

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

IN THE COMPETITION

Case Nos 1083/3/3/07

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

19th September 2007

Before:
MISS VIVIEN ROSE
(Chairman)

PROFESSOR ANDREW BAIN OBE
MR. ADAM SCOTT TD

BETWEEN:

HUTCHISON 3G (UK) LIMITED

Applicant

and

OFFICE OF COMMUNICATIONS

Respondent

Transcribed from tape by
Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

HEARING OF THE PRELIMINARY ISSUE

APPEARANCES

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

Mr. Nicholas Green QC and Miss Kelyn Bacon (instructed by SJ Berwin) appeared on behalf of 02(UK) Limited.

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

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

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

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

Mr. James Flynn QC and Miss Marie Demetriou (instructed by Field Fisher Waterhouse) appeared on behalf of the Intervener Orange.

Mr. Ben Rayment instructed by and appeared on behalf of the Competition Commission.

1 THE CHAIRMAN: Good morning ladies and gentlemen. Thank you to all the parties for their
2 very helpful submissions and also for your timetable for this morning. We will get started
3 with H3G. Thank you.

4 MISS ROSE: Madam, I am conscious that I am somewhat of a late entrant to this market
5 coming, as it were, half way through the party. I appreciate that there has already been
6 some discussion in relation to this issue at the case management conference in July and, of
7 course, the Tribunal also would have the benefit of skeleton arguments from the parties and
8 the Interveners. I hope, therefore, that I will be able to take it relatively quickly.
9 The question, as we know, is whether the following is a specified price control matter,
10 whether the imposition of a price control on H3G with effect from April 2007 is an
11 appropriate and proportionate response to the finding of SMP or whether a remedy short of
12 price control will be sufficient. Of course, the starting point must be the statutory scheme,
13 so if I can invite you to turn to tab 5 in the bundle where we have the relevant parts of the
14 2003 Act. I am hoping that you do have a single volume of material for the hearing today.

15 THE CHAIRMAN: No.

16 MISS ROSE: (After a pause): Madam, I do apologise for that. Copies are being provided. Not
17 surprisingly, the parties written submissions have focused particularly on s.193 and on r.3
18 of the 2004 Rules, but in my submission it is essential that those provisions are read in the
19 context of the statutory regime for the imposition of SMP conditions and, in particular, for
20 the imposition of SMP conditions that impose price control. Therefore in my submission
21 we need to look, first of all, at s.78 under the heading SMP Conditions Procedure. At s.78
22 we have the circumstances required for the setting of SMP conditions, essentially a finding
23 of dominance is necessary. Then at s.79 there is the process that must be followed by
24 Ofcom in order to establish whether there is SMP. Once that has been undertaken we come
25 on to the subject matter of SMP Services Conditions which is dealt with at s.87 and, in
26 particular, our concern is with s.87(9), "The SMP Conditions authorised by this section
27 also include (subject to section 88) conditions imposing on the dominant provider: (a)
28 such price controls as Ofcom may direct in relation to matters connected with the provision
29 of network access to the relevant network, or with the availability of the relevant facilities."
30 We then come to s.88 which, in my submission, is of great importance when considering
31 the proper construction particularly of r.3 of the 2004 Rules because s.88 provides clear
32 limits to the power that Ofcom has to set an SMP condition imposing a price control. By
33 s.88(1), "Ofcom are not to set an SMP condition falling within section 87(9) except where
34 (a) it appears to them from the market analysis carried out for the purpose of setting that

1 condition” – that, of course, is the analysis under s.79 – “that there is a relevant risk of
2 adverse effects arising from price distortion; and (b) it also appears to them that the setting
3 of the condition” – and by the condition what is meant here is the SMP imposing a price
4 control, the SMP condition within the meaning of s.87(9) – “is appropriate for the purposes
5 of (i) promoting efficiency; (ii) promoting sustainable competition; and (iii) conferring the
6 greatest possible benefits on the end-users of public electronic communications services.”
7 We then at subsections (2) and (3) have further preconditions that must be satisfied in order
8 for Ofcom to set an SMP condition within s.87(9). Therefore in my submission it is clear
9 that s.88 clearly sets out a set of principles that must be applied by Ofcom when it makes
10 an SMP condition of this type. Of course, Ofcom must also in imposing such an SMP
11 condition comply with its general statutory duties, including its duties to regulate in
12 accordance with the principles of proportionality, duty to promote competition for the
13 benefit of consumers and so forth. But we have in s.88 a specific set of principles that
14 must be applied by Ofcom when setting an SMP condition within s.87(9).

15 We then come to s.192 and 193 - section 192, of course, the general provision for appeals.

16 THE CHAIRMAN: Yes.

17 MR. SCOTT: Could you just go back to the wording of s.88(1)(b)? What 88(1)(b) says is it also
18 appears to them “the setting of the condition is appropriate”.

19 MISS ROSE: Yes.

20 MR. SCOTT: There is a distinction, it seems to me, between the setting of a condition being
21 appropriate, the principles relating to that and the setting of the condition in detail. Do you
22 see the distinction? This goes back to our earlier hearing.

23 MISS ROSE: Yes, the question of whether there is an a priori question whether any price control
24 should be set and the question of the specific level of the price control. Is that the
25 distinction?

26 MR. SCOTT: If you go back to the underlying European framework, there comes a distinctive
27 moment when in the Access Directive you move to Article 13 where the regulatory
28 authority “may” impose price controls. But you then move into a different situation, so
29 there seems to me a statutory distinction going on here.

30 MISS ROSE: I take your point, but my submission will be that in fact you cannot separate
31 cleanly, either legally or factually, the question of whether any price control is appropriate
32 and whether a particular price control is appropriate, that even though they may be
33 theoretically two distinct questions, in the real world the two are, of course, inevitably
34 completely factually intertwined and in my submission legally intertwined as well because

1 s.88 is concerned with both types of questions, with the question of whether price control is
2 in principle appropriate and whether the particular price control which Ofcom is
3 considering is appropriate for the particular statutory purposes.

4 MR. SCOTT: Yes, I think we would agree with the factual matrix being at least overlapping, but
5 we will come on to the implications of that.

6 MISS ROSE: Yes. We then come to s.192 and s.193 - section 192, of course, the general
7 provisions for appeal to the CAT and then s.193, the reference of price control matters to
8 the Competition Commission. So we start off at s.193(1):

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

13 And there are some points that are common ground. It is common ground that where a
14 price control matter is a specified price control matter there is a duty on this Tribunal to
15 refer it, there is no discretion. Equally it is common ground that the definition of a
16 specified price control matter that matters is that which is contained in the rules, because it
17 is at least theoretically possible within this statutory scheme that you could have a broad
18 definition of price control matters for the purposes of s.193 but that only certain types of
19 those price control matters would be specified for the purposes of the rules, and it is only
20 the price control matters that are specified under the rules which you are obliged to refer to
21 the Competition Commission; so those points are common ground.

22 We then, at s.193(10) have the general statutory definition of “price control matter”:

23 “In this section ‘price control matter’ means a matter relating to the imposition of
24 any form of price control by an SMP condition the setting of which is authorised
25 by ...”

26 And we see the section 87(9). In my submission that is plainly a very broad definition, the
27 use of the language “a matter relating to” makes it clear that any matter that relates to the
28 imposition of a price control under s.87(9) is potentially a specified price control matter if
29 it is specified in the regulations.

30 That, therefore, takes us to the crucial question, which is what are the price control matters
31 specified in the regulations? If you turn to tab 6, regulation 3:

32 “For the purposes of subsection (1) of section 193 of the Act, there is specified every price
33 control matter falling within subsection 10 ...” so that is the first requirement which, in my
34 submission, is easily satisfied and is not material to the outcome of this preliminary issue,

1 “which is disputed between the parties” – again that is not going to be material – “and
2 which relates to”, so again we have the broad language “which relates to”,

3 “(a) the principles applied in setting the condition which imposes the price control
4 in question,

5 (b) the methods applied or calculations used or data used in determining that price
6 control, or

7 (c) what the provisions imposing the price control, which are contained in that
8 condition should be (including at what level the price control should be set).”

9 At this stage I draw your attention to a distinction between the wording of Rule 3(1)(a) and
10 the wording of Rule 3(1)(b) and (c) because if we look at Rule 3(1)(b) it is concerned with
11 the calculation of the price control, and if we look at (c) it is concerned with the substance,
12 including the level of the price control. But rule 3(1)(a) is not concerned with the
13 substance or the calculation of the price control, what it is concerned with is the principles
14 applied in setting the condition, the SMP condition, which imposes the price control. So
15 the question is what is meant in rule 3(1)(a) by “...a matter which relates to the principles
16 applied in setting the SMP condition.” In my submission that is a clear reference in the
17 context of the statutory scheme which must be where there is a hole, back to s.88 because it
18 is s.88 of the 2003 Act which tells us what the principles are which must be applied in
19 setting the SMP condition which imposes the price control in question.

20 MR. SCOTT: Are you suggesting that there are not any intermediate principles, that after that it
21 is purely methodological? There are no principles that in setting a condition you have to
22 apply? In other words ----

23 MISS ROSE: A specific condition.

24 MR. SCOTT: Yes, if you go back ----

25 MISS ROSE: I am not suggesting that.

26 MR. SCOTT: You are not suggesting that. What you are suggesting then is that the principles
27 here ----

28 MISS ROSE: Encompass both.

29 MR. SCOTT: -- are both lots of principles.

30 MISS ROSE: And we can see that because the reference is not to the principles applied in setting
31 the price control, the reference is to principles applied in setting the condition which
32 imposes the price control. So the question is, is there an error of approach or an error in the
33 principles which are applied when the SMP condition is imposed. The reason I refer to
34 s.88 is because it is the cleanest and clearest example of a situation where you would be

1 engaging Rule 3(1)(a). The ground of appeal, let us say for example, if we go back to s.88,
2 the ground of appeal would be Ofcom had no power to set a condition under 87(9) because
3 they failed to take into account, or failed properly to assess the question whether the
4 condition would promote sustainable competition, and that relates to the principles applied
5 in setting the SMP condition which imposes the price control in question.

6 As I have said, of course, there are other principles which Ofcom must apply and most
7 obviously it is general statutory duty – to act proportionately, transparently, non-
8 discriminately so as to promote competition in the interest of the consumers, and generally
9 applying to all of its functions and those also are principles, and those principles of course
10 apply to the question: “Is any form of price control appropriate?” and to the question: “Is
11 this the appropriate form of price control?” That is why my response to your question
12 earlier, sir, was that in my submission those two questions are not legally distinct for the
13 purposes of the statutory scheme. They both fall within that ambit of s.88 and s.3 and 4 of
14 the 2003 Act; they both fall within the ambit of Rule 3(1)(a) of the 2004 Rules because
15 they relate to the principles for the imposition of the SMP condition.

16 In my submission it is of some importance to look at the difference in the wording between
17 (a) and (c), because the submission that the Tribunal has from Ofcom, Vodafone, T-Mobile
18 and I cannot remember who else it is who objects – God knows I have tried – I hope if I
19 leave anyone out they will forgive me. But they all essentially make the same submission
20 in different words, which is that the rules only cover the substance of the particular price
21 control imposed. Some talk about the substance of the particular price control, some talk
22 about the level of the price control. In my submission that cannot be right on the face of
23 the Rules because those matters are covered by Rule 3(1)(c) what the provisions imposing
24 the price control which are contained in that condition should be including at what level the
25 price control should be set. Rule 3(1)(b) covers the question of the substance of the price
26 control contained within the SMP condition, what is the right price control? What is the
27 level of the price control? What should the provisions imposing the price control be? All of
28 those questions. But if that is right, why do you need, on their submission, why do you
29 need Rule 3(1)(a)? On their submission it serves no function.

30 MR. SCOTT: Let me try and assist you. In the European framework what is envisaged by
31 Article 13 of the Access Directive is that you may have a cost oriented price control, or you
32 may have a price control that is oriented in some other way – retail minus being an
33 example. Now, is what you are saying to us that in your view a decision by Ofcom

1 between the two of those – LRIC say on the one hand, and retail minus on the other –
2 would be a decision that falls under (c) or would that be a decision that falls under (a)?

3 MISS ROSE: In the 12th century people used to debate how many angels could dance on the
4 head of a pin and I do not say that flippantly but because essentially the question, with
5 respect, is to a degree semantic because you could take it either way because you could say
6 in every case the question is whether this matter relates to – so you have a broad connecting
7 clause, so all you are looking for is a connection between the price control matter and one
8 of the specified matters under Rule 3. So if you say: “Is the question whether this price
9 control should be cost oriented or retail minus a question which relates to what the
10 provisions imposing the price control should be?” Answer: Yes, clearly it is. Equally, is it
11 a question which relates to the principles applied in setting the SMP condition? Well it
12 might or it might not be – it probably would depend on the nature of the challenge, because
13 if you were saying Ofcom have wrongly applied a cost oriented model because they have
14 completely misunderstood the way this market functions in their whole approach then you
15 might say that there was an error of principle in the way that they had applied the SMP
16 condition. Or, it might simply be a more mundane error by Ofcom in the way that it had
17 approached the question.

18 In my submission, you might or might not fall within (a) in that situation but you would
19 certainly fall under (c). It is impossible to see how that would not be within (c) because it
20 would be related to the question: what should the price control provision be?

21 MR. SCOTT: Sticking with the framework, what Article 13 envisages is that the burden shifts
22 once you have a price control, so that the burden in relation to costs lies with the Regulator
23 at the time that you are thinking about appropriately, and shifts to the regulated party once
24 the price control is there. So there is a distinction going on there in the European
25 framework which is what underlies the framework here. I suppose the question in my mind
26 is do you think that distinction is not material to our considerations (bearing in mind that it
27 results in a distinctive set of arguments once you are in the price control area) to the
28 situation when you consider appropriateness.

29 MISS ROSE: In my submission it is not material to this question because the overall position
30 here is that we are talking about the national implementation measures for the European
31 framework, the overall national implementation measures – first of all the national
32 regulatory authority, Ofcom makes a decision, then there is an appeal route to this Tribunal
33 and this Tribunal will make a decision on the merits of the appeal. But simply as part of
34 that determination there is provision for particular matters to be examined by the

1 Competition Commission and for findings to be made by the Competition Commission
2 for, in my submission, the entirely pragmatic reason that Parliament took the view that the
3 Competition Commission had available to it the best resources and expertise in order to
4 determine those kinds of questions. But ultimately, questions of principle – is there SMP?
5 If there is, is it appropriate for a price control to be imposed? If it is, is this particular form
6 of price control the right one or should there have been some other form of price control?
7 Those decisions will all be taken by your Tribunal, but simply on the basis of the findings
8 made by the Competition Commission. So, in my submission the European framework
9 does not have an impact on these questions which are essentially domestic procedural
10 questions about the bodies that are going to make particular findings of fact in relation to
11 particular issues. Of course, classically under European law when implementing Directives
12 it is up to the Member State to have the choice of means provided that the objectives in the
13 Directive are fulfilled and Member States have discretion about the procedures provided
14 that they are effective and not discriminatory. Nobody is suggesting that whichever route
15 is adopted here would fail to meet the basic European requirements of effective and non-
16 discriminatory enforcement of the provisions in the framework. In my submission,
17 although interesting they do not determine the questions here which are questions purely of
18 domestic process.

19 MR. SCOTT: I understand where you are coming from. It is merely that you do not have a
20 homogenous situation between the appropriateness question and the price control question
21 in terms of the burden.

22 MISS ROSE: I hear what you say, sir, but in my submission when you are asking about the
23 principles applied in setting the SMP condition that is one of the core principles that you
24 are considering.

25 So our primary submission, to wrap it up, is that on a construction of the statutory scheme
26 read as a whole, and on the plain language in particular of Rule 3, it is apparent that the
27 question of whether it is proportionate and appropriate to impose a price control is a
28 specified price control matter. We submit that that construction also accords with common
29 sense, and avoids a potentially absurd and chaotic result. The Tribunal can see this
30 eloquently demonstrated in the careful and full submissions from Vodafone because
31 Vodafone have adopted the contrary position. They submit that the question of whether a
32 price control is proportionate and appropriate is not a specified price control matter and
33 therefore must be decided by you.

1 They then have to confront a serious and, in my submission, intractable consequential
2 problem, which is that the same factual considerations will be relevant to the question
3 which, on their submission, you must decide and the questions which are to be referred to
4 the Competition Commission.

5 The Tribunal, very helpfully summarised the arguments that arise in your Ruling on the
6 formulation of this preliminary issue which you have at tab 3 of the bundle, and if you go
7 to para.17 there is a very helpful summary of the issues that arise under s.3 of our appendix
8 to our notice of appeal. So these are the issues which, on the submissions of Ofcom,
9 Vodafone *et al*, would have to be referred to the Competition Commission. The effect of
10 the price control would be to tilt an already tilted playing field further against a recent
11 entrant. The financial impact of the price control on H3G is considerable; adverse effect on
12 competition, reduce H3G's ability to act as a maverick competitor, welfare analysis flawed,
13 premature view, price control remedy appropriate, and so forth.

14 In my submission, and this does not appear to be disputed, indeed Vodafone accept that this
15 is so, those are plainly matters that will arise and be of central relevance on the question of
16 whether the price control has been set at the right level. We then confront the central
17 problem which is what happens if the CAT decides that the playing field is tilted and will
18 be further tilted by the imposition of any price control, but the Competition Commission
19 decides that there is not a tilt and imposing a price control of a particular level would not
20 adversely affect the tilt. Vodafone suggest that this problem can be avoided if the CAT
21 first makes decisions on those questions and then makes a reference the Competition
22 Commission with its findings of fact in some way binding the Competition Commission
23 when it comes to consider the price control matters. But, with great respect to Vodafone,
24 that is an impossible construction of the statutory scheme. Indeed, it turns it upside down
25 because the statutory scheme envisages is that the Competition Commission will make
26 findings on the price control matters which will bind the Tribunal, unless they are shown to
27 be irrational or *ultra vires*.. In those circumstances, in my submission, it is simply
28 impossible for Vodafone to suggest that this Tribunal would have the power to bind the
29 Competition Commission when approaching what everybody accepts are properly price
30 control matters to be decided initially by them and then referred back to this Tribunal. So
31 in my submission Vodafone's own submission demonstrates the impossibility of severing
32 the question whether price control is appropriate from the question of whether the price
33 control has been set at an appropriate level. In my submission, it is simply fallacious to

1 regard that as a severable a priori question. The two are intertwined; both are within the
2 scope of the rules.

3 I beg your pardon, Madam, I see your light has come on.

4 THE CHAIRMAN: Do not some of these issues also arise in relation to the question of SMP, so
5 that is there not inevitably an overlap over what this Tribunal has to consider and what the
6 CC has to consider?

7 MISS ROSE: Madam, I have puzzled over that question. Obviously it is right that the primary
8 focus of the appeal on SMP will be on different matters, in particular the question of BT's
9 countervailing buyer power; the history of the negotiations between H3G and BT;
10 whether Ofcom has misconstrued its own dispute resolution powers; whether Ofcom has
11 imposed an *ultra vires* end to end interconnectivity obligation; or whether it has
12 misconstrued the scope of that obligation on BT. Those are the central issues that arise on
13 SMP.

14 Now, it is right to say that there may, particularly in terms of putting context on the
15 argument and on the question of the extent of SMP, that some of these issues may arise. I
16 do not submit that there will be absolutely no overlap. But what I do submit is that on the
17 Vodafone analysis you will not simply be talking about some issues where there may be
18 some overlap at the edges, what you will be talking about is a very serious risk of mutually
19 inconsistent findings on core issues in this appeal in circumstances in which neither body
20 will be in a position to, as it were, impose its will on the other because in relation to matters
21 that are not price control matters this Tribunal has jurisdiction to make decisions. So if the
22 question whether it is appropriate to impose a price control at all is not a price control
23 matter, then it is a matter to be decided by you with no input from the Competition
24 Commission. But matters which are price control matters the Competition Commission
25 has jurisdiction to decide unless it does so irrationally. You cannot solve the problem by
26 dealing with it sequentially; you cannot solve the problem by one body trying to dictate to
27 the other. On their case you have a clear clash and in my submission the reason you have a
28 clear clash is that actually you cannot sever the issues because it is wholly artificial in my
29 submission to seek to divorce the question is it appropriate to impose this type of control
30 from the question is it appropriate to impose this specific control?

31 MR. SCOTT: Two follow up questions from that.

32 MISS ROSE: Yes.

33 MR. SCOTT: We could have been in a situation where Ofcom had found that there was SMP
34 but decided not to impose price control.

1 MISS ROSE: Yes.

2 MR. SCOTT: We were in that situation first time round.

3 MISS ROSE: Yes.

4 MR. SCOTT: Had BT appealed that on the basis that there should have been a price control
5 would you have expected us in accordance with your understanding of the statutory
6 framework to have referred that to the Competition Commission?

7 MISS ROSE: My submission, and I think there may be a difference in approach here between us
8 and BT, would be in that situation there would not be a price control matter. The
9 submissions that have been made by Ofcom and the other Interveners indicate that the
10 focus of the statutory scheme was on a particular condition that has been imposed, an SMP
11 condition that has been imposed, imposing a price control. They submit, and, of course,
12 you do not have to decide this question, and I accept there is room for argument on whether
13 it would or would not be, but it seems to me on a proper reading of the statutory scheme is
14 that the reference to the Competition Commission arises in circumstances in which an SMP
15 condition has been imposed, which imposes some form of price control. That seems to
16 follow particularly from s.193(10) which, of course, is the overall governing definition of
17 what is a price control matter, a matter relation to the imposition of any form of price
18 control. I accept that you could say imposition or failure to impose and that would be the
19 contrary submission and if you could construe 193(10) as meaning imposition or failure to
20 impose, then it would be a price control matter. Now, if it was a price control matter it
21 would go to the Competition Commission; if it was not, then plainly it would not, but there
22 is no illogicality. So assuming for a moment that Vodafone and the other Interveners are
23 right and that would not be a price control matter, in my submission there would be no
24 logicality in it not going to the Competition Commission for two reasons. The first is to
25 ask the question, why do you have this process in the statute at all? In my submission, the
26 reason is that imposing a price control on a company is a particularly intrusive form of
27 regulation which seriously impedes the extent to which a company can manage its own
28 business and is also, of course, a serious interference with the normal operation of a free
29 market economy; you are actually controlling the prices somebody can charge for the
30 services that they are providing. It is a very draconian remedy. In that situation Parliament
31 has thought fit to provide for an extra level of scrutiny by an expert body, the Competition
32 Commission, to ensure that the rights and interests both of the particular party affected and
33 of the functioning of the market as a whole, are properly considered.

1 But if the appeal is against a decision that there should not be price control, those
2 considerations are not in play. The matter would come before this Tribunal which would
3 obviously be considering the question whether Ofcom had heard in making its decision not
4 to impose a price control, but you would not then get a situation in which this Tribunal
5 would say, “Yes, we think Ofcom should have imposed a price control and we think it
6 should be 5p per minute”, in my submission an inconceivable result. What would happen
7 would be that this Tribunal would say, “Ofcom has erred and the matter must go back to it
8 for it to reconsider the question whether there should be a price control and, if so, what it
9 is, in accordance with the correct principles.” Therefore, there would be no such
10 interference with the economic interests of individuals or with the functioning of the
11 market. So in my submission, there is no illogicality in dealing with the two situations
12 differently. Now, if I am wrong and you can read s.193(10) as including failure to impose,
13 then the argument does not arise at all.

14 MR. SCOTT: One other small question, and it relates to the suggestion in your Notice of Appeal
15 that Ofcom might have gone for a fair and reasonable approach.

16 MISS ROSE: I am sorry, could you refer me to the paragraph?

17 MR. SCOTT: If anybody else can find it faster than I can?

18 MR. ROTH: I think, sir, it may be 3.17 of the appeal.

19 MR. SCOTT: Thank you.

20 MISS ROSE: The annex.

21 MR. ROTH: Yes, you are quite right, it is the annex, so it is in our bundle tab 1, if one goes to
22 p.35 and then starts the appendix, and then it is p.9 in the appendix.

23 MR. SCOTT: Thank you, Mr. Roth, that is just what I needed to do. The simple question is:
24 where does that fall in terms of price control mechanism?

25 MISS ROSE: (After a pause) In my submission that is also a price control matter.

26 MR. SCOTT: So you would say that that fell within the enabling section on price control

27 MISS ROSE: Yes, because it goes to the question of the principles applied by Ofcom in setting
28 the condition.

29 MR. SCOTT: And if that then led onto a dispute resolution process what would be the
30 implication?

31 MISS ROSE: But of course the significance of this point may be somewhat limited because the
32 Competition Commission would have to consider that question on the assumption that
33 H3G did have SMP. So it would have to be on the assumption that our contention the SMP
34 appeal ----

1 MR. SCOTT: Yes, the beginning of the paragraph says: “Even if H3G has SMP”, so that is the
2 precedent condition.

3 MISS ROSE: Exactly, so the scope of it is fairly limited, but nevertheless it is a price control
4 matter, so it would be on the footing that Ofcom were right and that the dispute resolution
5 procedure was not sufficient to give countervailing buyer power to BT.

6 MR. SCOTT: I understand.

7 MISS ROSE: Can I just address one further point before I sit down, which is the suggestion that
8 has been made that on our case everything is a price control matter even the determination
9 of SMP. In my submission that is plainly inconsistent with the structured statutory scheme
10 because, as we have seen, under the Statute, the process is first of all Ofcom determines the
11 question of whether there is SMP using the process that we have seen under s.78 and 79
12 and then there is the question of the imposition of an SMP condition, including under
13 s.87(9). The true *a priori* question in this case is whether H3G has SMP, that is the *a*
14 *priori* question. Once there is a determination that H3G has SMP, and a decision is taken
15 by Ofcom to impose a price control SMP condition, then the question of the principles that
16 Ofcom has applied in reaching that decision, as well as the level of the condition itself, are
17 all questions that go to the Competition Commission.

18 THE CHAIRMAN: It seems slightly puzzling, if you are right, that one kind of SMP condition
19 is singled out in this way for its appropriateness to be considered by a different body
20 whereas under s.87 there are all sorts of conditions that can be imposed.

21 MISS ROSE: Yes.

22 THE CHAIRMAN: Why would you say that that is a logical reading of the Statute? If that is
23 what was intended why would the legislature not have said once SMP has been established
24 the question as to which of the potential package of measures listed in s.87 is the
25 appropriate response should go to the Commission?

26 MISS ROSE: The answer appears to be that Parliament was particularly concerned about this
27 very intrusive form of regulation which impacts so severely on a company’s ability to
28 compete. It is fundamental to any business prices that it sets for its services, and it is clear
29 that the setting of a price control condition is singled out in the statutory scheme for special
30 treatment, that is the whole purpose of s.193. It is also clear from the wording of s.88 which
31 imposes a raft of particular principles, that Ofcom must apply this even if there is price
32 control.

33 MR. SCOTT: There is, as you are well aware, a wider statutory background to this both in terms
34 of other utilities and in terms of communications.

1 MISS ROSE: Yes.

2 MR. SCOTT: So we are in a situation where the MMC and the CC were used to considering
3 licence modifications.

4 MISS ROSE: Yes.

5 MR. SCOTT: They were used to considering licence modifications on a broader basis, as I
6 recall, than simply price control – they have had particular experience in doing price
7 control matters. So I think you need to see this in that context that the point just put to you
8 by madam chairman was that what is happening in this legislation is that a narrow part is
9 being referred, whereas had this been a licence modification this would have been going
10 there anyway as I recall. The point that you are making is not a point that is made *in*
11 *vacuo*, it is a point that is made in the context of the United Kingdom economic regulation
12 over the years since '84.

13 MISS ROSE: Sir, I am grateful for that. But of course the central point of why would you single
14 out price control deliberately? The answer is: “Well that is what the Statute does”.

15 MR. SCOTT: And they have particular expertise etc.

16 MISS ROSE: Yes. Unless there is any other matter on which I can assist the Tribunal, those are
17 my submissions.

18 THE CHAIRMAN: Now I think it is the turn of the interveners supporting H3G.

19 MR. BARLING: Madam, Mr. Green and I did have a discussion and, as you may have seen
20 from the proposed timetable, we managed to reach the conclusion that we would be 15
21 minutes between us and I hope that meets the spirit of what you intended, because it was
22 quite hard to predict in advance of hearing Miss Rose which points, as it were, would be
23 most important to BT and which to O2. So that gives me about 7½ minutes and I will be
24 very quick. I just want to make two or three point because we agree with virtually
25 everything that Miss Rose has submitted – there are one or two areas where she has
26 foreshadowed – we do not quite see eye to eye.

27 I need to say very little about the main point of construction. We agree that it would be a
28 wholly artificial distinction to draw to try and split off the question of whether any price
29 control is appropriate or proportionate from whether the particular price control was
30 proportionate or appropriate. We see, as she submitted, huge problems arising in practice
31 if the Tribunal were to attempt to split them in that way. No one seriously suggests here
32 that s.193(10) is not easily wide enough to encompass the question of whether a price
33 control at all is a proportionate remedy, even Ofcom appears to accept that the

1 proportionality of it is a price control matter – not a specified price control matter but a
2 price control matter, and I refer to para.6 of Ofcom’s skeleton for that.

3 The problem is suggested to arise in Rule 3(1). May I suggest a short, sometimes it is
4 deceptive to try and take shortcuts, but we do submit there is a touchstone here as to why
5 they simply cannot be right in submitting that proportionality of a price control is not a
6 specified price control matter. Leaving the other side apart, if one looks at Rule 3(1)(a):
7 the principles applied in setting the price control condition – I paraphrase slightly but that
8 is what it is specifying – one of those principles Miss Rose has referred to s.87 and s.88,
9 but no one would dispute that one of those principles which must be applied by the
10 Competition Commission is the principle of proportionality – it says so time and time again
11 in the legislation – the relevant decision maker must take account of proportionality. We
12 have given in para.13 of our skeleton some references, and I do not want to take time up
13 taking you to them all, if one looks you will see them set out at para.13 of our skeleton. If
14 we could perhaps just look at one of them to remind ourselves in s.3(3) of the Statute.

15 Section 3(1) obviously sets out the general duties of Ofcom in all cases. Section 3(3):

16 “In performing their duties under subsection 1 Ofcom must have regard in all cases
17 to the principles under which regulator activities should be transparent,
18 accountable, proportionate, consistent and targeted only at action which is needed.”

19 So it is beyond doubt, in our submission that proportionality is one of the factors that
20 whatever decision making body one is looking at, including the Competition Commission
21 where appropriate, must take account of proportionality, that principle.

22 It follows that the Competition Commission must be satisfied that any price control which
23 they approve or recommend must be proportionate, and obviously no price control can be
24 deemed proportionate if no price control was proportionate. It seems to me that that is
25 obvious and if we are right about that then when they are considering the questions referred
26 to them they must consider whether any charge control would be proportionate; they
27 simply cannot, in complying with their statutory duty, isolate that question. In one sense if
28 that is right that is the end of this argument because therefore they have to look at
29 proportionality of any price control.

30 MR. SCOTT: Yes, but if your opponents are right it would not be going to them if we were
31 doing the sequential process and we had already decided that a price control was
32 disproportionate

33 MR. BARLING: Yes, but this is an argument as to why that cannot be the permissible approach.
34 It cannot be permissible for the Tribunal, in our submission, to seek to hive off the question

1 of any price control and seek to bind the Competition Commission, as Vodafone has
2 suggested, and I will not reiterate what Miss Rose already very fully and eloquently has set
3 out with which we agree, because they must be entitled in fulfilling their function to look at
4 the proportionality of the price control that they are recommending – if they are
5 recommending one – and that must include whether any price control at all is
6 proportionate.

7 So it is an impossible task to separate these two questions and therefore the Statute does
8 not require you to separate them. The Statute, we say, has the opposite effect, it makes it
9 quite plain that this is specified price control in both senses of proportionality that we have
10 been looking at. I am conscious of my time. Mr. Scott, do come back at me on that if
11 necessary.

12 The other point I wanted to mention, just as a matter of practicality, the Competition
13 Commission are pre-eminently competent to consider the question of whether any price
14 control is proportionate, not least because they have recently had to grapple with that very
15 question, and the Tribunal should have received a fax from us yesterday – heads are
16 nodding so I am grateful - everybody else had it too. We only want to make one point
17 about the 2002 report and that was, as it were, in response to what you might have taken to
18 be a suggestion in one or two of the parties' skeleton arguments that somehow this was not
19 something that the Competition Commission (whether they were competent to look at all
20 the number crunching) they were not competent to look at alternative remedies as they
21 would obviously have to consider, at least in general terms, what else might be available by
22 way of a remedy if they were going to look at the proportionality of any price control. One
23 can see that they have done exactly that – I hope one can see that from the extracts that
24 they have supplied – and they have done it very recently. We make no more point than that
25 about those extracts.

26 MR. SCOTT: I was simply going to say that we have looked at the extracts. We are aware that
27 Ofcom and the Competition Commission (and we would say ourselves) are capable of
28 looking at a variety of remedies.

29 MR. BARLING: Yes. I hope, sir, you will notice that I did not for one moment suggest that you
30 were not capable or wholly possible, but we submit that in this context, given the statutory
31 requirements, it is something which must go, which if any price control is appropriate it
32 must go to them to consider at the same time. In doing so they will no doubt want to take a
33 view. They may not have to take a very detailed view; they may find the answer is very
34 simple. But there will be nothing inappropriate about them looking at what other arrows,

1 as it were, in the statutory quiver in terms of remedy. Madam, I do not know whether you
2 were poised or not to press your button?

3 THE CHAIRMAN: So you would go a little further than what I was understanding Miss Rose
4 would say, in that are you saying that the question that we could ask them is a broader
5 question, what is the appropriate remedy as a response to the finding of SMP, or that our
6 question is a narrow one, is it appropriate to impose price control but in deciding that they
7 can state what their view is about the other ----

8 MR. BARLING: ---- possibilities

9 THE CHAIRMAN: ---- possibilities, the arrows in the quiver, as you say.

10 MR. BARLING: Well, the latter. We would say not the former. What you are referring is the
11 specified price control matters and one of those, we would submit, is the question that you
12 framed in your preliminary issue, roughly speaking what, if any, price control? And in
13 dealing with the “any” which they have to deal with in our submission for the reasons I
14 have outlined because they had to look at proportionality of price control, in dealing with
15 the “any” they will have to have regard to the alternatives of no price control; and no price
16 control would include looking at what alternative remedies. But it would not be in our
17 submission their primary focus and it may be one that could be dealt with extremely
18 summarily in the context or the findings that they make about the market and other findings
19 and, of course, the fact that they may have to have regard, they will have to have regard, to
20 the SMP findings, either the existing ones or, if your judgment is available on SMP they
21 will no doubt want to have regard to all that. So it may be a relatively straight forward
22 exercise, but it is part and parcel of considering the “any”, in what price control if any and
23 the principles as we have said; as I say, it would not be a strange role for them to have that
24 we put in those.

25 Finally, Madam, for the record, we do not agree with para.7 of Ofcom’s skeleton or para.14
26 of Orange’s skeleton; we do not agree with the premise in there, the premise being the one
27 that Miss Rose has been dealing with as to whether a different result on any view, I think
28 the way it is put, had there been no price control imposed that would not be a specified
29 price control matter. We do not agree with that premise. It does not arise, of course, in this
30 case because here a price control has been imposed. We can see the attraction of arguing
31 about it insofar as it may have a bearing on the statutory construction, but it may be wise,
32 as it were, to leave it for another day when it does arise. But for the record, in our
33 submission, with specific reference to Miss Rose’s submissions we submit that in s.193(10)

1 a matter “relating to the imposition” obviously includes matters relevant to a decision
2 failing to impose a price control.

3 THE CHAIRMAN: But do you also say that would fall within r.3 ----

4 MR. BARLING: We do.

5 THE CHAIRMAN: ---- or do you say it ----

6 MR. BARLING: We do, yes. No, we do. We say that r.3 must be construed purposively and I
7 think that maybe Mr. Green is going to deal with this, this is the rather rough and ready
8 divisions of labour, but in outline we submit that r.3 must be construed purposively. There
9 is no compulsion because of the particular wording of r.3 to treat it as though it were
10 talking about an actual condition; “the condition imposed” could mean the condition
11 which is proposed to be imposed or which we are discussing when we are discussing the
12 imposition of a condition of that kind. I do not want to trespass on Mr. Green’s
13 submissions because I know that he is going to say a word or two about that. But for the
14 record we do say there does not have to be an imposition in order to have an appeal
15 containing a matter relating to an imposition. Such a matter would include, for example,
16 whether a price control was proportionate. If Ofcom had found that it would not be
17 proportionate and that was appealed by another operator, then the appeal would relate to a
18 matter within s.193(10). I have to say that we are also not terribly convinced by Miss
19 Rose’s distinction for this purpose that she draws between a draconian imposition and a
20 non-imposition because it seems to us that a non-imposition can in certain circumstances
21 be also quite draconian to those operators who find themselves having to negotiate with
22 someone who is not constrained by regulation . But as I have said, of course the question
23 does not arise in this case.

24 I am sure I have been longer than seven and a half minutes.

25 THE CHAIRMAN: There was just one other point, Mr. Barling. Miss Rose nailed her colours
26 very much to r.3(1)(a) as covering this. I think in your written submissions you were
27 saying that it fell within r.3(1)(a) and (c). Is that your case?

28 MR. BARLING: It is. I was simply in the oral submissions trying to home in on, if you like, a
29 quick point, that shows that it must be right, they must be entitled to look at proportionality
30 of any, but we do not in any way resile from anything we have put in our skeleton
31 argument including that it is within 3(c). We are also, I think, rather attracted by some of
32 the other parties’ submissions that say it might be in r.3(b) as well.

33 Madam, unless there is anything else at this stage, we have not dealt with the procedural
34 points of Vodafone because I think that is coming later.

1 PROFESSOR BAIN: Just on one point you were raising, you were suggesting that it would be
2 an impossible situation if the CAT were to decide that a price control was appropriate and
3 then subsequently the Competition Commission felt that no price control was appropriate.
4 We had had some discussion about this beforehand and we had wondered whether that
5 situation could not actually be resolved quite easily by the CAT simply setting prices that
6 were greater than the market prices that the companies would wish.

7 MR. BARLING: Yes.

8 PROFESSOR BAIN: So there would be a simple solution; it would not be an impossible
9 situation.

10 MR. BARLING: No, but in a way the fact that they could do that was one of the arguments that
11 we put in our written submissions as to why. They must, of course, be entitled to look at
12 whether any price control because they could, in looking at the level of the price control,
13 produce a price control that had no constraining effect at all and, therefore, they are really
14 the same question.

15 PROFESSOR BAIN: I think the issue is whether that is an impossible situation or whether it is
16 one that one could simply provide for.

17 MR. BARLING: It is a highly undesirable situation. We agree entirely with what Miss Rose
18 said, that to split it off as is suggested by the other parties, creates a real danger of conflict
19 because both Tribunal and CC would be looking at the same question in effect, would have
20 to look at the same question, whereas on our approach to statutory construction which we
21 say is both consistent with the statutes and with common sense, there is the risk of overlap
22 but not merely such a great one and one which no doubt in practice we hope would not
23 arise, particularly if the SMP judgment is available for the Competition Commission to
24 look at and study in advance of reaching their own decision which I think was tentatively
25 what we rather hoped might be the situation; before they reached their final report, they
26 might have the SMP judgment and be able to consider that. Presumably on that basis, if
27 that were the situation you would want to look very carefully anyway at your judicial
28 review powers when the Competition Commission report came back to you to finally
29 dispose of the appeal which one bears in mind may be a failsafe. That is the best we can do
30 at the moment.

31 MR. SCOTT: Just before you sit down, in the conclusion on other possible remedies in the CC
32 document that you put before us, one of the points made by the CC was that they noted
33 that a charge cap would not pre-empt bilateral agreements and there was this nice
34 suggestion that prices would be lower. We are sceptical, they said, that nothing in our

1 proposals would prevent MNOs from putting their preferred remedies into practice should
2 they choose to do so. If and to the extent they do so, then future regulatory reviews will
3 usefully be informed by hard evidence. We should be interested to see what hard evidence
4 may be adduced when either we or they are looking at these questions.

5 MR. BARLING: Indeed.

6 MR. GREEN: I want to make essentially four short points about construction and interpretation.
7 We essentially adopt the submissions of Miss Rose for Hutchison and Mr. Barling for BT
8 and I am going to limit myself to points which we say should guide the Tribunal in looking
9 at what is a tricky point of interpretation of both the Act and the subordinate rules. The
10 fact that there are wide variations in views about what are a very small number of words, I
11 think indicates that the Tribunal should stand back and ask what are the relevant principles
12 of interpretation because when one applies them sensibly we say you come to a logical
13 result.

14 The first point that I wish to make is to simply put down three broad principles of
15 interpretation. These should be trite; they should be uncontroversial. If they are not, they
16 all come from the Court of Appeal's judgment in *Floe Telecom*. We have brought copies;
17 they are here. I am sure everybody knows the judgment inside out and upside down, but I
18 will just simply give you the paragraphs where the point or the approach is evident. The
19 judgment of the Court of Appeal in *Floe* establishes in essence three things. The first, you
20 construe the Act by reference to the intent of Parliament. That surely cannot be
21 controversial, that is para.35 of Lloyd LJ's judgment.

22 Secondly, you construe the Act and the rules by reference to what is a sensible
23 interpretation and you find that in para.32. Then, thirdly, and I think significantly for the
24 present case and I hope, again, it is not controversial, you do not construe by reference to
25 an over nice reflection on the use of different language. One does not get bogged down
26 with tricky words; you stand back and ask yourself what is the intent of Parliament and
27 what is a sensible interpretation of the provision. We say the words of, in particular, the
28 subordinate rules are clear, but to the extent that they are considered to be ambiguous you
29 may find that these tenets of construction are useful. We say that an overriding policy
30 consideration which Parliament intended to impose upon both the CAT and the CC was
31 one of practicability. This is a very potent point, we submit, that there is a distinction to be
32 drawn here between the CAT and the CC. This is highlighted by the factual matters which
33 Miss Rose referred you to in s.88 of the Telecoms Act. These are factors which Ofcom
34 will take into account in deciding whether to set an SMP price condition, a charge control

1 condition, and what they demonstrate, at least in some part, is the sorts of factual issues
2 which might be put before the Tribunal when you are having to decide this *a priori*
3 “whether” question. You may have to consider issues relating to efficiency, the
4 sustainability of competition, end user benefit, the adverse effects of price distortion and
5 the extent of investment which has been undertaken. What this demonstrates is that on this
6 *a priori* “whether” question the CAT may have to grapple with those sorts of complex
7 issues and that is an obvious and logical starting point.

8 This takes me to Vodafone’s submission which highlight the difficulty which the Tribunal
9 may find itself in, simply because of a point which I think is uncontroversial again between
10 all parties, that the factual matters that the Tribunal may have to grapple with are not
11 dissimilar to the factual matters which the CC will grapple with when it is deciding on the
12 appropriateness of the price control condition as opposed to the earlier question of whether
13 to impose a price condition decision and it is from that sort of consideration that one gets to
14 the risk of a conflict of decisions, the fact that the CAT may come to a conclusion which is
15 dissimilar or adverse, or conflicts with that which the Competition Commission may
16 subsequently come to.

17 Now, if there is a risk of conflicting decisions it seems to us that Parliament specifically
18 intended that risk to be obviated, and that is both Parliament’s intent and a sensible
19 interpretation of the rules. If you identify a conflict and it is a material conflict then that is
20 an undesirable result and one may find we would submit artificial solutions to that and the
21 better approach is to interpret the Act and the Rules to avoid that situation arising in the
22 first place, which is why one steps back and says what are the relevant tenets of
23 interpretation? If you identify a complicated or an artificial or unacceptable end result you
24 seek to avoid it if you can do so reasonably by applying sensible principles of
25 interpretation, and one avoids this imbroglio of the risk of conflicting decisions by
26 construing the subordinate rules in a sensible, broad and purposive manner.

27 That brings me to my second point which does concern the interpretation of rule 3, and if
28 you would I would ask you to turn it up. Ofcom, in its submissions has said that the
29 necessary implication of rule 3 is that it contains an extant, existing condition and, with
30 respect, we disagree. Plainly rule 3(1) does include extant conditions, but its language is
31 broad enough to encompass putative conditions. The trigger for the operation of rule 3(1) is
32 a dispute as to a price control matter, that is what triggers rule 3(1). Then you have to ask
33 yourself, once you have a dispute, which will plainly be the case when there is an appeal,
34 does that dispute concern one or more of the matters in (a) through to (c).

1 If one takes, by way of example, subparagraph (c), what the provisions imposing the price
2 control which are contained in that condition should be, including at what level the price
3 control should be set, it plainly, as a matter of ordinary language contemplates a future
4 decision. The words “should be” and “should be set” are prospective. It may, as a matter
5 of ordinary language, include an ex post analysis: “should have been set at”, the decision
6 they were set at X and the appeal concerns they should have been set at Y, but it is broad
7 enough to include “should be set in the future in the condition which is contemplated.” So
8 (c) should be, and should be set are broad enough to be both prospective and retrospective
9 and, indeed, the same really goes for (a) – the principles applied in setting the conditions
10 which impose the price control in question, plainly they concern a past condition which has
11 been imposed, but there is nothing in the language which limits the situation contemplated
12 to past conditions. It is perfectly easy to construe it as the principles applied in setting the
13 condition i.e. adopted or to be adopted which imposes the price control in question.

14 THE CHAIRMAN: Well what is the meaning of the words “in question” there?

15 MR. GREEN: Well that is the condition which is being mooted. “In question” can be in
16 question which is then in place, or which is contemplated as being imposed, and that
17 obviously is what is contemplated by subparagraph 3, what should be included in the
18 mooted condition or should be set in the mooted condition. When you construe it broadly
19 you then come to avoid any risk of conflict, which is why one comes back to the principle
20 of interpretation to be applied. It is only if you give it a narrow interpretation and limit it to
21 an extant condition that one then gets into problems of risks of conflicting decisions and so
22 on. There is a logic to Parliament dividing up the analysis by the CAT and the CC
23 respectively. What Parliament has decided, if one imagines the conceptual framework that
24 Parliament was considering, was that dominance issues were for the CAT – that is SMP,
25 which equates, as we know, essentially to dominance. Abuse issues, insofar as they
26 concern price, are part of a *sui generis* regime which is carved out and sent to the CC, but
27 everything else which is non-price is left here, e.g. an obligation of transparency, because
28 Parliament has decided that you can create a rough and ready – and it is probably not rough
29 and ready, it is probably reasonably accurate – divide between price matters which go to
30 the particular expertise of the CC which has a great deal of practical experience, which we
31 all know, price matters on the one hand and other conditions which do not involve price.
32 That is perfectly logical, and one can understand why Parliament so intended, and that can
33 be the guide to interpretation. So one simply asks oneself would Parliament, if they were
34 asked, say that the *a priori* “whether” question, insofar as it involves complex price factual

1 matters, should that be Competition Commission or CAT? They will say: “Our policy was
2 the price matters go to the Competition Commission, there may be varying degrees of
3 complexity in a given case, but they go to the Competition Commission and everything
4 else is for the CAT, and that is a logical conclusion for Parliament to arrive at and it seems
5 to us to be the logic which underpins the Act, under division of labour, because if it is not
6 then one has a much more complex structural regime pursuant to which the CAT has
7 dominance issues, has non-price abuse issues, loosely described as SMP conditions and
8 then it has this grey area of a certain type of price issue, which is the existence of a price
9 condition. That, in our submission, simply muddies what should be (and is) a clear divide
10 between price issues which are for the Competition Commission, and everything else
11 which his for the CAT.

12 MR. SCOTT: Mr. Green, as you know we have this multi-stage procedure and you are aware
13 that one of the bits of evidence that could be brought before Ofcom or the Competition
14 Commission or ourselves in relation to dominance is the question of excessive pricing.
15 Now, that, as I understand it, in the present scheme of things would still have come to us;
16 we would be expected, if that argument arose, if Ofcom had sought to make a finding of
17 SMP on the basis of excessive pricing, to assess on the merits whether that was the proper
18 decision to have made, so it is clear that Parliament has not put all these issues of pricing to
19 the Competition Commission.

20 MR. GREEN: Parliament has carved out a particular issue based upon past experience of what
21 the Competition Commission has engaged in by way of investigation and it is said
22 regulatory charge controls so far as they impact upon price are for the Competition
23 Commission. It is plain that Parliament is not casting aspersions upon the ability of the
24 CAT to address other issues, and over the past six or seven years we have done many
25 pricing cases in these rooms, that is a given. The question is what did Parliament intend?
26 Parliament simply looked at the history and said: “There is a category of case which, par
27 excellence, would appear to be appropriate for the Competition Commission, and your
28 question is: how broadly is that category to be defined? We stand back and say if it is a
29 charge control, regulatory issue concerning price then Parliament intended it to go to the
30 Competition Commission, that is a logical delineation of the issue, and that should then
31 guide you to the conclusion, which is that the *a priori* “whether” question falls within that
32 rubric. It is a complex factual question concerning the regulation of price.
33 Otherwise, we do come back to this conundrum which is there is a risk of conflicting
34 decisions.

1 THE CHAIRMAN: You have referred to it as the *a priori* “whether” question, but the word
2 “whether” does not appear in rule 3(1) and I wonder why, if it had been the intention to
3 include this *a priori* question, why it does not simply say: “The principles applied in
4 deciding whether to impose a price control condition”?

5 MR. GREEN: Well within 3(1) you have to fall within 193(10) and the definition in 193(10) is
6 very broad. It is simply a matter “relating to the imposition”, and the words “relating to the
7 imposition” is, in our submission, quite clearly broad enough to include the imposition in
8 the future. So one of the things that you have to have to be within Rule 3 is that it must
9 relate to the imposition, that is part of the definition, because it has to relate to the
10 imposition as per 193 and then it has to fall within (a), (b), (c). The first part of that –
11 193(10) – if that is part of the definition in Rule 3, it is plainly broad enough to encompass
12 a future issue.

13 THE CHAIRMAN: Yes, your case is that 193(10) is broad enough to encompass whether a price
14 control should be imposed. The question is if those who are drafting the Rule 3 intended to
15 specify that aspect of price control matters, why they did not say more simply than they
16 have done, that the principles to be applied in deciding whether to set the condition which
17 imposes price control are specified matters.

18 MR. GREEN: With respect, I think they did. You simply have to read in the language of
19 193(10) which refers to a condition and plainly incorporates a future condition and an
20 existing condition and then add to it subparagraph 3, since you have a future condition in
21 193(10) you add to it subparagraph (c) of Rule 3 and you have the words “should be” and
22 “should be set”. There is no difficulty in coming to that conclusion.

23 MR. SCOTT: Mr. Green, if you go back to the beginning of s.193, the first subparagraph says:
24 “The Tribunal Rules must provide ...” so Parliament is very clear that the Tribunal Rules
25 are an important part of this scheme. Then, in relation to appeals under 192(2) relating to
26 price control, the price control matters arising in that appeal, and then the words occur:
27 “...to the extent that they are matters of a description specified in the rules”. So what the
28 scheme appears to be saying is that the rules are an inherent part of the scheme.

29 MR. GREEN: Yes.

30 MR. SCOTT: It is envisaging that price control matters can be broader than those which are
31 referable under the rules, and what it is saying is that in order to decide which of the price
32 control matters which may arise in sub.10, which defines what a price control matter is in
33 the broad sense, are going to be referred, you have to look at the Rules and see what the
34 extent is, and the implication is that the rules are narrower than sub.10.

1 MR. GREEN: In principle, there could be theoretical daylight, the question for you is whether
2 there is.

3 MR. SCOTT: Absolutely.

4 MR. GREEN: And rule 3 says: “For the purpose of subsection 1 of s.193, there is specified
5 every price control matter falling within subsection 10.” So your first question is: does
6 subsection 10 include prospective as well as ex post? Answer: Yes. If so, is there a
7 dispute about that? Answer: Yes. Should there be imposed price control? That plainly is a
8 dispute about a future decision which falls within subparagraph 10, and then as to its
9 subject matter, ask yourself simply does it fall within (a) or (c), to which the answer, we
10 submit is plainly “yes” – it is certainly (c) when using prospective language “should be”. It
11 seems to us, just as a matter of ordinary language, because rule 3 encompasses every price
12 control mentioned within subsection 10 that is a necessary pre-condition of rule 3. If it
13 includes the prospective and the ex post that is the starting point. Then the only questions
14 are first, is there a dispute? That is plainly answered “yes”; and secondly, does it fall
15 within the headings (a) to (c)? We have a prospective dispute concerning the principles
16 applied in setting the conditions and what the provisions imposing the price control which
17 are contained in that condition (that is the condition in s.193(10)) future or post, ex post,
18 should be. With respect, it is very simple.

19 MR. SCOTT: I think as you said yourself, there is the possibility and in fact the reality of
20 alternative views.

21 MR. GREEN: There is the reality of alternative views; whether they are good views is, of
22 course, another matter. But if one is in any doubt about it, one does stand back and simply
23 say, “As a matter of common sense where does this lead us to”, which is why I started with
24 *Floe Telecom*. What was Parliament in general terms trying to achieve? If it is a complex
25 regulatory matter concerning prices for the CAT or the CC or both, both with the risk of
26 conflict, then we would respectfully say Parliament would say, “It’s a no brainer. It’s for
27 the CC.”

28 THE CHAIRMAN: Can I just clarify what was the point you were making by referring to the
29 principles set out in s.88?

30 MR. GREEN: No more than to simply show how a conflict might arise. It really goes to nothing
31 more than that, that if a conflict can arise before your fact finding and the CC’s fact
32 finding, which everybody accepts in principle might occur, then that is something you say
33 to yourselves: is something which Parliament would have wanted us to avoid? How do we
34 achieve that? So it helps you identify what Parliament would have wanted you to do or

1 what is a sensible interpretation. But it does seem to us that Vodafone's submissions rather
2 highlight the artificiality, the problems which arise and then to suggest that the way to
3 overcome it is to set price controls at a very high level is an artificial solution to deal with
4 an artificial problem. It is better just to stand back and say, "Well, how can we avoid it in
5 the first place?" That is why the Court of Appeal's guidance in *Floe* is helpful because it
6 says, "Well, what sensibly was sought to be achieved?"

7 THE CHAIRMAN: Where do you stand on this question of whether it is still a price control
8 matter if Ofcom decides not to impose price control?

9 MR. GREEN: From the perspective of Parliament's intent, which is the submission I am
10 making, if you ask yourself is that the sort of issue which you, the Tribunal, if you had
11 jurisdiction over it, would then have to grapple with exactly the same sort of complex
12 factual price related matters, we would say there is no magic here, you simply bung that off
13 to the CC; that is a CC issue. We are only talking about the forum for the resolution of a
14 dispute; it is no more than that. We are simply saying is it the Tribunal or is it the CC? It
15 is not a magical question; it is not, if I can come back to Mr. Scott's earlier question, a
16 matter for the EC Directive. The EC Directive says that a discretion conferred upon the
17 NRA to determine whether to impose a condition, there must be an appeal process. We are
18 simply examining who determines, that is all.

19 MR. SCOTT: To clarify, my point about that was that Miss Rose was suggesting a homogeneity
20 of argumentation. What I was suggesting was that the burden is different depending
21 whether you are in the Article 13 area or outside the Article 13 area.

22 MR. GREEN: But we are now in the appeal process which obviously there has to be an appeal
23 process under the Community legislation and we are doing no more than answering a very
24 straight forward question who decides, whether it is the Tribunal or the CC. It seems to us
25 that when one brings it down to its most basic element, that is all we are talking about, a
26 procedural line, a route from the decision maker to an appellate body. You have to work
27 out this complex relationship between yourself and the CC.

28 MR. SCOTT: So if we were in a situation as the Chairman has suggested that Ofcom had not set
29 a price control and that was appealed to us and we decided that a price control condition
30 seemed appropriate, because of the process what we would normally do, absent any
31 reference to the CC, would be to send it back for the consideration of what that price
32 control should be. What you seem to be suggesting to us is that at that stage we would
33 send that to the CC.

1 MR. GREEN: My submission, to be clear, is the CC decides that because the process of deciding
2 it involves precisely the sorts of issues which Parliament has decided the CC should decide.
3 It is that narrow category of regulatory complex price issues. If the dispute within the
4 meaning of r.3 concerns that, then it is for the CC. Really it does not matter whether it is
5 the regulated company or third party who brings the appeal, it is the nature of the
6 adjudicative process that is key. That is why I come back to this is a straight forward
7 procedural point: is it you or is it the CC that decides?

8 PROFESSOR BAIN: Mr. Green keeps referring to complex price related matters as if we all
9 know what those are. It does seem to me looking at the conditions in s.88 of the Act that
10 they talk about market conditions leading to price distortion. These are the sort of
11 conditions that we are looking at in many of the cases that come before us. There is no
12 particular Competition Commission expertise in that, whereas if one regards complex price
13 related matters as being issues involved in determining precisely what prices should be,
14 precisely what costs are relevant, whether they have been measured correctly, the sort of
15 thing which one needs a team of professional accountants, staff, which we certainly do not
16 have, that is clearly the sort of issue that one could argue would be better going to the
17 Competition Commission. So I do not think it is necessarily clear simply labelling
18 everything as complex price related matters that they are better allocated to the
19 Competition Commission than to the CAT.

20 MR. GREEN: I understand that, and I accept that. We are not talking about a turf war between
21 the CAT and the CC in terms of expertise, we are talking about a broad category of factual
22 issues which may include complex cost and cost allocation issues and may include other
23 issues. Parliament has simply stood back and said there is a category – whether one calls it
24 complex, factual or just charge control related issues which the CC has dealt with in the
25 past in its previous inquiry and so on and we leave it to them. Perhaps to use the word
26 “complex” is over egging it, but it is a category of factual issue which Parliament has said,
27 “Leave it to the CC” and it is as simple as that. There is certainly no battle of expertise
28 between the two adjudicative appeal bodies.

29 THE CHAIRMAN: One further question I perhaps ought to have put to Miss Rose and Mr.
30 Barling, is it your case that the question this is a price control matter or not depends on the
31 kinds of arguments that are raised in the appeal, or is it a question which one determines
32 for all cases? It is always going to be a price control matter regardless of what the actual
33 grounds of contention are between Ofcom and the appellant.

1 MR. GREEN: I think that is purely a matter of interpretation of the scope of the dispute as per
2 r.3(1)(a) to (c) and those are so broadly drafted it is difficult at least at this stage to
3 contemplate disputes which would fall outside those terms as construed. The principles
4 applied in setting the condition, methods, calculations, what they should be, it is hard to
5 contemplate a dispute which would not fall within one of those three heads. In theory, if
6 one found daylight between those three heads and the nature of the dispute, then you do fall
7 into a rather unfortunate no man's land. But I think the draftsman of 3(1)(a) to (c) was
8 intending to encompass everything that could possibly be thought of as falling within the
9 definition of price control in 193(10). Certainly our submission is that it was intended to
10 be composite and comprehensive, not intending to leave daylight.

11 Unless there anything further I can assist with? Thank you very much.

12 THE CHAIRMAN: Thank you. Mr. Roth?

13 MR. ROTH: It was on the basis of the skeleton arguments that perhaps optimistically Ofcom
14 said "we would only want five minutes". Having heard the ingenious argument that Miss
15 Rose advanced this morning – and this is no criticism of her, it may be of me – it did not
16 quite spring out at me from reading her skeleton. To deal with that and the other points, I
17 would ask for a little bit longer, if I may, emboldened by the fact that the 45 minutes that
18 Hutchison and the Interveners asked for, as I see, spread to over double that length of time.
19 Madam, I think the lynchpin of Miss Rose's argument was r.3(1)(a) of the Rules. I do not
20 think she was suggesting that the question as formulated by the Tribunal for the
21 preliminary issue is coming within 1(b) or 1(c). Once it has been decided to have a price
22 control, that it is appropriate to impose a price control, the questions that are then presented
23 to the decision maker are not simply questions of methodology and calculations data or
24 fixing the level; there are also then questions of principles as to the approach to be used in
25 setting that price control. That is what we say and submit that the draftsman of the rules is
26 very properly having regard to. One can see that by looking at this appeal. There is
27 perhaps, if I may say so, a slight danger of this argument being conducted at such a level of
28 abstraction that one can look at what actually is before the Tribunal in this case and has to
29 be decided from this case.

30 If I could ask you to turn to tab 1 of your bundle, Hutchison's Notice of Appeal and then,
31 because the pagination changes, one goes to p.35 and then there follows the appendix; in
32 the appendix, if you go in the appendix to p.9 you see section 4, "Alternative approach to
33 remedy". 4.1 "The sections that follow set out the issues which would need to be
34 addressed if a price control in the form of a TAC is considered appropriate, whether for

1 fixed-to-mobile calls alone or mobile-to-mobile calls as well.” In other words, having
2 answered the first question, yes – I am sorry, sir, it is p.9 in the appendix.

3 MR. SCOTT: It says 10.

4 MR. ROTH: It is 9 in my copy. There seem to be two different versions. In any event, it is
5 section 4, Alternative approach to remedy and I was reading 4.1. “The sections that follow
6 set out the issues which would need to be addressed if a price control in the form of a TAC
7 is considered appropriate, whether for fixed-to-mobile calls alone or mobile-to-mobile calls
8 as well. In setting the TAC, Hutchison submits that it is necessary to try to address or
9 mitigate the detriments to competition and investment incentives referred to above. 4.2.
10 However, Hutchison also submits that there is an alternative approach to a price control
11 remedy regarding mobile-to-mobile calls which would have substantial benefits for
12 consumers in general, promote competition and not have the detrimental effects of the
13 current price controls which Ofcom has determined. That is, the appropriate remedies
14 should ensure that the payments made by Hutchison to the 2G/3G MNOs in relation to call
15 termination on their respective networks are wholly off-set by the payments it receives
16 from the 2G/3G MNOs for call termination on its network – in other words, the resulting
17 position for mobile-to-mobile calls should be ‘net wholesale payments zero’ or ‘NPZ’.”
18 Then there is a discussion of that in section 4. That seems to us clearly a question of the
19 principle to be applied in setting the price control in r.3(1)(a) and everyone is agreed that
20 that is indeed a price control matter that is referred to the Commission. So that is the kind
21 of thing that very properly r.3(1)(a) is addressing.

22 Then one can come on to questions of methodology which I think is perhaps a fair
23 description of section 5 of this appendix, namely the economic methodology and the path
24 of cost recovery and then, of course, you can get on to questions of data and calculations.
25 The idea that unless the present question is considered a price question, r.3(1)(a) as it were
26 is robbed of meaning and it must be looking back to s.88(1)(a) or (b) is simply not right.
27 There was then much discussion in the argument before you of the converse case where if
28 Ofcom had decided not to establish a price control. We submit, as you saw from our
29 written submission that looking for a moment at the converse case demonstrates the fallacy
30 of the argument that Hutchison and those who support them advance. I think on this there
31 seemed to be some difference in approach between Miss Rose and Messrs. Barling and
32 Green. I think Miss Rose’s primary argument was that the converse case was not a
33 specified price control matter. Mr. Barling said, “Well, you don’t need to have to decide

1 that, so you can park it for another day, but, if you do, that it is a price control matter” and
2 Mr. Green very firmly said that it definitely is a price control matter.

3 We say, with respect, it is quite clearly not a specified price control matter within r.3. We
4 can see scope for argument as to whether it is a price control matter within s.193(10), but
5 on any view I think everyone is agreed that r.3 is specifying a narrower group, a subset, as
6 it were, of price control matters embraced by s.193(10). If it were not there would not be
7 much point in sub-rules 3(1)(a), (b) and (c). Once one looks at rule 3, and it is becoming
8 familiar by now, but if I could ask you to turn it up again under tab 6, we say it is
9 absolutely clear that a decision or determination by Ofcom not to impose a price control
10 condition would not be, or give rise to – which was then disputed and challenged on appeal
11 – specified price control matters. I suppose that if you get enough senior barristers in a
12 room no proposition is unarguable, but we do say, with respect, to Mr. Green, this is pretty
13 close to being unarguable when one looks at the language which is before one. It is:

14 (a) the principles applied in setting the condition which imposes the price control
15 in question,

16 (b) the methods applied or calculations used or data used in determining that price
17 control.”

18 Not “might be used if there were to be a price control”, and (c), which I think Mr.
19 Green placed most weight upon:

20 (c) what the provisions imposing the price control which are contained in that
21 condition ...”

22 With respect it is clearly a reference back to the condition in rule 3(1)(a) which imposes the
23 price control in question. It is not a reference back to the statute, as he seemed to suggest.
24 Yes, of course, there are basic principles of statutory construction that one tries to give
25 sensible reading to statutory language and so on and so forth, but one cannot throw it out of
26 the window and read words into it and read the language as saying something that it plainly
27 does not say. This is clearly dealing with a condition that has been determined by Ofcom
28 to impose price control, and if Ofcom had decided not to impose price control, but the
29 specification in either 1(a), 1(b) or 1(c) would not be engaged and that is significant
30 because Miss Rose based much of her argument on s.88 of the Statute, and the link with
31 that – or at least the context I think she said – created by that when looking at the rules in
32 s.193(10). But if one goes back to s.88, which is under the previous tab, 5, and looks at
33 subsection (1) Ofcom could, of course, determine that it is not appropriate to set a price
34 control condition because that is not, in their view, appropriate to promote efficiency or

1 promote sustainable competition or confer benefits – any of the reasons – in other words
2 the pre-conditions to setting price control in Ofcom’s view were not fulfilled, and then that
3 could be challenged on an appeal. Ofcom’s view on that could be said to be wrong. The
4 arguments in that appeal would engage precisely therefore these issues under s.88, and yet
5 it would not – if I am right in the analysis of rule 3 – give rise to specified price control
6 issues.

7 With regard to statutory intent it was suggested that the purpose of the reference to the
8 Competition Commission, the mandatory reference, was to provide an extra level of
9 scrutiny, Miss Rose said, for such an intrusive remedy. I do not, with respect, know the
10 foundation for that submission in the statutory history – it is not accepted by Ofcom.
11 Indeed, we suggest, as I think the interveners suggested that the purpose of the mandatory
12 reference is that once you get into some of the detailed questions of principles to be used in
13 the approach, method, data calculations that that be more appropriately and efficiently
14 handled by the Competition Commission, assisted by the economists on its staff and a less
15 adversarial procedure than the procedure before the CAT which, of course, does not have
16 its own independent expert assistance, and that is the reason for this division of function. It
17 is not about an extra level of scrutiny because, of course, although price control is indeed
18 an intrusive remedy there are other SMP conditions which are also very intrusive
19 remedies, such as conditions under s.90, if you look across the page at s.90(3) – a
20 mandatory connection requiring an operator that has incurred a lot of expense investing and
21 building up its network to provide use of its facilities to its competitors certainly can be a
22 very intrusive remedy indeed, but there is no reference to the Competition Commission for
23 that condition, and there is no reference even though there are again some complex issues
24 that have to be considered in applying that condition, as you see from s.90(4).

25 That is why, we say, that this is really not such a difficult issue that you now have to
26 decide in the light of the ruling that you gave on 15th August in your Judgment. Indeed,
27 some of Miss Rose’s arguments seemed to go back to the argument that preceded that
28 Ruling by looking at some of the points that are raised in deciding whether or not the
29 imposition of price control is appropriate, and saying that those are points which involve
30 arguments concerning the questions that are also involved in determining the level of price
31 control or the principles, but we have crossed that bridge and it is recognised that there can
32 be some element of overlap and considerations that the Competition Commission and the
33 CAT may have to consider.

1 So we say that when one looks at the language of rule 3, when one considers it in the
2 context of the converse case, the argument based on s.88 falls away and it is clear that the
3 principles applied in setting a price control condition, once a price control is considered to
4 be appropriate, involve a whole lot of matters – or can involve a lot of matters – and in this
5 appeal clearly do involve matters (as set out in s.4 of the appendix) that are to go to the
6 Competition Commission.

7 THE CHAIRMAN: Dealing with the point about the converse case where there is no price
8 control matter imposed, do you say that if you are right that that a challenge to that is not a
9 price control matter, that that interpretation then reads across in some way to help us
10 interpret the position which we are faced with where there is a price control imposed. Are
11 your submissions that logically one would assume that Parliament meant the issue to be
12 either determined by the Competition Commission or not regardless of whether a price
13 control had been imposed or not.

14 MR. ROTH: We say it is helpful really in three respects. First, because the point, madam, that
15 you have just made, that one would say logically they would be handled the same way
16 procedurally. Secondly, in rebutting the argument that has been advanced as to why this
17 case is a price control matter, an argument that rested heavily on s.88, because the issues
18 that arise under s.88 will be debated in this appeal where a price control matter has been
19 imposed, and it helps in rebutting that argument because exactly the same issues are likely
20 to be debated in an appeal where a price control matter has not been imposed. It helps also
21 in dealing with this question of, as it were, which Body, which Tribunal, Commission, is
22 more appropriate to deal with these in that in general the arguments in a case where price
23 control has been imposed, but is being challenged on appeal, and the arguments in a case
24 where price control has not been imposed and that is challenged on appeal may very well
25 be almost exactly the same, it is just that a different side is advancing the arguments and so
26 no particular difficulty arises from the Tribunal in dealing with those questions.

27 The only other point I would make is just to draw your attention to the fact that s.88(1) is
28 dealing with the setting of conditions, and s.88(2) is then looking at some of the detail of
29 how the condition is set which points more directly at once you have decided to have a
30 condition then setting the condition has to take account of particular factors and that then
31 starts to look at exactly how the condition is to be determined, i.e. specified price control
32 matters, and one sees that distinction in the lay out of s.88.

33 Those are my submissions.

1 THE CHAIRMAN: Well what do you say about the main point that H3G made, which I think
2 one can summarise the overlap point that many of the same issues arise in relation to
3 deciding the level of the price control, will also arise in deciding whether price control is
4 appropriate that one should adopt a purposive construction and not create an artificial split
5 which may lead us into difficulties later on?

6 MR. ROTH: On that we say that there is clearly a potential overlap and there is indeed a
7 potential overlap, though I accept not as troublesome as deciding whether there is SMP, as
8 Mr. Scott indicated in his question, but that is inherent in the statutory scheme. We say that
9 one cannot, given the language of rule 3, distort it to an extent that enables one to make a
10 matter a specified price control matter that is not a specified price control matter simply
11 because one might think that would have been a better way for the Statute and the rule to
12 have been written. We think that there is indeed a certain potential logic in dealing with it
13 in the sort of *a priori* question before the Tribunal and then the more detailed questions
14 before the Commission, that is clearly the framework of the Statute, and one cannot –
15 simply because the same arguments may be deployed before both bodies and therefore
16 some of the same issues have to be evaluated – rewrite the Statutory framework. That is
17 what we have to work with and we will come to address you later on the second point of
18 what directions might be made that could perhaps mitigate that.

19 THE CHAIRMAN: Thank you, Mr. Roth. Now, the interveners supporting Ofcom. Mr. Flynn?

20 MR. FLYNN: Madam, the interveners supporting Ofcom for Miss Rose's note are Orange,
21 Vodafone and T-Mobile. We bid for 25 minutes because we thought possibly Mr. Roth's
22 five minutes was a little optimistic, so the good news is that I can be relatively short
23 because he has said pretty well everything that I would have hoped would be said on this
24 side of the debate. This issue is not about the respective technical competences of the
25 Tribunal or the Commission and certainly that is not a guiding principle of statutory
26 interpretation. This debate is about what the provisions of the Act and particularly rule 3 of
27 the Tribunal Amendment Rules actually mean.

28 We also submit that the potential for conflict in the sense that however you cut it there are
29 going to be issues, or factual matters, which the Tribunal is going to have to decide which
30 will be the same or similar or overlapping with those which will fall for consideration by
31 the Commission just cannot be avoided. What has to happen is that they should be
32 managed, and that is the point Vodafone has highlighted, which I think we are coming to
33 separately. It is illusory to suspect that you can decide this either by who is good at doing
34 what or making sure that it only gets decided once.

1 I will not say anything about the Statutory constructions – the varying Statutory
2 constructions advanced by Hutchison, BT and 02 because I think Mr. Roth has dealt with
3 that extremely well, and certainly the idea that rule 3, as a matter of natural language relates
4 to anything other than a price control which has actually been imposed is really stretching it
5 quite a bit.

6 Likewise, the converse case of no price control having been imposed at all – I agree with
7 what Mr. Roth has had to say about that; it may not be determinative but it is certainly
8 helpful in illustrating the Statutory scheme. You could consider a slight variant on that
9 which is say that Ofcom had not imposed a price control but something falling short of
10 price control and the appeal was brought by someone saying that that had not gone far
11 enough – that a price control should have been imposed rather than, say, a transparency
12 obligation or something of the sort. Would that conceivably be described as a specified
13 price control matter which had to be referred to the Commission? I think Mr. Barling
14 might say “yes”, but I am not sure that Hutchison would.

15 It should be remembered that Ofcom has that choice of range of remedies under s.87 and a
16 choice of them it seems to us – the question of principle – it cannot properly be described
17 as a specified price control matter, and that really brings us back to the preliminary issue
18 which was mentioned when we started a couple of hours ago (or more) but seems to have
19 been rather forgotten.

20 What we are actually here to discuss is whether the following is a specified price control
21 matter, whether the imposition of a price control on Hutchison with effect from April 2007
22 is an appropriate and proportionate response to a finding of SMP, or whether a remedy
23 short of that would be appropriate and, in my submission, it really is not appropriate to
24 describe that as a specified price control matter falling within any of the subparagraphs of
25 rule 3.

26 Really, madam, unless there is anything else I can assist with at this stage, I have nothing
27 more to say.

28 THE CHAIRMAN: Thank you, Mr. Flynn.

29 MR. WISKING: For Vodafone I think I can be even shorter than Mr. Flynn, and being a
30 solicitor perhaps that is my privilege as well. (Laughter) I want to make four very short
31 points, some of which have already been canvassed.

32 First, the point is really directed at highlighting the deficiencies of the argument that is put
33 against us; I adopt all the submissions that have been made by Ofcom, and Orange. The
34 first point is something which has been overlooked by Hutchison and others which is that

1 the question we are dealing with entails the consideration of alternative remedies and
2 alternative non-price control remedies. I think it is conceded that that is implicit in the first
3 part of the question, the proportionality part, and it is explicit in the second part of the
4 question whether a remedy short of a price control would be sufficient.

5 The difficulty with that, and it is a further argument in support of our position, is that it
6 seems to us that on a plain reading of s.193(10) that does not even constitute a price control
7 matter. The reason for that is that s.193(10) refers to s.87(9) which is the provision that
8 refers to price control SMP conditions.

9 Section 87 contains the ability to impose a range of non-price control conditions. Clearly,
10 if it was intended that price control matter, even at the first gateway, included the ability to
11 consider these non-price control matters, either as a matter of proportionality or as a matter
12 of considering whether alternative remedies would be sufficient, the Act would not make
13 an explicit reference to s.87(9), it would simply refer to s.87.

14 As far as I have heard this morning no one has sought to address that difficulty. In my
15 submission that reinforces our position because implicit in the question before the Tribunal
16 is the consideration of alternative non-price control conditions, and the effect of what is
17 being urged on you by Hutchison and others, is that the Commission should have the
18 jurisdiction to consider those matters even when s.193(10) explicitly does not refer to them.

19 **THE CHAIRMAN:** I think that was the question I asked Mr. Barling about what the scope of the
20 question that we would refer would be, and his answer was that he accepted that it was
21 limited to the price control matters but that in considering the question of the
22 appropriateness or proportionality of imposing price control inevitably the Commission
23 would need to have regard to what other options are available, even though it would not be
24 able to recommend them or point us in that direction in any formal sense other than what it
25 says in its background to its determination.

26 **MR. WISKING:** But that is at odds with the gateway provision in 193(10). 193(10) sets the first
27 gateway and then you have the rule which further creates what is a specified price control
28 matter, so to overcome the difficulty it is said that the Competition Commission can
29 somehow range outside its Statutory jurisdiction, and further create the risks of
30 inconsistency which apparently is put against us, which I will come to in a minute. In my
31 submission that is not an answer to the problem.

32 The second point is that the assumption is that Parliament intended the Commission to have
33 a broad jurisdiction, that submission is made by Hutchison by its view of the interpretation

1 of the language in rule 3. It is made by O2 and BT in this general argument about
2 practicality.

3 In our submission there is no basis for that. Our submission is that the creation of a special
4 jurisdiction or sub-jurisdiction for the Competition Commission inevitably creates
5 complexities, so there had to be a particular reason for doing it. In our submission, the
6 jurisdiction of the Commission is limited to those matters where it is better at dealing with
7 those matters than this Tribunal – “better” in terms of the resources, as the Tribunal has
8 already indicated, and in our submission that is limited to the detailed questions of
9 considering the quantitative aspects of a price control, not the questions of proportionality
10 or alternative remedies. I do not think it has been submitted that the Tribunal lacks the
11 competence or experience to deal with proportionality or alternative remedy question, and
12 indeed the majority position here is that if the reverse question was put that would be a
13 matter for the Tribunal and it would have competence to do so, and we would say that these
14 questions are the same sort of questions that the Tribunal will have to consider as part of
15 the SMP question.

16 MR. SCOTT: Just as it happens, the list that is provided for in 193(10) is not a comprehensive
17 list of all the price control mechanisms available in the Act so that for instance s.90(4) is an
18 example of one of the things left out. So Parliament was actually being very choosy.

19 MR. WISKING: Indeed.

20 MR. SCOTT: Parliament was being focused and the rules then focus down again.

21 MR. WISKING: Indeed, and much of the argument that has been put to you has been to strain to
22 reinterpret the rule to read in parallel with s.193(10) and if that was the Parliamentary
23 intent, then you would imagine the draftsman would have mirrored the language of s.193 in
24 the Rules; he did not.

25 The third point – again another short point – is that those who argue against us fail to set
26 the parameters of what a price control matter is. It seems to us that their interpretation
27 would effectively transfer to the Commission any aspect of Ofcom’s response to the
28 finding of SMP. Now, that is theoretically a line that could be drawn, but again if that was
29 the Parliamentary intent, why does the legislation not say that? You would expect to see
30 different drafting because the Act or the Rules would simply say: “Any matter other than
31 the question of SMP would be a matter for the Competition Commission”, but it does not
32 say that, it does not draw that line.

33 The last point I wanted to make, and we will no doubt come back to this, is this question of
34 inconsistency, and the argument put against us is one of convenience, there are potentially

1 factual matters that relate to or can be collected within the broad definition of price control
2 matter which should then more conveniently be referred to the Competition Commission.
3 Our submission is that it is not an appropriate response, or not an appropriate means of
4 Statutory interpretation to use the way the issues have fallen out in this case as a way of
5 deciding what a price control matter is. Different cases will raise different factual matters
6 but, in any event, there is clearly the prospect of inconsistency arising on the SMP question
7 so that even if the Tribunal decided the question before it was a price control matter there is
8 scope for factual questions to arise as on the SMP question and this broad price control
9 matter which could give rise to inconsistency. O2 in their skeleton at para.16 helpfully
10 point out that there are issues around the question of countervailing buying power which
11 obviously arise in the SMP question, which would also arise in the proportionality
12 question, so you cannot get away from the inconsistency. That, as Mr. Roth said, is a
13 product of the legislation dividing the jurisdiction in the way it has and the decision of the
14 Tribunal not to dissect the issues in Hutchison's appeal.

15 Those were the only points that I wanted to make – if there are any questions?

16 (The Tribunal confer)

17 THE CHAIRMAN: On your last point, Mr. Wisking, where you say that we should not place too
18 much reliance on how the issues have fallen out in this case when we are interpreting the
19 legislation, will it not always be the case that proportionality as a question is going to be
20 relevant to the question of whether price control should be imposed at all, and also what the
21 price control should be?

22 MR. WISKING: I do not know if I can say “always”, but equally it is conceivable that a whole
23 array of issues on the issue of SMP will also spill over into proportionality, and spill over
24 into the price control so that even if that were correct it is still not an answer. If the problem
25 is inconsistency then drawing the definition, the price control matter, widely does not
26 answer it.

27 MR. SCOTT: To give you an example, we have been reminded from Luxembourg in *Glaxo* that
28 in considering efficient competition you have to consider the final customer. It seems to
29 me the final customer is going to get considered at each level so that in 88(1)(d)(3) you are
30 at the benefits, whereas at the efficient competition level you are at the detriments, but the
31 benefits and the detriments are, if you like, one side and the other side of the same coin, so
32 that the position of the end user, and here a public electronic communications' service is
33 going to recur right the way through each stage of this investigation – probably from
34 market definition onwards, and you cannot get away from that.

1 MR. WISKING: Indeed.

2 THE CHAIRMAN: Thank you. Now, Mr. Pickford?

3 MR. PICKFORD: Madam, it will be a relief to the Tribunal and everyone present that I have
4 one point only to add to the submissions of my learned friend and it is really development
5 on a point that was made by Mr. Wisking – his first point.

6 Even if one puts aside s.193(10) of the Act, the question of whether a price control is a
7 proportionate and an appropriate remedy necessarily involves consideration of one remedy
8 against another – one simply cannot answer that question without considering all of the
9 available remedies that one has in the round, and comparing them against one another,
10 because necessarily proportionality involves consideration of the least onerous remedy that
11 is appropriate in the circumstances. So we say it makes no sense whatsoever to attempt to
12 bifurcate that analysis into whether it is proportionate to impose a price control remedy,
13 and whether separately it is proportionate to impose a different, less intrusive remedy.

14 Necessarily the same issues will inform the consideration in both cases.

15 Now, BT and O2 attempt to take that point on the chin and they say: “We effectively accept
16 that but what we say is that therefore all of those questions would fall to be referred to the
17 Competition Commission.” But on their case the proportionality, for instance, of a
18 decision to impose a non-discrimination obligation would also fall to be referred to the
19 Competition Commission, because inherent in it would be a consideration of the
20 proportionality of all the remedies that are available, including potentially a price control.
21 So we say that cannot be an adequate answer.

22 THE CHAIRMAN: It must depend on the grounds of appeal. If nobody is suggesting that there
23 should be a price control imposed, then that is not a matter that is in dispute between the
24 parties, and therefore it falls outside of the definition for that reason.

25 MR. PICKFORD: Indeed, it would clearly depend on a case by case basis, but the Tribunal has
26 to arrive at an interpretation that is appropriate for all cases, and it is therefore conceivable
27 that if one adopts the BT and O2 approach that one brings everything through the back door
28 into consideration of what is a price control matter? We say that cannot be the right
29 answer.

30 THE CHAIRMAN: Because there is always the potential for a price control to have been
31 imposed?

32 MR. PICKFORD: Because the question of proportionality involves consideration of all the
33 available remedies. But even if one does not go that far one still has the point that Mr.
34 Wisking made that if one looks at s.193(10) it does not refer back to all of the matters that

1 necessarily fall into play. Certainly, the principal argument that has been advanced by
2 H3G, which is that those two issues are necessarily separate, we say that that equally
3 cannot be right, that necessarily when considering proportionality one needs to consider all
4 of these issues in the round, and that they are an *a priori* question for the Tribunal.

5 So we say it is only when one has answered the question of what remedy is proportionate
6 and an appropriate response to SMP and determined that issue, and also come to the
7 conclusion that the appropriate response is a price control, that one goes on to examine the
8 price control in question – to use the words of rule 3(1)(a) and that the matter be referred
9 to the Competition Commission.

10 Unless I can be of any further assistance that is the only point I have to make.

11 (The Tribunal confer)

12 THE CHAIRMAN: Thank you, Mr . Pickford. Now, I think do the interveners supporting H3G
13 wish to say anything in reply?

14 MR. GREEN: I think Mr. Barling has a couple of small points. If I make my points and Mr.
15 Barling makes his and then Miss Rose can sweep up as she sees appropriate if that is all
16 right?

17 The points I have, and I will take them very briefly, are: first, just to deal with the point
18 about a third party wanting to challenge the failure to impose a price control. There is an
19 error of analysis on my learned friend’s side. Jurisdiction is subject matter based, not
20 person based. That is quite plain from rule 3. It is a dispute which relates to one of the
21 subject matter in (a) to (c) – it does not matter who raises it, the *locus* of the person raising
22 it is irrelevant to jurisdiction. Jurisdiction is subject matter governed, and that is an answer.
23 It really does not matter who raises the point before the CAT, it is the nature of the dispute
24 which controls jurisdiction.

25 MR. SCOTT: Yes, I think basically the point is that it is unlikely that a party who had been told
26 they would not have price control would appeal to us to set one.

27 MR. GREEN: Yes, but a third party might, I think, is the point – a third party who was a
28 competitor, saying , let us say, that “company X has been let off the hook”, and they ought
29 to be subject to – it does not matter who brings it, my only point is it is subject matter
30 governed.

31 THE CHAIRMAN: And similarly if a price control had been imposed with which the regulated
32 person was entirely happy, but somebody else thought it ought to have been set in a more
33 constraining way then one would be in exactly the same position as we are in. I did not

1 understand anyone on Ofcom's side to be saying something different . The converse
2 situation, to which we have all been referring, is where no price control has been imposed.

3 MR. GREEN: If no price control has been imposed and someone says it should be imposed then
4 it really is my next point, which is the key to rule 3, is the word "every" in the first line of
5 rule 3, because "every" dispute within 193 is specified, and so the full process that we
6 submit that the Tribunal should go through in a case such as the present is as follows.
7 You say "Every price control matter specified in 193(10) is specified – that is your starting
8 point. If you conclude that price control within 193(10) includes prospective as well as ex
9 post, you then simply ask yourself in relation to the prospective dispute, whether the
10 subject matter of that prospective dispute falls within (a), (b) or (c). You start with the
11 proposition that you are dealing with a prospective dispute which is specified, because that
12 is what Rule 3 says. Every price control matter falling within subsection 10, which is
13 disputed is specified. So you're starting point is that we take as a given a prospective
14 dispute and you simply say "the subject matter now determines it." Is the subject matter of
15 this prospective dispute within (a), and/or (b), and/or (c), they are disjunctive.

16 I will not go back over the submissions I have made about the scope of those because that
17 would simply be to repeat submissions.

18 The third brief point I want to make concerns the risk of conflict. It has been put to you by
19 my learned friends that, as Mr. Flynn put it, it cannot be avoided however you put it. It is
20 "illusory" as he put it, to even try and avoid the problem. With respect, that is a Cassandra-
21 like invitation to chaos. Why should you simply accept that invitation into a risk of
22 conflicting positions. The risk of conflict is not the same as an SMP determination. You
23 are then comparing apples with pears, and SMP is a different issue to a price control matter.
24 There may be subordinate facts which you find, which may conflict, but they are inviting
25 you to a precise overlap of issue dispute and that is quite different.

26 Mr. Wisking's point is if you are willing to tolerate that different issue/fact/dispute you
27 should open the door to issue/issue/dispute. Well that simply does not follow and the fact
28 that there may be a risk of conflict when you are determining SMP as against price control
29 does not mean to say you open the door to further conflict. Indeed, we would simply
30 suggest to you that you try and avoid that. Looking at my notes those are the only points I
31 wish to make, thank you

32 MR. BARLING: Similarly, madam chairman, there are two very quick points. Let us take the
33 case where no price control was imposed on H3G and BT appealed, as they obviously
34 would be entitled to do in those circumstances, which I think is the point that is really being

1 discussed. Mr. Roth agrees that in that case it is within s.193(10), I think he agreed that an
2 appeal in those circumstances would be a price control ----

3 THE CHAIRMAN: I do not think he went quite so far as agreeing with that

4 MR. BARLING: I thought he did, but perhaps it doesn't matter – he did not dispute it very
5 strenuously. One has then to ask oneself if Parliament did that why would the rule maker
6 wish to draw a distinction which Parliament had not drawn for the purposes of the
7 jurisdiction, the right forum? Why would the rule maker want to draw a distinction which
8 it appears is purely arbitrary because today nobody has suggested any reason why these two
9 appeals – where there has been a price control and where there has not been a price control
10 – why they should go to and be decided by different fora.

11 If the rule makers did not intend to draw a distinction of that kind, they would have done
12 so, clearly, we submit, clearly and distinctly, and expressly. They have not done so, and
13 the rules, being subsidiary legislation should not be construed so as to draw an arbitrary
14 distinction unless such a distinction is unavoidable.

15 If such a distinction were unavoidable in terms of other wording of the subsidiary
16 legislation which we submit it clearly is not, then that would raise all kinds of issues of
17 rationality, this being subordinate legislation and therefore capable of being challenged on
18 a number of grounds.

19 So the Tribunal should lean away, and I am not suggesting that the Tribunal is minded to
20 draw a distinction of that kind on the basis of the rules, but insofar as it is being prayed in
21 aid by other parties then we submit that such distinction exists.

22 THE CHAIRMAN: That is quite a brave submission, Mr. Barling. What you are saying, as I
23 understand it, is you now seem to be agreeing with Ofcom's submissions which is that
24 there can be no reason why Parliament or the drafters of the rules would want to deal
25 differently with the issue dependent whether price control had been imposed or not

26 MR. BARLING: We have always said that there was no distinction of that kind in the
27 legislation, but they were both ... in the same way. So to that extent the point does not
28 assist one side or the other because Mr. Roth prays in aid the consistency in that sense,
29 because he says "And therefore they should both come to the CAT to be dealt with on the
30 issue of proportionality of the price control". We say that they should both go to the same
31 forum, and that forum in relation to the proportionality of a price control, whether imposed
32 or proposed to be imposed should go to the Competition Commission.

1 THE CHAIRMAN: And you do not accept that your task on the interpretation of subparagraphs
2 (a) to (c) is any more difficult in relation to a situation where price control has not been
3 imposed

4 MR. BARLING: No.

5 THE CHAIRMAN: And it is where it has been imposed

6 MR. BARLING: Not at all. In fact we say, as we said in opening, that there is a point which one
7 notes Mr. Roth never addressed, which is how on earth can the Competition Commission
8 deal with the proportionality of any price control which it is going to recommend if it does
9 not address the question, if put before it, whether any price control at all is proportionate. It
10 cannot but face that issue and therefore that issue is plainly within rule 3(1)(a) one of the
11 principles relating to the imposition of the price control question.

12 THE CHAIRMAN: So you then adopt Mr. Green's arguments ---

13 MR. BARLING: Yes.

14 THE CHAIRMAN: About the fact that we should not interpret the words "... in setting the
15 condition which imposes the price control in question" as being predicated on the existence
16 of a price control condition

17 MR. BARLING: I entirely adopt that; if I have not made that plain I should do so. I entirely
18 adopt Mr. Green's submissions that there is no justification for a different interpretation.
19 There is no justification for interpreting the rule as it excluding an appeal where there has
20 been no price control conditions imposed, but contrary to the submission made by one of
21 the interveners a moment ago we do not suggest that the proportionality would always have
22 to go every time there is a challenge to, say, a non-discrimination condition. Madam, you
23 answered that point in precisely the way I would have submitted to you. If there were a
24 non-discrimination condition imposed and there was an appeal on the basis that there
25 should have been a price control that would have to go to the Competition Commission but
26 if the issue in the appeal was merely that there should be a non-discrimination provision
27 and there was not an issue in the appeal as to whether a price control should be imposed
28 that would not go to the Competition Commission because the appeal would not then relate
29 to a price control matter.

30 Of course, as Mr. Green said, one has to interpret these rules in a sensible, workable way
31 and there is no difficulty in doing so, in our submission. The wording is perfectly
32 consistent with that, and would not be consistent – and it appears that we all agree that it
33 would not be possible to draw any arbitrary distinctions between an appeal where it was not
34 imposing the price control and an appeal where it was. So that being the case neither side

1 can pray that in aid, as it were, but we submit, yes, that all those cases, if they raise price
2 control matters, go to the Competition Commission.

3 THE CHAIRMAN: Well I understood Miss Rose to take a slightly different stance, but no doubt
4 she will confirm

5 MR. BARLING: Yes, partly Miss Rose's I think primary submissions.

6 I think that is virtually everything. Yes, there may be some risk of overlap, it is inevitable
7 in this scheme, but one wants to minimise it, and not maximise it which is what, in our
8 submission, the other interveners' submissions and Ofcom's submissions would do.

9 Those, I believe, are the only points ----

10 MR. SCOTT: Mr. Barling, one small point . You mentioned the role of the rule maker

11 MR. BARLING: The rule makers, yes.

12 MR. SCOTT: And they are of course governed by 193(1) ---

13 MR. BARLING: Yes.

14 MR. SCOTT: -- which, as you recall, says "the Tribunal rules must provide ...

15 MR. BARLING: Yes.

16 MR. SCOTT: And then contains these words, which we went to before: "To the extent that they
17 are matters of a description specified in the rules". So Parliament was clearly anticipating
18 that the Rules were going to serve some purpose in s.193 otherwise they would not have
19 needed to put that middle bit in and just say anything in sub.10 has to go to the Competition
20 Commission, period

21 MR. BARLING: Of course that must be right. The rules were to put flesh on the bones, and as
22 Mr. Green also pointed out when you actually look at rule 3(1) it appears to be intended to
23 cover virtually every conceivable matter that could arise in a price control appeal. It is hard
24 to imagine how you could be much wider than (a), because almost anything can be
25 included within a principle that needs to be applied. Then of course it goes on to deal with
26 the more specific matters which have been described as relating to the substance of the
27 price control, but they are framed in correspondingly wide terms as s.193(10).

28 THE CHAIRMAN: So your submission then, that in drafting the rule 3 it was intended to catch
29 everything which is potentially specifiable under s.193(10)

30 MR. BARLING: Whether it needed to be is another matter, but in fact, it has, we submit, been
31 drafted in such a way as to be a catch-all, and simply to explain, as it were, what the
32 matters are that are likely to arise, and to do so in a very compendious way.

33 Madam, can I assist any further?

1 THE CHAIRMAN: Thank you. Miss Rose, I see it is now 10 past 1, would you prefer to make
2 your submissions now or should we adjourn and you make your submissions after the short
3 adjournment.

4 MISS ROSE: Yes, madam, if we adjourn now ----

5 THE CHAIRMAN: Yes, we will adjourn until 10 past 2.

6 (Adjourned for a short time)

7 MISS ROSE: Mr. Scott asked a question just before the short adjournment, the interaction
8 between s.193 and the Rules and, in particular, pointing to the fact that under s.193 of
9 course the specified price control matter is only to the extent specified within the Rules.
10 Now, in my submission it is clear that what the legislature has done is to give a discretion
11 to the Secretary of State as to the extent to which matters that fall within the scope of s.193
12 are matters that would have to be referred to the Competition Commission because there is
13 obviously room for different views on that and Parliament decided that that was an
14 appropriate decision for the Secretary of State. Now, it does not follow from that, that you
15 could infer that the rules were any narrower than s.193 because logically the rules could be
16 narrower or they could be of the same extent, it simply depends on the exercise of the
17 discretion. So we are just driven back to the wording of the rules themselves as being the
18 right source of rules, in the context of the statutory scheme as the right source of statutory
19 construction.

20 Coming to that question, Madam, you asked the question why r.3(1) does not say
21 “whether” and if we just go back yet again to the Rules, my submission is that it does not
22 say “whether” because it does not need to. The reason is, if we look at r.3(1)(a), the
23 question is, “A specified price control matter includes a price control matter falling within
24 subsection 10 which is disputed between a party and which relates to the principles applied
25 in setting the condition which imposes the price control in question.” So anything that
26 relates to the principles which Ofcom has applied in setting the SMP condition is within the
27 ambit of r.3(1)(a) and if you ask the question: does the question whether it is proportionate
28 to set a price control fall within the ambit of matters which relate to the principles applied
29 when setting the SMP condition? The answer is self-evidently that it does.

30 MR. SCOTT: You started by reminding us of the question that we had actually put to you.

31 MISS ROSE: Yes.

32 MR. SCOTT: That is a slightly different question. Could you address the question we actually
33 put to you.

34 MISS ROSE: The preliminary issue.

1 MR. SCOTT: The preliminary issue and take us through the argument as you have related to that
2 issue, not to a hypothetical issue which is different.

3 MISS ROSE: Yes. The preliminary issue is set out in your ruling which is at tab 3 and we have
4 it at para.44. "Whether the imposition of a price control on H3G with effect from April
5 2007 is an appropriate and proportionate response to the finding of SMP, or whether a
6 remedy short of price control would be sufficient", is the way the issue has been
7 formulated. Now, the first question, is that any different from the question has Ofcom
8 applied the right principles when setting the SMP condition? Is that any different from that
9 question? The answer is no, it is simply one aspect of that question. This issue is focusing
10 on the question whether Ofcom has acted appropriately and proportionately in deciding to
11 set this SMP condition. Now, of course, the way that the question is framed here is the
12 imposition of a price control. Consider for a moment if the question was formed "the
13 imposition of this price control". There is nobody I think in this room who would argue
14 that the question whether the imposition of this price control on H3G is an appropriate and
15 proportionate response would not be a price control matter. I think everybody would
16 accept that that would be.

17 MR. SCOTT: You have to read the whole question and the question does not say this, the
18 question says "a" ----

19 MISS ROSE: Indeed.

20 MR. SCOTT: ---- or a remedy short of price control will be sufficient. The background to this is
21 that we did not reach this out of nowhere. We came to this as a result of quite a lot of
22 debate.

23 MISS ROSE: Yes.

24 MR. SCOTT: And so it is important that you address that point.

25 MISS ROSE: Of course, but I am addressing it first by asking what is the difference in principle
26 instead of saying "a price control" it said "this price control". How would that take it
27 outside the scope?

28 THE CHAIRMAN: Well, if it said "this price control" that would be eliding to questions which
29 we have to decide separately which is, is the imposition of this price control on H3G
30 appropriate just because it is price control rather than whether the imposition of this
31 particular price control? I think if we used "this" instead of "a" we would just be
32 combining the two questions which it is quite clear need to be kept separate.

33 MISS ROSE: Yes, but the difficulty is that actually they cannot be kept separate. Let us
34 consider a situation. People talk about it as if there were an *a priori* decision taken by

1 Ofcom that in principle, in a vacuum, price control is appropriate. In my submission that is
2 an impossible decision for Ofcom ever to make. What Ofcom has to do is a two-stage
3 process. First of all, it has to conduct the market review and decide whether there is SMP.
4 Then it has to decide whether it is appropriate to impose an SMP condition and, if so, what
5 SMP condition and it imposes the SMP condition. In doing that, it could not simply say,
6 “We decide price control is appropriate” – full stop. That would be an irrational decision
7 because how could you reach that conclusion without asking the question? What is the
8 appropriate and proportionate response to the SMP that we have found given the effect of
9 the SMP in the market, given the impact on consumers, given the need to ensure efficient
10 operation, given all the surrounding circumstances? What is the appropriate SMP
11 condition to impose? That encompasses a range of different questions. Is any remedy
12 needed at all? Is price control the appropriate route or is there some other or lesser relief
13 that would be proportionate and sufficient? By definition if less intrusive regulation would
14 be sufficient, price control would be disproportionate. If there is to be price control, what
15 is the appropriate level of price control? You cannot take any of those issues and reach a
16 decision on them without considering the others because they are inextricably
17 interconnected and they are one decision. They are the decision which results in the
18 imposition of the SMP condition under s.87 and subject to the principles in s.88 and the
19 general statutory duties on Ofcom under the 2003 Act and under the European framework.
20 There is no separate *a priori* decision and if they were to take such a decision it would
21 instantly be appealable on the basis that it would be irrational. That is why in my
22 submission, when you look at the wording of this question, you say, well, everybody
23 accepts that if instead of saying “a price control” it said “this price control” it would be an
24 SMP matter, it becomes obvious that actually there is not a jurisdictional question here
25 because you cannot divorce the two questions.

26 The second point that Mr. Scott I think puts to me about the wording of this question is the
27 final clause, whether a remedy short of price control would be sufficient? In my
28 submission, consideration of that question is inevitable whether you take the view that
29 Ofcom put forward here or the view that we submit is appropriate, because the Competition
30 Commission on anybody’s submissions today has to consider the question whether the
31 price control that has been imposed is proportionate and appropriate. Submissions will be
32 made by H3G in that context, not only is this price control proportionate, but in fact the
33 Regulatory objectives would have been perfectly easily been met by X, Y and Z and,
34 therefore, this price control is disproportionate. So it is inevitable that the Competition

1 Commission has to consider what alternatives were available when it is considering the
2 substance and level of the price control in any event. You cannot avoid that question.

3 MR. SCOTT: If that is the case, why did they bother with the parentheses – I am sorry, let us go
4 to the Act for a moment. Look at s.193. If you think that the Competition Commission has
5 to consider all the alternative remedies ----

6 MISS ROSE: Can I just try and make that clear, that only in relation to the question of
7 proportionality but not, as it were, for the purpose of making a positive recommendation as
8 to what will be the best alternative. The extent of the Competition Commission's
9 consideration is insofar as the question of available alternatives being relevant to the
10 question whether what has been done is proportionate. But whenever you consider the
11 question -----

12 MR. SCOTT: So what you are saying is that in order to reach a decision both the Competition
13 Commission and the CAT have to engage in an on the merits analysis in parallel or in
14 series, precisely the same question of whether something short of price control is
15 appropriate and proportionate because the Competition Commission cannot decide on a
16 remedy short; only we can send it back for a remedy short. So what you are suggesting is
17 that there has to be a full hearing both before the Competition Commission and before us
18 on precisely the same issue.

19 MISS ROSE: Well, except that when the matter comes back to you so far as the price control
20 matters are concerned you, of course, are bound by the findings that have been made by the
21 Competition Commission. So if the Competition Commission in considering the question
22 whether it was proportionate or appropriate to impose any price control, says, "No, it
23 wasn't proportionate" and they might say "because this lesser remedy would clearly have
24 met the objectives", then in my submission that would be a finding that would be binding
25 upon you.

26 MR. SCOTT: And the statutory basis for that?

27 MISS ROSE: The statutory basis for that is s.193(6).

28 THE CHAIRMAN: So what would we do then? We would then remit it to Ofcom on the basis
29 of the findings made by the Competition Commission.

30 MR. SCOTT: But that makes a nonsense, it seems to me, of subsection (10) in that if it was the
31 intention of Parliament to send all remedy decisions to the Competition Commission,
32 which seems to be the effect of what you are saying, then they should have said, "You refer
33 all the possibilities in s.87 to the Competition Commission."

1 MISS ROSE: Sir, that brings me to the question whether a decision not to impose a price control
2 would be a price control matter and on that matter, as the Tribunal knows, we do not take
3 the same position.

4 THE CHAIRMAN: It does not quite bring you to that question. I am still trying to explore what
5 the process would be if you are right in a case where price control had been imposed.
6 According to your submissions, the whole question of whether that was appropriate or
7 correct principles had been applied, goes off the Competition Commission; the
8 Commission decides, "Actually, there were other things that could be done; other things in
9 the list set out in s.87 which could have been done which would have met the concerns,
10 therefore they report back to us that the price control was not appropriate or proportionate."
11 And they may or may not then also say "Because this other solution would have been
12 adequate or better."

13 MISS ROSE: Yes.

14 THE CHAIRMAN: What then are our powers? What then are our obligations under the section
15 in remitting that back to Ofcom?

16 MISS ROSE: It depends, of course, on what findings have been made by the Competition
17 Commission because your obligation under s.193(6) is to decide the appeal on the merits in
18 accordance with the determination of the Competition Commission. So if the Competition
19 Commission has decided that imposing a price control is disproportionate because there is
20 a range of lesser remedies which would have been available, then your obligation is to
21 decide the appeal in accordance with that determination. So in other words it would not be
22 open to you to say, "We disagree. We think that a price control would have been
23 proportionate, but just not the one that has been imposed." You would have to start from
24 the point that a price control was disproportionate, but then you would be in a position to
25 decide the appeal on the merits in relation to what lesser remedy could be imposed. You
26 would have your normal range of powers there, whether you determine the matter yourself
27 or remitted it to Ofcom for Ofcom to reconsider on the basis of the application of proper
28 principles. So you could do that. But if the Competition Commission said in this case,
29 having analysed all the submissions, looked at the economics, looked at the whole state of
30 the market, "We conclude that actually there is only one sensible remedy that should have
31 been imposed in this case and it is X; and to impose a price control was plainly
32 disproportionate on the basis that a price control was more intrusive than X", then your
33 determination on the merits would have to be made in accordance with that decision by the
34 Competition Commission. It may well be that the Competition Commission would not

1 consider it appropriate for it to make that sort of decision because it might consider that the
2 only positive decision that it was required to make was whether the price control was
3 proportionate and that it did not need to go from that to make a positive selection between
4 the other alternatives that were available.

5 What that plainly does not involve, that analysis, is the problem of overlapping concurrent
6 jurisdiction because the statutory scheme makes provision such that where a matter is a
7 specified price control matter and is referred to the Competition Commission, their
8 decision takes precedence and unless it is irrational or *ultra vires* your decision must be
9 compatible with it. So we do not have the absurd result, with respect, that we do on the
10 construction that my learned friends have adopted.

11 I have been somewhat deflected and I would like to return to just addressing the
12 submissions that were made, particularly by Mr. Roth, in reply to my submissions because
13 I do submit that the way that this matter has been argued by Ofcom is, with respect, very
14 telling. As the Tribunal will recall, the position that Ofcom is adopting now is very
15 significant and different from the position that they adopted in July, at which time they
16 were accepting that many of the matters that they now say are not price control matters
17 were price control matters. Leaving that aside, Mr. Roth sought to deal with my
18 construction of r.3(1)(a). Can we just go back to r.3(1)(a) and he said, this is his
19 submission, r.3(1)(a) only refers to the principles involved in setting the level of price
20 control after a decision has been taken to impose price control. That is his submission on
21 the construction of 3(1)(a). In my submission that is an impossible construction of 3(1)(a)
22 because, first of all, it is premised on the notion that Ofcom takes a decision to impose
23 price control in a vacuum before it takes a decision to impose the particular SMP condition
24 in question. As I have submitted, that is plainly impossible and, secondly, his submission
25 is that the only principles that are engaged by 3(1)(a) are the principles involved in setting
26 the level of price control. In my submission that, again, cannot be right, firstly, because it
27 is not what 3(1)(a) says and, secondly, because – and this point has not been addressed by
28 anybody who has spoken today – why have 3(1)(a) in there at all because that would
29 plainly be covered by 3(1)(c). Neither Ofcom nor any of the interveners who support
30 Ofcom has explained to you what is the purpose of r.3(1)(a) in this statutory scheme.
31

32 THE CHAIRMAN: That is not quite what I understood was being suggested. I understood that
33 Mr. Roth thought he had to meet a point that you were making which was that if one did
34 not regard the principles applied in setting the condition which imposes the price control in

1 question as meaning whether to impose a price control, then that was an empty category
2 because everything else is covered by (b) and (c). He thought that was the submission that
3 you were making and therefore (a) must include the issue that we are dealing with, whereas
4 he pointed to some high level questions, whether it should all be set at zero or whether
5 those sorts of structural issues that Mr. Scott referred to, the question of whether it should
6 be cost based or retail minus, as being the sort of architecture of the price control and then,
7 which he said you would say would fall within (a), (b) and (c) then looking at the
8 nitty-gritty of, well, once you have decided what kind of price control you are going to
9 have what actually are the costs, what actually should the levels be set. That is what I
10 understood as being the point he thought he was meeting and how he met it.

11 MISS ROSE: But, Madam, with respect to him, if that is the point that he was making, and your
12 understanding of his submission may be better than my own, it does not get away from my
13 principal point because if you say, well, you are talking about high level issues like should
14 it be set at zero or should it be retailed minus or should it be cost based, those come within
15 (c).

16 MR. SCOTT: It seems to me if you think about the task facing whoever it is, for example, the
17 Competition Commission may have to decide whether they need one model on the basis
18 that there is a technological neutrality, so they are not going to pay attention to the fact that
19 there are 2G networks and 3G networks, they are just going to have one model, or whether
20 they are going to have nine models between the different networks. So there you have got
21 an example of the sort of issue of principle that comes before you get to method and before
22 you get to the actual provisions. Similarly, as Madam Chairman has said, you have got this
23 question of are you going for retail minus or are you going for a cost based approach; if
24 you are going for cost based approach, are you going for a LRIC approach and so on. That
25 seems to me all to be happening at the principal level. Then you get into the method and
26 what you actually do and then you get into the detailed provisions. Now, by the time you
27 get to the detailed provisions, are you having a single average rate or are you having a rate
28 which sets separate rates for peak rate, evening and weekend? You are getting into a
29 wealth of individual detail. Is it flat? Is it stepped? You have got all those. Now those are
30 really the matters of the detailed provision which flow on down from the first two steps.

31 MISS ROSE: Sir, with respect, that does not deal with my point. The point that I make is which
32 of the high level matters that you have identified does not fall within (b) or (c)? The
33 answer is they all fall within (b) or (c) because the question such as should you have one or
34 two models go to the methods applied in determining price control. The question as to the

1 level of the price control, whether it should be at zero or not, goes to the level of the price
2 control. But it is accepted by everybody in this case that when you are looking at the
3 principles that should be applied, that includes principles such as the principle of
4 proportionality, the establishment of a level playing field in the market.

5 Now, the submission that I make is how do you distinguish when applying that principle
6 from the question of whether any price control is appropriate and the question whether this
7 price control is appropriate? In my submission is you cannot.

8 THE CHAIRMAN: Yes, I think we have got that point.

9 MISS ROSE: There is another point as well which I do not want to lose sight of in 3(1)(a) and
10 that is that what 3(1)(a) focuses on is not the principles applied in setting the price control,
11 it is the principles applied in setting the condition which imposes the price control and in
12 that respect 3(1)(a) is different from 3(1)(b) and 3(1)(c). Both 3(1)(b) and 3(1)(c) are
13 focused on the way in which or the level at which or the substance of the price control. So
14 you look at 3(1)(b), "Methods applied, calculations used in determining that price control"
15 and (c) what the provisions impose in the price control contained in that condition should
16 be. So (b) and (c) are both focused on the question, how did you calculate this price
17 control and what should it be? But (a) is focused on a different question, which are the
18 principles applied in setting the SMP condition. The point that I made is that when
19 deciding to set the SMP condition Ofcom is bound by s.3 and s.88 to do so in accordance
20 with the principles of proportionality and promotional competition and so forth. That is the
21 basis for my submission, that you simply cannot distinguish between the "whether"
22 question and the "how much" question because both of those questions must be considered
23 by Ofcom as part of the principles applied in setting the SMP condition.

24 MR. SCOTT: Sorry, forgive me. I may be missing something here. You are drawing a
25 difference, as I understand it, between the term "the condition" which imposes the price
26 control and ----

27 MISS ROSE: But what you are focusing on is the principles that Ofcom has applied when it took
28 the decision to impose this SMP condition.

29 MR. SCOTT: What it actually says is "setting the condition which imposes the price control".

30 MISS ROSE: Yes, and the condition which imposes the price control is the condition under
31 s.87(9).

32 MR. SCOTT: Yes.

33 MISS ROSE: The SMP condition.

1 MR. SCOTT: We seem to be drawing a distinction there between “the price control” and “the
2 condition” which imposes it.

3 MISS ROSE: Yes, because what I am focusing on is the statutory duties to which Ofcom is
4 subject when it takes a decision to set an SMP condition under s.87(9).

5 MR. SCOTT: If one goes to s.88(1) the setting of a condition is appropriate.

6 MISS ROSE: Yes.

7 MR. SCOTT: So they have got to decide whether setting a condition is appropriate.

8 MISS ROSE: No, that “the” condition.

9 MR. SCOTT: Yes. My difficulty with you is that I do not entirely understand whether this will
10 be different if it said it also appears from the setting of “the price control” it is appropriate.

11 MISS ROSE: You see the condition you are talking about is an SMP condition falling within
12 s.87(9), that is what “the condition” means here.

13 MR. SCOTT: Absolutely.

14 MISS ROSE: Which includes an SMP condition imposing on the dominant provider such price
15 controls as Ofcom may direct.

16 MR. SCOTT: And some other things.

17 MISS ROSE: And some other things.

18 MR. SCOTT: Yes.

19 MISS ROSE: So when it decides whether to impose an SMP condition under s.87(9) Ofcom is
20 bound to do so on an application of the principles in s.88. Then when you look at Rule
21 3(1) it indicates that a specified price control matter includes “any matter which relates to”
22 and of course the Tribunal has heard this several times before, “any matter which relates to
23 the principles applied and set in the SMP condition”, which imposes the price cap.

24 MR. SCOTT: And, as we explained to you, we see a difference in the language in that it does
25 not reflect the language of 88(1), it does not say: “The principles applied in deciding
26 whether the setting of the condition is appropriate for the purposes of 1, 2, 3”.

27 MISS ROSE: Forgive me, nor does s.88. What s.88 says: “Ofcom are not to set an SMP
28 condition falling within s.87(9) except where it appears to them X, Y and Z. So that all
29 that s.88 does is to tell Ofcom the principles it must apply in setting an SMP condition.

30 MR. SCOTT: No, no, no.

31 MISS ROSE: Yes.

32 MR. SCOTT: It is a gateway provision. I am sorry, I am prejudging – it may be a gateway
33 provision.

1 MISS ROSE: Sir, with all due respect, that will not do, because if you read the whole of s.88,
2 and this again is common ground between the parties, there are parts of s.88 which give a
3 detailed calculation of the level of the price control and therefore, in my submission, lends
4 further support to my submission that you cannot divorce the question “whether” from the
5 question “how much”, they are one question. It is entirely artificial. It would, in my
6 submission, be bizarre if the Secretary of State, Parliament, it would be entirely bizarre if
7 that is what the Secretary of State had intended to do from the broad and general wording
8 of Rule 3(1)(a).

9 That brings me to the next point that Mr. Roth made, and this, in my submission, is a
10 remarkable approach from the Regulator in this field, because one of the main points,
11 madam, as you put to him – one of the main points we had raised in our submission – was
12 that the outcome of the construction for which Ofcom are contending is extremely
13 undesirable (to put it at its lowest) because it results in the same factual questions being
14 determined concurrently by two Bodies with concurrent jurisdiction, neither of which is
15 capable of binding the other – the CAT or whether a price control should have been
16 imposed, and the Competition Commission on the question of the level of the price control,
17 the proportionality of the level of the price control, the proportionality of the level of the
18 price control.

19 Mr. Roth did not address that question at all in his submissions until prompted by you,
20 madam; that in itself is surprising. Secondly, when he was prompted on it, what he did was
21 essentially to put up his hands and say “Yes it is right, there is an overlap, it is very
22 undesirable, but there is nothing we can do about it, that is the statutory scheme.” That
23 means that the Regulator is positively advocating to you that you should adopt a
24 construction of these rules which leads to an undesirable and, in my submission,
25 unworkable result. But there is no basis for the submission that that is what the Secretary
26 of State intended and, indeed, it is contrary, as Mr. Green has indicated, to the most basic
27 principles of statutory construction. So what you should be doing is striving to avoid that
28 result and not to achieve it.

29 What Mr. Roth has not, with respect to him, done is explained what on earth it is in the
30 broad and general wording of rule 3 that drives Ofcom into this unpalatable and
31 unsatisfactory conclusion. In my submission the answer is that there is nothing in rule 3
32 that drives you to that conclusion. The Regulator agrees that the effects are undesirable,
33 and in my submission the answer is the simple one, namely, that you adopt the construction
34 of the rules that leads to a workable and feasible method of dealing with these issues.

1 That brings me to the vexed question of whether an appeal against a decision not to impose
2 a price control would or would not be a specified price control matter. It remains the
3 position of H3G, first that you do not need to decide this question, but secondly that our
4 submission on it would be that it is not a specified price control matter and we can, with
5 respect, see why the Tribunal thought it was a bold submission to suggest that it was.

6 The question is what flows from that? Is there any illogicality in saying that the question
7 of the proportionality of imposing price control goes to the Competition Commission if the
8 decision appealed is a decision to impose price control, but it is decided by the CAT if it is
9 not, and in my submission there is no illogicality.

10 The starting point, as we know, is that Parliament and the Secretary of State have both
11 taken the view that questions relating to the level of price control, the form of price control
12 particularly fall within the expertise of the Competition Commission and therefore are
13 particularly appropriate to be decided by it. However, where a price control has been
14 imposed and the proportionality or appropriateness of it is in issue it is inevitable that that
15 will arise both in relation to the level of the specific price control and as a matter of general
16 principle, whether any price control is appropriate. In those circumstances Parliament and
17 the Secretary of State very sensibly take the view that the whole matter should be
18 considered as one by the Competition Commission; not because the CAT does not have the
19 expertise to consider issues of proportionality – quite self-evidently it does, it does it all the
20 time, but because in the interests of getting a single, clear, coherent determination where
21 all the issues, the nitty-gritty complex price control matters, and the broader questions are
22 considered together as a piece to get a coherent finding.

23 The same policy considerations do not arise if the appeal is against a decision by Ofcom
24 not to impose price control because in that situation there will be by definition no nitty-
25 gritty questions about whether Ofcom has imposed price control at the right level. The
26 issues will be the s.88 type issues: is price control appropriate for ends set out in s.88.

27 Obviously matters well within the competence of the CAT can be dealt with by it and the
28 remedy will then be to refer the matter back to Ofcom, for Ofcom to make the primary
29 decision about whether it should touch price control and, if so, at what level. So in my
30 submission there is no illogicality in treating the two circumstances differently. Indeed,
31 what you have as a result is a coherent Statutory scheme which prevents the highly
32 undesirable outcome of overlapping concurrent restrictions which enables appropriate
33 determination by bodies that are equipped to do it, and which rightly puts the primary
34 responsibility for price control on Ofcom to take the first decision. It would be quite wrong

1 for the Competition Commission to look at that question before Ofcom had decided what
2 was the right level for price control.

3 Madam, can I just see if there are any further points? (After a pause) Madam, those are
4 my submissions.

5 MR. SCOTT: Just one small point. You referred us to the rest, we have concentrated on 88(1),
6 when you turn the page to 88(2), (3), (4) and (5), there are a variety of different things
7 going in that one is being instructed as to what one takes into account in what way.

8 MISS ROSE: Yes.

9 MR. SCOTT: And so for example in (2) ----

10 MISS ROSE: Yes, extent of the investment.

11 MR. SCOTT: Yes, now that is setting an SMP condition, so there you are they have already
12 decided that it is appropriate and now you have to take the investment into account.

13 MISS ROSE: No, with respect, I do not accept that, sir, because I do not accept that there is only
14 a two stage process.

15 MR. SCOTT: Yes, I understand.

16 MISS ROSE: The only decision is are we going to set an SMP condition with 87(9) and, if so,
17 what? That is a single decision, you cannot separate it out, and that involves questions of
18 principle – is any price control necessary, and questions of level taking into account
19 matters such as the degree of investment.

20 MR. SCOTT: So what you would say is despite the difference in language between sub (1) and
21 sub (2), they are in fact addressed to the same process.

22 MISS ROSE: The difference is that 88(1) is setting limits on the power to impose an SMP
23 condition at all, and 88(2) is identifying matters which must be taken into account by
24 Ofcom when it sets an SMP condition, that is the difference.

25 MR. SCOTT: Yes.

26 MISS ROSE: But they are all matters which, in my submission, relate to principles of the setting
27 of an SMP position, and they are all matters which would go to the Competition
28 Commission if you have a price control appeal.

29 MR. SCOTT: Thank you

30 PROFESSOR BAIN: Miss Rose, I am going to ask you to explain once again a key part of your
31 argument because I do not think I have followed it.

32 MISS ROSE: How depressing! (Laughter)

33 PROFESSOR BAIN: I am sure it is. I find it difficult to understand why it is impossible to look
34 at the menu of s.87 and go down the list of that menu on behalf of Ofcom, and say:

1 “Looking at that list I think the following elements of SMP conditions would be
2 appropriate”. I might choose a transparency obligation pure and simple. I might at that
3 stage say “no, that’s not going to be enough, I really have to go to price control”, but I do
4 not yet know whether the price should be 5p a unit, 6p a unit, 4p a unit, or different
5 between MNOs. At the first stage nothing other than price control will do; I am going to
6 have to have a price control. I then go through a lot of detailed analysis of accounting
7 information of economic theories, of decisions as to whether or not spectrum costs are to
8 be included and if so what proportion are to be included, all these things go in, and at that
9 stage I am looking at much more detailed matters, and I take a decision finally that these
10 are going to be the particular numbers I put into my SMP condition of price control. Now,
11 it seems to me that intellectually I can distinguish between these two levels very easily.
12 You are telling me that the two parts are quite inseparable, can you try again to explain to
13 me why I have to do all of this, 5p, at the same time as I know I am going to need price
14 control?

15 MISS ROSE: You can decide that you are minded to consider price control, but you cannot take
16 that decision until you have been through your full analysis of what price control is
17 necessary and proportionate, because if you first of all tie your hands by saying that price
18 control is appropriate in a vacuum before you have completed your analysis what happens
19 if your analysis then shows that in fact any level of price control is going to distort the
20 market?

21 PROFESSOR BAIN: Well if I discover that at the end then I would go back and rethink, but I
22 have to say I do not think I would have done the first stage properly if that was the possible
23 result.

24 MISS ROSE: Sir, with respect that is our argument, that you have to leave open the possibility
25 that you rethink, because until you have completed stage 2 you do not know whether stage
26 2 is right. You may say “I am minded to impose price control”, but you do not know –
27 even if you have the power to do that under s.88 – until you have conducted the analysis
28 and reached a conclusion as to what is the appropriate form as a level of price control.
29 Clearly you will not engage in that expensive exercise unless you are minded to impose
30 price control, but if you took that *a priori* decision I would appeal you. I apologise for not
31 being clear the first time around.

32 PROFESSOR BAIN: I think you are saying it is the same story, and I will reflect on it.

33 MISS ROSE: It may be, sir, that you understand but disagree. Unless there are any more
34 questions?

1 THE CHAIRMAN: I think we have run out, Miss Rose. Now, we have canvassed quite a lot of
2 material in your reply, whether or not there are new aspects which those on the other side
3 wish to answer, is there anybody jumping up saying that they want to deal with something
4 that was new that arose from what Miss Rose said?

5 MR. ROTH: Just to clarify one very small thing, Miss Rose said that I said that rule 3(1)(a)
6 refers to the principles applied in setting the level of price control, I hope I did not say that
7 but if I did I misstated. What I meant to say is the principles applied in setting the price
8 control, and I gave an illustration from s.4 I think of the appendix.

9 THE CHAIRMAN: Yes, thank you. I think that concludes then the submissions in relation to the
10 preliminary issue. So let us now turn to the points that Vodafone raised in their
11 submissions, which really are directed to what we do from here on in. Before we invite
12 submissions from Vodafone and others it might be helpful to outline how the Tribunal sees
13 the matter progressing from here. We would hope to deliver our decision on the
14 preliminary issue at the latest by the 12th October. As pre-figured at the end of the last case
15 management conference, we would at the same time as issuing that judgment issue
16 directions for the future conduct. If the judgment is delivered on the 12th October, the
17 following is a guide as to how we would see those directions developing.

18 The defence from Ofcom would be delivered by the 2nd November. That would cover in
19 detail the non-price control matters, whatever those turn out to be, covering the price
20 control matters to the extent necessary to assist with the formulation of the questions and
21 that is in relation both to the H3G appeal and the BT appeal; statements of intervention
22 similarly covering non-price control matters in detail and price control matters so far as
23 that assists with the formulation of questions by the 16th November. We envisage the
24 hearing of the non-price control matters in the H3G appeal taking place on the 11th and 12th
25 December and would therefore order skeletons in sequence in the third and fourth week of
26 November.

27 So far as the formulation of the questions on the price control matters is concerned, the
28 Tribunal clearly needs to see the defence and the statements of intervention and we
29 envisage that once we have had an opportunity to consider those, we will circulate in
30 writing draft questions, again covering both the H3G and the BT appeals and seek written
31 comments on those from the parties. We will then be in a position to decide whether we
32 need a further hearing on the formulation of the questions, but we would envisage, subject
33 to that, the questions then being referred to the Competition Commission in the second half
34 of December.

1 I hope that that is helpful to people in indicating our thinking. I do not know, Mr. Wisking,
2 whether it would help you before you stand up to have a brief moment of adjournment to
3 consider that and how that leaves you?

4 MR. WISKING: Madam, that would be helpful.

5 THE CHAIRMAN: We will rise for ten minutes.

6 (Short break)

7 THE CHAIRMAN: Yes, Mr. Wisking.

8 MR. WISKING: Thank you. The procedural issue which we are about to talk about is set out at
9 length in our skeleton, so I will not repeat the material in there. Just to start, I just want to
10 emphasise that this issue arises regardless of the outcome of the price control matter
11 preliminary issue. As I said previously, the possibility of factual matters overlapping could
12 arise if the non-price control matter were limited to SMP and O2 themselves have
13 identified issues which fall either side of SMP and the other issues. I think the Tribunal
14 itself recognised in its preliminary ruling at para.41 that this is just a consequence of the
15 division that exists here between price control and non-price control matters and the
16 decision of the preliminary ruling not to dissect the elements of Hutchison's appeal.
17 So the prospect of inconsistency arises in this case inevitably. We therefore in the skeleton
18 gave thought to how it could be addressed. We put forward one option there, but I think
19 there are three potential options for dealing with the issue. The option we put forward in
20 the skeleton was that the Tribunal would reach a preliminary decision on the matters with
21 which it is seized and it would deliver that decision prior to the reference being made to the
22 Competition Commission; that the reference would in terms effectively require the
23 Competition Commission to have regard to the factual findings in that preliminary
24 decision. So the terms of the reference would not bind the Competition Commission in any
25 way in respect of the price control matters, but simply require the Competition
26 Commission to follow those factual findings which the Tribunal had already determined
27 and which were relevant to the non-price control matters insofar as they were relevant to
28 price control matters. Those factual issues would not themselves be price control matters,
29 so the effect of the reference would be not to in any way bind the Competition Commission
30 in respect of its jurisdiction. In our submission, the ability to make that kind of reference
31 flows out of the scheme of the Act. We accept there is no express power on the part of the
32 Tribunal to do that, but if you look at the scheme of the Act you have a structure where the
33 appeal is to the tribunal in s.192(2). It is the Tribunal who has to decide the appeal on the

1 merits in s.195(2) and that includes at the end of the process that it is the Tribunal who
2 makes the directions to Ofcom in s.195(3).

3 The Competition Commission in this process has no freestanding jurisdiction. If it had
4 been the intention of Parliament for it to have one, that would have been provided for. It
5 has not got freestanding jurisdiction, so its determination only takes effect by reason of
6 being incorporated into the Tribunal's decision.

7 We say what arises from that is that the Tribunal is the primary and, if you like, the
8 hierarchy superior decision maker in the process and there is an obligation on the Tribunal
9 in producing that final judgment, recommendations, directions, if that is what follows, to
10 produce a judgment which is internally consistent and to seek to avoid inconsistency. Out
11 of that flows, in our submission, the ability to make a reference in the terms that we have
12 suggested.

13 In doing that, that produces a number of benefits. It ensures consistency; it avoids
14 duplication of effort where the same factual matters might arise in front of the Competition
15 Commission and the Tribunal. It avoids the need to dissect Hutchison's appeal into
16 different issues; it preserves the Tribunal's role as the principal appeal body and in our
17 submission will actually enable the Competition Commission to do its work more quickly
18 because it does it against the background of a judgment of the Tribunal and therefore
19 results in the more efficient disposal of the proceedings.

20 I understand there is an issue as to whether the Tribunal has *vires* to make such a reference.
21 In our submission that flows out of the scheme of the Act, but if the Tribunal finds that it
22 does not have the *vires*, the alternative is to follow the same process, that the Tribunal
23 reaches a preliminary decision. A reference is then made to the Competition Commission
24 without the explicit provision that we suggested, but on the basis that the Competition
25 Commission would then naturally have regard to the Tribunal's preliminary decision. That
26 still has the advantage because the Tribunal's judgment is delivered before the reference is
27 made of avoiding the duplication of effort and still has the benefit of engendering some
28 efficiency of procedure because the Competition Commission can see the Tribunal's
29 preliminary decision.

30 The third option which is available to the Tribunal and we would submit the less preferable
31 option, is that the Tribunal reaches a preliminary decision, that that decision is delivered
32 some time after the reference is made, but at the time of making it the Tribunal directs that
33 the Commission does not reach a determination until the Tribunal has delivered its
34 preliminary decision and, therefore, the Competition Commission is in a position to have

1 regard to that decision before it reaches its determination. So that you have a situation
2 where reference is made; the Competition Commission proceeds; at some point the
3 Tribunal's decision is available to it; it can have regard to that decision, but for that
4 process to work there would need to be a direction that the Competition Commission could
5 not reach a final determination until the Tribunal's decision had been delivered.

6 In our submission that is less attractive because then the issues of duplication start coming
7 in. The Competition Commission will want to get started and therefore will start
8 investigating matters in parallel with the Tribunal. So in our submission that is the less
9 preferable option and options one and two are to be preferred and two, if the Tribunal finds
10 it has no *vires*.

11 THE CHAIRMAN: Just to be clear, two, does not involve including in the questions a direction
12 to the Commission to have regard to our findings of fact, but assumes that they will do so
13 and postpones the referral of the questions until after the Tribunal has decided the non-
14 price control matters.

15 MR. WISKING: That is right. In the context of the indicative timetable which the Tribunal has
16 set out earlier, options one and two might involve a slight delay in the referral to the
17 Competition Commission, but not a significant one and it has the benefits, as I say, of
18 avoiding duplication, reducing efficiency.

19 MR. SCOTT: So in essence what you are saying is if we had in mind, given a parallel process to
20 formulate the questions and have them ready by the second half of December, but we had
21 heard the other on the 11th and 12th December and got our judgment out early in the New
22 Year, the practical effect would not be very great.

23 MR. WISKING: Yes, my option two would involve making a reference in January so that the
24 Competition Commission would not be formally seized until after the judgment was
25 available. But option three, yes, may not have much practical effect. As I say, option two
26 is preferable because it means that the Competition Commission, for example, can
27 formulate the information request that it would make which, as you will appreciate, might
28 involve the provision of quite substantial amounts of data and forth to the Commission in
29 the light of the Tribunal's decision and that would be of benefit to the parties.

30 THE CHAIRMAN: I am just thinking how this would affect the parties. Certainly I see the
31 point that if the questions are referred to the Commission before the Tribunal has issued its
32 decision on the non-price control matters, because of the front loading of the process in the
33 Competition Commission that may not help in reducing duplication. If we took your
34 second option of waiting before we referred the questions until we have delivered judgment

1 in the price control matters, is it open still to the parties to ask the Competition
2 Commission to come to a different view, or would you say that the findings that we would
3 make in the course of the non-price control matters preclude either in law or in practice the
4 parties seeking to re-open those before the Commission?

5 MR. WISKING: That is a very good question. It may well depend on the particular issues.
6 Certainly it might be difficult for parties to advance position before the Competition
7 Commission in relation to which they were already bound by the Tribunal. I suspect there
8 would not be a legal bar to doing so, but I think there would be a practical and evidential
9 one. Equally, that option does allow for the Commission to say, well, we have looked at a
10 whole range of other material and we will depart from the Tribunal's factual findings in
11 some respect. But that would not be an inconsistency so much as the Competition
12 Commission would be effectively distinguishing the Tribunal's findings. It may well be in
13 those circumstances the Tribunal when it received the determination of the Competition
14 Commission would then say, "Well, now having seen the further work that they have done,
15 we would accept those findings and that would not be an inconsistency in the way that we
16 envisage, but actually an evolution of the fact finding in the case." In our submission these
17 issues exist and therefore we have put forward these options as a way of dealing with them
18 rather than ignoring them and hoping they will go away.
19 I do not want to take up too much time, so having laid out those options unless there are
20 any other questions, I will sit down.

21 THE CHAIRMAN: Are there any parties who want to say anything in support of one or more of
22 those options that Mr. Wisking has set out? Mr. Flynn?

23 MR. FLYNN: Madam, I simply indicate that we support option two. If you are taking votes, as
24 it were, we support option two. I note that that was indeed the Tribunal's original
25 inclination. I will just state it as a fact. You wrote to the parties on the 12th July and in
26 para.25 of that letter you said: "Ordinarily the Tribunal would endeavour to decide the
27 market definition and SMP issues before making any reference. It appears that none of the
28 parties is urging that course upon the Tribunal." Well, I think now they are, Madam, at
29 least the Interveners, and I think, although I have a faulty recollection, that I did so at the
30 last CMC as well. We would urge you to decide these matters before making the
31 reference. I do not think there will be much of a delay, but even if it is a delay, it will
32 avoid possible messes later which are also likely to be time consuming and awkward. So
33 we are in favour of option two which may require a slight amendment to your timetable.

34 THE CHAIRMAN: Thank you, Mr. Flynn. Mr. Pickford?

1 MR. PICKFORD: Madam, T-Mobile also supports option 2 for the reasons that Mr. Flynn has
2 already given.

3 MR. GREEN: O2 too, as it were! We would not want the CC to embark blind upon a process
4 which gives rise to a risk of conflict.

5 MR. SCOTT: Should we have offered you a single transferable vote? (Laughter)

6 THE CHAIRMAN: Miss Rose, would you like to address us on this point?

7 MISS ROSE: Yes. ... [Inaudible] ... and the fact that a decision had been taken by this Tribunal
8 in relation to those issues would in no way impede or inhibit parties from running the
9 points again in the Competition Commission, so there would be no saving of time or
10 reduction in the investigation. They might not win but it would not stop them wishing to
11 make the points.

12 In my submission, the right approach to try to minimise inconsistencies, whilst minimising
13 delays – in fact option 3 – which in fact, in my submission, is the inevitable result of the
14 timetable that you have already proposed. What should happen is that this Tribunal should
15 now proceed to determine the non-price control matters, and concurrently with that to refer
16 the questions to the Competition Commission but with a direction that the Competition
17 Commission should not reach a final decision until it has the benefit of seeing the
18 Tribunal's decision on non-price control matters. Indeed, that is the inevitable timetabling
19 result, because if you hear the non-price control matters in December, and hope we will
20 have a result as soon as possible in the New Year, then if the questions are referred in the
21 second half of December we will be looking at a four month period or so for the
22 Competition Commission if the timetable works naturally. In my submission that is the
23 process which best accommodates the problem of overlap, whatever the scope of price
24 control or non-price control matters and minimises the crucial issue from H3G's
25 perspective of seeking to minimise delay.

26 Can I raise one small point – we may not be on it at the moment but I just wanted to flag it
27 up – which is the question of time estimate for the hearing in December. There has been
28 some discussion between counsel and we think that two days is unlikely to be sufficient
29 and we were wondering if the Tribunal would be able to list it for 10th to 13th December
30 inclusive – a four day period?

31 THE CHAIRMAN: I think the position is that the 10th is difficult for one member of the
32 Tribunal.

33 MISS ROSE: I presently have another engagement on 14th which could be problematic.

34 THE CHAIRMAN: Do counsel generally think this is a three day or a four day?

1 MISS ROSE: I think there is some question that it may depend on the scope ----

2 THE CHAIRMAN: Yes, of course it does, yes.

3 MISS ROSE: I do not think anybody thinks it is a two day case. I do not know if you would be
4 able to start it the previous Friday perhaps?

5 THE CHAIRMAN: No, I think the earliest it can start is the 11th. I think perhaps we cannot
6 really take it much further than that until we know what the scope of the non-price control
7 matters are. (After a pause) I think we will put it in the diary for the three days, 11th, 12th
8 and 13th and we can always revisit that.

9 MISS ROSE: I am grateful. Those are my submissions on the options, madam.

10 THE CHAIRMAN: Yes, of course, we did hear argument on this sequencing point at the CMC
11 and we have really only allowed this to be reopened at this stage because of this suggestion
12 that Vodafone put forward of incorporating this direction to the Commission within the
13 questions referred, so we do not intend to revisit this every time we have a hearing, but if
14 there is anything – well Mr. Barling is on his feet so we will hear what he has to say

15 MR. BARLING: Only for two seconds, I hope. I just make the obvious point to begin with that
16 of course the risk of inconsistencies which Vodafone's question is designed to deal with
17 becomes very significantly greater on the basis of Ofcom's and Vodafone's and the other
18 submissions, I think one accepts that.

19 In dealing with the much lower risk of inconsistency, if we are only talking about an SMP
20 issue, which of course is what we submit should be the case, one should shy away from any
21 concept of preliminary Judgments, whatever that may be – a recipe for huge problems.
22 One should shy away from any directions which attempt to tie or bind the findings of the
23 Competition Commission for the reasons which have been given already that we submit
24 any such attempt would be *ultra vires*, because quite the reverse is in fact the statutory
25 approach in s.193(6).

26 As far as option 2 is concerned, which is the favoured option by some people, of delaying
27 the reference to await a Judgment on SMP, our submission is as it was before, that there
28 should be no direction to that effect because the problem should not arise because almost
29 inevitably on the timing proposed a Judgment on SMP will be available well before the
30 Competition Commission is ever likely to come to report and they can have the benefit of
31 reading it, and there will then be no problem in practice and no unnecessary delay which is
32 what would happen on option 2. So we agree with what Miss Rose has said, but we would
33 not subscribe to there being any direction along the lines of what is suggested in option 3,

1 but simply that option 3 is likely to be what happens in practice and it should be, in our
2 submission, left to happen.

3 THE CHAIRMAN: Mr. Roth?

4 MR. ROTH: Madam, only on option 1, which we say, with respect is not an option, in response
5 to the Tribunal's request to be addressed on *vires*, the relevant provision is, I think,
6 s.193(2) in tab 5 of the bundle:

7 "Where a price control matter is referred in accordance with Tribunal rules to the
8 Competition Commission for determination the Commission is to determine that
9 matter ..."

10 And then (b):

11 "In accordance with directions given to them by the Tribunal in exercise of powers
12 conferred by the rules"

13 That is s.193(2)(b) so that takes one to the rules at tab 6, and the relevant rule is rule 5, and
14 rule 5(1) is directions as to the timing of the reference and sub-rule 2:

15 "The Tribunal may give directions as to the procedure in accordance with which the
16 Commission are to make their determination."

17 And although a lot of ingenuity has been devoted to textual analysis before lunch of
18 meaning of words in the Rules, I really submit it cannot be suggested that direction as "to
19 have regard to findings of the Tribunal" is a direction as to procedure. So we say option 1
20 is not an option.

21 As between options 2 and 3 as they have been described, Ofcom takes no position other
22 than to say we think it is clearly desirable that the Commission should have the benefit of
23 your Judgment before it makes and issues its determination, but on the timetable that would
24 appear to follow. We agree that if not only SMP but the other issue discussed today were
25 before the Tribunal four days is probably a sensible course. I might just mention that on
26 the last occasion where it was only SMP and there was only one intervener it took three
27 and a half days, and I do not think anyone could suggest, not only because it would be
28 impertinent it would also be inaccurate, that the Tribunal did not conduct the hearing
29 efficiently, so that was three and a half days, so this is likely to be longer and so four days
30 we think would be prudent.

31 Thank you very much.

32 (The Tribunal confer)

33 THE CHAIRMAN: We will pencil in the Friday as well, the 14th, and hope that things can be
34 worked out as far as availability of counsel is concerned. On the question of

1 options – 1, 2, or 3 we will include that in the directions that we issue with the Judgment
2 on today’s preliminary point.

3 So thank you to everybody for your submissions, written and oral, they have been very
4 useful.

5 (The hearing concluded at 3.45 p.m.)