IN THE COMPETITION APPEAL TRIBUNAL

Case No 1085/3/3/07

Victoria House
Bloomsbury Place
London WC1A.2EB

4th December 2008

Before:
MISS VIVIEN ROSE
(Chairman)

PROFESSOR ANDREW BAIN OBE
MR. ADAM SCOTT TD

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC Appellant

and

OFFICE OF COMMUNICATIONS Respondent

with interventions by:

HUTCHISON 3G UK LIMITED
ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED
TELEFÓNICA O2 UK LIMITED
T-MOBILE (UK) LIMITED
VODAFONE LIMITED

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CASE MANAGEMENT CONFERENCE
IN CAMERA (DAY 1)

APPEARANCES

Mr David Anderson QC and Miss Sarah Lee and Miss Sarah Ford (instructed by BT Legal) appeared on behalf of British Telecommunications plc

Mr Josh Holmes and Mr Jorren Knibbe instructed by and appearing on behalf of the Office of Communications

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

Miss Marie Demetriou (instructed by Field Fisher Waterhouse) appeared on behalf of the Intervener Orange Personal Communications Services Limited

Miss Kelyn Bacon (instructed by S.J. Berwin) appeared on behalf of the Intervener Telefónica O2 UK Limited

Mr Meredith Pickford (instructed by Regulatory Counsel, T-Mobile) appeared on behalf of the Intervener T-Mobile (UK) Limited

Miss Elizabeth McKnight (Partner, of Herbert Smith) appeared on behalf of the Intervener Vodafone Limited

Mr Tom Sharpe QC and Mr David Caplan instructed by and appearing on behalf of the Competition Commission

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THE CHAIRMAN: Good afternoon ladies and gentlemen. Thank you very much for all the written submissions that we have received, the most recent of which is headed "Refinement of BT's case" and handed to us just a few moments ago.

The first introductory remark I have is that we are sitting in Camera so there should not be any members of the public in the room but, as I understand it, the people attending are not limited to those within the confidentiality ring established for these proceedings. It is unlikely that we will need to discuss individual companies' figures, but it would help us if someone would indicate whether those who are outside the confidentiality ring have seen either the confidential or non-confidential versions of the provisional conclusions of the Competition Commission and the figures suggested in the Commission's letter of 26th November as the possible outcome in terms of applying their conclusions to the TAC figures. We are not quite sure whether those are treated as being discloseable only within the confidentiality ring or more broadly. Mr. Holmes, do you know the answer to that question?

MR. HOLMES: I am afraid I do not. I know that obviously Ofcom officials are all within the confidentiality ring and have therefore seen all of those things. I cannot speak for the other parties.

THE CHAIRMAN: Mr. Pickford?

MR. PICKFORD: All of T-Mobile's personnel here are in the confidentiality ring.

MISS ROSE: We have people here who are in and outside the confidentiality ring. Everybody has seen the TAC proposal of the Competition Commission and, indeed, it was discussed at the Plenary session last week.

THE CHAIRMAN: I see, so that is not treated as being confidential?

MISS ROSE: No, that is not confidential.

THE CHAIRMAN: That is fine, that is very helpful. Is everyone agreed that that is the case? Thank you very much. Another point we were going to raise which may have been finessed by this latest refinement, but just to be clear that we understand what is being said, as regards BT's case at this hearing, the T-Mobile skeleton refers to arguments by BT that the glidepath should be eliminated but we did not find that argument in BT's skeleton for this hearing, though we understand it might have been suggested in submissions to the Commission. As we now understand it, following the refinement, is it accepted by everyone here that if, at the end of the day, we conclude that the Commission should set out what the price control target average charge should have been in each year of the period, ignoring for the moment the question of any adjustment for past overcharging, is there

anyone who is arguing that the glidepath should be achieved in some other way than applying the principles Ofcom in fact applied, namely an equiproportional decrement, the tweak for the 60 days lack of notice, and the initial drop for H3G before then applying the glidepath. Mr. Anderson, perhaps you could confirm?

MR. ANDERSON: If it helps, madam, we align ourselves with Ofcom on that. The phrase "Ofcom's approach to the glidepath" did not seem to us to be an entirely unambiguous one and, indeed, it has been interpreted I think by different parties in different ways. We like what we have read in Ofcom's skeleton about it and I will address you on that in a moment. We do apprehend that at least two parties – I think O2 and T-Mobile – take a different view, they think the glidepath should begin in the existing year, in year two and go down from there to year four.

THE CHAIRMAN: Yes, that is why I said "if" it is the case that we find that we do not accept that argument and that we say that the – oh, I see, perhaps Miss Bacon? Your points are that it is not included in BT's Notice of Appeal and, in any event, there is no jurisdiction under the Statute to, as you see it, decide retrospectively what the TAC should have been in the elapsed period of the price control. Is there an additional point that even if you are wrong on those two points that nonetheless the glidepath ought to be adjusted to take a downturn from year three and remain where it is for years one or two, or not?

MISS BACON: Madam, it is not exactly a case that it should be adjusted. Our position is that even if we are wrong on question 1(a), which was the question of what is in BT's Notice of Appeal, whether they do challenge years one to three and, even if you then at some point after you have dealt with questions 1(b) and (c) get to the point of determining what Ofcom's reasoning applied to the case, where we are now would produce, there are a number of different outcomes. One is the outcome proposed – hypothetically, I should say, by Ofcom – that you should hypothetically put yourself back in the shoes of Ofcom in March, and say what would have happened if then you had applied its reasoning with the year 1 tweak to a different end point and then draw your graph in that way. There are at least two other solutions which would not involve putting yourself back in Ofcom's shoes, because we say actually that is all water under the bridge. So in applying Ofcom's reasoning to the new TAC you have to start from where we are now. That is our point, it is not a simple case of mechanistically applying Ofcom's reasoning because you have to take into account, as Ofcom did then, where it was then.

THE CHAIRMAN: Right, thank you.

MR. HOLMES: Madam, if it would assist I should just clarify Ofcom's position which is not quite as it was put by Miss Bacon. We do not suggest that the appropriate approach is to put yourself hypothetically in the shoes of Ofcom back at the beginning of the charge control period and work out what glidepath would have been fixed by Ofcom taking the changed end point into account. Our position is that BT's appeal challenges only the end point and that on a fair reading of BT's appeal one therefore makes the minimum adjustments necessary to the glidepath in the light of the scope of BT's appeal which involves only changing the end point. I have, madam, prepared a speaking note for today's hearing which contains a graphical illustration which may assist in clarifying the difference of position between the MNOs and BT in relation to the glidepath. Now might be a good moment to hand it ----

THE CHAIRMAN: Well, have the other parties seen the speaking note?

MR. HOLMES: No madam, but it is intended purely to capture my oral submissions for today.

THE CHAIRMAN: Well I think we will wait until we get to your submissions.

MR. HOLMES: Very good, madam.

THE CHAIRMAN: The third introductory matter is that counsel should be aware that the Tribunal is concerned about whether the outcome of this hearing is a result which benefits consumers and what part that objective should play in determining the scope of the powers of the different institutions involved. Finally, on a matter of logistics, we can sit today until about 10 to 5, and we hope to get through BT's submissions and get started on Ofcom's submissions, we understand that is the order in which it has been decided that we will proceed. We may take a break depending at what time you finish, Mr. Anderson, we may take a short break before starting on Ofcom, but we will see where we have got to.

Mr. Anderson, is it for you to start?

MR. ANDERSON: Thank you, madam. I think the first thing I have to do, on behalf of all of us is to thank the Tribunal for convening at such short notice. Nearly all the parties thought that you should convene, all of us I am sure are grateful that having decided to do so you managed to do so to this timescale.

You mentioned timings, madam, the arrangement we have come to between the parties is that I will address you for three hours to be divided between opening and reply. Ofcom after my opening for one and a half hours, and the MNOs between them for up to three hours – a generous allocation, but why not generous since it was fixed I think when H3G were still assumed to be an active participant in the hearing – they have indicated that they will not be.

On the basis that we have served a detailed skeleton argument, and will have quite a bit of material to reply to, I propose to open the case perhaps a little more shortly than the two hours that was pencilled in for it and then use the spare time, if I need it, in reply. I should say that those estimates do not allow any time for Mr. Sharpe, but he tells me that he may intervene if the spirit moves him and we certainly would not wish to discourage that.

It seems to me that the best way of maintaining some order in BT's submissions is to address the agreed questions in turn, and that is what I propose to do.

So starting with question 1(a), this is dealt with, as you will have seen at paras. 34 to 49 of our skeleton argument. I hope it is pretty clear from that why we are firmly of the belief that our challenge extended to the whole of the four year period and not just to the fourth year. You will recall from that passage of our skeleton argument that we have referred in particular to the terms of our Notice of Appeal itself, and we have referred to the fact that no-one could suggest any sensible reason why we would have restricted our appeal in the way that it is now suggested we did. T-Mobile suggests that it would have been illogical to do so. We have also indicated our reasons in the skeleton for considering that our belief was shared by the Tribunal, the Commission and at least some of the MNOs who now declare it to be clear that our belief was wrong. It is sometimes said that consistency is an overrated virtue. For reasons you will already appreciate, I would tend to agree. However, it is quite striking to see how views can change on a matter like this when the bandwagon begins to roll.

Still on 1(a), we note that Ofcom takes the same position, we believe, as BT, as can be seen from its skeleton argument at paras 6(a) and 12(a) to (c), which is to accept that our challenge is brought in respect of all four years of the period.

Finally, I am conscious that the Tribunal suggested in its letter of 18th November that the parties did not spend too much time on this issue. Really, for those reasons I propose to say nothing more about it now, and to come back if I need to in the light of what is said by others.

Questions 1(b) and (c) already adverted to by the Tribunal raise the trickier question of the glidepath approach. The argument against us goes something like this: Even if our challenge extended nominally to all four years of the period, we made no independent challenge to the parts of the decision that set the glidepath. That is certainly true. Therefore, we may get what we want in relation to Year 4, but in relation to the preceding years we are left with Ofcom's glidepath approach in the phrase used in the questions,

whatever that may mean. There are competing versions of what that glidepath approach means.

Now, in our skeleton argument we made two submissions on 1(b) and 1(c). Since serving that skeleton argument we have read the skeleton arguments of others - and, in particular, Ofcom. We have also considered the Tribunal's advice in its letter of 18th November that all parties should consider carefully which of the points raised in submissions before the Competition Commission they wish to pursue before the Tribunal. The result of that consideration, as you have seen, has been to modify our answer, at least to Question 1(c). Our position on that question is now closer to, although not quite identical to, that of Ofcom. If you have the note with you -- There has been some ribaldry about the use of the word 'refinement'. I have explained that it is taken from the world of precious metals where already valuable metals are refined still further to take them up to the full 28 carats. That is how I prefer to look at it.

MR. SCOTT: Mr. Anderson, remember that if you refine too far, the metals become soft.

(Laughter)

MR. ANDERSON: We have stopped, as it happens, just short of that point, sir, you will be pleased to hear. There have been references to crude oil, which I am not going to dignify with a response.

What we say is set out in tabular form there. 1(a) - of course, we still say, "Yes". Question 1(b) - we still say, "Yes, our Notice of Appeal does encompass substituted figures for periods other than Year 4 of the price control period arrived at by applying Ofcom's glidepath approach and for the whole of the four year period, we say.

Then in relation to 1(c), madam, you have already mentioned that our skeleton did not descend to a great deal of detail on how we put our case in relation to (c). What we have tried to do is to inject a little more clarity and certainty about what we are saying and to make it clear that we answer "Yes" to Question 1(c) only in one specific respect - that is, our Notice of Appeal encompasses substituted price control figures which depart from Ofcom's glidepath approach only to the extent that the figures produced by that approach may be reduced for future years to correct for past overpayment. So, that is the point we make there.

We also make, consistently with Ofcom's skeleton argument, an alternative submission which is that if such figures are not within the appeal and cannot be added by amendment, the question of whether to make these adjustments is a remedial question for Ofcom to consider when the decision is remitted to it. You will remember that that is how Ofcom put

their case. They say, well, if it is not within the appeal, and if there is a power to apply the future adjustment option, which Ofcom do not currently think there is, well, it is something that it is open for us to do because it is a remedial power, and we can do it when the matter is remitted to us. So, it was not within the appeal but it is still something that Ofcom can do. We embrace that argument in the alternative.

THE CHAIRMAN: I thought the point that Ofcom were making related to the question of whether it was a price control matter to decide whether to make the adjustment for the unelapsed period or not. As I understood it, Ofcom's stance is that it is not a price control matter because it is a remedial matter. But, you are saying that even if your appeal does not encompass this, because it is a remedial matter it is something that we could tell Ofcom to do anyway. But, where does that leave you on the question of whether it is a price control matter or not? Or, do you not take a position?

MR. ANDERSON: It seems to us that notionally there must be three possibilities, of which only two are realistic. One possibility is that it is raised in the appeal and also in the price control reference. So, it is properly before both the Competition Commission and the CAT. The second, we say rather unhappy, possibility (which it is difficult to see quite how it would arise) would be that it was raised in the appeal, and yet was not part of the price control reference. We have a little difficulty in seeing how that one could be. But, conceptually at least it is possible. The third is that it is not raised in the appeal at all, but, as Ofcom suggests - and I think the passages I was thinking of were the last sentence of 6(d) and in particular the last sentence of 13(d) of Ofcom's skeleton -- I have this at Tab 23. They say that further remedial issues arising as a result of the Competition Commission's determination are then for the Tribunal, insofar as they are properly raised in the appeal, or Ofcom once the decision is remitted. Then, looking back to 6(d) -- It is really all summarised in 6, is it not? They refer to these as remedial adjustments. They say at 6(c) that they are not specified price control matters and therefore not for the Competition Commission. They then say at (d) - and this is really what we rely on - that if they are properly raised in an appeal they are reserved to the Tribunal under s.195 and it is for the Tribunal to decide. Remedial questions not within the scope of the appeal would be for Ofcom to consider when the decision was remitted to it.

So, there are those three options: (1) it is in the appeal and it is also in the price control reference; (2) it is in the appeal only and it is for the Tribunal to decide; and (3) it is just a remedial question for Ofcom to consider. The reason for that is that it is a point which arises out of the length that the appeal took. The argument for it not being in the appeal

would be that it is not a complaint about what Ofcom originally said but is a consequence of the time that the appeal took, and for that reason Ofcom must have a remedial function, and it must have the power to consider it when it goes back to them, even if it has not been part of the appeal. So, it is really a consequence of the appeal, rather than a part of the appeal. That is how I understand the submission. It is made by Mr. Holmes, and it may be that I should simply leave him to develop it when his turn comes. That way, Mr. Holmes gets the hard questions on it. But, that is how we understand the submission. We do understand the logic of the submission. That is the refinement.

In terms of our skeleton, as we state on the same sheet, what this means is that we no longer rely on the first part of para.59. We do not rely on (a), (b) or (c) until you get down to the last four lines of (c) and then we put a capital "A" before "assuming", and we rely on that. We rely on (d) and (e) and then we delete 60 and 61 is replaced by the formulation that you see on the sheet.

So on questions 1(b) and (c) there are, so far as we are concerned, two matters which are still in dispute. The first is on question 1(b) and it is the question of what is Ofcom's glidepath approach. If it is possible to derive such an approach from the decision and if it is applied by analogy what is the approach, and we say it should be the approach that Ofcom has identified in its skeleton argument. In other words, the approach taken in MA3 and MA4, starting from the previous charge control level, and ending at the revised end point, whatever that might be.

We describe that in our skeleton argument as a "smooth glidepath" and the same phrase was used by the Tribunal in its letter of 18th November, and that is essentially what it is. I do not think I need take you back to the decision at this stage – I am very happy to do so if it would help refresh your memory. The most relevant parts are at tab 55 of the bundle, and I think it was suggested that we all keep a copy of the whole thing somewhere convenient beside us. The reference really is 9.179 and following, where Ofcom explains how it got to the glidepath that it did, and you see the graph at 9.180. We accept that O2, and Orange in particular, have pointed out and, indeed, as Miss Bacon recalled this morning, it was not entirely smooth in practice really for two reasons, for the 2G/3G operators, the year one figure was adjusted to compensate for the absence of the 60 day notice period and one sees that from para. 9.182 of the decision.

In the case of H3G it was not smooth to the extent that there was a 20 per cent drop at the beginning between year nought and year one, a 20 per cent drop between the average termination rate in force in March of 07 and the first year of the glidepath. But those, as it

seems to us are details, and details that could be easily replicated in any future setting of the controls.

The principal alternative approach that appears to be put against us is developed or described in T-Mobile's skeleton at para. 12.1.

THE CHAIRMAN: So your case, putting aside the adjustment because of the elapsed period, is you take the reasoning in 9.179 onwards, nobody has challenged that in the appeal, therefore whatever new number is arrived at for year four you apply those same principles to it and that gives you your new glidepath from the start of year one through the whole period?

MR. ANDERSON: Yes, we do not say that because it is the least generous solution – I thought there might have been a hint of that in something that was said earlier; we say that because that is what was done and we quite accept that we did not bring an appeal specifically directed to the glidepath mechanism. I should say that H3G also had a 60 day notice period, which I had forgotten.

THE CHAIRMAN: Yes.

MR. ANDERSON: In relation to T-Mobile's skeleton argument, their case on glidepath is set out at para.12 and that says:

> "In answer to the Tribunal's first question raised in its letter of 18 November, it cannot properly be said that BT's challenge to the year 4 TAC necessarily implies a challenge to the rate set for years 1, 2, and 3 'given that those rates are derived by applying a smooth glidepath from the existing rate to the TAC set for Year 4'."

So it is addressing at this stage question 1(a) but T-Mobile take as their starting point the Tribunal's own letter and, in particular, the phrase "the existing rate". If you look down to 12.1 they construe that letter and say that:

> "T-Mobile's case is that the application, today, of the glidepath to a revised Year 4 TAC (albeit a hypothetical exercise) would require rates to be smoothed from their existing (Year 2) level to the Year 4 TAC (we note in this regard that the Tribunal also uses the word 'existing' in its question)."

Then they go on to accept that not all parties accept T-Mobile's case on this.

As to that two points: first, we can think of no reason why the smoothing should begin in year two. It is said that the Tribunal had this in mind when it referred in its letter of 18th November to the existing rate, well it is not for me to say what was in the Tribunal's mind, but we read that letter as referring to the pre-existing rate effectively, the rate that existed before the charge control was set.

Secondly, we do not agree that in the phraseology used, I think both by T-Mobile and by O2, who make a similar point, this is the solution which does least harm to Ofcom's reasoning in the decision, (T-Mobile para.15) or would most closely conform to Ofcom's existing logic, that is the way O2 put it at, I think, 10(b). Indeed, we would go further, we would say that T-Mobile's solution and O2's solution actually departs from Ofcom's reasoning in that the glidepath which it has in mind not only has a different end point but performs a dog leg half way along its length, so we have difficulty with that submission and we prefer the way that it is developed by Ofcom.

The second matter in dispute under 1(b) and 1(c), looking at them together, is whether the future adjustment option as it has been called can be said to fall within our Notice of Appeal. The parties have used this shorthand, the Tribunal will well understand it and be well familiar with it by now. That of course means the option whereby one might reduce charges for the future so as to correct for an overcharge in the past, and the question is does that fall within Notice of Appeal or could it be read as falling within our Notice of Appeal? We have referred to this in the surviving part of 59(e) of our skeleton argument. Our submission was previously that one could read more than this into our Notice of Appeal. It is now limited to the future adjustment option and what we say about that is that it falls within the scope of our request for conditions MA3 and MA4 to be substituted by equivalent paragraphs containing conditions set at a level which is appropriate for fulfilling the purposes of s.88(1)(b). I will come on later in answer to question 2 about how we reconcile s.88 with the future adjustment option.

Further, or in the alternative, we say they fall within the scope of the request for such further or other findings or such other relief as the Tribunal or Competition Commission shall consider necessary or appropriate, para.190.3 of our amended Notice of Appeal. As we say there, to have expected BT to provide more detail in relation to an option which only becomes necessary because of the time that an appeal has taken, would have been unrealistic. It is precisely for a case such as that in which one cannot know until the end of the case exactly what sort of relief you are going to need that this standard phrase: "further or other findings, or such other relief" comes into its own, and has real meaning. I quite accept it should not be used as a lazy way of pleading but in circumstances where the problem has only arisen in a sense because of the time the appeal has occupied one can well understand why words such as that should be sufficient. The reason for general words like that is precisely to allow problems such as this to be picked up. That point is made at para.59 of our skeleton argument.

If that is not the case, and if our appeal is not sufficiently broad to encompass that limited point - the future adjustment option - we put the parties on notice at para. 47 of our skeleton argument that BT reserves the right to make a clarificatory application to re-amend its Notice of Appeal to address the pleading points taken by the MNOs. That was a course which we said we did not believe was needed, but which, if necessary, we take it at the hearing today with that skeleton argument of last week serving as due notice to the parties. Our third submission on that is that the pleading point is secondary anyway. This is a point which was traversed in introduction. As Ofcom accepts at 6(d), remedial questions not within the scope of the appeal would be for Ofcom to consider when the decision was remitted to it.

THE CHAIRMAN: Can you just explain a bit what you mean by that? When one looks at s.195 of the Communications Act we have to dispose of the appeal and we must include in our decision a decision as to what, if any, is the appropriate action for the decision-maker to take. Then we remit it to them with such directions as we consider appropriate for giving effect to our decision.

MR. ANDERSON: Yes.

THE CHAIRMAN: Ofcom must then comply with those directions.

MR. ANDERSON: Yes.

THE CHAIRMAN: Now, when you say, "Well, it's a matter for Ofcom to deal with at the remedial stage once it is remitted", I am not sure what you are saying then about whether anything needs to be done by us in giving them directions, or if you are saying that even if we say nothing about this and do not give them directions and therefore presumably do not consider that such direction is appropriate for giving effect to our decision, are they then able off their own bat, as it were, to make this adjustment?

MR. ANDERSON: Well, s.195 applies to the appeal process. It applies to matters that are within the appeal. I was delighted to hear the way that you introduced it, madam, because that is the primary way we put our case - that this is within our appeal and that that way it is possible for a direction to be issued by the Tribunal and that Ofcom would then have to give effect to it. In my alternative submission, if it is not in the appeal, and if we cannot amend to introduce it to our appeal, s.195 -- It falls, in a sense, outside s.195 as well because it would fall outside -- The appeal would be brought against what happened in March 2007. The Tribunal would decide that appeal on its merits. As part of that decision on the appeal against what happened in March 2007 it would include a decision as to what was the appropriate action for Ofcom to take.

If the future adjustment option formed no part of the appeal, then it would fall outside that mechanism and it would not be possible for you to make a decision under s.195 that directed them to employ the future adjustment option.

However, in your answer to Question 2(b) you will still presumably determine whether the future adjustment option is indeed a lawful option and whether it exists. That would inevitably be of assistance to Ofcom because it cannot exercise a discretion unless it knows whether it has the power or not. It currently seems to believe that it does not. So, that is one respect in which what you say at the conclusion of this hearing will be highly relevant. It may also be that in the course of any ruling that you give, you make some comments of a more general nature relating to the appropriateness of the future adjustment option and, indeed, the re-determination option which we identified as a possible alternative. But, we accept that if it falls outside the appeal, then it falls outside the decision-making power in s.195. So, if that alternative submission was right, then you would not be exercising your s.195 power to direct Ofcom.

THE CHAIRMAN: But you would still maintain that Ofcom in re-taking the decision would have power to make a future adjustment?

MR. ANDERSON: Yes. We accept that one would have to be very careful about this because if one is going to accept such a category of remedial questions it would have to be very narrowly construed. It certainly could not be a Trojan horse for the introduction of substantive issues that could have been the subject of the appeal, but were not the subject of the appeal. I was not there, but I understand it was a submission of H3G last Friday before the Competition Commission that the setting of a price control by Ofcom, following the determination of an appeal, would have to take account of all matters - even those which have been ruled inadmissible in the appeal by the Tribunal - such as, for example, the effect of the on-net and off-net points on H3G's alleged traffic imbalance. You will understand that if I am being careful it is because the last thing I want to do is to encourage you, as a Tribunal, to say anything that would be sympathetic to such an approach.

However, the future adjustment option - and I am still, of course, in my alternative submission here - is perhaps in a different category. We would accept that if it does not fall within the scope of our appeal, it is nonetheless open to Ofcom to deal with it for this reason: that the future adjustment option arises as a consequence of the time taken by the appeal.

THE CHAIRMAN: All I am concerned about at the moment is that you are not saying that if it falls outside your appeal because it is a remedial matter, we, the Tribunal, in disposing of the appeal, have a power to direct Ofcom to make that adjustment.

MR. ANDERSON: No.

THE CHAIRMAN: You are saying that they may or may not have a power to do it outside the scope of this appeal and that is not a matter for this Tribunal to determine.

MR. ANDERSON: Yes. We say that they have the power and what this Tribunal can determine is whether the future adjustment option is possible. That is the Question 2(b) answer.

THE CHAIRMAN: I see - whether they have that power. We have usually regarded the question of what Ofcom's powers are as relevant because they constitute a limit on what we can direct them to do. But, you are then regarding them as relevant on this issue independently of that inter-relationship between our powers and their powers.

MR. ANDERSON: So, we would like you to say that the future adjustment option is possible and it is possible for Ofcom to make an order to that effect in the exercise of its remedial jurisdiction after the termination of the appeal.

MR. SCOTT: Mr. Anderson, if between the parties - and let us not worry for a moment about quite how this decision is reached - it was felt that the future adjustment option was not possible, but if in the exercise of their powers the Competition Commission were to provide fairly comprehensive guidance at the end of the process not only in relation to the final figures, but in relation to how they would do the calculations in respect of their understanding of the unchallenged principles applied by Ofcom to the glidepath, so that there was reported to us by the Competition Commission what the Competition Commission would have seen as the correct way of applying the principles that they have adjusted together with the principles that have not been challenged -- Okay? So that Ofcom then had the duty imposed on them by us of adjusting the original decision in accordance with that guidance whilst leaving the remainder of MA3 and MA4 untouched -- Okay? Then, what do you say to us is the effect for BT of MA3.6, and to what extent would that provide an equivalent, if you like, of the future adjustment option, but one which fell utterly within the decision as it would then be re-taken? Have I made myself clear?

MR. ANDERSON: That is a very clear question. I would like to deal with MA3.6 in the context of Question 2. I would like to try and answer the question now. I suspect it might take me a little bit of time, and I fear I might get so confused that I did not then go back to the right place in my submissions. Could you wait a few minutes for an answer?

MR. SCOTT: Certainly. However, I think it is worthwhile bearing in mind that from your point of view you may achieve a similar result, but one which falls within the terms of Ofcom's existing decision in relation to parts of it which have not been challenged. We will come to it.

MR. ANDERSON: I will explain, if I may, under Question 2, how we think a re-determination of that kind might come about. We put our cards on the table, rather, in relation to that. I am hoping that we will get some reaction - not only from the Tribunal, but perhaps from the other parties. But, let me try and explain at that stage how we see it.

I can, I think, now start on Question 2. The heart of the case, of course, is Question 2. Only a negative answer to Question 1(a), as it seems to us, would render Question 2 irrelevant. The problem to which Question 2 - and, indeed, Questions 3 and 4 also - are directed is really this, as the Tribunal appreciates: Let us assume that the Competition Commission considers the TAC to have been excessive not only in Year 4 but in previous years as well. That is the starting point. It does not matter for that purpose how it gets there - whether it applies the Ofcom glidepath approach or whether it applies some other approach to the Year 1 to 3 figures, or even just the Year 3 figure such as that suggested by T-Mobile. What matters is that figures for years other than Year 4 are found to have been too high. Then let us assume also that Ofcom is not in a position to revise its decision until Years 1 and 2 have expired, and most probably part of Year 3 as well.

At the moment of revision or re-decision, or re-determination everyone, I think, agrees that Ofcom can implement a reduced figure for Year 4. That, at least, is not at all in issue. We find it difficult to see how it could not also implement a revised figure for the remainder of Year 3 - the unexpired portion of Year 3, the portion that would still lie in the future at the date of the re-determination. There was, in one of the skeleton arguments before the Competition Commission a suggestion that it could not. If you got just a few days into Year 3, that meant you were not in a position to set a charge for the remainder of Year 3. I do not think that suggestion is pursued in skeleton arguments before the Tribunal and I will not say anything more about it here - unless, of course, it is raised.

So, the real question is: What, if anything, can be done about the past - Year 1, Year 2, and the expired portion of Year 3? The questions were organised as they were, looking first at the powers of Ofcom, because everyone agrees that Ofcom cannot be directed to do anything that it does not have power to do - perhaps an obvious proposition, and if it is not obvious there is always s.195(5) which makes that clear. We say that Ofcom has two relevant powers - the re-determination option and the future adjustment option. The

question of which of them should be exercised is a secondary one, although we do have a clear preference which is for the second of them - the future adjustment option. The immediate question for the Tribunal, as it is expressed in Question 2, is whether either or both of those powers exist.

I will start with Question 2(a) which deals with the situation which Mr. Scott just put to me - Ofcom's power to set revised charges applicable to the past. Ofcom identified this as an issue of some importance to them.

THE CHAIRMAN: Is that the re-determination option, or is that both of those?

MR. ANDERSON: It is the re-determination option, because that is the one that involves setting revised charges in relation to a period that is already in the past. The future adjustment option involves setting charges only for the future, but reducing those charges in order to reflect the overpayment in the past. They are terribly confusing. Shall I try again?

THE CHAIRMAN: No. No.

MR. ANDERSON: There is a distinction.

THE CHAIRMAN: So, the future adjustment -- So, if one adopted the future adjustment one, are you saying then that that does not involve Ofcom saying what the charges ought to have been in Years 1 and 2? But, it cannot make the future adjustment without knowing what those ought to have been.

MR. ANDERSON: Both these options require us to know what the charges should have been throughout the period. That is one reason we are very keen to know, after all this work the Competition Commission have been doing, what those charges are. That is absolutely right.

The difference between them is that the re-determination option involves Ofcom setting a charge in respect of a period already in the past. That has been described in some quarters as retrospective, which is a fair description, but it is a dangerous word, as you know, because it has so many meanings. But, it involves setting a charge in relation to a period already past. The future adjustment option - they are not very snappy names - does not involve any "retrospective action". It involves setting a charge only for the future, but reducing it so as to make allowance for the extent to which it has been found to have been excessive in the past. That is the difference.

I am starting on 2(a), which is the re-determination option. I am just a little bit in the dark about this. Things will become clearer as the day goes on - no doubt indeed as the afternoon goes on. However, at the plenary session on 21st October (and we refer to this in our skeleton) Ofcom said that that while they did not yet have a view on their own powers to set charges for the past, they were carefully considering it. The Competition Commission

asked them a written question about that the following day, on 22nd October. What they asked them was whether in any sense there can be retrospective changes to price controls. However, in their response of 11th November (which I do not ask you to turn up, but which is at Tab 9 of your bundle), Ofcom did not answer that question. Their next opportunity came in the skeleton argument before this Tribunal. However, once again, they do not answer the question - they just say it is irrelevant. If you look at Annex A, where they set out their answers to the questions, that is all they say about Question 2(a) - that it is irrelevant. I do not say that by way of criticism, but simply to demonstrate that we do not as yet know whether there is a difference of opinion between ourselves and the Respondent as regards Ofcom's powers to set charges in relation to the past.

We have one indication that there may be no distinction -- no difference between us which we refer to, I am afraid, slightly out of order, at para. 92 of our skeleton argument. This paragraph has slipped into the wrong part of the skeleton. It really ought to be at about para. 78. You may want to re-home it or write something in the margin to that effect. It is a response in the letter of 18th September to a question that Ofcom were asked during a bilateral as to whether any amendments to H3G's charge control could be retrospective in the sense of covering the whole of the charge period from April 2007. What they said there was that,

> "The Commission has the power to recommend that any charge changes apply as from the date of the Notification in the MCT Statement. Thus, the period from when any changes would take effect is at the discretion of the Competition Commission albeit the Competition Commission cannot go back further than 1st April, 2007".

So, there is a suggestion there that the power to apply changes could be backdated to the start of the charge control period, but whether that is maintained, we do not know.

What Ofcom do say is that Question 2(a) is not relevant. So, I would like to deal firstly with the question of why Question 2(a) is relevant. That will mean looking in a little more detail at what the re-determination option actually involves. Secondly, I would like to look at why the answer to Question 2(a) is, "Yes".

If I can start with the relevance, that is dealt with at para. 65 of our own skeleton argument. Of course, we would like to have the Competition Commission's guidance as to what the rates should have been in each year. Ofcom accepts that the Competition Commission is entitled to give such guidance (para. 26 of its skeleton). Indeed, T-Mobile suggests that the Competition Commission is entitled to give such guidance (para. 25 of T-Mobile's

skeleton). So, such guidance is likely, indeed, to be the essential starting point for the exercise of at least the future adjustment option. Why, then, do we want more? Why do we want a determination by Ofcom? That is because it gives us something else - it gives us, or may give us, a contractual remedy against those to whom we pay the charge.

I do not think the Standard Interconnect Agreement is in the bundle. If it were, it would probably occupy about ten of the bundles. What we did was to set out the provisions that are relevant at Appendix 1 to our skeleton argument - the two pages right at the end of our skeleton argument. I think we have also produced para.13 in a clip of just two or three pages which we have here if anybody wants it. We are not relying on anything other than what is in Appendix 1. The simplest way to get hold of it might be to look quickly through that.

THE CHAIRMAN: What is the distinction then that is being drawn between the Competition Commission declaring what the rates should have been - which I assume means the same thing as giving guidance as to what the rates should have been ----

MR. ANDERSON: Yes.

THE CHAIRMAN: -- and determining what the rates should have been. What is the difference legally between those two things as far as the Commission is concerned as regards how that affects what the Tribunal must do when the matter comes back to us?

MR. ANDERSON: I will answer that question. But, the first point to make is that when I am talking about the re-determination option I am talking about a re-determination by Ofcom - not by the Competition Commission. It is actually a word that we take from the Standard Interconnect Agreement. It is a word that they use. That was the origin of the phrase - the re-determination option. So, the distinction, as we see it, is between a very morally satisfying report from the Competition Commission saying, "It seems to us that what they should have done is X" - and that may, or may not, have some utility - and something more than that - determination of the issue by the Competition Commission leading to a direction by the Tribunal to Ofcom to make a re-determination and Ofcom's reaction to that is, "Well, the question is irrelevant. We're not even going to answer it because it doesn't make any difference". We are saying "Well, actually, it does make a difference. There is a good reason why we would like to have a re-determination by Ofcom. It is because it triggers what we believe may be another remedy. That is the remedy that you get in the Standard Interconnect Agreement.

I would like to show you only three small paragraphs of that. I hope that you will find that they are relevant not only to the question of relevance, but also to the substantive answer to

Question 2(a): Is there a power, or at least has there been understood to be a power, to set these charges retrospectively or in respect of a past period?

MR. SCOTT: Mr. Anderson, just to be clear, we have not gone to 13 yet, but am I right in thinking that such a re-determination could arise by dispute resolution in the past and that what you are saying is that it might arise by re-determination of a price control?

MR. ANDERSON: Yes. (After a pause): The bits I am going to show you relate to a legal challenge to something set by Ofcom. As you know, there are separate provisions relating to dispute resolution. I would like to say a word about those later.

So, the Standard Interconnect Agreement. These provisions set out in Appendix 1 to our skeleton argument make specific provision for how charges are to be varied following a legal challenge. It is just a couple of pages at the end of the skeleton. I am not sure whether they have been separated from your copy of the skeleton argument, or not. Do you have a couple of pages? What I would like to try and do by reference to those pages is to map para. 13 of the SIA on to what has happened in this case.

Para. 13.11 is set out on the first page.

> "As soon as reasonably practicable following an order, direction, determination, requirement or consent (for the purposes of this para. 13 a 'determination' which expression includes a re-determination referred to in para. 13.12) by Ofcom of a charge (or the means of calculating that charge) for an Operator service or facility, BT shall make any necessary alterations to the Carrier Price List so that it accords with such determination".

Ofcom's original decision, the MCT statement in March 2007 was a determination within the meaning of para.13.11 and BT altered its carrier price list in order to accord with that determination. So 13.11 was applied.

Then, of course, there was an appeal against the determination and that is the subject matter of para.13.12 which, as you see provides:

> "If a determination referred to in para.13.11 is subject to a legal challenge the parties shall without prejudice treat the determination as valid until the conclusion of the legal proceedings unless the court otherwise directs."

Well we have no difficulty with that.

"If the court finds the determination to be unlawful then the parties agree to revert to the charges payable immediately prior to such determination being made and BT shall make any necessary alterations to the carrier price list."

So that is the sentence that comes in to fill what would otherwise be the legal vacuum, because of course the effect of an appeal is to find the determination to be unlawful from the start and not just from the moment of the finding.

> "As soon as reasonably practicable following a re-determination by Ofcom, as a result of a legal challenge of a charge BT shall make any necessary alterations to the carrier price list so that it accords with such re-determination."

So that is where the phrase "re-determination" option comes from and the remedy that flows from that requires not just a statement by the Competition Commission as to what the rates should have been, but a re-determination. We appear to need a re-determination in order to assert our contractual remedy against the operators.

THE CHAIRMAN: So are you saying that if there is a re-determination then according to the SIA you re-set the carrier price list as regards past charges and there is then a reconciliation by the parties as to what has been paid under the carrier price list as it applied until the re-determination or up until the appeal, and so you can retrospectively adjust the carrier price list prices?

MR. ANDERSON: Yes, you do not get that, of course from 13.11 or 13.12 they are completely neutral on the subject. What you get that from is 13.13, and perhaps I could go on to that ----

MR. SCOTT: Pausing there, what it looks to me is going to happen, absent any interim measures, is that once we have received the report from the Competition Commission and remit, you appear to go back to a situation in March 2007, at the end of the TRD, and then you wait until the conclusion of the re-determination and then do it all again. This strikes me as going to be an interesting ----

THE CHAIRMAN: Labour intensive!

MR. SCOTT: -- labour intensive process. So you may want some interim measures between you.

MR. ANDERSON: That may be one interpretation, I am certainly not going to commit to it, but the point on interim measures is well made. It is a cumbersome procedure, one can see why they did it, because lawyers, like nature, abhor a vacuum, and if the thing had been annulled what do you do pending the re-determination and the amendment to the carrier price list. My point really is that once the price list has been amended, well that is your remedy, that is your remedy against the operators with whom one deals, but in order to get that far it looks as though one needs the re-determination.

PROFESSOR BAIN: I wonder if I could pursue this a little, Mr. Anderson? This, as I understand it, gives you a legal right or obligation to re-determine. Once Ofcom has determined that

the rates should have been different then your SIA gives you certain entitlements or obligations. Would they still apply if as well as re-determining the prices there was some future adjustment made, because then you could recover twice over?

MR. ANDERSON: We certainly do not want to recover anything twice over.

PROFESSOR BAIN: I am not asking whether you want to; I am asking about the legal interrelationship between these two things. Let me take this one stage further. From the point of view of the consumer with whom I am sometimes concerned, the future adjustment option means that competition between MNOs and FNOs, everybody in the industry, will mean that the consumer actually benefits.

MR. ANDERSON: Yes.

PROFESSOR BAIN: If you take the re-determination option, the fixed network operators benefit, there may be a little bit of redistribution among the MNOs, and the good consumer gets absolutely nothing. From the point of view of the consumer, the future adjustment option is much superior, that is the only way of ensuring that the consumer gets the end benefits of this change for the elapsed period of time.

If, at the same time as doing that the FNOs are going to end up with legal rights to recover the money in other ways I have a problem. Now, can you tell me why I should not have a problem?

MR. ANDERSON: First, we agree with the view you have provisionally expressed, that the future adjustment option is much preferable to the re-determination option. It is our preferred option as well and for a number of reasons, not only that you have suggested but also the fact that it means that the appeal can be decided within the compass of the appeal and without the need for opening up yet another front involving the law of contract, possibly people suggesting that there has been references in some of the argument for the parties to passing on and matters of that kind, things which could be very time consuming to resolve, so it is certainly our preference as well. In a sense the Tribunal is in the fortunate position of being asked only about jurisdiction. It is being asked can Ofcom use the future adjustment option, and/or can it use the re-determination option? If the past is sufficiently taken care of by the future adjustment, then plainly there would be no need for the re-determination to relate to a past period.

PROFESSOR BAIN: But does your SIA not imply that you must go through this process?

MR. ANDERSON: Yes, but it does not imply that the re-determination must have retrospective effect. It certainly implies, and this is my next point, that it may have retrospective effect, one gets that from 13.13, but so long as you have taken care of the past by one route, and we

would agree with you that the route to go if it is available is the future adjustment option, then it is not necessary to make a re-determination that applies to the past itself.

THE CHAIRMAN: So then you would be looking at a glidepath which had a dog's leg kink in it because in order to avoid the application of these provisions you would have to say that in fact the years one and two figures were correct, so there is no re-determination of those, but then the future adjustment reduces the figures for the future so that there would be no question of there having any retrospective readjustments and repayments, and reconciliations for the past, so then you are looking at a different pattern for the charges over the four year period?

MR. ANDERSON: Yes, and if the future adjustment option could be applied, then question 2(a) at least from our point of view would be irrelevant because we would not be asking for it, we would say that the future adjustment option is all we need, tell us what the depressed rate should be for years 3 and 4 and Ofcom can then make that determination for the unexpired period in the normal way, BT can amend its carrier price list and we all carry on as before, so it is not necessary then to get into the complication of something with retrospective effect. But I am at the moment addressing question 2(a) at the level of jurisdiction, which is: does this power exist?

THE CHAIRMAN: Yes.

MR. ANDERSON: And having dealt with relevance in a sense I come on to whether the power exists. It is at paras. 66 to 78 of our skeleton that we argue for a positive answer for question 2(a). But before I come to the arguments set out there, and before, I hope, you have turned away from appendix 1, may I set out one additional point based on appendix 1, and that is based on the paragraph we have not looked at yet, which is para.13.13, and you will see that that provides:

> "If any charge or the means of calculating that charge, for an operator service or facility has retrospective effect for whatever reason, then the operator shall, as soon as reasonably practicable, adjust and recalculate the charges in respect of such service or facility and calculate the interest for any sum overpaid or underpaid."

Very much, madam, as you were suggesting to me that it worked. All I need take from that for present purposes is that the SIA at least plainly contemplates and therefore the parties to the SIA must be taken to have contemplated, that there is power in Ofcom to determine a charge with retrospective effect, it is plainly something that they thought was a possibility and that is exactly what question 2(a) asks – is it a possibility or is it not?

MR. SCOTT: Just one small point about status of the SIA. The SIA, although it is a collection of bilateral contracts, is also as I recall part of the regulatory framework which I imagine you would say Ofcom (or its predecessor) had its hand in?

MR. ANDERSON: Yes, you are absolutely right to pull me up on that, and I hope I did not go too far with my submission. We know of course that one cannot interpret the scope of a statute by reference to a private party's contract that may be made. What one can do, however, is interpret a statute in the context of the world in which it is to be applied, and in a field such as this where you have something as all pervasive as the SIA it does, in our submission, make sense to look at the SIA and see if there is a provision which is consistent and, indeed, can only be consistent with the statutory power for which we contend. We did not make this point in 66 to 78 where we set out our legal arguments for the power, but it is, we suggest, something which is relevant and something that can be taken into account as part of the factual matrix.

THE CHAIRMAN: So is it the case then that on your arguments the future adjustment option and the re-determination of years 1 and 2 are alternatives that, if you go for the future adjustment option then you cannot have a result which re-determines – whatever that means – years 1 and 2 of the price control?

MR. ANDERSON: It certainly should not be necessary, if the future adjustment is done properly then the past is taken care of and one does not need to legislate retrospectively or impose a charge retrospectively for the SIA.

66 to 78, they are set out in writing and time amazingly is already pressing on so I do not want to deal with them in any detail, but what we have done there is point to the absence of any restriction in the statutory powers that govern Ofcom when it is setting conditions and we refer in particular to s.45(10)(e). We refer to s.87(9)(a) "such price controls as Ofcom may direct", 87(9)(d) "such directions given by Ofcom as they may consider appropriate". At para.71 we deal with the section 88 criteria, which I will come back to. Our point on these sections being that they are very broad and there is no sign of any restriction in them in relation to the imposition of conditions relating to past periods.

At 72 to 77 we deal with the main substantive argument that is made against us on question 2(a), and in the lead on this one, I think it is fair to say, is T-Mobile. It is an argument based on the fact that the SMP conditions issued under s.87 are designed to operate *ex ante* and they say since we are in an *ex ante* world, how can one possibly issue a condition even by way of a re-determination that seeks to go back into the past. T-Mobile produced detailed argument on this point in its submissions lodged promptly after the last plenary on 31st

October. Their skeleton argument very largely incorporates those points with which we have dealt in our own skeleton because we dealt with 31st October. No doubt Mr. Pickford has been busy devising answers to our answers, so rather than spend a lot of time on material that you already have in writing, may I just summarise what it is that we say about this *ex ante* argument.

First, what do we mean when we say that SMP controls are *ex ante* regulation? We mean that they are regulation designed to govern the position after a finding of SMP, as distinct from, say, measures designed to punish for a past abuse, it is a distinction which T-Mobile correctly draws at para s.16.1 of its skeleton argument. So what is the status of a successful appeal against an *ex ante* control which varies the terms of that control? We say an appeal by its very nature requires you to look back to the time when a measure was adopted and correct it. We used to say when we were allowed to use Latin that an appeal operates *ex tunc*, rather than *ex nunc* – "from then" rather than "from now". You go back to see what the regulator should have done and you correct it. Now, such an appeal does not transform the nature of the exercise into an exercise in punishment. It does not make it into an Article 82 case, it does not apply to a period prior to a finding of SMP. It remains a case on *ex ante* controls for SMP, all the appeal does is it substitutes lawful controls – lawful controls – for controls which have turned out to be unlawful, but the controls are in both cases *ex ante*, you are dealing with *ex ante* controls. So it is in the nature of an appeal to look back, you do not, by looking back on appeal, transform the whole nature of the regime into something different.

We test that proposition in our own skeleton argument at 75 and 76 by saying "What if the boot was on the other foot?"

H3G, as you well know, have an appeal before the Court of Appeal in relation to SMP. Suppose they succeed in that appeal and establish that they do not after all have SMP, what would the result be? It would not be that as of the date of that appeal no further limitation could apply to the charges levied by H3G. The charge control would have to be set aside from the date on which it was levied *ex tunc* in the normal way.

THE CHAIRMAN: And what would happen then about all the money that they have lost in the interim by not being able to charge what they wanted to charge over that period?

MR. ANDERSON: Madam, that is a question on which I am really not going to commit myself.

(Laughter)

THE CHAIRMAN: Well, let us try and put it more hypothetically! (Laughter)

MISS ROSE: Madam, we are delighted BT are offering us our money back and we have taken due note of that!

THE CHAIRMAN: Yes, because this is a point that concerns me, which is a risk of the tail wagging the dog here, the tail being the remaining years of price control providing a more or less convenient mechanism for making the adjustment, but knowing that there can be all sorts of SMP conditions set under s.45 and all sorts of appeals against them being set or not being set. It is difficult to see what mechanism there is for revisiting the past in relation to the generality of appeals, each of which may find that the SMP condition should not have been imposed, or was imposed in a defective way and each of which results in one party, one person in the industry feeling that they have lost out because of that. Now, my concern is that we ought to have a power to address that or else we do not have a power to address that, but by focusing on the price control are we at risk of jumping over that question to considering whether, well okay in this case we have got a mechanism to do it, and therefore we should have the power to do it, rather than looking at the first question in giving directions to Ofcom to give effect to the decision, does that include adjusting for the past. If H3G succeed in their appeal then they will have arguably been kept out of money that they might otherwise have made. If you had appealed against the failure to regulate H3G in the 2004 statement and won, then you might have overpaid over that period. There are all sorts of ways in which an appeal against SMP conditions may lead to winners and losers.

MR. ANDERSON: Yes. I am not going to offer – certainly not at this stage – a general theory on how redress is to be effected, if indeed redress is to be effected at all. Could I just make two points, the first is, and I have not mentioned it yet, I will come on to it at the end, we of course have article 4(1) of the Framework Directive and the duty to have an effective appeal mechanism, as effective as may be, as one of the cases said. So one has to work with what one has in order to achieve the most effective result one can.

The second point I would make is that the point I am trying to make here is quite a narrow one. I am simply responding to a submission made principally by T-Mobile that because the whole SMP regime operates *ex ante* therefore the normal effects of an appeal are somehow different because one is not allowed to look back because that is not being *ex ante*, and we say that that is to misunderstand the nature of an appeal and what an appeal is all about and that my position does no violence at all to the notion of *ex ante* because what we are not doing is suggesting that anyone goes back and gets punished for something that happened, let alone punished before a finding of SMP.

Madam, if any further thoughts occur I will let you have them, but I think that is all I would like to say for now if that is all right.

So the H3G appeal analogy, we say, applies to us as well. If we are right, the charge control should have been set in year 1 not at X but at Y, then the correct remedy would be to start the price control at Y. There is nothing in the statutory powers to prevent that result and if there is any doubt about that it is, we say, relevant that all parties to the SIA appear to have been comfortable with the idea of charges being set, at least in some circumstances, with retrospective effect.

We do not need to consider whether there are situations other than an appeal in which that is so, what is certain in our submission is that charges may be substituted for the past as well as for the future when those past charges have been the subject of a successful appeal.

I would like to go on now to question 2(b) which concerns Ofcom's power or otherwise to exercise the future adjustment option. We deal with this at paras. 79 to 99 of our skeleton argument, but before coming to the detail of the argument may I say a word about the word "compensate" which is used in questions 2(b), 3(b) and 4(b), and which I recall, although I do not have a copy of it here, is the subject of a footnote to question 2. Perhaps we should have avoided the word, because it struck me this morning that it is a bit of weasel word. It is one of these words that has two senses – "compensate" in the sense of giving money to people who are out of pocket is one sense of the word; and "compensate" in the sense of adjust or correct in the other, the mechanical sense of the word. We are intending to focus here on the latter sense of the word, compensating for an error rather than paying compensation or anything of that kind. That is why, when discussing this option, we have stuck with the phrase "future adjustment option" which I think was originally coined by Ofcom rather than the phrase used in its skeleton, they have a version 2.0 which is "prospective compensation mechanism" – we do not like that very much, we think "compensation" might give off mixed signals, so that is just really a warning about that word.

No doubt an adjustment of this sort will also have the capacity to reimburse payers in the sense of reducing charges to those who have paid too much, and one of the beauties of this mechanism (the future adjustment option) is that you do not have to get into a debate about who ended up bearing the excessive cost. Whoever it was will, at least assuming relatively constant market shares, that person will benefit from lower charges just as it was harmed by higher charges. And, as Professor Bain said, the whole theory of the thing is that the

benefits trickle down to consumers where they belong, that is the way that the market works.

The re-adjustment may or may not be exact, but it is as good a system, we suggest, as could practically be devised and it is certainly a good deal fairer than the solution put forward by the MNOs, which is to leave the loss where it lies, or indeed leave the profit where it lies – in their pockets – in respect of the entire period prior to the re-determination.

The statutory position on 2(b) is really very much the same as the statutory position on 2(a). The starting point is again sections 45, 87, and 88, and we make in our skeleton 83 and following the same point that we made on question 2(a) that Ofcom's powers are expressed in a particularly broad manner. There is nothing here to preclude Ofcom from setting a control in respect of one year in order to correct for some distortion irregularity or injustice in another year.

In its skeleton argument Ofcom, at paras. 18 to 20 makes one objection and I believe one objection only, to the powers that we attribute to Ofcom in relation to the future adjustment option. It is the idea that the exercise of those powers would have what Ofcom call "a compensatory purpose" with, and I quote again from their skeleton "a remedial goal separate and distinct from the s.88 purposes" which of course are sufficiency, sustainable competition and greatest possible benefit to end users.

I am perhaps not in the strongest position to make submissions on consistency but I should just note that this is not what Ofcom was saying a little while ago, and H3G and we both refer to the example set out in para.91 of our skeleton, which is I think worth a look because it is in a way a more radical example than anything we are asking for. This was a submission to the Competition Commission on price control issues in which Ofcom said:

> "In the event that inaccurate traffic forecasts were to ultimately lead to under-recovery of costs during the control period, Ofcom believes that, when considering the level of any charge controls that may be imposed in a subsequent market review, it would be appropriate to consider whether or not there should be an adjustment to address that past under-recovery."

Of course it is about under recovery rather than over recovery, but it is difficult to see why the principle should be any different. What is interesting is that in this passage Ofcom appear to be envisaging some sort of trade-off or adjustment mechanism between charge control periods, whereas what we are asking for here is simply a mechanism that applies within a single period.

But more importantly than any question of consistency Ofcom's new position is wrong, and we have sought to explain why at paras. 85 to 88 of our skeleton argument.

Just to summarise again briefly, the s.88 criteria need to be satisfied across the whole of the charge control period. If there has been over-charging during part of that period for whatever reason, then an adjustment for the remainder of the period can make up for, or compensate for, that overcharging and put the s.88 criteria back on track. The adjustment may also have the incidental benefit of rewarding persons who have overpaid in the past. But, that is not a distinct objective from the s.88 criteria. It is simply a consequence of a measure taken to ensure that the s.88 criteria are satisfied across the control period as a whole. The other point we make there at paras.87 and 88 is about the general duties in ss.3 and 4 of the Act. We make the point that an adjustment of this kind would conform with those general duties as well as with the s.88 duties viewed over the period as a whole.

So, far from these obligations being opposed to each other, they work in the same direction. Far from s.88 being incompatible with a depressed level for Years 3 and 4, one could say that they might even require a depressed level for Years 3 and 4 if that is the only way of achieving the s.88 objectives overall, including, of course, the third of the s.88 objectives (which for some reason has vanished from my mind), conferring the greatest possible benefits on end users.

These points are reinforced - and I come very late to Mr. Scott's question - by what the Tribunal has itself identified as what we would call a very close analogy, this time in the SMP condition itself. I refer, of course, to the sixth paragraph of MA3 and MA4. You have them in Tab 55, but I have set out MA3.6, which governs fixed to mobile, at para. 93 of our skeleton argument. It may be convenient just to do it from there. MA4.6, of course, is effectively, I think, in identical terms. This deals with the situation in which the dominant provider - the network operator - has failed to keep the average interconnection charge within the TAC during Year 1, Year 2, or Year 3. The remedy for that, prescribed by the license condition, is that Ofcom may direct the provider to make such adjustments to its fixed to mobile interconnection charges by such day in the following relevant year as Ofcom may direct for the purpose of remedying that failure. Of course, 'the following relevant year' could be Year 4 if there was a failure in relation to Year 3. So, it is an adjustment that could be made in Year 2, in Year 3, or in Year 4.

It is worth just having a look at (b) as well underneath that. There is also a power in 3.6(b) to direct an adjustment for the purpose of avoiding an anticipated failure. So, there does not actually need to have been a failure to secure that the average charge does not exceed the

TAC. It is enough that you anticipate one, and then you can do something, as it is put at the end of (b), 'for the purpose of avoiding that failure'.

Well, what is the relevance of 3.6 first of all? Well, all the MNOs make the point that MA3.6 is concerned with a failure by the dominant provider to keep its average charge within the required bounds whereas this case, they say, by contrast, is concerned with an error by Ofcom. Well, that is, of course, perfectly true. We do not contend that MA3.6 governs this case directly. It is directed to a different circumstance. We do not believe that the Tribunal was suggesting this either in the letter that it wrote to the parties. So, O2 at paras. 17 to 21 and Orange at paras. 13 to 19 are knocking on an open door in this respect, certainly so far as we are concerned.

But, MA3.6 is still, in our submission, very important.

THE CHAIRMAN: Let me just be clear what you are saying there. Are you saying that if what we ultimately did was get from the Competition Commission a new four year price control and we directed Ofcom to re-determine the price control using those figures, that would then result in a situation in which it could be said, "Well, looking now at what the price control was in Years 1 and 2 one could say that the MNOs have not kept within it, not through any fault of theirs, but they just have not because they charged at the higher level -- Do you say, or not, that at that point MA3.6 and 4.6 would kick in?

MR. ANDERSON: Madam, it is very tempting. Perhaps I ought to think about it more ----

THE CHAIRMAN: No. No. I am not pressing you. I just want to clarify what your case is. I am not pressing you in one way or the other.

MR. ANDERSON: Our case is, as always, extraordinarily moderate, madam. (Laughter) We had not gone as far as that.

THE CHAIRMAN: I can see that that does get us back into the problem that we were looking at with the SIA, which is that you would then be at risk of having your cake and eating it - namely, in order for these paragraphs to work you would need to have a re-determination at a lower rate for Years 1 and 2. So, you might get the benefit of that through the SIA rather than through the operation of this mechanisms.

MR. SCOTT: It seems to me that one of two things would happen: either, as you say, you use the SIA and recover in contractual terms and re-arrange the monies in contractual terms, or if 3.6 and 4.6 are applied there are adjustments made for the oncoming TACs which produce the same monetary effect. Now, the difference is going to be that in the one case, as I understand it, you will get an interest benefit; in the other case you will not get an interest benefit.

THE CHAIRMAN: Let us see where we get with this.

MR. ANDERSON: Would it help if I made it clear what reliance we do place on 3.6? If you think I am not placing enough, you can tell me, but -- Perhaps if I started by showing where I think it is helpful to our case and then take it from there? We do not say that this is a situation directly governed by 3.6. This is about a failure by the dominant provider to keep the average charge in bounds. That is not what we are dealing with here. We are dealing with an error by Ofcom which needs to be corrected. We agree with what O2 and Orange say about that. That is not to say it is not relevant. Can I explain why?

I think there are really four things we take from MA3.6. At first a reduction for the future is an established way of correcting for overcharging in the past. It is a concept which is firmly grounded in this document. The second point is that there are circumstances in which Ofcom has the power to make such a future adjustment. So, again, that is established by this document. Then, the third and fourth points really answer submissions which are made against us, but we say that this is helpful to us in establishing two things - thirdly, the compliance with the s.88 criteria must be looked at across the period as whole and not by exclusive reference to one part of it. The fourth, and final, point is that a future adjustment may set the rate for Year 4 at below the efficient level.

If I could just take those point briefly and in turn? The first one was that a reduction for the future is an established way of overcharging in the past. Well, what matters is not why there was overcharging in the past. For O2 and Orange this is crucial. "Oh, well, in MA3.6 there is overcharging because it is the MNOs' fault, but this time it is overcharging because it is Ofcom's fault". That is not really the point. In order to answer Question 2(b), whether this mechanism exists, and plainly there is a mechanism to correct overcharging in the past by reductions in the future.

The second point is that Ofcom has the power and we say that MA3.6 supports inference of such a power from ss.45 and 87 of the Act. Those are Ofcom's general condition setting and condition varying powers. They are very broad. They are very open. They are the powers that are being exercised in order to apply MA3.6. Even though we are not asking Ofcom to apply MA3.6 to us, it must follow from the fact that ss.45 and 87 are broad enough to support MA3.6 that they are broad enough also to support the power for which we are looking.

THE CHAIRMAN: It is just that at the beginning of your para. 95 you say,

> "The MNOs may seek to argue that the situations are distinguishable because the overcharging envisaged in MA3.6 and 4.6 is the fault of the dominant provider

whereas the overpayments exposed by a successful appeal are attributable rather to Ofcom's error, but no such distinction can be sustained. The purpose of the provisions is not to punish the dominant provider for wrongdoing, but to adjust the TAC for Year 4".

I think that was why we thought that you were arguing that they were directly applicable in this situation, but that seems not to be the case.

MR. ANDERSON: Paragraph 94 is where we set out our position on that. We say - I hope clearly at the beginning of that - that we do not suggest that these paragraphs directly determine the powers of Ofcom on an appeal. Then we make exactly the distinction that O2 and Orange were busy drafting at the same time as we were drafting this, and made the distinction. But, we say that the parallel is exact and that these are useful to confirm the principle for which we contend. All we are saying at the start of para. 95 is that the distinction they suggest is that it is Ofcom's fault rather than ours is possibly interesting but an entirely irrelevant distinction to the issue of whether Ofcom has the power to act in this way, to depress a future price in order to compensate for a pass excessive price. That is all.

MR. SCOTT: I do not see in the word 'fail' there, if you like, to take your word earlier on, a punitive sense. It looks more like a calculation and the way in which the traffic turns out -- You know, there is no sense here of fraud or fault in a punitive sense. It is merely making an appropriate adjustment, to use your word.

MR. ANDERSON: Exactly.

MR. SCOTT: It is not, "Ofcom shall determine a penalty". It is, "Something has gone wrong in the way this is applied. We adjust, or we may adjust". You have a discretion, as I recall.

MR. ANDERSON: That leads on very nicely, if I may, to the rest of my second point. I was saying that Ofcom has the power and one can infer that because it was used in this case, it must have been available in our case as well - the same statutory background. T-Mobile have an answer to that. It is, I think, at para. 23 of their skeleton argument. Interestingly, it is an argument that is not made by Ofcom, and we think rightly so. It is an argument made by T-Mobile. What they say at para. 23 is that MA3.6 reflects the power given to Ofcom in s.95 of the Act to enforce conditions. They say that this is drawn from a different statutory power. So, it does not say anything about the width of the powers in ss.45 or 87.

We do not accept T-Mobile's point. I think to explain why I am going to have to take you to ss.94 and 95 of the Act. I do not know whether you have your own copy or whether you are relying on the bundle. I do not think s.94 is in the bundle for some reason.

Ss.94 and 95 are in the section headed “Enforcement of Conditions”. They provide for the enforcement of any SMP condition. Just glancing through them, you can see how it works. Ofcom first gives the person a notification, and then gives them an enforcement notification, and then, if necessary, commences civil proceedings in a court. It is a general enforcement power that applies to all SMP conditions and does not need to be re-stated every time that it is available. If it did need to be re-stated every time there was a condition that might possibly be contravened, then the conditions would of course be even longer than they are. So, that is the general enforcement power.

What you have in MA3.6 and 4.6 is a very specific additional power to require the adjustment of interconnection charges. It is broader than the enforcement power, as you can see from the fact that it can be exercised even if there has, as yet, been no failure to comply with the condition. That is where the point on 3.6(b) comes in, which, as you will remember, is aimed at avoiding that failure, as it says in the last line. There is no reference to notifications or enforcement notifications or anything else to tie that procedure in to ss.94 and 95.

So, because it does not form part of that enforcement procedure, the statutory powers that Ofcom is expected to use pursuant to 3.6 are not conferred by ss.94 or 95 - nor, of course, are they conferred by something that was mentioned earlier, the dispute resolution provisions in s.190 of the Act. The 3.6 powers must be Ofcom’s general powers to set such price controls as it may direct, or such directions as they may consider appropriate - that is, 87(9)(a), 87(9)(d). If 87(9)(a) and (d) are broad enough to produce an exercise of the 3.6 power, they must equally be broad enough to answer 2(b) in the affirmative.

The third point we take from 3.6 - and I have already summarised them - is that compliance with the s.88 criteria must be looked at across the period as a whole. If the s.88 argument raised by Ofcom were a good one, then it would militate against the corrective adjustment of a charge in MA3.6 circumstances, just as it would against the corrective adjustment of a charge on appeal. The argument is as good or as bad as both situations, and the existence of MA3.6 shows that it is bad.

Then the fourth point we take from MA3.6 - and, again, here, we are responding to something that has been said against us - is that it must be possible to reduce the charges below efficient levels. That follows from the fact that Year 4 is one of the years from which charges can be reduced. Vodafone, in their skeleton, make a lot of the fact that if you are applying MA3.6 in Year 2 or in Year 3, then you are probably not reducing the charge below efficient levels because there is some padding in there because of the glidepath.

However, even Vodafone cannot get away from the fact - indeed, they accept the fact in their skeleton - that by the time you get to Year 4 you are dealing with an efficient charge and it is very difficult to see how MA3.6 could be applied in Year 4 without reducing the charge below the efficient level - of course, in the greater good of complying with the general duties and complying with the s.88 criteria.

I pause here to make the point that this is another reason why Ofcom must be wrong about s.88. It is not disputed by anybody that MA3.6 allows Ofcom to direct a future adjustment to make up for past overcharging by an MNO. So, in that case, the s.88 criteria are satisfied. Why should they not be satisfied in this way as well? I apologise. I made that point as my third of four points. I have started making it again. I do not need to do that.

PROFESSOR BAIN: Before you go on, could I just take you back to the first sentence of s.94? BT does not suggest that the paragraphs directly determine the powers -- Clearly, these paragraphs 3.6 and 4.6 were drafted for a different purpose.

MR. ANDERSON: Yes.

PROFESSOR BAIN: Does that mean that they cannot be used for this purpose? I mean, there are other fields of legislation. I know anti-terror law is a very bad precedent to use, but it can be used to arrest eighty-two year olds at party conferences. Are you saying that this particular provision is not wide enough to cover these circumstances, even if it was drafted for another purpose?

MR. ANDERSON: What I am doing is I am responding to reliance on 94 and 95 that is placed by others. They are trying to resist my proposition that 87 must be broad enough to provide for future adjustment by saying, "Well, MA3.6 is simply an application of the 94/95 regime". I am saying, "No, it is not" because if you look at this regime it does not do what MA3.6 does. To take the very obvious example, 94 only applies where a person is contravening or has contravened a condition. MA3.6(b) can apply even when there is simply a fear that it would be contravened. It is a horribly arcane point. My only defence to that is that it is a point raised against me, and I had to see if I could show you why it was wrong.

I turn now to Questions 3 and 4 and take them, if I may, together. Those questions take the two matters in dispute - the power to specify prices for all four years of the period and the power to exercise the future adjustment option (the 2(a) and the 2(b) question) and ask effectively two things. Second, can the Tribunal rule on them, assuming they are raised in the appeal? That is Question 4. Firstly, can the Competition Commission also deal with them because they form part of the price control reference. That is Question 3.

I start with Question 4 because it is the more straightforward of the two. We have taken the rather simple view in our skeleton argument that if a point is properly raised in our appeal, and if Ofcom has the power to act in relation to it, then this Tribunal must have the power to direct it to act - because it is in the appeal; Ofcom have the power to act; so, the Tribunal must have the power to direct it to do so. That principle is not, I think, disputed by Ofcom. It has points certainly on the scope of BT's appeal. It has points on what it considers to be the limits on its own powers, but it does not take issue with that principle. Nor, at least, on the basis of their skeleton arguments, do any of the MNOs take issue with it. As Vodafone says at para. 45, and we would agree, "The governing principles are that the Tribunal's powers are limited to the grounds of appeal and that it may not order Ofcom to do anything which Ofcom does not have the power to do". Within those parameters, we would add, the Tribunal must be free to direct Ofcom.

So, if we are right about the scope of our appeal, or to the extent that we are right about the scope of our appeal and about the scope of Ofcom's powers, Question 4 must be answered in the affirmative.

Ofcom does answer Question 4(a) in the affirmative. It agrees with us about that. It agrees that the CAT has the power to specify the level at which the price controls should have been set. While it answers Question 4(b) in the negative, it does so for reasons that really arise under Question 1 and Question 2(b) - in other words, they say, "Well, we haven't pleaded the future adjustment option". They say, "It doesn't fall within Ofcom's powers in any event". So, for that reason it is not something that they can direct Ofcom about, but no other reason is advanced.

You already have our submissions on those points. So, it seems to us that there are no distinct points that need to be answered under Question 4.

Turning to Question 3, the additional issue there is whether the 2(a) and the 2(b) matters formed part of the price control reference. Well, again, as to Question 3(a) there is no dispute with Ofcom - or, I think, with anybody else - that the possibility of changes to past periods, assuming it to be pleaded at all, does form part of the price control reference. So, Ofcom answers Question 3(a) in the affirmative. They say that within the constraints of BT's Notice of Appeal the Competition Commission can determine the levels at which the price controls should have been set for each year of the price control period. We agree with that.

This is just a footnote: Ofcom adds that such guidance would not amount to a determination which bound the Tribunal as to how the price control for Year 3 falls to be determined. Now, we are a little puzzled as to how that could be as we read s.193,

> "If a price control matter is referred to the Commission the Commission must determine it".

That is s.193(2). In turn, the Tribunal must decide it in accordance with the determination of the Commission, subject only to the judicial review principles. That is s.193(6). So, if the Competition Commission did determine the levels at which the price controls should have been set, we are not sure of the basis upon which it is suggested that the Tribunal is not bound. Perhaps we should wait to hear what Ofcom say about it, and then come back if we need to after that.

Question 3(b) raises, once again, the future adjustment option. The question here is: Does it form part of the price control reference? I have already mentioned in answer to questions that there are really three possibilities here as it seems to us: (1) it forms part of the appeal and the price control reference; (2) it forms part of the appeal, but not part of the price control reference; and (3) it forms no part of the appeal, but is something that Ofcom can take account of as a remedial matter on the resolution of this appeal if you tell it that the jurisdiction exists.

We contend in the first instance for the first of those options - that it forms part of the appeal and the price control reference - for the reasons given in our skeleton argument. Just to summarise, without taking you through it all, it is to be found in paras. 105 to 108 where we set out our case on why the matter falls within the statutory definition of a price control matter and why it falls within the scope of Rule 3, including at what level the price control should be set. Then, at paras. 109 to 110 of our skeleton argument we explain why, in our submission, this issue falls within the scope of the reference itself. I suspect those paragraphs do not need oral repetition.

You have our alternative submission that Ofcom can take it into account as a remedial matter. The half-way house - inside the appeal, but outside the price control reference - seems to us to have no attraction. If it forms part of our appeal, then it must surely form part of the price control reference also, given the broad terms of that reference and of the applicable rules.

I come finally to effective appeal mechanism and Article 4(1) of the Framework Directive. We set out at para. 11 of our skeleton argument, by reference to authority, what that requirement means. It means, in essence, that an appeal mechanism must not be theoretical

and illusory (in the phrase one often reads), but practical and effective. To the extent that the applicable rules are capable of being interpreted in a manner favourable to that principle, well, they must be. To cite the *Klass* case which is relied upon by T-Mobile - I think a case about telephone tapping, as far as I remember - the remedy must be as effective as can be. What does that mean in the context of this case? I come to this last because this is not a necessary structural part of our case. The case runs, we say, perfectly well without even needing to get into the effective appeal mechanism because you see the statutory powers, you see that they exist, you see precedent for them having been used in closely analogous situations, and you say, "Well, it can work here". But, the effective appeal mechanism is simply another overlay -- another factor which should allay any doubt, in our submission, as to these jurisdictional questions. You have to do what you can, we say, to accommodate the future adjustment option. That is because it is the only option, so far as we can see, which is capable of rendering this appeal effective within the context of the appeal. I think T-Mobile have put in a case which demonstrates that sometimes you have to decide which is the set of proceedings to which the effective appeal mechanism applies. There was a case before this Tribunal earlier this year, and the question in that case was: Did it apply to the regular appeal? Did it apply to the judicial review proceedings? The Tribunal held that it applied to one of those. What the case did not say is that it is consistent with an effective appeal mechanism. Having established what is the effective appeal, and plainly in this case it must be this appeal that has to be effective, what one cannot do, at least if one has the choice, is say, "Well, I'm terribly sorry. The only way to make this appeal effective in relation to more than half of its length is to require you to take new proceedings against a variety of defendants in pursuit of a different remedy in a different court. So for that reason as well and very much -----

THE CHAIRMAN: So you say that you cannot treat the effective appeal mechanism as being the bundle of rights that BT may acquire following the disposal of this appeal, you have to look just at what relief is given in the disposal of this appeal.

MR. ANDERSON: We say it has to be as effective as may be, so one has to work within the rule one has but one interprets them in a way, if one needs to, favourable to effectiveness, and having identified what the appeal mechanism is then one seeks a remedy if at all possible within that mechanism, and there are other very good reasons for doing that as well, and I gratefully adopt what Professor Bain said about that. I think those are my submissions, unless ----

THE CHAIRMAN: Well can I just ask you, as far as this point about whether this is a price control matter or not and you, as I understand it say that both aspects of it are a price control matter, namely whether there should be a re-determination of years 1 and 2, or a future adjustment, is it then your case that it is for the Competition Commission to decide which of those is the right one to adopt in this case and then the Tribunal, subject to the judicial review challenge, must accept that determination and pass that through, if I can put it like that, to Ofcom? Is that how you see the decision making sequence going?

MR. ANDERSON: I think in law, madam, that must be right. The advantage of the collaborative process, if I may put it that way, in which we are, I will not say "condemned" by Parliament, but Parliament has placed us in the context of this appeal is that we can hear each other, and the Commission is here. While the questions that you are asked relate principally to jurisdiction no doubt it would be possible for you if you had a view or an inclination to register that view so that everybody here knew what it was, and so in a sense it is the sort of case where the strict legal niceties of course have to be respected but can be applied with a certain amount of commonsense and goodwill on all sides. If the Commission has particular views on the relative merits of those two remedies, it may be Mr. Sharpe will be petitioning you to say what those views are. Equally, it might be of interest to the Tribunal to know if any views have been formed, but ultimately the only questions you have been asked, I would accept, are questions about jurisdiction, and if you hold – as we hope you will – that there is jurisdiction in both cases, then it would be for the Commission to choose which to apply.

MR. SCOTT: Just staying with that point, if because of the pre-condition in the rule that a price control matter has to be something which is disputed between the parties, the Competition Commission did not find themselves able to express in a way that would bind us (subject to judicial review) a full table of year 1 to 4 prices, but did feel able to calculate them even though they could not express them in a way that bound us, what would you then expect us to do with those figures in relation to Ofcom? Do you understand what I am saying?

MR. ANDERSON: Well we very much hope that situation would not arise because it goes back to what I was saying a moment ago. If the matter is referred to them then the Commission, as it seems to us, have an obligation to determine the matter.

MR. SCOTT: Yes, what I am suggesting to you is this: if the outcome of these proceedings and their deliberations were such that they felt able, for example, to say that the answer at the end of year 4 is this and that, depending on the 2G/3G and 3G operators, but that they did not feel that it was within their competence to provide the intervening numbers that bound

us, but did feel that they could provide the numbers in accordance with the principles of the glidepath that had not been challenged, in other words they could do the calculations but they did not see it as being part of their competence to impose the calculations, then the question is what would you expect us to do? Do we just pass those through and then Ofcom do the calculations, or do we then direct at the remedial stage that Ofcom abide by the numbers that the Competition Commission have provided to us?

MR. ANDERSON: Yes, well I was quibbling with the premise and I should have answered the question. The answer must be in s.195 and under 195(2) it is the Tribunal's duty to decide the appeal on the merits, the Tribunal's decision must include a decision as to what, if any, is the appropriate action for the decision maker to take, that is 195(3), and 195(4) of course, you then remit with such directions as you consider appropriate. I think we would rely particularly on 195(3) and say that really you have to include a decision, whatever you have had back to the Competition Commission, as to what if any is the appropriate action for them to take. We very much hope that if you had the sufficiently detailed information from the Competition Commission in any form the action that you deem to be appropriate for Ofcom to take would be specified in a very high degree of detail.

THE CHAIRMAN: Surely if you say that your pleading does encompass this issue of what should happen about the past and that that is a price control matter, then it is a matter which must be referred to the Commission and a matter on which they must notify us of the determination.

MR. ANDERSON: Yes.

THE CHAIRMAN: So I am not sure how they could avoid, on the way you described the situation ----

MR. ANDERSON: Well that is my main submission, madam; that is my main submission.

MR. SCOTT: That is right, but what I am saying is if BT are wrong about that, and because the intervening years have not been put in dispute by the BT appeal we then have a practical issue of what the Competition Commission say to us and what we then say to Ofcom.

MR. ANDERSON: Yes.

MR. SCOTT: Because at the end of the day Ofcom have to come up with some re-determination of some sort.

MR. ANDERSON: Yes.

THE CHAIRMAN: Well a determination of some sort.

MR. SCOTT: A determination, yes.

THE CHAIRMAN: Yes, thank you. I think we will break for five minutes and then come back to hear from Mr. Holmes.

(Short break)

MR HOLMES: Madam, as I indicated previously I have prepared a short speaking note which is intended purely to capture my oral submissions in accordance with the previous practice of the Tribunal. I suspect it will be possible to dispense with it save for the graphs and so if the Tribunal wishes to proceed on that basis I am very happy to do so. For completeness there are in the skeleton a few authorities referred to which are not currently in the bundle, and a supplemental bundle has therefore been prepared by Ofcom and distributed during the course of the short adjournment which immediately preceded these submissions, and they have also been handed to the Tribunal. It may be entirely unnecessary to refer to those. If, when I refer to them, anyone wishes to object we can perhaps discuss the point then, but for now I propose simply to begin my submissions of which there are three that I would like to develop today. We have taken the decision to focus on those areas where Ofcom's position diverges from that of some or all of the other parties, and on Ofcom's statutory powers and duties, so we will not be considering the effective judicial protection point on which Ofcom takes the same approach as the interveners, and we are very happy to adopt their submissions on the point.

So we have three broad submissions. The first relates to the scope of the appeal, and on that we say that on a fair reading British Telecom's Notice of Appeal alleges errors in Ofcom's Year 4 control, but seeks lower controls in years 1 to 3 applying Ofcom's glidepath, adjusted only as necessary to reflect the revised year 4 end point, and we say that that is the only pleaded relief amongst the various options which are now being mooted by the parties before the Competition Commission. None of the other approaches proposed by BT or the MNOs are currently within the scope of this appeal and permission would be required from the Tribunal under the Tribunal's rules before those matters could now be raised.

Our second submission concerns the division of competence between the Tribunal, the Competition Commission and Ofcom, and here we say that the proposals for prospective compensatory or other adjustments to address the length of these proceedings, if they were now admitted, would not constitute price control matters, but are instead for the Tribunal under s.195 of the Communications Act 2003, and Ofcom following remittal. To bring them within the Competition Commission's jurisdiction would be inconsistent with a number of features of the statutory regime, which I will develop when I come to flesh out these submissions subsequently.

Our third main submission today concerns the scope of Ofcom's, the Competition Commission's and the Tribunal's powers, and we say our first two submissions are first, the only relief is the adjusted glidepath, adjusted to take account of the new endpoint, so none of the other adjustments proposed are in, and for that reason neither the Tribunal nor the Competition Commission currently needs to consider them. Secondly, we say insofar as the prospective adjustments to take account of the length of the proceedings to date are in, they are properly pleaded, or were pleaded following an application to amend, those matters would be for the Tribunal. Thirdly, we say that in any event neither Ofcom nor the Competition Commission nor the Tribunal would have power to give effect to the "future adjustment option" as it was described by Mr. Anderson, or the re-determination option which is BT's alternative proposal for dealing with the difficulties of over payments made in years 1 and 2. So those are the three broad areas of submission.

THE CHAIRMAN: You do not say you have power to do either the re-determination or the future adjustment?

MR. HOLMES: No, madam, we say that both those options are inconsistent with our powers under s.88 of the 2003 Act.

MR. SCOTT: So what would you expect to do – I am being positive now – if you are not going to do one of those two things?

MR. HOLMES: Well we would obviously have to give effect to, we would have to act in accordance with directions that were made by the Tribunal. The Tribunal could only make directions in relation to matters that were within the scope of the appeal, so if I am wrong that these various alternative adjustments are within the scope of the appeal the Tribunal could make directions in relation to them. Insofar as the Tribunal did not make directions to Ofcom and the matters were outside the scope of the appeal, we say that of course Ofcom always has the power to make adjustments to its price control; there is a specific power under the Statute for it to adjust its price control if in its discretion it considers that that is required, having regard to its statutory duties, but that would not be something that you would give directions to Ofcom to do because the assumption is that those matters are not within the scope of the appeal, and that was all that we meant when we said that there were matters for Ofcom that might not be the subject of a direction by the Tribunal which Ofcom might then attend to subsequently when the matter was remitted to it. I hope that makes that point clearer.

Turning to the scope of the appeal, if I may. BT's appeal alleges that Ofcom set the efficient charge level applicable in year 4 too high; that is the focus of all of their

substantive criticisms. The question then arises if BT's allegations are upheld how, if at all, years 1 to 3 should be adjusted. Parties may only seek such adjustments as are properly developed in their cases as pleaded, that follows from the Tribunal's Rules and the requirement that the appeal be determined by reference to the Notice of Appeal. So it is necessary to consider what exactly BT has argued and what the other parties have argued in their pleaded cases, that is to say in the Notice of Appeal and in the Statements of Intervention. To do this it is helpful first to consider the approach taken in the statement, because the parties' pleadings can only really be understood against the backdrop of the decision under challenge, so that is the first thing that I propose to do in relation to this submission.

Secondly, it is necessary then to consider what BT actually sought in its Notice of Appeal; and thirdly, I shall consider the various proposals now being advanced, none of which we say are pleaded.

So Ofcom's approach in the statement was to set a glidepath relative to three elements: the end point applicable in year 4, the starting point, i.e. the level from which the glidepath declined, and then the steps applied to determine the trajectory or path, the shape of the path between those two points. Ofcom began its analysis at the end point, it assessed what the efficient charge level would be for 2010 and 2011 and that is very clear from the statement. If I could perhaps take you to certain passages of the statement in this regard, it is clearest from annex 13, para.1 on p.291 of the statement. You will see there that Ofcom explains that:

"… [it's] approach to determining the appropriate levels for MCT charge controls is to consider the appropriate target level at the end of the proposed charge control period (in this case, 2010 to 11) before considering the most reasonable path of charges to reach that target."

So that was the first stage of the analysis and a separate stage of the analysis from subsequently determining the glidepath. Pausing there, that stage of the analysis, determination of the end point, is what the substance of BT's appeal is directed against. The end point was fixed on the basis of Ofcom's assessment of what would be a reasonable set of efficient unit cost estimates, and that one sees from para.9.33 of the statement on p.143, so it is by reference to cost estimates of a reasonably efficient operator.

You see at 9.31 the main components of that: Network costs, spectrum costs, non-network costs, network externality surcharge, which were subject to criticisms by BT in the appeal.

The conclusion that Ofcom reached as to the efficient level is recorded at 9.169 of the statement, on p.170. Ofcom's judgment is that:

> "… reasonable efficient charge levels are 5.1ppm for the2G/3G operators and 5.9ppm for the 3G-only operator."

That then supplied the year 4 charge.

THE CHAIRMAN: Well you say they are 5.1, were you saying that they are at the beginning of the price control period or that they will tend towards that at the end of the ----

MR. HOLMES: No, madam, you are right, the drafting there is slightly infelicitous, those figures are the Ofcom's assessment of the efficient charge level in 2010, 2011.

THE CHAIRMAN: No, but I was asking at what point is that your assessment of the efficiently incurred cost?

MR. HOLMES: At what point, for the 2010 to 2011 period? Those are Ofcom's assessment of the efficient charge levels that would prevail.

THE CHAIRMAN: No, I am not talking about the charge levels. My understanding, going back right to the very first CMC was that you had assessed that as at April 2007 the efficiently incurred costs of providing the service were 5.1 for the 2G/3G and 5.9 for the 3G only. Rather than say, okay, so that is what you are going to charge throughout the whole four year period, you instead set that as the end point and have a glide path down to that from the current position. Is that right, otherwise the glide path does not make much sense?

MR. HOLMES: Madam, as I understand it, the efficient charge level fluctuates slightly from year to year, so it shows a slight downward curve over the four years of the charge control, but the glide path, of course, adopts a different trajectory down towards cost in 2010/2011, so it does not go straight down to the efficient charge level. It declines on a path determined by Ofcom, so as to arrive in the year 2010/2011 at the efficient charge level determined by Ofcom for that year. I should take instructions to make sure that I am not misleading the Tribunal on the point. (After a pause) Madam, the explanation that has been given to me by Ofcom is that the level that I have described is the averaged level across the year 2010/2011 rather than any specific point in the year 2010/2011, if that is your concern.

THE CHAIRMAN: No, it is not my concern. My concern is the difference between the efficiently incurred costs of providing the service and the charge that you are allowing them to impose. I can understand that the charge is only 5.1 and 5.9 at the end of the period. What I am asking is at what point does the cost, your assessment of the cost of providing the service amount to 5.1 and 5.9?

MR. HOLMES: For the year 2010/2011, subject to the point of course that it is not only cost, it is cost plus the network externality surcharge but I do not think that is the nature of your concern. So it is the level for 2010. It is Ofcom's estimate of the reasonably efficient costs of an operator in 2010/2011, so not for the entirety of the charge control period. There would be slightly different figures for the preceding three years. Those figures given in 9.169 are exclusively the figures for the efficient charge level arrived at in 2010/2011. If you ask what would be the efficient charge level in the preceding years of the charge control, we would have a different figure.

THE CHAIRMAN: Sorry, that is a bit of digression, Mr. Holmes.

MR. HOLMES: Not at all, madam. I am instructed there is nowhere really in the statement that one can find the efficient charge levels.

Madam, if you turn to p.173 of the statements, you will see there that there is a figure, 9.5, which shows the glide path options for the 2G/3G MNOs. The line in red – I hope you have a coloured copy, that makes the graph slightly easier to read. You see the two trajectories of descent. There is a slightly steeper one from a higher level of 6.3, and there is a shallower one from the level of 5.6 converging on the figure of 5.1 on the right hand side of the graph. The efficient charge level is effectively the lower of those two lines. So each arrives at 5.1, the efficient charge level for 2010/2011, but in the preceding years the efficient charge level differs. It is the intermediate of the three lines, if you like, but the lower of the two slopes.

One sees the same figure on p.175 for Hutchison 3G. That is the end point.

The starting point in the statement adopted by Ofcom is explained in relation to the 2G/3G MNOs at 9.180 of the statement, p.173.

MR. SCOTT: Just to stick with those, the implication of a finding of error in relation to year four is, of course, that there are errors in years one to three on those graphs?

MR. HOLMES: In relation to the efficient charge level, yes.

MR. SCOTT: No, in relation to the cost, and therefore in relation to the efficient charge level.

MR. HOLMES: Yes, indeed. Subject to the network externality surcharge point, Ofcom regarded cost of course as a proxy for the efficient charge level in the circumstances of this case.

The starting point for 2G/3G MNOs was really quite straightforward. It was the prevailing headline level of the charge controls currently in force in 2006/2007.

MR. SCOTT: Apologies, if you take figure 9.4, what that is telling us is that in year four, you are correct, but in years one, two and three there is a margin in excess of the efficient costs.

The implication of an error in the principles applied being found by the Competition Commission is that that lower curve moves in its entirety.

MR. HOLMES: Yes, that was all I intended. Your point is that if Ofcom got the wrong measure of costs, it got the wrong measure of costs for all four years, and so that lower line would shift for all four years, yes, indeed.

MR. SCOTT: That does not necessarily tell us what happens to the upper line, but it does tell you that you are starting with that lower line depressed?

MR. HOLMES: Absolutely, I am grateful, but the glide path, as you say, is well above the efficient charge level for all but the final year. So what happens to that is another separate question, which depends on how we interpret BT's appeal and the interventions.

MR. SCOTT: The consequence of that is that earlier on what you said was that BT's appeal was addressed to the final year, but what you have just told us is that the effect of a Competition Commission finding will be to lower the entire lower line on that graph.

MR. HOLMES: That is true, but I should perhaps be more precise. BT does not challenge the approach to glide path. They challenge the efficient charge level ----

MR. SCOTT: I entirely understand that.

MR. HOLMES: The efficient charge level under Ofcom's approach to the price control only supplies the year four price control. You then need to consider what should happen to years one to three. There is no criticism of the approach that Ofcom used in deciding how to get to year four.

MR. SCOTT: I understand, but it would raise the question about the impact of a change to year one on the starting figure, would it not?

MR. HOLMES: That is an interesting question. We say that on a fair reading of BT's appeal, it leaves the starting point for all operators intact, and indeed it leaves the year one reduction for Hutchison 3G from the starting point equally intact. Perhaps I could develop that point now by reference to the starting point and the trajectory.

The starting point for the 2G/3G MNOs is given in para.9.180 of the statement on p.173. Ofcom explains that it is taking for the starting point:

> "… the headline level of the charge controls currently in force (i.e. 5.63ppm for Vodafone and O2 and 6.31ppm for Orange and T-Mobile) as the starting point for the glide path."

The starting point with 2G/3G operators was simply the prevailing headline level in 2006/2007. That was not necessarily the starting point. Ofcom could, for example, have taken into account the blended charges which were then being applied which would have

supplied a higher starting point. It determined as the appropriate level the prevailing headline regulated level for 2G charges.

As for Hutchison 3G there was, of course, no regulated level to which reference could be made. In 9.192 one sees it clearly. In relation to Hutchison 3G at the top of p.177 you will see that year one target average charge of 8.9ppm (2006/2007 prices) was determined by means of a percentage reduction, which is confidential, from current charges. So the starting point then was the current charges of H3G in 2006/2007.

MR. SCOTT: That was the current charges before any disturbance by a dispute resolution procedure.

MR. HOLMES: Of course, the current charges fluctuated somewhat during the course of 2006/2007. We are not sure exactly how the charge was determined. It may have been the average across the year of 2006/2007, but for present purposes it is sufficient to note that it was some measure of the charge imposed by H3G during the preceding year. If the Tribunal wishes a more precise answer, I am sure I can supply one tomorrow.

MR. SCOTT: The difficulty that is going to be faced by your clients is that when they come to look at this again they are going to have to take into account the fact that the position changed after the determination of the TRD.

MR. HOLMES: Sir, indeed, it is a point that I have certainly not given my mind to, and I am sure those behind me are already considering its implications. I should probably say no more about it myself.

The trajectory for the operators was again different between the 2G/3G MNOs and H3G. In the case of the 2G/3G MNOs you find the trajectory chosen by Ofcom at 9.180 of the statement on p.173. You see at the start of that paragraph it is stated that:

> "Having considered responses to the September 2006 consultation, Ofcom has concluded that the 2G/3G MNOs should be required to reduce their charges in line with a smooth glide path of four equal percentage reductions."

So you have four equal percentage reductions over the four years of the charge control from 2007/08 through to 2010/2011.

Subject to a little tweak, a little wrinkle, which is described in 9.181 and 9.182, which I think need not detain us for long, it was simply that for the first year a slight uplift was made to the charge to take account of the fact that there was not the 60 day notice period, and that was then recovered by a slightly increased percentage reduction in year two.

For Hutchison 3G the trajectory differed. The way in which the trajectory was determined is described in 9.190. The difference was that in year one Ofcom determined that it was

appropriate to make a one off cut in the level of charge control because Hutchison's charges were higher than the operators. There is a discussion between 9.190 and 9.192 as to how the appropriate level of the cut for the first year was determined. Effectively, it was done by reference to various factors, which in the round concluded that the dislocation that Hutchison might be expected to suffer as a result of that cut was not too great and the appropriate level was therefore fixed bearing in mind the need to get down as quickly as possible to the efficient charge level without disrupting or dislocating the operators. In particular, you will see in 9.191 there is a reference to an H3G business plan which had arrived at a figure which was more or less at the level that was determined for year one by the charge control.

Subsequently, you have, also in 9.190, a description of the subsequent years of reduction you have in the fourth line down. So after that one-off reduction you have a glide path of three annual reductions of equal percentage to reduce charges to cost by the final year of the charge control, so again down to the efficient charge level for 2010/2011. Again, just subject to the same wrinkle or tweak I described in relation to the 2G/3G MNOs, a slightly shallower decline in year one, a slightly steeper decline in year two.

Just to finish this off, you will see that the starting point, the end point and the percentage reductions are recorded in the table – figure 9.6 on p.187 of the charge control. You do not have the actual charge levels for the intermediate years, you just have the percentage reductions that will link you from the first year average charge through to the final charge. Of course, the H3G figure is not given in relation to the current average regulator charges because it is not regulated and its prevailing charges were commercially confidential and were therefore not included in the statement. This was then embodied in the SMP conditions which are set out in Annexe 20, Schedule 1. Again, this is slightly fiddly, but I think worth seeing in order to understand why we say that the logic of BT's appeal must mean that it was challenging not only Year 4, but also Years 1, 2, and 3. You see the way this set of principles was enshrined in the charge control is in MA3.4 and MA4.4 - the first applying to fixed to mobile interconnection charges; the second to mobile to mobile interconnection charges. Exactly the same conditions, but simply to make clear that they could not reduce one set of charges in order to recover more from the fixed operators.

At MA3.4(a) you see the first relevant year charges set out . Now, for Hutchison that is the figure in, I think, 2006/2007 money, which was determined on the basis of the cut of around 20 percent to the prevailing charges. For the other operators you see the first year charge which is determined on the basis of the first of the four equal percentage reductions from

their prevailing charges. So, that first percentage reduction is already embodied in these figures here, as is the first part of the tweak - the sixty days' notice point in relation to Year 1. Then, you get to the second, third and fourth relevant years by reference to the controlling percentage which is to be deducted -- The first relevant year charges are to be reduced in each of the subsequent years by the controlling percentage, which is then supplied at p.422. You see there a set of percentages shown. The reason why you have different percentages of Year 2 and then for Years 3 and 4 is, again, the tweak. Year 2 is compensating for the shallower adjustment in Year 1 for the sixty day notice period. So, perhaps not entirely crystal clear, but that is how the thing was embodied in the charge control. Why it was expressed in that way was partly to respect Hutchison's commercial confidentiality.

Turning then to BT's Notice of Appeal -- We say that BT's grounds of appeal are exclusively directed at the efficient charge level. They are not directed at the glidepath. By way of relief, BT seeks the setting aside of Ofcom's price controls in paras. MA3 and MA4, and the substitution for those paragraphs of equivalent paragraphs imposing price controls set at a lower level than the current figures of 5.1 and 5.9 pence per minute in 2010/2011 for the four MNOs and H3G respectively and at a level which is appropriate for the purposes set out in s.88(1)(b).

Now, on a fair reading of this relief, which is to be found, I should say, at para. 17 and 190 of BT's Notice of Appeal, BT was thereby seeking adjustments to conditions MA3 and MA4 sufficient to achieve a revised end point - the final year charge - which, of course, is the reference contained in that relief - the 5.1 and 5.9 pence per minute levels being the 2010/2011 charge controls, reduced to correct for the errors alleged by BT - so they wanted that level to come down - and price controls for Years 1 to 3 adjusted only as necessary to arrive at that new end point. We would say that that would involve no change at all to the starting point adopted by Ofcom; no change to the steps used to determine the trajectory - that is, for the 2G/3G MNOs an equal percentage reduction in each year subject to the tweaks in Years 1 and 2 for the sixty day point. Hutchison 3G - an initial one-off cut to 8.5 pence per minute which we say was Ofcom's assessment of the level that was appropriate in order to avoid dislocation or disruption to Ofcom's business. Of course, that level was not challenged by BT. Followed by equal percentage reductions - again, subject to the minor revisions to Years 1 and 2.

So, the new end point would simply then entail a slight increase in the rate of reduction or gradient of the glidepaths in the first three years. I would ask you now to turn to the

speaking note because this is illustrated graphically on p.5 of the submissions. I should say that these graphs are purely indicative. For simplicity, they are just the 2G and 3G MNOs. They show an entirely smooth line, I think, which of course is inaccurate because in fact first of all you have got the tweak and, secondly, it is reductions by percentages of percentages. Nonetheless, you see the general principle. You would see an adjustment down of the angle of the glidepath to reach the new end point.

MR. SCOTT: It might work with a logarithmic scale.

MR. HOLMES: Yes, indeed. That sounds like a matter for the Competition Commission most definitely. It is certainly not within my sphere of competence. So, this is what BT were seeking as confirmed by the following: first of all, BT specifically refers to equivalent paragraphs to those comprising MA3 and MA4, but suitable to yield a lower price for Year 4 than that imposed by Ofcom. That is how we interpret the relief that they specify in paras. 17 and 190. Of course, the glidepath is inherent to conditions MA3 and MA4. We have seen. They do not specify the end point at all. They specify the first year charge and then a set of controlling percentages to get you from the first year to the last year. So, if you wanted to adjust and put in equivalent paragraphs in place of MA3 and MA4, that would be a very odd way of arriving at the end point if it was only the end point that you were challenging. Those paragraphs begin from the first year and they move to the end point on the basis of a set of percentage reductions. That is the glidepath. The glidepath is enshrined in MA3 and MA4. So, we say equivalent paragraphs retaining the form of the conditions would therefore still entail the glidepath, but would simply require new Year 1 charges for the 2G/3G MNOs and new controlling percentages so as to arrive at the new end point determined following the adjudication of the errors alleged by BT in relation to the efficient charge levels.

We should say that this reading of BT's appeal is consistent with its approach during the consultation preceding the MCT statement. You will see at para. 9.179 - I need not take you there - of the statement on p.173 that BT supported a smooth glidepath for the 2G/3G MNOs and so did not attack Ofcom's approach to glidepath, at least as regards the 2G/3G MNOs. Having got what it wanted - a smooth glidepath through to 2010, it had no need to appeal the glidepath - it appealed the efficient charge level assuming that that glidepath would then be applied to it. So, we say that is the interpretation of BT's pleaded case, and that is, we say, the only current approach to glidepath which is properly pleaded in these appeals.

Turning to the other proposals advanced as regards Years 1 to 3 ----

THE CHAIRMAN: Is that a convenient moment for us to rise? We will reconvene at ten-thirty tomorrow morning.

(Adjourned until 10.30 a.m. on Friday, 5th December, 2008)