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**IN THE COMPETITION**

Case Nos 1083/3/3/07

**APPEAL TRIBUNAL**

1084/3/3/07

1085/3/3/07

Victoria House  
Bloomsbury Place  
London WC1A.2EB

26<sup>th</sup> July 2007

Before:  
**MISS VIVIEN ROSE**  
(Chairman)

**PROFESSOR ANDREW BAIN OBE**  
**MR. ADAM SCOTT TD**

BETWEEN:

**HUTCHISON 3G (UK) LIMITED**

Appellant

and

**OFFICE OF COMMUNICATIONS**

Respondent

AND

**02 (UK) LIMITED**

Appellant

and

**OFFICE OF COMMUNICATIONS**

Respondent

AND

**BRITISH TELECOMMUNICATIONS PLC**

Appellant

and

**OFFICE OF COMMUNICATIONS**

Respondent

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**CASE MANAGEMENT CONFERENCE**

**Interveners in Case No. 1083/3/3/07**

**02 (UK) LIMITED**

**T-MOBILE (UK) LIMITED**

**VODAFONE LIMITED**

**ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED**

**BRITISH TELECOMMUNICATIONS PLC**

**Interveners in Case No. 1084/3/3/07**

**02 (UK) LIMITED**

**T-MOBILE (UK) LIMITED**

**VODAFONE LIMITED**

**ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED**

**HUTCHISON 3G (UK) LIMITED**

**Interveners in Case No. 1085/3/3/07**

**02 (UK) LIMITED**

**T-MOBILE (UK) LIMITED**

**VODAFONE LIMITED**

**ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED**

**HUTCHISON 3G (UK) LIMITED**

## APPEARANCES

Mr. Brian Kennelly (instructed by Baker & McKenzie) appeared on behalf of Hutchison 3G

Mr. Nicholas Green QC and Miss Kelyn Bacon (instructed by S.J. 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 and Mr. Ben Lask (instructed by the Office of Communications) appeared for the Respondent.

Mr. Meredith Pickford (instructed by 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 appeared on behalf of the Competition Commission.

1 THE CHAIRMAN: Good morning ladies and gentlemen. The Tribunal is very grateful to the  
2 parties for the letters that we received on 20<sup>th</sup> July and we have also, of course, received the  
3 subsequent letters from Ofcom in relation to the O2 appeal, and from BT relating to the self-  
4 supply issue in its appeal and they have considerably helped to clarify the issues that we need  
5 to focus on and will, I hope, enable us to make progress today.

6 The procedural and substantive issues in these appeals are complicated and, as you are aware,  
7 these are the first appeals in which the mechanism set out in s.193 of the 2003 Act is being  
8 used. The Tribunal must bear in mind throughout that at the end of this process its duty under  
9 s.195(2) is to decide the appeals on the merits and by reference to the grounds of appeal set out  
10 in the notices of appeal and to remit the decision to Ofcom with appropriate directions (if any).  
11 We also aim to strike a balance between the public interest favouring expedition in the  
12 procedure and the public interest in the orderly conduct of the proceedings.

13 You will all have had copies of the agenda for today. How we propose to proceed today is  
14 rather than hear counsel in turn covering all of the issues, we propose to divide the hearing up  
15 into three bundles of issues and ask the relevant counsel to address us on the points that arise in  
16 relation to those issues in that bundle. I will say a few preliminary words about each of the  
17 bundles of issues as we reach it to summarise the position we have reached in the  
18 correspondence and, where appropriate, to give an indication of the matters on which the  
19 Tribunal particularly seeks the assistance of the parties. This is not intended to foreclose any  
20 areas of submission, however, it is clear from the length of the agenda and the number of  
21 parties here today that we will make best progress if parties are realistic about the submissions  
22 that they put forward.

23 The three bundles of issues that we propose to deal with are as follows: first, the consequences  
24 for the proceedings of the fact that Ofcom is no longer contesting the O2 appeal. The second  
25 bundle relates to non-price control matters. The issues remaining after the events of the past  
26 few days seem to us to be: what is the process for determining whether issue 4, i.e. the issue as  
27 to whether a remedy short of price control is an appropriate response to the finding of H3G's  
28 significant market power, what is the process for deciding whether that is a price control matter  
29 or a non-price control matter. Secondly, whether H3G's appeal discloses any other non-price  
30 control matters other than the two SMP issues; and thirdly, what directions should the Tribunal  
31 make as regards the service of pleadings in relation to the non-price control matters and within  
32 this point I propose to hear submissions on the questions raised by O2 and T-Mobile about  
33 whether any direction is necessary to restrict the interveners as regards the points they are

1 entitled to raise and also to deal with any issues of confidentiality arising from the redactions  
2 in H3G's notice of appeal.

3 The third bundle of issues relates to the price control matters and this covers the timing of the  
4 reference to the Competition Commission and in particular whether this should await the  
5 service of a defence by Ofcom dealing at least in outline with the price control matters and also  
6 the question of whether the reference to the Commission should await the determination of the  
7 non-price control matters or proceed in parallel. The second issue in this third bundle is the  
8 principles to be applied in framing the questions to the Competition Commission. After that  
9 we will deal with any other matters that the parties wish to raise.

10 Before we start with the first bundle we asked in our letter covering the agenda for copies of  
11 the requests for permission to intervene to be circulated among the parties and for H3G to  
12 circulate a non-confidential list of its redactions from the notice of appeal. We do not want at  
13 the moment to hear any challenges to those redactions, but can I just ask whether that process  
14 has been undertaken and whether everybody now has received the documents that they want?  
15 Nodding – good.

16 That brings us to the first of the bundle of issues, which are the consequences of Ofcom's  
17 decision not to contest the O2 appeal. There are, the Tribunal considers, two courses open to  
18 us. The first is to quash the decision now insofar as it decides that charges for ported in  
19 numbers are included in the definition of the relevant market with an appropriate direction to  
20 Ofcom. An alternative would be for the Tribunal to stay the appeal pending the resolution of  
21 the other non-price control matters which relate to the analysis of the market. Staying the  
22 appeal would avoid the possibility that one aspect of market analysis is remitted now and other  
23 aspects are then remitted at a future date without, of course, giving any indication as to  
24 whether there will be other matters to be remitted or not at the end of the day.

25 With regard to the possibility of remitting the matter back to Ofcom now there are two  
26 particular issues on which we would welcome submissions. First, we are not entirely clear  
27 from the correspondence whether Ofcom is saying that it accepts that it needs to look again at  
28 the question of whether ported in numbers should be in the same market as off net non-ported  
29 in numbers, or whether Ofcom's position is now that it accepts that they should not be in that  
30 market.

31 Secondly, Ofcom stated in its letter that if the decision is quashed and remitted on this issue in  
32 relation to O2 then the decision would need to be quashed in relation to the other 2G MNO  
33 operators as well and the Tribunal wishes to hear submissions on its powers in that regard. I

1 should say for completeness that we do not propose to make any order in relation to BT's  
2 application to intervene in the O2 appeal unless somebody suggests to the contrary.

3 So on this first bundle of issues relating to the consequences of Ofcom's decision not to contest  
4 the O2 appeal we will ask counsel for Ofcom to address us first on these points and then  
5 counsel for O2 and we will then invite any of the interveners who wish to make points in  
6 addition to address us if they have something to add.

7 MR. ROTH: Thank you. On the first point that you have raised about quashing the decision insofar  
8 as it relates to ported in numbers, I am sure you appreciate the qualification to ported in  
9 numbers that was raised by Ofcom in its letter to O2 and I think accepted by O2 in its letter to  
10 the Tribunal of 24<sup>th</sup> June, which I hope the Tribunal has – it is not one, I think, madam, that  
11 you referred to – it is ported in numbers for which the recipient network does not set the  
12 termination charge, it is not all ported in numbers. So that is a small but nonetheless important  
13 point.

14 We do, with respect, say that it would be more satisfactory to quash the decision now rather  
15 than staying the appeal and perhaps I can deal with that also by taking in your second point  
16 about whether to look again or not. Ofcom's position is not that they have reached a definite  
17 view on that, they would have to reconsider it further and if they concluded, or were proposing  
18 to conclude that they were in a separate market everyone would have a chance to make  
19 representations on that, they would have to consult on that.

20 It would not be necessary for them to do that immediately and therefore if on the remaining  
21 SMP appeal by Hutchison that were to result in a quashing of the rest of the decision – of  
22 course Ofcom says that is extremely unlikely – but if it were to happen and there then had to be  
23 a further consideration of the whole market the consideration of ported in numbers could be  
24 done at that time. In other words by quashing now it does not mean that it would proceed  
25 straight away and it could be dealt with all at once in due course. Therefore, we do not see any  
26 problem about quashing the decision now rather than staying the appeal for it to be quashed  
27 later, because we say on any view that appeal, now that there is no longer any substantive  
28 dispute between Ofcom and Hutchison, is not going to be heard as a substantive argument  
29 because the argument has gone.

30 On the question of whether the decision as regards the other MNOs can be affected as well,  
31 this, of course, as you will appreciate, is something that I think arises also on Hutchison's SNP  
32 appeal because Hutchison is seeking relief as regards Hutchison. But, if the Tribunal were to  
33 conclude - again, we say most unlikely, but if you were to accept their arguments and  
34 conclude, that Hutchison did not have SNP then the same logic and reasoning would have to

1 apply to all the other MNOs. Therefore, we say that in your power to quash the decision there  
2 must be a power, as you have envisaged, not to quash it not in toto, but in part, and to vary it,  
3 and that that will include any consequential effects that inevitably follow for other parts of the  
4 decision, and that therefore that can happen. Otherwise, one would get a situation where you  
5 have an artificial imbalance between the operators that clearly could not be satisfactory. I do  
6 not see that in Section 195, which is, I think, the relevant section there is anything which  
7 precludes you from so doing.

8 PROFESSOR BAIN: Mr. Roth, are you saying that we have the power under Section 195 to take  
9 decisions about parts of the statement about which no appeal has been put? Other MNOs have  
10 not appealed. What you are saying is that in spite of that we can actually take a decision that  
11 overturns the statement in respect of those MNOs?

12 MR. ROTH: I think it would be right that you should hear whether they object to you doing that.  
13 Clearly they would have a right to address you on it. If they opposed it, you would have to  
14 decide. But, if they agreed you decide the appeal by reference to the grounds of appeal; you  
15 decide what is the appropriate action to take, and if it is to take Hutchison's SNP appeal and  
16 the others have not appealed -- suppose you decide that because of BT's countervailing  
17 bargaining power an MNO, given BT's position in the fixed line market has no significant  
18 market power, it seems to us that it must follow, if that were the way you were to reason your  
19 decision, that that would have to apply to the other MNOs, and even though they had not  
20 appealed on this, to leave the decision why we were bound to impose an SNP decision on the  
21 other MNOs, but not on Hutchison because Hutchison was the only appellant, would produce a  
22 complete distortion of competition in the market which is, of course, the direct opposite of  
23 what the Act is seeking to achieve. So, we say that must be implicit in the scheme of Section  
24 195. (After a pause): We could, of course, I think, if necessary, as a regulator amend the  
25 notification to the market to the other operators in any event, as the logical consequences of  
26 your decision. That would be another way of dealing with it. I think we would rationally be  
27 bound to do that.

28 PROFESSOR BAIN: This was the issue we wondered whether we had the power, in fact, to quash  
29 the decision in relation to the other MNOs, or whether it would be something that would be left  
30 to Ofcom to do in the way you have just suggested.

31 MR. ROTH: Would you give me just a moment to take instructions? (After a pause): My clients  
32 have just told me that that is what they would then do. It may be the Tribunal may feel that  
33 would be more satisfactory that we would then amend the notification of everyone else. It does  
34 not of course affect the price control, as you appreciate, that has been imposed, and you would

1 not be concerned with that, and we, Ofcom, would take the necessary consequential action.

2 We certainly would not be uncomfortable in proceeding in that way.

3 PROFESSOR BAIN: Just to round up the other consequential -- in relation to accepting O2's  
4 point, presumably the consequential of that is that that part of Market 16 that now drops out of  
5 view, then gets reviewed afresh to see whether it has effective competition, and so on, and so  
6 forth.

7 MR. ROTH: It goes back to Ofcom's court, as it were, and generally whether they decide -- There  
8 are certain markets they have not actually reviewed. They have not reviewed every possible  
9 market in telecoms. -- whether it is necessary to proceed with a full market review, or whether  
10 they can just consult, and at what point, would be a matter for Ofcom to determine. Of course,  
11 the Commission would be notified.

12 THE CHAIRMAN: But, as I understood your first submission, it is possible that on reconsidering  
13 the question of whether ported in number should be included or not, Ofcom may still come to  
14 the conclusion that actually the current market definition was correct?

15 MR. ROTH: That is right. That is possible. As we made clear in our letter, the point was never put  
16 in the consultation. If we did now, having regard to the arguments put by O2, think that is the  
17 view we would have to give all the other operators the chance to comment, and then reach a  
18 considered view on it, which may, or may not, be to the same effect.

19 THE CHAIRMAN: Now we will hear from O2.

20 MR. GREEN: May I deal with the last point first? We agree with Mr. Roth's analysis. It seems to  
21 us that under Section 195 the regime is as follows: first, you rule upon the issues arising out of  
22 the notice of appeal. You then have the power under s.195(4) to direct what should happen and  
23 I quote the words appropriate for giving effect to its decision, in other words, you arrive at a  
24 decision, you would arrive at the decision which contains two parts, one you would quash the  
25 decision in relation to O2. Secondly, you then draw the consequences of that as part of your  
26 decision, namely, following Mr. Roth's submission that to only quash part of the decision  
27 would give rise to a discriminatory effect, that would be part of your logic. You can then do  
28 what is necessary under 195(4) to give effect to that decision. It seems to us that you have an  
29 option, you can either take the decision yourself or you can leave it to Ofcom, it is open to you  
30 to do either, whatever you think is pragmatic and suitable in the circumstances. So it seems to  
31 us that you have the power but you can also leave it to Ofcom if you think that is the right  
32 thing to do.

33 Turning things around, we agree with Ofcom that the matter should be remitted and quashed  
34 now rather than stayed; it puts this issue to bed, it means it is out of the fray and we can then

1 concentrate on all of the other issues which are myriad and complex and need to be addressed  
2 without this hanging over everybody. For the reasons Mr. Roth gave we think there is not  
3 going to be any pragmatic or practical difficulty in the event that the Tribunal remitted the  
4 entire decision pursuant to Hutchison's appeal. We anticipate that whatever the timescale the  
5 Tribunal is going to move with reasonable dispatch and expedition and so the daylight between  
6 the two is not going to be so great that it is going to cause a practical problem and we would  
7 suggest that it is better to simply dispose of it now. So we would agree with Ofcom on that.

8 THE CHAIRMAN: Would we, in your submission, need to make any direction as to the timescale  
9 within which Ofcom should undertake its reconsideration, for example, postponing it until the  
10 termination of other matters in the other appeals?

11 MR. GREEN: I would suggest not, I think it is clear from *Floe Telecom* that if you attempt to do  
12 that there may be issues which arise. *Floe Telecom* appeared to suggest that exceptionally you  
13 might have the power to do that but this is a case where there is really no material dispute  
14 between Ofcom, Ofcom has a consultation paper which it issued on 17<sup>th</sup> July which seeks to  
15 address the question of ported numbers through other means than SMP determination, namely  
16 through reducing port times and through direct routing of calls, and those are matters which  
17 Ofcom have to take into account – which way it moves forward to resolve the problem, and we  
18 would have thought it is sensible simply to leave it to Ofcom. All parties will have the  
19 opportunity to make submissions to Ofcom on the basis of *Floe Telecom*; if anyone is unhappy  
20 they have the power to bring a Judicial Review. Thank you.

21 THE CHAIRMAN: Do any other parties wish to address us on this point? Mr. Barling.

22 MR. BARLING: We have not got our ticket to the ball, I appreciate that. As far as quashing or  
23 staying we see the logic of quashing, and we are reassured that Ofcom say that that will mean  
24 that they will reconsider and re-consult because that will then give us, who apply to intervene  
25 because we were concerned to retain what Ofcom had done by keeping ported numbers in the  
26 market and therefore potentially subject to a price control, but our interest would be protected  
27 with a quashing and reconsidering and re-consulting. If, however, and I think it is unlikely in  
28 view of what has been said so far, but if you decided notwithstanding that that you wanted to  
29 stay the appeal then we would ask you to grant our application to intervene for the reasons set  
30 out in it and in the supplementary material you asked us for in our letter of 20<sup>th</sup> July.

31 May I also just say for the record that we are concerned about the logic of Mr. Roth's approach  
32 to the SMP, that is not what you are asking about at the moment and he was only giving it as  
33 an example, but if we get on to that we would say it does not follow as night follows day that if  
34 H3G were found – unlikely though it may be – not to have SMP that the same would follow

1 necessarily for the other MNOs given the grounds on which H3G is challenging SMP. Thank  
2 you very much.

3 MR. PICKFORD: Madam, if I might just make three very short points on the powers of the  
4 Tribunal. I am for T-Mobile. First, s.195(2) of the Communications Act obviously provides  
5 that the Tribunal should decide the appeal on the merits by reference to the grounds of appeal.  
6 It does not mention Ofcom's defence but it is implicit that clearly the Tribunal must take that  
7 into account, and we say it is also implicit that the Tribunal should take interveners' statements  
8 of intervention into account. One of the reasons why we say that is because the Tribunal needs  
9 to construe s.195 in a way which gives practical effect to the Tribunal's own rules on  
10 interventions and Rule 16(9) Tribunal's Rules provides for the intervener to set out its  
11 arguments in its statement of intervention – 16(9)(a) and also 16(9)(b) – that the intervener  
12 must set out the relief that it is seeking. We say that if an intervener cannot seek relief which  
13 differs from that that is applied for by the appellant or the respondent then that fails to give  
14 effect to those provisions.

15 THE CHAIRMAN: Well are you seeking different relief in relation to this point about the disposal  
16 of the O2 appeal? Are you asking us to do something different from what either Ofcom or O2  
17 are asking us to do?

18 MR. PICKFORD: No, but we are in fact seeking different relief from O2 in that we are asking for  
19 the determination to apply to us as well as to O2 – O2 only sought relief in respect of SMP for  
20 them, but T-Mobile seeks the same relief in relation to itself.

21 THE CHAIRMAN: Yes, well I think you have heard both the parties accept that in some way or  
22 other that is going to be the ultimate outcome of the disposal of the appeal.

23 MR. PICKFORD: Yes, we say it is certainly in the power of the Tribunal to grant that. The  
24 Tribunal does not need to rely on Ofcom itself withdrawing because there may, of course, be  
25 an issue on which Ofcom does not concede and in that situation the Tribunal would need the  
26 power to act itself so as to ensure consistency.

27 Finally, there is authority for the proposition that an intervener can seek different relief and  
28 that is the case of *Mastercard* which I have cited in my written submissions.

29 THE CHAIRMAN: Mr. Roth, did you have anything that you wanted to say further on this point?

30 MR. ROTH: Yes, just three short points on Mr. Barling's point. I was not saying that it will  
31 inevitably follow, I was giving it as an illustration, it will depend on the reasoning of the  
32 Tribunal and its judgment so you need not be concerned about that on the SMP appeal.  
33 Secondly, as regards timing we respectfully agree with Mr. Green that it would not, with  
34 respect, be appropriate and *Floe* does come to mind and, indeed, I think Ofcom may well wait

1 to see the outcome of the continuing appeals, particularly given that one of the arguments  
2 made by Hutchison in its price control appeal is that the effect of ported numbers should be  
3 taken into account in fixing the price control. So those are the two main points that I wish to  
4 mention at this stage.

5 With regard to the effect on the other two appeals of the disposal of the O2 appeals, do BT and  
6 H3G take the view that the quashing of the decision to the extent that we are invited to quash it  
7 in relation to O2, has any effect on their pleading of their case on their appeals?

8 MR. BARLING: We do not think it makes any difference at all to our case, certainly, or should  
9 make any difference anyway given the circumstances of ported in numbers.

10 MR. KENNELLY: Madam, the Ofnet issue is already before the Tribunal in our appeal. So, we do  
11 not take the view that any amendment is necessary at this stage. The question relates to our  
12 appeal and the answer is that we do not need to make any amendments of change our  
13 approach.

14 THE CHAIRMAN: Thank you. I think that now brings us to the second bundle of issues which  
15 relates to price control matters. These are the two SNP appeals in the H3G appeal, possibly  
16 Issue 4, and possibly some other issues raised in the H3G appeal appendix. All parties are  
17 agreed that the non-price control matters identified should be heard together by the Tribunal.  
18 Dealing first with Issue 4 and whether that is a price control matter or a non-price control  
19 matter, the position that we have arrived at in the correspondence, as we see it, is that H3G  
20 has indicated that it initially regarded this as a price control matter, but it is content for the  
21 Tribunal to hear it as a non-price control matter. Ofcom has said that the appendix to the  
22 appeal indicates a mixture of price control and non-price control matters, and submits that H3G  
23 should be directed to amend and re-submit the notice of appeal, splitting out the different kinds  
24 of matters. The interveners have taken various stances on this. BT, T-Mobile and O2 are  
25 tending to the view that it is a price control matter but this needs to be decided as a preliminary  
26 issue. Orange's view was that it is too soon to say, though they seem to agree that the appendix  
27 contains a mixture of issues. Some suggestion has been made that we could clarify this issue  
28 by H3G revising its notice of appeal and Ofcom then pleading to that appeal as to this point of  
29 whether Issue 4 is for the Tribunal or for the Competition Commission. That may be a fertile  
30 route to look at. That is the first point we want to hear submissions on now.

31 The second point is that some of the parties have raised the question whether there are other  
32 non-price control matters embedded in the part of H3G's appeal which it has described as  
33 'price control matters' and that needs to be teased out, recognising that there is a distinction

1 between issues which need to be decided and arguments that can be raised in relation to other  
2 issues.

3 The third area to explore is the directions, whether there is any need to limit the points that can  
4 be raised by the interveners. This was particularly a point raised in the letters of O2 and T-  
5 Mobile. Of course, as regard the O2 appeal, this does not now arise, but it may still be relevant  
6 as regards the other appeals. As a preliminary observation, the Tribunal considers that it is  
7 important to bear in mind that the procedure before the Tribunal is essentially an adversarial  
8 one, with the exchange of pleadings and the grounds of appeal, and the defence effectively  
9 setting the bounds within which the case is conducted. In contrast, the proceedings before the  
10 Competition Commission are generally not adversarial in nature, but more investigatory, and  
11 there is no exchange of pleadings as such, and the Commission receives submissions from  
12 parties in response to its request for information. The Tribunal does not envisage that in this  
13 case it will be directing the Commission to adopt a procedure which is markedly different from  
14 the way in which the Commission usually carries out its investigations. Therefore, the concerns  
15 raised in O2's letter about the scope of the submissions that they can make in respect of price  
16 control matters being looked at by the Commission may, in our judgment, be unjustified  
17 insofar as the pleadings in this case have only a limited role to play once the references get to  
18 the Commission's procedure.

19 There are a couple of other issues that have arisen from the correspondence. The first is the  
20 suggestion from the Competition Commission that we should direct them not to produce a  
21 draft of the decision with provisional findings because that would not be appropriate for this  
22 procedure.

23 Two other matters: whether Ofcom should serve the Tribunal now with an unredacted version  
24 of the statement of 27<sup>th</sup> March, and also in relation to the formation of a core bundle containing  
25 all the documents that people have so far annexed to their pleadings so that we do not duplicate  
26 public documents which everyone is referring to more than absolutely necessary.

27 Finally, any issues relating to the confidentiality relied on by H3G in making the redactions  
28 from its notice of appeal. A number of the interveners noted that substantial redactions have  
29 been made. All parties have now received a list of those and if there are any issues to be raised,  
30 now is the time.

31 So, we will first hear from H3G, and then Ofcom and then T-Mobile, and then any other  
32 interveners who wish to address on any of this bundle of points.

33 MR. KENNELLY: Thank you, Madam. Taking the Tribunal's points in turn, H3G maintains its  
34 initial submission that the issue identified by the Tribunal - Issue 4 - whether a remedy short of

1 a price control would be sufficient - is properly a price control matter within the meaning of  
2 s.193, and Rule 3(1) of the 2004 Rules. Madam, you have our written submissions. I propose  
3 to take the Tribunal to the statutory material, to look at s.193 and Rule 3(1) to make good that  
4 point, notwithstanding our suggestion in our written submission that H3G's position is that it is  
5 concerned principally with the expeditious resolution of this issue, whether it be by the  
6 Tribunal or the Competition Commission. But, our principal submission is still that the  
7 Competition Commission is the best place for the resolution of this issue.

8 I imagine that all of the parties have the statutory material before them. I have copies of s.193  
9 and the 2004 Rules, but I would be surprised if any of my colleagues and learned friends  
10 needed copies of that. (After a pause): I will make the point briefly: that if the Tribunal have  
11 before it s.193 of the Communications Act 2003 the Tribunal will see obviously s.193(1),

12 "The Tribunal rules must provide in relation to appeals under s.192(2) in relation to  
13 price control that the price control matters arising out of that appeal to the extent that  
14 they are matters of a description specified in the rules must be referred by the  
15 Tribunal to the Competition Commission for determination".

16 The important sub-section is (10):

17 "In this section 'price control matter' means a matter relating to the imposition of any  
18 form of price control by an SNP condition, the setting of which is authorised by ...  
19 the further sub-sections are provided below".

20 It should not be necessary to take the Tribunal to those sub-sections. My submission is that the  
21 word 'relating' indicates the very broad nature of this provision, and the very broad definition  
22 of what is a price control matter.

23 That submission is borne out if one turns to the relevant rules that are made in the statutory  
24 instrument 2004, no. 2068. These are the Competition Appeal Tribunal Amendment and  
25 Communications Act Appeals' Rules 2004, which at rule 3(1) set out the definition of a price  
26 control matter. The Tribunal sees there that it says:

27 "For the purposes of subsection (1) of section 193 of the Act there is specified every  
28 price control matter falling within subsection (10) of that section which is disputed  
29 between the parties and which relates to (a) the principles applied in setting the  
30 condition which imposes the price control in question. (b) the methods applied or  
31 calculations used, or data used in determining that price control, or ..."

32 And of course these are disjunctive:

33 "(c) what the provisions imposing the price control which are contained in that  
34 provision should be, including at what level the price control should be set."

1 In our submission, the issue of whether the setting of a strict price control is proportionate is a  
2 matter relating to the said principles, or indeed the methods and potentially the provisions  
3 imposing the price control itself and to that extent we adopt the submission of BT; it echoes the  
4 submission we make ourselves, that there is no question that the Competition Commission in  
5 the proper exercise of its powers may conduct a review as to whether the price control for H3G  
6 was set too low based on arguments in relation to the competitive conditions in the market,  
7 and it would be extraordinary if the Competition Commission had no jurisdiction to conduct  
8 the review as to whether it was appropriate to set this strict price control at all. The issue of  
9 whether it is proportionate to set a price control, having found SMP is clearly a matter which  
10 goes directly to the same principles which the Competition Commission may consider where  
11 there is no dispute between the parties.

12 MR. SCOTT: If we were in the situation, because we have to consider the implications of what you  
13 are saying, in which a price control had not been set but in which, say, BT had appealed and  
14 said there should have been a price control and there was not, are you suggesting that the CAT  
15 has now power to hear that appeal? In other words, because there is the possibility of a price  
16 control the decision on the nature of the remedy must necessarily go to the Competition  
17 Commission because there is a possibility of a price control? Is that the logic of your  
18 argument?

19 MR. KENNELLY: Yes, on the logic of my argument the appropriate forum for resolving that issue –  
20 you will appreciate, sir, that is an extreme example – on the logic of my argument the  
21 Competition Commission remains the best place to consider that issue, because the issues of  
22 whether or not, having found SMP it is necessary to impose any price control – there may be  
23 particular circumstances which lead Ofcom to decide that no price control is necessary,  
24 unlikely my learned friend would say, but that is a possibility – the Competition Commission  
25 is the best place to consider the competitive conditions and determine whether, in view of the  
26 various economic analyses that were used by Ofcom or by the other parties, that was the  
27 appropriate decision.

28 Alternatively, the language of subsection 10 states that in this section price control matter  
29 means a matter relating to the imposition of any form of price control. On one view the  
30 decision to set no price control may be said to be a form of price control – it is a decision not to  
31 impose any price control at all. But the important point which may be lost in the submissions  
32 is that our concern is that with a strict price control, such as the one imposed by Ofcom in this  
33 case, we suggest in our submissions that it might have been possible for Ofcom – and we  
34 submit it would be more proportionate not to have set a strict price control, but to have set

1 down guidelines which we ought to have respected in the setting of our prices, falling short of  
2 a strict price control. That is, for example, the kind of decision again which, if appealed,  
3 would be best resolved by the Competition Commission.

4 THE CHAIRMAN: Are you talking about a transparency provision, or a fair and reasonable  
5 provision?

6 MR. KENNELLY: Madam, yes. Ofcom is not obliged to set a strict price control, there is a range of  
7 options open to it and it is important just to return to the facts of this particular case. This issue  
8 goes to the proportionality of what Ofcom chose to do having found SMP. Our simple point is  
9 that the Competition Commission is the appropriate place to determine that issue of  
10 proportionality.

11 MR. SCOTT: I realise that one of your learned friends was arguing H3G's case in the first Hutchison  
12 appeal, but there was no suggestion in that appeal that the issue of transparency be sent to our  
13 neighbours in the Competition Commission, that was regarded as proper to us to determine  
14 whether that was a proportionate remedy or not. It seems to me that we are going to be in  
15 some difficulty if the possibility of a price control means that we automatically have to refer it  
16 to the Competition Commission, whereas what we are dealing with here is a situation where  
17 there is a price control and so far as a price control mechanism is concerned the legislation and  
18 the rules are clear. It is really where does this boundary occur, and you are suggesting that it  
19 occurs really at the point of the third stage commencing, not any further into the third stage.

20 MR. KENNELLY: Sir, you will appreciate, of course, that my learned friend, Mr. Green, did appear  
21 previously and I did not – I am being tapped by my solicitor – I will need to check on the  
22 specifics of that point. But dealing with the specific legal point which you have raised it is true  
23 that there is an element of greyness about the division that I suggest, but if the Tribunal asks  
24 whether it or the Competition Commission is best placed to examine the issue of  
25 proportionality, it is clearly far closer to the issues traditionally and properly considered by the  
26 Competition Commission, it is best placed to judge those and that is why on this issue of  
27 proportionality we submit it ought to go to the Competition Commission.

28 On the point that it was not a point raised before, which of course I accept, and I will just speak  
29 briefly to my instructing solicitor.

30 (After a pause) Sir, just dealing with your hypothetical question that a decision where no price  
31 control was imposed, this of course – and the reason why I took the Tribunal to subsection 10 –  
32 this issue would only arise in an appeal where a price control was imposed. If price control  
33 was imposed – this is an alternative submission – if price control was imposed the issue would  
34 arise. If no price control at all were imposed alternatively it would stay with the CAT because

1 it would not be, on this submission, a price control matter relating to the imposition of a form  
2 of price control; that is the alternative. So dealing with the actual example that you gave, Sir,  
3 that would be a matter that would stay with the CAT.

4 THE CHAIRMAN: Where do you get that from the legislation?

5 MR. KENNELLY: Subsection 10, madam, of s.1 of 93.

6 THE CHAIRMAN: Yes, but what part of that section says that it is a requirement that actually a  
7 price control must have been imposed for there to be price control matters.

8 MR. KENNELLY: The first point is that this arises where there is a decision – forgive me – the  
9 actual description is: “A decision which includes a price control matter”, and subsection 10  
10 then defines “price control matter” as “a matter in relation to the imposition of a form of price  
11 control.” My point was, one asks, what kind of decision is being appealed against, and if the  
12 decision imposes a price control that is a decision where this issue arises. If no price control is  
13 imposed in the example given by a member of the Tribunal the question does not arise.

14 MR. SCOTT: In fact we have before us part of the appeal relates to a decision in which there is not  
15 price control, there is a transparency remedy.

16 MR. KENNELLY: Yes.

17 MR. SCOTT: And although we appreciate that that has gone by it is part of your appeal in that you  
18 are addressing both the earlier period and the current period. So it is not entirely hypothetical,  
19 it is sitting before us at the moment.

20 MR. KENNELLY: We have made written submissions on that point, but it is not necessary to  
21 address you on that now.

22 The basic point, as I said, is that if one looks at the broader nature of the language of the  
23 legislation and the purpose of the legislation, the nature of the Competition Commission’s  
24 review, as we say and as BT say, it is clearly a matter for the Competition Commission and  
25 one they are best placed to judge.

26 Before I move on to the second point, the Tribunal in our respectful submission was correct to  
27 identify this issue as the sole issue where some dispute might arise as to whether or not there is  
28 a price control or a non-price control matter, and we submit that the Tribunal should be  
29 cautious when examining the submissions of the interveners as to whether a range of other  
30 issues or are not price control matters. It is important that this issue does not lead to further  
31 delay in the process and the Tribunal has seen our written submissions. I will make the point  
32 briefly because obviously it informs all of the points we make. H3G is the one suffering  
33 because of the delay, it suffers in view of its market position, its market share, and various of  
34 the problems that it has. Any delay in resolving these issues harms it and in our submission

1 benefits the other MNOs because they, in our submission benefit from the status quo, so we  
2 have a grave concern about further delay and the raising of issues which do not go to the heart  
3 of the dispute before the Tribunal or before the Competition Commission.

4 THE CHAIRMAN: So are you saying that there are no other issues in your notice of appeal which  
5 are on the border line between price control and non-price control.

6 MR. KENNELLY: Precisely, madam, yes. Of course, you have our submission that we think,  
7 although we understand the Tribunal's concern, when one looks closely at the legislation and  
8 the nature of the Competition Commission's review, this is properly a matter for them. But if  
9 the Tribunal is against me on that point we have read with interest Ofcom's written submission  
10 and the point that this raises in relation to para.3.16 and 3.17 of our notice of appeal which it  
11 says do not relate to price control matters. If necessary we are content, in a very short time  
12 frame, to amend that part – with the Tribunal's permission – to ensure that Ofcom's concern in  
13 that regard is addressed. Those points in our submission, do not go to the heart of the concern  
14 raised by the Tribunal as to whether or not the issue of the proportionality of the imposition of  
15 a price control, or a strict price control is a non-price control matter. But we are happy to  
16 address Ofcom's concerns.

17 Further, we have noted what O2 has said. O2, the Tribunal has seen in their submissions,  
18 agree, or suggest that they tend to agree, that this issue identified by the Tribunal is properly a  
19 price control matter, but suggest that a hearing of a preliminary issue is necessary to determine  
20 that question. For the reasons that I have outlined, firstly we say it is not necessary to have a  
21 preliminary issue because the issue, we say, is clear. Secondly, if there is to be a hearing of a  
22 preliminary issue on this point, the point identified by the Tribunal, we are concerned that it be  
23 resolved as quickly as possible. We have submissions to make on the kinds of directions the  
24 Tribunal, in our submission, ought to make if the Tribunal determines that this issue be heard  
25 as a preliminary issue. I shall not take the Tribunal to those suggested directions now. We  
26 would request that we have a right to come back on that issue if the Tribunal is minded to  
27 direct the hearing of a preliminary issue. Our primary submission is that it is not necessary in  
28 view of what we have said.

29 Taking the second point raised by the Tribunal in relation to whether or not there are further  
30 issues which are not properly price control matters contained in the appendix to the notice of  
31 appeal, again, it is significant that the Respondent to the Appeal, Ofcom, the expert regulator  
32 best placed to judge, in their own submission, these issues, raises no other issue. Ofcom's  
33 concerns are limited to para. 3.16 and 3.17 which we have addressed, as I have just said. We  
34 are content to address Ofcom's concerns.

1 It flows from my submissions as to the broad nature of s.193(1) and Rule 3.3(1) of the 2004  
2 Rules that the other matters identified by T-Mobile and others, which they say have nothing to  
3 do with price control -- It flows from my primary submission that they clearly do relate to price  
4 control because they are precisely the kind of competition conditions the Competition  
5 Commission would analyse in determining whether the imposition of this price control was  
6 correct, or whether an alternative, less onerous, and more proportionate price control ought  
7 properly to have been imposed. I refer, in particular, to the mobile number portability issue.  
8 This obviously is a very serious concern of H3G. The Tribunal is aware of the meaning of  
9 what is called MNP, and if it is difficult for customers to switch -- to keep their numbers and  
10 switch to H3G, for whatever reason - and it is not a matter for you today - that obviously is a  
11 very important competitive constraint, and one that affects the competitive conditions and one  
12 that ought properly to be considered by the Competition Commission. They would consider it  
13 in any event.

14 Taking up the Tribunal's third point, in terms of such directions as the Tribunal ought to make  
15 in relation to the Competition Commission -- I understand from what the Tribunal has said that  
16 we will come later to the framing of the individual questions. That is not a matter the Tribunal  
17 wishes to be addressed on now. I understood the Tribunal's identification of this issue to go to  
18 whether further submissions ought to be exchanged between the parties before a reference is  
19 made to the Competition Commission.

20 THE CHAIRMAN: I think the point that we were raising was in relation to the statements of  
21 intervention which we envisage will be served relating to the non-price control matters in the  
22 H3G appeal. Is there any direction that we need to give to the interveners before they draft  
23 those statements, limiting the kinds of points that they can raise by insisting that they are tied  
24 in to the grounds of appeal. That was the point that we wanted to address at this moment.

25 MR. KENNELLY: Madam, as the Tribunal has seen from our written submissions, we have  
26 attempted to take a pragmatic approach. We said in our original draft that we were very  
27 concerned again that unless limits were placed on the kinds of matters covered by  
28 interventions, there would be just the kind of further delay that would damage further H3G.  
29 Having said that, in view of the Tribunal's approach and case management of this case, and in  
30 the interests of fairness, we do not propose that any specific directions be made limiting the  
31 matters upon which the interveners can address. We are content, having read the submissions  
32 of the parties, and in view of the approach of the Tribunal, that no specific direction be made  
33 along the lines proposed by some of the parties -- that the parties can be trusted, as it were, to  
34 limit their points to the notices of appeal, and to co-ordinate, to the extent that they share

1 approaches and points of view, before making submissions to this Tribunal. That is obviously  
2 putting down a marker, as it were, because we anticipate, and not for the first time in this  
3 market, that we will be opposed by most, if not all, of the other operators, and we would expect  
4 some co-ordination of the proper kind between them before any submissions are made to this  
5 Tribunal.

6 THE CHAIRMAN: Yes. It remains to be seen whether your trust is well-placed.

7 MR. KENNELLY: Madam, then we place our trust in the Tribunal.

8 Turning, then, to the issue of confidentiality, we have read again the submissions of the parties  
9 and we have served confidentiality schedules as requested. It may be better for my learned  
10 friends to address you on this point since it is their concern. We submit that at this stage we  
11 have done all that we are required to do. In terms of the particular problems raised by the  
12 Tribunal, there is obviously a need - and this is something I have discussed with my learned  
13 friend, Mr. Roth, before coming in -- there is a need to co-ordinate the redacted statements  
14 between the parties so that the parties have a document they can work from in making  
15 submissions. That is a very important practical concern, best addressed by the parties  
16 themselves. Similarly, I am sure we all see the sense in a core bundle. It will save time and  
17 paper, and hopefully will lead, again, to a more expeditious conduct of these proceedings.  
18 It may assist the parties to know - and this will not come as a surprise - that the reason for the  
19 large number of redactions in our document was because a lot of it relates to matters that we  
20 put to the Competition Commission. That is why it is necessarily highly confidential. That  
21 should have been explained in a confidentiality schedule which the parties have.

22 Unless I can assist the Tribunal further ----

23 THE CHAIRMAN: You may be able to. I am just thinking about the sequence of the further  
24 progress of your appeal in relation to the pleadings regarding the SMP matters - which  
25 everyone accepts are non-price control matters - and the determination of this point about Issue  
26 4 (is that for us, or does that go to the Commission?) and your revision of your paras. 3.16 and  
27 3.17 which you have offered to do if Ofcom still wish that. What are your views on the  
28 sequence and possible timetable for the further progress of the appeal as a whole - not dealing  
29 for the moment with the question of when the reference to the Commission takes place?

30 MR. KENNELLY: Dealing with the SMP appeal, we take the view - and it is our submission - that  
31 there is no need for the Tribunal to delay the making of further directions in this respect: the  
32 Tribunal can direct that the SMP appeal proceed. This amendment which is canvassed before  
33 the Tribunal is extremely short. I have described - and all the parties have heard me - the  
34 nature of the amendment we will make. These are two very minor paragraphs in the appendix

1 which are being moved. It really is a question of form, we would say, and we can do that very  
2 quickly. There is no need for the parties to wait and consider that, and reflect on that. They  
3 hear now what is being done. They have seen Ofcom's submission, and so there is no need to  
4 delay further in that respect.

5 Similarly, in relation to any hearing of a preliminary issue, the Tribunal obviously has my first  
6 point that I say there is no need. But, if there is, that ought to be brought on very quickly.

7 Again, the further resolution of the appeal ought not to wait for that, because that can be  
8 determined very quickly on this single issue. Once it is determined, it can be then referred in  
9 the form of a question unless Ofcom and ourselves agree that the matters should be referred to  
10 the Commission in the form of a specific question. It can be done at that point. There is no  
11 need, in our submission, for the process to wait for the resolution of this narrow issue because  
12 it is possible for the other matters to be referred in the form that we have canvassed before the  
13 Tribunal, and this issue, which can be resolved, we would say, very rapidly can follow. It is  
14 limited, the Tribunal will see, to this one issue of whether the decision to impose a price  
15 control, whether it is proportionate, is itself a price control. It is not necessary to hold the  
16 whole process back for that narrow issue to be resolved. The Tribunal has my submission on  
17 the very serious consequences of delay to our business.

18 THE CHAIRMAN: So, is your preferred way to proceed to direct the pleadings to proceed in  
19 relation to the SMP matters; to refer questions on the undoubted price control matters to the  
20 Commission; and then to supplement those in either direction once we have decided about  
21 Issue 4? Would that summarise your position?

22 MR. KENNELLY: Madam, that is our position in a nutshell. If the Tribunal is concerned that that  
23 may be a slightly untidy approach, my submission is that the Tribunal should weigh that  
24 apparent untidiness against the very severe harm which Hutchison suffers as a result of further  
25 delay. The untidiness, in my submission, does not affect or prejudice the parties because it is a  
26 narrow issue which can be referred either way and ought not to delay the resolution of the main  
27 SMP appeal or the main reference to the Commission.

28 Those are my submissions.

29 MR. ROTH: Madam, you will of course appreciate that our submissions on some of these points in  
30 reply to the Tribunal's letter came before we had seen the submissions from the other parties,  
31 and we have now had to consider the position in the light of what everyone has had to say.  
32 Can I make a couple of preliminary observations on your first point? First of all, as you said  
33 right at the outset in your opening remarks, this is the first time that the new regime under  
34 these provisions of the Communications Act falls for judicial determination. The issue of what

1 is, or is not, within the scope of s.193(1) is a very important issue - obviously important in this  
2 appeal (because it arises only on the Hutchison appeal) because it de-limits the scope of the  
3 appeal, but also important for future cases and how this regime is going to operate. So, it is a  
4 precedent-setting question.

5 Secondly, Ofcom is very concerned that this matter should be clarified at the outset. It affects  
6 clearly the scope of the non-price control hearing before you. It affects, equally, the  
7 boundaries of the price control reference to the Commission.

8 Thirdly, we are concerned that all the parties' contentions on this point should be heard and  
9 determined on this issue. We are, of course, delighted to hear that Hutchison (albeit by way of  
10 concession) is now prepared to accept our point about paras. 3.16 and 3.17 and amend  
11 accordingly. If the interveners (some of whom have taken objection, as you will have noticed,  
12 to yet other points in the appendix to Hutchison's appeal) drop their objections, then, yes, the  
13 point falls away. But, if they maintain their contentions that there are other areas in  
14 Hutchison's proposed price control submissions that in fact are not price control, we submit  
15 that that should be determined at the outset, and it should be determined by this Tribunal, and  
16 not by the Competition Commission. We think it would be most unsatisfactory if there is then  
17 argument, a reference having been made before the Competition Commission as to what is, or  
18 is not, properly price control within their jurisdiction. We note from the Commission's letter  
19 that they also are concerned that the jurisdictional position is not clarified before the position  
20 goes to them.

21 I have heard that the interveners should be heard and their objections determined. Ofcom doe  
22 not particularly agree with their objections on this point, but nonetheless they are making the  
23 objections, and they would be able to make them subsequently if you were to make a reference  
24 of matters that they contend are not price control. Answers come back from the Commission.  
25 There is then, as you know, the scope for judicial review within this Tribunal. The interveners  
26 would be able to challenge the **vires** of what happened, and, indeed, ultimately could appeal a  
27 decision that is a point of law to the Court of Appeal. You will have noticed that under s.196 it  
28 is not only a party who can appeal, but it is anyone with a sufficient interest who can appeal.  
29 That would be a most unsatisfactory way to proceed. It should be determined right at the  
30 beginning so that we all know where we are. While I note that Mr. Kennelly invites you treat  
31 the submissions of the interveners with caution, of course we hope you will treat everyone's  
32 submissions with caution - except for my own, I should say. They clearly have an interest and  
33 a right to be heard on this point.

1 Mr. Kennelly says s.193(10) is a very broad one - a matter relating to the imposition of any  
2 form of price control. That is right. But, the relevant provision is not sub-section (10), but sub-  
3 section (1) which is 'price control matters arising in the appeal to the extent that they are  
4 matters of a description specified in the Rules'.

5 It takes one to the Rule. It is Rule 3 which is clearly narrower than sub-section (10).  
6 It says, "For the purposes of sub-section (1) of s.193 of the Act there is specified  
7 every price control matter falling within sub-section (10) of that section which is  
8 disputed between the parties and which relates to ..."

9 It does not say 'every matter falling within sub-section (10) of that section which is disputed  
10 between the parties [full stop]'. So, it is the application of those sub-paragraphs (a), (b) and (c)  
11 that one has to grapple with.

12 We submit, therefore, that unless the interveners drop their point it is really not, with great  
13 respect, practicable to resolve that today. They will make their points in reply. We have a right  
14 of reply. The appropriate course would be to set that down as a preliminary issue. I quite agree  
15 that it should be dealt with as quickly as possible. It would certainly take less than a day. We  
16 would submit that one does not - contrary to some suggestions made in some of the  
17 submissions - need pleadings on it. Under your case management powers you could direct that  
18 there just be skeleton arguments from each of the parties served simultaneously, and the matter  
19 be set down for hearing, and then you rule on it, and that that should be done first.

20 If that course is not agreeable, then after the interveners have made their points, arguing what  
21 is not price control, obviously I would wish to address you on the points they make. Maybe  
22 H3G would as well.

23 So, that is how, with respect, we suggest this, as we say, very important and fundamental issue  
24 should be resolved. We hope that if that course was one that appealed to the Tribunal, it could  
25 be heard and resolved as quickly as possible so that, then, the non-price control appeal could to  
26 full steam ahead.

27 On the second matter - any directions as regards the interveners - I should say that we have  
28 rather less concern here on the non-price control matters than we do when we come to the price  
29 control matters. But, I save that as that is your third head. We think, however, that it probably  
30 is appropriate, with respect, to make a direction that their observations should be limited to the  
31 grounds of appeal raised in H3G's notice of appeal. But, beyond that we do not think any  
32 further direction is needed.

33 On your third question of confidentiality, we can, of course, and will, serve an unredacted copy  
34 of the 27<sup>th</sup> March decision on the Tribunal. We are starting to grapple with the confidentiality

1 problems that arise with the various parties. The position is that certain bits of the decision  
2 were redacted as against, say, H3G because they concern confidential matters of BT. But, BT  
3 has, of course, seen that. Other matters were redacted as regards BT because they concern  
4 confidential matters regarding H3G but H3G has of course seen that. So, there are in fact  
5 several redacted versions of this decision which have been served on the different parties. It is  
6 a question of really coming to a sensible way of achieving a form of the decision that the  
7 parties' legal representatives can have and can take instructions on, such that the appeal can  
8 continue in an orderly way with everyone knowing what they need to know to make proper  
9 submissions. We are trying to resolve that by co-operation between the various parties, and it  
10 is very much a question of whether the parties have their own confidentiality interests. It is not  
11 really an interest of Ofcom. We hope and trust that as has happened, I am happy to say, in all  
12 previous cases I have conducted before this Tribunal, it can be resolved by goodwill between  
13 the parties, and that the Tribunal will not be asked at any time to rule on it. But, we would  
14 invite you to leave the parties to work on producing a solution to the confidentiality issues. I  
15 have indeed heard before we came in this morning that one area that was confidential in March  
16 is now no longer confidential and can be disclosed. So, one can make progress and deal with it  
17 in that way. If we are unsuccessful, then of course we may need to ask you to rule on it in the  
18 future.

19 Is there anything else I can assist you on under this bundle of issues?

20 THE CHAIRMAN: Yes. With regard to the service of your defence in the H3G appeal, you heard  
21 what Mr. Kennelly had to say - which was, as I understood it, that we should go ahead with the  
22 service of the defence and the statements of intervention in relation to the SMP matters  
23 pending the resolution of whether there are other non-price control matters for the Tribunal to  
24 consider. Is that a sequence that you would be in favour of, or would you submit that the  
25 service of the defence and further pleadings should await the outcome of our determination as  
26 to what all the non-price control matters are?

27 MR. ROTH: Madam, the second, because if you decide that there are other non-price control  
28 matters presently in the appendix, the notice of appeal would need further amendment. We  
29 would then have to amend and supplement the defence. We say it is much more sensible to get  
30 this preliminary matter determined, and then to have one notice of appeal dealing with all the  
31 non-price control -- one defence dealing with all the non-price control statements of  
32 intervention, whether joined, or, as I suspect, they will be separate, but I do not know, from the  
33 interveners dealing with it, so that we have from each party, or group of parties, one document

1 that covers all the non-price control matters together. We say that that is the most efficient  
2 and satisfactory way of dealing with things.

3 As to sequence of pleadings, you will have seen from our letter that we suggested that those  
4 interveners who support Hutchison should put their statements of intervention in first so that  
5 Ofcom, in its defence -- I say those interveners who support Hutchison. I think Mr. Kennelly  
6 assumes that nobody will. But if they do -- if there are any, such that we in our defence can  
7 reply to their points as well as to the points in the notice of appeal, that we then do our defence  
8 and that then those interveners who support Ofcom put their statements of intervention after  
9 the defence. We thought that was a sensible sequence. There is no magic in it, but we thought  
10 that might avoid a multiplicity of replies.

11 THE CHAIRMAN: I think there was a mixture in relation to the O2 appeal, but I think in relation  
12 to the H3G appeal, all the interveners are in support of you, Mr. Roth.

13 MR. ROTH: I am delighted to be reassured of that. In that case, this point does not arise and so  
14 our defence would go first, and then the statements of intervention.

15 THE CHAIRMAN: You have not given us any indication as to what Ofcom's view is as to whether  
16 Issue 4 is a price control matter or a non-price control matter. Do you want to reserve your  
17 position on that until the preliminary issue which you say we should hear?

18 MR. ROTH: I am sorry. We had intended to do that by breaking it down and dealing with it in our  
19 letter. I think Mr. Kennelly was referring to that point. It is at p.4 of our letter, paras. 17 and  
20 18. This is our letter of 20<sup>th</sup> July. "-- determine whether or not to what extent the issue in  
21 Point 4 raises requires consideration ----" We break it down into the four grounds which, as  
22 we understand it, come under Point 4 in H3G's appendix. We say that in our view two of them  
23 are price control and two are not. Those are paras. 3.16 and 3.17. Those are the two points that  
24 Mr. Kennelly said that although Hutchison does not formally agree with us, he is prepared, for  
25 the purposes of expedition, to accept that and put them in as non-price control. (After a  
26 pause): That is our position. Having heard Mr. Kennelly, I think Hutchison is prepared to  
27 accept that, and that is why I say that if the interveners abandon their view that there are yet  
28 other matters that are non-price control, this issue falls away as a dispute. I anticipate that  
29 they will not.

30 THE CHAIRMAN: Just to be clear, are you saying that given what Mr. Kennelly said about them  
31 moving of the two paragraphs, you do not regard there being any difference of opinion  
32 between you and H3G as to what are price control and non-price control matters. So, this  
33 hearing of a preliminary issue which you say we should have is to determine the points that the  
34 interveners want to raise, rather than the points of issue between you.

1 MR. ROTH: As a result of what Mr. Kennelly said today, yes.

2 MR. SCOTT: Just one quick question in relation to the relief sought by H3G - and this may be for  
3 the next hearing -- 3(1)(c) - direct Ofcom to impose no more than an obligation on H3G to set  
4 its NCT rate on fair and reasonable terms with suitable guidance to be issued by Ofcom, taking  
5 into account actual market circumstances.” We may need to decide at some point whether that  
6 is a price control matter or a non-price control matter without trying to reach a premature view  
7 on that.

8 MR. ROTH: We were trying to see where that comes into the appendix which is, as it were ... in  
9 the sense that we were really looking at that being H3G’s. We were really looking at that  
10 being H3G’s proposed case for submission to the Commission whether that covers issues that  
11 we say are not properly within the jurisdiction of the Tribunal and we think that that informed  
12 really what 370 appears to be getting at. If you look at the appendix at 3.17, it is the fourth  
13 ground, and it is because of the very point you have raised that we have taken the point that  
14 we think that is not a price control issue, and that has now been conceded at least for the  
15 purpose of the appeal. That indeed was one of the reasons why, having read that, we thought  
16 that is not price control as defined.

17 THE CHAIRMAN: T-Mobile.

18 MR. PICKFORD: Thank you, madam. In the interests of economy I propose to confine my  
19 submissions merely to dealing with the issue of directions as regards interveners, and I leave it  
20 to the other interveners to make such submissions as they see fit in relation to the other points  
21 that arise, and it may be that I can be relatively brief in relation to that point as well. Mr.  
22 Kennelly has, I am glad to say, dropped the contention that was originally advanced by H3G  
23 that the interveners should be required to produce a joint intervention – there are plainly good  
24 reasons why that is inappropriate; as it is no longer being advanced by him and, as I understand  
25 it, by Ofcom I do not intend to trouble the Tribunal with my submissions on that point.  
26 Secondly, as regards the permissible scope of interventions, again it appears that in fact there  
27 may ultimately be no dispute as between the parties as to that issue either. T-Mobile’s position  
28 is this: plainly, it must only address points in its intervention in the context of responding to  
29 points raised in the appeals themselves. We do not seek to argue that T-Mobile should be  
30 permitted to raise its own separate points that go entirely outside the scope of the points raised  
31 in the appeals. What we do say, however, is that an intervening party within the confines of  
32 that restriction must be able to advance a position that differs from that advanced by either  
33 Ofcom or an appellant, it must be entitled to put forward its own arguments; and secondly, it  
34 must be entitled to seek different relief from that sought by the appellant - or indeed by

1 Ofcom. Subject to those qualifications, which I say flow from the submission that I made  
2 earlier to the Tribunal concerning the Tribunal's rules on interventions, they are also supported  
3 by a lot of other points, but again unless that position is contentious I do not need to address  
4 the Tribunal on the reasons why I say I am right in relation to that so it may be appropriate if I  
5 pause there and allow anyone else to speak.

6 THE CHAIRMAN: Is anyone jumping up to take issue with Mr. Pickford's point? No, good.

7 MR. ROTH: We are not quite clear what is meant by the first point "put forward their own  
8 arguments", we cannot imagine it is contentious, but we are struggling with what is meant by  
9 "different relief in the context of the Hutchison appeal on non-price control".

10 THE CHAIRMAN: I do not want to press him to say what his case is at this stage; the Tribunal's  
11 preliminary view is that we will allow pleadings to be lodged and if anybody wants to take a  
12 point that someone has gone outside the bounds of what is permitted then they can take that  
13 point, but our concern is that any direction is more likely to cause problems than to resolve  
14 them.

15 MR. PICKFORD: Madam, we entirely support that approach and therefore for that reason would  
16 reject the suggestion of Ofcom that it should be a formal direction. I am grateful.

17 THE CHAIRMAN: Other interveners who want to make submissions? Mr. Green?

18 MR. GREEN: Thank you. Can I just deal with a few points? It seems to us that the way in which  
19 the non-price control issues are dealt with needs to be viewed in the context of how we might  
20 also address the price control issues. Can I just for a few seconds say a word about that? It  
21 seems to us that one way to approach all of these issues is to have a two track directions'  
22 approach. On the one hand you have directions for the preliminary issues, which are really are  
23 jurisdictional issues, which can go ahead and can be laid down but, at the same time, one  
24 would have directions which go to the terms of reference, and that we are going to deal with in  
25 your third bundle of issues. So there is nothing to prevent two sets of directions running in  
26 parallel and that will obviously address everybody's concern about expedition and speed. The  
27 one caveat we would add to that, it seems to us to be extremely important that the Tribunal  
28 does deal with jurisdictional issues before terms of reference are finalised and an order is made  
29 about them. That is good reason for having them run in parallel because one does not have  
30 them run sequentially and it does not waste time.

31 So far as the non-price control matters are concerned, we are worried about the way in which  
32 Hutchison is arguing the point today. We think there is a risk that the Tribunal is being urged  
33 to take a peremptory and hurried decision on points of great importance to the industry as a  
34 whole, namely the jurisdiction to make a reference to the Competition Commission. There are

1 a number of preliminary issues which now arise – what is a price control issue? What is the  
2 difference between that and a non-price control issue? It is a matter of enormous importance to  
3 the industry. It is not entirely clear where that divide lays, even this question of whether or not  
4 – in other words, if Hutchison has SMP whether price control should be imposed is of itself  
5 quite a complex issue. The Telecoms. Act says that a matter relating to the imposition of price  
6 control is price control, and the word “imposition” might suggest its future imposition or past  
7 imposition. On the other hand, the 2004 regulations may suggest it is narrower. Now, there  
8 may be quite a lot of argument about the relative balance between the Act and the underlying  
9 rules, and which takes precedence, and which should guide your interpretation of the  
10 jurisdiction, and that is a matter which requires mature consideration.

11 There are the other issues which need to be determined which may arise out of Hutchison’s  
12 appendix, and it seems to us that the Tribunal needs to grapple firmly with what is price  
13 control, then apply it to such factual disputes as arise. There is another issue which O2 is  
14 concerned about, we have made it clear that we are not interested in participating in  
15 Hutchison’s SMP appeal, but there is an issue in relation to its “whether or not” point. So far  
16 as “whether or not” is concerned, if it is a CAT matter – if it is a Tribunal matter – it seems to  
17 us that all the operators would want to make submissions in general terms about the principles  
18 which govern the exercise of discretion in imposing price control, and that is quite discrete  
19 from the factual matters which Hutchison raises which go to whether you should exercise your  
20 discretion on the facts of the case. So that is something that O2 would wish to intervene on; it  
21 has no interest in fighting Hutchison’s case for it or against it, but on how you should exercise  
22 your discretion in determining whether to apply price control in any given case is a matter of  
23 much broader importance.

24 So we think there are a significant number of issues arising of broad importance to the sector,  
25 which is why we suggest that a preliminary issue is the proper way to go about it. We agree  
26 with Mr. Roth that it can be dealt with fairly shortly – a day to a day and a half is probably  
27 sufficient.

28 The one thing we think is important before we all write a great deal about this issue is that  
29 there is a list of issues in dispute that we can then target our submissions at. That can be done  
30 either through everybody trying to agree a list and then we go straight to skeletons, or Ofcom  
31 can put in a defence and we put in observations – I do not think it really matters. But it does  
32 seem to us that it is important we identify precisely what is in issue – in other words an agenda  
33 for the preliminary issue – and then we can simply make submissions about those issues and it  
34 may be that the parties themselves can draw a list of disputed issues, or it can be left to Ofcom

1 in the course of their defence and we can then seek to move on from that. Precisely how we go  
2 about that I do not think is ----

3 THE CHAIRMAN: I think Ofcom was saying that having regard to what Mr. Kennelly has said they  
4 do not regard there being any dispute between them and H3G as to what non-price control  
5 matters and price control matters are. If we are being asked to order directions towards a  
6 preliminary point being determined we need to be satisfied that there is some set of issues  
7 which need to be determined by that preliminary hearing. At the moment it seems to be up to  
8 the interveners to suggest what issues there are that need to be determined in a preliminary  
9 hearing.

10 MR. GREEN: I have no difficulty with that. My point is simply that we need to identify the issues  
11 before everybody spends a great deal of time and effort in addressing them, and it may be they  
12 will be limited substantially, and it may be that the parties should simply put their heads  
13 together and draw up a list of the matters which are in issue and then one either goes to  
14 skeletons or one goes through a form of pleadings – I do not think that really matters.

15 THE CHAIRMAN: But what is your position now as to whether there are still issues which are in  
16 the grey area between ----

17 MR. GREEN: There are issues which other parties have raised and they can refer those to you  
18 themselves, for example bill and keep, the question of whether or not – so there are issues if  
19 one looks at it in the round, in the aggregate, but we do believe those need to be resolved  
20 before we get down to determining the terms of reference. That goes, we say, and perhaps this  
21 is for the next bundle of issues, for Hutchison's SMP determination and I think you would  
22 probably put that in the next category of issues, but we think it is very important that is  
23 determined before the terms of reference are formulated. We can deal with that now or in the  
24 next issue.

25 Can I just pick up one or two points. Mr. Scott's point about the Hutchison case last time,  
26 those of us who were in it will recollect that concerned SMP only, it did not concern what were  
27 the consequences of SMP, it was whether Hutchison had SMP in the light of the existence or  
28 otherwise of BT's countervailing buyer power, so it concerned that *a priori* question; we never  
29 had to get on to the question of whether or not in the light of such a finding any price control  
30 measure should be imposed.

31 MR. SCOTT: My point was simply that had that come up that would have raised the question: was it  
32 a price control?

33 MR. GREEN: I think the way in which you put it demonstrates how important these issues are. One  
34 can imagine that the distinction between price control and none price control could be a pure

1 question of law; it could concern the underlying EC Directive and its interpretation, or it could  
2 be a major dispute about cost. It could be a simple question that one could say it is appropriate  
3 for the Tribunal to resolve or it could be a very complex economic question which one might  
4 say it is appropriate for the Competition Commission to resolve. Whether or not that has any  
5 impact on the issue of classification is another matter, but I think it highlights the complexity  
6 of the issues.

7 MR. SCOTT: Yes, the difficulty the Tribunal faces is that the provisions in the statute and rules are  
8 not framed in terms of our exercising a discretion and in terms of our doing so on a mandatory  
9 basis, and I understand the point being made on this side of the room that there may be  
10 competitive market considerations that could conceivably arise on both the price control and  
11 the non-price control and we might both be forced to consider the same set of circumstances  
12 and obtaining consistency between ourselves and our neighbours is going to be one of the  
13 issues of operating this system.

14 MR. GREEN: Yes. There are two other matters arising. The position of interveners, I think we  
15 would adopt the suggestion that we simply ensure that we stick to issues arising out of the  
16 notice of appeal and if anyone wants to object to a submission then it is for later rather than  
17 now.

18 The final matter, confidentiality, we would support the suggestion it should be left to the  
19 parties. We have in many other cases evolved confidentiality rings and made suitable  
20 arrangements and the parties, if they have a difficulty can come back to the Tribunal for  
21 resolution of outstanding problems. It has worked in the past simply to leave the parties to try  
22 and put their heads together and come up with a sensible solution. Thank you.

23 THE CHAIRMAN: Thank you, Mr. Green.

24 MR. FLYNN: Madam, may I make a few points on behalf of Orange to the Tribunal? Your first  
25 two questions in this bundle, if I can put them together, were: what should be the process for  
26 determining whether what you call issue 4 is a price control matter or not? That issue is  
27 whether it was an appropriate response to an SMP finding to impose a price control.  
28 My first submission I support what Mr. Green and Mr. Roth have said that really a CMC is not  
29 the place for deciding these rather complex points. If one were looking at that issue as framed,  
30 one might think that under Rule 3(1)(a), which looks at the principles applied in setting the  
31 condition, that would not go to a question whether a condition should be set or not, and I rather  
32 take Mr. Scott's inverse analogy, if you like, what if no condition had been imposed, would  
33 that be a matter which had to be shipped off to the Commission. A measure of agreement,  
34 which I now confess I do not understand, seems to have broken out between Mr. Kennelly

1 and Mr. Roth, because Mr. Kennelly has agreed with Mr. Roth's points at para.18 of his letter,  
2 in which he breaks down into price control and non-price control matters what I think is meant  
3 to be this issue 4. But if one reads that none of them actually raises this specific issue, is price  
4 control the appropriate response to an SMP finding? If you look under price control matters  
5 Mr. Roth characterises a price control matter the financial impact on H3G and competition  
6 saying that this issue relates to the level of the price control and so forth, and says it was  
7 applied by Ofcom as a check and it was not analysed by Ofcom as a prior issue as to whether  
8 as a matter of principle a price control should be imposed.

9 THE CHAIRMAN: What are you reading from?

10 MR. FLYNN: I am sorry, madam, I am looking at para.18 of Ofcom's letter to the Tribunal of 20<sup>th</sup>  
11 July. This is the letter in which Ofcom identifies paras. 3.16 and 3.17 of H3G's appendix as  
12 being non-price control matters. Does the Tribunal now have that letter in front of them?  
13 My submission in short is if the issue is broken down in this particular fashion the point that I  
14 thought we were actually on – whether a price control was an appropriate response – seems to  
15 disappear between the crack because it has not been analysed as a prior issue by Ofcom in the  
16 first place, and if you then look at the third point – non-price control matter – the point seems  
17 to be taken that it is premature going to the procedure; it is a procedural issue but not a review  
18 of the matter of principle whether a price control should be imposed or not. So I am really not  
19 sure of the basis on which Mr. Kennelly and Mr. Roth seem to be agreeing that this is an  
20 appropriate way of cutting it.

21 THE CHAIRMAN: As I understood it, and no doubt Mr. Kennelly and Mr. Roth will jump up, that  
22 what the envisage happening, or what they are saying is that one cannot actually regard issue 4  
23 as a single issue, that it contains a mixture of non-price control issues and price control  
24 matters, those issues have to be decided by the two separate bodies, but after that then all  
25 issues come back together to the Tribunal to determine the appeal at the end of the day, and so  
26 we take the answers that the Competition Commission have given to the price control matters,  
27 and we put those together with the answers that we have arrived at in relation to non-price  
28 control matters and then we will be in a position to decide issue 4 as we have framed it.

29 MR. FLYNN: That may be how it is envisaged, madam, it still seems to me that the issue itself  
30 seems to fall between the cracks which leads me to repeat the point we made in our  
31 correspondence that because of the way the H3G appeal notice and its separate annex are  
32 framed, we do not have what I think the rules envisage which is a notice of appeal which set  
33 out the grounds on which they wish to rely and an identification by way of a statement as to  
34 which of those issues are price control issues and which are not, and why. The rules then

1 envisage that that will be followed by a defence from Ofcom which in effect reacts to that and  
2 indeed although they refer to requests to intervene I think at least the suggestion is that  
3 sequentially those would be followed by intervention statements which would react to the  
4 points made by the principal parties. I suggest that that really is the procedure that we need to  
5 follow here. We need a clear statement. Mr Kennelly this morning reverted to the original  
6 Hutchison position that issue 4, as originally formulated, was appropriate for the Competition  
7 Commission whereas in correspondence they had suggested not. You have our submissions,  
8 we have identified a few points and so have others, where it is frankly not clear whether they  
9 are price control matters or not in the appendix. While I really do not wish to be thought of as  
10 trying to delay these proceedings in any way; I do think we need at the very least a clear  
11 statement from Hutchison followed by a thought through reaction from Ofcom as to which are  
12 the price control issues and which are not, and that we can all take a position on that and then  
13 we will know whether there are matters in dispute. I do suggest to the Tribunal that it should  
14 take this case in stages because it is the first appeal under these rather complicated provisions  
15 and it is pretty important that we get it right. It does not mean the stages have to be long but I  
16 think things have to be approached in sequence.

17 If I can move on to your next point I must say we also are not attracted by the idea of  
18 proceeding with part of the Hutchison appeal and allowing others to catch up once a view has  
19 been taken on which are properly for the Tribunal to determine and which are for the  
20 Competition Commission. I think in light of what has been said about restrictions on the  
21 statements of intervention I probably do not need to add anything. I think the suggestion is we  
22 can be trusted, and if we cannot be trusted the Tribunal can in our place.

23 Unless I can help you further, madam, I think that is all I wanted to say on this particular point

24 MR. BARLING: I do not have very much to say but we do agree that the jurisdiction issue needs to  
25 be determined; we had rather assumed it would not be determined in the case management  
26 conference today. It seems to us that it probably does come down just to number 4, and there  
27 may be no dispute insofar as H3G are raising point 4, which they seem to be us to be raising,  
28 as the Tribunal has rightly identified as one of the points they make that does seem to us to be  
29 capable of a swift resolution – it may be that you would not need any further argument if it is  
30 framed in terms point 4. Already you have had some written submissions on point 4, you have  
31 had some oral submissions today and everyone has had the opportunity to come back on it.  
32 It did seem to us, I confess, and as it might have done to Mr. Flynn, that Ofcom with respect to  
33 them are rather over refining the way in which the matter was put in H3G's appendix. It did  
34 seem to us that the four matters that they have divided issue 4 up into were more factors than

1 issues, and a factor of course is capable of going to more than one issue. It may be of course  
2 that a factor that they wish to rely upon in the H3G appeal can go both to the SMP argument,  
3 which is of course a non-price control issue, and it can also be a factor that the Competition  
4 Commission may need to take into account when looking at whether there should be the  
5 imposition of a price control or what level it should be at. I am not convinced, and I suspect  
6 that this is what Mr. Flynn was saying too, that really those four matters need to be looked at  
7 separately as to whether each of them is or is not a price control, and we would much prefer  
8 the way that the Tribunal has put it in issue 4. But if there has to be further deliberation about  
9 it then we do urge very strongly that the Tribunal adopt a streamlined approach – written  
10 submissions within a very short time on these matters and then perhaps a short hearing to  
11 emphasise anything that needs to be emphasised, because it does need to be dealt with, as  
12 others have said, before we turn to the reference. Like others we would not support the idea of  
13 a two track reference with another question following on later.

14 So far as directions on the non-price, realistically we are talking about the SMP issue when we  
15 talk about the non-price control issues in our respectful submission and we would support  
16 getting on with that. We have put forward some directions. We would not favour requesting  
17 H3G to re-plead anything because that will just risk further time elapsing. We would rather  
18 move straight away to directions on SMP on that issue, including the Ofcom defence, and we  
19 have set out some indicative dates for those directions which, I think, follow what others have  
20 said in the sense that supporting interveners would plead at the appropriate time depending on  
21 who they were supporting. That timetable, of course, that we put in para.16 to 18 of our  
22 response to your letter, was at a time when there were two other non-price control matters to be  
23 dealt within the BT appeal and in the O2 appeal, so it may be that this is rather too generous  
24 and it could may be pulled forward by a couple of weeks down the line at the different stages.  
25 We do urge the Tribunal to put in place some directions on the SMP issue. If other issues have  
26 to be tacked on in the light of what we hope will be a fairly summary decision on price control  
27 matters those could no doubt be slotted into that.

28 I think those are the only points that we need to make that have not already been very full  
29 made. Thank you very much.

30 THE CHAIRMAN: You are acting for Vodafone?

31 MR. WISKING: Yes. I would just like briefly to state Vodafone's position on the various issues that  
32 have been raised. On the first question of what is or what is not a price control matter our  
33 submission is as set out in our written submissions that issue 4 is not a price control matter. I  
34 will not rehearse all the arguments that have been put already but one point which I do not

1 think has been made is that if it is right that it is a price control matter that will necessarily  
2 involve the Competition Commission considering – and I think Hutchison’s appeal is put in  
3 this way – what other alternative remedy should be put in place to deal with SMP. If that is  
4 right that requires the Competition Commission to consider matters which are plainly not price  
5 control matters and in my submission that is outwith the jurisdiction of the Competition  
6 Commission in these circumstances, and that indeed fits within the scheme of the  
7 Communications Act, s.87(9) which has been referred to identifies the price control matters.  
8 Other parts of s.87 identify other non-price control remedies which can be imposed where  
9 there has been a finding of SMP.

10 In our submission the question of whether a price control should be imposed *per se* as opposed  
11 to the actual price control is a matter for the Tribunal and it is a matter akin to the sort of  
12 considerations that arise in terms of SMP, which everyone accepts is not a price control matter  
13 and a matter for the Tribunal.

14 I do not propose to say anything more about that but in my submission it is not a price control  
15 matter, it is a matter on which we would like to make submissions at a preliminary hearing if  
16 the Tribunal deems that appropriate.

17 The second issue, and again we have identified this in our written submissions, is that there are  
18 a number of other issues identified in Hutchison’s notice of appeal. I will just itemise them.  
19 The first is in the notice of appeal itself in paras. 1.5 to 1.19 - there are a number of allegations  
20 regarding the state of competition in the mobile market, if I can use that generic terminology.  
21 It is headed ‘General Market Context’. Hutchison make a number of allegations broadly about  
22 the state of competition and the competitive process. What is not clear to us is the relevance  
23 of those allegations and how they play into the rest of the case. Is Hutchison arguing, for  
24 example, perhaps that two wrongs make a right -- that its position in the market is such that it  
25 does not deserve a price control which would otherwise apply? This is an example of a lack of  
26 clarity that has been mentioned before.

27 There are a number of other issues - the alleged distorted effect of the MMP arrangements  
28 which is mentioned in a number of places. One example is at para. 7.3(a) of the appendix to  
29 Hutchison’s notice of appeal; the alleged role of Hutchison as a maverick; and the  
30 appropriateness of the bill-and-keep system.

31 Now, it seemed to be suggested this morning that these fall under the heading of Issue 4. It is  
32 not clear to us that that is the case. Again, this is an example of lack of clarity. If it is, then it  
33 falls within the general submission I made before that that is not a price control matter. If they

1 are not, and they are self-standing grounds of appeal, then those are matters again which we  
2 would like to address as to whether they are appropriately price control matters.

3 That is our position on that issue.

4 The other matters that were raised, I think -- In terms of the position of interveners, I do not  
5 think we need to say any more. I think there is general agreement on that.

6 In terms of confidentiality, I think we need to consider the schedule and I think that is a matter  
7 that can be resolved between the parties.

8 In terms of the sequencing of the procedure, in our submission, the preliminary hearing has to  
9 be dealt with first; then the defence; then the statements of intervention; and parallel tracks is,  
10 frankly, messy and complicated and it would be a case of more haste and less speed -- or more  
11 speed and less haste, the other way around.

12 Unless there is anything else, that is our position.

13 THE CHAIRMAN: Mr. Roth and Mr. Kennelly, have either of you, or both of you, got anything  
14 you wish to say in response to the points that we have heard?

15 MR. ROTH: I am happy to clarify, for the benefit of Mr. Flynn, and my friends, as there seems to  
16 be some uncertainty of how we broach the four grounds in para. 18 of our letter -- There seems  
17 to be some uncertainty. This is Ofcom's letter of 20<sup>th</sup> July at paras. 17 and 18 which I  
18 mentioned before. The position was this: Hutchison in their main notice of appeal did address  
19 certain arguments which go to your Point 4, and they then attach an appendix dealing with  
20 what they say are the price control issues that arise from their appeal. We did not, in  
21 answering Point 4, address the question of whether those matters that Hutchison has put in its  
22 notice of appeal as non-price control issues should in fact be regarded as price control issues.  
23 We agree that where they are in as non-price control issues, they are indeed correctly  
24 categorised as non-price control issues. We gave our attention more specifically to those  
25 issues that they have said are price control issues to see whether they are, in our view, truly to  
26 be termed price control issues, on the basis that if they are not price control issues, then they  
27 clearly are non-price control issues. That was why we looked specifically at the appendix in  
28 answer Question 4 - the appendix that sets out Hutchison's case of the price control matters. At  
29 Section 3 of Hutchison's argument, in its appendix, on p.2, the section headed 'The Price  
30 Control Remedies are disproportionate/inappropriate', which starts, "Ofcom has erred as a  
31 matter of law and/or assessment in setting the price controls ----" After the general statement  
32 you see at the end of para. 3.1, "There are a number of reasons for this ----" and then there are  
33 in the following discussion four distinct grounds. First, at 3.2, under the heading 'An effects-

1 based analysis indicates the remedy is inappropriate' and then a long discussion of financial  
2 consequences .That goes up to 3.12.

3 Below 3.12 there is the heading 'Ofcom's welfare analysis is flawed' and that starts, 'Second',  
4 and that is the second ground that Hutchison has put forward with quite detailed discussion of  
5 what should be the unregulated rate that should be used as the comparator, and so on. That  
6 goes on all the way to 3.15.

7 Then, under the heading 'Premature view that a price control on H3G was  
8 necessary/dependency on Ofcom policy', are two further grounds: third, that Ofcom reached a  
9 view prior to having completed its assessment of countervailing buyer power; and, fourth,  
10 again a distinct ground which relates to the Ofcom dispute determination method, and that  
11 therefore this was inappropriate because anything could be resolved by dispute resolution.  
12 So, the four grounds are not our grounds. These are Hutchison's grounds put forward. What we  
13 did was to look at the argument they have put under the four grounds as set there, and said,  
14 "Well, given what they are saying, are all of these in fact price control within the definition in  
15 the rules?" and that is how we concluded that the third and the fourth ground would seem quite  
16 separate from the other grounds are not. So, that is how we approached it. That is what we did.  
17 Anything that relates to Point 4 that is not in the appendix and is in the notice of appeal as  
18 'other argument' -- It is not even suggested by Hutchison that it is a price control, and so we  
19 have not addressed it or taken issue with it, because we agree. Is that clear? I hope I have  
20 clarified it.

21 THE CHAIRMAN: 'Clear' is not the adjective that springs to my mind, I must admit. There seems  
22 to be some confusion here about grounds and arguments and issues. Now, I can quite see that  
23 looking at para. 3.17 the existence of the dispute resolution procedure, for example, and what  
24 the test is that Ofcom ought to be applying when a dispute is referred to it -- That is a matter  
25 which is relevant to the finding of SMP, and, as I understand it, Hutchison are also saying that  
26 is relevant to the question of whether it was proportionate to impose price control.

27 Now, when one is talking about price control matters or non-price control matters, are we  
28 distinguishing between lines of argument and deciding those, and then applying them to trying  
29 to decide what relief we should grant, or are the price control matters and non-price control  
30 matters the issues which we have to decide, and it may be that the Competition Commission  
31 has to look at this question of the relevance of Ofcom's dispute resolution jurisdiction, and that  
32 we do too, and that we will have to take steps in due course to make sure, if possible, we arrive  
33 at the same answer.

1 Now, what I still am not sure about is what Ofcom's view is as to -- Let us put the question a  
2 different way. The question, "Would a transparency obligation have been sufficient as a  
3 response to Hutchison's SMP?" -- Is that a question which is for the Tribunal, or is it a  
4 question for the Commission, or do you say, "No, those are not the matters. The matters are  
5 the individual grounds, and we have to divide up the appeal on the basis of the individual  
6 grounds rather than on what we have previously been considering the issues"? Before you  
7 respond to that, let me just have a word with my fellow panel. (After a pause): I think we  
8 are going to rise for a quarter of an hour.

9 (Short break)

10 THE CHAIRMAN: We have had a discussion. Where we are up to on this is as follows: as I  
11 indicated before we rose, we think there is some confusion here which needs to be sorted out  
12 between issues and factors. We do not find it particularly helpful, the suggestion of moving  
13 paragraphs from one portion of H3G's notice of appeal to a different portion of their notice of  
14 appeal because that does not tell us anything about which arguments are appropriately raised in  
15 relation to which issues, and what we have to decide are which issues are for the Tribunal and  
16 which issues are for the Competition Commission. It is clear that H3G's appeal raises the  
17 question of whether a remedy short of price control should have been imposed instead of price  
18 control, and we do not consider that the proposed change in H3G's pleading takes us much  
19 further forward in deciding what to do about that issue. We consider it probably is not  
20 something that can be resolved today; that we do therefore need to have some preliminary  
21 resolution of this issue in very short order indeed. We will hear from Mr. Roth and Mr.  
22 Kennelly if they have got anything to say at this point and then we propose to rise for the short  
23 adjournment and come back reinvigorated this afternoon

24 MR. KENNELLY: In that case, Madam, having heard the submissions of the parties, H3G's  
25 concern is that the preliminary issue ought to be identified with sufficient clarity so that it does  
26 not become a broad-based attack on our case. As I said earlier, as an alternative to our opening  
27 submission, we respectfully adopt the issue identified by the Tribunal as the one to be  
28 determined on a preliminary basis. As Mr. Roth said, that issue is drawn from Section 3 of our  
29 appendix to the notice of appeal. That is where we make the point. It is upon that issue that the  
30 interveners ought to make their submissions. Ofcom have indicated that, save for the  
31 amendment we would make, they agree with the rest of that section - as to it being a price  
32 control matter. It is our concern that this issue be resolved expeditiously. Therefore we would  
33 adopt the submission of Ofcom that there be simultaneous exchange of skeleton arguments.  
34 We have been consulting our diaries, and we are in a position to set a date, if the Tribunal is

1 able today, for the hearing of this preliminary issue. Our principal concern is, however, that it  
2 be limited and clarified by the Tribunal today so that we may proceed on a narrow and focused  
3 basis and that is more likely to produce an expeditious result.

4 Madam, in relation to the indication given by the Tribunal, therefore, since the Tribunal is  
5 against us on our opening point, we will not press that point further and we will seek to assist  
6 the Tribunal in formulating this narrow preliminary issue.

7 MR. ROTH: The first thing I should say is that I apologise this has happened. As regards the  
8 preliminary issue we will obviously have to consider Ofcom's observations further in the light  
9 of the observation you have just made for the Tribunal regarding the way we have approached  
10 it. But, we agree with Mr. Kennelly that it should be dealt with as quickly as possible, given  
11 the time of year we are at; that it can be done with skeleton arguments only; and that no more  
12 than a day should be needed, if that, but certainly within a day, of argument. Yes, anything can  
13 be done for clarity. Quite what has to be addressed is clearly desirable. I do not think there is  
14 any more I need to say.

15 THE CHAIRMAN: Finally on the points that Vodafone raised about the preliminary matters in the  
16 Hutchison notice of appeal, again, it seems to us that those are factors which may be relevant  
17 to more than one issue rather than particular issues which have to be divided up between being  
18 price control matters or non-price control matters. I just add that for the sake of completeness.  
19 It would be helpful if the parties could give some consideration not just to the timetable, but to  
20 the description of the preliminary issue that is to be determined so that, if possible, we could  
21 have a draft of that to consider later on.

22 MR. KENNELLY: So that we can use the time, does the Tribunal have any thoughts as to when it  
23 might have a day to hear this matter?

24 THE CHAIRMAN: We are available in the first half of August. Two of the members of the panel  
25 are away the second half of August. That is the panel's availability if that helps the parties.

26 MR. GREEN: Can I mention just one thing on timing? The timing of this rather depends upon the  
27 point of time at which you wish to make the reference to the CC. If that is going to go off  
28 slightly later, then it does not actually prejudice anyone provided this is determined before that  
29 point of time. So, I think one needs to look at the timing in the round. The end point is, in a  
30 sense, the most important point, which is the point at which the reference goes. Perhaps that is  
31 something which one reviews at the end of today.

32 THE CHAIRMAN: Yes, in the sense that in Bundle 3 one of the issues is whether the reference  
33 should wait the service of the defence ----

1 MR. GREEN: And what one does about the Hutchison SMP point - whether that goes first. If that  
2 goes first, then there is a larger window in order to determine this. Perhaps timing could be  
3 dealt with at the end?

4 (Adjourned for a short time)

5 THE CHAIRMAN: I think we will leave timing issues until the end of the day. If we could have  
6 some indication of whether any progress was able to be made in relation to framing the  
7 preliminary issue to be determined?

8 MR. ROTH: Some progress has been made but there is a difference of approach that has emerged  
9 really as to whether what one is looking at is what we did appreciate you did indicate was, at  
10 least provisionally, your view really in terms of issue, or whether one is looking in terms of  
11 particular matters pleaded irrespective in the sense of which issue they go to. For that reason  
12 there are at the moment two rival versions of what might be referred, both covering similar  
13 ground. If I just read them out, they are not quite in a neat form that one can happily hand  
14 them in.

15 The first alternative is the following a specified price control matter within the meaning of  
16 Rule 3(1) of the Tribunal's 2004 Rules, and s.193(10) of the Act, whether in the light of the  
17 matters relied upon in s.3 of the appendix to H3G's notice of appeal the imposition of a price  
18 control on H3G with effect from April 2007 is an appropriate and proportionate response to the  
19 finding of SMP, or whether a remedy short of price control would be sufficient .

20 THE CHAIRMAN: So the preliminary point would be whether that is a price control matter or not?

21 MR. ROTH: Correct. That is the first version. The alternative version is whether any, and if so  
22 which, of the specific matters raised in s.3 of the appendix to H3G's notice of appeal is a price  
23 control matter as defined in Rule 3 of the Tribunal's Rules 2004. At the moment there is a  
24 division, without identifying who supports which, between the parties as to which way to go.

25 THE CHAIRMAN: Well that will have to be one of the things that we decide in the course of the  
26 preliminary hearing, but I think it is useful to have those two drafts, and that may well have  
27 helped to clarify what the difference actually is between the parties in relation to this matter, so  
28 thank you for that.

29 MR. ROTH: I think we can put, as it were, the alternatives into a form of a preliminary issue, so that  
30 which is right is covered in the hearing.

31 MR. KENNELLY: Madam, just to clarify, are we to understand then that it is one of those two  
32 issues that is the issue to be resolved (Laughter) so that we can address that in our skeleton.  
33 The Tribunal will recall my submission made earlier that if the direction is for simultaneous

1 exchange we will need to know what we are addressing before we do so in the written  
2 submissions – if that is the path the Tribunal wishes to go down.

3 THE CHAIRMAN: If that is the path we decide to go down, one of the things on which we will  
4 expect to hear submissions from the parties is whether a price control matter is an issue such as  
5 is the imposition of price control an appropriate response, etc., or is a price control matter one  
6 of the factual issues, if I can put it like that, such as relating to dispute resolution procedure, if I  
7 can call those as a factual matter rather than a question matter. That distinction which is what  
8 has given rise to those two alternative versions is one of the points that we will have to resolve  
9 following the hearing of the preliminary issue, and therefore one of the things at which  
10 submissions should be directed. Does that help at all?

11 MR. KENNELLY: I am very grateful.

12 MR. GREEN: We were shown these drafts literally a moment ago. We have not had a chance to  
13 consider them, would it be possible, without holding anybody up now to have an opportunity  
14 let us say by the end of the week, or by Monday to put in a letter making any observations we  
15 want on those two alternatives, because we really have not had a chance to think about them.

16 THE CHAIRMAN: I think we probably want to try and avoid letters flying around too much in  
17 relation to this. I think we will think about the sequence of leading up to a preliminary  
18 hearing, but it may be a good idea for Mr. Roth and Mr. Kennelly to circulate a tidied up  
19 version of those two issues to the parties as and when they have arrived at them, and then the  
20 parties can address those in the skeleton arguments or whatever pleadings we order to be  
21 served prior to the preliminary hearing.

22 MR. GREEN: That presupposes that one of those two formulations is going to be the preliminary  
23 issue. I think our point is we would like to think about the formulation of the issue because  
24 we literally had a chance to look at those two formulations for just a few seconds.

25 THE CHAIRMAN: Yes, I am not at all saying that what we finally decide will be necessarily one of  
26 those two, what I am saying is that I do not think there need to be letters in addition to  
27 whatever pleadings we ask people to lodge.

28 MR. GREEN: At some point, presumably, the Tribunal will simply identify what the preliminary  
29 issue to be argued about is, and skeletons will presumably address that issue, so we need to get  
30 to the stage at which the issue is framed.

31 THE CHAIRMAN: I am not sure though that we are going to be able to identify what the  
32 preliminary issue is before we actually get to the hearing – that, I think, is the point that we are  
33 discussing, whether that is all rolled up into the hearing.

1 MR. GREEN: I see, you will hear submissions about the issue, come to a result, decide what the  
2 issue is that you are going to rule on – I can see the sense in that, yes.

3 THE CHAIRMAN: That brings us to the third bundle of issues on which we invite submissions.

4 The first is the timing of the reference to the Competition Commission and there are two points  
5 that have been raised. First, whether it should be postponed until after pleadings are served so  
6 that Ofcom should be required to serve a defence at least in outline as to its case on the price  
7 control matters, and secondly, whether the making of the reference should be only after the  
8 determination in effect of the SMP issues.

9 On that latter issue, the appellants to the appeals raising price control matters BT and H3G  
10 both submit that we should not postpone the reference until after the determination of the non-  
11 price control matters. Ofcom's position was that it does not object to the matters being tried in  
12 parallel. All the interveners however disagreed and argued that the question of SMP should be  
13 heard first. The parties should note that in this regard the Tribunal does consider that greater  
14 weight should be given to the views of the parties on this procedural matter than to the  
15 interveners but we are, of course, willing to hear any submissions the interveners wish to  
16 make.

17 The second point in this bundle is the framing of the questions. We do not think it is going to  
18 be profitable to get bogged down in the drafting today, but there are two points in particular  
19 which arise from the correspondence. First, what is the relevance to the framing of the  
20 questions of the fact that there is no ground of appeal before the Tribunal asking for the  
21 charges set for the 2G MNOs to be increased? There are two ways in which we consider this  
22 can be dealt with. The first would be to limit the questions referred to the Competition  
23 Commission in a way which asks them whether the charges should be reduced or should stay  
24 the same. The second would be to leave it completely at large as to what the level of charges  
25 should be and, in the event that the Commission reports back a figure which in fact would  
26 result, if applied, in an increase in the 2G MNOs charges, at that point we would have to  
27 consider what then the Tribunal's duty under s.195 to decide the appeals by reference to the  
28 grounds of appeal actually means.

29 The second point which arises in relation to the framing of the questions is whether the  
30 questions should refer to particular arguments raised in the appeal. For example, should the  
31 question simply ask what the figures should be in a very broad way, or should they ask  
32 whether Ofcom has used, for example, an appropriate economic model, whether its approach  
33 to spectrum costs, annexed work, externalities were correct?

1 At present the Tribunal's preliminary view is that the question should be fairly broadly framed  
2 in order to reduce the risk that the Competition Commission's deliberations will be  
3 inappropriately or artificially constrained by the fact that the question has been phrased in a  
4 particular way. On these issues we would like first of all, BT to make submissions, then H3G,  
5 and then Ofcom. This is a matter, Mr. Rayment, on which the Competition Commission may  
6 wish to say something. Then, any interveners who wish to make submissions.

7 MR. GREEN: Madam, just dealing then first of all very briefly with the question of parallel  
8 proceedings. We have set out the position, I think, quite fully. Our preferred course of action  
9 would be to refer the price control matters to the Competition Commission as soon as the  
10 preliminary issue has been resolved so that we know what it is that is going to be referred.  
11 As to waiting for Ofcom's defence before that reference is made, that is a defence on price  
12 control, assuming that the Tribunal wants to call for a defence on that. We consider that it  
13 would not be necessary really to have a defence before framing the questions because the  
14 appeals have to be determined on the basis of the notice of appeal. Of course, we have the  
15 notices of appeal in both cases. We do recognise, however, that the Competition Commission  
16 itself would prefer as much material as possible, including, I think, the pleadings to be  
17 available before the reference is made. Apparently, Ofcom take that view as well.  
18 But, we are concerned about the delay that that might cause in getting the reference underway.  
19 I wonder whether the solution is not to adopt the proposal of the Competition Commission - or  
20 something very similar to it - in para. 15 of its letter to the Tribunal. That would involve  
21 making the reference before the detailed Ofcom and the detailed interveners' submissions are  
22 put into the Tribunal. That would enable the Competition Commission to get started by  
23 appointing a group, and begin some preparatory work on the substance. On our reading of  
24 para. 15 that seems to be almost the resolution of their position, conscious as they are no doubt,  
25 as we all are, of the need not to have any unnecessary delays. It would save some time if they  
26 could, as it were, commit their members and start in on the preparatory work. In the meantime,  
27 of course, if pleadings are required in a fairly tight timetable, they may well be available at the  
28 time that the preliminary issue has been resolved, and so would be available actually for the  
29 final touches to the framing of the questions for the reference.  
30 So, that would be our compromise position, because undoubtedly, if one calls for the pleadings  
31 that will involve - which is the supposition, I think, in para. 15 - delay inevitably if one has to  
32 wait for all the pleadings to be in before you can even frame the reference. If the reference is  
33 capable of being framed in advance of that, which we submit it is, then you can get things up  
34 and running in the Competition Commission.

1 As to waiting for the non-price control issues to be resolved here, we are talking basically  
2 about, I think, SMP, we would respectfully suggest the same course should be adopted.  
3 Ultimately it would save time if a reference were made in the meantime for the same reasons.  
4 That could be done in tandem - the preparatory work and the appointing of a group - with the  
5 Tribunal's resolution of the SMP issue.

6 We do not think, for the reasons that we gave in our response to the Tribunal's letter that H3G,  
7 being realistic, has a very good prospect in the light of the Tribunal's last ruling on SMP. We  
8 see a re-run of a lot of the same points, actually that did not find favour first time round with  
9 the Tribunal. I know one cannot make too much of the merits, as it were, but we would say that  
10 it may be that one needs to take a view as to whether it is appropriate to delay anything  
11 pending the SMP decision. We would submit not - it would not appropriate. Even with what  
12 we say are the odds, if the Tribunal were to overturn Ofcom's finding of SMP, we say it would  
13 not cause insuperable problems. It is more likely than not that the Competition Commission  
14 would not have progressed very far by that stage, and all that would probably be necessary  
15 would be to delete some of the paragraphs if the questions are framed in an appropriate way --  
16 Some relate to H3G's appeals; some relate to BT's appeal. That is perfectly sensible. I think  
17 that was what the Tribunal wanted to do. We agree with that, respectfully. So, probably, the  
18 H3G ones would have to be deleted.

19 But, like the Competition Commission, we see no fundamental obstacle to the Tribunal and the  
20 Competition Commission dealing with these matters in parallel (see para. 9 of the Competition  
21 Commission's own response to you). Of course, there would have to be some arrangements to  
22 ensure that to whatever extent necessary the Commission can take the Tribunal's findings into  
23 account in its final report to the Tribunal on those matters. That should not cause a problem.

24 As to the framing of the questions, we very much adopt what, Madam, you have said there.  
25 We do not think it would be appropriate to artificially constrain the Competition Commission,  
26 although I think there are two extremes, and one should try to limit, to some extent, the  
27 questions so that people cannot go on a frolic of their own -- so that one cannot stray far and  
28 wide beyond the real issues raised by the notices of appeal. Equally, one should not artificially  
29 constrain the Competition Commission, and if it thinks it is appropriate to take account of a  
30 factor, then they should be able to do so. That is right.

31 There is another point: I think you raised the point that if no-one has asked -- We would go  
32 along these lines: if no appellant has asked for a particular form of relief, then the questions  
33 probably should be framed so that the Competition Commission is not asked to deal with that.  
34 An example you gave, of course, was that the 2G MNO's -- No-one has suggested at the

1 moment that their prices should be increased. In our submission (and I do not know whether it  
2 was your - I do not know that you have expressed a view on that) the questions should be  
3 framed so that the Competition Commission is not required to deal with that. I do not think that  
4 the rights of interveners to -- I think it would confuse utterly the roles of an appellant who has  
5 a right of appeal and an intervener if the intervener's rights were such as to enable him to raise  
6 that kind of so significant a different type of remedy where that is not suggested by any of the  
7 notices of appeal. So that can easily be done in the framing of the questions.

8 Thank you.

9 MR. KENNELLY: Madam, taking again the points in turn, in terms of the documents which ought  
10 to go before the Competition Commission, we have read with interest the submission from the  
11 Competition Commission where it indicated that it would be grateful for further assistance in  
12 writing from Ofcom and, if necessary, from the parties. You are aware from our submission  
13 that we submitted that the reference should go immediately to the Competition Commission.  
14 Having read what Competition Commission have said, we obviously want to accommodate the  
15 Competition Commission, but the point we make is that if Ofcom is to put forward a detailed  
16 document in advance of the making of the reference, H3G would like a similar direction that it  
17 be permitted to put in a response document to the Ofcom document. That reflects what the  
18 Competition Commission itself indicated in its submission. Obviously, we will hear from the  
19 Competition Commission and our submission may change depending on what the Competition  
20 Commission itself request.

21 Our simple point is that if there is going to be a detailed document by Ofcom rebutting, for  
22 example, price control matters set out in our appendix to the notice of appeal, they may be  
23 issues which will need to be addressed in a further document from us within a very short  
24 timetable before the reference is made to the Competition Commission.

25 We agree with the suggestion made on behalf of British Telecom that as the Competition  
26 Commission itself has raised the request, there is no reason why the Competition Commission  
27 may not begin its work and receive those documents when they are prepared. It may at least  
28 begin the work since, to a great extent, the job that they need to do is already clarified on the  
29 basis of the documents as they presently stand.

30 The second point, Madam, that the Tribunal raised is whether the proceedings may proceed in  
31 parallel. The Tribunal has our submissions on that. For the reasons already given - and I do  
32 not wish to repeat them - we are obviously strongly of the view that they ought to proceed in  
33 parallel, and there is no reason why they should not. We adopt the preliminary view of the  
34 Tribunal in that respect, and respectfully agree.

1 Turning to the framing of the questions themselves, we agree, respectfully, with the Tribunal  
2 that the questions should be framed by reference to the notices of appeal. For that reason, we  
3 submitted that the questions should, for example in relation to 2G operators, refer to the rates  
4 being reduced or staying the same. We again respectfully adopt the submissions of BT that it  
5 is appropriate for the questions to reflect the notices of appeal. Therefore the proper course in  
6 our submission is to limit it in that way. If the Tribunal is concerned, however, that the  
7 Competition Commission may thereby be restricted from examining the issue on the merits,  
8 then we can see force in broadening the question. The point is that we are not fixed on that  
9 point. Our real concern is that the Competition Commission is able to examine this issue on  
10 the merits of the Tribunal indicated earlier today and should not be artificially restrained in any  
11 way.

12 That brings us to the next point raised by the Tribunal, which is how the questions should be  
13 framed in terms of whether they are framed broadly or by reference to particular arguments.  
14 Again, we respectfully adopt the preliminary view of the Tribunal that the better view is that  
15 the broad questions should be put to the Competition Commission and should not be  
16 artificially constrained by reference to particular arguments which are taken from the pleadings  
17 and inserted into the questions.

18 Unless I can be of any further assistance.

19 MR. ROTH: On the first question, the timing of the reference, may I, for reasons which will  
20 become clear, address your questions in a slightly different order from the way you formulated  
21 them?

22 Dealing first with whether the reference should come only after determination of SMP, you  
23 have already, I think, observed that Ofcom in its letter made clear that it does not object to  
24 them going in parallel. We did make one proviso regarding costs. That does not arise on the  
25 BT appeal at all. It could conceivably arise on the H3G appeal. Our concern was that if,  
26 unlikely though we think it to be -- if Hutchison should succeed on the SMP appeal, that it  
27 could then seek to recover its costs in the Competition Commission from Ofcom. But  
28 Hutchison has confirmed to us this morning that it will not apply for its costs in the  
29 Competition Commission, leave aside the costs of any CAT hearing, of the reference, and on  
30 that basis our concern goes away and we are entirely content for them to proceed in parallel,  
31 and we certainly would like the whole matter to be resolved earlier rather than later; of course  
32 the reference can only go after the preliminary issue has been determined and one knows what  
33 are all the price control issues.

1 The next question was whether it should be postponed until after pleadings are served, and can  
2 I take that together with the issue you raised about the framing of the questions? We have a  
3 concern which can be addressed either by pleadings first or by framing of the questions, there  
4 are two approaches which could resolve the concern, but the concern we have is a very real one  
5 and that is that in particular the interveners are clearly seeking on price control matters to raise  
6 issue that go well beyond the grounds of appeal. To take one example, and perhaps one more  
7 striking example, if I could ask you to look at the skeleton argument of T-Mobile for today. I  
8 picked that as an example, it does arise on some of the others as well, but it is on p.8 of T-  
9 Mobile's submissions, para.30. T-Mobile submits that it should be entitled to participate, that  
10 is in the price control,

11 " ... to the fullest extent in explaining the errors in Bt's and H3G's appeals and why,  
12 to the extent that price controls are incorrect at all, they are in fact too severe in  
13 respect of T-Mobile and /or too lax in respect of H3G."

14 Well that goes quite outside the boundaries of the grounds of appeal and therefore the issue  
15 that you mentioned of the statutory framework in which the appeal has to be decided at the end  
16 of the day by this Tribunal. That could be addressed we think in one of two ways. One is  
17 taking on board the approach that you indicated when we were considering this morning what  
18 directions, if any, should be made regarding statements of intervention on the SMP appeal –  
19 the non-price control. When I think the way the matter played out was there was no need for  
20 any directions, pleadings put in and then one can see on the pleadings what points an  
21 intervener is really entitled to take, and what they are not entitled to take.

22 The same approach could be adopted to the price control but on that basis the pleadings should  
23 be served before a reference is made; it may be sufficient they are pleadings in outline, as you  
24 suggested in the agenda, but that would be Ofcom's defence on the price control issues, and  
25 the interveners' statement of their position on the price control issues. Then one could see that  
26 if they were seeking to raise matters such as in para.30 the Tribunal could say "no" or "yes"  
27 but at least could decide should that go to the Competition Commission. That is one way it  
28 could be done.

29 Alternatively, there could be much more targeted questions to the Competition Commission on  
30 the lines of those set out, again I take it by way of illustration, in the annex to H3G's skeleton  
31 argument for today. Again, I am not taking drafting points on these questions now, and some  
32 might be unnecessarily broad, but there is a series of particular questions that one sees that are  
33 set out – this is at the end of H3G's observations for the CMC. Looking down that list one  
34 sees the very specific matters that are there set out. That, we suggest, might be another way of

1 limiting what can be raised before the Competition Commission now without going into detail  
2 as to whether each one is right or not, or correctly framed. Our concern is that if there is on the  
3 one hand there are no pleadings other than the notices of appeal before the reference goes.  
4 Secondly, the reference questions are framed in very broad terms and that will mean that  
5 interveners will clearly be taking points and making points to the Competition Commission  
6 such as in para.30 of T-Mobile's skeleton argument, and it will then be effectively for the  
7 Competition Commission to decide is this effectively within the scope of the appeal or not?  
8 That kind of jurisdictional issue we submit is a matter for the Tribunal and not for the  
9 Competition Commission. We note that the Competition Commission, in its letter, has  
10 indicated that it is concerned that the question should be more specific and suggests that  
11 perhaps pleadings should be served first for that reason.

12 There is perhaps some parallel even though not exact with the position of the national court  
13 making a reference to the Court of Justice, where the proceedings are the proceedings in the  
14 national court. The national court sees the position taken by the various parties and then  
15 frames specific reference questions for the Court of Justice on which the Court of Justice is  
16 asked to rule. The Ruling comes back to the national court so it can then proceed to decide the  
17 case. On that experience having the defence case, and any intervention case in first is the  
18 general pattern because that assists in framing the reference questions that really arise between  
19 the parties and which properly arise between the parties and which parties are entitled in the  
20 case of interveners properly to take.

21 So we do not have a particularly strong view which way it should be done.

22 THE CHAIRMAN: (After a pause) Mr. Rayment.

23 MR. RAYMENT: Madam, I am very grateful. The Competition Commission submissions are likely  
24 to be quite limited on these issues and I think Mr. Roth has already averted to an issue that we  
25 have flagged up. I just note on the original order that in fact interveners are down as going  
26 before us and in some ways I can see the sense of that possibly, that we could react to them as  
27 well as appropriate, if that would be convenient.

28 THE CHAIRMAN: Which of the interveners then wants to address the Tribunal? Mr. Green.

29 MR. GREEN: Can I start with a point which I think will be of concern to all the interveners? It was  
30 suggested at the outset that the principal parties' submissions would carry greater weight than  
31 ours. With respect, that is wrong in principle, it is our money which is at stake here, it is our  
32 contracts. There is in a very real sense an Article 6 issue which is engaged and we are entitled  
33 to equality of arms both here and in front of the Competition Commission. It is not an  
34 academic exercise, this is of immense economic and financial importance to us, and it seems

1 that so far as all the MNOs are concerned we should be entitled to equal weight at all stages of  
2 these proceedings. This is an unusual procedure, it is not an ordinary CAT appeal, this is a  
3 unique procedure whereby we are going to be transferred to the Competition Commission.  
4 With respect, it simply is not right to say that Hutchison 3 G's submissions or Ofcom's  
5 submissions carry greater weight than ours.

6 Our principal submission is that the H3G SMP determination should precede the actual terms  
7 of reference. The starting point must be that that appeal is to be treated as arguable. There is  
8 no application to strike it out on the part of Ofcom. BT can cast aspersions at it but it must be  
9 treated in principle as arguable.

10 If it is arguable then without the Tribunal having expressed any views on the merits either way  
11 it could go either way and that leaves us with the real possibility that there will be an abortive  
12 Competition Commission reference and my clients – and I know other operators take the same  
13 view – are extremely concerned about embarking upon what would be an immensely complex,  
14 time consuming and expensive inquiry which then turned out to be abortive one third of the  
15 way through, or half of the way through or even further that the amount of senior management  
16 time which is dedicated to a Competition Commission inquiry is immense. If you think of the  
17 cost you simply have to take the number of people in this room, add in a few economists,  
18 multiply by a notional hourly rate and then multiply by six months, and one then sees the scale  
19 of the cost which might be wasted.

20 We have not heard either Ofcom, or BT or Hutchison suggest that they will indemnify us in  
21 costs and I doubt they would make that offer. It really would be a disruption to the entire  
22 mobile network operators' industry if they embark upon a wasted Competition Commission  
23 exercise.

24 Our suggestion is therefore that in the most rapid, reasonable time available the SMP issue is  
25 determined, and then one will know precisely what the scope of the reference to the  
26 Competition Commission is. There is no reason why that process should take an undue  
27 amount of time, and there is no reason why the Competition Commission should not  
28 informally be doing such preparatory work as it deems appropriate, possibly in informal  
29 consultation with the parties in order to get ready. But for everybody to embark upon that  
30 immense exercise we submit is simply wrong until such time as it is decided and ruled upon  
31 that it is a necessary exercise. We feel strongly about this because we went through the  
32 Competition Commission inquiry just three or four years ago, it was a 12 month exercise and it  
33 was, of course, immensely disruptive to senior management in the industry, and this is the  
34 entire industry that is going to be thrust into this exercise. So we do believe that in principle

1 the SMP matter should be determined first because that may profoundly affect the scope and  
2 nature of the actual reference to the Competition Commission.

3 THE CHAIRMAN: Just explore that point a little bit further, Mr. Green. What would you say would  
4 be would be the result for the BT appeal if H3G were successful on the SMP point?

5 MR. GREEN: The BT appeal would plainly go ahead, that is severable from the H3G point, because  
6 no one is disputing the SMP point in BT's appeal, that is simply now a price control matter.  
7 But everybody accepts – and the Competition Commission accepts – that sensibly they need to  
8 go together, and it would be unsatisfactory if they were severed and we started on one  
9 reference, and the Competition Commission then issues its questionnaires and so on and so  
10 forth in relation to that, and then a series of disparate questions arise from the Hutchison appeal  
11 and they have to catch up. It is much better, I think, for everybody concerned if the  
12 Competition Commission looks at these issues in the round.

13 We accept that BT is different. It is the Hutchison SMP determination which governs this, but  
14 of course the scope of their appeal on SMP is really rather broad, the number of issues that  
15 they raise is wider than those that are raised in the BT appeal, and it is our assessment, and one  
16 cannot be precise about this, that dealing with the issues arising out of the Hutchison notice of  
17 appeal will be probably more than 50 per cent. of the Competition Commission's investigation.  
18 It is a very substantial part, it addresses not just the discrete issues BT raises but all of the costs  
19 related issue which were at the heart of the Ofcom investigation leading up to the decision. So  
20 we do feel very strongly about that.

21 In terms of whether or not there is any prejudice in what would be a degree of delay, we doubt  
22 there would be substantial prejudice. It depends upon how quickly the SMP determination can  
23 be adjudicated upon by the Tribunal. But, there is no reason why that should not be addressed  
24 relatively quickly, and at the same time preparation can be put in play for that appeal as all the  
25 other matters are being resolved, including the question of price control and including  
26 formulation of questions for reference. We can see some force in Mr. Roth's suggestion that  
27 one deals with this iteratively - in other words, Ofcom puts in some form of outline defence;  
28 other parties put in outline submissions; and the parties make an effort to flush out the  
29 appropriate questions for reference. Now, that is going to take a little bit of time in order to do  
30 that, but these processes can be running simultaneously, and we do not think there would be a  
31 substantial delay provided the Tribunal can deal with Hutchison's appeal relatively  
32 expeditiously -- in delaying matters until such time as that is resolved. That would then obviate  
33 any risk that the Competition Commission investigation would be abortive. We do think the

1 system could be subject to criticism, certainly from the mobile sector, if they were thrown into  
2 an investigation before the Competition Commission which then had to stop.

3 THE CHAIRMAN: That is where I do not quite follow. You say it then has to stop. But, why  
4 would it have to stop if H3G were successful?

5 MR. GREEN: Huge chunks of it would become irrelevant and an enormous amount of work, cost  
6 and effort would have been expended on something which was abortive. There is another  
7 matter which is that Ofcom has said that if Hutchison were to succeed on its SMP appeal, it  
8 would have to review its decision in the light of the Tribunal's decision more generally. But,  
9 clearly, if the Hutchison SMP appeal succeeds then an enormous amount of the Competition  
10 Commission investigation simply becomes redundant. That is, I think, with respect, something  
11 for which the system could be criticised if it were permitted.

12 MR. SCOTT: You have explained that there is a great deal of money at stake here for the industry,  
13 and at the moment, as you will appreciate, part of that money is going in one direction, and if  
14 some people's appeals were successful, the flows would change. So, there are good reasons for  
15 getting on with it. But, logically, if you are right about delaying for the Hutchison SMP  
16 decision, you would also be right, I imagine, on the non-price control matters - you would need  
17 to argue that we had to decide the non-price control matter if that incorporated appropriateness  
18 before we can set a question.

19 MR. GREEN: It seems to us logical that you have to decide the non-price control matters first  
20 because they govern the scope of the reference. There may be issues arising out of the BT  
21 appeal. There may be issues arising out of the BT appeal that could be referred now, but there  
22 are a large number of issues which remain to be resolved if one is going to send a coherent,  
23 composite reference to the Competition Commission. So far as prejudice is concerned, one  
24 can always adjust the pricing at the 'glide path end', as it is described, rather than a sort of  
25 retroactive adjustment of prices. So, there are ways in which one mitigates any loss caused by  
26 a delay in time. We do not believe we are dealing with a long period of time. We may be  
27 dealing with a month or so. It rather depends how quickly the Tribunal can resolve  
28 Hutchison's appeal. But, we are not talking about an inordinate amount of time in the scheme  
29 of this particular decision - the amount of time it has taken for Ofcom to arrive at the decision.  
30 We do believe that sensible case management will accelerate various bits, and bring them to a  
31 single point at which a sensible reference can be made. But, we do feel very strongly that we  
32 should not be cast upon an exercise in which the amount of senior management time expended  
33 is huge, and disruptive to the industry as a whole, without good reason.

1 PROFESSOR BAIN: I wonder, Mr. Green, could you just spell out for us a little more clearly what  
2 it is that leads you to the conclusion that the majority of the work of the Competition  
3 Commission will arise from the H3G appeal rather than BT? My initial perception was that  
4 the BT appeal will cover most of the rising issues, and there will be a few additional things  
5 from H3G. But, perhaps I am wrong. We did an exercise in identifying the issues which we  
6 thought came out of both appeals. (After a pause): It is not just a matter of impression. If  
7 one analyses the questions which Hutchison proposes should be referred, there are a significant  
8 number of questions which go beyond the BT reference. So far as we can see, in fact, pretty  
9 much most of they are raised issued which are not in the BT appeal. The BT appeal is quite  
10 focused. The Hutchison appeal, so far as we can see, is not focused in the same way that the  
11 BT appeal is. The questions identify matters which we do not think come out of the BT  
12 appeal.

13 PROFESSOR BAIN: Is the BT appeal not concerned with some very big issues? There may not be a  
14 very large number of them, but things like the treatment of the ... costs and cars, and things of  
15 that sort are very big issues which, I would have thought, are going to involve quite a lot of  
16 Competition Commission time and effort.

17 MR. GREEN: I am sure that is right. We have no doubt that that is correct. But, it does not  
18 undermine the fact that the Hutchison appeals raise extraneous issues which are, in and of,  
19 themselves substantial. We are not talking about anything which could remotely be said to be  
20 *de minimis*. This is a substantial risk. We are not saying the Competition Commission  
21 investigation would simply stop in its tracks, but a very large part of it, we submit, would  
22 become redundant. You only have to compare the Hutchison reference with the BT appeal and  
23 you will see that there is not that much overlap. I accept entirely that the BT appeal raises big  
24 issues. There is no doubt about that. (After a pause): The point is made that if Hutchison -  
25 and I think rightly - prevails and Ofcom has to re-review the decisions across the board, then it  
26 is hard to see that BT's appeal could go ahead anyway. Ofcom would have to draw the  
27 consequences of having lost in relation to Hutchison. Now, at this stage one has to treat  
28 Hutchison's appeal as arguable - no-one has got into the merits or de-merits of it. We would  
29 invite you to give this very serious consideration because it is a matter which my clients feel  
30 very strong about. That is the principal point which I wish to make to you. Thank you.

31 MR. BARLING: I am sure everyone wants to have a say, but would it be convenient at some point  
32 for me to come back with a couple of points on that, whenever it is convenient.

33 MR. FLYNN: Madam Chairman, if I can just add a few points to what has just been said, we agree  
34 with Mr. Roth, I think, that on the question of the timing of the reference that will have to be

1 after determination of the preliminary issue. We also think we agree with him that it should be  
2 after a defence and intervention statements, even if those are only in outline. If I may say so, I  
3 think that is also the time for the framing of the questions. When the preliminary issue has  
4 been resolved, and when the parties have had their say, I think that is the time when they so  
5 submit for the questions themselves to be framed. Mr. Barling says that this causes delay. My  
6 submission is that just because you do not make the reference today or tomorrow, it does not  
7 mean that the whole process is necessarily delayed. We may end up with a shorter reference  
8 period if we have a clean and single reference which I think is what the Competition  
9 Commission is also asking the Tribunal to achieve. As I submitted in relation to deciding the  
10 timing on the pleadings of the issues for the Tribunal, I think we should not be breaking these  
11 up - not sausage-slicing. Everything should be done in one go, if I can put it that way.  
12 So, in terms of the framing of the questions, perhaps I should not say too much at the moment.  
13 I can see the sense in the questions being generally phrased rather than very detailed, so long  
14 as the cardinal principle is understood that whatever the Competition Commission does, it is by  
15 reference to the points that are raised in the notices of appeal. Whatever issues are for the  
16 Commission are within the four corners of these appeals. This is not a re-opening industry  
17 reference. This is determining particular matters, as the Rules call them, which arise in the  
18 context of the appeals.

19 Some concern has been expressed, particularly by Mr. Roth, as to what interveners might raise  
20 in their notices or before the Competition Commission. I think there is a risk of the MNOs  
21 here being between the devil and deep blue sea. It should either be possible for them to  
22 suggest -- It must be possible for them to suggest at some appropriate time, if these charges are  
23 to be adjusted, and say BT is to succeed on one or two of its points so that in principle the  
24 charges would go down -- It must be open to the MNOs to suggest that there are equally  
25 reasons why the charges might go back up again. The place for that is either the Competition  
26 Commission or subsequently with Ofcom.

27 I can see the sense of saying, "Well, what is before the Competition Commission and before  
28 the Tribunal is only what is raised in these appeals. So, the place for that is not necessarily the  
29 Competition Commission". If that is the right approach, my submission would be that the  
30 appropriate way to deal with it is in the relief that the Tribunal gives, assuming success by BT  
31 or Hutchison on one or other of these points not to constrain Ofcom in its reconsideration of  
32 the issues, and not to prevent hearing submissions from others as to the appropriate framing of  
33 the charge in its reconsideration. I think it has to be one or other of those. So, for it to be  
34 suggested that either by direction or by commentary once the intervention statements are in,

1 there is to be a limit on arguments that the interveners can raise, I think there has to be a  
2 balancing of that, which is -- I think the point is made both by T-Mobile and Vodafone, as well  
3 as us, that we chose not to appeal these determinations obviously, but that is on the basis that  
4 they stand. If they do not stand, it is not appropriate that we should be unable then to suggest  
5 ways in which they should be adjusted. Those points are for rather down the road. But, I  
6 indicate that concern. My main submission, I think, is that these things should be taken by  
7 stages and that the time for framing the questions is after pleadings are in and after the  
8 preliminary issue is determined, and we should pack off one composite reference to the  
9 Competition Commission, and not drip feed it as we go along.

10 (After a pause): I apologise. There is one thing I did not say, which is that we do also agree  
11 with Mr. Green that the SMP issue has to be determined first, for the reasons he gives. That is  
12 also something which would lead to a single reference being made. It all has to be done in one  
13 go, in our submission.

14 Thank you, Madam.

15 MR. PICKFORD: Madam, addressing the Tribunal's first question of whether pleadings should go  
16 first before any reference, we also endorse the suggestion of Mr. Roth that it would be  
17 appropriate -- Well, he proposed two alternatives and we endorse the alternative, which is that  
18 there should be pleadings first - at least outline pleadings - to set out the positions of the  
19 parties, in particular so that if anyone takes objection at that stage to something that T-Mobile  
20 is saying is a matter which should be determined, they can air that matter then, and the  
21 Tribunal can decide the issue ahead of the reference to the Competition Commission.  
22 In relation to the broader question of timing and whether the SMP issue should be determined  
23 first, we wholeheartedly endorse what Mr. Green said. We share his considerable concerns  
24 that it would be wholly inappropriate for there to be a very expensive reference to the  
25 Competition Commission which had to be abandoned half-way through. If I could just expand  
26 on why we say, in fact, it might well have to be abandoned half-way through, and that includes  
27 both the H3G appeal and the BT appeal. The reason is this: as Mr. Roth said in his  
28 submissions this morning, Ofcom takes the view that it is at the very least arguable, and indeed  
29 as I understood it, it was in fact Ofcom's initial view that if H3G is right in its analysis on SMP  
30 that analysis applies equally in respect of all of the other MNOs. H3G's essential proposition  
31 is that because there is a dispute resolution mechanism already in place as regards its charges  
32 with BT, BT has sufficient countervailing buyer power to offset any market power that it  
33 would otherwise have. Those very same dispute resolution mechanisms apply to everyone,  
34 they do not simply apply H3G, they apply to T-Mobile, to Vodafone, to Orange. So if H3G is

1 right its analysis applies equally to all of the other mobile operators. So if it is right it means  
2 that none of them have SMP at all, which renders otiose any reference to the Competition  
3 Commission because BT's points are all premised on there being SMP in the first place –  
4 clearly there would be no price controls if there were no SMP. That is why we say it is of  
5 fundamental importance to all of the appeals, not simply H3G's appeal, and while we would  
6 urge the Tribunal therefore not to set off a hare running that may ultimately turn out to be a  
7 wholesale waste of costs for certainly all those interveners involved.

8 In relation to the costs of the exercise, Ofcom said it is content for matters to proceed in  
9 tandem so long as there is some sort of costs' protection for it, and it can well take that position  
10 but it is well established in the Tribunal that interveners are not in the same position as regards  
11 costs and so there would be considerable costs' exposure to the interveners if matters were to  
12 proceed to the Competition Commission when they should not do.

13 As Mr. Green said, it is not merely a matter of costs either, the previous reference to the  
14 Competition Commission in 2002 involved great investment of resources on behalf of senior  
15 management in mobile companies and certainly that is something that they could do without if,  
16 in fact, there should not properly be a reference at all. That is what we say on the timing of  
17 the reference.

18 If I could deal with then the issue of the framing of any questions. We certainly endorse the  
19 approach that has been suggested by the Tribunal that the correct approach is that the price  
20 level should remain at large and if I could illustrate that by reference to one of BT's grounds,  
21 to attempt to make the point more concrete. BT argues as part of its case that "... placing any  
22 reliance whatsoever on the actual fees paid by the MNOs for 3G spectrum is wrong in  
23 principle". That is para. 90 of its statement of case.

24 What Ofcom did in its decision is it looked at various scenarios for auction fees, and it is not  
25 completely clear from the face of the decision the extent to which actual auction fees feed  
26 through into its final determination on the correct price level – clearly they took them into  
27 account, but quite how much of them they took into account is not completely clear from the  
28 face of the decision.

29 We may well wish to argue before the Competition Commission in response to BT's point that  
30 it was wrong to have regard to auction fees that it was right to have regard to auction fees, and  
31 not only was it right that was the only thing which Ofcom should have had regard to. To the  
32 extent that Ofcom in fact had regard to a number of factors, it had regard to auction fees, but  
33 had regard to other factors that potentially brought the levels down, if the Competition  
34 Commission agrees with us that leaves the possibility that the price level should in fact go up

1 in relation to the mobile operators rather than come down. We say it would be wholly artificial  
2 to constrain the ability of the Competition Commission to come to the view, potentially, that it  
3 is correct to have regard to auction fees and indeed it is only correct to have regard to auction  
4 fees, by somehow framing the reference in a way that meant that the Tribunal could only  
5 decide to reduce prices but not decide to increase them.

6 In relation to that point we are not opening up whole new avenues of appeal ourselves, we are  
7 not throwing completely new points, we are simply responding in that context to BT's own  
8 grounds of appeal – that is simply an example – and it is for that reason that we say that the  
9 price level should be left at large just as the Tribunal correctly recognised, we would  
10 respectfully submit, that it would be inappropriate to frame the questions too narrowly in case  
11 one thereby accidentally unduly constrained the Competition Commission in its determination.  
12 Madam, unless I can be of any further assistance.

13 MR. WISKING: For Vodafone, we endorse the submissions of O2, Orange and T-Mobile, and I do  
14 not propose to repeat those, save to make two points. As regards the timing of the reference we  
15 also agree that the very earliest that that should take place is after the close of pleadings and  
16 that is the appropriate time when the Tribunal has before it both the defence and the statements  
17 of intervention. We also agree to the extent there may be issues about the matters that the  
18 interveners have raised, rather than deal with it in abstract to day it is best, once the pleadings  
19 are there, for there to be a discussion about the appropriate questions in the light of the  
20 statements of intervention, but nevertheless we do endorse what T-Mobile have just said.

21 Vodafone would contemplate making similar points in its statement of intervention.

22 The second point is that we also agree with O2 regarding the overall timing of the case. We  
23 think the SMP issue should be dealt with first. Again, I will not repeat the submissions that  
24 have been made about efficiency but there is one further point which I do not think is being  
25 made, which further supports this, and that is the logic of Hutchison's case. Hutchison's case  
26 is not based solely on the binary question of whether or not there is SMP. There is also this  
27 separate issue as to the degree of SMP which Hutchison has, and that is raised at 3.17. The  
28 argument, I think, is depending on how much SMP you have that is a relevant factor that has to  
29 be taken into account when it comes to the price control. In our submission both the fact of  
30 whether or not there is SMP and the degree of SMP needs to be determined before a reference  
31 can be made.

32 That is all I want to say unless there is anything else.

33 MR. KENNELLY: Madam, I understand there is normally a power of reply, but since so much of  
34 that was directed towards H3G I would be grateful if I could have an opportunity very briefly

1 to take up some points, because some matters were addressed in relation to H3G that need to  
2 be corrected before the Tribunal can take a view.

3 THE CHAIRMAN: I think we would like to hear Mr. Rayment first. The one question in my mind  
4 in particular is what role the pleadings before the Tribunal play in the Competition  
5 Commission proceedings? As I indicated in my introductory remarks, we are aware of the  
6 different nature of the procedures followed by the Commission and the Commission has its  
7 own fact gathering powers and question asking powers which it is able to exercise and we are  
8 keen to avoid any confusion over which powers are being exercised, or pursuant to which  
9 powers the parties, the companies involved are providing information because we regard it as  
10 very important that that is absolutely clear for everybody.

11 What has emerged from the discussion this afternoon is that there are two ways in which one  
12 can somehow delimit or assist the commission in focussing its attention on the relevant points.  
13 One is by framing the questions in a particular way and one is by having the exchange of  
14 pleadings to which the Commission in some way has regard when deciding how it is going to  
15 conduct its own procedure. Another route may be to have questions and then accompanying  
16 directions from the Tribunal to the Commission which may reflect in some way what the issues  
17 appear to the Tribunal at least to be, having regard to the pleadings that have been exchanged.  
18 But it would be helpful to us to have some indication from you as to how you see the  
19 documentation for the Commission's purposes developing in the course of its reference.

20 MR. RAYMENT: Well that may have been an issue we were hoping you were going to tell us the  
21 answer to. In the first instance the Commission envisaged that the pleadings before the  
22 Tribunal insofar as they relate to price control matters, would form the basis of our starting  
23 point when the matters came to be referred to us. It seems to us that there are grounds of  
24 appeal, some of which relate to non-price control matters, and there are other grounds of  
25 appeal that are price control matters and price control matters then come to the Tribunal and  
26 they effectively have to come in some kind of form in which we can assimilate and understand  
27 the issues which the parties are raising which then forms the focus of our investigation. That is  
28 why we raise the issue of whether it would be helpful to have a full set of pleadings before we  
29 embark in any great detail on the reference, recognising also the point made by Mr. Roth that  
30 the terms of reference provided by the Tribunal can also form a basis for defining the issues.  
31 In a sense, quite what the relationship, in terms of the detail of the case being set out in those  
32 two documents – the pleadings on the one hand, or the terms of reference on the other – the  
33 Commission has no absolute position but is keen to ensure the objective which is that the

1 issues it has to decide are clear, and we think that provided that it's the case then that will form  
2 the basis for hopefully an efficient and expeditious reference if it comes to the Commission.  
3 It has been suggested that waiting for pleadings may in some way delay the conduct of the  
4 reference. That may be possible to some extent because as foreshadowed in the Commission's  
5 letter there may be preliminary matters that the Commission can be getting on with but that  
6 said we do feel that the progress we can make will be to some extent constrained until we do  
7 have the position of all the parties who are going to be parties to the reference.

8 So I think we do see initially that pleadings of a more traditional sort do have a role to play in  
9 this context. What would be likely to follow after that, I think, and this is very much at a  
10 preliminary stage at the moment because as the Tribunal and the parties will appreciate the  
11 members are not formally appointed at the moment, in fact, we have not got a full set of  
12 members – the ones that have been identified have been consulted – but it seems likely that  
13 once one has a set of pleadings the Commission will be seeking clarification from the parties  
14 about various issues. But, as I say, the starting point would be the pleadings.

15 Given also in the context of a case like this that the parties have provided a lot of information  
16 themselves including evidence, the Commission is unclear at the moment whether it would  
17 follow what would be normal practice which would be to issue quite extensive information  
18 requests at the beginning of the investigation. We think there is a question mark over whether  
19 we would proceed in that way given the amount of material that we would have after the close  
20 of a full round of pleadings, including statements of intervention and possibly even the reply  
21 that Mr. Kennelly wants to put in as well. So that in outline, I think, is the Commission's  
22 position on the relevance of pleadings. We do not have an absolute position. Our main aim is  
23 to ensure the objective of achieving clarity so that the reference is not "bogged down" – to use  
24 Mr. Green's term – and that we do not get into jurisdictional arguments about the scope of  
25 what we are doing. Of course, when one hears the various positions adopted by various  
26 interveners, the Commission does have some concerns about what it might be getting into if  
27 matters are not clear right from the outset.

28 As to the actual precise timing the Commission does not say that the reference could not start  
29 without the pleadings necessarily but the timing of the arrival of those pleadings would have  
30 to be taken into account when deciding how long the process is going to take – certainly the  
31 shortest the reference period could be would be if we had all the material right from the word  
32 "go". The more we have to do during the reference period the longer period we think we will  
33 need.

1 The other advantage, possibly, that we saw in having a round of pleadings is that before the  
2 reference, even though we do not say it has to take place at that point, would be that the  
3 Commission thinks it would be in a better position to give you an estimate, and the parties  
4 indeed, of the sort of time they think would be needed to conduct the reference, but again that  
5 is linked up with issues of the potential grounds that could be raised by, for example,  
6 interveners that might require the Commission to carry out work along lines that are not yet  
7 entirely clear. So I think on the sort of pleading issue that is as far as I can assist you at the  
8 moment with what the Commission is thinking.

9 As far as the issue of awaiting the Tribunal's decision on the non-price control matters, i.e.  
10 proceed in parallel. For obvious reasons we do not have any submissions on whether that is  
11 the appropriate course or not. Our concern is one that you have already mentioned, which is  
12 that if there are overlapping issues consistency is achieved across the landing. I think on that  
13 first agenda point that is all I have to say at the moment, unless I can assist you on any other  
14 point.

15 THE CHAIRMAN: You seem to be going somewhat further in relation to the pleadings than the  
16 other parties have in the sense that other parties' submissions, as I understood them, were that  
17 Ofcom should plead in outline to the price control matters, really directing their pleading at the  
18 identification of the price control matters in order to assist the framing of the questions. You  
19 seem to be envisaging a rather more substantial exercise of pleadings with information  
20 attached which would then go to the Commission and form the starting point of your own  
21 deliberations. Have I understood that correctly?

22 MR. RAYMENT: I accept that my submissions just now would have given that impression. The  
23 reality is I think at the outset I was quite struck when you raised the question of what  
24 relevance the pleadings before the Tribunal were to the Competition Commission process. Of  
25 course I have suggested quite important, because obviously, take BT's notice of appeal, for  
26 example, 98 per cent. of that notice concerns the matters that we are going to have to be  
27 dealing with and therefore any response document, or defence, or whatever you want to call it  
28 is going to have to deal with those issues. There may be issues about the timing of such a  
29 document, but we are going to have to have a document which deals specifically paragraph by  
30 paragraph we think with what has been advanced by the appellants. It may be possible for  
31 Ofcom to lodge an outline defence to start with. That would be extremely helpful both in  
32 settling the terms of reference and for the Commission getting down to work, but there is no  
33 doubt that the outline document would soon have to become something more substantive.

1 MR. SCOTT: Mention has been made of the interveners under our Rule 16(9)(b) seeking relief  
2 which may be distinct from the relief already sought by the notices of appeal and conceivably  
3 those requests could also have a bearing on the questions that the Competition Commission has  
4 to address?

5 MR. RAYMENT: Very much so.

6 THE CHAIRMAN: Mr. Kennelly?

7 MR. KENNELLY: I am grateful to the Tribunal. Dealing first with the effect of the SMP appeal, it  
8 was said by T-Mobile that if the finding of SMP in relation to H3G is overturned that will have  
9 a direct and automatic bearing on the positions of all of the MNOs and the consequences that  
10 my learned friend, Mr. Pickford, outlined. That is not correct. If H3G are successful in the  
11 SMP appeal the effects of that Judgment by this Tribunal will depend on the nature of your  
12 Judgment. Our SMP appeal is brought on a range of grounds, and the effects of any victory for  
13 us will depend on how the Tribunal finds in our favour, because it is possible to find in our  
14 favour on a number of bases, the effects of which will vary considerably. It is perfectly  
15 possible in our submission to overturn the finding of SMP in relation to H3G but not that it  
16 automatically falls away for the other mobile network operators. That is clear from the reading  
17 of our notice of appeal.

18 Secondly, if we are successful on the SMP appeal, it does not follow automatically that H3G  
19 withdraws from the Competition Commission because as the Tribunal has seen H3G is also  
20 appealing against elements of the price control decision that Ofcom took, and H3G is seeking  
21 relief in the form of reduced rates from the other MNOs. H3G is arguing that certain relief  
22 should be granted in relation to the rates charge by the other operators, and that is also a reason  
23 why H3G would stay in the Competition Commission and make these very important points  
24 even if the SMP appeal succeeded.

25 That brings me to my next point, which was laboured at length by the other operators, and that  
26 is the alleged waste that would occur if the proceedings moved in parallel. I do not wish to  
27 repeat the point that I made earlier that the urgency of this case has very important implications  
28 for the market in general, and in particular for H3G. The point was made about the costs  
29 incurred, or the costs that might be thrown away if parts of the Competition Commission work  
30 became unnecessary in view of your decision on our appeal. True it is, when one looks at this  
31 room, and reflects on the number of expensive lawyers and economists involved the costs may  
32 seem considerable. But the Tribunal needs to recall the broader cost of these issues to the  
33 parties, and to the market. My learned friend, Mr. Green, made a very important point, that this  
34 issue goes to financial impact in the nature of hundreds of millions of pounds annually between

1 the parties. The financial consequences of these decisions are vast, and the financial prejudice  
2 to H3G with every month of delay we would say from reaching the correct position leads to at  
3 least 10s of millions of pounds of damage which H3G suffers because of the delay –  
4 irrecoverable loss.

5 THE CHAIRMAN: Well you say “irrecoverable loss”, what do you say to the point that the glide  
6 path could ultimately be adjusted to take account of that delay in making the reference?

7 MR. KENNELLY: This is in relation, madam, to the consultation which has been suspended? There  
8 is a point there that Ofcom may try and remedy the situation but the customers that are lost  
9 may never be recovered. The competitive impact of this is not just the question of cash flow, it  
10 is cash which we lose, which we need to attract customers, which we transfer to our  
11 competitors, which they use to retain customers, and beat us in the market - that is their aim.  
12 It is as simple as that; there is an enormous cash flow from us to them, which continues until  
13 such time as we succeed, we say, in our appeal. I have made that point already, I simply raise  
14 it again because it shows the urgency of the appeal.

15 THE CHAIRMAN: Just on the second point that you made, is this your submission: that even if you  
16 are successful on the SMP argument your role in the proceedings is not simply as an intervener  
17 like the other interveners, but rather still as an appellant against the statement insofar as it sets  
18 the rates for the 2G MNOs, and that that would still be a price control matter before the  
19 Commission. Is that your point?

20 MR. KENNELLY: Yes, precisely, and as we have said in our notice of appeal – we raise this as part  
21 of our own appeal because of the very serious implications that it has for others, because that is  
22 the price controls imposed on the other MNOs.

23 THE CHAIRMAN: Can you just point me to the part of your appeal that makes that clear?

24 MR. KENNELLY: Paragraph 1.1(b) in the introduction, that is identifying the relevant decisions that  
25 are challenged, beginning with the decision appealed against. There is a reference to each of  
26 the mobile network operators including H3G has SMP dominance for the period marked and  
27 that *inter alia* a price control on each should be imposed for that period as the appropriate  
28 remedy, and that is the price control decision, and critically the relief which we seek is s.3 in  
29 the same notice of appeal (After a pause) The second paragraph that I took the Tribunal to is  
30 para.3.1(d), and there is a further reference in the appendix relating to price control matters  
31 which outlines the point again.

32 (After a pause) Madam, forgive me, before you leave s.3 and the relief sought, there is a  
33 further reference at para.3.2(a), the point there is made by H3G. It submits that the  
34 Competition Commission should determine:

1 “(a) the level of mobile to mobile MCT so that the MCT rate paid and received by  
2 H3G to and from other MNOs equals zero pence per minute or otherwise leads to a  
3 neutral net revenue position.”

4 And that of course goes directly to the rates imposed on the other MNOs.

5 THE CHAIRMAN: But if we were in a situation where it was either decided that you did not have  
6 SMP, or it as no longer clear that you had SMP, so that we were in a situation where no price  
7 control could be imposed upon you, would you still be able to maintain that without being  
8 subject to price control yourselves – the MCT rates for the other MNOs should be reduced to  
9 zero – or does your reduction to zero point depend on everybody being reduced to zero not  
10 just everybody except H3G?

11 MR. KENNELLY: Precisely. I am not seeking to argue that neither are we. We have already offered  
12 to the other MNOs and it will be our point that if what we call NPZ zero rates are imposed on  
13 the other MNOs we of course accept that that would apply to us too. That is the whole point,  
14 we say, necessary to ensure effective competition. There is no question that we are entitled to  
15 appeal against the price control decision as well insofar as it affects us and even if no price  
16 control is imposed on us, but imposed on the others, such that it affects us in the way we say,  
17 we raise that ground of appeal also.

18 That simply goes to the point, madam, that it is not as simple as the MNOs, again one notes  
19 that the range of opposition against us and if one reflects for a moment on what delay serves to  
20 achieve.

21 Turning then to the other points, I made the point that the costs of hearing this before the  
22 competition commission are quite significant but a drop in the ocean compared to the costs  
23 involved in the issues at stake, the financial transfers that will be determined, and the cost of  
24 delay is vast in comparison to the cost of having this issue brought to the Competition  
25 Commission in parallel with your determination of the SMP issue.

26 Further - and of course I recall that for H3G at least - the price control matters are much more  
27 important commercially than the SMP issue. These broader price control issues are not an  
28 add-on - they are central to our concerns brought before this Tribunal and the Competition  
29 Commission.

30 The point was raised that BT's issues are few in number and ours are greater. That, I am  
31 afraid, is an over-simplistic analysis. BT's issues may be fewer in number, but they are  
32 extremely significant, and will take a great deal of analysis by the Competition Commission.  
33 We have sought to list ours, as Mr. Roth noticed, in a very specific and focused way in our  
34 reference document. So, while there are a number listed, they are narrower issues. We say it is

1 over-simplistic to say that the matters to be determined by the Competition Commission would  
2 be dominated by H3G and not by BT. Since we all accept they must go in parallel, the  
3 arguments for hearing the SMP appeal and the reference in parallel, in my submission, are  
4 overwhelming.

5 Finally, turning to the submissions made by my learned friend Mr. Rayment for the  
6 Competition Commission, we have heard Mr. Roth say that in order to frame the issues Ofcom  
7 ought to put in an outline document and the interveners ought to have their say within a very  
8 short timeframe. Mr. Roth submits that we have no role in that - we have already set out our  
9 stall on the terms of reference. To the extent that the matter is limited to the terms of reference,  
10 we can see the force in his submission although we opposed it before the Tribunal.

11 If, however, the Competition Commission seeks a much more detailed and expansive set of  
12 pleadings, and that will be the full block of pleadings which the Competition Commission will  
13 consider before issuing its decision, there obviously we will need the right to reply and to put  
14 in our reply to Ofcom submissions on these price control matters which have now been  
15 developed much more between the parties than they were when we did our original document.  
16 That will be a matter of basic procedural fairness. If the Competition Commission seeks that  
17 level of detail before it considers the issue itself. Since I do not, Madam, ask for a particular  
18 direction in that regard, I simply flag our concern that if the Tribunal is minded to agree with  
19 the Competition Commission and direct detailed pleadings in that way, we would request, and  
20 argue that it is fair, that we have a right to reply since we are the targets of the vast majority of  
21 the argument in this. It would serve to clarify the issues before the Competition Commission  
22 in precisely the way the Competition Commission has requested.

23 Thank you.

24 MR. BARLING: Can I say that we agree with almost everything Mr. Kennelly has said. So, I will  
25 not repeat what he has said about this. But, we do want to make another point or two as to why  
26 Messrs. Green, Flynn and Pickford, if I can use them compendiously without disrespect, are  
27 fundamentally mistaken to link the SMP resolution with the reference to the Competition  
28 Commission. I think a good starting point, because one often tends to forget the most basic  
29 provisions is s.193 itself. S.193(1) says that the Tribunal rules must provide in relation to  
30 appeals under s.192 relating to price control that the price control matters arising in that appeal  
31 to the extent that they are of a description specified in the Rules, must be referred by the  
32 Tribunal to the Competition Commission for determination". "Price control matters which are  
33 specified, arising in that appeal ---- There is a strong degree of statutory compulsion there, we  
34 submit, implied in that to get on with it once issues that are price control matters have arisen.

1 So, of course one has to resolve the preliminary issue to decide what are the price control  
2 matters, but having resolved it - which one can do without any further pleadings because the  
3 matters that arise in the appeal are defined by the notices of appeal, if the notices of appeal are  
4 properly framed - and then they have to be referred. So, the idea that one can say “Oh, well, we  
5 won’t refer them just yet because it would be convenient to have some non-price control  
6 matters determined first, and that might avoid some waste ----“ with great respect is not  
7 actually what the statute is envisaging, in our submission. That it is envisaging is that as soon  
8 as they have arisen, they are sent off. We submit that once you have determined that, they  
9 will have arisen, and they ought then to be sent off without delay.

10 We are extremely sceptical, in any event, about a lot of the points that have been made as to  
11 why it will be more convenient, or hugely saving in costs. Some of those points have been  
12 made already by Mr. Kennelly and I will not repeat them. But, I think it was said by Mr. Flynn  
13 or Mr. Green, “Well, not hearing the SMP matters will avoid any risk of an abortive  
14 reference”. But, of course, that is not the case. If we delay and wait for the SMP, and then the  
15 Tribunal decides the matter, what about appeals? Supposing there is a huge clamour then,  
16 “You’ve got it wrong! It ought to go to the Court of Appeal quickly. There’s no point going  
17 on a reference until ----“ It simply will not avoid these kind of issues arising. In our  
18 submission, the likelihood, in any event, is that you will probably have reached your decision  
19 on SMP by well before Competition Commission is getting worried about the answer to it - in  
20 other words, they can do a lot of work in any event first - no doubt looking at the preliminary  
21 matters; getting themselves set up, and by which time you may well have ---- There will be a  
22 huge time-saving in those circumstances if it is referred at a reasonable time after the  
23 preliminary issue is determined.

24 We are sceptical also about the need for these pleadings. We do not see why Mr .Roth says the  
25 questions cannot be framed once the preliminary issue has been decided, and we do not see  
26 why the questions cannot be framed in such a way as to avoid the problems of para. 30 of T-  
27 Mobile’s letter, for example, with appropriate phraseology. In the unlikely event, as it were,  
28 that something happens - and this can always happen regardless of SMP and other matters -  
29 something happens that makes the people feel, “Well, actually the question should be looked at  
30 again” and the Competition Commission can come back for further directions, or the reference  
31 can be amended or tweaked in some way.

32 But, that is much more preferable, in our submission, to having the inevitable delay that will  
33 take place if the SMP issue has to be determined first. That will be a definite delay. I think  
34 one can guess how long it is going to take to do that. Even with the best will in the world it is

1 not going to be done, even with some degree of expedition, that quickly. They will not even  
2 have got off first base. In our submission that would arguably not be consistent with the  
3 approach that is envisaged by s.193(1). We also adopt the points that are made by Mr.  
4 Kennelly as to why there is no necessary linkage in any event between the SMP and H3G and  
5 the other MNOs. It is quite possible, bearing in mind the main ground for saying they have not  
6 got SMP is that they are very different from everybody else, and therefore BT being terribly  
7 big, and H3G being terribly small and new with a tiny market share, the countervailing buyer  
8 power and the imbalance between that and their position is such that those are special factors  
9 that apply to H3G. They do not necessarily apply to anybody else. So, we submit that Mr.  
10 Pickford is wrong about that. In any event, that ought not to trouble the Tribunal in getting the  
11 thing off.

12 I am sorry to labour the point a bit, but it does seem to us very important.

13 MR. SCOTT: Mr. Barling, while you are on your feet, one of the factors in the relief sought by  
14 H3G is the suggestion that they divide the remedy between mobile to mobile and fixed mobile.  
15 The question in my mind, since BT here represents fixed to mobile, is: will you be content to  
16 see that as an entirely price control issue, or do you see that as having a non-price control  
17 impact since it is effectively a way of sub-dividing the market?

18 MR. BARLING: I had not thought of that, sir, but it does seem to us that whatever else it may also  
19 be, it is definitely a price control matter. The point you make of 'what else it might be' is  
20 interesting. But, in our submission, for the purposes of H3G's appeal, at any rate, for present  
21 purposes, it is in the net of a price control matter specified, and therefore falls very much  
22 within the precincts of the Competition Commission. I have not taken any specific instructions  
23 about that aspect of H3G's claim for relief. I would rather leave it there, if I may. Otherwise, I  
24 may speak out of turn.

25 MR. SCOTT: It is, I think, going to be for you, but it is a differential that is introduced.

26 MR. BARLING: It is indeed and we will obviously have to give it some considerable thought in  
27 the context, we would say, of the reference to the Competition Commission.

28 THE CHAIRMAN: Has anybody else got anything that they wish to say on any of the matters so  
29 far raised or not yet raised? Speak now.

30 MR. PICKFORD: I am reluctant, at the eleventh hour, to say anything further. There is one very,  
31 very short factual matter that I wanted to pick up on in relation to a new point Mr. Kennelly  
32 made. He suggested - or certainly I understood him to suggest - that there is currently a  
33 transfer of monies from H3G to the other MNOs as a result of these price controls. Our  
34 understanding is that H3G has not reduced any of its prices currently, and it has reported

1 publicly that it is not proposing to reduce its prices until Ofcom has resolved other matters with  
2 which it is concerned, which are mobile number portability. So, to that extent the alleged  
3 urgency, we would say, is not quite as urgent as has been suggested because currently there is  
4 no compliance with the price control, and therefore no transfer of monies.

5 THE CHAIRMAN: I think it is accepted that the price control comes into effect in October.  
6 Whether one describes things as -----

7 MR. KENNELLY: Madam, the impact of the price control is delayed for a short period, but the  
8 financial detriment that I outlined does not depend solely on that. We are suffering in any  
9 event. It is exacerbated by the price controls against which we appeal.

10 I also have one further very brief matter to raise under this 'Any Other Business' heading. It is  
11 in relation to a point that you raised, and it is the potential relief that Ofcom could grant in the  
12 interim -- what apparently Ofcom refers to as the tweak in its treatment under the consultation  
13 called Amendment to Charge Control on Mobile Network Operators. This is a consultation  
14 which Ofcom has now suspended in view of the fact that some of these issues, according to  
15 Ofcom, are in play in this proceeding. We are concerned, since this would have granted us  
16 some relief in the interim, as to why Ofcom has decided to suspend this in view of these  
17 proceedings. We would be grateful for some indication from them as to why they have done  
18 this. It does not arise for you today to determine, but since you referred to this issue, at least  
19 indirectly, I wish to flag it now for Ofcom, since we are all here.

20 THE CHAIRMAN: I think that is a matter that you need take up with Ofcom separately. I do not  
21 think it is a matter that is currently before the Tribunal.

22 MR. KENNELLY: I appreciate that.

23 MR. BARLING: Madam, there is something I should have said this morning in relation to the BT  
24 appeal. As you know, we have decided not to pursue the self-supply market definition point,  
25 partly because we were conscious that it could delay what seems to us to be the most important  
26 aspect, which is the reference on the price control matters. I did want to say then, but forgot,  
27 that of course we do maintain our position that Ofcom got it wrong in excluding on-net calls  
28 from the relevant market. We do reserve our position to raise that point at any appropriate  
29 time in the future in relation to other proceedings. I wanted just to say that.

30 THE CHAIRMAN: Yes - but not in these proceedings.

31 MR. BARLING: Not in these proceedings.

32 MR. ROTH: I will not address Mr. Kennelly's point. It does not arise before the Tribunal. We  
33 have sought to explain that to H3G and we will no doubt be able to do that again.

1 Just two points on the pleading. I will not say anything further about the question of going in  
2 parallel or postponing price control until after SMP. I was not seeking to suggest that Mr.  
3 Kennelly's clients should not have a full chance to respond to our defence before the  
4 Competition Commission and put in their points. Clearly they would. It is really what is the  
5 minimum that we think is necessary so that questions can be properly framed and referred, and  
6 those matters which really should not be raised in this appeal by the interveners can be  
7 determined by this Tribunal. Having heard what Mr. Pickford said to the Tribunal a few  
8 moments ago only highlighted the concerns that we have when, as you will recall, he referred  
9 to para. 90 of BT's notice of appeal, saying that it was wrong of Ofcom to have regard to the  
10 auction fees. He said that T-Mobile may wish to argue that Ofcom was right to have regard to  
11 those fees. Well, we are delighted to hear that they will so argue, and clearly they can. And he  
12 said that that was the only factor that Ofcom should have had regard to. Well that is  
13 effectively, we would say, a fresh appeal. It is not an intervention. That is the sort of issue,  
14 without getting into it, that we say should be sorted out before a reference goes - and one  
15 which particularly could be determined by pleadings, whether full or outline pleadings, as we  
16 have suggested. You will have regard, no doubt, not only to Rule 3(1), but to Rule 3(5) of the  
17 Tribunal Rule which says that the Tribunal shall refer to the Commission for determination in  
18 accordance with s.193 of the Act and Rule 5, every matter which either .. consideration of any  
19 statement provided for in paras. (2) to (4) ----

20 So, that includes matters that arise from statements of intervention. That is why we think it is  
21 right to get, at least in outline, the interveners' statements on price control matters before the  
22 questions are framed so that so far as possible all relevant questions go to the Competition  
23 Commission in one go.

24 We do not, with great respect to Mr. Barling, see anything in sub-section (1) of s.193 that  
25 relates to the timing at which the reference should be made. It is a mandatory reference, but it  
26 must be within the case management powers of this Tribunal to decide on a case by case basis  
27 whether the reference should go right at the outset or a little later.

28 MR. SCOTT: The Rules in fact specifically say in sub-section (6), "The Tribunal may make a  
29 reference at any time ----"

30 MR. ROTH: Absolutely. Thank you, sir. You have complete discretion.

31 MR. GREEN: Can I make one point which really arises out of what Mr. Roth said? We are  
32 somewhat neutral on this, but it is something that you need to be aware of. If you say that the  
33 next round of pleadings - if there is to be one - is going to be reasonably complete, then it is  
34 going to take quite a lot of time to put those together because we are going to need to instruct

1 the accountants and the economists, and we may be talking about months. If you say it is an  
2 outline defence, then obviously it can be done in a very much shorter time. Now, I am not  
3 certain that we have a particularly strong view as to whether it is short now and then long in  
4 front of the Competition Commission, or longer now, and shorter in front of the Competition  
5 Commission. But, it will impact upon timescale.

6 MR. BARLING: If I may make a point on Mr. Scott's point? It is a perfectly proper point to put  
7 to us, but in our submission what that means is that if it arises -- they may make it at any time  
8 to the Commission before a decision, but -- before it -- that is obviously the Tribunal delivering  
9 its decision. It may not realise that a price control matter has arisen until then. But, if it has  
10 arisen, there is an obligation (it says in s.193) to make a reference. But, I agree that there is a  
11 point of statutory construction there which no doubt needs to be looked at.

12 THE CHAIRMAN: We will now rise briefly to consider in what sequence we want to do things.  
13 Then if it looks as if we are going to be able to come back relatively quickly and discuss dates  
14 with everybody, we will do so. We would be grateful if people would remain here for the  
15 time being. If it becomes apparent that that is not going to be possible and it will have to be  
16 dealt with in correspondence, then also we will indicate that as soon as we usefully can.  
17 I would just like to thank everybody for their self-restraint, exercised in general today, and for  
18 their very helpful submissions. I think we have got through a great deal in the course of the  
19 day. Thank you.

20 (Short break)

21 THE CHAIRMAN: We have considered very carefully everything that has been said to us during  
22 the course of the day and this is how the Tribunal proposes to proceed. We agree that there  
23 should be a rapid preliminary hearing as to the full scope of the price control matters, and non-  
24 price control matters, and I will come back in a moment to the proposed timetable to dispose of  
25 that point.

26 After the Tribunal has determined that preliminary point there will be a short period for the  
27 service of the defence and a further short period for the service of statements of intervention,  
28 those pleadings will deal with all the non-price control matters in detail and with the price  
29 control matters in outline. Parties should be aware that the time that we will allow between  
30 determining the preliminary issue and the service of the defence and the statements of  
31 intervention will be short to reflect the fact that we expect the parties to be making progress  
32 towards the preparation of those pleadings in the interim period, but we would like the  
33 pleadings all in one go in the sense of the pleadings covering all issues rather than delivering  
34 them in stages.

1 In relation to the statements of intervention referring to Rule 16(9)(c) of the Tribunal Rules we  
2 would not want copy documents to be annexed to the statements of intervention if those are  
3 already annexed to pleadings already before the Tribunal. At that point we will frame the  
4 questions to be referred to the Competition Commission; we think it is premature at the  
5 moment to say whether there might need to be further correspondence or even a further hearing  
6 as to what those questions should be, but we have determined that we will not postpone the  
7 reference of the price control matters to the Competition Commission pending the  
8 determination of the non-price control matters.

9 Our reasons for that are two-fold. First, we do not accept that the Competition Commission  
10 reference will necessarily be severely affected by the findings in relation to significant market  
11 power. If H3G is successful in its appeal it is not at all clear at present what the resulting order  
12 will be, or how that will affect the BT appeal, or how it will affect the remainder of the H3G  
13 appeal. We take the point that was made that there may well be appeals from those decisions  
14 of the Tribunal; it may be that the resulting order is a remission back to Ofcom rather than a  
15 determination by the Tribunal itself, and so we regard it as very unclear how long any delay  
16 would, in fact, be if we were to decide to postpone the reference to the Commission until the  
17 non-price control matters were finally determined, and because that matter is open-ended we  
18 think it is right to proceed with the reference to the Competition Commission.

19 As far as the timetable for this is concerned, for the preliminary hearing we envisage this is the  
20 process: Ofcom and H3G should circulate as soon as possible the tidied up versions of the two  
21 alternative questions rough drafts of which were prepared over the short adjournment. Written  
22 submissions from the parties supporting one or other of those questions, or providing an  
23 alternative question should be lodged with the Tribunal and served on the other parties by 2<sup>nd</sup>  
24 August. The Tribunal will then resolve on paper what is the preliminary issue to be heard, and  
25 that determination will be delivered, by the latest, 16<sup>th</sup> August.

26 The parties should then submit their skeletons on that preliminary issue by 3<sup>rd</sup> September, and  
27 we will have a hearing of that issue on 11<sup>th</sup> September. We cannot say at the moment when we  
28 will determine that matter – when the Tribunal will deliver its decision on that – but we can  
29 say now that once we have delivered our decision on that we will direct that the defence is  
30 served within three weeks of that determination and that the statements of intervention will be  
31 served within two weeks of the service of the defence. As I said, the pleadings will deal with  
32 all matters, the non-price control matters in detail, the price control matters in outline, and  
33 referring, so far as possible, to existing bundle in order to reduce the amount of duplication.

1 We will also draw up a consent order in relation to the O2 appeal, and we have decided that  
2 we will quash the decision to the extent suggested by the parties, and remit the matter back to  
3 Ofcom but without any further directions as to how Ofcom should either take the matter  
4 forward or deal with the repercussions of that quashing for the other MNOs.

5 Is there anybody who is unclear as to what is expected of them now?

6 MR. GREEN: Just in relation to your final comment about a consent order. There is a specific  
7 procedure for consent orders under Rule 57 which is somewhat cumbersome. I think you  
8 probably mean – not wanting to put words in your mouth – an order made with the consent of  
9 the parties but nonetheless simply an order of the Tribunal, not an order under Rule 57.

10 THE CHAIRMAN: That is precisely what I meant, thank you very much, Mr. Green.

11 MR. GREEN: We are very relieved.

12 THE CHAIRMAN: Mr. Kennelly?

13 MR. KENNELLY: Madam, we are very grateful for that and we understand the Tribunal is seeking  
14 to bring this on as quickly as possible. We have a concern though that it is still too lengthy for  
15 our purposes. I realise that I have an uphill struggle in this respect, but there is a possibility to  
16 speed up the timetable in one area and that is the skeleton arguments which follow the  
17 resolution by the Tribunal of what is the preliminary issue, because necessarily the parties will,  
18 in preparing the questions – if they disagree with the questions submitted by Ofcom and H3G –  
19 have to consider the substance of the issue itself, and there is every indication that that issue  
20 has been considered. So at the moment the Tribunal is indicating that skeletons be submitted  
21 on 3<sup>rd</sup> September, and there is potential there to bring that forward by a week and indicate that  
22 the parties should serve their skeleton seven days earlier than that, and that would assist in  
23 having a hearing in the first week of September.

24 That is our submission, madam, that the Tribunal has an opportunity to shorten the timetable in  
25 that respect.

26 THE CHAIRMAN: Can I just say, Mr. Kennelly, that this timetable was partly put in place because  
27 of the commitments of members of the Panel and so I am afraid that shortening the time for the  
28 service of the skeleton would not actually speed matters up because the Panel would not be  
29 able to consider the matters before 3<sup>rd</sup> of September in any event.

30 MR. KENNELLY: I am grateful.

31 MR. ROTH: I appreciate of course that the dates that you have outlined have been fixed with regard  
32 to the availability of the Panel. We did, over the period while you were out deliberating, have  
33 discussions between the parties – given the large number of parties – and it did emerge that all  
34 parties, and that includes Miss Dinah Rose, who is leading counsel for Hutchison are

1 available for the week after the week of 11<sup>th</sup>, that is the following week, and if the Panel were  
2 able to do the week of the 17<sup>th</sup>, perhaps avoiding the Friday, because of Yom Kippur on Friday  
3 afternoon, but Monday, Tuesday, Wednesday or Thursday, all parties can do that and we know  
4 that some parties could not do 11<sup>th</sup>. I do not think Hutchison would be prejudiced by one week  
5 in that.

6 THE CHAIRMAN: If it is convenient for everyone we will have the preliminary hearing on 19<sup>th</sup>  
7 rather than 11<sup>th</sup>.

8 MR. ROTH: I am very grateful. Before Mr. Kennelly complains about a week's delay the Tribunal  
9 will recall that Hutchison did take to I think the very last day of its three month period, or  
10 possible the penultimate, to get the notice of appeal in.

11 THE CHAIRMAN: Well we will not start that kind of debate now. Thank you very much, Mr.  
12 Roth. Mr. Rayment?

13 MR. RAYMENT: I am very grateful, madam. Can I raise a very minor matter. Could the order  
14 include that the skeletons in the preliminary issue be served on the parties and the Competition  
15 Commission? Obviously we are not intending to take part but we do have a keen interest in  
16 the outcome.

17 MR. SCOTT: Mr. Roth, presumably you will also serve an unredacted copy of the statement on the  
18 Competition Commission as well as ourselves.

19 MR. ROTH: Yes, certainly. Thank you for reminding us.

20 MR. BARLING: Madam, if the hearing is on the 19<sup>th</sup> I wonder whether we could crave a bit of  
21 extra time for the skeletons, perhaps put the skeletons back a week? I am sure no one will  
22 want to read them anyway before they have to. I know people are on holiday in the earlier  
23 period and it will assist a bit. At the moment you have them for the 3<sup>rd</sup>, so maybe they could  
24 be for the 10<sup>th</sup> or 12<sup>th</sup> – the 12<sup>th</sup> would be a week before.

25 THE CHAIRMAN: I think it would help us to have that weekend. If we said Friday, 7<sup>th</sup>, does that  
26 assist.

27 MR. BARLING: Yes, thank you very much.

28 MR. KENNELLY: Madam, this is my opportunity to complain, because it is precisely this kind of  
29 delay that concerns our client and, quite frankly, we are certainly available on the date  
30 indicated by the Tribunal and more than anxious to proceed on that day – the date which you  
31 gave, 11<sup>th</sup> September. We are prejudiced by ever week of delay by a very considerable  
32 financial sum, and it is not appropriate to change the Tribunal's initial indication without any  
33 idea as to the genuine nature of the inconvenience. There is ample representation here for all of  
34 the parties, Leading counsel and Junior counsel in most cases and experienced specialist

1 solicitors, and in my submission there is no indication that all of the parties cannot properly be  
2 represented on that day which the Tribunal has chosen for the hearing of the issue as soon as  
3 possible, and it is not acceptable to say that a one week delay prejudices in no respect because  
4 we are prejudiced and these delays, as the Tribunal knows well are cumulative. It is important  
5 to begin as we mean to go on and stick to the deadlines that the Tribunal has imposed in the  
6 interest of expedition.

7 THE CHAIRMAN: We understand your concerns, Mr. Kennelly, but there are many different  
8 factors which have to be taken into account in determining what the procedure is. We consider  
9 that the timetable that we have set, and the process that we have outlined really is the most  
10 rapid way in which this matter can be brought to a resolution. I consider that H3G has largely  
11 achieved what it set out to do coming here today, and we do not feel that the points of view of  
12 the other people present should be disregarded because of the urgency of the matter. So I think  
13 we will go with those revised dates. If I can just remind people what those are now then: The  
14 submission supporting one or other of the alternative questions to be submitted by 2<sup>nd</sup> August.  
15 We will give our decision on what the preliminary issue actually is on or before 16<sup>th</sup> August.  
16 Skeletons on that preliminary issue to be submitted by noon on 7<sup>th</sup> September – that is to  
17 ensure that they are circulated for the weekend to the Tribunal members – the hearing on 19<sup>th</sup>  
18 September. We will determine the matter as soon as possible. There will then be the defence  
19 within three weeks of that, and the statement of intervention within two weeks of the defence,  
20 and then we will frame the questions after that.

21 I think that is probably as far as we can get to today. Any further submissions – am I tempting  
22 fate? Well thank you everybody for your co-operation.

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