Neutral citation [2012] CAT 11

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1180/3/3/11
1181/3/3/11
1182/3/3/11
1183/3/3/11

Victoria House
Bloomsbury Place
London WC1A 2EB

3 May 2012

Before:
MARCUS SMITH Q.C.
(Chairman)
BRIAN LANDERS
PROFESSOR COLIN MAYER

Sitting as a Tribunal in England and Wales

B E T W E E N:

(1) BRITISH TELECOMMUNICATIONS PLC
(2) EVERYTHING EVERYWHERE LIMITED
(3) HUTCHISON 3G (UK) LIMITED
(4) VODAFONE LIMITED

Appellants

- v -

COMPETITION COMMISSION

Respondent

- and -

OFFICE OF COMMUNICATIONS

Interested party

- and -

TELEFÓNICA O2 UK LIMITED

Intervener

Heard at Victoria House on 3, 4 and 5 April 2012

JUDGMENT

APPEARANCES

Mr Robert Palmer (instructed by BT Legal) appeared for British Telecommunications plc.

Mr Jon Turner Q.C. and Mr Julian Gregory (instructed by Everything Everywhere Limited) appeared for Everything Everywhere Limited.

Mr Brian Kennelly (instructed by Baker & McKenzie LLP) appeared for Hutchison 3G (UK) Limited.

Mrs Elizabeth McKnight and Mr Andrew North (of Herbert Smith LLP) appeared for Vodafone Limited.

Mr Michael Bowsher Q.C. and Mr Nicholas Gibson (instructed by the Competition Commissions) appeared for the Competition Commission.

Mr Josh Holmes and Mr Mark Vinall (instructed by the Office of Communications) appeared for the Office of Communications.

The Intervener, Telefónica O2 UK Limited, did not appear, but indicated in advance of the hearing that it supported the written submissions made on behalf of Everything Everywhere Limited and Vodafone Limited, and had nothing to add.

CONTENTS

I. INTRODUCTION

1. This judgment determines four appeals to the Tribunal brought under the Communications Act 2003 (the "2003 Act")[1] by, variously, British Telecommunications plc ("BT"), Everything Everywhere Limited ("EE"), Hutchison 3G (UK) Limited ("Three") and Vodafone Limited ("Vodafone"). These appeals are registered with the Tribunal under Case Numbers 1180/3/3/11 (the "BT Appeal"), 1181/3/3/11 (the "EE Appeal"), 1182/3/3/11 (the "Three Appeal") and 1183/3/3/11 (the "Vodafone Appeal"). Collectively, we refer to these four appeals as the "Appeals".

2. The Appeals are in relation to a decision of the Office of Communications ("OFCOM") contained in a statement entitled "Wholesale Mobile Voice Call Termination", published on 15 March 2011. We shall refer to this decision as the "Statement". The Statement, amongst other things, imposed price controls on mobile communications providers ("MCPs"), and it is these price controls which have given rise to the Appeals. The Statement and its effects are described in Section II below.

3. The price controls in the Statement were all imposed by way of significant market power ("SMP") conditions. The 2003 Act lays down a number of conditions that must be satisfied in to relation to the setting of SMP conditions, and these are considered in Section III below.

4. It was common ground between all of the parties that the issues arising out of the Appeals were – in their entirety – "price control matters" within the sense of section 193 of the 2003 Act. Appeals relating to price control matters are determined by way of a special process under the 2003 Act. That process involves not only this Tribunal, but also the Competition Commission (the "Commission"). The procedural framework under which appeals to the Tribunal in relation to "price control matters" (as defined in section 193 of the 2003 Act) are progressed, involves a split in competence and jurisdiction between the

[1] This judgment uses a number of terms and abbreviations, which are defined when first used in the judgment. The Annex to this judgment lists these terms and abbreviations, and identifies where, in the judgment, the term or abbreviation is first used.

Tribunal and the Commission. This framework is considered in more detail in Section IV below, and elsewhere in this judgment. However, in very brief summary, the process whereby a decision of OFCOM is appealed to the Tribunal involves the following stages:

(1) *The articulation of grounds of appeal against the decision of OFCOM.* Grounds of appeal are articulated in a notice of appeal, and this is supported by evidence.

(2) *Reference of price control matters to the Commission.* Where the grounds of appeal involve price control matters, those matters must be referred to the Commission. It is the Tribunal that determines whether a notice of appeal raises price control matters, and it is the Tribunal which typically (and generally in consultation with interested parties) formulates those matters as "reference questions" for the Commission to determine. These questions are then referred to the Commission.

(3) *Determination of price control matters by the Commission.* The Commission considers, and determines, the price control matters referred to it by the Tribunal in accordance with its own procedures, but according to a timetable laid down by the Tribunal. Once determined by the Commission, the determination of the reference questions is notified by the Commission to the Tribunal.

(4) *Review by the Tribunal.* The 2003 Act then makes provision for the review of the Commission's determination by the Tribunal. As is more fully described below, the Tribunal is bound by the Commission's determination, unless that determination would fall to be set aside applying the principles applicable on an application for judicial review. Accordingly, this stage of the proceedings typically involves a further round of pleadings (although no provision for such documents is made in either the 2003 Act or the Competition Appeal Tribunal Rules (S.I. No. 1372 of 2003) ("the 2003 Tribunal's Rules"): the matter is dealt with as a case management issue), where those parties minded to challenge the Commission's determination identify the basis upon which, it is said, the

determination falls to be set aside. We refer to these pleadings as "JR Grounds".

5. Section V describes the procedural history of the Appeals. In very brief summary, and by reference to the four stages set out in paragraph 4 above:

(1) *The articulation of grounds of appeal against the decision of OFCOM.* The Statement was challenged by way of four notices of appeal filed by each of BT, EE, Three and Vodafone, all dated 16 May 2011. Subject to one gloss, these notices of appeal set out these parties' grounds of appeal. The gloss relates to Vodafone's notice of appeal, in relation to which Three contended, and the Commission found, that certain grounds had not been properly pleaded by Vodafone. This matter is an issue before the Tribunal, which is considered in Section XV below.

(2) *Reference of price control matters to the Commission.* On 30 June 2011, the Tribunal determined (as was common ground) that all of the matters raised in the parties' notices of appeal were price control matters. These matters were distilled into seven reference questions, and these questions were referred to the Commission for determination on or before 9 February 2012.

(3) *Determination of price control matters by the Commission.* The Commission considered the reference questions, and determined them in a determination (the "Determination") dated 9 February 2012.

(4) *Review by the Tribunal.* The future progress of the Appeal was considered by the Tribunal at case management conferences on 10 February and 24 February 2012. The Tribunal required the parties to indicate whether they intended to raise any challenges to the Determination, pursuant to section 193(7) of the 2003 Act, by 21 February 2012 and, if so, to give a broad indication of the nature of the challenge. Of the appellants, only EE and Vodafone indicated that they wished to challenge the Determination. The Tribunal required that any party seeking to challenge the Determination should file and serve a document setting out the grounds on which the challenge was based (together with any supporting evidence) by

7 March 2012. Such documents were served by EE ("EE's JR Grounds") and Vodafone ("Vodafone's JR Grounds") on 7 March 2012. Provision was also made for pleadings in response, and such pleadings were filed by the Commission, OFCOM, BT and Three. EE's and Vodafone's challenges to the Determination were heard on 3 to 5 April 2012. This judgment, of course, constitutes the Tribunal's determination of those challenges.

6. Section VI summarises the various challenges to the determinations made by EE and Vodafone in their respective JR Grounds. Essentially, there are seven such grounds (EE's Grounds 1 to 5 and Vodafone's Grounds A and B), in addition to which there is the pleading point referred to in paragraph 5(1) above (which is Vodafone's Ground C). There is some overlap and inter-relationship between the various JR Grounds put forward and, for that reason, they are considered in the following order in in Sections VIII to XIV below:

   (1) EE Ground 1: Section VIII.

   (2) Vodafone Ground A: Section IX.

   (3) EE Ground 2: Section X.

   (4) EE Ground 3: Section XI.

   (5) EE Ground 4: Section XII.

   (6) Vodafone Ground B: Section XIII.

   (7) EE Ground 5: Section XIV.

   The pleading point (Vodafone Ground C) is considered in Section XV. Although the specific grounds of judicial review relied upon by EE and Vodafone are considered as they arise in Sections VIII to XIV, a few general points regarding the review by the Tribunal are made in Section VII.

7. Finally, Section XVI below sets out our conclusions and states the basis upon which we intend to remit the decision under appeal to OFCOM pursuant to sections 195(3) and (4) of the 2003 Act.

II. OFCOM'S STATEMENT

(a) A history of regulation

8. The Statement imposes SMP conditions in respect of mobile call termination ("MCT") services provided by various MCPs. The Statement was not the first occasion on which OFCOM had imposed SMP conditions in respect of such services. MCT services have been subject to regulatory control since 1999. The set of price controls in force immediately before the conditions at issue in these Appeals was adopted by OFCOM in March 2007 and applied for the period 1 April 2007 to 31 March 2011.

9. With these price controls due to expire on 31 March 2011, OFCOM began a consultation process and market review of mobile call termination rates ("MTRs") in May 2009 to determine what, if any, SMP conditions should prevail in the next regulatory period, 1 April 2011 to 31 March 2015. As described by OFCOM in the Statement, the general consensus was that some form of price control remained appropriate in the case of MTRs, and that the price control should either be based upon LRIC+ (as it had been to date) or upon LRIC (see paragraphs 1.7 and 1.8 of the Statement). These two concepts are considered in greater detail below.

(b) OFCOM's Statement

10. The Appeals are in relation to the decision of OFCOM in the Statement. The effect of the Statement is summarised in paragraph 1.14:

> "Our decision is set out in this statement (which comprises sections 1 to 10 of the main document and all of the material set out in the annexes). This statement constitutes our impact assessment. In this statement we:
>
> 1.14.1 Define a market for call termination on each of 32 'individual mobile networks'. Each market is identified for a relevant MCP as the provision of services to other communications providers for the termination of voice call to UK mobile numbers which that MCP has been allocated by Ofcom, in the area served by that MCP, and for which the MCP is able to set the MTR.
>
> 1.14.2 Designate each of those 32 MCPs as having significant market power (SMP) with respect to the termination of calls to that network (i.e. within their allocated number ranges).

1.14.3 Require all 32 MCPs to provide MCT on fair and reasonable terms, to publish their MTRs, and to give 28 days notice of changes to their MTRs.

1.14.4 Require the four national MCPs not to unduly discriminate in relation to the provision of MCT.

1.14.5 Limit MTRs for all four national MCPs so that the maximum permitted charge for MCT reaches pure LRIC by 1 April 2014. The MTR cap will be set on a four-year glide path and aims to limit disruptive price-setting flexibility ('flip-flopping') by setting a simple cap with a single maximum charge in each year after a two-month transition period. Other designated MCPs will be required to offer MCT at fair and reasonable charges.

1.14.6 This approach will lead to MTRs falling from around 4.18 [pence per minute ("ppm")] in 2010/11 to 0.69ppm by 1 April 2014 (in 2008/9 prices). The major factors behind this decline are:

- expected falls in the cost of network equipment, as 3G technology becomes more established; and
- the removal, as a result of moving to pure LRIC, of the contribution by MCT charges to the joint and common costs of the network. (The equivalent calculation for LRIC+ would see a maximum average charge of 1.61ppm by 1 April 2014 in 2008/09 prices).

Table 1.1 – Proposed MTRs (pence per minute – 2008/09 prices)

	2010/11	2011/12	2012/13	2013/14	2014/15
Vodafone / O2 / Everything Everywhere	4.180	2.664	1.698	1.083	0.690
H3G	4.480	2.664	1.698	1.083	0.690
Other designated mobile communications providers	Set on the basis of being fair and reasonable"				

(internal footnotes omitted)

11. It is necessary, for a clear understanding of the Statement and of the Appeals arising from it, to be clear about exactly what comprise MCT services, and the nature of a price control based upon long-run incremental cost ("LRIC") or LRIC+. These matters are considered below. Before doing so, however, it is necessary also to refer to a recommendation of the European Commission on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (2009/396/EC) dated 7 May 2009 (OJ 2009 L124/67) (the "Recommendation").

(c) The Recommendation

12. Article 19 of Directive 2002/21/EC on the common regulatory framework for electronic communications networks and services (OJ 2002 L108/33) (the "Framework Directive") makes provision for the Commission to issue recommendations to Member States on the harmonised application of the provisions in the Framework Directive and the various other directives associated with it, which comprise the EU's common regulatory framework for electronic communications (the "CRF").

13. The Recommendation was issued pursuant to Article 19. Article 19(1) requires that "Member States shall ensure that national regulatory authorities take the utmost account of those recommendations in carrying out their tasks. Where a national regulatory authority chooses not to follow a recommendation, it shall inform the Commission giving the reasoning for its position". OFCOM is statutorily obliged to take account of recommendations: see sections 79(2) and (3) of the 2003 Act.

14. In this case, the Recommendation made a number of recommendations which were relevant to the Statement. They are mentioned as and when relevant in the course of this judgment.

(d) MCT services

15. Although communications services in the UK are provided by a number of communications providers, callers expect to be able to make calls from their telephone not merely to others subscribing to services from the same communications provider, but also to any other customer irrespective of the communications provider to which that customer subscribes. Equally, call recipients expect to be able to receive calls from all callers, irrespective of the identity of the caller's communications provider. This outcome is described as "end-to-end" connectivity. In order to achieve this end, communications providers enter into contractual arrangements with each other for the provision of access to each other's networks. Thus, where the customer originating the call subscribes to a different network from the customer receiving the call, two communications providers will be involved: the communications provider on

whose network the call originates and the communications provider on whose network the call terminates. Pursuant to these contractual arrangements, the communications provider terminating the call makes a charge for each call terminated on its network, known as a "termination rate". The rate for call termination is expressed in "pence per minute" or "ppm". For the vast majority of calls, the UK operates a "calling party pays" or "CPP" system. This means that the entire cost of the call is paid for by the party originating the call. Where a call originates on one network and terminates on another network, the terminating communications provider charges the originating communications provider a call termination charge. One way or another (depending upon the contractual arrangements between the caller and the originating communications provider), this call termination charge is passed on by the originating communications provider to its customer, the caller.

16. These Appeals are concerned with the termination rate charged by MCPs for the termination of calls on their networks – the mobile call termination rate or "MTR".

17. MTRs are charged on:

    (1) "Off-net" mobile-to-mobile ("MTM") calls, i.e. calls from a subscriber on one MCP's network to a subscriber on another MCP's network. An "on-net" MTM call is a call that is originated and terminated on the same network.

    (2) Landline- or fixed-to-mobile ("FTM") calls.

    (3) "Other"-to-mobile calls, a catch-all comprising all calls terminated on an MCP's network other than those originating on a mobile network or landline.

    MTRs are not charged on "on-net" MTM calls, mobile-to-fixed ("MTF") calls or mobile-to-"other" calls.

(e) The difference between LRIC and LRIC+

(i) Incremental cost

18. As we have noted (see paragraph 11 above), LRIC stands for "long run incremental cost". "Incremental cost" is the cost of producing a specified additional product, service or increment of output (hereafter, simply "service") over a specified future period of time. The incremental costs of a service are those costs which are directly caused by the provision of that service in addition to the other services which a firm may also produce.

19. In other words, the incremental cost of a service is the difference between the total cost in a situation where the service is not provided and the total cost in another situation where the service is provided. To this extent, the incremental cost may be regarded as a good proxy of the marginal cost of providing the service. LRIC is not, however, the equivalent of marginal cost, for the reasons given by OFCOM in footnote 573 of its Statement (and also, similarly, in footnote 4):

> "Pure LRIC is not equivalent to short term marginal cost, but for regulatory price-setting purposes, pure LRIC is a better approximation of the underlying economic concept of short run marginal cost than LRIC+. In network industries (such as mobiles) the short run marginal cost of a service may be very low or very high depending on whether usage is a long way from, or effectively at, installed capacity. This leads to very low (or zero) marginal cost most of the time, with small increments over which marginal cost is very high. In regulatory practice, long-run incremental cost has, therefore, been applied as a proxy, avoiding the volatility implied in setting prices on the basis of marginal cost which can be very variable in response to small changes in output. Pure LRIC measures service specific fixed and variable costs that arise in the long-run from the increment of output in question…".

The cost concepts of "LRIC" and "LRIC+" are considered in the paragraphs below.

(ii) Long run incremental cost

20. Costs can be fixed or variable. Fixed costs are those costs that remain the same irrespective of the activity level of the firm, whereas variable costs are those costs that vary directly with the level of output. When considering which costs are fixed, and which are variable, the time period is key. In the short run, some

costs (particularly capital costs) are fixed. The shorter the time period considered, the more costs are likely to be fixed. But, in the long run, all costs are variable.

21. LRIC looks to long run costs, and is a forward-looking approach to costing that values assets on the basis of the cost of replacing or providing them today. In other words, LRIC treats all costs as variable, and simply looks to the cost of replacement or provision in assessing cost.

(iii) Common costs and stand-alone cost

22. The LRIC of a service can be contrasted with the stand-alone cost of a service. The stand-alone cost (or "SAC") of a service is the cost of providing an increment of that particular product on its own, including all "common costs" which would necessarily be incurred in a single-service firm, but which in practice are shared with other services in a multi-service firm.

23. Common costs are those which arise from the provision of a group of services, but which are not incremental to the provision of any individual service. If the incremental costs of each service are removed from the total cost of providing all services, what are left are the common costs. The stand-alone cost of a service is the sum of the incremental cost of the service, plus all the costs which are common between that service and other services. The stand-alone cost is therefore higher than the incremental cost in a multi-service operator.

(iv) The difference between LRIC and LRIC+

24. As we have noted (see paragraph 8 above), the price controls imposed by the Statement were not the first price controls which had been imposed in relation to MTRs. However, the price controls imposed by the Statement did differ from their predecessors on one, very significant, respect.

25. Whereas the price controls at issue in the present Appeals are based upon LRIC (or "pure" LRIC, as it is sometimes termed – we draw no distinction between these two labels), previous price controls have been based upon "LRIC+" (or "LRIC plus" – again, we draw no distinction between these two labels).

26. The difference between LRIC and LRIC+ is that whereas the former includes no common costs, the latter does include an allocation for common costs. LRIC is thus a measure of the long run incremental cost of a service, whereas LRIC+ includes all of these costs and additionally makes allowance for the recovery of common costs (see, for example, footnote 3 of the Statement).[2]

27. As a price control ceiling, therefore, LRIC is lower than LRIC+. The upshot (as can be seen from paragraph 1.14.6 of the Statement) is that a price control based upon LRIC is more stringent on the service provider than a price control based on LRIC+ (i.e. the "ceiling" which restricts the prices that a service provider can charge is lower in the case of LRIC than in the case of LRIC+). In effect, a price control based upon LRIC will prevent or restrict a firm that is subject to that control from reflecting in its pricing for that service its common costs, whereas LRIC+ allows common costs to be taken into account.

28. In the Recommendation, the European Commission recommended (in point 2 of the Recommendation) that when imposing price control and cost-accounting obligations (such as SMP conditions), "the evaluation of efficient costs [should be] based on current cost and the use of a bottom-up modelling approach using long-run incremental costs (LRIC) as the relevant cost methodology". Recital (13) to the Recommendation notes:

> "Taking account of the particular characteristics of call termination markets, the costs of termination services should be calculated on the basis of forward-looking long-run incremental costs (LRIC). In a LRIC model, all costs become variable, and since it is assumed that all assets are replaced in the long run, setting charges based on LRIC allows efficient recovery of costs. LRIC models include only those costs which are caused by the provision of a defined increment. An incremental cost approach which allocates only efficiently incurred costs that would not be sustained if the service included in the increment was no longer produced (i.e. avoidable costs) promotes efficient production and consumption and minimises potential competitive distortions. The further termination rates move away from incremental cost, the greater the competitive distortions between fixed and mobile markets and/or between operators with asymmetric market shares and traffic flows. Therefore, it is justified to apply a pure LRIC approach whereby the relevant increment is the wholesale call termination service and which includes only avoidable costs. A LRIC approach would

[2] Precisely how such common costs are allocated between the various services incurring such costs is itself an extremely difficult question. Clearly, common costs cannot be allocated 100% to a given service: if a multi-service firm prices all its services at SAC, it will make an unreasonable profit, because there will be a multiple recovery of common costs. There must, therefore, be some form of distribution of common costs amongst multiple services. The manner in which common costs are allocated does not specifically arise in these Appeals.

also allow the recovery of all fixed and variable costs (as the fixed costs are assumed to become variable over the long run) which are incremental to the provision of the wholesale call termination service and would thereby facilitate efficient cost recovery."

(f) Choice of "glide path"

29. The move from LRIC+ to LRIC in the Statement gave rise to another important issue that arose before us, namely the period of time over which the shift from a price control based on LRIC+ to a price control based on LRIC was to be achieved. This period was described by all as the "glide path" and – as is clear from paragraph 1.14.5 of the Statement – OFCOM set a four-year glide path, so that the transition from LRIC+ to LRIC was achieved by 1 April 2014.

30. In doing so, OFCOM diverged from the Recommendation, which recommended (in Article 11) that termination rates be implemented by 31 December 2012.

(g) Price controls imposed by OFCOM in the Statement

31. In the Statement, OFCOM imposed price controls on each of Vodafone, EE, Three and Telefónica O2 UK Limited ("Telefónica") (which operates the O2 network), specifying in ppm terms, the maximum permitted MTRs, determined by applying pure LRIC, which each of them might levy for MCT services on its network. OFCOM fixed a four-year glide path for the reduction from the levels applied in the previous price control period to the new levels determined using pure LRIC.

32. As can be seen from the proposed MTRs set out in OFCOM's Table 1.1 (which is reproduced in paragraph 10 above), the glide path envisages a graduated reduction in MTRs, so that the LRIC level is achieved by 1 April 2014, the commencement of the final year of the current price control period.

33. In determining whether to apply pure LRIC or LRIC+ as the basis for setting the MTR price controls, OFCOM considered that a pure LRIC approach would confer the greatest possible benefits on consumers, as it better promoted sustainable competition and eliminated barriers to expansion that exist when MTRs are priced above LRIC. Whilst accepting that the consumer benefit of

choosing pure LRIC over LRIC+ would be less material than the reduction from the previous LRIC+ levels to OFCOM's revised LRIC+ levels, OFCOM was of the view that there would nevertheless be additional consumer benefits arising from the use of pure LRIC. OFCOM also considered that there would be no significant adverse effect on vulnerable consumers such as to reduce mobile phone ownership or usage, and that the move to pure LRIC would lead to an intensification of retail price competition. OFCOM also observed that this approach was in line with the Recommendation (paragraphs 8.158 to 8.162 of the Statement).

34. During the course of the proceedings before OFCOM, EE, Vodafone and Telefónica all submitted that OFCOM had not properly taken account of its duties under the CRF and the 2003 Act. They further submitted that OFCOM had placed undue emphasis on the Recommendation (paragraph 8.16 of the Statement). OFCOM agreed that any condition it imposed had to meet the relevant tests under, and accord with the statutory duties imposed on it by, the 2003 Act. OFCOM indicated that it had initially considered that the competing economic rationales for adopting either LRIC or LRIC+ were finely balanced. However, in light of all the consultation responses and further evidence received, OFCOM concluded that there was a better case for adopting LRIC as it would maximise the benefits to consumers by promoting sustainable competition. In noting that the decision to adopt pure LRIC, rather than LRIC+, was consistent with the Recommendation, OFCOM considered submissions as to whether there were reasons specific to the UK market for departing from the Recommendation and concluded there were not (paragraphs 8.19 to 8.23 of the Statement). OFCOM set out an analysis of its conclusions by reference to the specific statutory duties imposed on it in section 10 of the Statement (see paragraphs 10.139 to 10.150).

III. THE STATUTORY FRAMEWORK FOR THE IMPOSITION OF PRICE CONTROLS

35. OFCOM's power to regulate MCT, and therefore MTRs, ultimately derives from the EU's CRF. The CRF comprises the Framework Directive (referenced in paragraph 12 above), together with (amongst other instruments) Directives

2002/20/EC (OJ 2002 L108/21) (the "Authorisation Directive"), 2002/19/EC (OJ 2002 L108/7) (the "Access Directive"), 2002/22/EC (OJ 2002 L108/51) (the "Universal Service Directive") and 97/66/EC concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ 1998 L24/1). The CRF has been transposed into UK domestic law by the 2003 Act.

36. Aspects of the directives comprising the CRF were amended by Directive 2009/140/EC, which was implemented in the UK by the Electronic Communications and Wireless Telegraphy Regulations 2011 (SI No. 1210 of 2011), with effect from 26 May 2011.

37. The 2003 Act prescribes a wide range of duties and powers for OFCOM, which is the UK's national regulatory authority ("NRA") for the purposes of the CRF. Pursuant to section 3(1) of the 2003 Act, OFCOM's principal duty is to further the interests of citizens in relation communications matters and to further the interests of consumers in relevant markets, where appropriate, by promoting competition. In carrying out its functions, OFCOM is required to secure, among other things, the availability throughout the United Kingdom of a wide range of electronic communications services (see section 3(2)(c) of the 2003 Act).

38. In performing any duties under the 2003 Act, OFCOM is required by section 4 to act in accordance with the "six Community requirements", set out in subsections (3) to (9). The Community requirements give effect to, among other things, Article 8 of the Framework Directive, which sets the policy objectives and regulatory principles applicable under the CRF. Briefly stated, the Community requirements are to:

    (1) Promote competition;

    (2) Secure that OFCOM's activities contribute to the development of the common market;

    (3) Promote the interests of all EU citizens;

(4) Take account of the desirability, so far as possible, of OFCOM carrying out its functions in a way that does not favour only one form of electronic communication;

(5) Encourage the provision of network access and service interoperability; and

(6) Encourage compliance with certain standards set out in section 4(10) of the 2003 Act.

39. Article 8(2) of the Access Directive requires Member States to ensure that their NRAs have the power to impose the obligations set out in Articles 9 to 13 of that Directive, including on operators found to have SMP in a specific market. This requirement is implemented by section 45 of the 2003 Act, which empowers OFCOM to set such binding conditions, including SMP conditions. OFCOM can apply SMP conditions to communications providers which OFCOM determines have SMP in a particular market, provided that the conditions in section 47 of the 2003 Act are met. Pursuant to section 47, before imposing any SMP condition, OFCOM must be satisfied that that condition is objectively justifiable, not unduly discriminatory, proportionate to the intended regulatory aim, and transparent.

40. For present purposes, it is the obligation set out in Article 13(1) of the Access Directive that is relevant. That specifically requires that NRAs are empowered to impose obligations relating to cost recovery and price controls "in situations where a market analysis indicates that a lack of effective competition means that the operator concerned might sustain prices at an excessively high level … to the detriment of end-users". Article 13(2) prescribes that the imposition of any such obligations must serve "to promote efficiency and sustainable competition and maximise consumer benefits". Accordingly, section 87(9) of the 2003 Act specifically authorises OFCOM to set SMP conditions imposing price controls on the dominant provider in relation to matters connected with the provision of network access, the recovery of costs and costs orientation, the use of cost accounting systems and the obligation to adjust prices in accordance with

directions given by OFCOM. Pursuant to section 88(1), OFCOM shall not set any SMP condition under section 87(9) except where:

> "(a) it appears to them from the market analysis carried out for the purpose of setting that condition that there is a relevant risk of adverse effects arising from price distortion; and
>
> (b) it also appears to them that the setting of the condition is appropriate for the purposes of –
>
> (i) promoting efficiency;
>
> (ii) promoting sustainable competition; and
>
> (iii) conferring the greatest possible benefits on the end-users of public electronic communications services."

IV. APPEALS IN THE CASE OF "PRICE CONTROL MATTERS"

(a) Article 4 of the Framework Directive

41. The Appeals are all "appeals" within the meaning of Article 4(1) of the Framework Directive. At the time of the Statement, and the Notices of Appeal in relation to the Statement, Article 4 provided, so far as material:

> "1. Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise available to it to enable it to carry out its functions. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise.
>
> 2. Where the appeal body referred to in paragraph 1 is not judicial in character, written reasons for its decision shall always be given. Furthermore, in such a case, its decision shall be subject to review by a court or tribunal within the meaning of Article [267] of the Treaty."[3]

42. Article 4 (being part of a directive, and not a regulation) was transposed into domestic law by sections 192 to 196 of the 2003 Act. Before us, no-one

[3] The wording of Article 4 was slightly modified by Directive 2009/140/EC but nothing turns on any of the amendments on these Appeals.

contended that these provisions failed properly to implement the relevant provisions of the CRF, and we obviously have the CRF in mind when construing the 2003 Act.

43. However, it is the 2003 Act that is the operative legislation for the purposes of these proceedings and we shall, therefore, describe the procedure for appealing OFCOM's decisions by reference to those statutory provisions.

(b) Appeals to the Tribunal

44. Section 192(1) of the 2003 Act provides that section 192 applies to various decisions, including (in section 192(1)(a)) a decision of OFCOM to set SMP conditions, including price controls. Section 192(2) of provides that a person affected by such a decision may appeal against it to the Tribunal. We shall refer to such appeals as "Section 192 Appeals".

45. Section 192(3) to (6) set out how a "person affected" is to appeal the decision. Essentially, the means of making an appeal is by sending the Tribunal a notice of appeal in accordance with the Tribunal rules (section 192(3)), within the period specified in those rules (section 192(4)), and setting out the information and detail required in sections 192(5) to (6). We will have occasion to return to these provisions later in this judgment.

46. Section 195(1) of the 2003 Act requires the Tribunal to "dispose of an appeal under section 192(2) in accordance with this section". By section 195(2) of the 2003 Act, the Tribunal must "decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal". The Tribunal's decision must include a decision as to what, if any, is the appropriate action for the decision-maker to take in relation to the subject-matter of the decision under appeal (section 195(3)), and the Tribunal shall then remit the decision under appeal to the decision-maker with such directions, if any, as the Tribunal considers appropriate for giving effect to its decision (section 195(4)).

(c) Reference of "price control matters" to the Commission

47. There are specific provisions in section 193 of the 2003 Act as to how the Tribunal shall deal with an appeal which relates to a so-called "price control matter". Section 193(10) defines a price control matter for these purposes as follows:

> "In this section "price control matter" means a matter relating to the imposition of any form of price control by an SMP condition the setting of which is authorised by –
>
> (a) section 87(9);
>
> (b) section 91; or
>
> (c) section 93(3)."

48. Section 193(1) provides that:

> "Tribunal rules must provide in relation to appeals under section 192(2) relating to price control that the price control matters arising in that appeal, to the extent that they are matters of a description specified in the rules, must be referred by the Tribunal to the Competition Commission for determination."

49. The Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (S.I. No. 2068 of 2004, the "2004 Tribunal Rules"), which were made pursuant to the power in section 193(1) of the 2003 Act specify, for the purposes of that subsection, identify those price control matters which must be referred to the Commission under this procedure. Rule 3(1) of the 2004 Tribunal Rules provides as follows:

> "For the purposes of subsection (1) of section 193 of the Act, there is specified every price control matter falling within subsection (10) of that section which is disputed between the parties and which relates to-
>
> (a) the principles applied in setting the condition which imposes the price control in question,
>
> (b) the methods applied or calculations used or data used in determining that price control, or
>
> (c) what the provisions imposing the price control which are contained in that condition should be (including at what level the price control should be set)."

50. Rule 3(5) of the 2004 Rules states that the Tribunal shall refer to the Commission for determination, in accordance with section 193 of the 2003 Act and rule 5 of the 2004 Tribunal Rules, "every matter which … it decides is a specified price control matter".

51. Where the Tribunal has determined that a matter is a specified price control matter, that matter is referred to the Commission. Section 193(2) of the 2003 Act states that:

> "Where a price control matter is referred in accordance with Tribunal rules to the Competition Commission for determination, the Commission is to determine that matter—
>
> (a) in accordance with the provision made by the rules;
>
> (b) in accordance with directions given to them by the Tribunal in exercise of powers conferred by the rules; and
>
> (c) subject to the rules and any such directions, using such procedure as the Commission consider appropriate."

52. The Tribunal Rules may (see section 193(3) of the 2003 Act) and in fact do (see rule 5(1) of the 2004 Tribunal Rules) make provision about the period within which the Commission must reach its determination.

53. The Commission's procedures are articulated in guidelines published by the Commission in April 2011 entitled "Price control appeals under section 193 of the Communications Act 2003: Competition Commission Guidelines" (the "Commission Guidelines").

(d) The determination of price control matters by the Commission

54. By section 193(4) of the 2003 Act, when the Commission has determined the specified price control matters referred to it, it must notify the Tribunal of its determination. This notification must be given "as soon as practicable" (section 193(5).

(e) The role of the Tribunal

55. As has been seen (see paragraph 46 above), in Section 192 Appeals the Tribunal must, by virtue of section 195(2), decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal.

56. However, in relation to price control matters determined by the Commission, section 193 of the 2003 Act provides as follows:

> "(6) Where a price control matter arising in an appeal is required to be referred to the Competition Commission under this section, the Tribunal, in deciding the appeal on the merits under section 195, must decide that matter in accordance with the determination of that Commission.
>
> (7) Subsection (6) does not apply to the extent that the Tribunal decides, applying the principles applicable on an application for judicial review, that the determination would fall to be set aside on such an application."

57. Thus, in the case of price control matters, although the Tribunal does still decide the appeal on the merits, where and to the extent that the issues in the appeal are price control matters, the Tribunal must (subject to the limited exception in section 193(7)) follow the determination of the Commission.

58. It follows from this, that the Commission's own determination of price control matters must be "on the merits", and this was uncontroversial before us. In paragraph 1.32 of the Determination in this case, the Commission stated:

> "The role of the [Commission] is to establish whether Ofcom erred on the merits."

We accept this as an accurate description of the Commission's role. It would be perverse if the mere fact that a Section 192 Appeal involved a price control matter resulted in the application of a lower standard of review than in an appeal not involving a price control matter. The difference between issues involving price control matters, and issues not involving price control matters, lies not in the standard of review, but in the persons conducting it.

59. Unless the Commission's decision would, on an application of the principles applicable to an application for judicial review, fall to be set aside, the

Tribunal's role is to decide the appeal in accordance with the Commission's determination.

V. THE PROCEDURAL HISTORY IN THE CASE OF THESE APPEALS

(a) The Appeals

(i) The notices of appeal

60. As we noted in paragraphs 1, 2 and 5(1) above, the Statement gave rise to various Section 192 Appeals – the Appeals – brought by each of BT, EE, Three and Vodafone in separate notices of appeal, all dated 16 May 2011.

61. In its notice of appeal, BT supported OFCOM's decision to fix the maximum permissible MTRs by reference to LRIC. BT nevertheless challenged the Statement on the following limited grounds:

    (1) OFCOM erred in fixing the glide path for the reduction of MTRs to pure LRIC-level at four years, rather than three; and

    (2) OFCOM erred in failing to make a one-off adjustment to MTRs at the outset of the price control cycle to strip out allegedly unjustified windfall profits made by the MCPs.

62. Three, like BT, supported most aspects of the Statement. Its appeal was directed to one aspect only of OFCOM's cost-modelling. Three submitted that OFCOM set the maximum MTRs too high for each of the four years in the price control period because it relied on costs associated with certain items of radio access network equipment, which were (so it said) overstated.

63. In contrast to BT and Three, EE and Vodafone took issue with fundamental aspects of the Statement. In particular, it was contended that OFCOM had erred in the following respects:

    (1) First, in adopting LRIC, rather than LRIC+, as the basis for setting MTR price controls.

(2) Secondly, in the nature of the model (the "2011 Model", considered further below) which was used by OFCOM to determine the maximum level of charges based on a LRIC price control. In other words, it was contended that, even if LRIC was the correct basis for the price control, the model was inappropriate to compute what – in terms of ppm – that ceiling should be.

64. This summary does not – and deliberately does not – do justice to the fullness and detail of EE's and Vodafone's contentions. That, of course, is because (these being price control matters), these were matters in the first instance for the Commission. A sense of the fullness and detail of EE's and Vodafone's contentions can be gleaned when the detail of the Commission's own determination of these matters is considered.

(ii) Interventions and consolidation

65. Following notification by the Registrar of the Appeals pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003, as amended by S.I. No. 2068 of 2004, the "2003 Tribunal Rules"), a number of applications for permission to intervene, pursuant to rule 16, were received:

(1) On 27 May 2011, Three applied for permission to intervene in the EE Appeal in support of OFCOM;

(2) Also on 27 May 2011, Telefónica applied for permission to intervene in the EE and Vodafone Appeals in support of the appellants, and in the BT and Three Appeals in support of OFCOM;

(3) On 2 June 2011, EE applied for permission to intervene in the Vodafone Appeal in support of Vodafone, and in the BT and Three Appeals in support of OFCOM;

(4) On 3 June 2011, Vodafone applied for permission to intervene in the EE Appeal in support of EE, and in the BT and Three Appeals in support of OFCOM; and

(5) On 7 June 2011, BT applied for permission to intervene in the Three Appeal in support of Three, and in the EE and Vodafone Appeals in support of OFCOM.

66. On 13 June 2011, the Chairman of the Tribunal ordered the four Appeals to be consolidated pursuant to rule 17 of the 2003 Tribunal Rules and each of the applications for permission to intervene was granted.

(b) The Tribunal's reference to the Commission

67. On 30 June 2011, the Tribunal determined (as was common ground) that all the matters raised by the parties' notices of appeal were price control matters within the meaning of section 193 of the 2003 Act and the 2004 Tribunal Rules.

68. The price control matters raised by the notices of appeal were distilled into seven "Reference Questions" for the attention of the Commission. These were as follows:

> "**Question 1**
>
> Whether the charge controls imposed by paragraph 1.11.2 of, and Condition M3 in Schedule 2 to, Annex 1 of the Decision [i.e. the Statement] have been set at levels which are inappropriate because Ofcom erred in adopting the pure LRIC cost standard, rather than the LRIC+ cost standard, as the basis for the charge controls (for the reasons set out in paragraphs 41 to 154 of EE's Notice of Appeal (Ground 1), and paragraphs 20(A), 31 to 57 and 63 to 74 of Vodafone's Notice of Appeal).
>
> **Question 2**
>
> Whether the charge controls imposed by paragraph 1.11.2 of, and Condition M3 in Schedule 2 to, Annex 1 of the Decision have been set at levels which are inappropriate because Ofcom erred in determining the level of the charge control based on pure LRIC (for the reasons set out in paragraphs 155 to 237 of EE's Notice of Appeal (Ground 2), and paragraphs 20B and 75 to 82 of Vodafone's Notice of Appeal).
>
> **Question 3**
>
> Whether Ofcom erred in determining the level of mobile termination charges that would reflect the adoption of the LRIC+ cost standard (for the reasons set out in paragraphs 238 to 240 of EE's Notice of Appeal (Ground 3), and paragraphs 20A and paragraphs 58 to 62 of Vodafone's Notice of Appeal).
>
> **Question 4**
>
> Whether the charge controls imposed by paragraph 1.11.2 of, and Condition M3 in Schedule 2 to, Annex 1 of the Decision have been set at levels which are

inappropriate because Ofcom erred in deciding to adopt a four-year transition period over which mobile termination rates would be reduced to the level of the pure LRIC cost standard, rather than over a three-year period (for the reasons set out in paragraphs 4.1 to 4.17 and 6.1 of BT's Notice of Appeal).

Question 5

Whether the charge controls imposed by paragraph 1.11.2 of, and Condition M3 in Schedule 2 to, Annex 1 of the Decision have been set at levels which are inappropriate because Ofcom erred in failing to make a one-off adjustment to the rate at the start of the control to current levels calculated in accordance with the LRIC+ cost standard (for the reasons set out in paragraphs 5.1 to 6.1 of BT's Notice of Appeal).

Question 6

Whether (for the reasons set out at paragraphs 5.1 to 5.19 of Three's Notice of Appeal) the charge controls imposed by paragraph 1.11.2 of, and Condition M3 in Schedule 2 to, Annex 1 of the Decision have been set at levels which are inappropriate because Ofcom erred in relying on a costs model that overstated certain costs associated with certain radio equipment, specifically one or more of the items encompassed within the following descriptions in Ofcom's publicly-available costs model:

(a) 2G cell site equipment;

(b) 2G TRXs;

(c) 2G BSCs;

(d) 3G cell site equipment; and

(e) 3G RNCs.

Question 7

Having regard to the fulfilment by the Tribunal of its duties under section 195 of the Communications Act 2003 and in the event that the Competition Commission determined that the answer to any of the above questions is yes, the Competition Commission is to include in its determination:

(i) clear and precise guidance as to how any error found should be corrected; and

(ii) insofar as is reasonably practicable, a determination as to any consequential adjustments to the charge controls."

69. These seven Reference Questions were the price control matters referred by the Tribunal to the Commission for determination. The Commission was directed to determine the specified price control matters contained in this reference on or before 9 February 2012, which was (at the request of the Commission, and as

ordered by the Tribunal) a period some two months longer than the default period laid down in rule 5(1) of the 2004 Tribunal Rules.

(c) The Commission's Determination

(i) An overview of the Determination

70. The Commission considered the Reference Questions in accordance with the Commission Guidelines, which involved further hearings and submissions from all parties.

71. On 9 February 2012 the Commission notified the Tribunal of its Determination.

72. Broadly, the Commission determined that OFCOM had erred in relation to the matters raised in Reference Questions 3, 4 and 6. The Commission concluded that OFCOM had erred in using a four-year (rather than three-year) glide path and in relying on overstated radio equipment costs in its costs model. The Commission also found that Vodafone had identified certain errors in OFCOM's analysis (in the course of answering Reference Question 3), but the Commission did not consider that these allegations had been properly pleaded. As it was requested to do by the Tribunal's Reference Question 7, the Commission set out how the charge controls should be adjusted to reflect the errors that it identified. It dismissed the remainder of the arguments relating to Reference Questions 1, 2 and 5, upholding OFCOM on these points.

73. The Determination is a long and complex document running to some 555 pages. We briefly summarise the Commission's determinations in relation to Reference Questions 1 to 7 below. Naturally, we consider the Commission's conclusions in greater detail when considering the points raised by the EE and Vodafone JR Grounds.

(ii) Reference Question 1

74. By Reference Question 1, the Tribunal directed the Commission to determine:

> "Whether the charge controls imposed by paragraph 1.11.2 of, and Condition M3 in Schedule 2 to, Annex 1 of the Decision have been set at levels which are inappropriate because Ofcom erred in adopting the pure LRIC cost standard, rather than the LRIC+ cost standard, as the basis for the charge controls (for the reasons set

out in paragraphs 41 to 154 of EE's Notice of Appeal (Ground 1), and paragraphs 20(A), 31 to 57 and 63 to 74 of Vodafone's Notice of Appeal)."

75. The Commission determined that neither EE nor Vodafone had demonstrated that OFCOM had been wrong to adopt a LRIC cost of providing an MCT service, taking account of OFCOM's statutory duties and the considerations contained in sections 3, 4, and 88 of the 2003 Act (paragraph 2.931 of the Determination). Nor did the Commission consider that EE or Vodafone had demonstrated that these statutory duties and considerations would have been better served by the setting of the price control using a LRIC+ methodology. In particular, the Commission did not agree with EE or Vodafone that OFCOM had erred in its assessment of the relative merits of LRIC and LRIC+ from the standpoint of competition (paragraph 2.524 of the Determination).

(iii) Reference Question 2

76. By Reference Question 2 the Commission was directed to determine:

"Whether the charge controls imposed by paragraph 1.11.2 of, and Condition M3 in Schedule 2 to, Annex 1 of the Decision have been set at levels which are inappropriate because Ofcom erred in determining the level of the charge control based on pure LRIC (for the reasons set out in paragraphs 155 to 237 of EE's Notice of Appeal (Ground 2), and paragraphs 20B and 75 to 82 of Vodafone's Notice of Appeal)."

77. The Commission's answer to Reference Question 2 found that there had been no material errors on the part of OFCOM in its modelling of the LRIC of providing MCT services using the 2011 Model. Paragraphs 3.4 to 3.18 of the Determination summarise OFCOM's description of its MCT costs model and how it arrived at the costs avoided by a hypothetical average efficient operator in the UK of not providing off-net voice call termination whilst still providing all other services. The Commission considered a series of specific, pleaded, allegations by Vodafone and EE of errors in relation to the calculation of the LRIC of the MCT service. The alleged deficiencies in the MCT cost model were numerous and wide-ranging and included, for example, that the coverage network in the model was too large, the mark-up of LRIC+ over LRIC was

implausible and that the weighted average cost of capital was too low. The Commission was not persuaded by EE's or Vodafone's arguments that OFCOM's cost model contained a number of flaws that undermined its ability to produce reliable estimates of LRIC. Further, the Commission did not consider that the specific adjustments to OFCOM's model suggested by EE or Vodafone would have produced a more robust estimate of LRIC (paragraph 3.986 of the Determination).

(iv) Reference Question 3

78. By Reference Question 3, the Commission was directed to determine:

> "Whether Ofcom erred in determining the level of mobile termination charges that would reflect the adoption of the LRIC+ cost standard (for the reasons set out in paragraphs 238 to 240 of EE's Notice of Appeal (Ground 3), and paragraphs 20A and paragraphs 58 to 62 of Vodafone's Notice of Appeal)."

79. In the Statement, OFCOM compared MTRs calculated on the basis of LRIC and LRIC+, and considered the likely incremental effect, so far as possible, of shifting from LRIC+ to LRIC in setting MTRs. Subject to the Commission's reservations about Vodafone's pleaded case, summarised at paragraphs 91 to 96 below, it upheld Vodafone's challenge that OFCOM had erred by understating the proportion of data traffic that occurred at the weekend (the busy day/week split), in its modelling of the historic data card market shares and in its modelling of the 2G/3G MSC cost driver (paragraph 4.372 of the Determination). The Commission did not consider that EE had demonstrated that OFCOM erred in its assumptions on the cost recovery from data services (paragraph 4.397 of the Determination).

(v) Reference Question 4

80. By Question 4 the Commission was directed to determine:

> "Whether the charge controls imposed by paragraph 1.11.2 of, and Condition M3 in Schedule 2 to, Annex 1 of the Decision have been set at levels which are inappropriate because Ofcom erred in deciding to adopt a four-year transition period over which mobile termination rates would be reduced to the level of the pure LRIC cost standard, rather than over a three-year period (for the reasons set out in paragraphs 4.1 to 4.17 and 6.1 of BT's Notice of Appeal)."

81. Thus, Reference Question 4 concerned OFCOM's chosen four-year glide path over which mobile termination rates would be reduced to the level of the LRIC cost standard. The Commission accepted that regulatory judgement was involved in OFCOM's decision on the length of the glide path, but that it could be challenged on grounds of lack of reasoning or that its judgement was manifestly unsound (paragraph 5.48 of the Determination). As OFCOM adopted a LRIC standard and recognised, in principle, that it should align prices with LRIC as quickly as it reasonably could, the Commission considered that OFCOM needed good reasons to adopt the longer glide path. The Commission determined that the reasons put forward by OFCOM preferring a four year glide path – including, for example, the reduction in MTRs was large compared with the then current MTRs with knock-on effects for the MCPs' revenue – were not convincing. The Commission noted that while both a three-year and a four-year glide path would miss the target date of the Recommendation (that MTRs should be reduced to the level of LRIC by 31 December 2012), the target date was a relevant factor that favoured the adoption of a shorter, three-year glide path, which mean MTRs at LRIC level would be reached by 1 April 2013 (paragraph 5.73 of the Determination).

(vi) Reference Question 5

82. By Reference Question 5, the Commission was directed to determine:

> "Whether the charge controls imposed by paragraph 1.11.2 of, and Condition M3 in Schedule 2 to, Annex 1 of the Decision have been set at levels which are inappropriate because Ofcom erred in failing to make a one-off adjustment to the rate at the start of the control to current levels calculated in accordance with the LRIC+ cost standard (for the reasons set out in paragraphs 5.1 to 6.1 of BT's Notice of Appeal)."

83. The Commission was not persuaded by BT that OFCOM had erred in failing to make a one-off adjustment to the rate at the start of the price control (in April 2011) to current levels calculated in accordance with the LRIC+ cost standard. The Commission found that the considerations relevant to answering Question 5 were similar to those to answering Question 4. In both cases the Commission

found that there were good arguments for more rapid adjustment (a shorter glide path with lower MTRs in each intermediate year) to achieve the goal of reaching the "desirable" level of LRIC sooner. Nevertheless, the Commission considered that "Ofcom's arguments about the difficulties in adjusting prices in the first year have some force, especially given that the new price control came into effect 17 days after the publication of the Statement" (paragraph 5.104). That being so, the MCPs could not reasonably have anticipated a one-off starting adjustment based on OFCOM's usual practice and the arguments put forward during the consultation process. The Commission's overall conclusion was that BT had not provided any valid additional reason in favour of a one-off adjustment to lower MTRs in the first year (paragraph 5.105).

(vii) Reference Question 6

84. By Reference Question 6 the Tribunal directed the Commission to determine:

> "Whether (for the reasons set out at paragraphs 5.1 to 5.19 of Three's Notice of Appeal) the charge controls imposed by paragraph 1.11.2 of, and Condition M3 in Schedule 2 to, Annex 1 of the Decision have been set at levels which are inappropriate because Ofcom erred in relying on a costs model that overstated certain costs associated with certain radio equipment, specifically one or more of the items encompassed within the following descriptions in Ofcom's publicly-available costs model:
>
> (a) 2G cell site equipment;
>
> (b) 2G TRXs;
>
> (c) 2G BSCs;
>
> (d) 3G cell site equipment; and
>
> (e) 3G RNCs."

85. The Commission determined that OFCOM had erred in relying on a costs model that overstated certain costs associated with certain radio equipment specifically with the items described in OFCOM's cost model (listed above) (paragraph 6.139 of the Determination). In particular, the Commission concluded that OFCOM should not have relied upon the figures it used. The Commission found that, on the balance of probabilities, OFCOM's costs model overstated the contested radio equipment costs. The Commission was satisfied that the errors

that it had found did not fall within the margin of OFCOM's regulatory discretion.

(viii) Reference Question 7

86. By Reference Question 7 the Commission was directed to determine:

> "Having regard to the fulfilment by the Tribunal of its duties under section 195 of the Communications Act 2003 and in the event that the Competition Commission determined that the answer to any of the above questions is yes, the Competition Commission is to include in its determination:
>
> (i) clear and precise guidance as to how any error found should be corrected; and
>
> (ii) insofar as is reasonably practicable, a determination as to any consequential adjustments to the charge controls."

87. The Commission provided guidance on how each of the errors it had identified in determining Reference Questions 3, 4 and 6 should be corrected and what, if any, adjustments should be made to the level of the price controls.

88. The Commission did not consider that it was necessary to adjust the price controls in order to remedy the errors identified by its determination of Question 3 for two reasons. First, it had not been demonstrated to the Commission's satisfaction that OFCOM should have set the price control on a LRIC+ basis (paragraph 7.360 of the Determination). Secondly, the Commission did not consider that Vodafone had pleaded the relevant errors identified in Reference Question 3 (paragraph 7.361 of the Determination). If the Tribunal were to conclude that the errors were properly pleaded in relation to the calculation of LRIC, however, the Commission believed in any event that:

(1) "the 2G/3G MSC cost driver error was corrected in full in Ofcom's revised decision of 25 October 2011" (paragraph 7.96 of the Determination);

(2) "the remaining Reference Question 3 errors (before calibration) should be corrected as set out in Ofcom's proposal of 5 January 2011" (paragraph 7.100 of the Determination); and

(3) "recalibration for the remaining Reference Question 3 errors should be performed as set out by Ofcom in its letter of 5 January 2012" (paragraph 7.116 of the Determination).

89. The Commission decided that the errors found in its determination of Question 4 should be remedied by moving the MTRs to the three-year glide path which OFCOM would have adopted in its Statement had it not made the relevant errors (paragraph 7.159 of the Determination). As a practical matter, the Commission considered that this error should be rectified by moving on to a glide path that moved from the level of MTRs at 31 March 2011, under the expired pricing conditions, to reach the level of LRIC for 2013/14 on 1 April 2013 by way of three reductions of equal percentage size, on the first of April of each year. The MTRs would, however, continue on their current glide path set by OFCOM until the corrected glide path was implemented by OFCOM pursuant to a direction of the Tribunal given under section 195(4) of the 2003 Act. That being so, on 1 April 2012 the MTRs were reduced to the level envisaged by the Statement for the second year of the price controls.

90. Finally, in relation to the correction of the errors it had identified in its determination of Question 6, the Commission decided that a revised cost model (submitted by OFCOM) should be used for capital expenditure ("capex") and operating expenditure ("opex") in order to calculate LRIC (paragraphs 7.349, 7.371 and 7.372 of the Determination). If the Tribunal were to find that Vodafone has properly pleaded the errors which the Commission had identified in determining Question 3, the Commission pointed out that the correction of the Question 3 errors was interrelated with the correction of the Question 6 errors (as the recalibration adjustments for capex for Question 3 impacts on the recalibration of capex in Question 6).

(ix) Pleadings points in relation to Reference Questions 3 and 2

91. Vodafone's challenges in relation to Reference Questions 3 and 2 (and it is appropriate to consider these questions in this order) gave rise to two questions of pleading.

92. First, Three submitted that Vodafone should not be entitled to rely on certain arguments relating to alleged errors in OFCOM's LRIC+ model, since the points were raised only in a witness statement on behalf of Vodafone, and not in Vodafone's notice of appeal. These points, if Vodafone was to be permitted to raise them, went to Question 3.

93. The Commission determined that, whilst it was neither necessary nor desirable for Vodafone to replicate in its pleading what was said in witness statements, Vodafone had failed to refer expressly to certain alleged deficiencies in OFCOM's model in its notice of appeal. This failure meant that it was not possible to determine all the errors alleged in relation to the LRIC+ model from the notice of appeal alone.

94. Nevertheless, the Commission decided that it should determine these matters since, if the Tribunal were to take a different view, it would be undesirable for the Tribunal to have to refer Reference Question 3 back to the Commission (see paragraphs 1.42 to 1.61 of the Determination).

95. Secondly, even if Vodafone could rely on the unpleaded allegations in relation to the LRIC+ model, and they were held to be well-founded, it was argued that those allegations formed no basis for making adjustments to OFCOM's pure LRIC model. The Commission agreed. It held that alleged errors in relation to the busy day/week split and historic datacard market share were raised (and then only in a witness statement) in relation to Reference Question 3 alone. Reference Question 3 raised no issues with OFCOM's pure LRIC model and it was undesirable to read these allegations across into Question 2, when they were already inadequately pleaded in relation to Question 3.

96. However, for the same reasons, the Commission decided to address these points in its Determination, effectively *de bene esse* (see paragraphs 1.42 and 1.62 to 1.74 of the Determination).

(d) The conduct of the Appeals after the Determination

97. The day after the Determination was published (10 February 2012), the Tribunal heard argument in relation to the need for expedition of the future progress of

this matter. In particular, the Tribunal considered whether it might be possible to dispose of the Appeals prior to the beginning of the second year of price control on 1 April 2012.

98. In the interests of fairness and consistency, and taking due account of the length and complexity of the Commission's Determination, the Tribunal ultimately did not consider that such expedition was either appropriate or practical. To secure the just and expeditious conduct of the Appeals, however, the Tribunal ordered the parties to indicate whether they intended to raise any challenges to the Determination under section 193(7) of the 2003 Act by 21 February 2012.

99. Vodafone and EE subsequently notified the Tribunal that they wished to challenge aspects of the Determination. BT, Three and OFCOM provided no such indication.

100. A further case management conference took place on 24 February, following which the Tribunal made an order, amending the one made on 10 February 2012, for filing and serving of submissions prior to a hearing of those challenges.

101. Pursuant to this order, on 7 March 2012, EE and Vodafone submitted their JR Grounds under section 193(7) of the 2003 Act, stating the basis for contending that the Determination would, either in whole or in part, fall to be set aside on a judicial review application.

102. The section 193(7) challenges of EE and Vodafone were heard between 3 to 5 April 2012.

103. We draw attention to the extremely tight timetable under which the parties and the Tribunal have sought to deal with the disposal of these Appeals because important issues arise from the fact that by the time the price control matters were determined by the Commission, nearly a quarter of the period covered by the price control had elapsed. Three particular issues should be noted.

    (1) First, and most importantly, there is the consumer detriment that arises from the fact that MTRs have been, and are currently, subject to price

control, which the Commission has determined is based on errors made by OFCOM. In short, every day's delay in this process reduces the period over which the corrected price controls can operate.

(2) Secondly, the need for speed is underlined by the fact that the Tribunal can only direct OFCOM to adopt a corrected price control for the future. It cannot retrospectively correct for the effect of those errors: *Vodafone Ltd v British Telecommunications plc* [2010] EWCA Civ 391 at paragraphs [34]-[46]. In this case, that means that OFCOM can only be directed to adopt a corrected price control for the remaining two years of the price control period and that, taking account of the Commission's determination of Reference Question 4 concerning the length of the glide path (unless the Determination on this point would fall to be set aside), LRIC-level MTRs are to be achieved by the time the next price comes into effect on 1 April 2013.

(3) Thirdly, the time taken in disposing of the Appeals may have significant consequences for the parties, particularly given the size of the financial sums in issue.

104. Taking all of these considerations into account, as well as the overriding objective in rule 19 of the 2003 Tribunal Rules, the Tribunal has sought to use its case management powers to deal with cases as expeditiously as practicable, including to produce this judgment without delay. The Tribunal is very grateful to the parties' legal teams for their very full and helpful, written and oral submissions, all produced within the exacting timetable mentioned above.

VI. THE SECTION 193(7) CHALLENGES TO THE COMMISSION'S DETERMINATION

105. According to section 193(6) of the 2003 Act, where (as here) a price control matter arising in an appeal is required to be referred to the Commission under section 193(1), the Tribunal, in deciding the appeal on the merits, must decide that matter in accordance with the determination of that Commission.

106. The Determination must be the Tribunal's "on the merits" determination unless the Tribunal decides, applying the principles applicable on an application for judicial review, that the Determination would fall to be set aside: section 193(7) of the 2003 Act.

107. Only EE and Vodafone have sought to contend before us that the Determination falls to be set aside on this basis. The other parties before us – BT, Three, OFCOM and, of course, the Commission – all contended that the Determination would not be set aside and that it, therefore, bound the Tribunal pursuant to section 193(6).

108. Although EE and Vodafone advanced distinct grounds, they each supported and adopted the other's, and helpfully ensured that their submissions were not duplicated. We are extremely grateful to Mr Turner Q.C. (leading counsel for EE) and Mrs McKnight (solicitor advocate for Vodafone) for the trouble they took in this regard. We are equally grateful to Mr Bowsher Q.C. (leading counsel for the Commission), Mr Kennelly (counsel for Three), Mr Palmer (counsel for BT) and Mr Holmes (counsel for OFCOM) for the manner in which the responses to EE's and Vodafone's submissions were co-ordinated so as to avoid duplication whilst ensuring that the essential points were covered.

109. Here we set out the various grounds of review advanced by EE and Vodafone in their respective JR Grounds. The JR Grounds are set out below in the order in which the Tribunal has found it most convenient to deal with the points raised by EE and Vodafone. This is also the order in which these points are then addressed in this judgment:

    (1) *EE Ground 1:* That the Commission had – in respect of Reference Question 1 – misdirected itself as to how to proceed in circumstances where OFCOM's own reasoning and evidence had been "demolished in respect of a key part of its analysis in the Statement" (to quote from paragraph 37(a) of EE's JR Grounds). As a result, the Commission was "faced with an absence of satisfactory evidence" needed to resolve the question of whether LRIC or LRIC+ was the appropriate cost standard. Specifically, the Commission needed – and did not have – a robust survey

in relation to likely consumer responses to price increases. Instead of recognising this evidential gap, and dealing with it properly, the Commission simply determined Reference Question 1 without this evidence. In doing so, the Commission failed properly to determine the reference question on the merits. The Commission wrongly decided the reference question in OFCOM's favour by default, on the basis that EE had failed to demonstrate that LRIC was the inappropriate cost standard. The Commission had, accordingly, misdirected itself as to the correct legal test when discharging its functions.

(2) *Vodafone Ground A:* that, in determining Reference Question 1, the Commission had acted irrationally and/or failed to put itself in a position to deal properly with the merits of Vodafone's appeal by failing to resolve any uncertainties it had as to the operation of Vodafone's simulation model (Vodafone's JR Grounds, paragraph 6). Although Vodafone's notice of appeal summarised the assumptions used in Vodafone's simulation model and the findings of that model, and although a copy of that model was subsequently provided to the Commission, the Commission did not follow up with any questions about the model, nor did it take up Vodafone's offer of a meeting (Vodafone's JR Grounds, paragraph 15). Vodafone's simulation model was the only empirical evidence available to the Commission, which sought to quantify the impact, from a competition perspective, of reducing MTRs to LRIC in terms of consumer welfare in the UK and, as such, should have been a critical part of the Commission's analysis (Vodafone's JR Grounds, paragraph 23). The Commission erred in rejecting, or placing little weight on, Vodafone's simulation model on the ground that the Commission did not have sufficient understanding of the model to make an independent assessment of the results (Vodafone's JR Grounds, paragraph 24). This amounted to a reviewable error on the part of the Commission, in that it failed to place itself in a position to deal properly with the merits of Vodafone's arguments (Vodafone's JR Grounds, paragraph 25).

(3) *EE Ground 2:* that the Commission, in determining Reference Question 1, had regard to a matter that was outside the scope of the appeals and in any event entirely unsubstantiated (EE's JR Grounds, paragraph 92).

(4) *EE Ground 3:* that the Commission had, in determining Reference Question 1, reached a conclusion on an issue which was internally inconsistent and unsupported by any evidence (EE's JR Grounds, paragraph 100).

(5) *EE Ground 4:* that the Commission had, in determining Reference Question 4, failed to put itself in a position to resolve the question on its merits. The Commission's approach to the glide path failed to take into account "the crucial consideration, namely the potential adverse effects on mobile customers of the larger and earlier prices that would arise as a result of reducing MTRs more quickly" (EE's JR Grounds, paragraph 117).

(6) *Vodafone Ground B:* that, in determining Reference Question 2, the Commission had made a reviewable error in rejecting Vodafone's grounds of appeal on the basis that Vodafone had not shown that OFCOM had erred in respect of any particular aspect of the specification of the ex-MCT network in OFCOM's network costing model (Vodafone's JR Grounds, paragraph 31). Essentially, the model used by OFCOM was, according to Vodafone, insufficiently accurate for the ascertainment of a LRIC based price control of the MCT service (Vodafone's JR Grounds, paragraphs 47 and 48). According to Vodafone, additional work was essential to render the model fit for purpose (Vodafone's JR Grounds, paragraph 48.2), and the Commission was wrong to find that the model should stand unless Vodafone had demonstrated that OFCOM had erred in the specification of the ex-MCT network (Vodafone's JR Grounds, paragraph 56). Moreover, the Commission's reasoning was internally inconsistent, containing errors of logic amounting to irrationality (Vodafone's JR Grounds, paragraph 57) and failed to give adequate reasons for its conclusions (Vodafone's JR Grounds, paragraph 58).

(7) *EE Ground 5:* that the Commission, when determining Reference Question 2, relating to whether OFCOM had correctly modelled the level of pure LRIC, made reviewable errors in that it had failed to deal properly with the real risk that OFCOM's modelling of LRIC understated certain avoidable costs (EE's JR Grounds, paragraph 122). Instead of remitting the matter to OFCOM, the Commission answered the reference question in the way it did, on the grounds that it would be disproportionate to remit the matter to OFCOM because correcting the error would only increase the value of LRIC by a few per cent. (EE's JR Grounds, paragraph 123).

(8) *Vodafone Ground C:* in the Determination, the Commission found that OFCOM had made a number of specific errors of assessment in relation to its model. Although the Commission provided – in answer to Reference Question 7 – guidance as to how these errors should be corrected, it in fact declined to accept Vodafone's contentions, on the grounds that they had been insufficiently pleaded. Vodafone contended that, in this, the Commission erred (Vodafone's JR Grounds, paragraphs 102*ff*), alternatively that Vodafone should be given permission to amend its notice of appeal (Vodafone's JR Grounds, paragraphs 125*ff*).

VII. GENERAL POINTS RELATING TO THE TRIBUNAL'S SECTION 193(7) REVIEW

110. Before dealing with the specific JR Grounds relied upon by EE and Vodafone in turn (see section VIII onward), this Section discusses some preliminary points.

(a) Section 193(7) imposes a test of deemed judicial review

111. Self-evidently, this is not – in terms of procedure – a judicial review. Rather, section 193(7) defines the standard of review that the Tribunal must apply to determinations of the Commission by reference to the standards that would pertain on an application for judicial review.

(b) A three level process or a two level process?

112. Before us, Mr Bowsher for the Commission suggested that the process laid down in section 193 of the 2003 Act created a "three level process" so that the Tribunal would be applying a "third level of review" (see Transcript of the Hearing, Day 2, page 27). Although it is easy to see why this might be said, it is very important to be clear exactly how the section 193 process operates.

113. Section 192 Appeals from a decision of OFCOM lie to the Tribunal, not to the Commission (see paragraphs 44 to 46 above and section 192(2) of the 2003 Act). It is the Tribunal which then refers price control matters to the Commission and subsequently receives the Commission's determination of those matters (see paragraphs 47 to 54 above and section 193 of the 2003 Act).

114. Although it is right to say that the Commission's determinations of price control matters bind the Tribunal in the manner prescribed by section 193(6), it is absolutely clear from the 2003 Act that – even in the case of price control matters – it is the Tribunal, and not the Commission, that decides the appeal. Thus, section 195(2) provides that "[t]he Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal", whilst section 193(6) provides that "[w]here a price control matter arising in an appeal is required to be referred to the Competition Commission under this section, the Tribunal, in deciding the appeal on the merits under section 195, must decide that matter in accordance with the determination of that Commission" (emphasis supplied).

115. The matter can be tested in the following way: suppose an appeal from a decision of OFCOM that does not raise price control matters. In such an appeal, the Commission does not even feature, and it is the Tribunal alone that determines the appeal.

116. Essentially, therefore, a Section 192 Appeal is always to the Tribunal, but (in the case of price control matters) the Tribunal's competence and jurisdiction is split between itself and the Commission, with the Commission determining price control matters "on the merits" (see paragraphs 58 to 59 above) and the Tribunal reviewing that determination applying the principles applicable on an

application for judicial review (see paragraphs 56 to 57 above). The point is clearly made in paragraph 2.38 of the Tribunal's "Guide to Proceedings":

> "If an appeal raises a price control matter as specified in the Tribunal's Rules (see Rule 3 of the 2004 Rules), the Tribunal must, before reaching its decision, refer the matter to the [Commission] for determination in accordance with the Tribunal's Rules and any direction of the Tribunal (section 193). Subject to the Tribunal's direction, the [Commission] shall then determine the price control matter within four months (Rule 5 of the 2004 Rules). In its final decision the Tribunal must follow the [Commission's] determination concerning the price control matter unless that determination would fall to be set aside applying the principles applicable on a claim for judicial review (section 193(7))." (Emphasis supplied.)

(c) The Tribunal's review is of the Commission's determination

117. Although the provisions of the 2003 Act are clear, it is nevertheless worth emphasizing that the Tribunal's role – in the case of a Section 192 Appeal raising price control matters – is to review the determination of the Commission, not the decision of OFCOM.

118. Essentially, there are three layers of consideration in respect of any price control matter, but that is not the same as the Tribunal applying a "third level of review":

    (1) First, there is the decision of OFCOM itself. Here, it is obvious that OFCOM is acting as an administrative decision-maker, subject not only to all the obligations that such decision-makers are usually under as regards its decision-making process, but also the specific obligations laid upon it by the 2003 Act.

    (2) Secondly, albeit that it receives its directions from the Tribunal, usually in form of reference questions, there is the review of OFCOM's decision by the Commission, which is (as we have noted – see paragraphs 58 to 59 above) on the merits. The position of the Commission, under section 193 of the 2003 Act, is somewhat unusual:

        (i) Clearly, the Commission is an administrative, and not a judicial, body.

(ii) However, its role under section 193 is not to exercise an original or an investigative jurisdiction. That is OFCOM's role. The Commission's role is to determine, on the merits, the reference questions remitted to it. These reference questions arise out of the notices of appeal made in respect of OFCOM's decision. Thus, albeit in a somewhat indirect way, the Commission is reviewing on the merits the decision of another administrative body. In short, the Commission is acting as an administrative appeal body.

(iii) That is very clearly demonstrated by the fact that, whereas in relation to some of its functions, the Commission does have investigative powers, that is not the case when the Commission is determining price control matters. Thus, in the case (for example) of merger investigations, the Commission is given statutory powers of investigation: see sections 38 and 109 of the Enterprise Act 2002. The Commission has no such powers when determining price control matters under section 192 of the 2003 Act. By contrast, OFCOM does have power to require information to be produced: see sections 135 and 191 of the 2003 Act.[4]

(3) Thirdly, and finally, there is the Tribunal's review of the Commission's decision, on the limited basis laid down in sections 193 of the 2003 Act. Under these provisions, the Tribunal is not concerned with the correctness of OFCOM's decision, but with the lawfulness (if that term can be used to describe the various heads of judicial review) of the Commission's review of that decision.

(d) Standard of review

119. The regime under sections 193(6) and (7) is extremely clear. Unless the Commission's decision would fall to be set aside on a judicial review, the Tribunal is bound to follow the Commission's determination. Parliament has

[4] Which section applies depends upon the function OFCOM is exercising. Thus, section 135 would be the relevant provision where OFCOM is considering the imposition of an SMP condition, whereas section 191 would be the relevant provision where OFCOM is resolving a dispute pursuant to the dispute resolution procedure contained in sections 185*ff* of the 2003 Act.

thus given a special weight to such determinations, which the Tribunal must be careful to respect. The Tribunal must, obviously, provide a full and rigorous judicial review of the Commission's determination, but it would be wrong for the Tribunal to substitute its "on the merits" view for that of the Commission: that would be to subvert the regime laid down by the 2003 Act.

(e) "European" versus "English" grounds of judicial review

(i) An articulation of the issues

120. One of the points that was debated before us was whether the "review" under section 193(7) should be to "European" or to "English" standards. Although EE and Vodafone contended for a "European" standard of review, and the Commission contended for an "English" standard of review, in the oral submissions before us, a number of parties suggested that there was actually very little difference between these two standards, at least in the circumstances of this case.

121. These parties' contentions appeared to draw a great deal from the Tribunal's decision in *Hutchison 3G (UK) Limited v Office of Communications* [2009] CAT 11. In that case, the Tribunal considered the judicial review standard in precisely these circumstances:

> "21. It is firmly established that although this Tribunal is itself a specialist body, the judicial review principles which it must apply under section 193(7) of the 2003 Act are precisely the same as would be applied by an ordinary court: see *Office of Fair Trading & Ors v IBA Health Ltd* [2004] EWCA Civ 142 and *British Sky Broadcasting Group plc v Competition Commission & Anor* [2008] CAT 25 (both of which cases concerned section 120(4) of the Enterprise Act 2002 which also refers to applying judicial review principles). We regard this case law as particularly pertinent here where the procedure prescribed by the 2003 Act is unusual in splitting the appellate function between two bodies; the [Commission] and the Tribunal.
>
> 22. In their submissions on the intensity of the Tribunal's review, the [Commission] and [Three] relied on the case law which emphasises that the court should be slow to interfere with the decisions of a regulatory body to which Parliament has entrusted decision-making powers, particularly as regards the "educated prophesies and predictions for the future" made by that regulator: see *R v Director General of Telecommunications ex parte Cellcom* [1999] ECC 314 and *R v Securities and Futures Authority ex parte Panton* (20 June 1994, unreported).

> 23. The three Interveners countered with the citation of cases which point to a more intense level of scrutiny. Mr Turner QC on behalf of T-Mobile also relied on the often cited decision of Laws J (as he then was) in *R v MAFF ex parte First City Trading* [1997] 1 CMLR 250. Mr Turner argued that the domestic provisions that the Tribunal is considering in this case derive from the Common Regulatory Framework ("CRF") so that the "tighter" European model of judicial review propounded by Laws J applies. We are not convinced either that the "tighter" test is engaged here or that in the circumstances of this case, the European model calls for any greater degree of scrutiny than would apply under domestic law…"

122. It is very tempting, in this case, to follow the same course, and to suggest that there is – in the circumstances of this case – very little practical difference between these two models of review. However, we do not consider that this course is open to us in the light of Vodafone's submissions in respect of its JR Grounds. As to this:

(1) Vodafone clearly attached importance to the "proportionality" head of review, and to the fact that this head of review was potentially more stringent than the "English" standard of review. This is clearly conveyed in a letter written by Vodafone's solicitors dated 26 April 2012 (but the same point permeated Mrs McKnight's submissions to us):

> "8. ...it is clear that, at the least, the [Commission's] determination would fall to be set aside if its reasons were Wednesbury unreasonable: reasons which are Wednesbury unreasonable cannot provide a proper basis for a conclusion. However, a further question arises as to whether, in the present context, the Tribunal should apply a more intensive review of the [Commission's] reasons than the Wednesbury standard (and, potentially, a full merits review), so that the [Commission's] determination would fall to be set aside as insufficiently justified, even if its shortcomings did not amount to Wednesbury irrationality...
>
> 9. Vodafone submits that, in the present case, the Tribunal should, so far as the issue arises at all..., apply a relatively intense scrutiny of the [Commission's] determination that Ofcom's decision was proportionate..."

In short, although Vodafone contended that its JR Grounds ought to succeed on the basis of the rationality test first articulated in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1, it was also Vodafone's contention that, even if the Determination

passed the *Wednesbury* rationality test, it in any event failed the higher "European" proportionality ground of review.

(2) Accordingly, in order to deal properly with Vodafone's submissions, it is necessary to reach a view as to whether "proportionality" is a head of review in this case.

123. Two questions therefore arise:

(1) first, is the standard of review required by the Tribunal under section 193(7) of the 2003 Act at the "English" or the "European" standard; and

(2) secondly, if the standard of review is at the "English" standard, does that standard include "proportionality" as a head of review?

124. We consider these two points in turn below.

(ii) The standard of review

125. Sections 192 to 195 of the 2003 Act implement a directive (specifically, parts of the Framework Directive). A directive is binding as to the result to be achieved, but leaves to the national authorities the choice of form and methods (Article 288 of the Treaty). Since the term "review" is otherwise undefined in the Framework Directive, it seems to us that the intention (subject always to the principle of effectiveness) is that the standard of review is governed by national, and not Community, law and that the phrase "applying the principles applicable on an application for judicial review" in section 193(7) is a reference to the principles that an English court would apply in an ordinary judicial review.

126. That conclusion is plainly supported by the opening words of Article 4(1) of the Framework Directive:

> "Member States shall ensure that effective mechanisms exist at national level…" (emphasis supplied).

(iii) "Proportionality" in English law?

127. Although there are a number of *dicta* of high authority either suggesting that proportionality will (in the future) become such a head of review (e.g. *Council of Civil Services Unions v Minister for the Civil Service* [1985] 1 AC 374 at 410; *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 at 750) or that the *Wednesbury* rationality test has developed into something akin to proportionality (e.g. *R (Alconbury Developments Limited) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 at paragraphs [51] and [169]), it is not possible to conclude that English law presently recognises proportionality as a distinct and generally-applicable head of judicial review (*Somerville v Scottish Ministers* [2007] UKHL 44, [2007] 1 WLR 2734 at paragraphs [55] and [56]). As yet, there is no authoritative statement that, as a general proposition, English law has adopted proportionality as an independent ground of review.

128. Absent two important exceptions, we do not therefore consider that it is possible to say, as matters stand at the moment, that proportionality is an independent ground of review under English law for the purposes of section 193(7) of the 2003 Act.

129. The two exceptions are as follows:

    (1) The proportionality ground of review <u>does</u> operate where there are derogations from EU and Human Rights Act rights (e.g. *R v Secretary of State for Health, ex parte Eastside Cheese* [1999] 3 CMLR 123; *Interbrew v Competition Commission* [2001] EWHC 367; *R (Association of British Civilian Internees – Far Eastern Region) v Secretary of State for Defence* [2003] 1 QB 1397 at paragraphs [32] to [37]; *R (Sinclair Collis Limited) v Secretary of State for Health* [2011] EWCA Civ 437, [2012] 2 WLR 304; *BAA Limited v Competition Commission* [2012] CAT 3 at paragraph [20(2)].

    (2) Equally, the proportionality ground of review operates when "built into" the legislation pursuant to which a power is exercised (*Somerville v*

Scottish Ministers [2007] UKHL 44, [2007] 1 WLR 2734 at paragraph [147]).

We consider, first, whether a proportionality ground of review has been "built into" section 193(7); and, secondly, whether this is a case where there is a derogation from an EU or a Human Rights Act right.

Proportionality "built in"

130. In the present case, OFCOM's ability to impose SMP conditions derives from an enactment intended to implement the CRF (i.e. the 2003 Act), which expressly renders OFCOM's power to impose SMP conditions subject to a proportionality requirement. Section 47(2)(c) of the 2003 Act provides that OFCOM must not set an SMP condition unless that condition is "proportionate to what the condition or modification is intended to achieve". Equally, section 3(3)(a) of the 2003 Act obliges OFCOM to have regard, in all cases, to "the principles under which regulatory activities should be…proportionate…".

131. These are duties that the 2003 Act imposes upon OFCOM. They are not imposed, directly at least, on either the Commission or the Tribunal. Self-evidently, when reviewing a decision of OFCOM, both the Commission and the Tribunal will have to have regard to the fact that OFCOM is subject to these (and many other) duties. But that is not the same thing as saying that – when the Tribunal is conducting a review under section 193(7) of the 2003 Act – proportionality constitutes one of the criteria by which the Commission's determination in relation to OFCOM's decision is assessed. We do not consider this to be a case where the proportionality ground of review has been "built into" section 193(7), which is the question before us.

Derogation from an EU or a Human Rights Act right

132. The proportionality ground of review does operate where there are derogations from EU and Human Rights Act rights.

133. Article 1 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Treaty Series No 73 (1953) Cmd

(vi) Burden of proof

213. As we have noted, the Commission determines price control matters referred to it "on the merits". We explore what this means further below, but in essence the Commission's job is to review the decision of OFCOM on the point that has been referred to it, and determine whether "the decision was the right one" (to quote from *Hutchison 3G (UK) Limited v Office of Communications* [2008] CAT 11 at paragraph [164]). Or, to put the point the other way round, and to draw, by analogy, on CPR Part 52.11(3)(a), the question for the Commission is whether OFCOM got it "wrong".

214. OFCOM's decision stands, unless an appellant can demonstrate that the decision was not the right one (or was wrong). If an appellant fails so to do, then it may very well be said that the appellant has failed to discharge the burden that was on him. But that certainly does not mean that the appeal body has decided the matter by resorting to the burden of proof. In paragraph 12 of its written submissions, OFCOM put the point extremely well:

> "EE makes various complaints about the [Commission] "resorting to the burden of proof", and cites authority to the effect that a court should be reluctant to decide a case on the burden of proof. It is important, however, to be clear about what this means. The Court of Appeal in Stephens v Cannon [2005] EWCA Civ 222, cited by EE at §83, was talking about the situation where the court concludes that, *"notwithstanding that it has striven to do so, it cannot reasonably make a finding in relation to a disputed issue"* and it therefore finds itself in a *"legitimate state of agnosticism"* which cannot be resolved other than by reference to the burden of proof. Such cases are rare indeed. But judges frequently direct themselves that party A has to satisfy them of X, Y and Z, and – having made findings on the balance of probabilities in the normal way – express their conclusions in terms that party A has, or has not, satisfied them of those matters. That is perfectly legitimate and does not constitute "resorting to the burden of proof" in the pejorative sense. A High Court personal injury claimant whose case on causation relies on a speculative and unsubstantiated theory will lose his case, because he has not proved the matters he needs to prove, but the court cannot be criticised for "deciding the case on the burden of proof"."

We agree.

(vii) The Tribunal's judgment in TalkTalk Telecom Group plc v Office of Communications

215. The Tribunal's judgment in *TalkTalk Telecom Group plc v Office of Communications* [2012] CAT 1 was cited to the Commission by EE, and receives extensive consideration in the Determination (e.g. in paragraphs 1.28 to 1.29). In particular, the judgment is relied upon by EE and Vodafone to suggest that a decision will be wrong, on the merits, if an appellant can demonstrate "that Ofcom applied a methodology which was so unsound as to create a real risk that the decision was wrong" (to quote from paragraph 2.59 of the Determination). It appears from paragraph 1.28 of the Determination that the source for this formulation was the *TalkTalk* decision:

> "Vodafone cited *TalkTalk Telecom Group plc v Ofcom*...as authority for the proposition that the Tribunal (and hence the [Commission]) should proceed on the basis that an appeal must succeed if it showed that Ofcom had reached the wrong decision or that, in reaching its decision, it applied a methodology which was so unsound as to create a real risk that the decision was wrong."

216. *TalkTalk* was a Section 192 Appeal in which TalkTalk challenged a decision of OFCOM that there had been no material change to a market within the meaning of section 86 of the 2003 Act on two grounds, "Ground A" and "Ground B". The nature of these grounds (the detail does not matter) was summarised in paragraph [10] of the decision:

> "…TalkTalk's grounds of appeal fall under two broad heads – Ground A and Ground B. In Ground A, TalkTalk contended that OFCOM had erred procedurally in failing to take proper steps to satisfy itself that there had been a material change within the meaning of section 86(1)(b). In Ground B, TalkTalk contended that OFCOM's decision that there had been no material change within the meaning of section 86(1)(b) was, in substance, wrong."

217. Thus, in an "on the merits" appeal, a point was taken as regards the <u>procedure</u> by which OFCOM had reached its decision.

218. The Tribunal gave detailed consideration to the interplay between a substantive point (Ground B) and a procedural point (Ground A):

"75. In the context of an appeal against a decision by OFCOM that there has not been a "material change" for the purposes of section 86 of the 2003 Act, the role of the Tribunal is to assess the correctness of OFCOM's decision, and not to apply a judicial review standard (by, for example, seeking to determine whether OFCOM has taken into account immaterial factors or failed properly to consult). In essence, this merits review ought to be a binary one. Either:

(a) It may be clear that there has been a "material change", as this is defined by section 86 of the 2003 Act. In such a case, any SMP services condition imposed by way of a notification not also making the necessary market power determination must – by virtue of section 86 – be invalid. Section 86 appears to allow no other option ("OFCOM must not set an SMP services condition...unless...").

(b) Alternatively, it may be clear that there has not been a "material change", as this is defined by section 86 of the 2003 Act. In such a case, as section 86 provides, OFCOM's decision to impose an SMP services condition by way of a notification not also making the necessary market power determination would be upheld.

76. We do not suggest that this binary outcome necessarily renders all consideration of OFCOM's decision-making process by the Tribunal irrelevant and certainly does not preclude a party from raising such matters in an appeal. As TalkTalk rightly noted in paragraph 40 of its Notice of Appeal, "Ofcom must be able to justify its decision as being adequately and soundly reasoned and supported in fact". Without adequate consultation, it may be unclear whether there has been a material change or not. To take a hypothetical example, suppose a case where OFCOM simply fails to consider or consult upon the question of material change at all. In such a case, it may be that it is impossible – without the benefit of a proper consultation – for either OFCOM or, on appeal, the Tribunal to determine whether there has, or has not, been a material change. In such a case, on an appeal, it may be that the proper course would be for the Tribunal to remit the matter to OFCOM with a direction that a proper consultation be carried out.

77. In short, we do not seek to suggest that OFCOM's obligation to consult – both in general and as regards section 86 in particular – to be an unimportant one. To the contrary, the Common Regulatory Framework makes very clear the importance of consultation, so as (amongst other things) to ensure that the least intrusive form of regulation is imposed in a market where SMP exists: see, in particular, Recitals 15, 27 and 28 of the Framework Directive, as well as Articles 6, 8, 15 and 16 of that Directive. As a general proposition, a failure by a regulator to consult is likely to result in poor decisions.

78. The reason we consider that – in the case of section 192 appeals – the level of consultation is at most a second order question is simply because of the Tribunal's own statutory obligation under section 195(2) to "decide the appeal on the merits". Thus, even if OFCOM's consultation process has been unimpeachably conducted, the Tribunal may nevertheless conclude that OFCOM's decision was wrong. Conversely, if the Tribunal is satisfied that OFCOM's decision was correct, then the fact that OFCOM's process of consultation was deficient ought not to matter (unless, as we have noted, that process was so deficient that the Tribunal cannot be assured that OFCOM did indeed get it right).

79. We unanimously conclude, therefore, that because this appeal is "on the merits", the Tribunal must first grapple with the question of whether OFCOM's decision is right, and only then consider the process by which OFCOM's decision was reached. In short, we conclude that it is necessary to consider Ground B before Ground A."

219. The Tribunal then considered Ground B, and concluded that, on the substantive point, OFCOM had got the answer "right". The Tribunal then turned to Ground A:

"130. In short, it seems to us that where – as here – there is a full rehearing by the Tribunal of an issue initially determined by OFCOM and the appellant's case has received "overall, full and fair consideration" (per Lord Wilberforce in *Calvin v Carr*, cited in paragraph 127 above, at 697), that will, in general, dispose of a challenge based upon deficiencies or alleged deficiencies in OFCOM's procedure. This, we consider, is the short answer to TalkTalk's Ground A.

131. It may be that there are cases where OFCOM's approach in reaching its decision was so defective as to preclude the Tribunal from reaching an "on the merits" conclusion. In paragraph 76 above, we considered the case where OFCOM reached a decision regarding "material change" without any consultation at all. It may be that, in such a case, the procedural deficiency on the part of OFCOM is so serious as to render it unsafe for the Tribunal to conclude that, "on the merits", OFCOM reached the correct decision. In such a case, where (because of the deficiencies in OFCOM's decision-making process) it is impossible to say one way or the other whether OFCOM's decision was right or wrong, it may be that the only appropriate course is to remit the matter back to OFCOM for OFCOM to carry out its decision- making process again.

132. It is not necessary for us to express a view on this point, and we expressly decide to leave it open. We need only say that this case does not disclose the sort of procedural deficiencies which cause us in any way to doubt the soundness of the conclusion we have reached on Ground B. In paragraph 71 of its Notice of Appeal and paragraphs 38*ff* of its Reply and Skeleton Argument, TalkTalk sought to raise the spectre of "other changes in Market 1 of which TalkTalk, Ofcom and by implication the Tribunal will be unaware as a result of Ofcom's failure to consult/investigate" (to quote from paragraph 71 of OFCOM's Defence and Skeleton Argument).

133. Mr Pickford referred us to the well-known statement of the former US Secretary of Defence, Mr Donald Rumsfeld, made on 12 February 2002:

> "[T]here are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns – there are things we do not know we don't know."

134. We do not consider that it is appropriate to rely on "known unknowns" or even "unknown unknowns" that might – were they known – serve to undermine the soundness of OFCOM's original decision. Where a decision can be challenged by way of a merits appeal, it is incumbent upon an appellant to show – if

> necessary by way of new evidence – that the original decision was wrong "on the merits". It is not enough to suggest that, were more known, the Tribunal's decision might be different."

220. A number of points need to be stressed:

(1) The Tribunal's conclusion was that the substantive consideration that had occurred on the appeal was sufficient to cure the deficiencies alleged as part of Ground A (paragraph 130 of the *TalkTalk* judgment). That was sufficient to dispose of Ground A.

(2) The Tribunal did accept that it might be possible for a deficiency in the original decision-making procedure by OFCOM to be so great as to preclude an "on the merits" conclusion (paragraph 131 of the *TalkTalk* judgment), but the Tribunal found that it was not necessary to express a view on the point, and expressly left it open (paragraph 132 of the *TalkTalk* judgment).

(3) The Tribunal did not, in *TalkTalk*, formulate the test advanced by Vodafone and adopted by the Commission in paragraph 1.28 of the Determination. Again, keeping the point open, we would simply say that we doubt whether the test as formulated by the Commission is correct.

(4) The Tribunal made absolutely clear (in paragraphs 133 to 134 of the *TalkTalk* decision) that the mere fact that there existed "known unknowns" or even "unknown unknowns" would not serve to undermine the soundness of OFCOM's original decision. Indeed, it is worth repeating what the Tribunal said at paragraph 134:

> "Where a decision can be challenged by way of a merits appeal, it is incumbent upon an appellant to show – if necessary by way of new evidence – that the original decision was wrong "on the merits". It is not enough to suggest that, were more known, the Tribunal's decision might be different."

221. We do not consider that this case comes remotely close to a case where OFCOM's procedure in reaching the Determination was so defective as to render it impossible for the Commission to reach a view on the merits. On the

contrary, there was a great deal of material before the Commission and – as has been described – it received exhaustive consideration. The fact that more evidence might have been adduced on certain points certainly does not affect this conclusion.

222. It was the essence of EE's case that the Commission correctly stated the "on the merits" test (see paragraph 37(c) of EE's JR Grounds), but failed to apply that test correctly (see paragraphs 37(c) to (e) of EE's JR Grounds). We do not consider that contention to be correct. The "on the merits" test is clearly articulated in *Hutchison 3G (UK) Limited v Office of Communications* [2008] CAT 11, where the Tribunal stated at paragraph [164]:

> "However, this is an appeal on the merits and the Tribunal is not concerned solely with whether the 2007 Statement is adequately reasoned but also with whether those reasons are correct. The Tribunal accepts the point made by H3G in their Reply on the SMP and Appropriate Remedy issues that it is a specialist court designed to be able to scrutinise the detail of regulatory decisions in a profound and rigorous manner. The question for the Tribunal is not whether the decision to impose price control was within the range of reasonable responses but whether the decision was the right one."

223. That is the test which the Commission had in mind in the Determination (see paragraphs 1.27 to 1.33), albeit with a potentially unhelpful gloss derived from *TalkTalk*, which might (but, in fact, did not) have inclined the Commission to decide Reference Question 1 according to a standard that was based upon whether more and better evidence could have been obtained. We consider that the Commission's actual approach to Reference Question 1 was unimpeachable.

(viii) EE as the "author of its own misfortune"

224. It follows from what we have said that even if the "missing" material had been as significant as EE contends, we would have rejected EE's submissions. We see force in the suggestion, made by the Commission and by the other parties, that EE was the author of its own misfortune, in failing to deploy evidence that, it now says, the Commission should – in some way – have obtained prior to reaching a determination.

225. EE protested that there was no way of foreseeing that the Commission would – in the provisional determination – strike out on a course of its own, and depart from the findings made by OFCOM in its Statement. We reject that submission. In an "on the merits" review, there is every reason to anticipate that a long and complex decision may not be upheld. After all, an "on the merits" review is a review into the correctness of the decision-maker's decision, and can scarcely be regarded as a rubber stamp. The notion that the Commission might depart from the Statement was eminently foreseeable.

226. We accept, of course, that precisely how the Commission might depart from the Statement was less foreseeable. However, in this case, the Commission in large part accepted EE's contentions as to how the waterbed would operate (see e.g. paragraph 2.823 of the Determination, quoted in paragraph 181 above), and it must be expected that a party advancing a specific contention will, when making that contention, ensure that there is before the adjudicator in question such material as it cares to adduce which identifies the consequences of the particular finding being contended for. EE did not do so.

227. Even when the provisional determination was published – and despite the prohibition on new evidence contained in the Commission's Guidelines – an application to admit new evidence could have been made. The Commission might – exceptionally – have admitted it of its own volition; but in any event, an application could have been made to this Tribunal under rule 22 of the Tribunal's Rules. As the Court of Appeal made clear in *British Telecommunications plc v Office of Communications* [2011] EWCA Civ 245, the Tribunal has a discretion to admit new evidence in a Section 192 Appeal.

228. Naturally, an application to admit evidence at so late a stage would have to be justified, and one would have expected:

    (1) A cogent explanation as to why the evidence had not been submitted earlier. As we have explained, we have some doubt as to whether such a cogent explanation could have been advanced in this case.

    (2) A cogent explanation as to the importance or significance of the evidence. Of course, no-one (including EE) has actually produced any evidence

along the lines that EE suggests was missing, so the question is a difficult one to answer. But, we venture to suggest that the evidence in this case lacks the importance suggested for it by EE. This is for a number of reasons:

(i) First, the "missing evidence" related to only one of five criteria by which OFCOM assessed its choice of cost standard (namely allocative efficiency). Allocative efficiency (topic 2 in Table 1) itself comprised a number of different factors which were evaluated by OFCOM, and would have had to be evaluated by the Commission. The new evidence would only have be relevant to two of these factors (Table 1, topics 2.2.1.2 and 2.2.1.3; see further paragraphs 161(3) and 163 above).

(ii) The missing evidence – essentially, survey evidence as to how customers would react to defined price changes – might very well be of dubious weight. OFCOM declined, in the Statement, to rely on survey evidence at all, including survey evidence commissioned by it (see paragraph 169 above). The Commission, it is fair to say, was less dismissive, but even it treated such survey evidence as there was with caution (see paragraph 170 above). Of course, it is right to say that the Commission, in paragraph 2.700 of the Determination (quoted in paragraph 171 above), expressed the hope that in other cases OFCOM would rely upon a "robust" survey. But that, of course, begs the question as to whether any such survey would be "robust". It is perfectly conceivable (as Mr Turner himself accepted) that – were a number of parties to carry out surveys – the decision-maker might be faced with evidence pointing in different ways.

(iii) EE used somewhat emotive language to describe the differences between OFCOM and the Commission on this point. Thus, in paragraph 37(a) of its JR Grounds, EE suggested that "Ofcom's reasoning and evidence had been demolished in a respect of a key part of its analysis in the Statement". Whilst we have no desire to

minimise the difference of view between OFCOM and the Commission, this is something of an overstatement. OFCOM and the Commission reached different views as to how the waterbed effect would operate, and so reached different views as to which particular customers would be affected.

We are sceptical as to whether a case could have been made out for the late admission of new evidence.

(ix) Remission to OFCOM pursuant to section 195(4) of the 2003 Act

229. For EE, Mr Turner drew a clear distinction between the identification of an error on the part of OFCOM by the Commission and the steps that had to be taken to correct that error. He quite rightly pointed out that it was not part of the Commission's function, when reviewing a decision of OFCOM, to work out the "correct" answer in the sense of determining, for example, exactly what price control should be imposed: the Commission's role was to work out whether or not OFCOM had got its decision right or wrong, and to provide guidance (if directed to by the Tribunal) as to how any error might be rectified.

230. If an error was identified, then clearly the Commission would say so in its determination of the price control matter that had been referred to it. Equally, assuming the Commission's determination bound the Tribunal (i.e. assuming no reviewable error under section 193(7)), the Commission's determination would become the Tribunal's decision on the merits pursuant to sections 193(6) and 195(2). At that point, the Tribunal would remit the matter to OFCOM pursuant to section 195(4), with appropriate directions. In the case of an identified error, naturally these directions would have as their object the correction of OFCOM's original error. How specific the direction might be, would depend on the nature of the error identified.

231. We agree with this analysis. However, where we consider Mr Turner fell into error was in his suggestion that a section 195(4) remission to OFCOM could be used to obtain more evidence, so as to assist the Commission to reach a conclusion on a reference question (see, e.g. Transcript of the Hearing, Day 1, pages 14 to 16). This is not correct: remission to OFCOM can only occur when

once the Tribunal has decided the appeal under section 195(2) which – in a case concerning a price control matter – can only occur once the Commission has determined, pursuant to section 193(2), the price control matter that has been referred to it.

(x) Proportionality

232. *BAA Limited v Competition Commission* [2012] CAT 3 concerned an application for review to the Tribunal under section 179(1) of the Enterprise Act 2002, of a decision by the Commission, on this occasion acting as administrative decision-maker in the context of a market investigation reference.

233. Provided it is borne in mind that, in this case, the Commission's role was as administrative decision-maker, and not administrative appeal body (its role, as we have found, in the Appeals), the Tribunal's decision contains, in paragraph [20], a valuable distillation of the relevant principles, which it is worth setting out at length:

> "(2) …There was common ground as to the formulation of the proportionality test to be applied by the [Commission] in taking measures under the Act (and by the Tribunal in reviewing its actions):
>
> > "…the measure: (1) must be effective to achieve the legitimate aim in question (appropriate), (2) must be no more onerous that is required to achieve the aim (necessary), (3) must be the least onerous, if there is a choice of equally effective measures, and (4) in any event must no produce adverse effects which are disproportionate to the aim pursued" (*Tesco plc v Competition Commission* [2009] CAT 6 at [137], drawing on the formulation by the Court of Justice in Case C-331/88 *R v Ministry of Agriculture, Fisheries and Food* [1990] ECR I-4023, para. 13)
>
> In addressing proportionality, the following observation of the Tribunal at para. [135] of its judgment in *Tesco* should particularly be borne in mind:
>
> > "[C]onsideration of the proportionality of a remedy cannot be divorced from the statutory context and framework under which that remedy is being imposed. The governing legislation must be the starting point. Thus the Commission will consider the proportionality of a particular remedy as part and parcel of answering the statutory questions of whether to recommend (or itself take) a measure to remedy, mitigate or prevent the AEC and its detrimental effects on customers, and if so what measure, having regard to the need to achieve as comprehensive a solution to the AEC and its effects as is reasonable and practicable."

(3) The [Commission], as decision-maker, must take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed for it…: see e.g. *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065B per Lord Diplock; *Barclays Bank plc v Competition Commission* [2009] CAT 27 at [24]. The [Commission] "must do what is necessary to put itself into a position properly to decide the statutory questions": *Tesco plc v Competition Commission* [2009] CAT 6 at [139]. The extent to which it is necessary to carry out investigations to achieve this objective will require evaluative assessments to be made by the [Commission], as to which it has a wide margin of appreciation as it does in relation to other assessments to be made: compare, e.g., *Tesco plc v Competition Commission* at [138]-[139]. In the present context, we accept Mr Beard's primary submission that the standard to be applied in judging the steps take by the [Commission] in carrying forward its investigations to put itself into a position properly to decide the statutory questions is a rationality test: see *R (Khatun) v Newham London Borough Council* [2004] EWCA Civ 55; [2005] QB 37 at [34]-[35] and the following statement by Neill LJ in *R v Royal Borough of Kensington and Chelsea, ex p Bayani* (1990) 22 HLR 406, 415, quoted with approval in *Khatun*:

> "The court should not interfere merely because it considers that further inquiries would have been desirable or sensible. It should intervene only if no reasonable [relevant public authority – in that case, it was a housing authority] could have been satisfied on the basis of the inquiries made."

(4) Similarly, it is a rationality test which is properly to be applied in judging whether the [Commission] had a sufficient basis in the light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did. There must be evidence available to the [Commission] of some probative value on the basis of which the [Commission] could rationally reach the conclusion it did: see e.g. *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320, 1325; *Mahon v Air New Zealand* [1984] AC 808; *Office of Fair Trading v IBA Health Ltd* [2004] EWCA Civ 142; [2004] ICR 1364 at [93]; *Stagecoach v Competition Commission* [2010] CAT 14 at [42]-[45];

(5) In some contexts where Convention rights are in issue and the obligation on a public authority is to act in a manner which does not involve disproportionate interference with such rights, the requirements of investigation and regarding the evidential basis for action by the public authority may be more demanding. Review by the court may not be limited to ascertaining whether the public authority exercised its discretion "reasonably, carefully and in good faith", but will include examination "whether the reasons adduced by the national authorities to justify [the interference] are 'relevant and sufficient'" (see, e.g., *Vogt v Germany* (1996) 21 EHRR 205 at para. 52(iii); also *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, paras. 135-138). However, exactly what standard of evidence is required so that the reasons adduced qualify as "relevant and sufficient" depends on the particular context: compare *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 at [26]-[28] per Lord Steyn. Where social and economic judgments regarding "the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken" are called for, a wide margin of appreciation will apply,

and – subject to any significant countervailing factors, which are not a feature of the present case – the standard of review to be applied will be to ask whether the judgment in question is "manifestly without reasonable foundation": *James v United Kingdom* (1986) 8 EHRR 123, para. 46 (see also para. 51). Where, as here, a divestment order is made so as to further the public interest in securing effective competition in a relevant market, a judgment turning on the evaluative assessments by an expert body of the character of the [Commission] whether a relevant AEC exists and regarding the measures required to provide an effective remedy, it is the "manifestly without reasonable foundation" standard which applies. One may compare, in this regard, the similar standard of review of assessments of expert bodies in proportionality analysis under EU law, where a court will only check to see that an act taken by such a body "is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion": Case C-120/97 *Upjohn Ltd v Licensing Authority* [1999] ECR I-223; [1999] 1 WLR 927, paras. 33-37. Accordingly, in the present context, the standard of review appropriate under Article 1 [of Protocol 1] and section 6(1) of the [Human Rights Act 1998] is essentially equivalent to that given by the ordinary domestic standard of rationality…

(6) It is well-established that, despite the specialist composition of the Tribunal, it must act in accordance with the ordinary principles of judicial review: see *IBA Health v Office of Fair Trading* [2004] EWCA Civ. 142 per Carnwath LJ at [88]–[101]; *British Sky Broadcasting Group plc v Competition Commission* [2008] CAT 25, [56]; *Barclays Bank plc v Competition Commission* [2009] CAT 27, [27]. Accordingly, the Tribunal, like any court exercising judicial review functions, should show particular restraint in "second guessing" the educated predictions for the future that have been made by an expert and experienced decision-maker such as the [Commission]: compare *R v Director General of Telecommunications, ex p. Cellcom Ltd* [1999] ECC 314; [1999] COD 105, at [26]. (No doubt, the degree of restraint will itself vary with the extent to which competitive harm is normally to be anticipated in a particular context, in line with the proportionality approach set out by the ECJ in Case C-12/03P *Commission v Tetra Laval* [2005] ECR I-987 at para. 39…

(7) In applying both the ordinary domestic rationality test and the relevant proportionality test under Article 1 [of Protocol 1], where the [Commission] has taken such a seriously intrusive step as to order a company to divest itself of a major business asset like Stansted airport, the Tribunal will naturally expect the [Commission] to have exercised particular care in its analysis of the problem affecting the public interest and of the remedy it assesses is required. The ordinary rationality test is flexible and falls to be adjusted to a degree to take account of this factor (cf *R v Ministry of Defence, ex p. Smith* [1996] QB 517, 537-538), as does the proportionality test (see *Tesco plc v Competition Commission* at [139]). But the adjustment required is not as far-reaching as suggested by Mr Green at some points in his submissions. It is a factor which is to be taken into account alongside and weighed against other very powerful factors referred to above which underwrite the width of the margin of appreciation or degree of evaluative discretion to be accorded to the [Commission], and which modifies such width to some limited extent. It is not a factor which wholly transforms the proper approach to review of the [Commission's] decision which the Tribunal should adopt…"

might be material. In particular, Vodafone said that the indication here was that consumer surplus could be significantly reduced …

2.443 Ofcom responded that Vodafone had not explained many of the assumptions made and that it could therefore provide only limited comments on Vodafone's simulation model at that stage. Ofcom said that it appeared that the model was based on restrictive assumptions and a particular model of competition that was unlikely to exist in practice. Therefore, Ofcom was not persuaded that any weight should be placed on it. Ofcom gave the following examples:

(a) Ofcom said that it was not clear what assumptions had been made regarding the impact of on-net/off-net price differentials on the intensity of competition and the mechanism by which this affected subscription charges;

(b) Vodafone used a call price elasticity of -0.3 which appeared to be an industry-wide elasticity estimate. Ofcom noted that a number of industry commentators considered that it could be higher; and

(c) Ofcom considered that neither of the two scenarios were particularly realistic given O2's and EE's market shares vis-à-vis Three and other smaller operators.

2.444 Vodafone in turn responded that:

(a) The assumptions used to generate the results had been set out in Annex 3 to Schedule 2 of Vodafone's NoA. These included the form of competition assumed, the market shares of the different operators, and all the assumptions made about the inputs in order to calibrate the model so that it mimicked, to the extent possible, the situation in the UK market.

(b) The simulation model was not intended to provide a complete and accurate description of all the potential impacts that lowering MTRs could be expected to have on the intensity of competition. The purpose was to seek to estimate the materiality of a specific dampening effect on competition from lower MTRs, using a 'standard' competition model calibrated to reflect the current levels of MTRs in the UK, and the proposals of Ofcom. The results indicated that this effect could be material. None of Ofcom's criticisms were said to have addressed this point.

(c) Ofcom itself used a similar modelling exercise to examine the potential effects of different level of MTRs on different consumer segments. Most if not all of the models used in the economic literature assumed two operators, as this was typically considered sufficient to capture most of the key features that the analysis sought to evaluate.

(d) Ofcom had not attempted to provide even an indicative or illustrative estimate of the potential effect of the alleged competition effects it had identified.

2.245 We agree with Ofcom that Vodafone had not provided sufficient documentation of the model. Vodafone provided only a brief description of the purpose of the model, its approach and inputs, as set out above, in Annex 3 to its NoA Schedule 2. Following its bilateral hearing, Vodafone provided a copy of the spreadsheet but no further documentation of the assumptions and formula. We do not have a sufficient understanding of the model to allow us to make an independent assessment of the result.

2.446 In addition, these countervailing effects require there to be on-net/off-net retail price differentials. Vodafone did not say what assumptions were made in the model on current or future differentials, or the basis for these assumptions. In response to the [Commission's] provisional determination, Vodafone said that the model sought to evaluate a specific competition dampening effect under the same assumptions underlying Ofcom's retail effects which included an assumption that on-net/off-net price differentials existed. The same assumptions were said to underpin Vodafone's simulation model. Vodafone did not say, however, what figure it attached to an assumption that there were such differentials and what the source of these inputs was.

2.447 Finally, Vodafone used this model to estimate the size of the positive competition effect identified in the economic literature associated with setting MTRs above LRIC…We considered the appellants' arguments in relation to this literature above in paragraphs 2.95 to 2.151. We conclude that we are not persuaded by Vodafone's argument that a clear conclusion of the literature is that the competitive effects identified by Ofcom must be balanced against the otherwise pro-competitive effects of higher MTRs.

2.448 For the reasons set out in paragraphs 2.445 to 2.447, we consider that we cannot attach much weight to the results of Vodafone's simulation model."

(b) Vodafone's contentions as to reviewable error under section 193(7)

242. As we have observed before, it is not for us to review this conclusion on the merits, and Vodafone did not invite us to do so. Rather, it was suggested that the reviewable error on the part of the Commission was its failure to dig deeper. It was, *pace* Vodafone, "incumbent upon the [Commission] to clarify the workings of the model". The Commission's failure to do, again *pace* Vodafone's JR Grounds, was that:

"29.1 The [Commission] was not in a position to conclude that the potential competition effect identified by Vodafone did not exist or that it was not sufficiently material to outweigh the competition effect identified by Ofcom;

29.2 There is a real possibility that, if the [Commission] had not made such errors, it would have concluded that the potential competition effect identified by Vodafone did exist and that it outweighed the competition effects identified by Ofcom, or at the very least, that there was a real risk that it might do so;

29.3 In these circumstances, the proper course of action is to remit the matter to Ofcom to conduct a proper assessment of the materiality of the potential effect identified by Vodafone balanced against the materiality of the competition effects identified by Ofcom."

243. We reject all three of these contentions for the following reasons:

(1) Beginning with the third contention, as we have noted, the Commission has no power to remit questions to OFCOM. The Commission has an obligation to determine the questions referred to it by the Tribunal. The Tribunal then makes a remission pursuant to section 195(4) of the 2003 Act once the appeal has been decided.

(2) As we have also noted, the Commission had to make a determination on the basis of the material adduced before it. Here, Vodafone had adduced a model producing results which (at best) were "only indicative" and whose operation was the subject of criticism by OFCOM.

(3) Of course, where evidence is adduced, it is incumbent upon the Commission to consider it and - where that evidence is not clear – to take steps to ask the party adducing it for clarification. However, we consider that the extent of those steps is for the Commission to determine (subject always to review by this Tribunal).

(4) In this case, the Commission plainly decided that given *(i)* the indicative nature of the products of the model and *(ii)* the fact that the model was in any event controversial, it is was not appropriate to consider the model further. Certainly, to produce a new model, one that reflected Ofcom's (and the Commission's) concerns is not something that the Commission could have been required to undertake or require others to undertake.

244. In short, we regard the Commission's conclusion at paragraph 2.448 of the Determination as one that is not susceptible to judicial review.

X. EE'S GROUND 2

(a) Introduction

245. By its Ground 2, EE complains of the Commission's regard to a matter which lay outside the scope of the appeals. This was the question of the implications of changes in subscribers and usage for allocative efficiency, considered in paragraphs 2.799 to 2.812 and 2.823 of the Determination and paragraphs 177 to 179 above (Table 1, topic 2.2.5). Again, EE's Ground 2 related to Reference Question 1.

246. In paragraph 92 of its JR Grounds, EE contended that:

> "a. As the [Commission] noted, Ofcom proceeded on the basis that any reduction in ownership or usage would harm allocative efficiency. No party appealed that aspect of Ofcom's reasoning; rather the appellants proceeded on the basis that it was correct. As the point was not challenged in the NoAs, the parties did not adduce (and had no opportunity to adduce) relevant evidence during the appeals. It was not therefore open to the [Commission] to overturn that aspect of Ofcom's analysis as it was outside the scope of the appeals.
>
> b. Further, even if one or more of the NoAs had called into question whether a reduction in ownership or usage reduced allocative efficiency, such that the issue fell within the scope of the appeals, and that issue was relevant to the assessment of which charge control was appropriate, the [Commission] dismissed the RQ1 appeals without having reached any clear finding on the issue as the [Commission] simply noted the possibility that the loss of some customers might not reduce allocative efficiency without making any findings on the extent to which that was the case.
>
> c. In the alternative, to the extent that the [Commission] did make findings on that issue, then it did so without any or any proper evidential basis."

247. Essentially, there are two points here. First, this was not a matter in issue before the Commission; and, secondly, that either the Commission was wrong not to make findings on the point or if it did make findings, that it did so with no evidential basis.

(b) The point was not in issue before the Commission

248. As we have noted, Section 192 Appeals to the Tribunal are not hearings *de novo*. The Tribunal's consideration is confined to the points raised on appeal, and it determines these on the merits on the evidence adduced by the parties.

The Commission's role is the same, save that the Commission is obliged to determine the reference questions referred to it by the Tribunal

249. It is trite, however, that appeals are against decisions and not against the reasons for decisions: see *Lake v Lake* [1955] P 336 at 342, 343-344 and 346-347. In this case, the question that was before the Commission was Reference Question 1 which – to paraphrase – questioned whether OFCOM had been right to adopt the LRIC cost standard, rather than the LRIC+ cost standard. We do not consider that, when considering a reference question, the Commission is obliged to look only at the reasoning of OFCOM, and then only to the extent that that reasoning is challenged. What the Commission looks at is the decision, and reviews that on the merits.

250. This should not be read as an encouragement to adduce points late. Whilst, of course, it is right that fresh evidence can be adduced before the Tribunal (and so, into the Commission's consideration of price control matters), subject always to the Tribunal's discretion under rule 22 of the 2003 Tribunal Rules, the late adduction of a point before Tribunal, which has not been tested by OFCOM, is liable to raise the question why the point was not made before, which may affect either the admissibility of the evidence altogether or its weight (particularly if other parties cannot deal properly with the point).

(c) No evidential basis

251. The Commission was questioning the correctness of an assumption made, *sub silentio*, in OFCOM's reasoning (see paragraph 2.799 of the Determination). This was a matter raised with the parties by the Commission (see paragraph 2.807 of the Determination). Whilst it is true that the Commission made no explicit findings, its questioning of OFCOM's assumption that e.g. a reduction in subscribers was necessarily a bad thing was a matter that affected the weight the Commission attached to the point that the number of subscribers might reduce given the effect of the waterbed. This was a view that was perfectly open to the Commission, and we see nothing to criticise.

XI. EE'S GROUND 3

252. EE's JR Ground 3 also related to Reference Question 1, and in particular to paragraphs 2.843 to 2.919 of the Determination (see Table 1: topic 4 above). The question at issue is the extent to which vulnerable customers (a class defined in paragraph 2.844 of the Determination) would be adversely affect by price rises caused by the waterbed effect. To this extent, therefore, EE's Ground 1 and EE's Ground 3 are connected.

253. We have summarised the Commission's consideration of this point, and its reasoning, in paragraphs 184 to 188 above.

254. EE's criticism of the Commission's conclusion at paragraph 2.907 of the Determination (quoted in paragraph 188 above) is set out in its JR Grounds:

> "103. Any mobile customer faced with a price increase may respond either by giving up their mobile or reducing their usage. As discussed under Ground 1, the elasticity calculations referred to by the [Commission] implied that the level of price increases that the [Commission] anticipated would result from LRIC might cause around 800,000 pre-pay customers to give up their mobile subscription. The elasticity figures derived from the studies constitutes evidence that a significant proportion of customers will respond to price increases by giving up their subscription rather than choosing to reduce their usage (i.e. even though that latter option would also have been open to them).
>
> 104. As vulnerable consumers are predominantly pre-pay, these calculations suggest that the adoption of LRIC would be likely to result in tens and possibly hundreds of thousands of vulnerable customers giving up their mobile subscription.
>
> 105. The [Determination] does not provide any evidence to justify a finding to the contrary, or that vulnerable customers would be less likely to respond to price increases by giving up their subscription than is implied by these industry-wide elasticity figures. Indeed, the [Commission] itself finds that vulnerable customers are **more** likely to respond in this way.
>
> …
>
> 108. In short, the [Commission] found that vulnerable customers are more, rather than less, likely than average to respond to price increases by giving up their mobile, and there is no basis, either in logic or in any evidence relied on by the [Commission] in the [Determination], for finding that fewer vulnerable customers are likely to give up their mobile subscription than is implied by industry-wide elasticity figures." (Emphasis in original)

255. Paragraph 108 of EE's JR Grounds, just quoted, rather misstates the Determination. The Commission emphatically did not find that vulnerable customers were more, rather than less, likely than average to respond to price increases by giving up their mobile, as a reading of paragraph 2.907 of the Determination (quoted in paragraph 188 above) shows. At most, EE can say that there was no basis or evidence for this conclusion.

256. Yet that, too, is an untenable submission. In the Determination, the Commission, quite properly, summarised EE's contentions regarding harm to vulnerable consumers. Those contentions – made in a review that was on the merits – resemble the contentions made before us (in a judicial review). Of course, the Commission went on to consider contentions going the other way, notably those made by Three (see paragraphs 2.868 to 2.872). We shall not repeat these paragraphs here: what is important to note is that EE's contentions were by no means incontrovertible nor uncontroverted. It was the Commission's task to consider and evaluate these contrary arguments, and to reach a view.

257. This is exactly what the Commission did, and we are somewhat at a loss to differentiate EE's "on the merits" contentions before the Commission from EE's "judicial review" contentions before us. Essentially, having lost on the merits before the Commission, EE is raising exactly the same point (albeit differently labelled) before us. In any event, we are firmly of the view that the Commission's conclusion satisfies the rationality test, and that the suggestion that the Commission's conclusion should be set aside pursuant to section 193(7) is hopeless.

XII. VODAFONE'S GROUND B

(a) Overview

258. Vodafone's Ground B related to Reference Question 2. Essentially, this point accepts OFCOM's and the Commission's conclusion that LRIC was the appropriate basis for the price control, but contends that the actual price ceiling (set out in summary form at Table 1.1 in the Statement, and referenced in paragraph 10 above) had been computed wrongly. As a result, even if LRIC was the correct measure, the level at which the price control was set was wrong.

Essentially, this was because the economic model used by OFCOM to establish such prices – the 2011 Model – was not fit for its purpose.

(b) The need for a model

259. We described, in paragraphs 18 to 28 above, the difference between a price control based upon LRIC+ and a price control based upon LRIC. In the latter case, a MCP's ability to charge for terminating a call is constrained by the incremental cost of that call. In the former case, a MCP's ability to charge for terminating a call is constrained by the incremental cost of that call plus a contribution towards the common costs.

260. OFCOM derived the LRIC price ceiling through the use of a model – the 2011 Model. A model may be described as a "simplified system used to simulate some aspects of the real economy. Models are used in economics because there are limited possibilities for experimentation and past experience does not always provide an answer. A model is a simplified description of the economy, or part of the economy, relevant for the analysis" (see under: "model" in Black, Hashimzade & Miles, *A Dictionary of Economics*, 3rd ed (2009)).

(c) OFCOM's model

261. OFCOM had, of course, used models during previous price controls, and its model had twice been reviewed by the Commission (see paragraph 3.5 of the Determination). However, this model had been used to calculate price ceilings for a price control based upon LRIC+. On this occasion, a revised version of the model was being used to calculate price ceilings for a price control based upon LRIC.

262. OFCOM's modelling was described in the following terms in the Determination:

> "3.5 Ofcom stated that it had used a bottom-up MCT cost model in setting MCT charges for the period 2011 to 2014 (2011 Model) and that this approach had been used by Ofcom (and its predecessor Oftel) for a number of years. The MCT cost models used in previous Price Controls had been twice reviewed by the [Commission] (the 2002 [Commission] report and the 2009 [Commission] determination). The 2011 Model was based on an updated version of the cost model from the 2007 charge control.

3.6 Ofcom said that the 2011 Model estimated the costs of a hypothetical average efficient operator in the UK, and was therefore based on the use of technologies and spectrum bands that had been, or were currently being, deployed in the UK.

3.7 Ofcom said that the 2010 Model, on which it consulted as the basis for the 2011 Model (the subject of these challenges) used what might be called a 'total network minus' approach to calculate the LRIC of MCT services. This approach assumed that the network build parameters were the same for a network with all services and a network that had all services except for MCT services.

3.8 Ofcom explained that the MCT cost modelling used an abstraction of a real-world network deployment and balanced practicability and materiality in estimating the long-run incremental costs of MCT. Therefore the model assumed, for example, that cell radii and the percentage of traffic on macrocell, microcells and picocells were parameters that neither changed dynamically with the levels of traffic nor between *(a)* a full network and *(b)* a full network minus termination traffic.

3.9 Ofcom said that whilst the model had been developed as a bottom-up cost model it had also been calibrated by adjusting the unit replacement cost levels and cost causality relationships of different cost components, to ensure the model was reasonably in line with the national 2G/3G MCPs' actual costs in historical years. Ofcom described its *calibration* of the 2011 Model as follows:

(a) It was intended to ensure that the model as a whole was a good approximation to reality for the costs overall and the level of key assets.

(b) Calibration was an iterative process in which first the model was built and the parameters were specified, which were then matched to metrics that were observed from the operators (eg gross book value, operating costs, or the level of key assets).

(c) The calibration exercise would typically start by looking at the average of the operators, but Ofcom was at least trying to be within the upper and lower bounds from the operators, because hitting the average in every year, every time for every asset would be very challenging. It said that there were no precise rules on how it performed its calibration and that it used its judgment.

(d) Where in the model adjustments were made for calibration depended on where the gap was by reference to the metrics used for calibration.

3.10 Ofcom said that estimated costs in the model were driven by three main factors: *(a)* the number of subscribers; *(b)* coverage requirements; and *(c)* the total traffic generated by subscribers. The number of subscribers drove a relatively small number of network assets eg Home Location Registers (HLRs), whereas coverage requirements and service demand (traffic) drove the majority of costs.

3.11 Ofcom stated that its approach to modelling LRIC was consistent with the Recommendation which specified the estimation of the LRIC of termination

as the avoidable costs associated with termination traffic, with MCT being the final service to be taken into account. Ofcom noted that as explained at point 6 and recital 14 of the Recommendation, traffic-sensitive costs may arise jointly with other traffic services (eg call origination, SMS, MMS, etc) and were common across a number of traffic services and MCPs would continue to face those costs even if MCT volumes fell to zero. Ofcom did not believe that the LRIC estimate should include a contribution to costs which were not traffic (specifically MCT traffic) driven.

3.12 Ofcom said that the model calculated the network costs for the period 1990/91 to 2039/40 with a perpetuity-based terminal value thereafter, although forecasts for all inputs were constrained to be constant from 2020/21 onwards.

3.13 Ofcom stated that the model recovered capital and operating costs over time using its chosen economic depreciation (ED) methodology. This calculated a cost per unit of output in each year for every asset in the model. The ED approach matched the cost of equipment to its actual and forecast usage over the long term. Consequently, there was relatively little depreciation in years when utilization was low and relatively high depreciation in years of full, or almost full, equipment utilization."

263. OFCOM's 2011 Model was spreadsheet based. The data in the spreadsheet was enormous. OFCOM points out in paragraph 27.1 of its written submissions that:

> "[t]he primary part of the model is made up of 6 Excel workbooks containing over 150 Excel spreadsheets and almost 2.5 million cells. It is over 100 MBs in size".

264. Even so, it was common ground that the model – as with <u>any</u> model – was a simplified representation of the real world, and was using that simplified representation to project certain costs forward.

265. Putting it very simply, in order to produce this output, it was necessary for OFCOM:

(1) first, to identify the relevant data to be input into the spreadsheet;

(2) secondly, to identify how that data inter-related; and

(3) thirdly, to describe the strength of that inter-relationship.

266. It goes without saying – but it is nevertheless extremely important that it be said – that the construction of a model involves the exercise of judgement of a high order, both in terms of selecting what data is to be input into a model, and then in defining how that data interacts so as to produce an output.

(d) Adjusting the model to calculate LRIC

267. The 2011 Model was the first model to calculate a price control based upon LRIC, as opposed to LRIC+. Whereas formerly, under LRIC+, common costs were apportioned amongst the various services provided by MCPs, including call termination, under LRIC, these were left out of account.

268. The Determination describes – in a high level way – how this was achieved:

> "*The calculation of LRIC+*
>
> 3.14 Ofcom said that it calculated LRIC+ as the incremental costs of traffic using a large increment approach (ie all voice and data traffic).
>
> 3.15 Ofcom stated that the 2011 Model calculated service costs by allocating all network costs according to service routing factors. Under LRIC+, any common costs were allocated to service increments according to routing factors. For common costs where no routing factors existed (such as administration costs), the allocation was on an EPMU (equi-proportionate mark-up) basis. The LRIC+ model did not identify or estimate the level of common costs. The outputs of the LRIC model were unit costs that included all network costs. Therefore, the model output, for a LRIC+ cost benchmark, was an incremental cost plus an implicit contribution to common costs.
>
> *The calculation of LRIC*
>
> 3.16 Ofcom said that when using a LRIC approach, incoming voice traffic was considered as a final increment with no common costs (such as the common costs of a coverage network) being allocated to the wholesale voice termination service. The only costs allocated to voice termination were the incremental costs of providing voice termination on a hypothetical network built to provide all services except voice termination.
>
> 3.17 Ofcom stated that the LRIC of MCT was calculated as the cost avoided by not providing off-net termination whilst still providing all other services.
>
> 3.18 Ofcom's 2011 Model calculated LRIC-based MCT charges using a total network minus (or subtractional method), which operated as follows:
>
> (a) running the model on the basis that the modelled network provided a full range of services;
>
> (b) running the model again on the basis that the modelled network provided a full range of services excluding an MCT service;
>
> (c) subtracting the second result from the first, so as to ascertain what additional (or incremental) assets/resources were needed to provide an MCT service, and then running the ED algorithm of the model to derive the cost of providing the MCT service; and
>
> (d) the output of this algorithm was the LRIC of an incoming minute of voice traffic (in ppm)."

(e) Vodafone's section 193(7) challenge

(i) Deficiencies identified in the 2011 Model

269. Vodafone identified a number of alleged deficiencies (or, more neutrally, characteristics) in the 2011 Model. These characteristics, it is important to note, had always been present in that model. It was simply that their effect or significance became more acute if the model was used to compute a cost control based on LRIC rather than one based on LRIC+. As Vodafone noted in paragraph 44.4 of its JR Grounds:

> "For these reasons, Vodafone judged the deficiencies in the Model to be tolerable if the Model was to be used to set a LRIC+ based charge control, even though the same deficiencies might render the Model wholly unsuited to the purpose of setting a LRIC based charge control."

270. According to its JR Grounds, Vodafone's case before the Commission was that:

(1) "Ofcom did not do enough to adapt the 2007 Model to ensure that it was fit for use in setting LRIC-based charge controls" (Vodafone's JR Grounds, paragraphs 48.1 to 48.3).

(2) Historic and current calibration adjustments did not disclose whether the adjustments were driven by traffic-related factors, or non-traffic related factors, or both (Vodafone's JR Grounds, paragraphs 48.4 to 48.5).

(3) Calibration adjustments to the design rules might not accurately reflect the facts which drove the need for additional assets (Vodafone's JR Grounds, paragraphs 48.6 to 48.8).

(4) Refinement to the design rules for each year individually did not lead to better overall specification of the Model (Vodafone's JR Grounds, paragraphs 48.9 to 48.11).

(5) Variation in individual design rules from one year to the next implied that there was a real risk of error in OFCOM's assessment of the LRIC cost of the MCT service (Vodafone's JR Grounds, paragraphs 48.12 to 48.13).

(6) OFCOM had not made any adjustments to the Model to predict the assets employed in the ex-MCT network (Vodafone's JR Grounds, paragraph 48.14).

271. As a result of these arguments, Vodafone asked the Commission to conclude that:

> "49.1 The Model was not fit for the purpose of deriving a LRIC measure of the cost of the MCT service; and
>
> 49.2 Ofcom had erred therefore in setting MCT charges on a LRIC basis; or, in the alternative to 49.2,
>
> 49.3 If the [Commission] considered that MCT charges should be set at LRIC levels, it should not rely on Ofcom's Model, but should use some other method to derive an approximate estimate of the LRIC cost of the MCT service."

(ii) The Commission's consideration in the Determination

272. The Commission rejected Vodafone's contentions. It is important to understand the basis upon which the Commission did so.

(1) Although Vodafone's JR Grounds (summarised in paragraph 270 above) identify only six deficiencies in the model, EE and Vodafone identified to the Commission no less than 15 alleged "key deficiencies in the 2011 Model" (see paragraph 3.36 of the Determination), including these six.

(2) In the case of each alleged deficiency, the Commission:

(i) Identified the decision that OFCOM had made, which was being challenged.

(ii) Described the submissions made in respect of the challenge.

(iii) Stated its conclusion.

(3) It would be pointless to set out the detail of the Commission's Determination on these points. Vodafone, who addressed us on these points, was emphatic that the Tribunal could not concern itself with reviews on the merits, and had a judicial review function only. That,

clearly, is right. Nevertheless, the table below lists: *(i)* each deficiency alleged by Vodafone and EE; *(ii)* the place in the Determination where the challenged decision by OFCOM is identified; *(iii)* the place in the Determination where the submissions in respect of the challenge are described; and *(iv)* the place in the Determination where the Commission reached its conclusion.

(i) **Description of Deficiency**	**(ii)** **Paragraphs where OFCOM's decision is identified**	**(iii)** **Paragraphs describing the parties' submissions**	**(iv)** **Paragraphs stating the Commission's conclusion**
OFCOM had wrongly specified the ex-MCT network	§3.39	§§3.40 to 3.65	§§3.66 to 3.72, rejecting the appellants' contentions
The network design parameters were incorrect as regards (*inter alios*) microcell and picocell deployment; cell breathing and cell radii	§§3.73 to 3.75	§§3.76 to 3.122	§§3.123 to 3.144, rejecting the appellants' contentions
OFCOM's 2011 Model did not correctly identify traffic- and non-traffic-related costs	§§3.145 to 3.147	§§3.148 to 3.241	§§3.242 to 3.269, rejecting the appellants' contentions
The coverage network in the 2001 Model was too large	§§3.270 to 3.271	§§3.272 to 3.315	§§3.316 to 3.343, rejecting the appellants' contentions
The mark-up of LRIC+ over LRFIC was implausible	-	§§3.344 to 3.362	§§3.363 to 3.371, rejecting the appellants' contentions
The slope of the traffic cost curve in the 2011 Model was incorrect	-	§§3.372 to 3.383	§§3.384 to 3.387, rejecting the appellants' contentions

OFCOM had modelled the zero-traffic network wrongly	-	§§3.388 to 3.403	§§3.404 to 3.407, rejecting the appellants' contentions
The modularity of assets was too large	§3.408	§§3.409 to 3.429	§§3.430 to 3.436, rejecting the appellants' contentions
The result of the incremental asset calculation was implausible	§3.437	§§3.438 to 3.451	§§3.452 to 3.460, rejecting the appellants' contentions
The ED calculation unduly depressed incremental costs	§§3.461 to 3.476	§§3.477 to 3.494 and 3.512 t0 3.542	§§3.495 to 3.511 and 3.543 to 3.552, rejecting the appellants' contentions
OFCOM did not consider the difference in MCT cost for a 900 and 1800 MHz operator	-	§§3.553 to 3.567	§§3.568 to 3.571, rejecting the appellants' contentions
Regulatory precedent	-	§§3.572 to 3.575	§§3.576 to 3.578, rejecting the appellants' contentions
Errors in the forecast data usage	-	-	§3.579, rejecting the appellants' contentions on the basis of grounds elsewhere in the Determination
Administration costs were incorrectly excluded from the calculation of LRIC	-	§§3.580 to 3.607	§§3.608 to 3.615, rejecting the appellants' contentions

The WACC was too low	-	§§3.616 to 3.717, 3.722 to 3.739, 3.746 to 3.778, 3.801 to 3.814, 3.821 to 3.833, 3.838 to 3.842, 3.845 to 3.871, 3.879 to 3.889, 3.897 to 3.899, 3.902 to 3.917	§§3.718 to 3.721, 3.740 to 3.745, 3.779 to 3.800, 3.815 to 3.820, 3.834 to 3.837, 3.843 to 3.844, 3.872 to 3.878, 3.890 to 3.896, 3.900 to 3.901, 3.918 to 3.922

Table 2: The Commission's consideration of EE and Vodafone points regarding the 2011 Model

273. We have not reviewed the Commissions "on the merits" findings on these various points. We were, rightly, not invited to do so by either EE or Vodafone. Nevertheless, some of the findings made by the Commission are highly instructive in terms of how the Commission regarded the 2011 Model. In particular, we have regard to the following paragraphs:

(1) When considering the contention that OFCOM had wrongly specified the 2011 Model, i.e. that the model was unsuitable to calculate LRIC, the Commission concluded:

> "3.66 Ofcom considered that the ex-MCT services network was a network that was similar to the all-services network, but smaller, because it carried less traffic. Ofcom said that the ex-MCT network should be considered as a network that was effectively built a little bit later in time.
>
> 3.67 Vodafone's view in respect of the network design of the network without MCT services was that this would be a completely redesigned network, optimizing network costs for providing all services excluding MCT services.
>
> 3.68 We were persuaded by OFCOM's reasoning that, in principle, a network that has design parameters that provide the cost of the all-services network satisfactorily over time does also provide a sufficient approximation of the costs of the ex-MCT network at a specific point in time.

3.69 We were also persuaded by Ofcom's reasoning that the all services network build parameters in its 2011 Model were informed by its calibration over time. Vodafone's approach would require a large number of hypothetical assumptions that could not be calibrated to what operators do in practice, whereas Ofcom's approach, at least in principle, would be informed by how operators have responded to traffic growth in the past, providing a verifiable reference point.

3.70 We note, in this context that EE stated that there would be an infinite number of ways that the ex-MCT network could be hypothetically re-optimized and were persuaded by Ofcom that there would likely be considerable practical difficulties in identifying an appropriate reoptimized ex-MCT network. Neither Vodafone nor EE have provided evidence that showed that any of these hypothetical networks could be calibrated against an external benchmark or would be built in practice.

3.71 We also agree with Ofcom that it is not appropriate to treat costs as being wholly or partly the avoidable costs of the final increment unless there was an evidential or analytical basis on which Ofcom could conclude that those costs would not be incurred by the hypothetical efficient operator in the absence of providing MCT services.

3.72 We do not therefore consider that Vodafone has demonstrated that Ofcom erred in its specification of the ex-MCT network."

(2) When considering the contention that OFCOM should have used different network design parameters for the ex-MCT network compared with the all-services network, the Commission concluded:

"3.124 We consider that, in principle, there may be a case for Ofcom using different design parameters in the ex-MCT network in certain circumstances, for example for assets where Ofcom uses different design parameters over time and where such differences are traffic related (as Ofcom considered the ex-MCT network to be similar to a time shift (ie an earlier build) of the current network). However, we consider that the appropriateness of any such design parameter adjustment cannot, when modelling the MCT charge control, be answered at a general level, in the abstract. Rather any potential adjustments must be considered individually, parameter by parameter, based on specific arguments raised and evidence presented.

3.125 We accept that the 2011 Model is an abstraction of reality and will necessarily need to include approximations."

(3) When considering the contention that the 2011 Model did not properly distinguish between traffic- and non-traffic-related costs, the Commission concluded:

> "3.242 Vodafone identified various assets that appear in the 2011 Model to be invariant to traffic when going from full-traffic (ie providing all services) to zero traffic (ie when eliminating all services including MCT services from the 2011 Model, except for minimal traffic). What the 2011 Model (and the EC Recommendation) tries to measure, however, is which assets are invariant to traffic when going from full traffic to full traffic less incoming third party calls (ie full traffic less MCT services). As MCT services are a much smaller increment than all services, it is plausible that some assets may well be invariant to traffic when the increment is MCT services even if these assets would vary with traffic if the increment is all services. We agree with Ofcom that where MCT services are the last increment it is highly likely that common costs form a larger proportion of total costs than where the increment is all services. This is because costs for jointly-used assets would have already been allocated to the first increment and all other increments before any remaining costs are allocated to the final increment.
>
> 3.243 Vodafone said that too few assets were modelled as traffic variant in the 2011 Model. We accept that the 2011 Model is an abstraction of reality and will necessarily need to make approximations."

(iii) The JR Grounds advanced before the Tribunal

274. It was contended that the Commission had misdirected itself, in that although it had correctly stated its overall approach in paragraph 2.58 of the Determination, it had in fact failed to follow through and actually apply that approach (paragraph 56 of Vodafone's JR Grounds). Additionally, it was suggested that:

(1) The Commission's reasoning was irrational (paragraph 57 of Vodafone's JR Grounds).

(2) The Commission failed to have regard to relevant considerations and had regard to irrelevant considerations (paragraph 58.1 of Vodafone's JR Grounds).

(3) The Commission failed to provide reasons for its conclusions (paragraph 58.2 to 58.4 of Vodafone's JR Grounds).

275. The paragraphs in the Determination which came in for most criticism were paragraphs 3.66 to 3.72 (quoted in paragraph 273(1) above) and paragraphs 3.123 to 3.144 (quoted in part in paragraph 273(2) above).

276. A consideration of Vodafone's criticisms of the Determination show that they amount to no more than a further "on the merits" appeal of the Commission's decision, dressed up as judicial review grounds. For example:

(1) Paragraphs 69 to 75 of Vodafone's JR Grounds contend that the Commission's assessment is "flawed" because it concluded "that there was insufficient evidence to suggest that the proportion of microcells and picocells in a network is related to termination traffic.

(2) OFCOM's original decision in the Statement – summarised at paragraph 3.73 of the Determination – was that "microcell deployment data gathered from the national MCPs did not suggest a clear link between the percentage of microcells and the levels of termination traffic. While the number of cells would ultimately vary with traffic, the precise split between macrocells, microcells and picocells as a function of termination traffic levels was not clear. Therefore, the removal of termination traffic could delay the deployment of additional macrocell sites and/or microcell sites and this was captured in the model through the traffic demand used for network dimensioning. Provided the MCT cost model accurately captured the long-run average relationship between traffic and different cell site deployments Ofcom considered this to be satisfactory. Through the calibration exercise Ofcom was sufficiently confident that the model dimensioning rules reasonably captured the relationship between network assets such as cell sites and network traffic."

(3) This decision was appealed to the Tribunal, which referred that price control matter to the Commission, and after setting out the parties' arguments (paragraphs 3.83 to 3.85, 3.95, 3.101 to 3.103, 3.112 to 3.114) the Commission determined as follows:

> "3.129 Vodafone said that Ofcom should have used a different proportion of microcells and picocells in the ex-MCT network compared with the

all-services network. It reasoned that because these sites were more expensive than macrocell sites, disproportionately more of these sites would be removed in the ex-MCT network given the lower traffic levels of the ex-MCT network. Vodafone said that the 2011 Model itself showed an increased proportion of microcells and picocells over time. Ofcom said that microcell and picocell sites were used to meet a mixture of local coverage and capacity needs and that it considered that the proportion of microcells and picocells in its model reflected an efficient deployment of microcells and picocells. Ofcom also stated that it had no evidence of a clear link between the proportion of microcells and picocells and termination traffic. Three also provided evidence suggesting that there was no clear link between traffic levels and the proportion of microcells and picocells.

3.130 We note that Vodafone indicated that the evidence of a link between the proportion of microcells and picocells and the ex-MCT network was one of logic when the ex-MCT network did not exist. However, we were persuaded by Ofcom's reasoning that, in principle, a network that has design parameters that provide the cost of the all-services network satisfactorily over time does also provide a sufficient approximation of the costs of the ex-MCT network at a specific point in time (see paragraph 3.68 [quoted at paragraph 273(1) above]). We therefore consider that evidence relating to the proportion of microcells and picocells over time could inform the appropriateness of such an adjustment.

3.131 We agree with Vodafone that the proportion of microcell and picocell sites increased in certain periods in the 2011 Model. However, we agree with Ofcom and Three that there is insufficient evidence to suggest that the proportion of microcells and picocells is related to termination traffic. In particular, we were persuaded by Ofcom's explanation that a proportion of microcells and picocells are built for coverage purposes.

3.132 We therefore do not consider that Vodafone has demonstrated that Ofcom has erred in its modelling of microcells and picocells."

(4) Having lost this point on the merits before the Commission, Vodafone then raised <u>exactly the same point</u> before the Tribunal. Paragraph 74 of Vodafone's JR Grounds states:

"The CC's assessment is flawed because:

74.1 Vodafone had adduced evidence, by way of explanation based on its experience of network deployment, to the effect that the percentage of microcells and picocells on the network varies with traffic volumes. The [Commission] did not reject that evidence.

74.2 The [Commission] found that this element of Vodafone's case should fail because Vodafone's evidence did not suggest that such percentage varied with MCT traffic volumes.

74.3 However, Vodafone's evidence implied that such a percentage varied with all traffic volumes, including MCT, so that a network configured to carry a lesser traffic volume (ex-MCT traffic) could be expected to have a lower percentage of microcells and picocells than a network configured to carry the year's all-services traffic volumes. Since the [Commission] had already concluded that the ex-MCT network is merely a network designed to carry less traffic than the all services network, this should have been sufficient to satisfy the [Commission] of Ofcom's error. It was therefore irrational for the [Commission] to reject Vodafone's case on this basis.

74.4 If Vodafone had shown that the percentage of microcells and picocells varied to a proportionately greater extent with MCT traffic than with other traffic, then it could have justified a larger adjustment to the design rule in respect of microcells and picocells. But, if it failed to do so, it does not follow that Ofcom was correct to make no adjustment at all.

75.5 The [Commission] relied on Ofcom's statement that some microcells and picocells are deployed for coverage purposes. But, even assuming that were correct, it would not eliminate the real risk that a material proportion are deployed in hotspots (as Ofcom's evidence accepts) to handle higher traffic loads, and that Ofcom's model fails to reflect the extent to which the percentage of microcells and picocells varies with traffic."

(5) This is a very ambitious contention, which we consider to be ill-founded. We make two points in particular:

(i) The Commission found, in terms, that "…we agree with Ofcom and Three that there is insufficient evidence to suggest that the proportion of microcells and picocells is related to termination traffic. In particular, we were persuaded by Ofcom's explanation that a proportion of microcells and picocells are built for coverage purposes" (paragraph 3.131 of the Determination). The suggestion that Vodafone's contention to the contrary was not rejected (paragraph 74.1 of Vodafone's JR Grounds) flies in the face of the wording of the Determination.

(ii) Vodafone's submissions suggesting that there was a "real risk" that the 2011 Model might not accurately reflect how a hypothetical ex-MCT network (which has never been constructed in the real world, because no MNO provides only termination services) completely

overlooks the fact that the whole point of a model is to approximate reality, and that in order to do so assumptions have to be made. This is a point we shall return to below.

277. The same can be said of the other points advanced by Vodafone in its JR Grounds. Thus, paragraphs 76 to 81 criticise "flaws" in the Commission's assessment in relation to 2G cell radii assumptions and paragraphs 82 to 86 criticise "flaws" in the Commission's assessment in relation to cell-breathing. Yet in each case, these were network design parameters on which OFCOM reached a decision, which decision was then reviewed "on the merits" by the Commission: see paragraphs 3.73 to 3.75 of the Determination, summarising the relevant parts of the Statement; paragraphs 3.76 to 3.122 of the Determination, describing the parties' contentions; and paragraphs 3.123 to 3.144 of the Determination, stating the Commission's conclusions.

278. What is fundamentally wrong about Vodafone's submission is that it is – on what is supposed to be a judicial review – seeking to re-visit exactly the same merits questions as were considered by the Commission. It is not a matter for the Tribunal to revisit such merits questions in a hearing such as this.

279. We consider that Ground B fundamentally misunderstands the nature of the review being undertaken by the Tribunal. We note that:

(1) The Commission considered that it was for the appellants to show that OFCOM had erred. For the reasons given above, we consider this approach to be entirely correct. The "burden" – to use a term that we do not consider particularly helpful or apposite – on showing that OFCOM's decision was wrong lies essentially on the person appealing that decision.

(2) The Commission quite rightly accepted that when considering the construction of a model, a model could only ever hope to be an approximation of reality. In short, no model can, ever, perfectly reflect reality. This is important when considering appeals in relation to models. It is not enough for an appellant to say that a model is an imperfect reflection of reality. That is a truism that take the argument no further. An appellant must do more than that and show that the model is deficient in

the sense that a different model could better approximate reality. We doubt very much that such a point can be made good simply by showing (still less, merely by contending) that the model imperfectly reflects reality: we consider an appellant would have to state specifically and in good time how the model could be rendered a better approximation of reality.

(3) Where an appellant is able to demonstrate this, it may be that an appeal can succeed on the merits. However, that will not necessarily be the case. As the Commission recognised, the construction of a model involves judgment. Many, many different ways of modelling a situation may suggest themselves, and each may have advantages and disadvantages. In short, there may be many "right answers" (or, more particularly, many models that are similarly "bad" at approximating reality), and a decision-maker like OFCOM will have to choose one out of these many. We consider that the Commission was entirely right in being slow to criticise OFCOM for picking one particular model out of many potential alternatives.

280. Vodafone sought to side-step these difficulties by deploying the labels of judicial review, in particular those of lack of proportionality and failure to give reasons, as we have noted above. But we consider that Vodafone was using the language of judicial review only in order to support what was in substance an attempt to re-open, before us, the merits not merely of the Commission's Determination, but also of OFCOM's Statement. In short, we were being invited to follow what Mr Fordham Q.C. calls (in *Judicial Review Handbook* (5th ed, 2008, paragraph 15.1) the forbidden substitutionary approach, where a court or tribunal tasked with a duty of judicial review instead usurps and trespasses upon the proper role of the actual decision maker.

281. We dealt, extensively, with the "proportionality" head of review in paragraphs 232 to 234 above. As we have concluded, at most, the head of review requires us to consider whether the Commission's Determination was rational, and we emphatically find that it was. The Commission identified OFCOM's decision in each case; considered the parties submissions on that decision; applied the

correct "on the merits" when reviewing the decision, and reached a conclusion which cannot be described as irrational. Indeed, that contention was never made by Vodafone.

282. It was also suggested that the Commission had failed to give adequate reasons for its conclusions in the Determination. We turn, again, to *BAA Limited v Competition Commission* [2012] CAT 3 for a clear statement of the law in this regard:

> "Where the [Commission] gives reasons for its decisions, it will be required to do so in accordance with the familiar standards set out by Lord Brown in *South Buckinghamshire District Council v Porter (No. 2)* [2004] UKHL 33; [2004] 1 WLR 1953 (a case concerned with planning decisions) at [36]:
>
> > "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."
>
> In applying these standards, it is not the function of the Tribunal to trawl through the long and detailed reports of the [Commission] with a fine-tooth comb to identify arguable errors. Such reports are to be read in a generous, not a restrictive way: see *R v Monopolies and Mergers Commission, ex p. National House Building Council* [1993] ECC 388; (1994) 6 Admin LR 161 at [23]. Something seriously awry with the expression of the reasoning set out by the [Commission] must be shown before a report would be quashed on the grounds of the inadequacy of the reasons given in it."

283. Vodafone's JR Grounds invite the Tribunal to do precisely that which the Tribunal should not do: namely, to go through a long and detailed report "with a fine-tooth comb to identify arguable errors". The Determination is a substantial,

highly-structured and well-reasoned document, and we reject any suggestion (if, indeed, any was made) that something went "seriously awry" with the expression of the reasoning in the Determination.

XIII. EE'S GROUND 5

284. EE's Ground 5 essentially overlapped with Vodafone's Ground B, considered in Section XII above, in that it attacked the validity of the 2011 Model used by OFCOM, and accepted by the Commission, to compute the LRIC price control ceiling. For these reasons, much of what was said in Section XII above pertains here. Nevertheless, because EE put the point differently, it warrants distinct consideration.

285. EE's contention was that the Commission had, when determining Reference Question 2, relating to whether OFCOM had correctly modelled the level of pure LRIC, made reviewable errors in that it had failed to deal properly with the real risk that OFCOM's modelling of LRIC understated certain avoidable costs (paragraph 122 of EE's JR Grounds). Instead of remitting the matter to OFCOM, the Commission answered the reference question in the way it did, on the grounds that it would be disproportionate to remit the matter to OFCOM because correcting the error would only increase the value of LRIC by a few per cent (paragraph 123 of EE's JR Grounds).

286. EE's criticisms were made on four specific grounds – JR Grounds 5(a) to 5(d). Before us, EE abandoned Grounds 5(b) to (d), but persisted with Ground 5(a), which relates to "cell breathing" (Transcript of the Hearing, Day 1, page 2). For the reasons given in Section XII above, we consider that EE was right to abandon the points that it did. Our consideration in this Section is confined to EE's Ground 5(a).

287. The question of cell breathing was one of several points considered by the Commission when considering the more general contention that the model's network design parameters were incorrect (see Table 2 set out at paragraph 272 above).

288. Mr Roche is a senior regulatory manager employed by Vodafone. In the course of these appeals, he has given evidence on behalf of Vodafone. In paragraph 5.50 of the schedule to his first witness statement (made on 16 May 2011), Mr Roche helpfully explains the nature of "cell breathing":

> "Cell breathing is a fundamental aspect of 3G networks, and primarily results from the fact that, unlike 2G, where adjacent cells cannot share the same frequency (and hence 2G deployment is dictated by a spectrum re-use schema designed to prevent this), 3G is designed to use the same carrier and frequency in adjacent cells. But, as the level of traffic carried by a cell and its neighbours rises, so intra-cell interference rises, and the effective range of a cell site shrinks. Thus, lower traffic volumes enable the deployment of larger cells."

289. Thus, it seems clear that there is an established relationship between the volume of call traffic and the number of cells needed to deal with that traffic which is – at least in part – influenced by cell breathing. It ought to follow, therefore, that in hypothetical world without mobile call termination, this is a factor that ought to be taken into account in the model.

290. For its part, OFCOM certainly did not disagree with the factual premiss that cell breathing had this effect. The Determination notes:

> "3.74 Ofcom said it recognised that some parameters, such as cell radii, could vary with the level of traffic in a practical deployment. However, the MCT cost model was an abstraction of a real-world network deployment and balanced practicability and materiality in estimating the long-run incremental costs of MCT. Therefore, the model assumed, for example, that cell radii were parameters that neither changed dynamically with the levels of traffic nor between *(a)* a full network and *(b)* a full network minus termination traffic.
>
> 3.75 Ofcom undertook a simple assessment of the impact of changing the cell radii in response to the removal of termination traffic (ie the cell breathing effect) to assess the materiality of this effect. The changes in cell radii for the 'full network minus termination traffic model' resulted in a 4 percent increase in the LRIC unit cost of termination. This was based on traffic levels in a single year and Ofcom stated that a fuller analysis based on a more dynamic and complex model could give different results."

291. Before the Commission, the Determination records Vodafone as contending:

> "3.88 Vodafone said that cell breathing was a fundamental aspect of 3G networks, and primarily resulted from the fact that, unlike 2G, where adjacent cells could not share the same frequency 3G was designed to use the same carried and frequency in adjacent cells. As the level of traffic carried by a 3G cell

and its neighbours rose the effective range of a cell site shrank. Thus lower traffic volumes enabled the deployment of larger cells. It followed that, under the lower traffic volumes assumed in the world without MCT, the area that could be covered by each site would rise, giving a larger cell radius and fewer sites in any given geotype."

292. The Determination records EE as contending:

> "3.96 EE said that it was reasonable to make an adjustment for cell breathing. EE explained that for a 2G network coverage could be provided independently from capacity, but this was not the case for 3G. With 3G the MNO had to make a decision on capacity on day one. EE said that if no MCT services were provided, it would have built its network using larger cell radii for 3G."

293. The Determination also records Three as contending:

> "3.117 Three stated that cell breathing was a very complicated phenomenon with many dependencies. Three noted, in particular, that cell breathing was impacted by how the surroundings affected the passage of radio waves. For example, cell breathing was more pronounced in urban environments where there were more solid objects to absorb that radio waves. Three provided an example that showed that a reduction in capacity of 25 per cent would increase the cell radius by 3.3 per cent in an urban environment and 2.9 per cent in a suburban environment.
>
> 3.118 Three was of the view, given the complexities of cell breathing, that network operators did not model cell breathing in every circumstance, but would try to plan ahead to manage the effects of cell breathing by deploying cell sites a reasonable distance apart with effective ranges that overlapped at very low levels of traffic. Operators would then add capacity to the cell sites, for example by deploying an additional carrier, once traffic passed a certain threshold, in order to prevent effective ranges shrinking too far (and creating coverage gaps between cell sites). The further apart that cell sites were initially deployed, the lower the traffic threshold at which additional capacity was required to prevent coverage gaps. In other words, there was a trade-off to be made between the planning radius of a cell site and its traffic capacity. A larger radius resulted in a lower capacity; and a smaller radius resulted in a higher capacity (and a reduction in capacity increased the need to deploy additional sites to service traffic at a later stage). It was this trade-off that was the basic operational characteristic of cell breathing.
>
> 3.119 Three considered that as the 2011 Model assumed fixed radii for cell sites and then added capacity to cell sites as traffic increased, and as the parameters for both had been compared with historical operator data, the 2011 Model implicitly captured the basic operational impact of cell breathing."

294. The Commission concluded:

"3.139 Vodafone said that for 3G cells, the coverage radii increased as the traffic carried in the site shrank and an adjustment should therefore be made to the ex-MCT network to reflect this increased cell radii as the ex-MCT network carried less traffic.

3.140 From the evidence provided, it was unclear to us if an adjustment for cell breathing was, in principle, appropriate.

3.141 Ofcom acknowledged that cell breathing may have an effect on LRIC, but considered that this effect was less than 4 per cent of LRIC and that modelling this effect would have been complex and, therefore, disproportionate.

3.142 We found Three's case that the 2011 Model implicitly captured the basic operational impact of cell breathing persuasive for sites that are capacity constrained (because an adjustment would need to be made to account for the reduced cell capacity in the ex-MCT network if cell radii are decreased) and found Ofcom's case persuasive that cell breathing would be unlikely to have a significant effect in coverage sites. Further, we were not persuaded that Ofcom was wrong to say that modelling cell radii would likely have been disproportionate. While Vodafone's proposed adjustment for cell breathing would have had a larger impact on LRIC than suggested by Ofcom (12 per cent compared with 4 per cent or less), we gave less weight to this estimate as Vodafone had stated that its own adjustment was not objectively derived.

3.143 We are therefore not persuaded that Ofcom erred by not modelling cell breathing."

295. Before us, EE contended that in failing to take cell breathing into account, and as a result refusing to remit the issue in Ground 5(a) on the basis that a remittal would be disproportionate, the Commission failed to put itself in a position to determine the appeals – in particular the proportionality issue – on a proper basis, and/or failed to have regard to a relevant consideration, as the Commission failed to consider the effects, in particular on mobile customers, of not correcting the potential error" (see paragraph 124 of EE's JR Grounds).

296. We reject this contention. For the reasons we have given, we consider that it was incumbent for the Commission to reach a conclusion on the evidence before it.

297. As we have noted, the question of what parameters should, or should not, be used in a model is a question of judgment, and in our view the Commission was right to accept that there were many ways in which an ex-MCT network could be modelled. In this case, the decision not to model cell breathing cannot, in our

view, be classified as so wrong as to lie outwith the range of potential "right" answers. It is, therefore, our view that even on the merits, the Commission appear to have reached the correct answer.

298. Of course, it is not our role to substitute our assessment of the issue for the assessment made by the Commission. We consider that the way the Commission dealt with the question of cell breathing and the answer it reached cannot be called into question by judicial review. We therefore consider that EE's contention that the Determination is vitiated on this ground fails.

XIV. EE's GROUND 4

299. EE's JR Ground 4 relates to Reference Question 4, which itself related to the question of whether – assuming LRIC was the appropriate cost standard – the glide path ought to be four years (as OFCOM had determined) or three years (as is more consistent with the Recommendation). The Commission's reasoning, and its conclusion, appear in Section 5 of the Determination.

300. It is necessary that we set out EE's contention that the Commission's conclusion should be set aside at some length, so that proper justice be done to the point:

> "110. Under Reference Question 4 ("RQ4"), the [Commission] upheld BT's argument on appeal that Ofcom should have adopted a three-year, rather than a four-year, glide path, under which MTRs would reach the level of LRIC approximately two years after publication of the Statement.
>
> 111. This is consistent with the Recommendation, which recommends that MTRs should be reduced to the level of LRIC by 31 December 2012. However, as discussed under Ground 1, the Recommendation can and should be departed from where there are good reasons for a different conclusion.
>
> 112. The statutory framework requires that the charge control must be proportionate: §§9 to 11 above. As a result, the glide path, as well as the cost standard, must be proportionate by reference to the statutory criteria, and the relevant decision-maker must put himself in a position to be able to determine that the requirements of proportionality are satisfied.
>
> 113. This requires identifying the difference between charge controls based on three- and four-year glide paths, and identifying the costs and benefits of reducing the charge control more quickly on the shorter glide path.
>
> 114. However, it is clear from the analysis at FD§5.8 to 5.76 that the [Commission] failed to put itself in a position to resolve the appeals on their merits by reference to the statutory criteria, in particular the proportionality requirement, and/or that it failed to have regard to relevant considerations.

115. In terms of the benefits of the glide path, the [Commission] adopted the following approach:

> "in approaching this question we believe it is correct to treat LRIC as the most appropriate level of MTRs…That determination having been made, we have addressed this question from the starting point that in any given year, having MTRs closer to LRIC is prima facie a good thing. The only relevant detriments are those that arise from faster adjustments in MTRs."

116. However, the proportionality assessment cannot be carried out on the basis of a binary judgment about which of two cost standards is better. Rather it requires an assessment of the extent to which LRIC is better than LRIC+, and more specifically in this context of the scale of the benefits that would arise as a result of having MTRs closer to LRIC which can then be compared with the detriments of moving more quickly to LRIC by a three- rather than a four- year glide path. Unless that is done, whether quantitatively or qualitatively, no sort of weighing exercise can be carried out (as one cannot weigh a binary judgment).

117. In terms of potential costs, the [Commission] failed to take into account the crucial consideration, namely the potential adverse effects on mobile customers of the larger and earlier prices that would arise as a result of reducing MTRs more quickly. The [Commission's] [*sic*] dismissed the possibility of material adverse effects on MCP profitability or investment decisions, and the 'risk of disruption to pricing'. However, the [Commission's] analysis of disruptive pricing was limited to considering the effects on post-pay contract customers. There is nothing in the [Determination] to indicate that in considering this issue the [Commission] took into account the potential harmful effects on pre-pay customers, which is the group of the mobile customers that the [Commission] found would suffer the brunt of the price increases. The point is not that MCPs might struggle to raise prices to pre- pay customers more quickly, but rather whether the introduction of larger and earlier pre-pay price increases might generate disruptive effects (e.g. exacerbating any negative effects on mobile subscription, mobile usage and/or vulnerable customers that would result from gliding MTRs down to LRIC over a longer timeframe).

118. Although these proportionality issues are related to a number of the issues raised under Ground 1, they are distinct, as the duration of the glide path is a separate decision and the costs and benefits of a shorter glide path are not necessarily the same as the costs and benefits of a lower cost standard: as illustrated by the fact that Ofcom adopted a four year glide path towards LRIC."

301. We accept that the question of what glide path should be adopted is one distinct from the question of what measure should inform a price control. The decision having been made to move from LRIC+ to LRIC (rather than sticking with LRIC+), the subsidiary question necessarily arose as to <u>how</u> (or, more precisely, over what period of time) that transition should be made.

302. Although, theoretically, some parties might have contended for a longer glide path, in a price control lasting only four years, such an argument would have been unlikely to succeed. Equally, a shorter glide path – of one or two years – might have been contended for, but again, there might well have been difficulties of implementation. Thus, the argument turned on a binary question of four years versus three years.

303. Pre-eminently, this is a question of judgement. It having been determined that LRIC is a more appropriate price control than LRIC+, the question arises as to how, i.e. over what period of time, to implement this. That is precisely the substance of Reference Question 4.

304. We consider that the Commission formulated the question entirely correctly in paragraph 5.49 of the Determination. It is worth setting out the entirety of this paragraph, as the quotation in paragraph 115 of EE's JR Grounds is partial:

> "With regard to EE, Vodafone and Telefónica's interventions, to the extent that these interventions challenged the assumption the LRIC was the appropriate cost standard we consider that these arguments were examined in Reference Question 1 and we found no error in Ofcom's conclusion. Therefore in approaching this question we believe it is correct to treat LRIC as the most appropriate level of MTRs. The choice of LRIC or LRIC+ may have consequences for MCPs profits and the number of mobile subscribers, and reductions in MTRs may not be fully passed on to fixed-line users – but those factors were taken into account when determining the appropriate level of MTRs, and Ofcom found that any negative effects were outweighed by positive effects (especially effects on competition, and that lower MTRs would benefit fixed-line users to some extent). That determination having been made, we have addressed this question from the starting point that in any given year, having MTRs closer to LRIC is *prima facie* a good thing. The only relevant detriments are those that arise from faster adjustments in MTRs."

305. As we noted, the question of glide path is pre-eminently one of judgement. Contrary to EE's submission, we find that the Commission formulated the question before it entirely properly. It may very well be that there are other ways of formulating the question – although we do not consider the sort of minute weighing of the relative advantages of LRIC and LRIC+ contemplated in paragraph 116 of EE's JR Grounds to be a remotely plausible or practicable approach. Our role, as we have noted, is not to determine whether the Commission formulated the question correctly or answered it correct, but

whether the question as formulated and the answer as found is susceptible of challenge on a judicial review. The answer to this question is a very clear-cut "No".

XV. VODAFONE'S GROUND C AND THE AMENDMENT OF VODAFONE'S PLEADINGS

(a) Introduction

306. Vodafone contended that there were certain deficiencies in the calculation of certain inputs into OFCOM's LRIC+ model. However, these deficiencies were not – so it was contended by Three and found by the Commission – properly pleaded by Vodafone in its notice of appeal. Rather, Vodafone's contentions appeared in the witness statement of Mr Roche, which accompanied the notice of appeal (see paragraphs 1.42(1) and 1.44 to 1.61 of the Determination). We shall refer to these points – which are described in paragraph 96 of Vodafone's JR Points – as the "unpleaded points".

307. As regards these unpleaded points:

(1) Vodafone's notice of appeal against the Statement raises two broad grounds of appeal – "Ground A" and "Ground B". Essentially, by Ground A, Vodafone contended that the price control should be set by reference to LRIC+ (and not LRIC) and that OFCOM's computation of LRIC+ should be corrected. By Ground B, Vodafone contended that <u>if</u> the price control should be set by reference to LRIC (and not LRIC+), then a higher estimate of the LRIC cost of providing the MCT service should be adopted.

(2) As part of Ground A, Vodafone contended (in its <u>unamended</u> pleading):

> "58. Ofcom erred in its computation of the LRIC+ cost of providing the MCT service. The network costing model adopted by Ofcom in its final Decision embodies errors which mean that the LRIC+ cost of providing the MCT service is understated.
>
> 59. In this part of its appeal, Vodafone relies on the accompanying report of Mr Howard Roche entitled "Commentary on Ofcom's use of the network costing model to derive a cost for the provision of the MCT service". As Mr Roche shows in Section 3 of his report, the Ofcom

model is deficient, for the purposes of calculating a robust measure of the LRIC+ cost of the MCT service, in the following respects:

59.1 It overestimates the volumes of datacard services to be provided over the price control period, and the costs of providing such services, with the result that too much of the total network costs is allocated to data services, and too little to voice services (including the MCT service."

(Emphasis supplied)

(3) It is the part of paragraph 59 of Vodafone's notice of appeal which we have underlined that gives rise to the difficulty. The Determination put the point as follows:

"1.56 …we can see that there is some force in Three's contention that, on the face of Vodafone's NoA, the proper particulars of the claim that Ofcom overestimated the volumes of datacard services to be provided were not sufficiently clear. It may be argued that, since Mr Roche's report clearly advances separate allegations of four particular deficiencies in relation to datacard services, each of the alleged errors should have been particularized in Vodafone's NoA, albeit that the alleged consequence of each of the points supports the more general allegation that the volumes of datacard services were overestimated in the LRIC+ model.

1.57 For the avoidance of doubt, we do not believe a party needs to copy out its detailed evidence into, or even to summarize its evidence in detail in, its NoA. Indeed, we would strongly deprecate such an approach to pleading…

1.58 Rather, the parties should include proper particulars of the matters alleged in its NoA so that its grounds of appeal are set out in sufficient detail to indicate *(a)* to what extent (if any) the appellant contends that the decision appealed against was based on an error of fact or was wrong in law or both; and *(b)* to what extent (if any) the appellant is appealing against the exercise of a discretion by Ofcom (or another relevant person), as is clearly required by the Act: see section 192(6).

1.59 In the present case, it would have been open to Vodafone to have referred expressly to alleged deficiencies in respect of each of the estimates of future datacard growth, the statement of historic datacard growth, the different profile of data traffic across the week from the profile of voice traffic, and the need to reflect the future deployment of faster and less resource-intensive HSDPA variants within paragraph 59.1. An example of how this might be done is found in [paragraph] 59.4 where the relevant particulars include the limbs of the alleged error which Mr Roche then details under separate sub-headings in his report. To have done so would not have significantly extended Vodafone's pleadings. But it would have made clear to the

other parties and to the Tribunal and, indeed, to us on the face of it NoA exactly what alleged errors were. For whatever reason, Vodafone did not do so."

(4) The draft Amended notice of appeal proposes to amend paragraph 59.1 by:

(i) Deleting the underlined words in the passage quoted in paragraph 307(2) above; and

(ii) Inserting the words "The Ofcom model does not properly address the growth in data traffic since the March 2007 model. The errors relate to…". The four specific errors – identified by Mr Roche – are then set out in paragraphs 59.1(a) to (d).

(5) As regards Ground B, Vodafone's unamended notice of appeal stated:

"75. If Vodafone's appeal on ground A is unsuccessful, so that the new MCT price controls are to be set by reference to a LRIC measure of costs, then, in the alternative, Ofcom should have used, and the Tribunal should now provide for the use of, a different methodology to estimate the LRIC cost of the MCT service.

76. Vodafone relies on the report of Mr Roche in support of this ground of appeal."

(6) Vodafone's draft Amended notice of appeal proposes amending these paragraphs to contain a reference back to paragraph 59, and a more precise reference to the relevant parts of Mr Roche's report.

(b) The pleading requirements

308. Section 192(5)(b) of the 2003 Act requires a notice of appeal to set out "the grounds of appeal". Section 192(6)(a) goes on to require that the "grounds of appeal must be set out in sufficient detail to indicate…to what extent (if any) the appellant contends that the decision appealed against was based on an error of fact or was wrong in law or both".

309. Section 192(3) brings into play the Tribunal's rules, by providing that "[t]he means of making an appeal is by sending the Tribunal a notice of appeal in accordance with Tribunal rules". The relevant rules are set out in rule 8 of the 2003 Tribunal Rules. Rule 8(4)(b)(ii) essentially duplicates section 192(6)(a).

310. Rule 8(6)(b) separately requires evidence to be annexed to the notice of appeal.

(c) Application of the rules to Vodafone's pleading

311. It is clear that Vodafone's proposed amendments raise new grounds for contesting OFCOM's statement, rather than further arguments in support of grounds already pleaded.

312. It is therefore clear that these are matters that should have been pleaded. It is plain that Vodafone's existing notice of appeal – disregarding for the moment Mr Roche's statement – is deficient. As regards Ground B, that deficiency is so glaring as to require no further comment. We completely fail to see how anyone reading paragraphs 76 and 77 could begin to appreciate the extent to which Vodafone was contending that the statement appealed against was based on an error of fact or was wrong in law or both.

313. The position as regards paragraph 59.1 is a little less clear-cut, since it at least asserts that OFCOM's model overestimates the volumes of datacard services to be provided over the price control period, and the costs of providing such services, with the result that too much of the total network costs is allocated to data services, and too little to voice services (including the MCT service). However, paragraph 59.1 fails to state <u>how</u> this overestimate occurred. It, too, fails to state the extent to which Vodafone was contending that the statement appealed against was based on an error of fact or was wrong in law or both.

314. Looking at Vodafone's notice of appeal on its own, we conclude that the unpleaded points were, indeed, unpleaded. The question is whether Mr Roche's statement can rescue the pleading, or whether Vodafone must seek to amend.

(d) The significance of Mr Roche's statement

315. It is accepted by Three that the unpleaded points do appear in Mr Roche's statement. In its written submissions, Three makes the points (at paragraph 263) that:

> "Lack of discipline and confusion in pleading extends proceedings, increases costs and wastes time and irrecoverable resources even if the parties are able ultimately to address the point that should have been properly pleaded. All of the parties and the [Commission] have suffered prejudice due to the further effort involved in understanding and responding to Vodafone's case."

There is force in this point. It is for a party advancing a case to articulate it in the pleadings, not for the parties responding (still less the Tribunal) to play the role of detective and work out what points – given the totality of the material served by a party – that party is or may be taking.

316. What is more, the 2003 Act and the 2003 Tribunal Rules make it clear that it is the notice of appeal (and not some other document) that should contain the grounds of appeal.

317. Yet still further, in *Hutchison 3G (UK) Limited v Office of Communications* [2008] CAT 10 at paragraph [86], the Tribunal noted:

> "…it is unsatisfactory for an appellant to plead an unparticularised statement…and simply cross refer to a witness statement as particulars. The witness statement is intended to provide evidence is support of matters pleaded, it is not the pleading itself…".

318. We agree with the above statement. Although Vodafone sought to contend that it was not of general application, that submission is hopeless. The 2003 Act, the 2003 Tribunal Rules and, indeed, *Hutchison* itself, do not differentiate between different types of pleading, or pleadings served for one purpose rather than another. We hold that the same rule applies in all Section 192 Appeal cases. We further hold that the effect of the 2003 Act, the 2003 Tribunal Rules and *Hutchison* is that points must be pleaded in the notice of appeal itself, and not simply incorporated by cross-reference.

319. Accordingly, it is our view that Vodafone's pleading is deficient, and requires amendment, and that Vodafone must apply to amend its notice of appeal.

(e) Application to amend

320. Rule 11 of the 2003 Tribunal Rules provide:

> "(3) The Tribunal shall not grant permission to amend in order to add a new ground for contesting the decision unless –
>
> (a) such ground is based on matters of law or fact which have come to light since the appeal was made; or
>
> (b) it was not practicable to include such ground in the notice of appeal; or
>
> (c) the circumstances are exceptional."

321. Vodafone (rightly) does not rely on either rules 11(3)(a) or (b) of the 2003 Tribunal Rules. It relies on rule 11(3)(c), namely that the circumstances are exceptional (see paragraph 132 of the Vodafone JR Grounds).

322. The basis upon which Vodafone contended the grounds were exceptional are set out in paragraph 131 of the Vodafone JR Grounds. Essentially, Vodafone contended:

(1) The draft amended notice of appeal would correctly reflect the case which the parties had addressed and which the Commission had decided in the Determination. What is more, the Commission had (on these points) decided in favour of Vodafone.

(2) The draft amended notice of appeal would simply state what was already clear in documents other than the notice of appeal.

(3) No formal objection was taken to the notice of appeal until after the Commission issued its provisional determination. There was, therefore, no reason for Vodafone to conclude – sooner than it did – that there was a need to amend and no party suffered detriment from the failure to amend.

(4) It was in the public interest that the adjustments be made, because this would enable the price control more accurately to reflect the LRIC cost of providing the MCT service.

323. We do not consider the second of these points (i.e. paragraph 322(2) above) to have any weight. For the reasons we have given, we consider the pleading rules before the Tribunal to be clear. Vodafone has, quite simply, failed to follow them.

324. Equally, we do not consider that it is incumbent upon a party to object to a defective pleading: it is for the pleader to plead out his case properly. Obviously, we would hope that any lack of clarity in the pleadings can be resolved, in the first instance, between the parties and, in the second instance, in a prompt application to the Tribunal (if necessary, made by the party objecting to the pleading, rather than the party putting it forward). But this does not detract from the basic responsibility on the pleader to plead out his case properly. A failure to do so will, at the very least, give rise to the sort of prejudice to the other parties described in paragraph 315 above. In this case, we consider that there was some prejudice arising out of Vodafone's conduct, to both the other parties and to the Commission. However, we consider that – given that the points in issue have now substantively been determined – this prejudice lies in the past. It does not subsist at this point in time, and no party before us sought to contend otherwise. Nevertheless, for the reasons we give, we find the third point described in paragraph 322(3) above persuasive.

325. That leaves the first and fourth points (paragraphs 322(1) and (4) above), which to an extent are interconnected. As to these:

(1) The Commission concluded that these were points that Vodafone was not entitled to raise. However, in case the Tribunal disagreed, and to avoid the Reference Questions being remitted back to the Commission, the Commission determined the points raised by Vodafone as if they had been properly pleaded. Thus, the Commission stated:

> "1.60 However, we are mindful of the fact that Vodafone, EE and Telefónica have expressed the contrary view [as regards the adequacy

> of the pleading]. We anticipate that one or more of those parties may seek to persuade the Tribunal that our understanding of what was said in *Hutchison 3G v Ofcom* at [86], as set out in the foregoing paragraphs, is wrong. It would be inefficient and undesirable, particularly given the need expressed by all parties from the outset of these proceedings for an urgent resolution of the matters raised in these appeals, for the Tribunal to have to refer Reference Question 3 back to us for a supplementary determination, were the Tribunal to disagree with our analysis of its intention in *Hutchison 3G v Ofcom*. We note in addition that it is not our belief that this issue with Vodafone's pleadings resulted in prejudice to any of the parties.
>
> 1.61 Accordingly, we have included in our discussion of Reference Question 3 an assessment of each of the alleged errors set out in Mr Roche's witness statement, while not deciding conclusively whether they were properly particularized in Vodafone's NoA and therefore matters falling within the scope of the reasons advanced to support the allegation we were asked to determine in Reference Question 3.
>
> …
>
> 1.74 … for the same reasons as discussed above in paragraph 1.60, we have included in our determination our views as to how any such error would be corrected and the consequential adjustments that would be necessary to the LRIC model and the charge control itself, were the Tribunal to disagree with the position we have taken in relation to this second question."

(2) Thus, the issues raised by Vodafone's unpleaded points have, in substance, already been resolved. We should say that whilst we have no doubt that the Commission acted from the best of intentions, and with a view to efficient management of the determination of the Appeals, the course it took very much involved "falling between two stools". It seems to us, where there is a procedural issue that arises in the course of the Commission's consideration of reference questions, that issue should be resolved conclusively, rather than contingently, and (if necessary) the relevant party or parties forced to make an application to the Tribunal for the matter to be resolved. Such matters can, if necessary be dealt with swiftly. (Indeed, we note that in these Appeals, there was a question regarding admissibility of evidence. The Commission indicated that an application should be made, and the matter was determined with great expedition, the papers coming before the Tribunal on Friday 14 October

2011 and a ruling handed down on Monday 17 October 2011: see [2011] CAT 31.)

(3) There are advantages in applying to the Tribunal to have such an issue resolved conclusively. If the pleading point succeeds (i.e. a party making it is precluded from advancing a particular point) the Commission will be spared the need to examine a potentially time-consuming question. Conversely, if the pleading point fails (i.e. the party making it is permitted to advance the point) the parties will know where they stand. In particular, those parties who have points to make in response will appreciate that they must make those points.

(4) We are now faced with a situation where the Tribunal had before it a procedural application to amend in circumstances where all substantive questions arising out of that amendment have already been resolved. The situation, if not exceptional, is certainly unusual.

(5) Because we agree that, since the substantive issues have been considered and determined, and errors identified by the Commission, it is in the public interest that those errors be corrected, we are – by the slimmest of margins – persuaded that this case is indeed "exceptional".

326. Accordingly, we permit Vodafone, pursuant to rule 11(3)(c) of the 2003 Tribunal Rules, to amend its notice of appeal in the manner appended to its JR Grounds.

XVI. CONCLUSION AND REMISSION

327. For the reasons that we have given, we do not consider that any part of the Determination would fall to be set aside on an application for judicial review under section 193(7) of the 2003 Act, and we reject EE's Grounds 1 to 5 and Vodafone's Grounds A and B.

328. So far as Vodafone's Ground C is concerned, we consider that the unpleaded points should have been pleaded in Vodafone's notice of appeal, but we give permission to amend pursuant to rule 11(3) of the 2003 Tribunal Rules. To that

extent alone, we depart from the Determination. However, because the points the subject of amendment have already, substantively, been considered and determined by the Commission, all we are doing is determining a procedural question as the grounds of appeal that Vodafone was advancing.

329. In the light of these conclusions, it follows that – pursuant to section 193(6) of the 2003 Act – we must decide this appeal in accordance with the Determination, save that the Commission's conclusions with respect to the unpleaded points must stand as if they had been pleaded by Vodafone in its Notice of Appeal.

330. In a letter dated 2 March 2012, OFCOM helpfully wrote to the parties setting out – in an appendix to that letter – how it would implement the Determination *assuming* the Tribunal decided the Appeals in accordance with the Determination. Paragraph 19 of the appendix indicated how OFCOM proposed to take account of the issues arising out of the unpleaded points.

331. So far as we are aware, none of the other parties have so far commented on this letter.

332. We propose to remit the Statement to OFCOM with the direction that it implement the Statement, as corrected by the Determination, in line with its letter of 2 March 2012, and on the basis that the corrections arising out of the unpleaded points are made. However, we will delay making an order to this effect until 4.30pm on Friday 4 May 2012, so as to enable any party who wishes to do so to make representations.

333. Finally, in paragraph 103 above, we explained why it was necessary to determine these Appeals as expeditiously as possible. For the same reasons, we consider that the time for requesting permission to appeal should be abridged to a period of 2 weeks from the handing down of this judgment. Again, we will delay making an order to this effect until 4.30pm on Friday 4 May 2012, so as to enable any party who wishes to do so to make representations.

Marcus Smith Q.C. Brian Landers Professor Colin Mayer

Date: 3 May 2012

Charles Dhanowa
Registrar

ANNEX

GLOSSARY OF TERMS

Defined Term	Description	Defined at para.
2003 Act	Communications Act 2003	1
2003 Tribunal Rules	The Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003)	4
2004 Tribunal Rules	The Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (S.I. No. 2068 of 2004)	49
2011 Model	The model which was used by OFCOM to determine the maximum level of charges based on a LRIC price control	63
Access Directive	Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities	35
Appeals	Collectively Case Numbers 1180-1183/3/3/11	1
Authorisation Directive	Directive 2002/20/EC on the authorisation of electronic communications networks and services	35
BT	British Telecommunications plc	1
BT Appeal	Case Number 1180/3/3/11	1
Capex	Capital expenditure	90
Commission	Competition Commission	4
Commission Guidelines	Price control appeals under section 193 of the Communications Act 2003: Competition Commission Guidelines, published in April 2011	53
CPP	Calling party pays	15
CRF	Common regulatory framework for electronic communications	12
Determination	The Commission's determination of price control matters dated 9 February 2012	5
EE	Everything Everywhere Limited	1
EE Appeal	Case Number 1181/3/3/11	1
EE's JR Grounds	EE's grounds for challenging the Commission's Determination	5
Framework Directive	Directive 2002/21/EC on the common regulatory framework for electronic communications networks and services	12
FTM	Landline or fixed-to-mobile calls	17
JR Grounds	The parties' pleadings which seek to challenge the Commission's Determination	4
LRIC	Long-run incremental cost. LRIC is a measure of the long run incremental costs of a service	11 and 26
LRIC+	Long-run incremental cost. LRIC+ includes all costs and additionally makes an allowance for the recovery of common costs	26

MCPs	Mobile communications providers	2
MCT	Mobile call termination	8
MTF	Mobile-to-fixed calls	17
MTM	Mobile-to-mobile calls	17
MTRs	Mobile call termination rates	9
NRA	National regulatory authority	37
OFCOM	Office of Communications	2
Opex	Operating expenditure	90
PPM	Pence per minute	15
Recommendation	Recommendation of the EU Commission on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (2009/396/EU) dated 7 May 2009	11
Reference Questions	The price control matters raised by the parties' notices of appeal which were distilled into seven reference questions for the attention of the Commission	68
SAC	Stand-alone cost	22
Section 192 Appeals	Appeals commenced under section 192 of the 2003 Act	44
SMP	Significant market power	3
Statement	Wholesale Mobile Voice Call Termination Statement, published by OFCOM on 15 March 2011	2
Telefónica	Telefónica O2 UK Limited	31
Three	Hutchison 3G (UK) Limited	1
Three Appeal	Case Number 1182/3/3/11	1
Universal Service Directive	Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and Services	35
Vodafone	Vodafone Limited	1
Vodafone Appeal	Case Number 1183/3/3/11	1
Vodafone's JR Grounds	Vodafone's grounds for challenging the Commission's Determination	5