Neutral citation [2012] CAT 28

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1189/3/3/11

Victoria House
Bloomsbury Place
London WC1A 2EB

30 October 2012

Before:

THE HONOURABLE MR. JUSTICE HENDERSON
(Chairman)
WILLIAM ALLAN
STEPHEN WILKS

Sitting as a Tribunal in England and Wales

BETWEEN:

TELEFONICA UK LIMITED

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

- and -

EVERYTHING EVERYWHERE LIMITED
HUTCHISON 3G UK LIMITED
VODAFONE LIMITED

Interveners

Heard at Victoria House on 25-26 April 2012

JUDGMENT

APPEARANCES

Mr. Tom Richards (instructed by Ashurst LLP) appeared for the Appellant.

Mr. Pushpinder Saini QC and Mr. Andrew Scott (instructed by the Office of Communications) appeared for the Respondent.

Mr. Tim Ward QC (instructed by Herbert Smith LLP) appeared for Vodafone Limited.

Ms. Monica Carss-Frisk QC and Mr. Fraser Campbell (instructed by Baker & McKenzie LLP) appeared for Hutchison 3G UK Limited.

I. INTRODUCTION

1. This is an appeal brought by Telefónica UK Ltd ("Telefónica") under section 192(1)(a) and (2) of the Communications Act 2003 ("CA 2003") against the determination by Ofcom, the respondent to the appeal, published on 14 September 2011 ("the Determination") of a dispute between Telefónica and each of Hutchison 3G UK Ltd ("H3G" or "Three") and Vodafone Ltd ("Vodafone").

2. Ofcom is the independent regulator and competition authority for the UK communications industries. Its responsibilities include the regulation of the telecommunications sector, and in particular the resolution of interconnection disputes between the providers of electronic communications networks and services.

3. Telefónica is a national mobile communications provider ("MCP") which provides mobile communications services to consumers and businesses in the UK under the "O2" brand. It is one of only four national MCPs in the UK, the others being Vodafone, H3G and Everything Everywhere Ltd ("Everything Everywhere"). When a customer makes a call from his or her mobile telephone to another UK mobile telephone, that customer's MCP will charge a retail fee to the customer making the call. The customer's MCP will then pay a wholesale charge to the MCP which terminates that call, known as the terminating communication provider. These wholesale charges are known as "mobile call termination" ("MCT") charges. The MCT charges levied by one MCP to another are governed by interconnection agreements between them, subject to any applicable regulatory conditions.

4. In a lengthy and detailed regulatory mobile call termination statement published by Ofcom on 27 March 2007 ("the 2007 Statement"), Ofcom determined that each of the four national MCPs, when acting as a terminating communications provider, held a position of significant market power ("SMP") in the market for wholesale voice call termination on its own network. In exercise of the powers conferred on it by CA 2003, Ofcom decided to impose SMP conditions on wholesale voice call termination services by way of *ex ante* regulation. For the period from 1 April 2007

to 31 March 2011, those conditions were set out in the 2007 Statement, and were subsequently amended in April 2009 following a successful appeal against the price control element of the conditions brought by British Telecommunications Plc ("BT") to this Tribunal ("the Tribunal").

5. As we will explain in more detail below, the charge control took the form of a cap on the termination charges that could be levied by all four MCPs. However, the cap was deliberately not imposed as a fixed ceiling above which charges could not rise, but instead took the form of a maximum average figure (known as the Target Average Charge, or "TAC") which the charges levied by each MCP over each financial year (that is, from 1 April to 31 March in the following calendar year) could not exceed. The TAC for the second and subsequent financial years was to be calculated, broadly speaking, by reference to the actual charges imposed by the MCP in the current year, but weighted according to the corresponding volumes of calls in the preceding year. Provided the TAC was not exceeded over the year as a whole, each MCP had the ability, apparently unrestricted, to set its charges as it chose, including (for example) the freedom to impose charges at different rates for calls made during the daytime, at evenings and at weekends. Each of the MCPs took advantage of this freedom, and set different termination charges for each month for daytime, evening and weekend calls. In practice they tended not to change their rates within any particular month, although there was nothing to prohibit them from doing so.

6. With the benefit of hindsight, it is perhaps unsurprising that before long some of the MCPs sought to exploit the mechanism for calculation of the TAC by indulging in a practice which came to be known as "flip-flopping". The practice is described by Telefónica's head of regulation, Lawrence Peter Wardle, in a witness statement filed in support of the appeal as follows:

> "14. The practice of "flip-flopping" exploits the way that an MCP's average MCT charge is calculated under the 2007 Statement. As I mention above, an MCP's average MCT charge for a particular month (the "relevant month") is calculated using the MCP's day/evening/weekend MCT charges for the relevant month, but weighted according to the volume of day/evening/weekend calls in the same month <u>in the previous year</u>. "Flip-flopping" exploits this by identifying months which have more weekends than the same month in the previous year (for example, October 2010 has 5 weekends while October 2009 had 4 weekends) and

> dramatically increasing the weekend MCT rates charged in that month. Since the TAC calculation uses the day/evening/weekend volumes from the previous year, the higher weekend rates will only be multiplied by the lower volume of weekend calls from that month the previous year (and conversely the lower weekday rates will be multiplied by the higher volume of weekday calls from that month in the previous year). This means that the MCP's average MCT charge, as calculated this way, may not necessarily exceed the TAC. However, in reality, the MCP's average MCT charge for the relevant month, as charged to the originating communications provider, will be above the TAC, because the MCP is charging the higher weekend rate for the higher number of weekends. This allows the "flip-flopping" MCP to earn extra revenue in those months, in excess of those intended by Ofcom when establishing the charge control regime in 2007. The originating communication provider suffers, because it bears the higher weekend MCT charges for the higher number of weekends in that month, leading to a higher overall charge – and it cannot realistically change its customer retail charges month by month to reflect such higher overall charges."

7. Concerns about the practice of flip-flopping were raised by a number of interested parties in response to a market review consultation process initiated by Ofcom in April 2010 as a prelude to the introduction of a new charge control regime to run from 1 April 2011 until 31 March 2015 ("the April 2010 Consultation"). We will describe the proposals made by Ofcom in this document in more detail later in this judgment. For now, it is enough to record that Ofcom considered flip-flopping to be an objectionable practice which sought to exploit a loophole in the existing charge control regime, and expressed the wish to close the loophole "because left unaddressed, we believe it would have an adverse effect on the purchasers of MCT and, ultimately, on consumers during the period of this market review" (paragraph 9.111 of the April 2010 Consultation). A range of options for dealing with the problem was then discussed.

8. For reasons which were not explained to us, Telefónica alone of the four national MCPs in the UK decided to eschew the practice of flip-flopping. For reasons which are equally obscure, Telefónica took no steps to challenge flip-flopping by any of its competitors, despite the alleged financial prejudice referred to by Mr. Wardle in his evidence, until the end of September 2010 when Telefónica raised an objection, initially in correspondence, to varied rates of charge for October 2010 which had been notified to it on 26 August 2010 by Vodafone and H3G.

9. It is not in dispute that these varied rates were indeed a typical instance of flip-flopping. This can be clearly seen from the table set out in paragraph 24 of

Telefónica's notice of appeal, which is reproduced in substantially the same form in paragraph 2.12 of the Determination:

Period	**Daytime (pence per minute)**	**Evening (pence per minute)**	**Weekend (pence per minute)**
Vodafone's charges			
September 2010	4.4276	4.4276	4.4276
October 2010	0.5	0.5	19.7546
November 2010	4.6694	7	0.5
H3G's charges			
September 2010	4.93	4.93	0.5
October 2010	1.0	1.0	19.0
November 2010	5.1	5.1	0.5

The common feature, in each case, is a huge reduction in the rates charged for daytime and evening calls, coupled with a huge increase in the rates for weekend calls. Self-evidently, Telefónica could not reasonably have been expected to pass on sudden changes of this magnitude to its retail customers for a single month, and no commercial justification for the changes could possibly be advanced beyond a desire to exploit the system in a month which happened to have a larger number of weekends than its counterpart in the previous year.

10. Attempts to resolve the dispute by negotiations proved unsuccessful, and Telefónica paid the charges on a "without prejudice" basis. On 25 March 2011 Telefónica made a formal request to Ofcom that it resolve the dispute pursuant to its dispute resolution powers in CA 2003. By this date Ofcom had completed the consultation process to which we have referred, and in its wholesale mobile voice call termination statement published on 15 March 2011 ("the 2011 Statement") Ofcom had announced its decision to deal with flip-flopping by setting a simple cap with a single maximum charge in each year, after a two month transitional period. By this means, the ability of the national MCPs to charge differential rates for calls made at different times was preserved, but the fixed cap on charges prevented future exploitation of the system by charging at artificially high levels for individual months.

11. Following the reference to it of the dispute, Ofcom decided on 16 May 2011, in accordance with section 186(4) of CA 2003, that it was appropriate for it to handle the dispute, and formulated the scope of the dispute as being to determine:

> "(i) whether it was fair and reasonable in light of the prevailing regulatory regime for Vodafone and H3G to levy the charges which applied to the purchase of wholesale voice call termination services by [Telefónica] during the period October 2010; and
>
> (ii) if not, what charges would it have been fair and reasonable for Vodafone and H3G to have levied on [Telefónica] for the purchase of wholesale voice call termination services during the period October 2010?"

We record that no party has contended before us that Ofcom's formulation of the scope of the dispute was in any way erroneous, although Telefónica had originally sought to persuade Ofcom to omit the words "in light of the prevailing regulatory regime" from subparagraph (i) of the formulation: see paragraph 79 below.

12. The parties then made written submissions to Ofcom, and on 4 August 2011 Ofcom published a draft determination. Comments on the draft determination were received from Telefónica, H3G and Vodafone, and also from two other interested parties whom Ofcom had permitted to intervene, Cable & Wireless Worldwide and Everything Everywhere. In addition, Telefónica held a meeting with Ofcom on 22 August 2011 to discuss the written comments which Telefónica had made on 19 August. The final Determination was published, as we have already said, on 14 September 2011. Ofcom's final conclusion was stated as follows in paragraph 1.8 of the Determination:

> "Having carefully considered and taken into account the responses received, we have concluded that it was fair and reasonable in light of the prevailing regulatory regime for Vodafone and H3G to levy the October 2010 charges."

A formal determination to that effect was set out in Annex 1 to the Determination.

13. In the present appeal, initiated by Telefónica's notice of appeal filed on 14 November 2011, Telefónica submits that the Determination is vitiated by a number of errors of law, principally resulting from Ofcom's alleged failure to follow the approach to dispute resolution explained by the Tribunal in *T-Mobile (UK) Ltd & Ors v Ofcom* [2008] CAT 12 ("*TRD*") and *British Telecommunications Plc & Or v*

Ofcom [2011] CAT 24 ("*08-numbers*"). It is expressly stated in paragraph 5 of the notice of appeal that "the appeal solely involves questions of law", and that "Telefónica does not seek to argue the substance of the underlying dispute before the Tribunal". The only relief sought, accordingly, is that the Tribunal should remit the dispute to Ofcom for reconsideration in accordance with the proper approach to dispute resolution. For the same reason, no factual or expert evidence has been adduced on the appeal, with the exception of the limited amount of background material set out in Mr. Wardle's statement.

14. Permission to intervene in the appeal was sought by Vodafone, H3G and Everything Everywhere, and granted by the Tribunal. The oral hearing of the appeal took place on 25 and 26 April 2012, when we heard argument from Mr. Tom Richards on behalf of Telefónica, Mr. Pushpinder Saini QC leading Mr. Andrew Scott on behalf of Ofcom, Mr. Tim Ward QC on behalf of Vodafone and Ms Monica Carrs-Frisk QC leading Mr. Fraser Campbell on behalf of H3G. We also had the benefit of comparatively brief written submissions from Everything Everywhere. We express our gratitude to the legal teams of all the parties for their able and helpful submissions.

15. At the date of the hearing before us, an appeal to the Court of Appeal in *08-numbers* was pending, but nobody suggested that the hearing of the present appeal should be adjourned for that reason. In the event, the Court of Appeal heard argument on the *08-numbers* appeal between 1 and 3 May 2012, and handed down its judgment on 25 July 2012. Since our judgment was still in the course of preparation, and since the judgments of the Court of Appeal had a good deal to say about the nature of the dispute resolution process and the principles that the Tribunal should apply, those being issues which are also at the heart of the present appeal, it seemed to us that the parties should be afforded an opportunity to comment on the Court of Appeal's decision before we finalised our own conclusions. A letter was therefore sent to the parties on 30 July 2012 inviting the parties to file written submissions in relation to the judgment in *08-numbers* by 17 August, with any submissions in response to be filed by 24 August. The parties took advantage of this opportunity, and we have taken their written submissions into account.

16. The neutral citation number of the Court of Appeal's judgment in *08-numbers* is [2012] EWCA Civ 1002. The appellants were the four national MCP's, the respondent was BT, and Ofcom was joined as an interested party; there was also a cross-appeal by BT against Telefónica only. It may be helpful to explain at this point that we have followed the parties in the present case in using the description "*08-numbers*" as a convenient label for the case, because the question in issue concerned the rates payable as between BT and the four MCPs in respect of calls to numbers beginning with 080, 0845 and 0871, all of which are non-geographic numbers.

17. With this introduction, we will now deal with matters in the remainder of this judgment in the following order. First, we will describe the relevant legal background. We will then say a little more about flip-flopping and the way in which Ofcom decided to deal with it. Next, we will discuss the proper approach to dispute resolution by Ofcom in the light of the authorities, including the recent decision of the Court of Appeal in *08-numbers*. We will then describe and analyse the Determination, before considering the five grounds of appeal in turn. Finally, we will state our conclusion.

II. THE LEGAL BACKGROUND

18. The account which follows is largely based on the helpful summaries contained in paragraphs 7 to 14 of the notice of appeal and paragraphs 13 to 46 of Ofcom's defence dated 13 January 2012.

(1) The EU Regulatory Framework

19. The regulation of electronic communications services and networks in the UK is governed by a common EU regulatory framework ("the CRF"), comprising the Framework Directive (Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services) and four other directives known as "Specific Directives". For present purposes, the only relevant Specific Directive is the Access Directive (Directive 2002/19/EC of 7 March 2002 on access to, and interconnection of, electronic communications

networks and associated facilities). Significant modifications to the CRF were made in 2009 by Directive 2009/140/EC, and were transposed into UK law by the 2011 Regulations mentioned below.

20. The EU regulatory framework requires Member States to allocate the business of regulation to national regulatory authorities, or NRAs. In the UK this role is fulfilled by Ofcom. One of the tasks allocated to NRAs is dispute resolution, in respect of which Article 20 of the Framework Directive provides, so far as material, as follows:

> "Dispute resolution between undertakings
>
> 1. In the event of a dispute arising in connection with existing obligations under this Directive or the Specific Directives between undertakings providing electronic communications networks or services in a Member State, or between such undertakings and other undertakings in the Member State benefiting from obligations of access and/or interconnection arising under this Directive or the Specific Directives, the national regulatory authority concerned shall, at the request of either party, and without prejudice to the provisions of paragraph 2, issue a binding decision to resolve the dispute in the shortest possible time frame and in any case within four months, except in exceptional circumstances. The Member State concerned shall require that all parties cooperate fully with the national regulatory authority.
>
> …
>
> 3. In resolving a dispute, the national regulatory authority shall take decisions aimed at achieving the objectives set out in Article 8. Any obligations imposed on an undertaking by the national regulatory authority in resolving a dispute shall respect the provisions of this Directive or the Specific Directives.
>
> 4. The decision of the national regulatory authority shall be made available to the public, having regard to the requirements of business confidentiality. The parties concerned shall be given a full statement of the reasons on which it is based."

21. Article 8 of the Framework Directive, to which Article 20(3) refers, is entitled "Policy objectives and regulatory principles". Article 8(1) requires Member States to ensure that "in carrying out the regulatory tasks specified in this Directive and the Specific Directives, the national regulatory authorities take all reasonable measures which are aimed at achieving the objectives set out in paragraphs 2, 3 and 4", and that such measures should be proportionate to those objectives. Those objectives are, in short: the promotion of competition in the provision of electronic communications networks, electronic communications services and associated facilities and services (Article 8(2)); contribution to the development of the internal

market (Article 8(3)); and the promotion of the interests of EU citizens by, inter alia, ensuring a high level of consumer protection in their dealings with suppliers, and promoting the provision of clear information with transparency of tariffs and conditions for using publicly available electronic communications services (Article 8(4)). Article 8(5) of the Framework Directive, which was inserted by Directive 2009/140/EC, provides that:

> "The national regulatory authorities shall, in pursuit of the policy objectives referred to in paragraphs 2, 3 and 4, apply objective, transparent, non-discriminatory and proportionate regulatory principles by, inter alia:
>
> (a) promoting regulatory predictability by ensuring a consistent regulatory approach over appropriate review periods;
>
> …"

22. Among the other tasks allocated to NRAs is the *ex ante* regulation of competition under Article 16 of the Framework Directive, by market analysis and the imposition upon undertakings with SMP of appropriate regulatory obligations, including the imposition of price controls or other access obligations pursuant to Articles 8 to 13a of the Access Directive. By virtue of Article 13(2) of the Access Directive, a NRA must ensure that "any…pricing methodology that is mandated serves to promote efficiency and sustainable competition and maximise consumer benefits."

23. Article 5 of the Access Directive deals with the powers and responsibilities of NRAs with regard to access and interconnection, and includes the following provisions:

> "1. National regulatory authorities shall, acting in pursuit of the objectives set out in Article 8 of [*the Framework Directive*], encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and the interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, efficient investment and innovation, and gives the maximum benefit to end-users.
>
> …
>
> 3. With regard to access and interconnection referred to in paragraph 1, Member States shall ensure that the national regulatory authority is empowered to intervene at its own initiative where justified in order to secure the policy objectives of Article 8 of [*the Framework Directive*]…"

(2) Ofcom's relevant powers and duties under CA 2003

24. In exercising its functions in relation to network access and dispute resolution, Ofcom is required to comply with the regulatory duties set out in sections 3 and 4 of CA 2003. It is unnecessary for us to set out these sections, because it is common ground that their purpose is to reflect and give effect in domestic law to the relevant requirements of the EU regulatory framework which we have already described.

25. Chapter 1 of Part 2 of CA 2003 makes detailed provision for Ofcom's powers to set SMP conditions following a market analysis. The imposition of price controls is generally recognised as being the most intrusive form of regulation available to a NRA, and this is reflected in section 88 which lays down stringent conditions which have to be satisfied before such controls may be imposed. Thus, Ofcom may not set price controls except where:

> "88(1) …
>
> (a) it appears to them from the market analysis carried out for the purpose of setting that condition that there is a relevant risk of adverse effects arising from price distortion; and
>
> (b) it also appears to them that the setting of the condition is appropriate for the purposes of –
>
> (i) promoting efficiency;
>
> (ii) promoting sustainable competition; and
>
> (iii) conferring the greatest possible benefits on the end-users of public electronic communications services."

Further, by virtue of section 84, where Ofcom imposes such a condition it must thereafter review the relevant market at appropriate intervals for the purpose of considering whether the conditions should be modified. (For SMP determinations made on or after 26 May 2011, such a review must be carried out within three years of the determination: see sections 84(2) and 84A(3) of CA 2003, as amended by the 2011 Regulations mentioned below).

26. It is convenient to note at this point that in *Vodafone Ltd v British Telecommunications Plc* [2010] EWCA Civ 391, [2010] Bus LR 1666, the Court of

Appeal held that Ofcom has no power to impose revised price controls on a retrospective basis, that is to say in respect of a period that has already elapsed when the revisions come into effect: see the judgment of Richards LJ, with whom Moore-Bick and Lloyd LLJ agreed, at paragraphs [34] to [46].

27. We now turn to Ofcom's dispute resolution powers. Where a dispute is referred to Ofcom, Ofcom must first decide whether it falls within the scope of section 185 of CA 2003, and (if it does) whether, in accordance with section 186, it is appropriate for Ofcom to handle it. If Ofcom decides to handle the dispute, its only powers on making a determination are those set out in section 190. As we have already said, Telefónica referred the present dispute to Ofcom on 25 March 2011, and Ofcom notified the parties that it would handle the dispute on 16 May 2011.

28. The relevant provisions of sections 185 and 186 in force at that time provided as follows:

> "**185. Reference of disputes to OFCOM**
>
> (1) This section applies in the case of a dispute relating to the provision of network access if it is –
>
> (a) a dispute between different communications providers;
>
> …
>
> (3) Any one or more of the parties to the dispute may refer it to OFCOM.
>
> …
>
> (8) For the purposes of this section –
>
> (a) the disputes that relate to the provision of network access include disputes as to the terms or conditions on which it is or may be provided in a particular case;
>
> …
>
> **186. Action by OFCOM on dispute reference**
>
> (1) This section applies where a dispute is referred to OFCOM under and in accordance with section 185.
>
> (2) OFCOM must decide whether or not it is appropriate for them to handle the dispute.
>
> (3) Unless they consider –

(a) that there are alternative means available for resolving the dispute,

(b) that a resolution of the dispute by those means would be consistent with the Community requirements set out in section 4, and

(c) that a prompt and satisfactory resolution of the dispute is likely if those alternative means are used for resolving it,

their decision must be a decision that it is appropriate for them to handle the dispute."

29. On 26 May 2011, that is to say ten days after Ofcom had notified the parties that it would handle the dispute, there came into force the Electronic Communications and Wireless Telegraphy Regulations 2011, SI 2011 No. 1210 ("the 2011 Regulations"). Among other things, the 2011 Regulations made certain amendments to sections 185 and 186 of CA 2003, and introduced a new subsection (2A) into section 190. The amended version of section 190 was, of course, in force by the time when Ofcom made the Determination on 14 September 2011, and one of the matters in dispute is whether the new subsection (2A) applied even though the dispute had been referred to and accepted by Ofcom before the amendments came into force. We will deal with that issue in due course. Meanwhile, we will set out the relevant provisions of section 190 with the new subsection (2A) underlined:

"**190. Resolution of referred disputes**

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

(2) Their main power…is to do one or more of the following –

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

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

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

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

(2A) In relation to a dispute falling within section 185 (1), OFCOM must exercise their powers under subsection (2) in the way that seems to them most appropriate for the purpose of securing –

a) efficiency;

b) sustainable competition;

c) efficient investment and innovation; and

d) the greatest possible benefit for the end-users of public electronic communications services.

…

(4) Nothing in this section prevents OFCOM from exercising the following powers in consequence of their consideration under this Chapter of any dispute—

(a) their powers under Chapter 1 of this Part to set, modify or revoke general conditions, universal service conditions, access related conditions, privileged supplier conditions or SMP conditions;

…

(6) Where OFCOM make a determination for resolving a dispute, they may require a party to the dispute –

(a) to make payments to another party to the dispute in respect of costs and expenses incurred by that other party in consequence of the reference of the dispute to OFCOM, or in connection with it; and

(b) to make payments to OFCOM in respect of costs and expenses incurred by them in dealing with the dispute…"

III. The practice of flip-flopping and Ofcom's response to it

30. The relevant SMP conditions imposed by Ofcom in the 2007 Statement were conditions MA1.1 to 1.3 and MA4.1 to 4.4, which applied (as we have already said) for the period of four years from 1 April 2007. As amended in April 2009, those conditions provided as follows:

"**MA1.1** Where a Third Party reasonably requests in writing Network Access, the Dominant Provider shall provide that Network Access. The Dominant Provider shall also provide such Network Access as Ofcom may from time to time direct.

MA1.2 Subject to condition MA1.3, the provision of Network Access in accordance with paragraph MA1.1 shall occur as soon as reasonably practicable and shall be provided on fair and reasonable terms and conditions (including charges) and on such terms and conditions (including charges) as Ofcom may from time to time direct.

MA1.3 The charges for Calls as covered by SMP conditions MA3 and MA4 below shall be as set out in those conditions, but only for the duration of those conditions.

MA4.1 Except in so far as Ofcom may otherwise consent under SMP condition MA4.7 below, the Dominant Provider shall take all reasonable steps to secure that, during any Relevant Year, the Average Interconnection Charge does not exceed the Target Average Charge for the provision of Network Access.

MA4.2 In this Condition, the Average Interconnection Charge means the average of the Mobile-to-Mobile Interconnection Charges during the Relevant Year in question, which shall be weighted according to:

(a) the profile by Charging Period of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls; and

(b) the corresponding volumes by month or part-month of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls, in the Base Year [*defined as meaning the period of 12 months ending on 31 March immediately preceding that Relevant Year*]

MA4.3 For the purposes of calculating the Average Interconnection Charge where any Mobile-to-Mobile Interconnection Charges are in force during a part only of the Relevant Year (commencing or ending at a date in the course of the Relevant Year), the weighting shall be derived from:

(a) the profile by Charging Period of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls; and

(b) the corresponding volumes by month or part-month of the Dominant Provider's sum of minutes of Fixed-to-Mobile Calls and Mobile-to-Mobile Calls, in the corresponding part of the Base Year.

MA4.4 For the purposes of this Condition, the Target Average Charge means:

(a) for the purpose of the First Relevant Year

(i) 9.1 pence per minute for H3G;

(ii) 5.7 pence per minute for [Telefónica];

(iii) 6.2 pence per minute for Orange;

(iv) 6.2 pence per minute for T-Mobile; and

(v) 5.4 pence per minute for Vodafone;

(b) for the purpose of the Second, Third and Fourth Relevant Years:

the Target Average Charge in the Base Year multiplied by the sum of 100% and the Controlling Percentage for that Relevant Year.

…

MA4.8 The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition."

31. Provided that the average interconnection charge of a regulated provider remained at or below the TAC, the SMP conditions imposed no restriction on the freedom of the provider to fix and vary its charges in whatever way and at whatever intervals it chose. In the 2007 Statement, Ofcom explained why it considered it appropriate to impose a charge control of this type, and in particular why the charge control in conditions MA3 and MA4 was to take the form set out in those conditions, and not (as in condition MA1) to stipulate that the charges should be fair and reasonable. In paragraph 10.27, Ofcom said that it had included this form of control:

> "to ensure that the MNOs [*ie mobile network operators*] have certainty in this context of what the appropriate charges should be for the provision of such calls i.e. that the only rules regarding the level of 2G/3G charges are contained in conditions MA3 and MA4 for their duration. The charges for any other services within this market which are not subject to the charge controls … would however be subject to the obligation that these charges, and not just other terms and conditions, should be fair and reasonable."

32. In relation to its decision to weight the average interconnection charge by reference to historic rather than current call traffic, Ofcom referred (in paragraph 10.43) to the risk of forecast error which the use of current call traffic as the yardstick would involve, and (in paragraph 9.228) to "the commercial uncertainty which such an approach would generate".

33. We have already explained how certain operators developed the practice of flip-flopping in order to exploit the freedom afforded to them under condition MA4, and how Ofcom set out its concerns in relation to the practice in the April 2010 Consultation. It is evident that by then the practice had already been prevalent for some time, because (as recorded in paragraph 4.22 of the April 2010 Consultation) three respondents to Ofcom's earlier consultation in May 2009 had already expressed strong concerns about the practice. In its discussion of the subject at paragraphs 9.110 and following of the April 2010 Consultation, Ofcom said that it wanted "to close this loophole in the new charge control", because "left unaddressed, we believe it would have an adverse effect on purchasers of MCT and, ultimately, on consumers during the period of this market review" (paragraph 9.111). Ofcom's view was that such behaviour was "motivated by securing additional revenue under the charge control beyond that envisaged by us when setting the glide path" (paragraph 9.116).

34. Under the heading "Why is it a problem?", Ofcom then said this:

> "9.120 First, flip-flopping allows MCPs to gain extra revenue beyond that envisaged by the regulator when the glide path to efficient unit costs was set. We have made some estimates and found that MCPs could obtain up to an extra 5% of termination revenue per annum, i.e., in the tens of millions of pounds. This compares to the baseline case where a single, flat rate is charged throughout the year i.e. no separate time of day rates.
>
> 9.121 Second, frequent and radical changes in time of day rates increase risk for originating providers and potentially raise their costs, in a way that it is not susceptible to competitive pressure…
>
> …
>
> 9.124 Even if new rates are not directly passed through to consumers at the time they happen, retail customers are likely to lose out in the long run from higher overall rates. If originating providers do not pass through any kind of price increase (or allow a premium in retail tariffs to cover future expected increases) then they will be exposed financially.
>
> 9.125 Flip-flopping behaviour is in fact likely to operate counter to the efficiency objectives that might argue for freedom over pricing structures within the constraints of the charge control. As set out in paragraph 9.114 above, our reason for allowing pricing freedom is that it would induce efficient network use, for example via price signals indicating the relative costs of meeting peak demands. For this to work, there needs to be some sustained certainty on mobile operators' rate structures so that originating providers, and in turn consumers, can react in a way that will encourage efficient use of networks. If a set of prices exists for one month and is radically changed the next, it is difficult to see how an originating provider can change its rates to react in time, because of notice periods and agreements like fixed-term contracts. Similarly, there will be a time lag of significantly more than one month, for consumers to react and change their calling patterns in response to a change in prices.
>
> 9.126 Notwithstanding the above concerns about the effect of pricing volatility on efficiency, there is clearly an additional impact arising from frequent and radical price changes, allowing the MCPs to gain extra revenue. We have not revised the current charge control condition, considering that any risks of harm need to be considered alongside the need to preserve regulatory certainty once a control is set. In setting a new charge control, however, we want to ensure a glide-path approach whereby pence per minute charges match forecast costs plus a reasonable rate of return. By improving the design of the rule to exclude flip-flopping, we set conditions such that MCPs are only able to increase their profitability by operating their networks more efficiently or by expanding demand for services and thereby reducing unit costs. The intention was not that operators could increase revenues by exploiting the mismatch between prior year and in-year weights."

35. This last paragraph, in particular, introduces a theme which lies at the heart of Ofcom's response to the perceived mischief of flip-flopping. Ofcom formed the view, after consultation with interested parties, that no change should be made to the current charge control conditions, in the interests of regulatory certainty, and

that the appropriate remedy was to introduce new rules which would exclude flip-flopping after the expiry of the current regime on 1 April 2011. Ofcom then went on, in paragraphs 9.127 to 9.160, to set out four options for dealing with the problem, expressing a preference for the second one which would restrict the frequency and size of rate changes during the year. Stakeholders were asked to express their views on the issue generally, and on the question whether option 2 "strikes the optimal balance between retaining flexibility for efficient pricing and restricting gaming opportunities that adversely effect originating operators and, ultimately, consumers" (paragraph 9.160).

36. In a supplemental consultation document published on 16 November 2010 ("the November 2010 Consultation"), Ofcom sought comments from stakeholders on a change to its preferred approach for dealing with the problem. In the light of comments made by stakeholders in response to the April 2010 Consultation, and discussions with the industry at a workshop to discuss the proposals for an appropriate pricing rule held on 12 October 2010, Ofcom now proposed, as its preferred approach, to set a maximum ceiling price, instead of the existing average price rule. In the body of the document, Ofcom repeated its reasons for regarding flip-flopping as an undesirable practice and then summarised the responses to the April 2010 Consultation. In paragraph 2.14, Ofcom recorded that:

> "In general responses to our proposals considered that preventing flip-flopping was a good idea. The majority of respondents, including MCPs, agreed that regulation should prevent frequent and significant changes in MTRs - and agreed with our assessment that flip-flopping harmed the interests of providers and, indirectly, consumers."

37. Ofcom then set out its revised proposals, including a new option 5 ("set a maximum average charge with only one price change during each year") and option 6 ("set a price ceiling"). In explaining why option 6 was now its preferred solution, Ofcom said in paragraph 2.39:

> "We believe that this is a proportionate remedy. It has the benefit of simplicity and it achieves the objective of severely restricting flip-flopping and preventing it at rates above the ceiling, thereby removing concerns over the consumer detriment that we believe occurs through the practice of flip-flopping. In addition, this revised option allows MCPs some flexibility in how they set their MTRs, removing restrictions on the frequency of price changes, maintaining the ability for MCPs to set different time-of-day MTRs, whilst also providing certainty to

> purchasers of MCT over the maximum level of MTR allowed. To the extent that pricing flexibility remains useful for MCPs wanting to affect usage of their network, this option allows some flexibility to do so. Finally, because of its simplicity it also reduces the cost of compliance, therefore reducing the likelihood of future regulatory disputes."

38. As we have already explained, option 6 was indeed the solution which Ofcom decided to adopt in the light of responses to the November 2010 Consultation. Whether it will be successful in eradicating gaming of the charging conditions remains to be seen, but in paragraph 7 of its defence Ofcom says it "anticipates that the effect of the new charge control will be substantially to eradicate 'flip-flopping'".

IV The proper approach to dispute resolution by Ofcom

(1) The decision of the Court of Appeal in *08-numbers*

39. The leading authority on this question is now the recent decision of the Court of Appeal in *08-numbers*, so it is necessary for us to examine it with some care. The background to the dispute in that case is described in the introductory section (paragraphs 1 to 23) of the leading judgment delivered by Lloyd LJ. For present purposes, only a brief summary is necessary. The issues in the case concerned calls made to non-geographic numbers, also known as NTS (short for "number translation services") numbers, from mobile network numbers. In order to ensure end-to-end connectivity, regardless of the network used by the caller or the recipient, BT provided connection services with its network to other communications providers under the terms of its Standard Interconnect Agreement ("SIA"). The effect of the main provisions of the SIA was that the charge payable for a BT service or facility was specified by BT, and could be varied by BT by notice given under paragraph 12.2 of the SIA. Such a variation would take effect in accordance with the notice, but it could be disputed by the operator in accordance with a prescribed procedure, and in the absence of agreement the dispute could be referred to Ofcom. If Ofcom ruled against the variation, BT would then be obliged to give effect to the ruling.

40. In June 2009, BT introduced a novel method of pricing, described as "ladder pricing", which imposed successive layers of termination charges depending on the amount of retail charges (if any) payable by the customer of the originating communications provider. It was common ground before the Tribunal that the introduction of the ladder charges amounted to a variation imposed by BT under paragraph 12.2 of the SIA. Further similar charges, in respect of other 08-numbers, were introduced by BT in November 2009. In each case, the introduction of the charges was disputed by the operators and the matter was referred to Ofcom. In each case Ofcom rejected BT's variation of the charges, finding in particular that benefit to consumers could not be shown to be likely to result from the changes, and that on the contrary there was a risk of disadvantage to consumers. BT appealed against Ofcom's determinations to the Tribunal, which allowed the appeals. In holding that Ofcom had erred in its approach to determination of the dispute, the Tribunal was in particular influenced by two considerations. First, the Tribunal attached significance to the contractual rights of BT to impose a variation under paragraph 12 of the SIA, and it drew a contrast with the different procedure under paragraph 13 which applied to changes in the price payable by BT for services or facilities provided by other operators. Secondly, the Tribunal attached significance to the absence of any prior regulatory control of the disputed prices by Ofcom, regarding this "regulatory absence" as a powerful indicator in favour of allowing BT to introduce the new prices.

41. The Court of Appeal unanimously reversed the decision of the Tribunal, and restored the determinations made by Ofcom. The court held that the two features of the case to which Tribunal had attached particular significance were "entirely neutral from a regulatory perspective" (to adopt the phrase used by Etherton LJ in paragraphs [101] and [102]), and that no grounds had been shown to undermine or displace the view of the merits formed by Ofcom.

42. In the section of his judgment headed "Dispute resolution by Ofcom", Lloyd LJ began by describing the nature of the statutory dispute resolution process. He referred to the decision of the Tribunal in *TRD* as being a case "of particular significance", where the Tribunal had given some general guidance about Ofcom's functions. Lloyd LJ continued at [59]:

> "There Ofcom had declined to interfere with proposals by the MNO as to the termination charges payable, and the Tribunal said that they had erred by failing to recognise that dispute resolution was a 'third potential regulatory restraint that operates in addition to other *ex ante* obligations and *ex post* competition law'.
>
> 60. In paragraph 101 of their decision in the *TRD* case, the Tribunal said this, describing the test that Ofcom should adopt:
>
> > "That test can be expressed as requiring OFCOM to determine what are reasonable terms and conditions as between the parties. The word 'reasonable' in this context means two things. First it requires a fair balance to be struck between the interests of the parties to the connectivity agreement. It therefore requires the same kind of adjudication that any arbitrator appointed by the parties to determine a dispute about the reasonable rate would carry out. But secondly, because OFCOM is a regulator bound by its statutory duties and Community requirements it also means reasonable for the purposes of ensuring that those objectives and requirements are achieved. OFCOM did not approach resolving these disputes on this basis and it therefore committed an error of law.'"

43. Lloyd LJ went on to say at [63]:

> "Certain matters were common ground between the parties and on the part of the Tribunal, as Ofcom pointed out in their helpful submissions as intervener, concerned as to the debate as to their proper role in relation to the dispute resolution. It is worth setting these out in terms here. The purpose of dispute resolution is to provide a solution where a deadlock is reached in commercial negotiations between parties. Ofcom's task, where it undertakes the resolution of the dispute, is to impose a solution that meets the public policy objectives of the CRF as set out in article 8 of the Framework Directive, and therefore goes beyond deciding disputes on the basis of the parties' respective contractual rights. Dispute resolution is a form of regulation in its own right, to be applied in accordance with its own terms, and it is intended to operate as a rapid and relatively informal means of breaking a commercial deadlock, especially having regard to the normal maximum of four months for completion of the process."

44. The next section of Lloyd LJ's judgment, headed "The nature of the appeal to the Tribunal", is important and needs to be quoted in full:

> "64. An appeal may be brought to the Tribunal in a case of this kind under section 192 of the 2003 Act. Under section 195(2) the Tribunal must determine the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal. (By contrast, a further appeal, such as these appeals, under section 196 lies only on a point of law.) By virtue of the previous decision of this court in relation to this particular dispute resolution process…the appeal to the Tribunal is not limited to the material that was before Ofcom. It is a full consideration on the merits, by reference to the specified grounds of appeal. In *T-Mobile (UK) Ltd v Ofcom* [2008] EWCA Civ 1373, where the argument was as to whether a particular dispute was to be resolved on a judicial review application or on an appeal to the Tribunal, Jacob LJ said this at paragraphs 30 and 31:

> "30. I would add this: it seems to me to be evident that whether the 'appeal' went to the CAT or by way of judicial review, the same standard for success would have to be shown. In either case it would not be enough to invite the tribunal to consider the matter afresh – as though the Award had never been made…
>
> 31. After all it is inconceivable that article 4, in requiring an appeal which can duly take into account the merits, requires Member States to have in effect a fully equipped duplicate regulatory body waiting in the wings just for appeals. What is called for is an appeal body and no more, a body which can look into whether the regulator had got something material wrong. That may be very difficult if all that is impugned is an overall value judgment based upon competing commercial considerations in the context of a public policy decision".
>
> 65. In the course of his judgment on the appeal concerning the evidence admissible on the appeal to the Tribunal…Toulson LJ had occasion to comment on the nature of the task facing the Tribunal, which was relevant to the question whether it could look at evidence which Ofcom had not seen. At paragraph 60 he referred to the Framework Directive's requirement that the merits of the case are fully taken into account, and said this:
>
> > 'There is nothing in Article 4 which confines the function of the appeal body to judgment of the merits as they appeared at the time of the decision under appeal. The expression 'merits of the case' is not synonymous with the merits of the decision of the national regulatory authority.'
>
> 66. Later, at paragraph 65, he commented that a scheme which permits an appeal body to receive fresh evidence 'is not necessarily inconsistent with the appeal body being obliged to have proper regard for the role of the primary decision-maker', as an example of which he cited appeals from licensing authorities to magistrates' courts.
>
> 67. Thus, the question is whether the regulator was right in its decision on the merits, but the appeal body's consideration of that is not necessarily confined to material that was before the regulator. The question on the merits, however, is the same as was (or should have been) addressed by the regulator, and if the regulator has addressed the right question by reference to relevant material, any value judgment on its part, as between different relevant considerations, must carry great weight."

45. We draw attention to two points in particular which emerge from this passage in the judgment of Lloyd LJ. First, the function of the Tribunal is not to act as 'a fully equipped duplicate regulatory body waiting in the wings just for appeals', to quote the graphic phrase used by Jacob LJ in the *T-Mobile* case, and it may be very difficult for the Tribunal to interfere "if all that is impugned is an overall value judgment based upon competing commercial considerations in the context of a public policy decision" (ibid.). Secondly, and to similar effect, if Ofcom 'has addressed the right question by reference to relevant material, any value judgment

on its part, as between different relevant considerations, must carry great weight': see the concluding words of paragraph [67]. Another way of making the same point is to say that the weight to be attached to different considerations in forming a value judgment is a matter for Ofcom, as the NRA charged with the duty of resolving disputes, and in the absence of any misdirection by Ofcom the court will normally respect its determination, whether or not the court would itself have balanced the considerations in the same way and reached the same conclusion.

46. In the next section of his judgment Lloyd LJ discussed the relevance of BT's contractual rights. In paragraph [73] he criticized the view of the Tribunal that there was no onus on BT to justify the proposed price changes, and the Tribunal's reliance on the contractual position under paragraph 12 of the SIA. Lloyd LJ continued:

> "To take that position would, as it seems to me, involve a somewhat similar abdication of a regulatory role to that of which Ofcom was guilty in the *TRD case*.
>
> 74. It seems to me that the Tribunal in the present case, although having set out material passages from the *TRD case* decision, failed to give effect to them, or to do so properly, in paragraph 444. The whole point of this aspect of the CRF is that the NRA must be able to sort out a dispute between the parties in the relevant market, who may or may not already be in contractual relations with each other. If there is already a contract, the NRA's powers must enable it to override the contractual rights of one party (or even those of both parties). There is no place for any kind of presumption either way as to the position of one party or the other. If there is not a contract already, the regulator's powers must enable it to prescribe what the terms are to be. So, while the previous position under the contract (if there is one) is no doubt relevant (as the Tribunal said in the *TRD case*), and while upholding contractual rights, thereby favouring commercial certainty, can be a relevant consideration for the regulator to bear in mind, neither the actual or previous contractual position, nor any right of BT to impose a change, can be of any overriding significance…
>
> 75. …The regulator must be able to apply its regulatory powers in the same way regardless of how the issue at the heart of the dispute may have arisen. "

47. Lloyd LJ then discussed the concept of 'regulatory absence', and criticised the Tribunal for attaching significance to it. His observations in paragraph [79] are pertinent:

> "79. Of course *ex ante* regulation, such as by way of SMP conditions, is limited in its scope. That is manifest, for example, from recital (27) to the Framework Directive, and from its contrast with recital (25). Such forms of regulation are the most intrusive and extreme and can only be justified by strong considerations. *Ex*

> *post* regulation by way of the application of European or domestic legislation, as in instances of cartels or of abuse of a dominant position, is in some respects a powerful constraint on the activities of undertakings, in whatever area of economic activity, but that is not of any particular use in regulating a market such as that of electronic communications, especially one which is so active and fast-developing as that involving mobile telephones. Hence the need for the NRA to have power to resolve disputes between relevant undertakings, whether or not already in contract with each other, and to do so with its regulatory objectives in mind rather than merely as a sort of commercial arbitrator, as reflected in recital (32) to the Framework Directive. The Tribunal did refer to dispute resolution as being a regulatory function in itself, but it seems to me that, by virtue of what they went on to say, they did little more than pay lip-service to that aspect of Ofcom's regulatory functions. The dispute resolution function is, in itself, part of the regulatory responsibility for ensuring interconnectivity."

48. Lloyd LJ then discussed Ofcom's assessment of the competition aspects of the case, and in paragraphs [89] and [90] reiterated that the balancing of relevant considerations was a matter for Ofcom alone:

> "89. Ofcom came to their conclusion in the second determination by way of a balancing exercise… The balancing of the various regulatory objectives, insofar as they pointed in different directions, was a matter for Ofcom by virtue of the terms of the legislation. The Tribunal and Ofcom were proceeding on essentially the same basis as regards the welfare assessment, so that, despite the additional evidence called before the Tribunal, the appeal on the merits had not undermined Ofcom's view that benefit to consumers had not been demonstrated as a probable result of the changes. That being so, it seems to me that it was not open to the Tribunal to reach their own different conclusions as to how the relevant considerations should be weighed in the balance against each other, unless Ofcom's conclusion could be shown to have been wrong in law.
>
> 90. This is not the occasion on which to review the true nature of the relationship between Ofcom and the Tribunal on an appeal of this kind. Nothing turns on it, and we did not hear argument on this, other than points made in passing… Although the Tribunal is an expert and specialised body, it is not set up as a second tier regulator of the sector, and it seems to me that, absent new evidence which shows that the actual basis on which Ofcom proceeded was wrong, or an error of law, the Tribunal ought to respect the policy decisions and matters of judgment involved in Ofcom's decisions."

49. Lloyd LJ returned to the theme of value judgments in paragraph [94], where he referred to the "function and duty of the regulator" as being:

> "to consider all the various factors and to assess the balance of advantages and disadvantages, whether proved, probable, likely or merely possible, to take into account the degrees of probability in each case and the respective seriousness of each, and to come to a balanced assessment overall as to what outcome would most appropriately meet the relevant regulatory objectives… that is what Ofcom said that they had done in the present case, placing greater weight, for what seem to me to be entirely legitimate reasons, on the risk of disbenefit to consumers. That involves a value judgment on the part of Ofcom, on which they could perhaps

> have come to a different conclusion on the same facts, and on which they might well have come to a different conclusion on different facts and evidence. But that is a matter for the regulator to decide. I can find no error in that approach."

50. In his concurring judgment, Etherton LJ agreed with the approach and reasoning of Lloyd LJ. Elias LJ agreed with both judgments.

(2) The relevance of the existing charge control

51. The facts of the present case differ in one important respect from those in *TRD* and *08-numbers*, namely the presence of an existing regime of *ex ante* charge control which applied to the disputed charges. In both *TRD* and *08-numbers* there was no *ex ante* regulation of the charges in issue, and Ofcom therefore had to approach the dispute with a regulatory "clean sheet", as it was termed in argument before us. We have already explained how the dispute in *08-numbers* arose. The background to *TRD* was briefly as follows. By its 2004 mobile call termination statement, Ofcom had imposed a charge control on the mobile call termination charges of operators in respect of second generation ("2G") networks, but not third generation ("3G") networks, because 3G was at that time still a new technology and occupied a much less significant part of the market. This charge control initially applied until 31 March 2006, but was then extended by Ofcom until 31 March 2007. In its 2007 Statement, Ofcom then imposed a new charge control in respect of both 2G and 3G networks. From 2004 onwards, the 2G and 3G operators began to charge blended rates, i.e. rates for which the regulated 2G charges were blended with unregulated 3G charges, and a number of disputes were referred to Ofcom concerning the 3G element of the blended rates which resulted in determinations by Ofcom and appeals to the Tribunal. Central to Ofcom's approach, which was successfully challenged on appeal, was the fact that in its 2004 statement it had decided not to impose a charge control or any other form of *ex ante* regulation in respect of 3G termination charges, from which Ofcom concluded that the operators were at liberty to set the level of blended charges for call termination on their respective networks as they thought fit, provided only that the 2G element of the charges complied with the existing charge control. This approach was held by the Tribunal to involve an abdication of regulatory responsibility, and a failure to recognise the significance of dispute resolution as a third and separate form of regulation.

52. In the present case, by contrast, there is no such regulatory absence, and it is therefore important to know what part the existing charge control regime should have played in Ofcom's determination of the dispute relating to the October 2010 charges. It is common ground that this is a question which has not been directly addressed in any of the existing authorities. Perhaps for that reason, the position adopted by the protagonists evolved considerably after the initial reference of the dispute to Ofcom, and having started apparently far apart they ended up at the hearing with little, if any, clear ground to separate them. Thus, Telefónica appeared to start from the position that, given the existence of dispute resolution as a distinct and complementary form of regulation, the existing charge control was no more than one factor among many which Ofcom had to take into account, and that no special weight should be accorded to the fact that the charge control had been the product of a lengthy and detailed investigation by Ofcom. In his skeleton argument for the hearing, however, Mr. Richards acknowledged that the existing charge control was "a significant feature of the present dispute", and expressly disclaimed any suggestion that Ofcom was obliged to carry out a "*de novo*" or generalised assessment of fairness and reasonableness. He accepted that it was "obviously appropriate for Ofcom to take into account the pre-existing regulatory regime, but not as the sole criterion for its Determination." For its part, Ofcom appeared to start from the position that compliance with the letter of the existing charge control was all but conclusive in favour of Vodafone and H3G, even though flip-flopping had admittedly been neither foreseen nor intended by Ofcom. By the date of the hearing, however, Ofcom expressly accepted that a party's compliance with *ex ante* regulation does not necessarily prevent Ofcom from imposing additional regulation on that party's pricing behaviour through the dispute resolution process (paragraph 72 of Ofcom's skeleton), and that in resolving a dispute it is necessary for Ofcom to have due regard to the full range of its regulatory duties and responsibilities.

53. As a result of this convergence, we agree with the observation of Mr. Ward QC (in paragraph 33 of his skeleton argument for Vodafone) that the issue between Telefónica and Ofcom concerning the correct approach to dispute resolution is "a narrow one, and difficult to define". As it seems to us, the difference is in the end not one of substance, but rather one of the correct interpretation and evaluation of Ofcom's reasoning in the Determination. For our part, we have no difficulty in

accepting that the existence of the charge control regime, with its inbuilt flexibility, was a highly material factor for Ofcom to take into account, as was Ofcom's policy decision to counter the abuse of flip-flopping for the future by means of the 2011 Statement but not to amend the 2007 Statement in the meantime. On the other hand, we are equally satisfied that it would have been wrong for Ofcom to regard those considerations as being necessarily conclusive of the present dispute, although the weight to be attached to them was a matter for Ofcom's judgment. The dispute had to be resolved having regard to the full range of Ofcom's regulatory duties and responsibilities, and according full recognition to the fact that dispute resolution is a third form of regulation which operates in parallel with, and complementary to, *ex ante* and *ex post* regulation.

V. The Determination by Ofcom

54. The Determination consists of four sections and two annexes. The sections are headed, respectively, **(1) Summary, (2) Introduction and background to the Dispute, (3) Analysis of the Dispute,** and **(4) Submissions on the Draft Determination and Ofcom's response and conclusion**. The first annex is the formal Determination, and the second annex sets out the relevant SMP conditions.

55. The summary in section 1 sets out Ofcom's formulation of the scope of the dispute in the terms which we have already quoted (see paragraph 11 above), and continues as follows:

> "**Summary of analysis**
>
> 1.5 The following paragraphs summarise the analytical framework that we have used for reaching our Determination and the conclusions we have reached:
>
> 1.5.1 The regulatory framework which applied at the time of the October 2010 charges was contained in significant market power ("SMP") conditions in 2007. It was not suggested that the October 2010 charges failed to comply with those conditions.
>
> 1.5.2 We have assessed whether there was a separate, general requirement for the October 2010 charges to be fair and reasonable, as contended by [Telefónica]. We disagree with [Telefónica's] view that case law requires us to carry out a separate assessment of whether the charges are fair and reasonable. The case law cited is distinguishable on the basis that it related to circumstances in which no regulatory requirement was in place in respect of the disputed charges (see paragraph 4.18).

1.5.3 We have also considered whether the determination sought by [Telefónica] would be consistent with the principle of legal and regulatory certainty. We consider that making such a determination would be contrary to the principle of legal and regulatory certainty, in light of the SMP conditions and our position set out in subsequent consultations.

1.5.4 We have further considered whether the Determination is consistent with our statutory duties. In doing this, we have assessed, in particular, the balance we must strike between the effects on consumers and competition of H3G and Vodafone levying the October 2010 charges.

Draft Determination

1.6 On 4 August 2011, we issued our draft determination (the "Draft Determination") setting out our provisional conclusions in respect of the Dispute and the reasoning supporting those conclusions.

1.7 The Parties and interested parties were given until 19 August 2011 to provide comments on the Draft Determination. We received comments from [Telefónica], H3G, Vodafone, Cable & Wireless Worldwide ("C&W") and Everything Everywhere ("EE").

Final Conclusions

1.8 Having carefully considered and taken into account the responses received, we have concluded that it was fair and reasonable in light of the prevailing regulatory regime for Vodafone and H3G to levy the October 2010 charges…

Structure of the remainder of this document

1.9 [*reference is made to the headings of sections 2, 3 and 4*]. Given the nature of our final conclusions, Sections 2 and 3 of this document are both identical to those sections of the Draft Determination, save for minor corrections."

56. Section 2 begins by setting out Ofcom's duty to handle disputes under sections 185 and 186 of CA 2003, and its powers when determining a dispute as set out in section 190. Paragraph 2.6, under the sub-heading "**Ofcom's duties when determining a dispute**", reads as follows:

> "The dispute resolution provisions set out in sections 185 to 191 of the Act are functions of Ofcom. As a result, when Ofcom resolves disputes it must do so in a manner which is consistent with both Ofcom's general duties in section 3 of the Act, and (pursuant to section 4(1)(c) of the Act) the six Community requirements set out in section 4 of the Act, which give effect, amongst other things, to the requirements of Article 8 of the Framework Directive."

57. Reference was then made to Ofcom's process for determining disputes within the stipulated four month period, concluding with the statement that "We determine disputes on the evidence available to us in the time available" (paragraph 2.9).

58. The next part of section 2 described flip-flopping by reference to paragraphs 9.117 and 9.118 of the April 2010 Consultation, and reproduced the disputed charges in tabular form (see paragraph 9 above).

59. Paragraph 2.13 recorded Telefónica's arguments that the October 2010 charges had the effect of increasing Telefónica's outpayments by confidential amounts which were then specified, that they carried a risk of arbitrage, and that they did not provide Telefónica with any countervailing benefit. Paragraph 2.14 then said:

> "This Dispute must be considered in the context of the prevailing regulatory regime as set out below and imposed in the context of SMP regulation."

60. In the next part of section 2, headed "**Prevailing regulatory regime**", Ofcom set out the relevant provisions of the existing charge control regime, and referred to the consultation process which had led to the 2011 Statement. Under the further sub-heading "**Preliminary arguments of the Parties**", Ofcom recorded in paragraph 2.26 that:

> "[Telefónica] notes that its objections to the October 2010 charges are not based on any allegations of breach of the charge controls in place at that time".

61. Ofcom then said it was satisfied that the dispute fell within section 185 (1)(a) of the CA 2003 as a dispute between communications providers relating to network access in respect of the terms on which each of Vodafone and H3G were prepared to interconnect with originating communications providers or the termination of voice calls posted on their networks. We comment that this characterisation of the dispute appears to us to be clearly correct, and that the dispute plainly fell within section 185(1)(a) at the date when it was referred to Ofcom.

62. We now turn to section 3, which it is important to remember contains the analysis and reasoning which underpinned the draft determination issued on 4 August 2011. Ofcom began by directing itself that its task was to "make an assessment of what is fair and reasonable in light of the prevailing regulatory regime", and referred to SMP conditions MA1 and MA4. Brief reference was made to certain arguments of the parties, including arguments by Telefónica that it had never been Ofcom's intention to permit flip-flopping, and that flip-flopping was "*per se* not fair and

reasonable and in every case therefore breaches SMP Condition MA1". Paragraphs 3.13 to 3.17 then set out Ofcom's preliminary view to the effect that the October 2010 charges were subject to condition MA4, which was expressly excluded from the general "fair and reasonable" requirement in condition MA1.2, for the reasons given in paragraph 10.27 of the 2007 Statement with its emphasis on certainty. The conclusion, stated in paragraph 3.17, was that:

> "the October 2010 charges are subject to Condition MA1.3 and Condition MA4 but are not subject to Condition MA1.2 relating to fairness and reasonableness."

63. Ofcom then addressed Telefónica's argument, based on the judgment of the Tribunal in *TRD*, that there was an *additional* general obligation on Ofcom to ensure that the rates set were fair and reasonable. Telefónica's arguments were recorded as being:

> "3.18.1 in the context of a dispute that arises where one of the parties is trying to vary the terms of an existing commercial agreement, the onus lies on the party proposing the variation to provide to the other party and to Ofcom the justification for the change in the existing terms – in this case, [Telefónica] contends that there has been no such justification;
>
> 3.18.2 there is no suggestion that the cost incurred by H3G and Vodafone in providing MCT services had changed in such a way as to justify the new charges for October 2010;
>
> 3.18.3 Ofcom should benchmark the charges for the MCT services – [Telefónica] suggests that a suitable benchmark would be either the charges levied in September or the TAC; and
>
> 3.18.4 Ofcom's other regulatory objectives would be met by upholding [Telefónica's] rejection of the October 2010 charges, given Ofcom's previous statements that flip-flopping is undesirable from the perspective of its general duties."

64. Counter-arguments by H3G and Vodafone were then noted, leading to a statement of Ofcom's preliminary view as follows:

> "3.22 The *TRD* case involved a dispute in which no charge control applied to the charges in question.
>
> 3.23 However, as set out in paragraph 3.13 above, the October 2010 charges were specifically subject to a charge control. In light of the charge control, the SMP conditions further specifically excluded an additional assessment of "fair and reasonable".
>
> 3.24 Ofcom had explicitly decided that a "fair and reasonable" condition should not apply to charges which were the subject of the charge control. If a general

> "fair and reasonable" requirement were to apply in this case, this would fundamentally alter the explicit position taken in the 2007 MCT Statement, which was not overturned in the subsequent appeals.
>
> 3.25 We therefore consider that the guidance provided by the *TRD* case is not relevant for the purpose of this Draft Determination insofar as it is claimed that it has the effect of imposing an additional requirement that charges are fair and reasonable."

65. In the next part of section 3, under the heading "**Legal and regulatory certainty**", Ofcom again summarised the parties' arguments and then set out its preliminary view in the following terms:

> "3.30 As set out in paragraphs 2.18 to 2.25 above, the prevailing regulatory regime for mobile-to-mobile calls during the relevant period comprised the charge control set out in SMP Condition MA4 in accordance with the requirement in SMP Condition MA1.3 of the 2007 MCT Statement. To now apply any other regulatory regime with retroactive effect would be contrary to the principle of legal and regulatory certainty.
>
> 3.31 This is further supported by our position taken in our consultations in 2009 and 2010 leading up to the 2011 Statement whereby Ofcom identified concerns with flip-flopping, but decided not to modify the charge control going forward during the time the charge control was still in place.
>
> [*There is then a quotation from the April 2010 Consultation, paragraph 9.111 and 9.126*]
>
> 3.32 This was followed by a further consultation on the design of a proposed charge control in November 2010 (the "November 2010 Consultation") in which we noted that there was general (though not universal) support for our assessment that flip-flopping harmed the interests of other providers and, indirectly, consumers. We then set out further possible options for setting new SMP conditions, with a view to eradicating flip-flopping in the next charge control period.
>
> 3.33 In the 2011 MCT Statement, we set regulation that removed the scope for flip-flopping by setting a ceiling on MTRs during each year of the charge control, regardless of time of day or from month to month.
>
> 3.34 In light of the conclusion set out above that the prevailing regulatory regime at the time of the October 2010 price charges comprised Condition MA1.3 in conjunction with Condition MA4, Ofcom does not consider that it would be consistent with the principles of legal and regulatory certainty to seek to apply any additional obligations to this period. Whilst Ofcom raised concerns over flip-flopping prior to the imposition of the October 2010 charges, we did not amend the charge control or impose any additional regulations. On that basis, the only regulation applicable at the time of the October 2010 charges was the charge control alone.
>
> 3.35 Accordingly, and on the basis that Vodafone and H3G complied with SMP Conditions MA1 and MA4… it was fair and reasonable in light of the prevailing regulatory regime for Vodafone and H3G to levy [*the disputed charges*]"

66. There then followed what Ofcom termed an "**Additional point of analysis**" in relation to Telefónica's concerns about arbitrage:

> "3.36 In relation to [Telefónica's] concerns over arbitrage, Ofcom notes that it is plausible that MTRs for weekend calls of 19.75ppm to Vodafone numbers and 19ppm to H3G numbers were higher than some of [Telefónica's] retail charges for the relevant calls. However, [Telefónica] has not provided any evidence comparing these MTRs to its retail tariffs, nor provided any evidence of how arbitrage arose (or could have arisen) and how this harmed (or would cause harm to) competition (and ultimately consumers)."

67. Section 3 concluded as follows:

> "Assessment of our Draft Determination against Ofcom's statutory duties and Community requirements
>
> 3.37 As part of our analysis, we have considered our general duties in section 3 of the Act and the six "Community requirements" set out in section 4 of the Act, which give effect, among other things, to the requirements of Article 8 of the Framework Directive.
>
> 3.38 We consider that our Draft Determination is consistent with these duties and we would highlight in particular:
>
> > 3.38.1 the duties to further the interests of consumers and promote competition. We noted in the April 2010 Consultation that continued application of flip-flopping in the long term would likely result in higher prices for consumers and impact on competition. The present Dispute, however, relates to a much shorter period where the associated impacts on consumers and competition cannot be any more material and are likely to be much smaller. Moreover, the 2011 MCT Statement has modified the charge control so as to effectively bring flip-flopping to an end. The ongoing effects of any proposed determination on the October 2010 charges on consumers and competition on a prospective basis are therefore negligible. In those circumstances where our determination can have little prospective effect, we consider that this is consistent with the primary duty, the interests of consumers and the promotion of competition being secured by the 2011 MCT Statement; and
> >
> > 3.38.2 our duty to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted. This includes consideration of the extent to which our proposed action provides legal and regulatory certainty and takes proper account of the basis upon which parties have entered agreements or adopted particular courses of conduct and is discussed in paragraphs 3.30 to 3.35.
>
> **Provisional conclusion**
>
> 3.39 Our provisional conclusion therefore is that, on the basis that Vodafone and H3G complied with the prevailing SMP Conditions MA1 and MA4, it was fair and reasonable in light of the prevailing regulatory regime for Vodafone and H3G to levy the October 2010 charges.

> 3.40 In light of our provisional conclusion, we do not need to consider whether it would be appropriate to order repayments and have not sought to address comments from Vodafone and H3G regarding the consequences of repayments or the amounts claimed by [Telefónica]."

68. Section 4 of the Determination began by grouping the responses to the Draft Determination under three thematic headings: (a) analytical framework; (b) Ofcom's statutory duties and Community requirements; and (c) additional arguments.

69. The first heading, "**Analytical framework**", was in turn broken down into three sub-divisions: (1) the 2007 Statement; (2) an additional "fair and reasonable" test: guidance from the *TRD* case; and (3) legal and regulatory certainty. Under each sub-division, Ofcom recorded the arguments which had been advanced in the responses to the consultation, and then set out its response.

(1) The 2007 Statement

70. The arguments here included a complaint by Telefónica that Ofcom had presented no evidence to support its assertion that Vodafone and H3G had complied with the relevant charge control in the 2010/11 period, and an argument by Cable & Wireless on the interpretation of the SMP conditions to the effect that the "fair and reasonable" requirement also applied to condition MA4. Ofcom's response was as follows:

> "4.6 Ofcom has not determined that Vodafone and H3G have complied with the charge controls. Rather, our conclusions in this dispute are based on the fact that [Telefónica] did not allege that there had been a breach of the charge controls and we have seen no evidence that Vodafone or H3G did not in fact comply with them. Ofcom is monitoring compliance with the charge controls as part of a separate project which will be concluded after the time permitted by the Act for resolution of this Dispute has expired.
>
> 4.7 We do not agree with C&W's interpretation of the SMP conditions…
>
> 4.8 Our interpretation of the SMP conditions is based on what we consider to be a strict reading of the text, and does not rely on the explanation at paragraph 10.27 of the 2007 MCT Statement. We nevertheless consider that this explanation provides useful contemporaneous evidence as to why the SMP conditions are expressed as they are."

(2) An additional "fair and reasonable" test

71. The arguments here focussed on the correct interpretation of *TRD*, and the question whether compliance with a charge control excluded consideration by Ofcom of what was fair and reasonable as between the parties. In its response, Ofcom continued to adhere to its provisional view that the guidance provided by *TRD* was "not relevant for the purpose of this Determination insofar as it is claimed that it has the effect of imposing an additional requirement that charges are fair and reasonable" (paragraph 4.14). In Ofcom's view, the guidance in *TRD* had to be considered in light of the fact that no prior charge control applied to the disputed charges, and in paragraph 4.18 it added this comment:

> "Moreover, if [Telefónica's] position were correct, Ofcom would not have been able to adopt the position set out at paragraph 3.23 above whereby, in light of the imposition of a charge control, Ofcom explicitly excluded the application of an additional "fair and reasonable" obligation. Ofcom does not consider that the effect of the *TRD* judgment is to constrain Ofcom's discretion in setting SMP conditions in such a manner."

(3) Legal and regulatory certainty

72. Telefónica's arguments under this sub-heading included a submission that, although the imposition of SMP conditions was a material factor in the dispute, it was not determinative, and it remained necessary for Ofcom to weigh up all relevant factors, including its declared policy opposition to flip-flopping. Counter-arguments advanced by Cable & Wireless included the point that there had been ongoing industry disquiet about the issue of flip-flopping well before October 2010, and it had been discussed in the April 2010 Consultation as well as in workshops on the subject. Ofcom's response was as follows:

> "4.27 Ofcom notes that the principal *ex ante* regulation in place at the time of the imposition of the October 2010 charges was the charge control. Whilst Ofcom raised concerns over flip-flopping prior to the imposition of the October charges, the charge control was not amended and neither was any additional regulation imposed at the time. On that basis, the charge control was the only relevant regulation applicable at the time of the October 2010 charges. We continue to consider that it would be inconsistent with the principles of legal and regulatory certainty, in light of the prevailing regulatory regime at the time, to seek to apply any additional obligations in the absence of any compelling reasons requiring us to exercise our dispute resolution powers in a conflicting manner.

> 4.28 Our policy preference in relation to flip-flopping as a whole was developed in the context of setting the new charge controls set out in the 2011 MCT Statement, which removed the possibility of flip-flopping. Whilst this policy preference was flagged in the April 2010 Consultation and subsequently, our views in relation to flip-flopping were not finalised until publication of the 2011 MCT Statement at which point the relevant *ex ante* regulation was amended.
>
> 4.29 We do not, however, accept Vodafone's position that we created a legitimate expectation regarding the exercise of our dispute resolution function in relation to its prices, either generally or specifically in relation to the October 2010 charges. As Vodafone notes, it discussed the issue of flip-flopping with Ofcom, but Ofcom did not undertake that it would not consider flip-flopping conduct if a dispute on that subject were brought to it.
>
> 4.30 Finally, we accept that market reviews may not anticipate every issue that may subsequently arise and that it may be appropriate, where there are compelling reasons to do so, to exercise dispute resolution powers in a manner which may conflict with the principle of legal certainty. However, any such assessment must take into account all relevant factors in accordance with Ofcom's statutory duties and will depend upon the precise facts before Ofcom."

73. Under the next main heading, "**Ofcom's statutory duties and Community requirements**", the same pattern was followed of providing a summary of the arguments before a statement of Ofcom's response. Telefónica's arguments included the submission that Ofcom had elevated one relevant factor, namely compliance with SMP conditions, to determinative status, and that instead of incorporating its statutory duties and Community requirements as part of its reasoning, it had merely used them as a benchmark by which to check its conclusion. Telefónica also referred, among other matters, to Ofcom's finding in the April 2010 Consultation that flip-flopping "ran counter to the efficiency objectives served by allowing price signals to indicate the relative costs of meeting peak demands". Cable & Wireless, for its part, referred to certain specific objectives which it considered Ofcom was obliged to achieve, including promotion of the provision of clear information and ensuring that there was no distortion or restriction of competition in the electronic communications sector.

74. Ofcom's response was in these terms:

> "4.41 We agree that Ofcom must have regard to the objectives identified by [Telefónica] and C&W in resolving disputes. For the reasons set out at paragraph 3.38 above, we considered that in the context of the particular conduct that is in Dispute (i.e. flip-flopping in October 2010), our Draft Determination was consistent with these duties.

> 4.42 We do not consider the comments received alter our assessment of the Dispute. We maintain that our Determination is consistent with the general duties in section 3 of the Act and the six "Community requirements" set out in section 4 of the Act, which give effect, among other things, to the requirements of Article 8 of the Framework Directive.
>
> 4.43 In relation to the specific objectives identified by C&W:
>
> > 2(b) we considered whether our Draft Determination was consistent with the objective of ensuring that there is no distortion or restriction of competition in the electronic communication sector and concluded that it was consistent with this objective [*a footnote referred to paragraph 3.38 of the draft Determination*];
> >
> > 4(d) we understand that the October 2010 charges were notified to [Telefónica] in accordance with the provisions of the interconnect agreements between [Telefónica] and, respectively, H3G and Vodafone. We have not seen any evidence that this resulted in the provision of unclear information either to [Telefónica] or to any retail customer."

75. Finally, under the heading "**Additional arguments**", Ofcom responded to a point made by Cable & Wireless which is not material for present purposes. In paragraph 4.46, Ofcom then set out its conclusion:

> "We have considered the representations we received on the Draft Determination and have addressed above the points raised. For the reasons set out above, we do not consider that those representations mean that we should alter the draft conclusions that we set out at paragraphs 3.39 to 3.40 above, and we therefore adopt those as our final conclusions. Our determination giving effect to our final conclusions is set out at Annex 1."

76. Before moving on, we would draw attention to certain specific features of the Determination.

77. First, Ofcom deliberately proceeded on the footing that the October 2010 charges complied with the relevant SMP conditions: see paragraphs 1.5.1 and 3.13. Ofcom did not independently verify this in the context of the dispute, partly because no allegation of breach had been made by Telefónica or anybody else, and partly because Ofcom had seen no evidence that Vodafone or H3G did not in fact comply with the conditions: see paragraph 4.6. There was also the further point that compliance could not easily be assessed over a single month, when what had to be established was compliance with a weighted *yearly* average TAC. Nevertheless, Ofcom clearly had questions of compliance in mind, because it expressly said in paragraph 4.6 that it was monitoring compliance with the charge controls as part of

a separate project which would be concluded after the short period permitted for resolution of the dispute had expired.

78. Secondly, Ofcom expressly reminded itself at an early stage, in paragraph 2.6 of the introductory section 2, of its duty to resolve disputes in conformity with the requirements of sections 3 and 4 of CA 2003, including the six Community requirements set out in section 4 which implement Article 8 of the Framework Directive. Nor could it plausibly be said that Ofcom then ignored or forgot about this duty, because paragraphs 3.37 and 3.38 were in our view clearly intended to demonstrate that Ofcom had complied with it. Paragraph 3.37 contains the clear and unqualified statement that "we have considered our general duties in section 3 of the Act and the six "Community requirements" set out in section 4…". Paragraph 3.38 then states that Ofcom considered the draft Determination to be consistent with those duties, and highlights (without purporting to be exhaustive) Ofcom's assessment of the weight to be attached to the interests of consumers, the promotion of competition and regulatory certainty, in the context of a proposed determination relating to a single month not long before the practice of flip-flopping was due to be eradicated by the 2011 Statement. In those circumstances, the view formed by Ofcom was that the ongoing effects on consumers and competition of a determination of the dispute in Telefónica's favour would be "negligible". Ofcom then returned to this theme in the sub-division of section 4 headed "**Ofcom's statutory duties and Community requirements**" (paragraphs 4.31 to 4.43), but saw no reason to alter its preliminary assessment.

79. Thirdly, although Ofcom clearly rejected the submission that the *TRD* case imposed a further test of reasonableness and fairness, in circumstances where such a criterion had deliberately been excluded by the relevant SMP conditions, Ofcom nevertheless determined the scope of the dispute as being "whether it was fair and reasonable in light of the prevailing regulatory regime" for Vodafone and H3G to levy the disputed charges, and this was the question to which Ofcom eventually returned an affirmative answer. It is therefore important, in our view, not to read too much into those passages in the Determination where Ofcom dismissed *TRD* as irrelevant "insofar as it is claimed that it has the effect of imposing an additional requirement that charges are fair and reasonable" (paragraphs 3.25 and 4.14). What

was being rejected by Ofcom was a separate and freestanding test of what is fair and reasonable, divorced from the existing charge control which regulated the charges. It was clearly not Ofcom's intention to say that considerations of fairness and reasonableness had no part to play in the determination, or that compliance with the charge control would of itself necessarily be fair and reasonable. The formulation of the scope of the dispute was in our view clearly intended to reflect a more nuanced approach, whereby the question of what was fair and reasonable had to be considered, not in the abstract, but rather "in light of the prevailing regulatory regime". It is significant to note in this context that the words which we have just quoted were inserted by Ofcom into the formulation of the dispute, following correspondence with the parties, and against the wishes of Telefónica which had argued for an unqualified test of "whether it was fair and reasonable".

VI The grounds of appeal

80. Telefónica advances five grounds of appeal, which are summarised as follows in paragraph 31 of its notice of appeal:

> "Telefónica contends that the Determination is vitiated by five errors of law:
>
> (1) Ofcom proceeded upon the false premise that the SMP regime was the *only* applicable regulatory regime at the time the October 2010 charges were imposed: Ofcom's dispute resolution jurisdiction is one of three regulatory regimes, applicable in addition to *ex ante* regulation by SMP conditions and *ex post* enforcement of competition law.
>
> (2) Ofcom failed to consider whether the October 2010 charges were "fair and reasonable" in the sense explained in ***TRD*** and ***08-numbers***: i.e. it failed to consider the appropriateness of those charges by reference to all relevant considerations including Ofcom's own regulatory duties and policy preferences.
>
> (3) Ofcom failed to have regard to the matters required by section 190(2A) of CA 2003, and misdirected itself in law that section 190(2A) was inapplicable to its determination.
>
> (4) Ofcom unlawfully attached determinative, alternatively excessive, weight to Vodafone's and H3G's putative compliance with the SMP regime.
>
> (5) Ofcom had no adequate evidential basis to conclude that Vodafone and H3G had complied with the SMP regime."

81. The limited scope of the appeal is made clear by paragraph 32 of the notice of appeal:

> "Telefónica does not accept the factual findings and discretionary assessments contained in the Determination, but it does not in this Appeal rely upon any error of fact by Ofcom or seek to impugn any exercise by Ofcom of a discretion. Rather, Telefónica submits that this Appeal should be allowed, and the Determination should be remitted to Ofcom, on the grounds of all or any of the above errors of law…"

82. We will now consider the grounds of appeal in turn.

(1) Ground 1: The SMP regime was not the only applicable regulatory regime at the relevant time

83. Telefónica argues that the Determination is founded on the false premise that "the only regulation applicable at the time of the October 2010 charges was the charge control alone": see paragraph 3.34, and the almost identical wording in paragraph 4.27. Telefónica complains that, on Ofcom's approach, there was a single "prevailing regulatory regime" (paragraph 3.30), namely that imposed under the 2007 Statement, and that to strike down the October 2010 charges on grounds other than non-compliance with that regime would amount to "retroactive" regulation and would be inconsistent with principles of legal and regulatory certainty (paragraphs 3.30, 3.34 and 4.27). Telefónica submits that this approach fails to recognise the existence of dispute resolution as a different and complementary regulatory regime in its own right, and that the purpose of Ofcom's dispute resolution function is not merely to bolster pre-existing regulatory constraints (compare *TRD* at paragraph 93).

84. The argument is summed up in paragraph 36 of the notice of appeal as follows:

> "Termination charges, as MCPs should be aware, are at all times susceptible to scrutiny by Ofcom under its disputes jurisdiction, irrespective of the existence of any SMP regime and irrespective of whether that regime has been complied with. For Ofcom to conclude that the October 2010 charges were not fair and reasonable would not be to impose a retroactive "fair and reasonable" SMP condition: it would be a conclusion that notwithstanding the limitations of the current SMP regime, the charging practices adopted by Vodafone and H3G are, in the particular circumstances of the dispute and in light of *inter alia* Ofcom's regulatory duties, inappropriate. Accordingly, it would not interfere with legal or regulatory certainty

> for Ofcom, in its disputes jurisdiction, to strike down termination charges otherwise than on grounds on non-compliance with SMP conditions."

85. Ofcom's pleaded response to these submissions is that they involve an "improper extension" of the principles laid down by the Tribunal in *TRD* and *08-numbers* to the materially different circumstances of the present case. Ofcom accepts that its dispute resolution powers include a power to impose obligations which go beyond existing *ex ante* regulation, and says (correctly) that the existence of such a power is recognised in the Determination: see in particular paragraphs 3.34 and 4.27. Ofcom then seeks to distinguish cases where it has not imposed any *ex ante* regulation in relation to the subject matter of the dispute, and accepts that when it exercises its dispute resolution powers in such a case it must consider whether it would be appropriate to create new obligations. In the present case, however, where there are existing SMP conditions which regulate the disputed charges, the critical question is how the three separate regulatory regimes should interrelate. The point is put as follows in paragraph 87(4) of Ofcom's defence:

> "The relevant question in the present case, as Ofcom understood when making the Determination, is whether it would be appropriate for Ofcom to exercise its power to impose obligations on the parties to the Dispute in circumstances where it has already imposed obligations applicable to its subject-matter. Ofcom rightly decided that it would be inappropriate to do so."

86. In our view this ground of appeal can be disposed of shortly. On a fair reading of the Determination as a whole, we simply do not accept that Ofcom proceeded on the false assumption that the existing SMP conditions were the only form of regulation applicable to the dispute. Ofcom was therefore not guilty of the alleged error of law. As we have already explained, Ofcom clearly understood that dispute resolution was a separate limb of regulation. This is made explicit in paragraph 4.27 of the Determination, where Ofcom said it adhered to the view that "it would be inconsistent with the principles of legal and regulatory certainty, in light of the prevailing regulatory regime at the time, to seek to apply any additional obligations in the absence of any compelling reasons *requiring us to exercise our dispute resolution powers in a conflicting manner*" (emphasis supplied). It may be arguable that Ofcom here adopted an unduly narrow view of the scope for operation of dispute resolution as a third form of regulation – a question to which we will have to return when considering the second ground of appeal – but as to Ofcom's

acceptance and recognition of dispute resolution as a third form of regulation which was potentially available, there can in our judgment be no reasonable doubt.

87. In a similar way, the express consideration by Ofcom of the question whether its preliminary conclusion was consistent with its statutory duties under sections 3 and 4 of CA 2003 (at paragraphs 3.37ff and 4.41ff of the Determination) again demonstrates, in our view, that Ofcom was well aware of the availability of dispute resolution as a separate form of regulation in its own right. Accordingly, when read in context, the references in paragraphs 3.34 and 4.27 of the Determination to the existing charge control as being "the only regulation applicable at the time of the October 2010 charges" must in our view be taken as references to *ex ante* regulation only, and not as a denial of the potential availability of the dispute resolution machinery itself as a third form of regulation. Any such denial would be impossible to reconcile with the last sentence of paragraph 4.27, quoted above, as well as being inconsistent with paragraphs 3.37ff and 4.41ff of the Determination.

88. For these short reasons, we would dismiss the first ground of appeal.

(2) Ground 2: Ofcom's alleged failure to consider whether the October 2010 charges were "fair and reasonable"

89. The fundamental criticism levelled against Ofcom in support of this ground of appeal is that Ofcom failed to conduct any, or any proper, examination of the question whether the October 2010 charges were fair and reasonable in the light of all its regulatory duties and objectives. Allied with this criticism is the contention that Ofcom wrongly distinguished, or failed to follow, the general guidance given by the Tribunal in *TRD* on the ground that the charges there in dispute were not the subject of any *ex ante* regulation. Telefónica argues that the "fair and reasonable" test articulated by the Tribunal in *TRD* was not dependent upon the particular facts of that case, but was "an expression of or a shorthand for the exercise upon which Ofcom must embark in <u>any</u> interconnection dispute: namely, an examination of the appropriateness of interconnection terms not only as an arbitrator between two parties but as a regulator, having regard to all relevant considerations in light of its regulatory duties and objectives" (paragraph 39 of the notice of appeal).

90. Telefónica goes on to submit that the consequence of Ofcom's error is that Ofcom failed to discuss its regulatory duties and objectives in the analytical framework in section 3 of the Determination before reaching the provisional conclusions stated in paragraph 3.35. Instead, it is said, Ofcom adopted a "linear process of reasoning" which wrongly bypassed such considerations. The stages in this linear process were: (a) the prevailing regulatory regime was the SMP regime imposed under the 2007 Statement; (b) there was no requirement under that regime for the October 2010 charges to be fair and reasonable; (c) to subject the charges now to such a requirement would infringe principles of legal and regulatory certainty; and (d) the October 2010 charges complied with the sole regulatory regime applicable at the time.

91. Telefónica accepts that Ofcom did use the language of "fairness and reasonableness" both in identifying the question it had to answer and it framing its conclusions. Telefónica submits, however, that it is plain from the substance of the Determination that Ofcom paid no more than lip service to such considerations, and afforded them no significance in its reasoning. Telefónica also submits that the brief assessment of the draft Determination against Ofcom's statutory duties and Community requirements, contained in paragraphs 3.37 and 3.38, and coming as it did *after* the provisional conclusion stated at paragraph 3.35, cannot save the day for Ofcom. As it is put in paragraph 42 of the notice of appeal:

> "This exercise is… cursory, ancillary to the main body of Ofcom's reasoning (which is contained in the section entitled '*Analytical framework*'), and represents a fundamental error of approach. Ofcom's regulatory duties are not simply a benchmark by which to stress-check its conclusions, but should form a '*central*' part of the reasoning by which those conclusions are reached (*TRD*, paragraphs 89, 99)."

92. Further and in any event, the only particular matters mentioned by Ofcom in relation to its regulatory duties in those paragraphs were (a) the facts that the underlying dispute related to a limited period and that flip-flopping had been addressed from April 2011 onwards by the 2011 Statement, and (b) the principle of legal and regulatory certainty. As to the first of those points, "the fact that *ex ante* regulatory action has been taken in relation to flip-flopping from April 2011 onwards cannot absolve Ofcom from considering, from a dispute resolution

perspective, the fairness and reasonableness of historic flip-flopping in October 2010" (paragraph 43 of the notice of appeal).

93. According to Telefónica, the proper approach to dispute resolution as explained in *TRD* and *08-numbers* required Ofcom, before reaching its conclusion at paragraph 3.35, and in order to form a proper view about the fairness of the disputed charges, to consider, among other matters:

(a) its general duties under sections 3 and 4 of CA 2003, its objectives under Article 8 of the Framework Directive and its specific duties under section 190(2A) of CA 2003;

(b) its own view as a matter of policy that flip-flopping was undesirable on the ground that it may lead to inefficiency and/or consumer detriment (a view which Ofcom had already firmly expressed in the April 2010 Consultation, before the imposition of the October 2010 charges);

(c) the fact that flip-flopping was recognised as an unintended loophole in the SMP regime, with the result that formal compliance with that regime should be accorded comparatively little weight;

(d) the need for the disputed charges to be justified by the parties proposing them, given their potential for anti-competitive effects and consumer harm; and

(e) the historic impact of flip-flopping (particularly from the perspective of efficiency, competitiveness and consumer harm) in the period before April 2011.

94. In his skeleton argument and oral submissions, Mr. Richards for Telefónica emphasised the difference in nature between regulation by the *ex ante* imposition of SMP conditions on the one hand, and regulation by dispute resolution on the other hand. The purpose of *ex ante* regulation, he submitted, is "not to make Ofcom's job easier by giving Ofcom a ready-made answer in the event of a dispute between

undertakings, but to seek in advance to avert the problems which a lack of effective competition may cause". By contrast, in determining the present dispute, Ofcom was, or should have been, engaged in *ex post* regulation of actual pricing behaviour in known circumstances, on an individual basis.

95. More generally, Mr. Richards submitted that the fair and reasonable test articulated in *TRD* had to inform Ofcom's whole consideration of the question from the outset. It was necessary for Ofcom to articulate the appropriate conceptual framework for its determination, and then to be able to demonstrate by reference to its written decision that it had followed the required process of thought. It was not good enough for Ofcom to postpone consideration of the wider issues until the end of the process, and to bring them in merely as a cross-check for a decision in principle which had already been reached.

96. In its defence, Ofcom contended that it was required to determine the dispute in accordance with the criteria set out in the 2007 Statement, and that this is what Ofcom did. There was no general requirement for Ofcom to assess the fairness and reasonableness of the disputed charges in all the circumstances. Ofcom identified its regulatory duties correctly at the outset of the Determination, and complied with them by (a) applying to the dispute criteria derived from the SMP conditions, and (b) giving specific consideration to the question whether its provisional conclusions under those criteria would be consistent with its regulatory duties (paragraph 93 of the defence).

97. Ofcom submits that there is no general requirement that a party which proposes varied charges should justify them. Furthermore, Ofcom says it imposed the SMP conditions with due regard to its duties to promote competition and consumer interests, so there can be no basis for presuming that charges raised in accordance with those conditions are anti-competitive and harmful. In any event, Ofcom submits that it did give consideration to the question whether upholding the disputed charges would be consistent with its duty to promote competition and consumer interests: see paragraph 3.38 of the Determination.

98. In relation to the argument that flip-flopping represented the unintended exploitation of a loophole in the charge control, Ofcom made two points in its defence. First, it would be contrary to the principles of legal and regulatory certainty to disapply the SMP conditions by reference to Ofcom's subjective intention and purposes when formulating them. Secondly, Ofcom sought to draw an analogy with the position where a taxing statute, properly construed, fails to apply to transactions which the legislator subjectively intended to be taxable. Pending amendment, the taxpayer is at liberty to arrange his affairs so as to limit the amount of tax that is payable under the statute. A taxing statute has no "penumbral spirit which strikes down devices or stratagems designed to avoid its terms or exploit its loopholes": see *Norglen Ltd v Reeds Rains Prudential Ltd* [1999] 2 AC 1 at 13-14 per Lord Hoffmann. The proper course, submits Ofcom, which it has followed, is to introduce a new charge control following the conclusion of a market review which closes the loophole.

99. As to the alleged requirement to take account of the historic impact of flip-flopping before April 2011, Ofcom submits that this was not in issue in the dispute, the subject-matter of which was confined to charges raised by two operators in a single month.

100. In reviewing these submissions, we begin with the point that Telefónica faces obvious difficulties in submitting that Ofcom failed to consider whether the disputed charges were fair and reasonable, when Ofcom's own formulation of the scope of the dispute stated the question as being whether it was fair and reasonable in light of the prevailing regulatory regime for Vodafone and H3G to levy the charges, and when Ofcom's statement of its conclusions duly reflected that formulation. In some sense, therefore, Ofcom clearly did give explicit consideration to the question of what was fair and reasonable. The real burden of Telefónica's complaint, we think, has to be that, by adding the qualifying words "in light of the prevailing regulatory regime," Ofcom unduly narrowed what ought to have been a general examination of the merits of the disputed charges, in the light of all Ofcom's regulatory powers and duties, by linking the examination to the single criterion of legal and regulatory certainty, and by relegating other potentially relevant considerations to the status of mere cross-checks.

101. We do not, however, consider that to be a fair characterisation of what Ofcom has actually done. We take first the qualifying words "in light of the prevailing regulatory regime". As we have already pointed out, nobody contended before us that Ofcom was wrong to frame the question for determination in this way, and in our judgment rightly so. The existing charge control was clearly a most material matter for Ofcom to take into account, not least because it had itself been the product of a detailed investigation which involved consideration of competition issues, consumer protection and the public interest. It would clearly not have been sensible, even if it were possible, for Ofcom to conduct its examination of the disputed October 2010 charges otherwise than "in the light of" the prevailing *ex ante* regulatory regime, that is to say the SMP conditions as they stood at the relevant time.

102. The next question, as we see it, is whether Ofcom erred in law in attaching the primary significance which it clearly did to the interests of legal and regulatory certainty. Although a different regulator might arguably have taken a different view, we do not consider that Ofcom's approach was demonstrably wrong in law. In the absence of misdirection or error of law, it is common ground that the weight to be attached to relevant factors was a matter for Ofcom alone. In our view, Ofcom was fully entitled to give predominant weight to legal and regulatory certainty, in the context of the present dispute, for a number of reasons which include the following:

(a) the relevant SMP conditions had been deliberately designed to allow maximum flexibility of charging, provided only that the annual TAC was not breached;

(b) in the interests of certainty, charges for calls covered by SMP condition MA4 had deliberately been excluded from the general "fair and reasonable" requirement in condition MA1.2 (see paragraph 10.27 of the 2007 Statement);

(c) in relation to practices such as flip-flopping, predictable and reliable *ex ante* regulation enhances the efficiency of both commercial planning and

regulatory enforcement by avoiding a multiplicity of individual and disparate disputes relating to charges in individual months (without going so far as wholly to exclude the scope for a proper process of review to correct identified deficiencies during the currency of a charge control regime (cf. paragraph 107 below));

(d) the disputed charges related to only a single month close to the end of the relevant charge control period, and for unexplained reasons Telefónica had made no complaint about flip-flopping in earlier months, even though the practice had clearly been prevalent for a substantial part of that charge control period (see paragraph 33 above);

(e) by the time that the Determination was made (within the four-month period allowed for that purpose), Ofcom had already taken steps to prevent flip-flopping for the future with effect from 1 April 2011;

(f) in the circumstances stated in points (d) and (e), a determination of the dispute in Telefónica's favour could, as Ofcom considered, have "little prospective effect" and the ongoing effects of any such determination on consumers and competition would be "negligible" (paragraph 3.38.1 of the Determination); and

(g) it is, in any event, doubtful whether the determination of a dispute relating to the charges for a single month would have provided a satisfactory basis upon which to resolve the perceived mischief of flip-flopping, for which the preferred solution was only identified after a process of widespread and iterative consultation in which several possible solutions were canvassed (see paragraphs 33 to 37 above).

103. If we are right thus far, the next main question is whether Ofcom gave adequate consideration to the full range of its regulatory duties, powers and responsibilities under both EU and domestic law. (We leave aside here the provisions of section 190(2A) of CA 2003, because they are the subject of the third ground of appeal; but we observe that the additional impact of section 190(2A), assuming it to apply, is

anyway unlikely to be of critical importance, given that the content of the subsection appears to add nothing of substance to the six requirements of Community law already enshrined in section 4). Again, we consider that on a fair reading of the Determination as a whole this question should be answered in Ofcom's favour. As Mr. Richards rightly accepted in oral argument, the question is one of substance, not form. Thus it does not necessarily matter if Ofcom set about its task by forming a preliminary conclusion, on the basis of the factors to which it attached primary significance, and then testing that conclusion in the light of other relevant considerations to see if it needed to be modified or rejected. Provided the process was carried out conscientiously and with an open mind, we can see nothing objectionable in proceeding in such a manner; nor do we think it would be conducive to good decision-making to be unduly prescriptive about the way Ofcom should resolve disputes or how it should formulate its conclusions.

104. With these observations in mind, we note that in paragraph 2.6 of the Determination Ofcom directed itself about its duties when determining a dispute in terms which nobody has sought to criticise, and which expressly embraced sections 3 and 4 of CA 2003, including the six Community requirements. In paragraph 3.37 Ofcom confirmed that, as part of its analysis, consideration had been given to the general duties in section 3 of CA 2003 and to the six Community requirements. In paragraph 3.38 Ofcom said that it considered its provisional conclusion to be consistent with those duties, and drew attention to certain aspects which it thought worthy of comment. Ofcom then considered the submissions made in response to its draft Determination, and in paragraph 4.42 stated that it saw no reason to alter its assessment of the dispute in the light of the comments received. In our view the adoption of this procedure betrays no error of law, and in the absence of evidence to the contrary Ofcom must be assumed to have performed its tasks fairly and with an open mind. It is also relevant to bear in mind that the purpose of the dispute resolution procedure is to find a swift resolution to disputes between commercial parties, who can reasonably be expected to identify the issues that they consider relevant to resolution of the dispute. Where no express reference is made to particular aspects of Ofcom's duties or the Community requirements, the inference which we draw is that Ofcom has considered them, if they were raised by the parties or if they are clearly matters which a reasonable regulator would take into

account, and formed the conclusion that they do not have a material bearing on resolution of the dispute. We do not infer that Ofcom failed to consider them at all, or that it paid only lip service to the need to take them into account.

105. We now turn to some more specific points, beginning with the burden of proof. As a general proposition, we accept that when a new charge, or a variation of an existing one, is proposed, challenged and referred to Ofcom for resolution, the onus lies on the proponent of the change to justify it: see in particular the judgment of Lloyd LJ in *08-numbers* at paragraphs [61] and [92], and *TRD* at paragraph [177]. But in the context of the present case we do not think it helpful to say that the burden lay on Vodafone and H3G to justify the disputed charges. The reason is that the charges complied with the existing charge control regime, or at least nobody contended the contrary. Thus there was, prima facie, nothing that required to be justified. Indeed, if anything it might be said that it was for Telefónica to show why the charges were unfair and unreasonable, despite their apparent compliance with the SMP conditions. A dispute of such a nature does not in our view turn on the burden of proof, and Ofcom was right not to approach it as though it did. It follows that we would reject any submission by Telefónica that Ofcom misdirected itself in relation to the burden of proof. We put the matter in that rather abstract form, because although Mr. Richards touched on the question at various points in his written and oral submissions, it was not clear to us whether he sought to rely on it as, in effect, a separate ground of appeal.

106. It does not, of course, follow from the absence of any legal burden of proof that an evidential burden may not lie on a party who wishes to advance and establish a particular proposition in the course of the dispute resolution procedure. In our judgment it is an evidential burden of this nature that Ofcom had in mind when it dealt with Telefónica's concerns over arbitrage in paragraph 3.36 of the Determination. We mention this point because Mr. Richards argued that Ofcom had wrongly placed the burden on Telefónica when it said that Telefónica had not provided any evidence of how arbitrage arose or could have arisen, or how it harmed or would harm competition and consumers. We would reject that submission, while noting that it would of course have been open to Ofcom to investigate the question for itself had it taken the view that it was material to do so.

107. Secondly, we wish to comment on the "compelling reasons" test that Ofcom appears to have set out in paragraphs 4.27 and 4.30 of the Determination. At first blush, that might create the impression that considerations of legal and regulatory certainty must always prevail unless negated by compelling reasons to the contrary, with the implication that such countervailing reasons do not meet that threshold unless they are so strong as to be irresistible. If that were indeed the test proposed by Ofcom, it would be erroneous for the reasons stated by the Tribunal in *TRD* (see, for example paragraph 88 of that judgment). However, we do not think that this is the test that Ofcom sought to articulate. Rather, we think that the notion of compelling reasons was intended to bear the more modest meaning of such reasons as are sufficient to displace the considerations of legal and regulatory certainty applicable to the case at hand. Only in that way can one give full significance to Ofcom's observation, in the final sentence of paragraph 4.30 of the Determination, that the weight to be attached both to those considerations and to the countervailing factors must vary with circumstances of the individual case. So expressed, the test seems to us to be unexceptionable. The application of that test is one that the regulator is pre-eminently suited to adjudicate, as Lloyd LJ explained in the passages from *08-numbers* quoted above (see paragraphs 48 and 49). In the present case, we have already expressed our view (in paragraph 102 above) that there was ample justification for Ofcom to attach a high degree of weight to the considerations of legal and regulatory certainty and a relatively low degree of weight to the countervailing considerations.

108. Thirdly, we wish to make a brief comment on the analogy with tax avoidance drawn by Ofcom in its defence. We accept Mr. Richards' submission that the analogy is inapposite, both because Her Majesty's Commissioners of Revenue & Customs are not regulators, and because they do not fulfil a statutory function of retrospective dispute resolution. In referring the dispute to Ofcom, Telefónica was not seeking to invoke any penumbral spirit which strikes down stratagems designed to exploit loopholes, but rather was requesting Ofcom to fulfil its regulatory function of dispute resolution by reference to its regulatory duties and objectives.

109. We hope that we have now dealt with all of the main arguments which were advanced to us in support of the second ground of appeal. Despite Mr. Richards'

able and persuasive submissions, we remain unconvinced that there is any substance in this part of the challenge to the Determination. We would therefore dismiss the second ground of appeal.

(3) Ground 3: CA 2003, section 190(2A)

110. Under this ground, Telefónica claims that Ofcom failed to have regard to the matters required by section 190(2A) of CA 2003 and misdirected itself in law that section 190(2A) was inapplicable to the Determination.

111. As we have already explained, section 190(2A) was introduced by the 2011 Regulations with effect from 26 May 2011. Its commencement therefore post-dated the reference of the dispute to Ofcom but pre-dated Ofcom's adoption of the Determination. The disagreement between the parties arises because Ofcom, supported by H3G, contends that section 190(2A) applies only to disputes referred to Ofcom after the effective date, while Telefónica maintains that it applies to all disputes determined on or after that date.

112. To recapitulate, section 190(2A) provides that:

> "In relation to a dispute falling within section 185(1), OFCOM must exercise their powers under subsection (2) in the way that seems to them most appropriate for the purpose of securing –
>
> (a) efficiency;
>
> (b) sustainable competition;
>
> (c) efficient investment and innovation; and
>
> (d) the greatest possible benefit for the end-users of public communication services."

113. That subsection forms part of the Chapter that deals with Ofcom's dispute resolution functions. Those functions derived from the fundamental dispute resolution obligation imposed on NRAs by Article 20 of the Framework Directive, originally supplemented in relation to access and interconnection by Article 5(4) of the Access Directive. The present dispute requires us to have regard to several features of the dispute resolution regime and, in particular, to the modifications to

that regime (including the addition of section 190(2A)) that were made at EU level by Directive 2009/140/EC and transposed into UK law by the 2011 Regulations.

114. The first feature concerns the scope of the dispute resolution regime.

(a) As originally drafted, Article 20 of the Framework Directive applied in relation to disputes between undertakings providing electronic communication networks or services in connection with obligations arising under the CRF. The 2009 amendments to the CRF added a second category of disputes, namely those between undertakings providing electronic communication networks or services and other undertakings benefiting from obligations of access and/or interconnection arising under the CRF. The scope of the dispute resolution obligation is, therefore, defined by two parameters, one connecting the dispute to the obligations created by the CRF and the other relating to the activities of the parties to the dispute.

(b) In the original form of the CRF, Article 5(4) of the Access Directive made specific provision for disputes relating to access and interconnection though it did so by invoking the procedures established by the Framework Directive. That provision was deleted in the 2009 amendments to the CRF. No point was taken in relation to this amendment and, in view of the broad overarching role of the Framework Directive in this respect and the expanded scope of Article 20 following the 2009 amendments, we do not attach any significance to it in the present context.

(c) Section 185 did not include any general provision corresponding to Article 20 but, rather, identified certain categories of dispute to which the Chapter applied. Section 185(1), as originally enacted, identified five types of disputes relating to the provision of network access: in three cases (including disputes between communications providers), the scope was defined simply by the activities of the parties to the dispute while, in the remaining two cases, the scope was defined by two parameters – one which connected the dispute to a condition under section 74(1) and the other relating to the activities of the party to the dispute. The 2011 Regulations

left the first three cases unchanged but deleted the remaining two cases. They also introduced section 185(1A), the scope of which was defined by two parameters - one which connected the dispute to a condition under section 45 and the other relating to the activities of the party to the dispute.

(d) Section 185(1A) differs in at least two notable respects from the provisions in section 185(1) that were deleted by the 2011 Regulations. First, it is based upon conditions imposed under section 45 rather than section 74(1). Section 45 covers every type of condition that Ofcom is empowered to impose (that is, a general condition or one of a set of specific conditions, namely a universal services condition, an access-related condition, a privileged supplier condition and an SMP condition) whereas section 74(1) refers specifically to access-related conditions. Secondly, whereas the deleted provisions in section 185(1) were drafted in such a way as to exclude any overlap with the retained provisions, section 185(1A) does not contain any language to that effect. In summary, section 185(1A) covers a wider range of disputes than the deleted provisions and overlaps with the retained provisions in a way that the deleted provisions did not.

(e) Moreover, the amendments to the regime give a significance to the classification of a dispute that the original legislation did not have. While the substantive provisions of the dispute resolution Chapter applied without differentiation to the original classifications, the 2011 Regulations introduced two provisions (sections 186(2A) and 190(2A)) which apply to the retained cases in section 185(1) alone. In the context of section 186, the 2011 Regulations made specific provision for cases falling within the new section 185(1A) but no such provision was made in respect of section 190.

115. The second feature concerns the power of Ofcom to decline to resolve a dispute referred to it. Article 20(2) of the Framework Directive authorised Member States to give NRAs a limited power to that effect where other more effective resolution mechanisms were available. That power was conferred on Ofcom by section 186(3) as originally enacted. While the 2009 amendments to the CRF made no changes in this respect to Article 20, the 2011 Regulations introduced section 186(2A) which

extended Ofcom's power to decline to resolve disputes falling within the retained categories of section 185(1) by reference to its priorities and available resources: there is no obvious basis in the CRF for this extended provision. The new category in section 185(1A) is subject to the original, limited power to decline set out in section 186(3).

116. The third feature concerns the objectives to be taken into account by Ofcom when it resolves a dispute. Article 20(3) of the Framework Directive stated that, in resolving a dispute, NRAs should aim to achieve the objectives set out in Article 8. The latter Article is of general application, setting out the objectives to be pursued by the NRAs when they exercise any of their powers. The objectives set out in that Article were transposed into UK law by section 4 of CA 2003 which, by subsection (1)(c), specifically included the dispute resolution function as one to which the objectives applied. Section 190 as originally enacted did not contain any additional provisions with respect to the basis upon which Ofcom was to exercise its dispute resolution functions: as the Tribunal said in *TRD*, the answer to that question was provided by the general provisions of sections 3 and 4. While the 2009 amendments to the CRF again made no changes in this respect to Article 20, the 2011 Regulations introduced section 190(2A) which specified the objectives that Ofcom was to take into account when resolving disputes within the retained categories of section 185(1). No specific or additional provision was made in respect of the new category in section 185(1A).

117. In this connection, we note in particular the similarity between section 4(7) to (8) and section 190(2A). Section 4(7) sets out the fifth Community objective, relating to network access and service interoperability, which is specified in Article 5(1) of the Access Directive: as such, it bears directly upon network access disputes that are the subject of Ofcom's dispute resolution functions. Section 4(8) sets out the objectives that Ofcom is to have in mind when securing network access and service interoperability. They were modified by the 2011 Regulations to conform to the modification of Article 5(1) made by the 2009 amendments to the CRF. At the same time, section 190(2A) was introduced in terms that are substantially identical to the amended terms of section 4(8).

118. As we have noted above, the amendments introduced by the 2011 Regulations created the possibility of overlap between categories of dispute that did not previously exist. Cases of that kind arise in two ways. The first is created by the overlap between section 185(1)(a), which is stated to cover a dispute between communications providers, and section 185(1A) which includes, broadly stated, that sub-set of disputes between communications providers which relates to network access entitlements that one party is required to provide to the other by a section 45 condition: it is common ground that the present disputes fall within this overlap. There is a second, parallel, overlap which arises because cases that fall within section 185(1)(b), which covers disputes between a communications provider and a person who makes available associated facilities, may also fall within section 185(1A) where the latter person is a beneficiary of the section 45 condition imposed on the communications provider.

119. For convenience, we refer to cases that fall within section 185(1)(a) as "1(a) cases" and cases that fall within section 185(1A) as "1A cases"; cases that are capable of falling within either of those provisions are referred to as "overlap cases" or "overlap disputes". We do not make separate reference to those cases that fall within the second overlap between sections 185(1)(b) and 185(1A), as they are not directly relevant to the present proceedings.

120. Against that background, there are two issues to be decided under this ground. First, does section 190(2A) apply to the Determination? Secondly, if it does, what are the consequences for the legality of the Determination?

Issue (1): Application of section 190(2A) to the Determination

The parties' submissions

121. Mr. Richards' principal submission is beguilingly straightforward. Telefónica on the one hand, and Vodafone and H3G on the other, are all communications providers. The Determination concerns parallel disputes between them. The disputes, therefore, fall within section 185(1)(a); indeed, the Determination says so in terms at the outset (paragraph 2.1). Section 190(2A) applies to disputes that fall

within section 185(1). There is nothing in the 2011 Regulations to preclude the application of section 190(2A) to determinations of disputes referred prior to 26 May 2011; on normal principles, it would apply to such determinations and, if anything, the drafting of the 2011 Regulations reinforces that conclusion.

122. However straightforward that submission may be, the questions that it prompts are far from straightforward. Ofcom contests Mr. Richards' submission on a number of grounds.

123. First, Ofcom maintains that the amendments introduced by the 2011 Regulations constitute a coherent package. The classification of a dispute as a 1A or 1(a) dispute is central to the operation of that package. That classification must be made at the point at which the dispute is referred to Ofcom and it only makes sense, therefore, to treat the whole package as effective with respect to disputes referred after the commencement date.

124. Telefónica rejects Ofcom's submission on the basis that, although sections 185(1A) and 190(2A) form part of the same "package" in a broad sense, there is no necessary link between them. In particular, section 190(2A) is not dependent on the operation of section 185(1A). It is not expressed to apply to disputes that fall outside that category but, rather, to disputes that fall within the pre-existing section 185(1). Therefore, in Telefónica's submission, there is no reason for supposing that any delay in the implementation of section 190(2A) was intended.

125. Secondly, Ofcom contends that its first submission is consistent with the presumption that an enactment does not have retrospective effect. Telefónica's response focuses on three points:

(a) The interpretation for which it contends involves no retrospectivity: it applies in a prospective way to all determinations after 26 May 2011.

(b) Had the draftsman wished to avoid that result, specific provision to that effect would have been made, as was the case in respect of amendments to CA 2003 governing applications to install facilities for electronic

communications networks (see 2011 Regulations, Schedule 3, paragraph 1) and contraventions of the prohibition upon the provision of electronic communication services without giving advance notice to Ofcom (see 2011 Regulations, Schedule 3, paragraph 3).

(c) There is no unfairness in the application of section 190(2A) to disputes that had been referred before 26 May 2011. The subsection provides a specific, domestic statutory footing to the regulatory approach that was, for the reasons explained in *TRD* and *08-numbers*, already required. Furthermore, it did not restrict or adversely affect the rights of disputants. Finally, in any event, fairness was a matter for the legislator and, had it been concerned, it would have made specific provision to that effect as it did in the other cases noted above.

126. Thirdly, Ofcom argues that the application of the presumption against retrospectivity is reinforced by the desirability of not giving retrospective effect to the extended cost powers given to Ofcom in section 190(6). Telefónica disputes the relevance of this point: if anything, the amendments in section 190(6A) and (6B) restrict Ofcom's costs powers and, in any event, they have no bearing on the interpretation of section 190(2A).

127. Fourthly, Ofcom argues that, had the amended provisions of CA 2003 been applied, it would have been bound to decide that the dispute should be classed as a 1A dispute with the result that section 190(2A) did not apply in any event. Telefónica rejects that approach on two grounds: first, Ofcom accepted that the dispute was a 1(a) case and, secondly, the distinction is in any event based on a false dichotomy.

128. This issue was developed at the hearing. As the discussion developed, Mr. Saini's central argument became that the package of amendments introduced by the 2011 Regulations is based upon a sharp distinction between 1A and 1(a) cases. A dispute that falls within the overlap has to be allocated to one or other of those categories – and, in view of the differing prioritisation provisions in section 186 (as amended), has to be made with reasonable speed after receipt of the reference by Ofcom. In his reply, Mr. Richards argued that Mr. Saini's approach proceeds upon a false binary

distinction between sections 185(1) and 185(1A). The fact that there is such a distinction within section 186 is immaterial. The only question that matters for present purposes is whether the dispute falls within section 190(2A) as to which the only question, having regard to the terms of section 190(2A), is whether it falls within section 185(1) – which this dispute, being a dispute between communication providers, plainly does: the fact that it may also fall within section 185(1A) is not to the point because section 190(2A) says nothing about excluding from its provisions those 1(a) cases that are also 1A cases.

Discussion and conclusions

129. Although the immediate issue raised by this ground focuses on the effective date of section 190(2A), the arguments canvassed by the parties also raise the underlying, and broader, question whether section 190(2A) is capable of applying at all to a dispute of this kind. We consider first the immediate, temporal, question and then the broader question of the scope to be given to section 190(2A).

(i) Application of section 190(2A) to disputes referred to Ofcom before 26 May 2011

130. We approach this question on the assumption that section 190(2A) is to be treated as applying to overlap disputes such as the present dispute and that, consequently, the only question is whether it takes effect in relation to a dispute which was referred before its effective date but decided after that date.

131. The central thrust of Mr. Saini's argument is that the package of amendments has to be considered as a whole and that, as it would be impossible to give effect to the amendments to section 186 in relation to the present dispute and inappropriate to give retrospective effect to the amendments to the cost provisions in section 190, it would similarly be wrong to give effect to section 190(2A) in relation to the present dispute.

132. While we accept Mr. Saini's contention that the amendments introduced by the 2011 Regulations cannot be interpreted in isolation from each other, we do not accept that the fact that they were introduced in the same legislative instrument of

itself dictates that they are all to be interpreted in the context before us as constituents of a single package (or, as we would prefer to say, set) of amendments. A stronger connection between the provisions under examination is required to justify that conclusion. We do not see a sufficient connection between the provisions at issue in this case and the modifications to the cost provisions in section 190(6)ff (which do not depend in any way upon section 185(1A) and its implications but, rather, apply indifferently to all categories of dispute) to treat those modifications as part of a set that is relevant to the present case. We do, however, accept that sections 185(1A), 186(2A) and 190(2A) have a sufficient connection to form part of a relevant set, delimited by the fact that each constituent amendment either defines a class of dispute or employs a dispute classification.

133. We are satisfied that the provisions constituting that set do not apply to disputes referred before 26 May 2011. We do not base that conclusion simply on the fact that, under section 186, Ofcom is obliged to classify all disputes referred to it after that date in order to apply the correct criteria in deciding whether to accept the reference. That classification decision is only the start of a continuous process of information-gathering and analysis that leads to the final determination and the exercise of the powers conferred by section 190 to which section 190(2A) relates. Mr. Richards' own case emphasises that section 190(2A) establishes the thought process that Ofcom is required to follow in exercising its powers. Under section 188(3), Ofcom is entitled to follow the procedure for consideration and determination of the dispute that it considers appropriate. Despite the apparent breadth of that discretion, it is well-established that a decision-maker such as Ofcom "must take reasonable steps to acquaint [itself] with the relevant information to enable it to answer each statutory question posed for [it]": see the Tribunal's judgment in *BAA v Competition Commission (No.2)* [2012] CAT 3, para 20(3) and the cases there cited. The terms of the statutory question determine the information that the decision-maker must obtain during the administrative process and the nature of the analysis that it conducts. Section 190(2A) cannot, therefore, be seen as a provision that simply bites on the day of the determination; rather, it must inform the entirety of the administrative process leading to the determination. It follows that section 190(2A) can only apply to those disputes that are conducted as well as determined once it is in operation.

134. Our conclusion is not affected by the particular stage in the administrative process relating to a particular dispute when section 190(2A) took effect. Ofcom's duties must be unambiguously and consistently delineated in respect of all disputes; it would be wholly impractical to attempt to identify a cut-off point in the process such that section 190(2A) would apply only to disputes submitted before that point. Ofcom's duty to issue a determination within 4 months after its acceptance of the dispute, unless there are exceptional circumstances, emphasises the importance of an early identification of the scope of its inquiries. There is, therefore, no viable middle course between the propositions for which the parties have contended – nor has the legislator made provision for such an approach. It follows that the facts that this dispute was submitted on 12 April 2011 and that Ofcom decided it was appropriate for it to handle the dispute on 16 May 2011, albeit only ten days before section 190(2A) took effect, are immaterial to our conclusion.

135. Our conclusion is also not affected by the other points upon which Mr. Richards relied. The fact that section 190(2A) refers to disputes under section 185(1), which was not amended in any relevant way by the 2011 Regulations, is immaterial: the present question concerns the nature of the process to be applied to the disputes within that subsection, not the description of those disputes. The submission that the application of section 190(2A) to the Determination would not have retrospective effect fails once it is appreciated that it cannot apply to the Determination without also applying to the process that preceded it. The submission that, in any event, the legislator must have intended to give retrospective effect to section 190(2A) because, in contrast with other amendments, no provision was made to exclude such effect cannot be accepted: the terms applied to the other provisions are at best indicative, and cannot override the other indicators specific to these provisions that point clearly against giving them retrospective effect.

136. Finally, it does not assist Telefónica to say that the requirements imposed by section 190(2A) do not differ materially from those that applied to Ofcom under their general duties. If that were true, this ground would add nothing to the claims advanced under grounds 1 and 2 and Telefónica's case in this respect would stand or fall by the disposition of those grounds.

137. We conclude, therefore, that section 190(2A) had not come into effect in time to apply to the Determination and, for that reason alone, ground 3 must be dismissed. Nonetheless, for the sake of completeness, and in case the issues become relevant on appeal, we discuss the other issues raised in connection with this ground.

(ii) Application of section 190(2A) to disputes between communication providers

138. As we have noted, it is common ground that the present disputes are overlap disputes, in that they satisfy the criteria of both section 185(1)(a) and section 185(1A). The very fact that an overlap dispute has that quality may, at least in certain circumstances, require it to be treated as falling into one category to the exclusion of the other. In principle, an overlap dispute may be classified either on a hybrid basis (in which case the dispute falls within the provisions applicable to either category unless the legislation necessarily excludes that possibility) or on a singular basis (in which case, at the outset, the dispute is given a classification, either as a 1(a) case or as a 1A case, which determines the provisions applicable to it). However, the possibility of a singular 1(a) classification can be excluded immediately because it is also common ground that an overlap dispute is to be treated as a 1A case for the purpose of section 186: Mr. Richards acknowledged that, in his words, section 186(3) trumps section 186(2A). The choice before us, therefore, lies between the hybrid basis and the singular 1A basis. Mr. Richards puts his case on the hybrid basis while Ofcom relies on the 1A basis.

139. Mr. Richards' first submission is that, having expressly classified the dispute in the Determination as a 1(a) dispute, Ofcom has effectively conceded the hybrid basis and cannot now claim that the dispute should properly be regarded as a 1A case. Superficially attractive though that proposition is, we are not persuaded by it. In our judgment, Ofcom is entitled to rely on footnote 2 to paragraph 2.1 of the Determination, in which it expressly stated that it was applying the law in place before 26 May 2011, to rebut any suggestion that it is estopped from making its present claim. While our decision above means that the footnote was correct in law, the present point is not dependent on that conclusion. To put it another way, the Determination did not consider the dispute as an overlap dispute or reach any decision as to its true characterisation on the hypothesis that it was an overlap

dispute – so there is no finding to that effect to bind Ofcom. That decision is, in any event, a question of law to be determined by reference to the proper interpretation of the relevant statutory provisions.

140. The hybrid basis for which Mr. Richards contends has the merit that it requires the minimum degree of supposition about the intentions of the legislator. It only requires a choice to be made where that choice cannot be avoided. In Mr. Richards' submission, no such necessity arises in respect of section 190(2A): that subsection applies, without express limitation, to all disputes falling within section 185(1), and the absence of any reference to section 185(1A) in section 190 means that there is no need to imply a limitation to section 190(2A).

141. Mr. Saini resists that approach on the ground that the amendments to the dispute resolution provisions constitute a package under which a binary choice must be made between the classification of disputes as 1(a) or 1A cases and, once made, that choice must be applied consistently to all elements in the package: the agreed classification of overlap disputes as 1A disputes for the purpose of section 186 necessarily excludes the application of provisions, such as section 190(2A), which are only applicable to disputes within section 185(1). For the reasons stated in paragraph 132 above, we accept that the provisions in sections 185(1A), 186(2A) and 190(2A) should be treated as a set that it is relevant to consider in this context, though we exclude the provisions in section 190(6) to (6B) from that set. While it does not follow from that approach that the hybrid basis is necessarily excluded, it is reasonable to consider that the legislator, in drafting that set of amendments, would at least have considered the implications of the drafting for the set as a whole.

142. We are not satisfied that Mr. Richards' proposition can be accepted simply on the basis that it is the natural reading of section 190(2A). The fact that that subsection is expressly limited to cases falling within section 185(1) necessarily says something about the legislator's view as to the application of section 190(2A) to cases falling within section 185(1A). As to what that may be, we can only see two possibilities: the drafting must reflect either a positive though unstated decision that section 190(2A) should not, or does not need to, apply to such cases, or simple oversight.

Although we canvassed the latter possibility at the hearing, we do not consider oversight to be a satisfactory explanation: it is implausible that, in the drafting of one amendment (section 190(2A)), the draftsman would have overlooked another amendment (section 185(1A)) or simply been indifferent to their interaction – especially in view of the close connection between the two amendments. That being so, we consider that the limitation must reflect the legislator's intention that section 190(2A) should not, or did not need to, be extended to cases falling within section 185(1A).

143. Discerning the reasons for not extending section 190(2A) to 1A cases has not been straightforward. It defeated the efforts of all parties at the hearing who could not point to anything, either in the legislation itself or in the explanatory notes or other surrounding material, that provided any assistance in resolving this issue. Mr. Saini tentatively suggested that a partial explanation may lie in the fact that section 185(1A) concerns cases in which an SMP price control has already been imposed, in which case the specific factors will already have been assessed under section 88(1)(b); but as Mr. Richards, quite rightly, observed, those cases themselves represent only a small subset of the cases that may fall within section 185(1A), so the suggested explanation is too partial to assist.

144. Whatever the explanation for the limited scope of section 190(2A) may be, it is clear that the draftsman saw no need to make special provision in section 190 for the objectives to be taken into account in the resolution of those 1A cases that do not fall within section 185(1), that is to say disputes that engage a section 45 condition to which one of the parties is neither a communications provider nor a supplier of associated facilities. However, if that is the case with respect to 1A cases that fall outside section 185(1), it must also be true in respect of all 1A cases including overlap cases. It also follows that, if there is a perceived gap that section 190(2A) is required to fill, that gap relates to those cases that only fall within section 185(1).

145. We conclude, therefore, that section 190(2A) was not intended to apply to overlap disputes. The issue would, in any event, be of little moment if section 190(2A) made no material difference to the manner in which Ofcom was required to resolve

a dispute: in such circumstances, ground 3 would add nothing to grounds 1 and 2, and would necessarily fail for that reason. If, on the other hand, application of section 190(2A) were to make a material difference, we consider that it would be a manifest error to apply it to overlap disputes. Such disputes would be subjected to an uncertain and incoherent double standard. There would, moreover, be an unexplained and unjustified distinction in the standards applicable to such disputes and those applicable to the other 1A cases that are not overlap disputes. We see no basis for presuming that the legislator would have intended either outcome.

146. Our conclusion in relation to section 190(2A) is further reinforced by the undisputed interpretation of section 186. As we have noted, in that context, it is common ground that the status of overlap disputes as 1A disputes should be the determinative characteristic. On Mr. Saini's argument, it follows that overlap disputes must be given the same characterisation for all other dispute resolution purposes. We do not need to go as far as that: in particular, we do not exclude the possibility that a subsequent amendment to the dispute resolution provisions may provide that, for that purpose, the status of an overlap dispute as a 1(a) dispute should be the determinative characteristic. We do, however, consider that the legislator may be expected to attach substantial weight to consistency and coherence in the legislative scheme which points towards the identification of a singular determinative characteristic unless there are clear and strong considerations to the contrary. No such considerations exist in the present case. On the contrary, acceptance of the hybrid basis would lead to a three-fold division amongst disputes:

(a) disputes that fall exclusively within section 185(1), as to which Ofcom is entitled to rely upon the broader prioritisation criteria in section 186(2A) and must exercise its decision-making powers in light of section 190(2A);

(b) disputes that fall exclusively within section 185(1A), as to which Ofcom is entitled to reject a dispute only on the narrow grounds specified in section 186(3) and is bound by the decision-making duties in section 4(7) and (8) but not bound by the duties specified in section 190(2A); and

(c) disputes that fall within both section 185(1) and section 185(1A), as to which Ofcom is entitled to reject a dispute only on the narrow grounds specified in section 186(3) and is bound by the decision-making duties in section 4(7) and (8) as well as those in section 190(2A).

There is no basis in the material before us to support the view that the legislator would consciously have intended to achieve that result. The most that can be said is that the legislator has not made any express provision to avoid that result. In our judgment, that would be an insufficient basis upon which to conclude that that is indeed the result in the circumstances of this case.

147. Furthermore, treating the 1A characteristic as determinative in the context of both section 186 and section 190 is consistent with the general principle that, where the literal meaning of a general enactment covers a situation for which specific provision is made by some other enactment within the Act, it is presumed that the situation was intended to be dealt with by the specific provision (see *Bennion on Statutory Interpretation*, 5th ed. (2008), at p.1164). In the present context, so far as disputes between a communications provider on the one hand and another communications provider or a supplier of associated facilities on the other hand are concerned, section 185(1)(a) and (b) constitute the general provisions which cover all such disputes and section 185(1A) covers a specific sub-set of such disputes involving those cases in which a section 45 condition is engaged.

148. We conclude, therefore, that disputes that appear to satisfy the criteria of both section 185(1) and section 185(1A) are to be treated, for the purposes of both section 186 and section 190, as falling within section 185(1A) with the specific consequence that the requirements of section 190(2A) do not apply to them. It follows that, for those additional reasons, ground 3 must fail.

Issue (2): Materiality of section 190(2A)

149. In view of the conclusions which we have already reached, we will deal with this aspect of ground 3 briefly. Ofcom contends that, even if section 190(2A) had been applicable, Ofcom's failure to refer to it was not material to the Determination.

Ofcom submits that the effect of section 190(2A) was merely to clarify and further specify Ofcom's existing regulatory duties under sections 3 and 4 of CA 2003. Ofcom had regard to those duties, both in imposing the SMP conditions and in its determination of the dispute. Accordingly, nothing would have been added by an express requirement in terms of subsection (2A).

150. We accept this submission. In our view there is no basis for holding that there is any material difference between the standards that Ofcom has to apply to cases that fall, respectively, within section 185(1) and section 185(1A). Cases in the latter category are clearly covered by section 4(7) to (8), which are couched in terms that are substantially identical to those of section 190(2A), which applies to cases in the first category. There is admittedly a minor linguistic difference in relation to the fourth element (section 190(2A) refers to securing the greatest possible benefit for the end-users of public communication services, while section 4(8) refers to securing the maximum benefit for the persons who are customers of communications providers and of persons who make associated facilities available); but we regard this difference as immaterial. Both section 4(8) and section 190(2A) are based upon Article 5(1) of the Framework Directive, and they should therefore be interpreted consistently.

151. Mr. Richards attempted to draw a distinction on the basis that section 190(2A) mandates a particular process of thought which requires Ofcom to ask itself what would be the most appropriate way to secure each of the four specified regulatory objectives. He contrasted that with the approach adopted by Ofcom in the present case, in which he said it focused its attention upon the charge control regime and only addressed the wider issues by way of a cursory cross-check. As we have already explained in relation to ground 2, however, we do not accept that this is a fair characterisation of the procedure which Ofcom adopted. Nor can we see any basis for holding that subsection (2A) requires any special process of thought upon the part of Ofcom, apart from the express requirement that it must exercise its dispute resolution powers under subsection (2) in the way that seems to it most appropriate for the purpose of securing the four stated objectives. If anything, it seems to us that this formulation is designed to allow Ofcom considerable flexibility in the approach that it decides to adopt, and permits Ofcom in appropriate

circumstances to accord priority to particular considerations at the expense of others. We are therefore unable to read the subsection as imposing any requirement that is more stringent than the existing obligation on Ofcom to have regard to the general duties set out in section 4 of CA 2003.

152. Accordingly, we conclude that section 190(2A) would have made no material difference to the conduct or outcome of the resolution of the dispute by Ofcom in the present case, if (contrary to our earlier conclusions) it had any application to the present case.

(4) Ground 4: Ofcom unlawfully attached determinative, alternatively excessive, weight to Vodafone's and H3G's putative compliance with the SMP regime

153. Telefónica's complaint under this heading is about the weight which Ofcom attached to the assumed compliance by Vodafone and H3G with the relevant SMP conditions. The submission is that Ofcom allowed this assumed compliance to dominate its thinking to such an extent as to infringe the public law principle that one relevant consideration should not be allowed to dominate so as to exclude others: see *R v Waltham Forest London Borough Council, ex parte Baxter* [1988] QB 419 at 428G per Russell LJ. Alternatively, Telefónica argues that the weight attributed to such compliance by Ofcom was, if not determinative, manifestly excessive, particularly in view of the absence of any positive evidence to establish it.

154. In our view this ground of appeal must fail, for the reasons which we have already given in relation to ground 2. On a fair reading of the Determination, we do not consider that Ofcom treated the assumed compliance with the SMP regime as determinative, or that Ofcom attributed manifestly excessive weight to it. What Ofcom did do, and in our judgment was entitled to do, was to give predominant weight to such compliance in the particular circumstances of the present case. We do not think that this involved any error of law on Ofcom's part, and in the absence of any error of law the weight to be attached to relevant factors was a matter for Ofcom alone.

(5) Ground 5: Ofcom had no adequate evidential basis to support its conclusion that Vodafone and H3G had complied with the SMP regime

155. In support of this ground, Telefónica relies on the "well-established principle of public and regulatory law that any conclusion or decision of a regulator must be objectively and reasonably justified by the facts and by the evidence": see paragraph 50 of the notice of appeal and the cases there cited. Ofcom's decision to uphold the October 2010 charges was expressly made on the basis that Vodafone and H3G had complied with SMP conditions MA1 and MA4 (paragraphs 3.35 and 3.39 of the Determination). Telefónica's complaint is that there was no evidential basis for this conclusion. Telefónica accepts that it did not specifically allege any breach of the SMP conditions, but says the reason for this was that it had no evidence to form a view on the point, and it could not have done so because it did not have access to the confidential call volume information that would be necessary to reach a conclusion on the matter.

156. Ofcom's justification for proceeding as it did is contained in paragraph 4.6 of the Determination, quoted above. Telefónica submits, however, that this justification fails to meet the thrust of the objection. It remains the case that the Determination proceeded on the basis of an unsubstantiated premise, and this is doubly objectionable where Ofcom chose to afford such prominence in its reasoning to compliance with charge controls.

157. Nor is it an answer, submits Telefónica, that no specific allegation of breach of charge controls was made by it against Vodafone or H3G. Any decision-maker is under a basic duty to appraise itself of the relevant factual position; and since Ofcom in the exercise of its disputes jurisdiction acts in a regulatory capacity, it is entitled to, and should, use such information as it has at its disposal from the exercise of its other regulatory functions: see *TRD* at paragraph 105. Further, since Ofcom was engaged in monitoring compliance with the charge controls as part of a separate project (see again paragraph 4.6 of the Determination), it should at the very least have had regard to the evidence generated by the monitoring process.

158. Ofcom's pleaded response to these submissions is that it was unnecessary for it to resolve the question of compliance in order to deal with the dispute that it had decided to handle. The question for determination was whether the October 2010 charges were fair and reasonable in the light of the prevailing regulatory regime. In order to answer that question, Ofcom did not need to decide whether the charges in fact complied with the letter of the regime; and since no allegation of breach had been made, Ofcom was entitled to proceed on the assumption that they did comply. Telefónica's complaint did not depend in any way on the establishment of a breach, because its case was that flip-flopping was unfair and unreasonable in all the circumstances. Nor would it have been appropriate, in the present case, for Ofcom to have taken account of evidence gathered in the course of monitoring compliance with the charge control, because that process was incomplete when the dispute was due to be determined.

159. In our view this ground of appeal too must be rejected. In the absence of any specific complaint of non-compliance, Ofcom was in our judgment free to decide whether to investigate that aspect of the matter, or whether to proceed on the assumption that the disputed charges, viewed in the context of the financial year as a whole, complied with the charge control. For the reasons given in paragraph 4.6 of the Determination, it was in our judgment eminently reasonable for Ofcom to decide to proceed on the latter basis. After all, the whole point of flip-flopping was that it represented an attempt to exploit the existing charge control, not to breach it; and it was in our view an entirely reasonable assumption, in the absence of positive evidence to the contrary, that Vodafone and H3G would have taken good care to ensure that the disputed charges complied with the letter of the charge control. Had there been a breach, it could only have been caused by inadvertence or incompetence.

VII CONCLUSION

160. We have now reviewed all the grounds of appeal, and decided that each of them must be rejected. Telefónica's appeal will therefore be dismissed.

The Honourable Mr. Justice Henderson | William Allan | Stephen Wilks

Charles Dhanowa
Registrar

Date: 30 October 2012