted the position in March 2004, as described in the reasoning of the 2004 Statement with the position on the market in 2006/07 being the period in which the disputed rates applied. We agree with his conclusion that none of the reasons cited as justifying not imposing *ex ante* regulation in 2004 still applied. All five of the MNOs were offering 3G voice call termination and the 3G networks of each of the five MNOs covered over 50 per cent of the UK population by the end of 2006/7. 3G networks were being used extensively and, according to Mr Budd's calculations there were about 7 million 3G customers in the UK at the time of the dispute as compared with approximately 0.4 million at the time of the 2004 Statement. The greater numbers using 3G termination meant that any adverse effects from excessive pricing were likely also to be much greater than they were in 2004.

111. We therefore agree that OFCOM erred in failing to take account of the significant changes that had occurred in the market since March 2004 in deciding what weight to place on the need to be consistent with the decision in the 2004 Statement that 3G voice call termination should be unregulated.

112. The Tribunal also agrees that OFCOM erred in leaving out of account the need to be consistent with the stance it was already adopting in consultation on the 2007 market review. By September 2006 OFCOM had issued a consultation document indicating that it considered that the market had changed to such an extent that it was now proposing to regulate 3G termination. We consider later the importance of the findings in the 2007 Statement as regards benchmarks for the prices at issue in these disputes. OFCOM should have balanced the need to be consistent with the 2004 Statement against the need also to be consistent with what it was proposing for the period from April 2007 onwards. Had it done so, it would not have placed such reliance on the decision taken in March 2004.

113. OFCOM's analysis of the effect on its powers of the 2004 Statement went further than simply the question of what had or had not changed since that time. OFCOM argued that although the 2004 Statement made clear that OFCOM was keeping the pricing of 3G termination under review, OFCOM was in effect limiting itself to carrying out any such review by exercising its powers to impose SMP conditions prospectively. Mr Roth, appearing for OFCOM, at the hearing was asked what would have been OFCOM's answer if someone had asked, immediately after the 2004 Statement was published, how OFCOM would deal with a dispute about 3G termination charges referred under section 185 during the currency of the 2004 Statement. His reply was that the answer would have been that 3G termination was not going to be regulated retrospectively through dispute resolution but that if OFCOM saw that 3G rates were shooting up they would exercise their power under section 190(4) of the 2003 Act to set or modify SMP conditions in consequence of their consideration of the dispute. OFCOM would then suspend the dispute resolution procedure and start an urgent modification process. In OFCOM's opinion, the expectation in the industry in the light of the 2004 Statement was therefore that any regulation of the 3G termination rates over the period covered by the Statement would be imposed only prospectively and only after OFCOM had followed the statutory procedure for amending the SMP conditions.

114. OFCOM's analysis of the appropriate use of its powers in this instance is, in the Tribunal's judgment, misconceived. The decision in the 2004 Statement not to impose *ex ante* regulation on 3G call termination did not and could not preclude

OFCOM during the currency of that Statement from determining a dispute referred to it about 3G call termination by setting a rate which was less than the rate requested by the MNO supplying the service, regardless of what other regulatory constraints were in place. The decision not to regulate 3G charges in 2004 made it more, not less, important that the customers paying those charges should be able to refer disputes about them to OFCOM and obtain a decision on what is a reasonable and fair price. For OFCOM to set a reasonable charge when determining a dispute is entirely consistent with the decision not to impose *ex ante* regulation in respect of those charges. It would be wrong to characterise constraining the charges proposed by the MNOs as retrospectively imposing SMP-type regulation.

(vi) The interpretation of the end-to-end connectivity obligation and the gains from trade test

115. OFCOM in its Defence made clear that it accepts that the E2E Proviso is intended in part to protect BT from the imposition of unreasonable prices. However, OFCOM regards the purpose of the obligation as limited to ensuring that connection takes place. This means in OFCOM's view that the E2E Proviso that the prices and conditions offered should be "reasonable" means only that they should not be so high as to make it uneconomic for BT to enter into a contract on those terms. Provided that BT does not make a loss on the trade which takes place under the contract it is, in OFCOM's view, "reasonable" for it to enter into a contract on those terms and hence the purpose of the end-to-end connectivity obligation is achieved. Orange supported OFCOM's submissions in this regard arguing that according to the CRF, the purpose of dispute resolution was to resolve deadlock between two undertakings where such deadlock either threatens interconnection or access, or where it concerns a regulatory obligation. The purpose of the procedure is, conversely, not to address market conditions in general, and not to address SMP.

116. The Tribunal does not consider that the purpose of the end-to-end connectivity obligation should be construed so narrowly. The purpose is not merely to achieve interconnection but to do so in a manner which promotes, or at least is not inconsistent with, the other regulatory objectives. It is not right to compartmentalise regulatory activity by saying that end-to-end connectivity obligations are solely

aimed at preventing market failure though lack of access and that other aspects of the regulatory objectives are protected by the exercise of different powers. Whenever OFCOM is exercising any of its regulatory powers it must take into account the regulatory objectives relevant to the industry concerned. Clearly objectives aimed for example at the quality of television programmes are not relevant here. But the need to ensure the maximum benefit to end users, to promote competition and to ensure technological neutrality are relevant and it is not correct to disregard them on the basis that they would also be relevant when exercising different statutory functions.

117. In any event we do not consider that it is right to interpret the use of the term "reasonable" as it is used in the end-to-end connectivity obligation in such a narrow sense as to mean the highest price which could be charged which would still result in BT not making a loss. There is no reason to give the word anything other than its ordinary meaning; the price that it is fair should prevail as between the parties taking into account all the circumstances including in particular the arguments put forward in the dispute by the parties, OFCOM's statutory duties and the Community requirements set out in the 2003 Act (see paragraph [101] above).

118. The Tribunal's conclusion is that the gains from trade test is seriously flawed and should not have been used by OFCOM in resolving these disputes. It is not an appropriate methodology to adopt in order to arrive at a result which is reasonable in either of the senses which we have held constitute the test under the dispute resolution procedure, namely reasonable as between the parties and reasonable from OFCOM's perspective as the regulator. It does not assist in arriving at a price which is fair as between the parties because it focuses entirely on the question whether BT makes any profit, in the sense of a contribution in excess of their long-run incremental costs, and does not consider whether the MNOs are making an excessive profit at BT's expense (or at the expense of BT's customers). This is demonstrated most starkly by how OFCOM proposed to deal with the backdating of the award it made in favour of H3G. In both the draft determinations and the final version OFCOM calculated what was the price at which BT would break even on doing the relevant part of its business with H3G and ordered them in effect to transfer all of the revenue in excess of long-run incremental costs ("LRIC")

received on this aspect of their business over to H3G. This was without any consideration of whether H3G had already been making a contribution to profit from the charges levied before the proposed price increase. There was no discussion as to why it was fair that BT should receive no contribution or a considerably reduced contribution from this contract regardless of how much profit H3G was making. This cannot be described as striking a reasonable balance between the parties. In the Tribunal's judgment a price which results in one party only breaking even on a significant part of its business while the other party may be making a substantial contribution to profit on the contract cannot ordinarily be described as a "reasonable" price.

119. BT argued that the price set was also unfair and unreasonable because it undermined BT's ability to negotiate on rates in other areas of its business where it operates on terms and conditions which are not set by regulatory constraints. BT's submission that OFCOM's reasoning will set a precedent and lead to adverse effects in other markets was supported by evidence from Mr Richardson and Mr Amoss. Mr Amoss also described the potential impact of the increased charges on BT's transit business. BT argued that the gains from trade test in combination with the assumption that increases that make the business loss making will be mitigated by passing through the increase is not really a "test" at all because it is almost impossible for any proposed price to "fail" the test. Their economic consultant witness, Mr Keyworth, demonstrated that if BT passed on any price increase in full to its customers, the gains from trade test could still be satisfied even when the price was so high that the volume of calls that were subject to the charges were substantially reduced.

120. OFCOM's answer to these points is that it is not the role of the end-to-end connectivity obligation, the gains from trade test, or dispute resolution more generally to discourage terminating operators from setting their own charges or to address potential distortions of competition that may arise from excessive mobile call termination charges. The alleged impact of OFCOM's approach on the prices charged for services in other markets is, OFCOM asserts, "wholly irrelevant" to the appropriateness of the gains from trade test in the BT disputes. The Tribunal disagrees. These points raised by BT are important factors which should have been

properly considered by OFCOM in order to arrive at a price which is fair as between BT and the MNOs and which promotes the regulatory objectives.

121. OFCOM also asserts that its determinations have no precedent setting value because it is wrong to assume that OFCOM would apply the gains from trade test in an identical manner when resolving other disputes. Its approach to other disputes might differ "in the light of the specific facts and circumstances" so that a counterparty to a potential dispute would be misguided if they argued in different context that on the basis of the gains from trade test, BT should accept a price offered. This stance, in the Tribunal's judgment, ignores commercial reality – OFCOM's approach to these disputes are bound to have important repercussions in other areas of negotiation between operators, particularly given the importance that OFCOM has attached, elsewhere in its reasoning, for the need for its regulatory decisions to be consistent. We were told that OFCOM has effectively suspended its determination of other disputes pending the handing down of this judgment.

122. The gains from trade test is also not an appropriate method for assessing the reasonableness of the price from a regulatory point of view. It ignores the role that the price set for interconnection with BT has on retail customers and on competition both amongst the MNOs and between MNOs and FNOs. OFCOM distinguished between two situations in its use of the gains from trade test; those where the prices charged by BT to their wholesale and retail customers were sufficient to cover BT's LRIC assuming the mobile call termination charges were set at the proposed level and those where part or all of the increased mobile call termination charges would have to be passed through to customers to enable BT to continue to cover their LRIC. In the latter case, OFCOM assumed that BT would pass on the higher charges. This reasoning is flawed in a number of respects. First, OFCOM appears to assume that BT would be content to operate on a break even basis and not pass through the increase in charges provided it was not making a loss on the business. This does not, in the Tribunal's judgment accord with commercial reality. In the event of a substantial change in the MNOs' charges it may well be in BT's interest to pass on all or part of the increase. The extent to which it would be able to do so would, of course, depend on whether the increase had been applied to

BT's competitors and how far the pressures of competition in the retail and transit sectors forced BT to absorb the extra costs or risk losing market share.

123. None of these factors was examined by OFCOM because they concluded that the gains from trade test was not intended to protect consumers: "Appropriate protection of retail customers arising from the exercise of market power by terminating operators is addressed under market reviews and SMP conditions" (paragraph [6.13] of the BT Disputes Determinations). OFCOM elaborated on this argument in its Defence as regards the charge proposed by H3G:

> "139. As regards H3G, the charge proposed in November 2006 was indeed high; and it is possible that if the charge had been accepted by BT, and passed through to consumers, it may have infringed Chapter II [of the Competition Act 1998] and/or Article 82 EC. In such circumstances, OFCOM would have considered using its powers under the 1998 Act to propose interim measures to suspend the charges pending a full investigation. However, given that (a) BT did not accept the charges, which were therefore not passed through to consumers; and (b) for the future an SMP charge control would apply with effect from 1 April 2007, OFCOM did not consider, in such particular (and unusual) circumstances, that it would be appropriate to open an investigation under the 1998 Act. Nor have any of the parties suggested that it should have done so. If a situation arose in which OFCOM was faced with potentially excessive charges, and it had not recently completed a market review, it would consider postponing resolution of the dispute on the basis of exceptional circumstances under s.188(5) and initiating a market review in order to address the excessive pricing".

124. In the Tribunal's judgment, this paragraph shows that the approach adopted by OFCOM was misconceived. If a party to an agreement refers a dispute to OFCOM arguing that the price proposed by its counterparty is too high, the proper context in which to determine whether the price is or is not too high is in the context of resolving that dispute, not in the context of an investigation under competition law or by the use of OFCOM's other regulatory powers or by a party bringing a private action to enforce its competition law rights. It is wrong to determine the dispute on some other basis and leave the question of whether the rate is unreasonable to be resolved in some other forum.

125. OFCOM should have had regard to the fact that if higher mobile call termination charges are passed on to BT's customers (and the customers of other FNOs to whom the increases were also applied), consumers might be adversely affected. Even if the MNOs themselves used the extra revenues from these charges for the

benefit of their own customers, for example, by including free handsets in their own retail packages, there could be a detrimental impact on consumers of fixed line services. To the extent that the higher charges are not passed on to BT's customers, there is still a transfer of funds from BT to the MNOs, placing the former at a competitive disadvantage. Such a transfer is not necessarily unfair or unreasonable but it needs to be justified by the party proposing it. Similarly, although the mobile call termination charges that MNOs make to each other are to some extent netted off, there are still substantial payments as between the MNOs so that there are winners and losers from each change to the rates. These changes therefore have important competitive effects as between the MNOs. OFCOM's principal duty to further the interests of consumers under section 3(1)(b) of the 2003 Act and the fourth Community requirement of technological neutrality under section 4(6) of the 2003 Act required OFCOM to address these points in arriving at its determination. It was wrong to reject them as relevant only to the use of its other regulatory powers and these issues are not addressed by the application of the gains from trade test. As we have already stated, we do not consider that the fact that there was no evidence that BT had in fact passed on the increased prices during the short period during which the proposed prices prevailed absolved OFCOM of its obligations to have regard to these relevant considerations.

126. A number of other arguments were put to us by the appellants criticising the use of the gains from trade test. Having regard to what we have decided, we do not consider it is necessary to address them. We find that the gains from trade test was not an appropriate method because it does not assist in arriving at a result which is fair as between the parties; it does not assist in arriving at a result which is consistent with OFCOM's regulatory duties and the Community requirements; it is ineffective particularly when combined with a pass through test because it cannot be failed even by a price which is manifestly excessive and it is wrong to rely on other regulatory powers to remedy its shortcomings.

(vii) The comparison of blended rates with the underlying 2G rate

127. BT argues that OFCOM erred because it considered that the blended rates that the 2G/3G MNOs proposed to charge were reasonable because they were not significantly higher than the regulated 2G rate. OFCOM compared the disputed

blended charges (using a time of day average) with the regulated 2G target average charge set by the 2004 Statement. It expressed the difference in terms of tenths of a penny and as a percentage of the 2G regulated charge. The results showed that the difference between the blended rates and the 2G regulated rates ranged from 0.2 pence to 0.4 pence (depending on the MNO concerned) and that this represented an increase of between 2.8 and 7.6 per cent.

128. This is, according to BT, the wrong comparison. OFCOM should have compared the underlying 3G rate component of the blended rate with the regulated 2G rate, not the blended rate. This is because the weighting of the two rates which make up the blended charge assumes that the great majority of call traffic will continue to be terminated on the 2G network so that only a small element of the blend represents the charge for 3G termination. Mr Budd, in his evidence on behalf of BT, drew the following analogy. Suppose that the price of white eggs is regulated at 10 pence each but the price of brown eggs is unregulated. A consumer normally buys boxes of 12 white eggs costing 120 pence. When he next buys a box, the farmer has included 10 white eggs and 2 brown eggs and informs him that the price for the box is now 150 pence. This must be because the brown eggs are priced at 25 pence each. The customer, who has no control over the colour of the eggs included in the box and who does not perceive any benefit in having brown eggs rather than white, complains to the hypothetical egg regulator. According to Mr Budd, OFCOM's treatment of the dispute is akin to the egg regulator investigating the complaint on the basis that the average price of the eggs is 12.5 pence. This ignores the fact that the regulator has already determined that white eggs should not cost more than 10 pence. As Mr Budd puts it, "The only change is the introduction of the brown eggs at 25p each into the box. The price of brown eggs is the relevant increment which warrants investigation, and to consider otherwise would be to make the mistake of ignoring the fact that white eggs are already price regulated".

129. A comparison between the regulated 2G rate and the underlying 3G element in the blended rates was set out in the table in Annex 2 of the BT Disputes Determinations. This table compared the figures in more detail since it set out the different rates for daytime, evening and weekend minutes. The table showed that there was a wide discrepancy in the differences between the 2G regulated rates and

the underlying 3G rates. In many instances the underlying 3G rate was more than double the regulated 2G rate – in a few instances it was more than three times the regulated rate. The smallest differential for any of the rates was an instance where the underlying 3G rate was 43 per cent higher than the corresponding capped 2G rate.

130. OFCOM's reasoning as to why it was appropriate to compare the blended rate rather than the underlying 3G rate with the regulated 3G rate was set out in paragraph [4.39] of the BT Disputes Determinations. This paragraph came in the section which set out OFCOM's conclusions as to the practical reasons why it was reasonable to set a blended rate which set a single charge for all calls regardless of whether they are in fact terminated on the 2G or 3G network rather than to attempt to charge two rates and collect the higher 3G rate only on those calls actually terminated on the 3G network. As neither the originating operator nor the calling party is able, on the current state of the technology, to affect the choice of terminating network and neither is likely to be aware of which network has been used, "this indicates that there are practical reasons why it is reasonable for MNOs to set blended termination rates". Further there are no economic efficiency reasons for charging separate rates.

131. OFCOM continued:

> "Ofcom indicated that this conclusion has an important implication for Ofcom's approach to considering the reasonableness of the blended termination charges in these disputes, specifically why it is only necessary to focus on the blended charge in resolving the disputes. It is only necessary to consider the reasonableness of the blended charge (i.e. the output from the way the charge is calculated), not the way in which the blended charge was calculated (in particular the underlying 3G charge). This is because the blended charge is what BT actually pays for each minute of termination (i.e. it is the contractually applicable charge). The underlying 3G rate is not paid in any commercially realistic sense on any minute of termination – instead its relevance is only that it contributes to the derivation of the blended charge, which is the charge that is paid by BT."

132. In the Tribunal's judgment this is a *non sequitur*. There may well be good reasons why, if it is reasonable to charge a premium for 3G terminated calls at all, it is reasonable to do so by way of a blended charge rate for all calls rather than a separate rate for 3G and 2G terminated calls. But that fact says nothing about whether the increases that BT and H3G are being asked to pay is a reasonable

amount or not. BT's complaint was not about whether it was fair for the increased 3G rate to be spread over the whole of its traffic rather than paid on 3G terminated calls. It was not contesting the estimates for future traffic used by the MNOs in deciding how much 3G termination rate to include in the blend. Its complaint was about whether it should have to pay more for 3G termination at all and if so, how much more. OFCOM's reasoning was flawed because the points that it discussed as to why blended rather than separate rates made sense were irrelevant to the issues in dispute between the parties.

133. In the Tribunal's judgment the question whether the correct comparison for assessing reasonableness is as between the blended rate and the regulated 2G rate or between the underlying 3G rate and the regulated 2G rate is not necessarily answered in the same way in all circumstances – it depends on the purpose for which the comparison is being made. For example, if one were considering the impact that the increase in charges would make on BT's or H3G's profitability it would be appropriate to compare the blended rate with the regulated 2G rate since profitability is affected by the amounts actually paid not by the level of the charges themselves. But in this case OFCOM's task was to consider whether the MNOs were justified in seeking to increase the existing prices charged under the SIA. Since the 2G/3G MNOs were already charging the maximum for 2G termination that they could charge under the 2004 Statement price control, the proposed increase in price was entirely based on the introduction of 3G termination.

134. The relationship between the blended rate and the 2G regulated rate depends on two factors: how much higher the underlying 3G rate is than the 2G rate and what assumption is made about the volume of traffic which will be terminated on the 3G network as compared with the 2G network. The effect of the 2G/3G MNOs' introduction of a higher 3G rate is diluted in the blended rate because most of the rate is made up of the regulated 2G rate. The correct comparison when one is assessing whether the charge over and above the regulated rate is reasonable must therefore be between the 2G regulated rate and the underlying 3G rate. OFCOM's reasoning amounts to saying that because BT is not required to buy very much 3G termination from the MNOs (because the proportion of 3G termination in the blend

is small), the price charged may be reasonable even if it would not be considered reasonable if BT was required to buy more. That cannot be right.

135. Mr Budd's white and brown egg analogy usefully illustrates the mistake that OFCOM made. We agree with BT that OFCOM erred in using the blended rate as the relevant comparator as opposed to examining whether the 3G rate proposed was a reasonable rate for 3G termination.

(viii) Disregard of relevant material

136. BT argue that the BT Disputes Determinations were flawed because OFCOM ignored relevant material, namely the information that it had gathered in the course of its review of market 16 which began with the preliminary consultation in June 2005 and culminated in the 2007 Statement. This information included in particular information about the costs of 3G termination which the MNOs had provided to OFCOM together with information obtained from other sources, including OFCOM's own modelling. OFCOM explained that it did not regard it as appropriate to use that data because it was gathered "for a different regulatory purpose", that is the consideration of significant market power and appropriate remedies for mobile call termination after the expiry of the existing 2G charge controls on 31 March 2007. OFCOM accepted that it was not precluded by statute from using the information. On the contrary, section 393 of the 2003 Act, which generally prohibits disclosure of information by the exercise of powers conferred by the Act, expressly provides that disclosure can take place for "the purpose of facilitating the carrying out by OFCOM of any of their functions". But, in OFCOM's view, it was neither necessary nor appropriate, in OFCOM's view, to determine the disputed charges by reference to data gathered in the context of the 2007 market review.

137. OFCOM's only reference to the level of costs established in the 2007 Statement was in relation to the question whether, applying the gains from trade test, it was satisfied that the MNOs would make a gain from trade if their mobile call termination were set at the rates they were proposing.

138. In the Tribunal's judgment, OFCOM's refusal to consider cost information gathered during the SMP market review other than for that very limited purpose was an error. It would not have been inappropriate to have regard to this - on the contrary, the information could have provided substantial assistance in arriving at a reasonable rate.

139. This is all the more the case because we were told that OFCOM had earlier expressed its intention to gather information to produce a model for 3G termination costs for general use in resolving any future disputes about 3G termination charges. We were shown a letter which OFCOM sent to H3G in February 2005 saying that OFCOM intended to consult on developing a model for 3G costs. In that letter OFCOM said that its objective was to "develop a robust and transparent model that could have a number of uses". OFCOM advised H3G that they should not infer anything about OFCOM's intentions in the forthcoming SMP market review from this new exercise:

> "Even under the current regulatory regime for termination, there is a possibility that Ofcom will be required to investigate a complaint or dispute concerning the reasonableness of 3G termination charges. As 3G volumes grow, the likelihood of a complaint or dispute grows also. Clearly, in order to complete any such investigation, it would be essential for Ofcom to have a good understanding of the underlying costs. But it would not be practicable to achieve that understanding within the limited timescales for an investigation."

140. OFCOM therefore proposed informal discussions with H3G in advance of the formal consultation on the costs model. Such a model would have been a very useful tool for ensuring that OFCOM was in a position to respond promptly to disputes referred to it and to enable OFCOM to resolve such disputes within the strict time limits set by the 2003 Act. We were told, however, that the exercise envisaged in the February 2005 letter did not take place because the cost modelling exercise was subsumed in the work for the SMP market review. In those circumstances there could be no justification for saying that the cost model arrived at in the SMP market review should not have been used for the dispute resolution powers.

(ix) Benchmarks for the reasonableness of the proposed rates

141. BT complained that OFCOM wrongly rejected the appropriateness of comparing the proposed MNO charges with various benchmarks that BT urged upon it. Had it made the right comparisons, BT argues, OFCOM would have seen that the proposed charges were unreasonable. OFCOM dealt with benchmarking at paragraphs [4.62] onwards of the BT Disputes Determinations. It rejected any comparison of the rates of the different MNOs one with the other since they were all the subject of legal challenge. No one has argued that OFCOM erred in that respect.

International comparisons

142. So far as international comparisons were concerned OFCOM said that termination charges that apply in other countries were "unlikely to be sufficiently relevant to enable a robust conclusion to be drawn". International benchmarks may be difficult to compare "due to differences in costs related to, for example, geography, topology and underlying equipment and labour".

143. BT argues that OFCOM should have used this material as benchmark. Mr Budd's evidence was that even taking into account differences between countries, some valid inferences could be drawn. He referred to information published by Comisión del Mercado de las Telecomunicaciones ("CMT"), the Spanish regulator as part of the data it collected in December 2006 to resolve an interconnection dispute between Telefonica and Xfera a new entrant 3G only operator. The table reproduced from the CMT decision shows the average price charged in December 2006 by 3G only operators in different Member States and then expresses it as a percentage of the excess over the average 2G/3G price. It shows the United Kingdom figure for H3G as being 88 per cent (that is, H3G's charge before the 22 November 2006 proposed increase was calculated in December 2006 to be 88 per cent higher than the average 2G/3G price prevailing in the UK), substantially above the percentages shown for the five other Member States in the table. Mr Budd calculates that if the increase approved for H3G's rates was included in the table, that 88 per cent figure would rise to 150 per cent.

144. The Tribunal accepts that there may be difficulties in making comparisons and that OFCOM cannot be expected within the four months allowed for its investigation to make extensive inquiries into what has happened in other territories. But there was an error of methodology in simply dismissing the value of any comparison. This is particularly so given that these MNOs themselves belong to corporate groups which operate in the other Member States so may be expected to have access to relevant information. BT was able in preparing its evidence for its appeal to draw on readily available published sources to point up a comparison which merits further consideration. Within the limited time available OFCOM should have made some attempt to gather from the parties comparative information and seek their views as to reasons for and against reliance on it. It should then have been able to form a view about (a) whether there was any value in making the comparison or whether the differences in the markets were so fundamental as to make any comparison invalid and (b) whether, if it was possible to make a valid comparison, the figures were different by an order of magnitude which cast doubt on the reasonableness of the proposed prices.

Comparison with the 2G/3G MNOs' regulated 2G rate

145. OFCOM did compare the proposed rates with the regulated 2G rate but, as we have explained earlier, they erred in using the blended rate for the comparison rather than comparing the underlying 3G rate – which was the matter in dispute between the parties – with the regulated 2G rate. OFCOM's conclusion that because the blended rates were all less than 10 per cent higher than the 2G regulated rates and hence could be regarded as reasonable was therefore invalid because they were comparing the wrong things.

146. As regards benchmarking for H3G, which was not subject to the price control set under the 2004 Statement, OFCOM did compare its proposed 3G rate with the 2G price cap although it stated that this comparison was "less likely to be meaningful" because H3G does not operate a 2G network. OFCOM regarded the comparison between the proposed rates and the regulated 2G rate as a "one-way test" in that closeness to the cost-based prices set under the 2004 Statement price control would be evidence that the proposed charge is likely to be reasonable, but this was not a necessary condition and the charge might be considered reasonable even if it was

not close to a strictly cost-based level. Looking at H3G's charge, OFCOM acknowledged that the charges proposed by H3G in November 2006 were substantially higher than the regulated 2G charges of the other MNOs. Hence this comparison did not provide evidence that H3G's charges were reasonable. However, given that OFCOM regarded the comparison as a one-way test, OFCOM concluded that it did not provide evidence that H3G's charges are unreasonable. OFCOM therefore considered that no reliable inference could be drawn from this comparison as regards the reasonableness of H3G's charges proposed in November 2006 in the context of the end-to-end obligation on BT.

147. The Tribunal disagrees with the use of this benchmark as a "one-way test". A test that cannot be failed is not a test at all. Even if OFCOM rejected BT's primary argument and considered that some additional charge for 3G termination might be justified, since it was common ground that the additional functionality in voice termination was minimal, there had to be some limit beyond which the higher charges would be deemed to be unreasonable. The comparison between the 3G rates of H3G with the regulated 2G rate was equally important as the comparison of the underlying 3G charge in the 2G/3G MNOs' blended rates because this was the crux of the issue between the parties. The fact that the charges were so distant from the benchmark – H3G's proposed charge was over 80 per cent higher than the average regulated 2G rate – should have prompted OFCOM to consider whether this indicated that the charges were unreasonable. That is the purpose of making benchmark comparisons.

Comparison with 3G costs and regulated rates apparent from the 2007 Statement

148. In his evidence, Mr Budd for BT drew the Tribunal's attention to the findings as to the costs of 3G termination set out in the 2007 Statement and compared these with the proposed 3G element which the 2G/3G MNOs proposed to charge BT in these disputes. In the 2007 Statement, Mr Budd stated, OFCOM concluded that the costs of 3G termination were 4 ppm ignoring the costs of the spectrum (that is ignoring the amounts that the MNOs had paid for spectrum in the 2000 auction) and 6.7 ppm if one included an allowance for spectrum costs. These per minute cost figures were based on medium forecast volumes in 2006/7. 2G costs were calculated as 4.9 ppm. Mr Budd compared these with the average charging rate of 14.84 ppm

which OFCOM had held that it was reasonable for BT to pay and invited the Tribunal to conclude that these were a further indication that the prices proposed by the MNOs were outside the bounds that could be described as reasonable.

149. Mr Budd also compared the underlying 3G rates proposed by the MNOs in these disputes with the rates set for 2007/8 in the 2007 Statement: 5.7ppm for Vodafone and O2, 6.2ppm for T-Mobile and Orange, and 9.1ppm for H3G. These rates formed the first year of the glide path to allow the MNOs some time to adjust from their existing rates to the lower rates determined for 2010/11, and are in some cases higher than the 2G capped rates.

150. OFCOM rejected comparisons with the results of the 2007 review stating that BT's complaint is in effect that OFCOM did not "use the dispute resolution process as a means of "bringing forward" the regulation of 3G MCT rates introduced in the 2007 MCT Statement". The Tribunal does not accept that using the 2007 Statement rates as a benchmark to assist in assessing the reasonableness of the prices proposed for the period immediately adjacent to the period covered by that Statement would be "bringing forward" the price control or that it would amount to using the dispute resolution powers as a substitute for, or in a manner inconsistent with, decisions taken in the 2004 Statement. This is not to say that the cost modelling carried out for the 2007 market review should have determined the rates that are reasonable for the purpose of the resolution of these disputes. Other considerations are also relevant, and the Tribunal is aware that, while the cost data underlying OFCOM's 2007 Statement are not in dispute, the methodology adopted in the cost modelling is subject to appeal: there are no firm, agreed estimates of costs. But for OFCOM to leave entirely out of account the information available from its extensive review of mobile call termination charges and to ignore what it concluded were the appropriate prices as a result of that review was a serious error in approach.

151. The Tribunal also considers that regulatory consistency with the 2007 Statement is as important as consistency with the 2004 Statement. Any comparison with rates

set by the price control in the 2007 Statement[10] must be made on a like for like basis - blended rate against blended rate, underlying 3G rate against underlying 3G rate. In its Defence OFCOM stated that for the 2G/3G MNOs the disputed charges were not *appreciably* above the regulated charges introduced by the 2007 MCT Statement. OFCOM set out in a table comparing the MCT charges upheld in the BT Disputes Determinations with the first year target charge imposed by the 2007 Statement (figures in ppm):

Company	**Charges upheld in disputes (time of day averages)**	**1st year target charge**
Vodafone	5.9	5.7
O2 (first OCCN)	5.8	5.7
O2 (second OCCN)	6.0	5.7
T-Mobile	6.5	6.2
Orange	6.7	6.2
H3G	16.6	9.1

152. OFCOM's table, however, needs some adjustment to take account of inflation between 2006/07 being the year of the disputed charges and 2007/08 being the year of the first target charge. For a valid comparison, the disputed rates should be increased by about 4 per cent, that is by about 0.2-0.3 pence for the 2G/3G MNOs and by about 0.7 pence for H3G. The first year target charges should also be reduced by 0.1-0.3 pence for the 2G/3G MNOs and by about 0.4 pence for H3G because OFCOM made an upward adjustment to the first year target to take account of the fact that it was not able to give the usual 60 days notice of a change in the regulated charges. Making these adjustments increases the disparity between the disputed charges and the first year target charges considerably. OFCOM's conclusion that the disputed charges of the 2G/3G MNOs are reasonable because they are close to the first year charges in the 2007 Statement is therefore flawed.

[10] The 2007 Statement rates are themselves blended to take account of OFCOM's assessment of 3G termination costs and traffic forecasts.

Even taking OFCOM's figures at face value, the sums of money involved may be significant.

VII. THE SIA CONSTRUCTION ISSUE

(i) Introduction

153. We have described earlier in this judgment how OFCOM concluded, in applying the gains from trade test in respect of the rate proposed by H3G, that BT would not have made a gain from trade if that price had applied during the period of the dispute. This conclusion was based on information provided by BT about its costs and the prices it charged its transit and retail customers. OFCOM nonetheless found that the charges proposed by H3G in November 2006 were reasonable because BT could have passed through the increased charges to its customers prospectively and therefore have made a profit. OFCOM therefore approved the rate that H3G proposed as reasonable for the purposes of BT's end-to-end connectivity obligation.

154. When OFCOM came to consider the appropriate backdating to be made in respect of the difference between what BT had been paying over the period of the dispute and what OFCOM had concluded was a reasonable rate, OFCOM took into account BT's ability to go back and recover H3G's increased charges retrospectively from originating operators, including its transit customers. This, say the 1092 Appellants and Vodafone, was based on an error of contractual construction since the SIA, when properly construed, does not entitle BT to recover such charges retrospectively from its customers: essentially, this is the "SIA construction issue".

155. The relevant provisions of the SIA were described in section III (ii) above. The remedial powers that OFCOM can exercise once it has resolved a dispute are set out in section 190(2) of the 2003 Act which, so far as material, provides:

> "(2) [OFCOM's] main power (except in the case of a dispute relating to rights and obligations conferred or imposed by or under the enactments relating to the management of the radio spectrum) is to do one or more of the following-
>
> …

(d) for the purpose of giving effect to a determination by OFCOM of the proper amount of a charge in respect of which amounts have been paid by one of the parties of the dispute to the other, to give a direction, enforceable by the party to whom the sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment".

(ii) The draft determinations and responses

156. In May 2007 OFCOM issued its draft determinations, which noted that whilst H3G's proposed charges were reasonable, BT would be required to incur a loss if OFCOM backdated its decision and ordered BT to repay the full difference between the proposed charges and those actually paid to H3G over the period 22 November 2006 (the date on which the proposed charges were supposed to apply) to 31 March 2007 (the last date of the 2004 Statement charge controls). BT had not in fact raised its own retail and transit prices during that period pending the resolution of the dispute to cover the possibility of the increased charges being backdated. OFCOM concluded that it had acted reasonably in refraining from doing so since there may have been genuine uncertainty as to the price which OFCOM would uphold as reasonable under BT's end-to-end connectivity obligation.

157. OFCOM's provisional view set out in the draft determinations was that it would not be proportionate therefore to backdate the new charges in their entirety because that would mean that BT would have been providing its own services at loss making prices over that period. This view was based on OFCOM's understanding at the time that BT would not have been able to mitigate any such loss by seeking to impose price increases retrospectively on its own retail and/or transit customers. OFCOM's initial view was that BT should be required to make repayments to H3G representing the difference between what was actually paid over the period and what would have been paid if H3G's charges had been set at BT's break-even rate on all traffic (BT originated and transit), that is to say, if BT had been paying the highest price that it could have paid to H3G without incurring a loss on its own business.

158. In its response to the draft determinations, H3G argued that OFCOM had failed to explain why BT's profitability should be given priority over H3G, thereby placing it at a competitive disadvantage vis-à-vis the other MNOs. According to H3G, OFCOM had wrongly assumed that BT would be unable to recover the costs of

backdating the proposed charges. H3G argued that under the SIA in place between BT and each of its transit customers BT would have been able to recover H3G's proposed rate retrospectively from originating operators. On this basis, BT should be required to repay H3G the full amount of its proposed charges from 1 November 2006, the effective date of H3G's proposed change of rates.

(iii) The final BT Disputes Determinations

159. Having considered responses to its draft determinations, and the terms of the SIA, in the final version of the BT Disputes Determinations OFCOM accepted H3G's argument and concluded that BT would be entitled to recover H3G's increased charges retrospectively from its transit customers, even though this might not always be commercially feasible. OFCOM stated as follows (paragraph [6.57] of the BT Disputes Determinations):

> "Ofcom understands that Clause 12.3.1 [of the SIA] would allow BT to recover an increase in termination charges from originating operators in situations where BT is acting as a transit operator for mobile call termination to a particular MNO. Clause 12.3.1 allows BT to vary a charge for a BT Service (i.e. the transit charge for calls to H3G's network) with retrospective effect where that variation is the result of a variation in a Third Party Operator charge payable by BT which has retrospective effect. Ofcom's final determination that BT should pay a higher charge for termination of calls to H3G and is therefore liable to vary those charges with retrospective effect would amount to a variation envisaged by Clause 12.3.1. Ofcom is therefore of the view that BT can claw back the increase from transit customers and this is consistent with the position adopted by BT and H3G in relation to this issue."

160. OFCOM therefore considered it was appropriate to take BT's ability to claw back any repayments from its transit customers into account when determining how far its award should be backdated. OFCOM further noted that BT's transit customers were likely to have similar or higher margins than BT on calls to other networks, in which case any attempt by BT to recover H3G's proposed charges retrospectively would not require its transit customers to absorb a loss.

161. Because there was no suggestion that BT could recover retrospectively the costs of H3G's proposed rates insofar as they related to BT-originated calls, and in order to avoid a result that would be unfair on BT's transit customers, OFCOM required BT to make the same repayments in respect of all traffic. The repayments were calculated according to a break-even charge based on BT originated traffic.

In OFCOM's view, this would ensure that any retrospective charges payable by BT's transit customers for call termination provided by H3G were equal to the charges faced by BT's retail operations.

162. In light of the foregoing analysis, OFCOM directed BT to make repayments to H3G reflecting a break-even charge for BT-originated traffic. The break-even charge for BT-originated traffic only adopted by OFCOM in the final version of the Determination was considerably higher than the break-even charge for both BT-originated and transit traffic used in the draft determination. This meant that the overall backdated sum BT was ordered to pay H3G (being the difference between the amount actually paid over the period and the break even rate in each case) was significantly higher than proposed in the draft determination. This was offset somewhat by the fact that OFCOM also brought forward the date from which the adjustment had to be made from the date of the proposed increase (22 November 2006) to 17 January 2007. This took into account a 56 day notice period which OFCOM found was usually given for price increases in the industry.

163. On or around 12 July 2007, BT issued invoices to its transit customers, including all of the 1092 Appellants, seeking to recover the increased MNO charges retrospectively.

(iv) Parties' submissions

164. It was submitted by the 1092 Appellants and Vodafone that BT was not entitled to recover the increased H3G charges retrospectively from its transit customers. They argued that OFCOM had misinterpreted the SIA since, on its proper construction, the SIA does not allow retrospective collection. The fact that BT did not pay H3G's charges when they were due to take effect, but chose instead to refer the matter to OFCOM for determination does not mean that the charges had retrospective effect for the purposes of the SIA. This construction, say the 1092 Appellants, means that BT's transit customers do not have to bear the risk of BT unsuccessfully challenging the rates proposed by a third party operator.

165. The 1092 Appellants also refer to a provision in the Carrier Price List which forms an express part of the SIA. In the section dealing with charges in respect of transit calls, the Carrier Price List states:

> "Please note that billing team only provides one month backdated billing for Transit charges. Retrospection, as determined by OFCOM, is not applicable to [Payments to Other Licensed Operators] payments for traffic which originates on non-BT networks".

166. The 1092 Appellants submit that the SIA and the Carrier Price List should be construed together. In their view the SIA sets out the broad general principles governing the contractual relationship, while the Carrier Price List sets out the detail, which, in this case, means BT is unable to recover the cost of higher transit charges retrospectively.

167. There was a further argument relied on by the 1092 Appellants which challenged BT's entitlement to claim retrospective payments from its transit customers on the basis that it would be incompatible with one of BT's SMP conditions, and in particular condition AA1(a).2. That SMP condition requires BT to provide network access "on fair and reasonable terms, conditions and charges". The 1092 Appellants argue that if, contrary to their primary argument, the terms of the SIA do allow retrospective imposition of price increases then those terms are, to that extent, unfair and unreasonable and so contrary to that SMP condition. This is particularly so given that the transit customers (a) were not aware of the increased rates being proposed for a long time, (b) did not have an opportunity during OFCOM's investigation to comment on the proposed retrospective charging and (c) were unable to pass on these charges to their own customers.

168. OFCOM argued that, on a proper construction of the SIA, BT would be entitled to recoup H3G's increased rates. First, by ordering BT to make repayments to H3G for the period 17 January to 31 March 2007, OFCOM's determination varied charges incurred by BT prior to the date of variation and therefore had retrospective effect. Secondly, whatever the meaning of the provision in the Carrier Price List, that document cannot alter the proper construction of the SIA. Thirdly, the 1092 Appellants have not established that OFCOM's interpretation of the SIA would mean that BT was in breach of its SMP conditions. In any event if the complaint is

that BT has acted in breach of its SMP conditions, the appropriate course would be for the 1092 Appellants to refer a complaint or dispute to OFCOM. BT's primary argument was that the issue of retrospection was irrelevant but, in the alternative it supported OFCOM's arguments on the proper construction of the SIA. BT made the further point that its ability to recover variations of charges with retrospective effect did not depend on it first having notified its transit customers of the disputed MNO charges. BT also notes that retrospective collection may adversely affect its position in the market for transit services.

(v) The Tribunal's analysis

169. The Tribunal has already found that the use of the gains from trade test was a serious error by OFCOM and did not form a proper basis for a decision as to the reasonableness of the rates proposed by the MNOs. The question of what sums should be ordered to be paid under section 190 does not, at the moment therefore, arise for the Tribunal's decision. We consider, however, it is useful to clarify certain matters, in deference to the submissions that have been made. Section 190(2)(d) of the 2003 Act is a straightforward provision designed to ensure that OFCOM's determination of what is a reasonable rate is backdated to the time at which that rate would have come into effect had the OCCN been accepted. It should ordinarily follow on from a determination that this kind of readjustment takes place. Otherwise the party which has wrongly resisted the proposed OCCN is in a better position than they would have been in had they accepted it without challenge.

170. Ordinarily it will be irrelevant to the decision to order an adjustment whether the paying party either has been prudently collecting the money from its customers just in case the determination goes against it, or whether it should have done so or whether it could go back and collect the money from those customers now. The sum ordered to be paid under section 190(2)(d) does not relate to particular past minutes in a way that means that the sum should be charged to the users of those minutes. Rather it is a liability which is imposed on the company by OFCOM in the dispute between the parties. How the payer, at least a payer who is not impecunious, goes about meeting that liability is not material to the question

whether it is fair that the vindicated party should have their reasonable rate backdated.

171. The issue only became problematic here because OFCOM had determined that a reasonable price was a price which resulted in BT making a loss unless and until it raised its own retail and/or transit prices. This led OFCOM to conclude that in the particular circumstances of the case it was unfair to apply section 190(2)(d) in its full force.

172. Adapting the ordinary application of section 190(2)(d) in this way would, in the Tribunal's judgment, have been an error. If OFCOM had been correct in determining that the rate proposed by H3G was reasonable even though it resulted in BT making a loss at its existing transit or retail rates, then those losses would not provide any justification for depriving H3G of the money it would receive pursuant to an order made under section 190(2)(d). If the reasonable rate was backdated, it would then be for the payer, BT in this instance, to decide whether it would fund the payment by absorbing the loss or by attempting to recover monies from its transit customers or simply by increasing its retail and transit charges for the future to fund the required payments.

173. The Tribunal finds it difficult therefore to envisage a situation where the question whether BT is able to recover additional sums retrospectively from its customers would be relevant to making an order under section 190(2)(d).

174. Having come to the conclusions we have on the BT Disputes Determinations, and in light of what we consider to be the proper application of section 190(2)(d), we find it unnecessary to express any views on the proper interpretation of the SIA.

VIII. HOW SHOULD OFCOM HAVE APPROACHED THE TASK OF RESOLVING THESE DISPUTES?

175. The relief sought by some of the appellants asks for clear directions or guidance to be given to OFCOM as to how to approach the task of resolving these disputes in the event that one or more of the grounds of appeal succeed. We were told that there are a number of disputes currently before OFCOM in which it is considering

the exercise of its dispute resolution powers. This, as well as the large sums of money involved, explains why the parties have been so assiduous in pursuing these appeals even though the price set by the Determinations has largely been overtaken by the price controls set in the 2007 Statement. OFCOM also made clear at the hearing that, in the event that the appeals were upheld, the Tribunal should give as much guidance as possible as to how to exercise this function.

176. We recognise that it is not helpful simply to require OFCOM to take into account its statutory objectives. Those objectives are expressed in broad terms setting out a series of "goods" that the regulator should promote. OFCOM has to find a way of moving from those "goods" to a price expressed in pence per minute and must provide adequate reasoning explaining how it has arrived at the figure. The Tribunal has therefore considered both what general guidance can be given to OFCOM as to how it should resolve disputes referred to it under section 185 of the 2003 Act and also how the current disputes should be disposed of. The Tribunal must bear in mind that it is intended to provide an effective appeal mechanism from OFCOM's decisions and that this is best achieved if the appeal process arrives at a final resolution of these disputes rather than simply remitting the matter back to OFCOM to undertake further investigation and consultation.

(i) Dispute resolution generally

(a) Consideration of why the dispute has arisen

177. In many cases, including the present ones, the dispute will arise in the context of an existing commercial agreement where one of the parties is trying to vary the terms. OFCOM has made it clear in the guidance it issued in July 2004 on dispute resolution that it "will not accept a dispute without evidence of the failure of meaningful commercial negotiations". It requires the parties to provide documentary evidence of commercial negotiations on all issues covered by the scope of the dispute and a statement by an officer of the company, preferably the CEO, that the company has used its best endeavours to resolve the dispute through commercial negotiation. This stance reflects the wording of Recital (32) of the Framework Directive which provides that "an aggrieved party that has negotiated in good faith but failed to reach agreement should be able to call on the national

regulatory authority to resolve the dispute". The onus lies on the party proposing the variation to provide to the other party and to OFCOM the justification for the change in the terms upon which the parties have hitherto been prepared to do business. This would be the position in any situation where one party to a binding contract proposes a variation of that contract.

178. The fact that the dispute is referred to OFCOM must mean either that the other contracting party does not accept the justification put forward by the party proposing the variation or that it asserts that there are counter influences cancelling out that justification or perhaps both. OFCOM's first task is therefore to examine the reasons put forward for the proposed change in terms and decide whether they are justified. In considering this question OFCOM must have regard to what is fair as between the parties and what is reasonable from the point of view of the regulatory objectives set out in the Common Regulatory Framework directives and in the 2003 Act.

179. If it is clear that the reasons put forward do not support the change proposed, then the dispute may be resolved simply by upholding the rejection of the proposal by the recipient of the OCCN and ordering the parties to continue doing business on the terms and conditions that have so far applied. Similarly, if it is clear that the objections raised by the recipient of the OCCN are without foundation, then OFCOM can resolve the dispute by upholding the proposed change and make the appropriate orders.

180. Given OFCOM's role as a regulator, even if it decides that the arguments put forward by one side of the dispute are misconceived, OFCOM must still check whether the position that would be arrived at by fully accepting one or other side's arguments will accord with the regulatory objectives. This is not to say that OFCOM must, as a matter of course, consider afresh the totality of the terms and conditions each time a dispute is referred, regardless of how wide or narrow the actual area of dispute is between the parties. However, it is always appropriate for OFCOM to ask itself whether there are grounds which would justify it exercising other powers under the 2003 Act to intervene in respect of those aspects of the contract which are not in dispute between the parties. This is part of OFCOM's

overall regulatory remit, keeping in mind its powers under section 105 of the 2003 Act (pursuant to article 5(4) of the Access Directive) to intervene on its own initiative in matters relating to access and interconnection. If OFCOM concludes that there would be no grounds for such intervention, then OFCOM would be entitled not to stray beyond the matters put at issue by the parties. If the answer is affirmative then OFCOM would be entitled to investigate the contract terms more widely. It would not be right for OFCOM to ignore that possibility on the grounds that those are matters which can be dealt with in the course of a future market review into the imposition of SMP conditions or by the application of domestic or European competition law.

181. Turning to the matters which are in dispute between the parties, there was some discussion during the course of the hearing about whether OFCOM was bound when resolving a dispute, to arrive at a figure falling within the range of figures proposed by the parties or whether it could set a figure that was outside that range, if it concluded that that was necessary in order to achieve the regulatory objectives. All the parties agreed that this was possible though there was some difference of opinion as to whether OFCOM could do so in the course of its section 185 dispute resolution function or whether it would have to exercise other powers under the 2003 Act in order to arrive at such a result. Section 190(4) of the 2003 Act provides that nothing in section 190 prevents OFCOM from exercising its powers to set conditions in consequence of their consideration under this Chapter of any dispute. The legislation clearly thus envisages that the reference of a dispute to OFCOM could lead ultimately to a result which is not that contended for by either of the parties to the dispute. This confirms the point that was stressed by the Tribunal in its judgment in *H3G (1)*, that OFCOM carries out its dispute resolution function as a regulator and not as a third party arbitrator. The Tribunal did not mean by this that nothing in OFCOM's role in dispute resolution should be regarded as akin to the role of a commercial arbitrator, simply that that was not OFCOM's *only* role. The fact that, as we have held, part of OFCOM's role is to determine a rate which is fair and reasonable *as between the parties* does not mean that OFCOM is transformed into a commercial arbitrator; this factor is combined with a requirement that it determine a rate which also accords with its regulatory objectives.

(b) Information about costs

182. If OFCOM decides that there is some merit on both sides of the dispute, it must go on to consider and adjudicate on the reasons proposed for changing the contractual terms. The parties may, during the course of OFCOM's investigation raise new points that had not hitherto been relied on in the negotiations and OFCOM may itself decide that there are other issues which need to be explored and may ask the parties to provide it with the necessary information regarding such issues in the exercise of its powers under section 191(1)(c) of the 2003 Act.

183. In some cases the reason why an increase in price is proposed is that there has been an increase in the supplier's costs. Conversely they may be cases where the purchaser, noting that some new technological or other market development has decreased the supplier's costs, proposes a reduction in price so that it and its customers can share in the benefit of the cost savings (as would be likely to happen if the supplier were operating in an effectively competitive market). In such a case, OFCOM will need to investigate the assertions of the parties to determine whether a change in the price is fair and reasonable. As explained earlier, it is accepted that OFCOM is not expected to carry out the kind of cost based analysis that is performed in the setting of a price control SMP condition. The Tribunal has made clear that parties' expectations must be realistic and that OFCOM has a degree of discretion as to how it approaches this task.

184. Even if the submissions made by the parties do not focus on costs issues, the Tribunal would expect OFCOM at least to consider whether an analysis, however broad brush, of the relationship of prices to costs is necessary. OFCOM should also have regard to the consistency of price and cost trends in all cases, regardless of the stance adopted by the parties. Such an investigation may well be appropriate to ensure, for example, that the objectives in section 3 of the 2003 Act are met.

185. Section 393(2)(a) of the 2003 Act permits OFCOM to use material gathered for one regulatory purpose to facilitate its carrying out of any of its other functions. In carrying out its dispute resolution task OFCOM is entitled to and should make use of information in its possession which appears relevant, including information

gathered in the course of its other regulatory activities. This is subject to allowing the parties to comment on the accuracy and relevance of that information. The Tribunal has already found that OFCOM erred in ruling out reliance on costs information gathered in the course of the SMP market review.

(c) Benchmarking

186. Benchmarking is a useful tool and OFCOM should consider the value of comparisons put forward by the parties and what they show about the reasonableness of the charges or other terms and conditions being proposed. Nevertheless, the Tribunal considers that benchmarking against a price control cap set as an SMP condition needs to be approached with caution. Price controls are set on the basis of information about costs available at the start of a period to be covered by a market review and such controls will extend over a number of years. The regulatory intention is that such controls encourage undertakings bound by them to reduce their costs over the period so as to maximise profits. Any such reductions in costs will then be taken into account when the controls are reviewed and revised for a subsequent period of years. It is important therefore not to allow benchmarking against actual or proposed price controls to be used in a way which deprives the undertakings of the benefits of cost reductions and other efficiency savings which such controls were intended to encourage.

(d) Consideration of other regulatory objectives

187. In any determination issued by OFCOM under section 185, the Tribunal would expect to see some discussion of which of the general duties set out in section 3 and which of the Community requirements set out in section 4 of the 2003 Act (read together with article 8 of the Framework Directive) are particularly engaged by the issues raised in the dispute and how the proposed resolution of the dispute accords with those objectives. It is not sufficient simply to refer to the relevant provisions of the legislation in general terms when many are of little relevance to issues raised by the dispute. Some of these provisions are likely to apply in most disputes referred under section 185. OFCOM must always bear in mind that the parties to the dispute may have common interests antithetical to other interests to which OFCOM is bound to have regard. The first Community requirement to promote

competition in relation to the provision of services as well as networks indicates that OFCOM must take into account the interests, for example, of the mobile virtual network operators ("MVNOs") as well as of the MNOs themselves. The fourth Community requirement, often summarised as a requirement for "technological neutrality" means OFCOM must balance interests not only between those providing voice service over different types of mobile network but also the interests of voice service providers using a variety of fixed networks.

188. The principal way in which OFCOM ensures that relevant interests are taken into account is by consultation and the publication of a draft determination. It will generally be important to invite and consider the views of undertakings other than the parties to the dispute. For example, OFCOM may consider that the desirability of encouraging investment and innovation in relevant markets requires it to invite the views of the wholesale customers of the parties to the dispute, given that they may be affected by the pass through of any price increase under consideration. It is essential therefore that the information published about the nature of the dispute and how OFCOM proposes to resolve it is sufficiently detailed to enable third parties to appreciate the significance of what is involved and how it might affect them. If this requires setting up a confidentiality ring within which commercially sensitive information can be disclosed then that is something which OFCOM should consider.

189. As we have already indicated, consistency of approach is an important factor for OFCOM to bear in mind. There are two aspects to this. First, OFCOM needs to consider whether there are relevant *ex ante* obligations in place which affect the position of the parties on the market. Thus, the end-to-end connectivity obligation imposed on BT may well be a relevant factor to bear in mind, though it should not be treated as an overriding factor. Secondly, OFCOM needs to consider whether its proposed action is consistent with its previous approach to issues such as cost modelling and its assessment of particular issues.

(ii) The resolution of these disputes in particular

190. In the light of this judgment, it is clear that the Disputes Determinations cannot stand. Section 195 of the 2003 Act requires the Tribunal to remit these

Determinations to OFCOM with such directions, if any, as we consider appropriate for giving effect to our decision. We have considered what is the best course for these proceedings to take from this point on. The prices in dispute relate to a finite period between the second half of 2006 and 1 April 2007, being the point at which the price control cap set in the 2007 Statement applies. Although some of the MNOs may have chosen to maintain the prices set by the Determinations beyond 1 April 2007, they will need to have offset this by a reduction later in the year in order to ensure compliance with the target prices set for the first year of the new price control. Given that the matters in dispute effectively relate to a period which ended more than a year ago, the Tribunal does not intend simply to remit the decision to OFCOM with a direction to consider the matters afresh. The Tribunal has in mind its power under rule 19 of The Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003) ("the Tribunal Rules") to give directions to secure the just, expeditious and economical conduct of these proceedings. This is best secured by achieving finality as quickly as possible as regards what the price should be over the relevant months. The Tribunal has therefore considered what further steps are necessary to enable us to determine what the appropriate price for call termination should be so that we can remit the matter to OFCOM with a direction specifying the rates which OFCOM should fix.

191. We have said that the first task in resolving disputes referred under section 185 is to consider the arguments that were put forward by the party seeking to vary the contractual terms either in the course of negotiations before the reference was made or in their submissions to OFCOM. On the information currently available it appears that the nub of each of the disputes referred to OFCOM could be expressed as whether it was right that the MNOs should charge more for 3G termination than for 2G termination and, if so, how much more. The OCCNs served by T-Mobile and O2 were rejected by BT because they introduced a blended rate and the OCCNs served by BT on Orange and Vodafone sought to reduce the rates to a level which expunged any additional charge for 3G termination. Similarly, H3G's OCCN of 22 November 2006 was based on what it understood to be the rate for the 3G element in one of the MNOs' blended rates and was rejected by BT for that reason. The OCCNs served by Orange and O2 on H3G sought to introduce blended

rates and H3G rejected these rates in part for the same reasons as BT had rejected them.

192. The BT Disputes Determinations deals with these points of principle very briefly. In paragraph [4.26] OFCOM notes that it decided not to regulate 3G termination prior to 1 April 2007 and that in doing so OFCOM made a number of public statements concerning blended termination charges and did not preclude the MNOs from setting charges on a blended basis. A footnote to this paragraph directs the reader to the Preliminary Consultation issued in June 2005 as an example of the public statements referred to. OFCOM's reasoning as to why the blended charge could be higher than the regulated 2G charge – in other words as to why the MNOs should be able to charge more for 3G termination – is set out in paragraphs [4.40] to [4.45] of the BT Disputes Determinations. There OFCOM reiterates its view that the only *ex ante* regulation in place which is relevant to the assessment of the reasonableness of the blended charge is the end-to-end connectivity obligation imposed on BT. Having regard to the purpose of that obligation it would not be proportionate to set a strictly cost based price. Further OFCOM referred to the deliberate decision in the 2004 Statement not to regulate 3G termination charges "in the full knowledge that MNOs were likely to blend charges". OFCOM therefore considered that it would be contrary to its clearly stated position in the 2004 Statement if OFCOM now considered that blended charges must be the same as regulated 2G charges. OFCOM's view was therefore that the price regulation applicable to 2G termination should not be extended to cover blended termination rates.

193. This treatment of what was actually the subject matter of the dispute was inadequate. OFCOM's focus on the impact of *ex ante* regulation and on the need for consistency with the 2004 Statement, both of which the Tribunal has found were erroneous, meant that it failed to address the real content of the disputes referred to it. The Determinations do not therefore contain any real discussion of the merits of the arguments put forward by BT in resisting the introduction of the blended rates (whether by rejecting OCCNs or serving its own OCCNs), nor do they explore the nub of H3G's complaint that O2 and Orange had failed to provide it with adequate information to support their proposed increases in rate.

194. There is therefore a dearth of information before the Tribunal about the justification for the price increases proposed and BT's reasons for rejecting them. The Tribunal has concluded that it would be unfair to formulate a direction specifying the prices which should be set without exercising its powers under rule 19 of the Tribunal Rules to allow the parties to supplement the existing evidence before the Tribunal with any contemporaneous evidence on which they seek to rely to justify a change in price. Such evidence may relate to the negotiations between the parties before the dispute was referred to OFCOM or their internal deliberations concerning the prices set or proposed at that time.

195. The Tribunal has considered further whether there is sufficient evidence before it on issues such as costs information or benchmarking for the Tribunal to determine the price following the "route map" indicated earlier in this judgment. Some of the evidence lodged by the parties in these appeals does assist. For example the witness statement of Mr Budd on behalf of BT sets out information extracted both from the BT Disputes Determinations and from the 2007 Statement. There is other information in the 2007 Statement and, given that the conduct of these appeals has recognised the overlap between the issues in the TRD appeals and the challenges to the 2007 Statement, the Tribunal considers that it may be appropriate to rely on evidence provided in the appeals against the 2007 Statement in arriving at the final disposal of the TRD appeals. In line with the previous section of this judgment, the Tribunal would not be undertaking an investigation similar to that which is carried out in the context of the market review and our preliminary view is that, apart from the contemporaneous material referred to earlier, there is enough information in the 2007 Statement and in the evidence lodged in these appeals for the Tribunal to arrive at a conclusion on what is a reasonable price.

196. The Tribunal also recognises that some of the issues which may need to be resolved in determining these appeals overlap with the issues that the Competition Commission must consider in its investigation of the specified price control matters referred to it in the challenges to the 2007 Statement. The focus of the Competition Commission's investigation is on a different period from that covered by the TRD appeals. If the Tribunal adopted OFCOM's cost analysis in the 2007 Statement for the purposes of resolving these disputes, it would be made clear that the Tribunal

was not prejudging the outcome of the Competition Commission's investigation of the price control matters in the appeals by BT and H3G against the 2007 Statement. The Tribunal needs to balance the desire not to prejudge the Competition Commission's investigation against the desire to resolve these disputes as soon as possible.

197. In addition, there remain the issues that are raised in the TRD appeals but which were not argued at the combined hearing in January and February 2008 ("the non-core issues"). These comprise the matters that were set out in the Tribunal's order of 5 February 2008 and include allegations of procedural unfairness in the consultation process, a challenge by T-Mobile to OFCOM's decision to apply the rates in T-Mobile's OCCN of 1 December 2006 and issues about the backdating of the awards made by OFCOM. The order of 5 February set a timetable leading up to a hearing of the non-core issues at the end of March but this hearing was vacated by the Tribunal because it will only become clear which, if any, of these non-core issues remains live once the Tribunal has handed down this judgment and determined the rates in dispute.

198. On handing down this judgment, therefore, the Tribunal will set a date for the submission of any further contemporaneous evidence as discussed in paragraph [194] above. The Tribunal intends then to proceed to determine the rates in dispute. At that stage the Tribunal will seek the parties' views as to which, if any, of the non-core issues remain to be decided. Once any such issues have been decided the Tribunal will be able to remit the decisions to OFCOM with appropriate directions, in accordance with section 195 of the 2003 Act.

IX. CONCLUSION

199. The Tribunal finds unanimously that the challenges brought in the four appeals against the BT Disputes Determinations and in H3G's appeal against the H3G Disputes Determination are well founded, in so far as they relate to the core issues considered at the hearing in January and February 2008.

Vivien Rose Andrew Bain Adam Scott

Charles Dhanowa
Registrar 20 May 2008