



Neutral citation [2007] CAT 27

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1083/3/3/07

Victoria House
Bloomsbury Place
London WC1A 2EB

4 October 2007

Before:

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

Sitting as a Tribunal in England and Wales

BETWEEN:

HUTCHISON 3G UK LIMITED

Appellant

-v-

OFFICE OF COMMUNICATIONS

Respondent

supported by

O2 (UK) LIMITED

T-MOBILE (UK) LIMITED

VODAFONE LIMITED

ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED

BRITISH TELECOMMUNICATIONS PLC

Interveners

RULING ON THE PRELIMINARY ISSUE

APPEARANCES

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

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

Mr. Gerald Barling QC and Miss Sarah Lee (instructed by BT Legal) appeared on behalf of British Telecommunications plc.

Mr. Nicholas Green QC and Miss Kelyn Bacon (instructed by S.J. Berwin) appeared on behalf of O2 (UK) Limited.

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

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

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

Mr. Ben Rayment appeared on behalf of the Competition Commission.

I INTRODUCTION

1. By a ruling delivered on 15 August 2007 (see [2007] CAT 26) the Tribunal ordered that the following question arising in this appeal should be tried as a preliminary issue:

Whether on the proper interpretation of the Communications Act 2003 and the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 the following is a specified price control matter:

“Whether the imposition of a price control on H3G with effect from April 2007 is an appropriate and proportionate response to the finding of SMP, or whether a remedy short of price control would be sufficient.”

2. The appeal by Hutchison 3G UK Limited (“H3G”) concerns the statement made by the Office of Communications (“OFCOM”) entitled “Mobile Call Termination” which was published on 27 March 2007 (“the Decision”).¹ In the Decision OFCOM concluded, as regards H3G that:

- (a) a separate market exists for the provision by H3G of wholesale mobile voice call termination (“MCT”) in the UK to other communications providers;
- (b) H3G has significant market power (“SMP”) in the market for termination of voice calls on its network;
- (c) a price control condition should be imposed on the supply of MCT by H3G and should apply for 4 years from 1 April 2007;
- (d) the “target average charge” of H3G under that price control should be reduced to 5.9 ppm by the final year of the price control, with the change to be implemented by an initial reduction to 8.5 ppm followed by three reductions each of equal (percentage) change across the next three years; and
- (e) further conditions should be imposed requiring provision of voice call termination on fair and reasonable terms and conditions (including contract terms), prohibiting undue discrimination, and requiring transparency.

¹ H3G have also appealed against a second decision published by OFCOM on 27 March 2007 entitled “Assessment of whether H3G holds a position of SMP in the market for wholesale mobile voice call termination on its network” (“the SMP Reassessment Decision”), this reassessment having been conducted following the Tribunal’s judgment in Case 1047/3/304 *Hutchison 3G (UK) Limited v Office of Communications*, [2005] CAT 39.

3. The appeal is brought pursuant to section 192(2) of the Communications Act 2003 (“the 2003 Act”) which provides that a person affected by a decision to which section 192 applies may appeal against it to the Tribunal.
4. Sections 193 to 195 of the 2003 Act set out the procedure to be followed in appeals brought under section 192(2). Broadly speaking, those provisions require the Tribunal to identify whether the appeal raises any specified “price control matters” as defined. If it does, then those matters are to be referred by the Tribunal to the Competition Commission for determination. Matters raised by the appeal which are not price control matters are to be decided by the Tribunal. Once the Competition Commission has notified the Tribunal of its determination of the price control matters referred to it, the Tribunal must decide the appeal on the merits and, in relation to the price control matters, must decide those matters in accordance with the determination of the Competition Commission, unless the Tribunal decides, applying the principles applicable on an application for judicial review, that the Competition Commission’s determination would fall to be set aside on such an application.
5. Some of the statutory provisions which are relevant to the determination of this preliminary issue were set out in the ruling of 15 August 2007. But since the point of construction the Tribunal has to decide requires an analysis of the wording of the provisions, we set them out here again. The parties also urged us to consider the construction of the provisions in the context of the regulatory regime of which they form a part.
6. The Competition Commission and its predecessor, the Monopolies and Mergers Commission, have a long history of involvement in the regulation of pricing in the telecommunications sector. The Tribunal’s attention was drawn by British Telecommunications plc (“BT”) to the Report by the Competition Commission in December 2002 on a reference made by the Director General for Telecommunications under section 13 of the Telecommunications Act 1984. Under that section, the Competition Commission was required to investigate and report on whether the termination charges made by the mobile network operators (“MNOs”) would, in the absence of a charge control mechanism imposed upon them, be set at levels which operated or may be expected to operate against the public interest and, if so, whether

those adverse effects could be remedied or prevented by modifications to the MNOs' licences. The Competition Commission concluded that all four of the MNOs were operating against the public interest, with termination charges that were too high, with consumers paying too much for calls from fixed to mobile networks and from one mobile network to another. The Competition Commission also identified unfair subsidies from those making such calls in favour of those receiving calls and those making calls within a particular MNO's number range(s). Price control was therefore extended to all four of these MNOs.

7. Turning to the provisions of the 2003 Act, section 3 sets out the general duties of OFCOM when exercising its functions under the Act. Sub-section (3) provides that:

(3) In performing their duties under subsection (1), OFCOM must have regard, in all cases, to—

(a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and

(b) any other principles appearing to OFCOM to represent the best regulatory practice.

8. Section 4 requires OFCOM, in exercising certain of its functions, to comply with the six "Community requirements" which give effect, amongst other things, to the requirements of Article 8 of the Framework Directive, which is one of the set of European Community instruments which govern the regulation of the sector.
9. Section 45 confers power on OFCOM to set conditions of several different kinds including an "SMP services condition": see section 45(7)(a). Section 46 defines the persons upon whom SMP services conditions can be imposed. So far as is relevant to the present case, SMP services conditions can be imposed only on a communications provider whom OFCOM has determined to be a person having significant market power in a specific market for electronic communications networks, electronic communications services or associated facilities. Section 47(2)(a) to (d) sets out the test for the imposition of conditions and section 48 sets out the procedure which must be followed by OFCOM before it sets conditions.

10. Section 78 defines when an operator has significant market power. According to section 78(1) a person has significant market power in relation to a market if he enjoys a position which amounts to or is equivalent to dominance of the market. Once OFCOM has made a finding of SMP, section 87 sets out the different kinds of SMP services conditions which can be imposed and stipulates, in relation to some of those conditions, the factors that OFCOM must take into account. Sections 87 and 88 provide:

87 Conditions about network access etc.

(1) Where OFCOM have made a determination that a person to whom this section applies (“the dominant provider”) has significant market power in an identified services market, they shall—

- (a) set such SMP conditions authorised by this section as they consider it appropriate to apply to that person in respect of the relevant network or relevant facilities; and
- (b) apply those conditions to that person.

(2) ...

(3) This section authorises SMP conditions requiring the dominant provider to give such entitlements as OFCOM may from time to time direct as respects—

- (a) the provision of network access to the relevant network;
- (b) the use of the relevant network; and
- (c) the availability of the relevant facilities.

(4) In determining what conditions authorised by subsection (3) to set in a particular case, OFCOM must take into account, in particular, the following factors—

...

(5) [conditions ancillary to the conditions authorised by subsection (3)]

(6) The SMP conditions authorised by this section also include one or more of the following—

- (a) a condition requiring the dominant provider not to discriminate unduly against particular persons, or against a particular description of persons, in relation to matters connected with network access to the relevant network or with the availability of the relevant facilities;
- (b) a condition requiring the dominant provider to publish, in such manner as OFCOM may from time to time direct, all such information as they may direct for the purpose of securing transparency in relation to such matters;

- (c) a condition requiring the dominant provider to publish, in such manner as OFCOM may from time to time direct, the terms and conditions on which he is willing to enter into an access contract;
- (d) a condition requiring the terms and conditions on which the dominant provider is willing to enter into an access contract to include such terms and conditions as may be specified or described in the condition;
- (e) a condition requiring the dominant provider to make such modifications as OFCOM may direct of any offer by that provider which sets out the terms and conditions on which he is willing to enter into an access contract.

(7) The SMP conditions authorised by this section also include conditions requiring the dominant provider to maintain a separation for accounting purposes between such different matters relating—

- (a) to network access to the relevant network, or
- (b) to the availability of the relevant facilities,

as OFCOM may from time to time direct.

(8) The SMP conditions authorised by subsection (7) include conditions imposing requirements about the accounting methods to be used in maintaining the separation.

(9) The SMP conditions authorised by this section also include (subject to section 88) conditions imposing on the dominant provider—

- (a) such price controls as OFCOM may direct in relation to matters connected with the provision of network access to the relevant network, or with the availability of the relevant facilities;
- (b) such rules as they may make in relation to those matters about the recovery of costs and cost orientation;
- (c) such rules as they may make for those purposes about the use of cost accounting systems; and
- (d) obligations to adjust prices in accordance with such directions given by OFCOM as they may consider appropriate.

(10) The SMP conditions authorised by subsection (9) include conditions requiring the application of presumptions in the fixing and determination of costs and charges for the purposes of the price controls, rules and obligations imposed by virtue of that subsection.

...

88 Conditions about network access pricing etc.

(1) OFCOM are not to set an SMP condition falling within 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.

(2) In setting an SMP condition falling within section 87(9) OFCOM must take account of the extent of the investment in the matters to which the condition relates of the person to whom it is to apply.

(3) For the purposes of this section there is a relevant risk of adverse affects arising from price distortion if the dominant provider might—

- (a) so fix and maintain some or all of his prices at an excessively high level, or
- (b) so impose a price squeeze,

as to have adverse consequences for end-users of public electronic communications services.

(4) In considering the matters mentioned in subsection (1)(b) OFCOM may—

- (a) have regard to the prices at which services are available in comparable competitive markets;
- (b) determine what they consider to represent efficiency by using such cost accounting methods as they think fit.

(5) In this section “the dominant provider” has the same meaning as in section 87.

11. Sections 89 to 91 provide for certain additional conditions to be imposed in certain circumstances on service-providers with significant market power. Section 89 concerns the imposition of additional network access provisions in exceptional circumstances (with the approval of the European Commission), section 90 concerns conditions related to carrier selection and pre-selection, and section 91 provides for the imposition of additional conditions concerning the regulation of services for end-users.

12. The determination of this preliminary issue turns on the proper construction of section 193 and the rules made under it. Section 193 provides, so far as material:

193 Reference of price control matters to the Competition Commission

(1) 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.

(2) 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.

(3) The provision that may be made by Tribunal rules about the determination of a price control matter referred to the Competition Commission in accordance with the rules includes provision about the period within which that matter is to be determined by that Commission.

(4) Where the Competition Commission determines a price control matter in accordance with Tribunal rules, they must notify the Tribunal of the determination they have made.

(5) The notification must be given as soon as practicable after the making of the notified determination.

(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 of the Competition Commission is a determination that would fall to be set aside on such an application.

(8) ...

(9) For the purposes of this section an appeal relates to price control if the matters to which the appeal relates are or include price control matters.

(10) 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).

13. The price control condition which was imposed on H3G by the Decision was a price control authorised by section 87(9). It is common ground that, at least in a case such as the present where a price control condition has been imposed by OFCOM, the question set out in the preliminary issue falls within the definition of a price control matter within section 193(10). The issue is therefore whether it is also a specified price control matter, that is, whether it also falls within the rules made under section 193(1), namely the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (SI 2004 No. 2068) (“the 2004 Rules”).
14. The relevant rule for present purposes is rule 3 of the 2004 Rules which provides:

Reference of price control matters to the Competition Commission

3. - (1) 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).

II APPROACH TO STATUTORY CONSTRUCTION

15. Mr Green, on behalf of the Intervener O2 (UK) Limited (“O2”), described three broad principles of statutory interpretation which should guide us. The first is that we should construe the provisions of the 2003 Act by reference to the intention of Parliament. Secondly we should endeavour to arrive at an interpretation of the relevant provisions which is sensible. Thirdly we should not construe by reference to an over nice reflection on the use of different language. These canons of construction are not controversial provided that it is accepted that the intention of Parliament is to be ascertained primarily by determining the natural meaning of the words which Parliament used to express its intent in the statute. The intention of the Secretary of State in promulgating rule 3 is, in the same way, to be ascertained primarily by an analysis of the wording of that rule. Although clearly a sensible interpretation of the wording is better than a nonsensical one, these canons of statutory construction are not

intended to replace a proper interpretation of the words used with an examination of what would have been a sensible provision for Parliament or the rule maker to enact. The Tribunal's task is to apply the provisions in accordance with their natural meaning unless that leads to a result which Parliament or the Secretary of State cannot have intended.

III WHETHER THERE IS A PRIOR QUESTION

(a) The parties' submissions

16. H3G argued that the preliminary question should be answered in the affirmative and that the question whether it was appropriate to impose a price control condition on H3G is a specified price control matter which must be referred to the Competition Commission for determination. H3G was supported in this by BT and O2. Those three parties adopted each other's submissions on the issue, save in respect of one aspect, described below, where BT and O2's stance diverged from that of H3G. OFCOM argued that the question was not a specified price control matter and that it fell to the Tribunal to consider. In this, OFCOM was supported by Orange Personal Communications Services Limited ("Orange"), Vodafone Limited ("Vodafone") and T-Mobile (UK) Limited ("T-Mobile") and, again, each of those parties adopted the submissions of the others.

17. H3G's primary contention was that the preliminary issue should be answered in the affirmative because the issue in question relates to the principles applied in setting the condition which imposes the price control and hence is a specified price control matter within sub-paragraph (a) of rule 3(1). The reference in sub-paragraph (a) to "principles applied in setting the condition which imposes the price control" necessarily includes, it was argued, the principles applied in deciding whether to set a price control condition. Three arguments were put forward in support of this. First, unless one construes sub-paragraph (a) to cover the principles applied in deciding whether to set the price condition, that sub-paragraph may be devoid of content. All other issues relating to the setting of the price control are covered by sub-paragraphs (b) and (c). The second and third sub-paragraphs are widely drawn and encompass all possible issues which could arise relating to the setting of a particular price condition. Sub-paragraph (a) is therefore redundant unless the preliminary issue is answered in the affirmative.

18. Secondly, H3G argues that it is legally and factually impossible to separate out the principles applied in deciding to set a price control from the principles applied in deciding to set a particular price control. One cannot envisage a situation, it is said, in which OFCOM decided to impose a price control but then did not go on to decide what that price control should be because OFCOM cannot reach a firm decision that price control is appropriate and proportionate without knowing precisely what that price control should be. The approach which treats the question whether to impose price control as a separate, prior question is therefore misconceived because the decision whether to impose is simply one aspect of the decision to impose a particular price control. H3G submitted that the “principles” in rule 3(1)(a) are intended to refer back to the principles set out in section 88. Those principles relate both to the circumstances in which it is appropriate for OFCOM to set a price control condition (section 88(1) and (3)) and to the level of any price condition set (section 88(2)). Further, section 88 indicates the kinds of issues that a party bringing an appeal is likely to raise, for example whether OFCOM properly assessed the risk of adverse effects arising from price distortion or whether the setting of the condition promotes efficiency and sustainable competition. These issues cannot be decided without looking at the particular price control in fact imposed. Given the substantial degree of overlap and the undesirability of the Tribunal and the Competition Commission reaching different conclusions, H3G invited the Tribunal to interpret rule 3 to include the principles applied when deciding to impose the price control.

19. The impossibility of treating the issue of whether price control was appropriate as separate from the terms of the price control itself was also stressed by those Interveners who supported H3G’s arguments on this issue. BT pointed in particular to the importance of the principle of proportionality in both aspects of the question. Several provisions in the 2003 Act enjoin OFCOM to act proportionately. In a case where it is disproportionate to impose any price control, there is necessarily no particular price control which would be a proportionate response to a finding of SMP. Since it is agreed that the Competition Commission has to consider the proportionality of the particular price control concerned, they must inevitably also consider whether any price control is proportionate.

20. OFCOM counters this argument by referring to the wording of the rule as indicating that the matters relating to the principles applied in setting the price control condition are only specified as price control matters in so far as they arise as a second question, after it has been decided that a price control condition should be imposed. The wording of the rule presupposes that a price control condition has been set and so the rule is drafted on the basis that it is possible to split out those issues from the issue as to whether such a condition should be set.

(b) The Tribunal's findings

21. The Tribunal is not persuaded that it is impossible to consider the appropriateness or proportionality of imposing price control separately from the questions relating to what that price control should be. According to section 87 of the 2003 Act, OFCOM's duty, where it has made a determination that a person has significant market power is to set such SMP conditions as it considers appropriate. Section 87 provides for a wide range of possible conditions. These include a condition requiring the dominant provider to make its network or other facilities available to others or a condition imposing non-discrimination obligations, transparency obligations, or obligations regarding accounting methods. OFCOM must therefore consider which of the possible options available under the Act, either singly or in combination, it is appropriate to apply taking into account the factors which the section stipulates are relevant to that particular kind of condition.

22. OFCOM is aware in general terms of the kinds of price control it could impose and of their implications for the factors set out in section 88(1). At the point when it carries out its duty under section 87(1)(a) and considers these factors it is capable of taking an informed decision as to whether or not a price control would be appropriate and proportionate without simultaneously having to decide about the precise nature of any such control. There is nothing unusual in a body taking a decision that it is appropriate to impose one or more of a range of conditions before it makes any further decision as to how any particular condition should be structured.

23. The Tribunal rejects the argument that sub-paragraph (a) of rule 3(1) would be devoid of content if the issue under consideration is not a price control matter. There are many aspects of a price control condition which could properly or naturally be described as

the “principles applied in setting the condition which imposes the price control in question”. OFCOM referred to H3G’s notice of appeal, in particular section 4 of the Appendix to the Notice, where H3G sets out an “alternative approach” to remedy, namely that the price control should be set in such a way that the payments made by the MNOs cancel each other out. The question whether such a course is correct can properly be described as relating to the principles applied in setting the condition. Similarly, questions such as whether the price control should be a “cost plus” control or a “retail minus” control or whether the price control should be technologically neutral and if so, how this is achieved, are questions of principle which would fall naturally within sub-paragraph (a).

24. The fact that some of those issues might also be described as relating to the methods applied in determining the price control or to the provisions imposing the price control and thus falling within sub-paragraphs (b) and (c) does not preclude them falling within (a). While the three sub-paragraphs in rule 3(1) follow a natural progression from the more general principles to the more particular calculation and level of control, they do not need to be mutually exclusive. We note that BT and O2 argued that the question at issue fell within more than one of the sub-paragraphs of rule 3(1).
25. The Tribunal therefore proceeds on the basis that there is a prior question as to whether or not it is appropriate or proportionate to set any price control and that this is independent of separate questions about how that particular price control should be set. The task is therefore to decide whether that prior question is a specified price control matter.

IV WHETHER RULE 3 PRESUPPOSES THE IMPOSITION OF A PRICE CONTROL CONDITION

(a) The parties’ submissions

26. OFCOM’s case is that the words used in sub-paragraphs (a), (b) and (c) of rule 3 presuppose that a price control has been set. Sub-paragraph (a) refers to the condition “which imposes the price control in question”. Sub-paragraph (b) refers to “that price control” and sub-paragraph (c) to “that condition”, both phrases referring back to (a). This wording indicates, according to OFCOM, that the Secretary of State intended to limit the extent to which price control matters are specified for the purposes of section

193(1) to those matters which arise after the decision to impose a price control has been adopted. This is important in two respects. First, if the rule is drafted on the basis that a price control condition has in fact been imposed, this is an indication that the prior question of whether to impose a price control has not been specified as a price control matter. Secondly, it indicates that specified price control matters can only arise in a case where a condition imposing a price control has been set by OFCOM.

27. The application of section 193(10) and rule 3(1) in a case where OFCOM had decided *not* to set a price control condition for a dominant provider was canvassed at length in argument before the Tribunal. It was common ground that in such a case a third party, such as one of the dominant provider's customers would be affected by that decision and so would be able to challenge it under section 192(2). Would the issue of whether a price control *should* have been imposed need to be referred to the Competition Commission pursuant to section 193? OFCOM submitted that the answer to this was "no". OFCOM left open the question of whether the issue would be a price control matter within the meaning of section 193(10) since the wording of rule 3, in their view, clearly presupposed that a price control had been imposed.
28. O2 and BT submitted that the Tribunal did not need to determine the scope of specified price control matters in a case where no price control was imposed. However, accepting that the answer to this point might be an aid to interpreting the provisions in the appeal before us, they put forward a different way of construing the rule. O2 emphasised the opening part of rule 3(1) which specifies "every price control matter falling within sub-section (10)". They argued that since section 193(10) is drafted in sufficiently broad terms to include cases where price control has not been imposed as well as cases where it has, both those situations are necessarily imported into rule 3 by the specification of "every" matter falling within that sub-section. It remains simply to consider whether the matter is in dispute and whether it relates to the principles, methods, provisions and so forth listed in sub-paragraphs (a) to (c). Because, according to this argument, the reference to "every" matter includes all appeals about the appropriateness of a price control, whether or not OFCOM has imposed such a condition, one must read the reference in sub-paragraph (a) to "the price control in question" as meaning the putative or mooted price control. Similarly, "that price control" in sub-paragraph (b) refers not just to price control which has in fact been

imposed but also the potential price control which the hypothetical appellant argues should have been imposed. The position is clearest, according to O2, in sub-section (c) where the reference is to what the condition “should be”. Thus, according to BT and O2 there is no difficulty in construing rule 3 so that the prior question whether any price control is appropriate is as much a specified price control matter to be referred to the Competition Commission whether the challenge is to the setting of price control or to the failure to set a price control.

29. H3G took a different stance on this point from BT and O2. H3G’s case was that, although there is room for argument, a proper reading of the statutory scheme is that the appropriateness of price control would not be a specified price control matter if no price control had in fact been imposed. They submitted that there was no illogicality in construing the provisions in that way for two reasons. First, imposing price control is a particularly intrusive form of regulation which seriously impedes the extent to which a company can manage its own business. Where such a draconian remedy is imposed, Parliament has provided for an extra level of scrutiny by an expert body, the Competition Commission, to ensure that the rights and interests both of the particular party affected and of the functioning of the market as a whole are properly considered. That consideration does not arise in a case where no price control has been imposed. If the Tribunal were to conclude in such a case that price control ought to have been imposed, the proper course would be for the Tribunal to remit the case to OFCOM with a direction that it construct a price control condition.
30. The second point relied on is that the risk of duplication in the issues considered by the two bodies is substantially lessened where in fact no price control has been imposed. If a third party challenges the non-imposition of a price control, there will be no detailed questions about whether OFCOM has imposed price control at the right level.
31. OFCOM invited the Tribunal to reject these arguments and indeed BT and O2 also argued that a construction of the provisions which resulted in the same question being determined by different bodies depending on whether price control has been imposed would be purely arbitrary.

(b) The Tribunal's findings

32. The Tribunal accepts OFCOM's submissions on this point and finds that rule 3(1) does limit specified price control matters to cases where a price control condition has in fact been imposed. O2's alternative construction of the rule does too much violence to the ordinary meaning of the words which plainly envisage the existence of a condition which imposes price control. We cannot see any justification for reading into the subparagraphs of rule 3 the words which would need to be read in order to render the rule capable of applying to a putative, potential or mooted price control condition as well as an actual price control condition. We do not accept that the use of the word "every" in the opening lines of the rule has the effect contended for by O2.
33. Both BT and O2 accepted that if their argument was correct, rule 3 was intended to encompass everything that could fall within the definition of price control within 193(10) without there being any "daylight" left between the definition of price control matters in the statute and the specified price control matters in the rule. We reject that as a possible interpretation of the rule. If the Secretary of State had intended to specify every price control matter which he was empowered to specify, the rule would have been drafted to make that clear and there would have been no need for the subparagraphs (a) to (c). The complexity of the rule indicates that it is intended to specify a narrower class than all price control matters and clearly provides that the specified matters are the principles, methods, calculations etc. applied or used in setting a price control that has been imposed.
34. The Tribunal also regards the exclusion of cases where price control has not been imposed from the ambit of rule 3 as a strong indicator that the question whether to impose price control was not intended to be a specified price control matter. We do not accept the first ground relied on by H3G to explain the apparent illogicality. OFCOM argued that there was no foundation in the statutory history of these provisions to support the contention that Parliament regarded price control as a more draconian remedy than the other SMP conditions authorised by section 87. Indeed, price control is not necessarily a more draconian or intrusive remedy than, for example, requiring a dominant provider to make its facilities available to its competitors. A price control condition can fall far short of the kind of detailed regulation imposed in the current

case. Thus one element of the relief sought by H3G in its notice of appeal is that the Tribunal direct OFCOM to impose no more than an obligation on H3G to set its MCT rate on fair and reasonable terms with suitable guidance to be issued by OFCOM. H3G indicated that in its view, the imposition of such a simplified price control condition would also give rise to specified price control matters which would need to be referred to the Competition Commission.

35. There is some force in the second point raised by H3G, namely that issues about the detail of the particular price control can only arise in a case where price control has in fact been imposed so that arguments based on the need to have those issues decided by the same body as considers whether price control is appropriate at all do not arise where no price control has been imposed. The finding that specified price control matters in rule 3 arise only where price control has been imposed is not determinative of the preliminary issue, even though it is a strong indication that the matters specified do not include the prior question.

V THE PROPER CONSTRUCTION OF RULE 3

36. The Tribunal therefore approaches the task of construing rule 3 on the basis that the natural meaning of the words used indicates that specified price control matters are limited to the principles applied, methods used and provisions contained in a condition where a price control has in fact been imposed and thus does not include the prior question. The Tribunal has then considered whether there are other factors which lead to the conclusion that Parliament or the Secretary of State cannot have intended the natural meaning of the words to be the correct interpretation.
37. H3G submitted that this cannot be the correct interpretation because of the duplication of function that it creates and the risk that the Tribunal and the Competition Commission will have to consider precisely the same issues arising in a particular appeal and may come to conflicting conclusions. H3G and the Interveners supporting it conceded that a degree of overlap might arise from the Tribunal's determination of issues which are clearly non-price control matters, such as the existence of SMP. But whereas that kind of overlap may or may not arise, overlap in the determination of the two questions in this case was inevitable and would cover a wide range of issues

fundamental both to the question of whether there should be a price control and to the question of what that price control should be.

38. This potential for conflict between the findings of the Tribunal and those of the Competition Commission could not be obviated by the Tribunal determining the prior question first, before the Competition Commission begins its deliberations on the detail of the price control. The Tribunal does not have power to direct the Competition Commission to accept the Tribunal's findings or to prevent the parties from raising the same arguments before the Competition Commission as were rejected by the Tribunal. It was submitted that Parliament cannot have intended to create such a risk of conflicting decisions, so that the Tribunal should construe the rules in a sensible, broad and purposive manner to remove or minimise the potential for such conflict.
39. BT posited the possibility that the Tribunal could determine that price control was an appropriate remedy but the Competition Commission could reverse this by setting the price control at a level which in fact imposed no constraint on the dominant provider's pricing decisions. The fact that the Competition Commission would have the power to do this and that such a determination would then be binding on the Tribunal shows, in their submission, that it does not make sense to split the issue of the appropriateness of price control from the issue of at what level that price control should be set.
40. The Interveners supporting OFCOM argued that it is important to consider not only the possible overlap between the issue of whether to impose a price control and the issue of what that price control should be but also the overlap between the issue of whether to impose a price control and the issue of whether any of the other possible non-price related conditions listed in section 87 would be a proportionate response in addition to or instead of a price control condition. In order to answer the question to which the preliminary issue relates, consideration will have to be given to issues which are plainly not price control matters. The price control condition may be one of several conditions that have been imposed by OFCOM and the assessment of whether it was appropriate to impose a price control will have to take account of the remainder of the package of remedies adopted by OFCOM. Thus, in any particular case it might be just as problematic to attempt to split the question of whether price control is an appropriate and proportionate remedy from the question of whether other remedies provided for in

section 87 are sufficient or better, as it is to split the question of whether price control is appropriate from the question of what kind of price control that should be.

(b) The Tribunal's findings

41. The Tribunal acknowledges to some extent the validity of the concerns raised by H3G, BT and O2 about the overlap between the issues to be considered by the two bodies if the issue of the appropriateness of any price control is determined by the Tribunal whilst consideration of the form and detail of that control is investigated by the Competition Commission. The possibility of overlap is inherent in a statutory scheme where the determination of different issues in a single appeal is divided between two different bodies and where the same, possibly disputed, factual material necessarily has to be considered by both bodies in determining the issues allocated to them. The Tribunal does not accept that avoiding the risk of conflict is an imperative that justifies departing from the wording of the provision. That wording is clear and the construction of rule 3 necessary to bring about the result for which H3G, BT and O2 contend would require a substantial distortion of the wording used.
42. We do not consider that either the Competition Commission or the Tribunal is better placed than the other in terms of expertise or resources to determine this issue. Clearly the Competition Commission is better placed to investigate the detail of the price control and it is common ground that that is why those details are to be determined by them. It is true that under section 13 of Telecommunications Act 1984 the Competition Commission considered both whether the charges set by the MNOs in the absence of a charge control mechanism operated against the public interest as well as what the licence modifications should be in order to remedy or prevent any adverse effects. But under the provisions set out in section 193 of the 2003 Act, questions of relative expertise do not point in one way or the other on this question of construction. We do not accept that the Competition Commission could properly frustrate the Tribunal's finding that price control was appropriate by setting the price control at a high level. Such a determination would undoubtedly invite submissions from OFCOM under section 193(7).
43. The construction urged on us by H3G would transfer to the Competition Commission all aspects of OFCOM's response to the finding of SMP. If Parliament had intended,

broadly, that issues relating to the finding of SMP were for the Tribunal and issues relating to what SMP conditions to impose were for the Competition Commission, it could easily have made this clear. In fact the definition of price control matters in section 193(10) includes a very narrow class of the possible conditions, namely those authorised by section 87(9), section 91 or section 93(3). This does not include all the powers that OFCOM has to impose conditions relating to prices. Section 90(4) empowers OFCOM to set conditions for the purpose of securing that prices charged by the dominant provider to persons to whom certain services are provided do not constitute a disincentive to the use of its facilities.

44. Consideration by the Competition Commission of whether it was appropriate for OFCOM to impose a price control will in many, if not all, cases involve considering what other powers could have been exercised instead, for example, would a non-discrimination condition under section 87(6)(a) or a transparency condition under section 87(6)(b) have been an proportionate way to respond to the finding of SMP? H3G argued that if the Competition Commission concluded that a particular lesser remedy would have been adequate and on that basis a more intrusive price control was disproportionate, then that finding would be binding on the Tribunal under section 193(6). But it is plainly not intended by section 193(10) that the Competition Commission should be capable of making a determination which binds the Tribunal in respect of SMP conditions other than those listed in section 193(10). Treating the question whether to impose a price control as part of the overall question of what kind of price control should be imposed, rather than as part of the overall question of which of the powers in section 87 should have been exercised, does not, therefore, necessarily present an alternative which is free from the kinds of problems that H3G has described.

CONCLUSION

45. For the reasons set out above the Tribunal unanimously determines that the question whether the imposition of a price control on H3G with effect from April 2007 is an appropriate and proportionate response to the finding of SMP, or whether a remedy short of price control would be sufficient is not a specified price control matter within the meaning of rule 3 of the 2004 Rules.

Vivien Rose

Andrew Bain

Adam Scott

Charles Dhanowa
Registrar

Date: 4 October 2007