IN THE COMPETITION APPEAL TRIBUNAL

Case No 1085/3/3/07

Victoria House
Bloomsbury Place
London WC1A.2EB

5th 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 COMMUNCATIONS SERVICES LIMITED
TELEFÓNICA O2 UK LIMITED
T-MOBILE (UK) LIMITED
VODAFONE LIMITED

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

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CASE MANAGEMENT CONFERENCE
IN CAMERA (DAY 2)

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.

THE CHAIRMAN: Good morning.

MR. HOLMES: Madam, by the end of yesterday I had set out what Ofcom considers to be a fair reading of BT's Notice of Appeal - that it seeks adjustments to all four years; that in relation to Year 4 it seeks price controls at the efficient charge level revised as necessary if the errors it alleges in Ofcom's calculation of that level are upheld, and that in relation to Years 1 to 3 it seeks the levels that would be generated by adjusting Ofcom's glidepath only as necessary to reflect the new level. This is illustrated by the figure on p.5 of my speaking note. It may be convenient if the Tribunal were to turn that up now as I shall be picking up on that page at para. 13.

MR. SCOTT: Just for completeness, what you say is that that is the same whether we are talking about the 2G/3G or the 3G.

MR. HOLMES: Indeed, sir. We say that the only difference between those two is as to whether you have a smooth glidepath over all four years or whether you have an initial reduction between Year 0, the starting point, and Year 1. We say that that initial reduction was set by reference to the level that is permissible, given the disruption and dislocation that would result to H3G. So, if you like, it is a backward looking assessment that was concerned there. There is no reason, as we see it, for that to be reopened. It has not been challenged by BT. Therefore, on a fair reading of BT's appeal, that first reduction would remain in place albeit that it is not mechanical in the same way as the equal percentage reductions which underpin the 2G/3G MNOs glidepath in all four years

THE CHAIRMAN: Also that we do not need to adapt the starting point because of the result of the TRD judgment.

MR. HOLMES: Madam, if I may, I think that will require me to take instruction. Perhaps I could return to the point, if that is possible, subsequently. But, I see your concern. I think it would perhaps be sensible if I gave those behind me an opportunity to reflect. They have heard the point that you have raised. Perhaps I could take instruction later on in my submissions and come back to you on that issue.

For now, though, I propose to turn to the other proposals now advanced as regards Years 1 to 3 in these proceedings. We say that BT and the interveners have sought to advance a plethora of alternative proposals for dealing with those years if BT's challenge to the end point is upheld and the Year 4 control is lowered. BT advances a number of alternative approaches. I should say that in spite of the refinement of BT's case that was offered by Mr. Anderson yesterday, Ofcom remains unclear as to what BT's position now is. So, I

shall set out our understanding of the positions that are still on the table. Mr. Anderson can no doubt clarify matters in his reply.

BT's preferred approach is what BT calls the future adjustment option. Having coined that phrase, Ofcom has, of course, since shifted its terminology and has come to refer to the approach as the prospective compensation mechanism. I should say that the reason for this terminological shift is no kind of exercise in pejorative labelling. The difficulty we had with the future adjustment option is that the MNOs, as we see it, have advanced their own future adjustment option to which I shall turn shortly. We therefore wanted to use terms that were apt to distinguish between those two. Hence our calling one of them the prospective compensation option or mechanism, and the other the prospective adjustment to glidepath mechanism. But, at all events, whatever one calls it, BT's proposal is illustrated graphically on p.6 of my speaking note. The graph underneath para. 15(a). This graph shows one of the variants of BT's proposals under which the price control would be reduced below the efficient charge level in order to reflect overpayments made in Years 1 and 2. In Year 4 the price control would then revert to the efficient charge level which is shown on the graph at a level below the end point of Ofcom's glidepath to reflect the reduction in the efficient charge level if BT's grounds of appeal are upheld, but above the Year 3 level.

MR. SCOTT: Are we right in believing that the picture on p.6 represents what would happen if MA.3.6 and MA.4.6 were applied in Ofcom's discretion, were they applicable? Do you see what I mean? In other words, it is an effective adjustment for over-payment.

MR. HOLMES: Sir, I will come, if I may, to MA.3.6 and MA.4.6. I do have submissions on those paragraphs.

MR. SCOTT: And their applicability.

MR. HOLMES: Very briefly, and to anticipate those submissions, we say that they must be understood as part of the price control as a whole in order to set ex ante the incentives of individual MNOs not to diverge from the price control. Of course, the hope is -- the expectation is that as a result of the incentives that are put in place, you will never need to call upon the mechanisms in MA.3.6 and MA.4.6. But, we accept that in principle those mechanisms might lead in an individual year and for an individual MNO to a level that fell below the efficient charge level that would otherwise have applied in that year.

MR. SCOTT: Thank you.

THE CHAIRMAN: In this figure in para. 15 Ofcom's approach - the dotted line - is that the existing glidepath leading to the existing 5.1 ----

MR. HOLMES: Madam, yes, it is - although I should say that one of the remaining uncertainties in BT's case, at least -- perhaps we failed to apprehend it correctly -- is how exactly the prospective adjustment marries with its proposals for the first two years. This was touched upon in discussion with Mr. Anderson yesterday. There is obviously a risk that if this were compounded with an approach which revised the glidepath for the first two years, you would find a situation of over-recovery as Mr. Bain indicated in questions to Mr. Anderson. However, we assume that in a scenario in which the prospective compensation mechanism - the future adjustment - was available to BT, the glidepath would remain as at present for Years 1 and 2.

Madam, there is a slight variant on the prospective compensation mechanism as regards Years 3 and 4 which is shown at the top of p.7. This variant emerged for the first time in BT's skeleton for this hearing. I will just give you the reference, if I may. At para. 82 of its skeleton BT indicates that its proposal could be implemented by reducing the charge levels for both Years 3 and 4 below the efficient charge level - in other words, instead of having a big one-off cut in Year 3 you spread your cut over Years 3 and 4 which would take both years below the efficient charge level, but below the cost level arrived at in the fourth year.

PROFESSOR BAIN: Mr. Holmes, on the assumption that something like this did occur, does Ofcom have any view as to the relative desirability of those two options?

MR. HOLMES: Sir, I speak without instruction, and I will be corrected if I am wrong. But, my understanding is - and obviously on the premise that we think neither of these alternatives is appropriate - that the first alternative would be preferable to the second because it would avoid a situation in which one goes into the next price control at a level which is below the efficient charge level.

PROFESSOR BAIN: Thank you.

MR. HOLMES: The third alternative shown in the speaking note is BT's alternative of cost based charges and no glidepath. Now, as I understood Mr. Anderson yesterday, this option is no longer pursued by BT. I am sure he will correct me in reply if that is not the case.

THE CHAIRMAN: Well it might be helpful if he corrected you now, if that was not the case.

MR. ANDERSON: I am sorry, which option is it? (Laughter) There are so many of them?

MR. HOLMES: Of BT's options it is the second graph shown on p.7, it is the option of an immediate reduction to cost for all four years.

MR. ANDERSON: Yes, that is not on the table.

MR. HOLMES: That is no longer on the table, that is very helpful; I am grateful to Mr. Anderson.

But there is another alternative which we understand still to be on the table which was announced for the first time at the Competition Commission plenary session on 28th November 2008. BT there explained in its skeleton of 27th November that it sought a glidepath with a reduced starting point to reflect errors of various kinds. It might be helpful if we quickly turn that up.

MR. ANDERSON: If I can help that has gone too.

MR. HOLMES: That has gone too?

MR. ANDERSON: It is a consequence of the refinement that both those have gone.

MR. HOLMES: That is very helpful, it was not clear to us that it had gone because, of course, Mr. Anderson reserved his position as to quite what was meant by Ofcom's approach to glidepath and we were worried that behind the cloak of ambiguities in that phrase there might still linger various alternatives.

MR. ANDERSON: I think I said we agreed with Ofcom and what they said about the approach to glidepath, I hope that was clear.

MR. HOLMES: Very good, thank you. One further alternative which certainly is still on the table, which does not require graphical illustration is the alternative of a re-determination by Ofcom, which I will come to shortly when I discuss Ofcom's powers.

THE CHAIRMAN: Is the re-determination one the p.5 one?

MR. HOLMES: Madam, it is with one important addition, and that is that there is nothing inherent in this glidepath that would require Ofcom to arrive at any re-determination of rates in respect of past periods. We say that the appeal could perfectly well be resolved by the Competition Commission or the Tribunal making a declaration as to what the correct position is, which would supply guidance for BT and the other parties as to what level should have prevailed at that time. We say that it does not follow from that that there is any requirement for Ofcom to re-determine past levels and, indeed, we say that there is no statutory power for it so to do, that is a late addition to BT's case, and the explanation for that addition, which lies, of course, in the mechanisms of the SIA and the trigger requirement under BT's contractual arrangements with the MNOs only became apparent to us when BT served its skeleton for this hearing. So we say it is an elaboration of their case.

MR. SCOTT: We may come back to this, but just pausing on your powers, what you are saying, as I understand it, is there is something peculiar about the price control mechanism, you are not saying in relation to any other remedy that you do not have power?

MR. HOLMES: If you have in mind, sir, the H3G SMP appeal example, which is relied upon by BT, we say the obvious distinction is that in that case there is no need for anything to be

remitted to Ofcom, the price control falls because it was always *ultra vires* for a price control to be set, the condition precedent for such a price control not being in place, there being no SMP, and so of course the price control falls away for the entirely *ab initio* , from the moment when it was imposed – I am sorry, I am using much too much Latin.

MR. SCOTT: Say there was a transparency obligation, you could still have an obligation of transparency to reveal what the figures had been?

MR. HOLMES: I fail to see though why it would be necessary for Ofcom to arrive at any fresh decision in order to give effect to that obligation, that is the distinction on which I am relying here. For the re-determination option BT requires that at the end of the appeal the matter is remitted to us with a direction that we re-determine our rates for years 1 and 2. The H3G example, if SMP fell away and all of the conditions imposed in consequence were therefore removed, there would be nothing left for Ofcom to do.

THE CHAIRMAN: But take the different example, which I think was also raised yesterday. If the FNOs or somebody had challenged Ofcom's decision not to regulate 3G termination in the 2004 statement, and half way through that period it had been decided that that was a mistake and they should have regulated 3G and hence H3G you are saying then that they would not have power to re-impose the decision setting a price control from a date earlier than the date on which Ofcom retakes that decision?

MR. HOLMES: Indeed not, and indeed that example we say would raise very starkly the problem of retrospective relief. We doubt very much if it would be legal for Ofcom subsequently to impose a price control in relation to times past in that example where H3G was under the impression that no price control would apply for past periods. But we say, looking at our statutory powers there is simply no power to impose a price control in relation to past periods.

I am somewhat conscious of the time and also my main submission at this stage is simply to note that the alternatives, which I have outlined, none of them are to be found in BT's Notice of Appeal, and we say that the generalised request for relief made in BT's Notice of Appeal cannot extend to such detailed and sophisticated remedial mechanisms. The Tribunal's rules require relief to be pleaded and new arguments as to relief can only be raised, we say, with the Tribunal's permission under Rule 11 if they are not properly raised in the Notice of Appeal. The importance of pleadings, we say is well illustrated by both the variety, the evolving nature and the continuing uncertainty which, at least for our part attached to BT's position, and so we say this is an object lesson in the need for parties to set

out clearly what their case is and to be held to their case as pleaded, subject of course to the possibility of applications to amend, if there are good grounds to do so.

On that point, we say that BT has not properly made any application today. Mr. Anderson suggested yesterday that his skeleton argument contained an application to amend his Notice of Appeal and he relied specifically on para. 47 of his skeleton. We do not accept that any proper application has been made; BT has not come forward with the text that it proposes to insert in the Notice of Appeal, which would be crucial given the detail, the complexity, the nuances of these points which have emerged very clearly from the discussion we have had so far. We still do not know what is being applied for by BT. Mr. Anderson did not develop the reasons why an amendment should be allowed at this very late stage and, moreover, if you look at para.47 of his statement, it did not relate to any of the new proposals we have just been considering. I will not ask you, for reasons of time, to turn it up, but I would point out that para.47 comes in a section which begins on p.12 of BT's skeleton, under the heading "Question 1: The scope of BT's appeal", and under the sub-heading on p.13, "Question 1(a): Is BT's appeal limited to the TAC set for Year 4?" Paragraph 47, as we read it, comes at the end of a discussion as to whether BT's appeal extended to all four years, or was confined to year 4. At most the clarificatory application, which we say was sought, was to reflect BT's own understanding that this appeal extended over all four years. Mr. Anderson invoked para.47 when discussing the future adjustment option, but we say that para. 47 did not concern BT's alternative proposals and put no one on notice of an application to amend to include those proposals. We say that such an application would require specific text. It could be dealt with on the papers if necessary, we are not suggesting that there be another hearing to determine it if an application is forthcoming, but we do not accept that it can be done today.

Finally, to develop the MNOs new proposal. There were two proposals mentioned in my speaking note, the first is the graph shown on p.8. We recognise on reflection that this is not in reality a proposal by the MNOs, it is rather the MNOs interpretation of BT's Notice of Appeal as applying only to the fourth year, and so it shows only an adjustment to that fourth year. They are not putting forward any positive case that this is what should be done, they are simply saying that this is what BT's appeal, properly construed, extends to – you have my submissions on that. What we say is a new proposal is the graph shown on p.9, which we have called the "broken glide path". It was the "dog leg glide path" in Mr. Anderson's terminology yesterday. You will see that the MNOs' proposal is that there be a new glide path beginning from the end of the appeal, assuming that is within the period

of Year 2, and running to Year 4 at the reset level of the charge control for the final year. On this graph you see three lines. You see Ofcom's approach which is the dotted line; you see the MNOs' approach which is the line which begins from the dotted line about half way along at Year 2 and runs to the revised end point for Year 4; and you then see the glide path as reset in accordance with BT's notice of appeal, as we understand it, the figure on p.5, which is simply to change the gradient of the original glide path from year zero to reach the new end point in Year 4.

Just to be clear – I am sure the Tribunal will already apprehend this – from a commercial perspective, the reason why the MNOs would prefer their dog leg is because if you draw a vertical line up from Year 3, you will see that that line intersects the MNOs' proposed glide path at a higher level of charge control than the glide path reset from year zero. So they will end up with a higher price control for Year 3.

THE CHAIRMAN: But a lower one than on p.8?

MR. HOLMES: Yes, madam.

THE CHAIRMAN: This broken glide path, as you have called it, that is the MNOs' case, as you understand it, if they are wrong on the question of the scope of BT's appeal, is it Year 4 or all the period?

MR. HOLMES: Yes, madam, we understand the MNOs to be saying that, given where we are now, two years in and given the divergence between the two glide paths, this has been increasing throughout this appeal – that is to say the Ofcom approach to glide path and the reset glide path with the new gradient from year zero, you have got an ever increasing difference between those two. That increases the risk of a dislocation, of a disruption, to the MNOs when one moves from the one glide path to the other. So they say that to remain loyal to the purpose which motivated Ofcom to arrive at the glide path in the first place you have to reset the glide path so that the disruption in Year 4 is not to go straight down across this big gap which has now opened up two years now, or will have opened up three years in between the original glide path and the glide path reset only as to gradient, and instead you have to draw a new glide path from Year 2 to the end of Year 4.

MR. SCOTT: Sticking with the diagram at the top of p.9 and taking the point that you made about the differential on Year 3, if you wanted to achieve the result of giving a more balanced view year, that line could run through so that it intersects the lower line in Year 3, though that would result in a lower Year 4, which would then presumably be below the efficient charge? I see a nod. Do you see what I am saying?

MR. HOLMES: Yes, I do see that. If you were to change the end point you would arrive at it. It would be against the interests of the MNOs to go below that level. That would assume, I suppose, some version of BT's future adjustments perhaps to reflect over-payments in preceding years. Is that what you had in mind?

MR. SCOTT: Yes, I was thinking of getting an effect in years three and four, bearing in mind that, as has been pointed out to us, conditions MA.3 and MA.4 do not actually have the end point in them. What they have is a beginning and a slope.

MR. HOLMES: Albeit the figures are all there to arrive at that point. To pick up one point that I perhaps neglected yesterday, we say nothing can turn on the fact that the controlling percentages, the definitions contained in the first part of the control, they are still part and parcel of MA.3 and MA.4, but they do supply the start point, the end point and the gradient.

THE CHAIRMAN: Looking at the graph at the top of p.9, the Year 3 figure for the resetting path is lower than the MNOs' proposal by a small ----

MR. HOLMES: The reset path, indeed, yes, and that is why the MNOs seek a broken glide path.

THE CHAIRMAN: Yes.

MR. HOLMES: Madam, we say again that this broken glide path is nowhere to be found in the statements of intervention. It may very well be justified, given the situation in which we now find ourselves, as indeed may be BT's prospective adjustment, but those are matters on which the Tribunal has not heard argument. There is no application pending by the MNOs to amend their statements of intervention. I would note in passing, as the Tribunal will have well in mind, that Rule 16 of the Tribunal's Rules requires statements of intervention to plead the relief which is required. Rule 11, requiring amendment, applies equally to the statements of intervention as it does to the notice of appeal. That is expressly stated in Rule 16. We can go to the Rules, if that would assist you.

That completes my first submission. My second submission relates to the division of competence between the Tribunal, the Competition Commission and Ofcom. My second submission only arises on the assumption that my first submission is wrong. Our primary case is that all of these various adjustments and options, the future adjustment option, the re-determination option and the MNOs' prospective adjustment to glide path, they are none of them currently pleaded and, therefore, in order for them to be raised there would need to be amendments to the existing pleadings. An amendment is necessary, on any view, to keep this appeal within manageable bounds, and so that we all know what parties are actually saying and so that they do not chop and change with their cases.

My second submission is that if the future adjustment option and the re-determination do arise on the pleadings or were to arise as a result of an amendment to the pleadings, we say that they are not matters for the Competition Commission. Of course, the purpose of today's CMC is to determine what the Competition Commission may do.

THE CHAIRMAN: Just to be clear what it is that you say and do on the pleaded case as you see it, that would be going back to the graph at the top of p.5 and saying what the numbers should be in years three and four on that reset original glide path?

MR. HOLMES: Yes, madam.

THE CHAIRMAN: And that is it.

MR. HOLMES: You could give an indication if you considered it appropriate in disposing of the matter as to the levels that would have prevailed in years one and two.

THE CHAIRMAN: One would have to really in order to explain how you would ----

MR. HOLMES: It would follow necessarily, and it is not a difficult task because, as we have seen, the glide path is effectively a mechanical exercise if you accept my proposition that the starting points and Year 1 for Hutchison remain the same and only the gradient is adjusted.

THE CHAIRMAN: You say that not because you think the appeal is limited to Year 4, you accept that the appeal covers the whole period?

MR. HOLMES: Indeed, madam.

THE CHAIRMAN: You say that the only relief that is sought, effectively, is the last part of the graph on p.5?

MR. HOLMES: Not quite, madam, we accept that the relief requires adjustments to all four years consequential upon the change of the end point. We accept that, properly understood, the glide path continues to operate and that, therefore, for outstanding periods between now and the end of the price control period, at the end of this appeal the new glidepath -- the revised -- the re-set glidepath will apply. It is not only the Year 4 level which changes. The Year 3 level changes as well. The Tribunal could equally give guidance as to what levels would have been for Years 1 and 2. But, that is not really for any remedial purpose in these proceedings. The guidance may, of course, be helpful to BT if there is some other mechanism available to them to recover. It is not within Ofcom's remit to say whether or not that is the case.

MR. SCOTT: If you had that guidance, and given the proximity of Year 3, do you think that either by using the general provisions of Article 6 and Article 7, or the particular provisions

of Article 7(6), Ofcom could proportionately and provisionally, because of the time for further appeals, be able to get a Year 3 price control in place in time for Year 3?

MR. HOLMES: Sir, of course, the Tribunal has considered before how exactly the mechanism should operate after matters are remitted to Ofcom. There is an open question - a question which remains to be resolved - as to how the consultation process should apply. I apprehend that that is what you have in mind, sir.

MR. SCOTT: What we have in mind is getting an effective answer which helps consumers on a speedy basis.

MR. HOLMES: The direction that would be made to Ofcom -- Sir, I think we will need to consider and to arrive at a considered view on that, but we are alive to the need for the remedy to be effective. Of course, what comes back to us is, on any view, subject to your directions. Depending on the terms of your directions it may be that there would be nothing left to consult about. But, I cannot express a concluded view at this stage, as I am sure you will appreciate.

Turning then to my second submission -- We say that the future adjustment option and the MNOs' prospective adjustment glidepath are not price control matters and if they are raised at all, they are for the Tribunal - not the Competition Commission. I have five points in support of that submission which I shall canter through in view of the time. But, the speed with which I take them should not be taken to indicate any departure from them. I shall simply make the points by reference, if I may, to the speaking note which I handed up yesterday, beginning at para. 19 on p.9.

We rely first on the language of Rule 3(1). We say that in each case the reference point in Rules 3(1)(a) to (c) is the price control imposed by Ofcom. That follows from the fact that 3(1)(a) refers to the price control in question. That control is referred to in 3(1)(b), and 3(1)(c) refers, again, to the conditions imposed by Ofcom. So, we say that the references to the price control imposed by Ofcom -- I would note in passing that the Tribunal has already considered at least once what is, and what is not, a price control matter during these proceedings. When ruling on the preliminary issue in the parallel H3G case in 2007, it noted precisely this point - that Rule 3(1) applies to the principles, methods, calculations, and so on, applied or used in setting a price control that has been imposed. I give the reference in the note.

Now, we say that the prospective adjustments now proposed by BT and the MNOs do not concern the principles, methods, calculations or conditions applied by Ofcom at all. They are not adjustments that follow necessarily from the errors alleged in Ofcom's approach to

setting the glidepath. Instead, they are new adjustments which are entailed by the passage of time. In the case of the MNOs the adjustment is because the glidepath is said no longer to be fit for purpose. The gap between Ofcom's glidepath and the steeper glidepath that would otherwise apply to reach the lower final year rate has been steadily growing as the proceedings have gone on, and as the gaps widened, so the risk of dislocation as a result of moving from Ofcom's glidepath to the revised glidepath running in a straight line from ... … descent in accordance with Ofcom's methodology from Year 0 to Year 4 has grown. Given that situation, a new glidepath is needed to fulfil Ofcom's objectives in the statement. That is how we read the underlying logic of the MNOs' position.

Likewise, BT says that a new price control is needed for Years 3 and 4 to adjust for the overpayments in the first two years of the price control period. Now, we say that these are all remedial adjustments which are not captured by Rule 3(1). They do not relate to the principles, methods, calculations, etc. applied by Ofcom, or the conditions that Ofcom sets. They relate instead to the principles and conditions that should now be applied in determining a new price control to deal with circumstances that have arisen since Ofcom imposed its original price control.

Now, we say that that interpretation is supported by various other matters. Second, we say that price control matters are clearly intended, under the statutory scheme, to be matters that are immediately raised by, and readily discernible from, the face of the Notice of Appeal which, of course, must be served within two months of Ofcom's decision imposing the price control. The Tribunal is required under s.193(1) to identify price control matters arising in the appeal and to refer them to the Competition Commission. The Tribunal captured this point, in its ruling on the formulation of the preliminary issue in the parallel H3G appeal, when it concluded that a price control matter should be understood as a fundamental aspect of the appeal, capable of being identified as a potential price control matter from an examination of the Notice of Appeal. But, of course, prospective adjustments of the kind now sought by BT and the MNOs will, by their nature, not be apparent when the appeal is first brought, but will subsequently emerge over time and will only then arise in the appeal. So, for that reason also we say that price control matters were not intended to encompass remedial adjustments arising at a later stage of the proceedings - for example, as a result of the effluction of time.

PROFESSOR BAIN: Can I interrupt your canter at this point, Mr. Holmes? You seem to be saying here that it is not possible at the time the appeal is lodged to say what these adjustments would be. That is 20(c). You are also saying that BT has not particularised

what the adjustments would be whilst simultaneously saying it would have been impossible for them to do so.

MR. HOLMES: Yes.

PROFESSOR BAIN: You accept, I think, that there was a phrase in rather general terms about consequential adjustments in the BT Notice of Appeal.

MR. HOLMES: In the most general terms.

PROFESSOR BAIN: If it was not possible for them to particularise, is it fair to criticise them for not having particularised it? Should we not in these circumstances assume that there was a more general request for adjustments? Was it not actually obvious to anybody who thought about what would be involved if the appeal was successful that if consumers were to benefit at the end from this that there would have to be some kind of adjustment mechanism for overpayment during the period that had elapsed before the appeal was determined?

MR. HOLMES: Sir, I have no brief to criticise BT. Our point in relation to the pleadings is that it is important that parties plead their cases in order that they be properly understood and we can all see what it is that they are saying. We have seen the difficulties that arise because of the fact that BT's case is not currently set out in a pleading. Now, we accept - and it is not for argument today because an amendment has not been proposed - that it may very well be the case that BT could not have anticipated the position it now finds itself in, and could not have made more than an entirely unparticularised request for further or other relief at the outset. It may well be that now they need to amend their case and that they will have good reason to amend their case, and that that will be accepted. But, that does not affect the question of whether those are price control matters. That is a separate issue.

THE CHAIRMAN: That is what I am now confused about - whether this is a pleading point, or whether it is a non-pleading point. Are you saying that even if they had, or have, raised this in their pleading it is nonetheless not a price control matter because it does not fall within the definition of price control matters?

MR. HOLMES: Madam, it is possible to imagine that parties, having viewed the way in which these proceedings have progressed, would anticipate the possibility that this situation may arise, and would therefore make provision in their Notice of Appeal for precisely an adjustment mechanism of this kind. But, we would say that at the time when the Notice of Appeal is lodged that it is well and good that they should have anticipated the point if possible, but the point would not arise in the appeal for that reason at that time - it would arise as and when circumstances had prevailed in such a way as to make the point a relevant one. If the appeal had been determined within the first year of the charge control, if we had

had a Notice of Appeal lodged within the two months, a reference had gone off rapidly, and there had not been all of the difficulties which arose because of the parallel non-price control matters in this case, the Competition Commission had determined the specific errors lodged in BT's Notice of Appeal within four months as specified, it could have found the result at the end of the appeal before the end of the first year period and we say that if these issues would have arisen at all they would have arisen on a much smaller scale, and we say probably they would not have arisen at all.

PROFESSOR BAIN: Is there not a difficulty here, Mr. Holmes? Supposing the Competition Commission, not taking account of this, were to say that on the glidepath the figure for Year 3 should be 4.3p. Then we come along and say: "Well, taking account of these, the figures should be 3.6p. We would then be determining a price; it would be a price that would go into the condition – correct? If it goes into the condition, as I understand the Rules, what the provisions imposing the price control (which are contained in that condition) should be would seem to me to make it a matter for the Competition Commission. As I read it, if we actually set a number, a price at the end, that is part of the condition then under the Rules that is for the Competition Commission so it should not be us saying it should go down from 4.3 to 3.6, it should be the Competition Commission deciding for us what is the best way of making the adjustment that is required to ensure that consumers get the benefit at the end of the day. That is how I read it and I am having difficulty in understanding why it is wrong.

MR. HOLMES: Sir, what we say is that 3(1)(c) intends to capture, and it may be sensible if we turn it up in a moment, but let me make my submission first. 3(1)(c) is intended to deal with errors alleged in the way in which Ofcom went about its business. So you look first of all at the types of matter which are referred to in 3(1)(a), 3(1)(b), errors in the methodology, in the principles, in the calculations and the data used, and you then decide, on the basis of that whether the price should have been set at a different level, and 3(1)(c) makes clear that price control matters extend to that question of how the price should have been set by Ofcom.

PROFESSOR BAIN: But there is nothing in the Rule that mentions errors. There may well be errors of principle that give rise to the Competition Commission deciding that you were wrong, or errors of calculation, but it does not say there have to be errors in determining what the final result ought to be; there is nothing in that rule that mentions errors, that comes into your pleadings, it is not there that I can see.

MR. HOLMES: Well, sir, we say that first, one needs to take into account the fact that this is all by reference to the Notice of Appeal and that the Notice of Appeal sets out errors in Ofcom's price control, and it is from the Notice of Appeal that you determine what is raised in an appeal and you pick those things out. It is then the job of the Tribunal to refer those things off to the Competition Commission and the Competition Commission has a four month period, a tightly constrained period in which to determine as a default how those errors should be resolved. We say that it is possible, given that it is by reference to that price control, the price control in question – that is to say Ofcom's price control, and the matters raised in relation to that price control – in the Notice of Appeal that you determine what should go off to the Competition Commission and the Competition Commission's remit is decided, otherwise you are left with a roving jurisdiction for the Competition Commission, which can expand as new points arise, as matters go along, as we find ourselves now a few years down the line, and we find ourselves with concerns that are raised purely as a result of the efluxion of time and not as a result of any original error in Ofcom's price control. We say that Rule 3(1) can be read in such a way as to avoid those matters coming within and we rely in support of that on the fact that it refers to Ofcom's price control and we say that that should be read as referring to errors in Ofcom's price control, and that avoids having an impossible task for the Competition Commission to perform within four months. We say also it makes sense of the tasks which are then reserved to the Tribunal and Ofcom under s.195. Could I develop those points and come back to the specifics of Rule 3(1).

PROFESSOR BAIN: If I can just come back on this. It seems to me that it is very difficult to argue that there do not have to be errors for the principles to be criticised or the calculations to be criticised, but as I have read 3(1) the third part of that says that you found these errors, and now you have to look and see what are the consequences for the control of those errors", and the consequences of those errors for the control you have to look at the whole period, and looking at the whole period it would seem to me to include, taking account of any adjustment that was needed, to get it right over a period as a whole, and the condition that is there, MA.3 or MA.4 is a condition that covers the whole period, it is not a condition for each separate year, it is one that covers the whole period. So looking at these calculations it would seem to me that what was being remitted, or what the CAT was bound to remit to the Competition Commission was that it should look at the consequences for the whole thing and come up and say what the answers were, and that if they only did part of it

and we afterwards came along and said: "These are the numbers we think it ought to be", we would not be abiding by our own rules.

MR. HOLMES: Sir, to be clear, Ofcom's position is that the Competition Commission may, in relation to matters that are raised in the Notice of Appeal, errors that are alleged in relation to the entirety of the price control period, determine for the entire price control period the prices that are to apply. BT's appeal does not raise errors in relation to periods other than Year 4, and that is the matter which can appropriately be determined by the Competition Commission. The Competition Commission can give guidance, we say, as to what levels would have prevailed in the prior years as a result of the adjusted glidepath, but we say that insofar as no error is alleged in the glidepath it is no part of the Competition Commission's remit, it is not within the price control matters which may be referred to the Competition Commission to specify the adjustments that may be made in those prior years in such a way as to prevent the Tribunal when matters return to the Tribunal, from exercising its remedial powers in such a way as to revise earlier levels as necessary to reflect consequential issues which do not arise as a result of any error in Ofcom's price control, but arise as a result of subsequent circumstances that supervene during the course of the appeal.

PROFESSOR BAIN: Well, thank you, I think I understand your position.

MR. HOLMES: Thank you.

MR. SCOTT: It seems to me that the implication of what you are saying is that although the price control matters referred to in Rule 3(1) which, in (a) and (b) take you back in the past tense to what is in the price control set by Ofcom, and then in (c) the provisions which should have been, and that is governed by what is in dispute and what you are saying is that what is in dispute is Year 4?

MR. HOLMES: Yes.

MR. SCOTT: What you are then saying is that if, having gone through that point, we are then faced with what should have been in that condition when you think through the implications of what has happened to Year 4 that is *intra vires* us despite the fact that otherwise it would look like a provision imposing the price control which contained in that condition should be?

MR. HOLMES: Yes, sir. We say that that makes very good sense in terms of the statutory scheme because, first of all, the statutory scheme makes specific provision for such matters to be dealt with, we say, by the Tribunal. The purpose of s.195 is to allow the Tribunal to deal with remedial matters which arise. The Tribunal is given considerable flexibility under s.195 as to whether and how far it directs Ofcom as to what it should do following remittal,

so the Tribunal decides what, if any, is the appropriate action for Ofcom to take, and the Tribunal decides what directions are appropriate to give effect to its decision. So the Tribunal has remedial powers and it can determine what is done by Ofcom and what it, itself, determines. We see that this is an important flexibility in relation to these remedial matters for two reasons: first of all, because it means that the Tribunal has available to it specific expertise in so far as these remedial questions raise matters that cannot easily be dealt with by the Tribunal in so far as there are calculations which need to be done which the Tribunal could not easily do. It could remit to Ofcom as necessary for Ofcom to do, subject to governing principles determined by the terms of the remittal.

We also say that the arrangements under s.195 are more conducive to the appellate nature of these proceedings than if the remedial questions were dealt with by the Competition Commission as part of the price control reference. That is for this reason: remedial questions of the kind at issue, the adjustment to the glide path, the broken glide path and the prospective adjustments to compensate for over-payments in the first two years, both of those are matters which Ofcom has never determined for itself. Ofcom has never addressed its mind to those questions, and yet we find them arising on this appeal. It may well be that the principles that govern the appropriateness of those adjustments are clear. For example, there might be a good solid legal impediment, and I shall go on to make my submissions about that, as to whether either of those adjustments are possible, in which case the Tribunal can deal with them. If not, s.195 makes clear that such matters can be remitted to Ofcom for Ofcom to decide.

If the matters are before the Competition Commission, the Competition Commission must determine them. There is an imperative specified in the statute for the Competition Commission to determine them. Although the Competition Commission does not have the benefit of any reasoning, other than by way of submission at the final stage by Ofcom during the Competition Commission process, during this four month process, equally there will have been no consultation in relation to those adjustments. We say that simply is not the appropriate method for determining new issues which arise during the course of the proceedings. For that reason also, Rule 3(1) should be read as limited to errors raised in relation to Ofcom's price control under all its three limbs.

THE CHAIRMAN: What role do the pleadings then play at that point? Are you saying that when it comes back to us and we consider what is appropriate for giving effect to the decision, at that stage we can direct Ofcom to change the price control for Year 3 as well as for Year 4?

MR. HOLMES: That depends on what issues are raised before you, and that depends on your discretion whether to admit the argument.

THE CHAIRMAN: That power then to consider what is appropriate is, you say, governed by what I included in the pleadings, or is limited by what is included in the pleadings?

MR. HOLMES: Yes, madam.

THE CHAIRMAN: But when it comes back to you, if we make no such recommendation or direction and simply say, "This is what it should be for Year 4 and it is up to you, Ofcom, to decide what to do, if anything, about Year 3 when you reset the price condition", are you then also bound by the pleadings or do you then have a free discretion as to what to do?

MR. HOLMES: We would submit that it would be very difficult for you, in relation to something that was properly raised before you, not to decide that. Indeed, you have to. Once it is within the bounds of the Notice of Appeal you have to deal with it under s.195, which we say is the appropriate stage for dealing with these remedial questions. You would, therefore, have to decide whether to give directions to Ofcom again. That is an obligation upon you under s.195 when you dispose of the appeal on the merits. If you decided that there was merit in these new arguments that are being raised now, and they were properly raised, you accepted that they could be brought within the scope of these proceedings, then you would have to give directions. It would be difficult to see how you could avoid giving directions as to how we should go about retaking the decision.

In so far as the matters are not properly raised within the appeal, and I hope I made this clear yesterday, we say that although Ofcom has a discretion to consider its price control, and it would only properly do so after remittal, after these proceedings were at a close, it would do so by way of a modification to the existing price control. So it is only matters raised within the appeal which require a direction which can then be addressed when the decision goes back to Ofcom. In relation to matters not raised within the appeal Ofcom has a discretion under its general powers to modify price controls to decide whether there are any other good reasons to vary its price control for the remainder of the price control period.

We would say, just to recap, you would give directions to us in relation to matters properly raised in the appeal and we would then deal with those on remittal. We say that remedial matters properly raised in this appeal should be dealt with under s.195.

THE CHAIRMAN: In your submission the matters properly raised in this appeal are the resetting of the glide path in accordance with the line on the graph on p.5 for whatever unelapsed period remains?

MR. HOLMES: We say there are currently no remedial issues pleaded that would require to be addressed by the Tribunal under s.195.

MR. SCOTT: But if there were, because we allowed the amendment of the pleadings, what you have just said in relation to the exercise of general powers, I have to confess, does suggest to me something other than an urgent consultation in minimal time.

MR. HOLMES: Sir, it is obviously for you to decide ultimately on the basis of applications that you receive what it is that you deal with. That will determine how we go about deciding matters subsequently. It is a matter within, I would say, the Tribunal's powers to ensure that these questions are determined, should you wish to do so, at the final stage. We say, of course, that there are good reasons why these suggestions do not get off the ground anyway to do with Ofcom's powers and the constraints that are then imposed on the Tribunal and the Competition Commission.

THE CHAIRMAN: Perhaps we should go on.

MR. HOLMES: Madam, my final submission then concerns Ofcom's powers under ss.87 and 88 of the 2003 Act, either, firstly, to redetermine the price controls applicable to past periods; or secondly, to give effect to BT's future adjustment option. We submit that neither the Competition Commission nor the Tribunal could arrive at a solution which required Ofcom to do either of those things.

My third submission relates to my first two submissions as follows, the third submission only arises if I am wrong about my first submission as to the scope of BT's appeal or if BT succeeds in amending its Notice of Appeal. By contrast, my third submission arises irrespective of whether I am right about my second submission. Whether the future adjustment option is for the Tribunal or the Competition Commission, we say that neither has the power to require Ofcom to impose price controls of the kind proposed by BT.

I will deal first with the retrospective redetermination point. Mr. Anderson expressed some perplexity as to why Ofcom took the view in its skeleton that Question 2(a) was not relevant. When the skeleton was settled, Ofcom was proceeding on the basis of BT's position as previously stated. BT had until then focused on the need to know rates for past periods as guidance for other unspecified remedies that it might seek to pursue. For your note this can be seen from the transcript of the Competition Commission Plenary Session of 21st October 2008, bundle 2, tab 57, p.19, lines 7 to 11. Now, if all BT were seeking was an indication of the levels that would have prevailed had Ofcom not erred in the ways alleged, it would not need Ofcom to do anything. It would be sufficient for the Competition Commission or the Tribunal to declare the rates in question, and this could be done

independently of Ofcom's powers because it would not require anything to be remitted to Ofcom at the end of the process. S.195(5) therefore would not bite.

THE CHAIRMAN: Where does this power to declare things come from? Where, in ss.190 to 195 is there a power to declare rather than to determine on the part of the Commission or us?

MR. HOLMES: Madam, if I could take you to s.195 at Tab 29 of Bundle 2? You will see from s.195(2) that the Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the Notice of Appeal. The decision is, of course, in the form of a judgment which will contain a number of statements besides your determination as to what Ofcom should do afterwards, i.e. the directions that you will make to Ofcom. That is clear from the use of the word 'include' in s.195(3).

> "The Tribunal's decision must include a decision as to what is the appropriate action for the decision-maker to take in relation to the subject matter of the decision under appeal".

So, we say as part of your judgment it would be entirely within your powers to declare -- to state what levels would have prevailed on the basis of the glidepath adjusted only to the extent necessary to arrive at the new end point sought in BT's appeal. So, we say that it would simply be part of the judgment. I cannot give you the references now, but, similarly, it has previously been discussed at CMCs - and, indeed, it may be within the terms of the ruling by which the price control matters were referred to the Competition Commission -- It has always been understood that the Competition Commission can give a narrative presentation of its determination which would include guidance of various kinds that was beyond the scope of those matters which it was strictly required to determine. So, we say on that basis that there would be scope for both the Competition Commission and the Tribunal, were they minded to do so, to give guidance as to the levels, or to declare what levels would have prevailed. Indeed, in relation to your conclusion for Year 3 of the price control period you will need necessarily, we say, to consider how the glidepath would operate on the basis of the change of gradient that we say is inherent in BT's Notice of Appeal -- in the relief sought by BT's Notice of Appeal.

THE CHAIRMAN: So, it is not really a power to declare. It is a power to include statements in our judgment which form part of the decision, but are not a part of the decision in respect of which it is possible for us to give directions to you to give effect to.

MR. HOLMES: Or necessary to do so. I mean, I envisage that a judgment will frequently contain decisions on various matters which will not entail any direction being given to

Ofcom at the end of the day. That is perfectly imaginable. I do not understand that to be in dispute between BT and ourselves. BT, of course, says that there is this possibility to make a re-determination, but as I understood Mr. Anderson, it accepts that in the alternative the Competition Commission or the Tribunal could make a declaration or could specify what the levels would have been for Years 1 and 2 had Ofcom not erred in the respect alleged and then found by the Competition Commission to have occurred.

MR. SCOTT: I appreciate you may not be able to give an answer to this immediately, and I also appreciate that the 190 series of sections with which we are concerned are national -- They are the national way of giving effect to Article 4 -- But, one of the things of which we are conscious in a European context is the need for what is called reciprocal permeability of the way in which Article 4 is handled. We are assuming that Ofcom is being consulted when matters like this occur in other member states. It may be helpful if those behind you could advise you on whether this question has resulted in one of those consultations in relation to Ofcom and whether Ofcom are able to advise us of what has happened in other member states in similar circumstances. Now, we do not expect an immediate answer to that, but having regard to the fact that this is a European framework, you may like to ask them that question.

MR. HOLMES: Sir, those behind me, I am sure, will have taken a note of your request. We will revert to the Tribunal, copying all parties with any relevant information in that regard.

PROFESSOR BAIN: Mr. Holmes before you go on, your argument pre-supposes that Ofcom cannot take a retrospective decision.

MR. HOLMES: Yes.

PROFESSOR BAIN: What I had imagined, as a pure layman, over the last eighteen months or so, was that at the end of this we would get a set of figures from the Competition Commission which would replace the controlling percentages in the conditions MA.3 and MA.4, and that that would be it. Now, that requires a new determination. You say that that would therefore be retrospective, and so it would not be possible. Now, if the figures in this new determination satisfied all the conditions of s,88(1)(b), taking the four years as a whole, can you just point me to the statutory provision which prevents you from doing that?

MR. HOLMES: Sir, that takes me neatly to my next submission. But, I should say that we do take issue with the proposition that there is any need to re-determine the charge levels for Years 1 and 2.

PROFESSOR BAIN: I want to know what actually prevents you.

MR. HOLMES: Certainly, sir. (After a pause): The only provision under which Ofcom has the power to impose a price control that is of any present relevance is s.87(9). That is, of course, subject to the constraints of s.88. It would be helpful, I think, to turn up s.88, which is at Tab 29 of the second bundle, at p.86 of the internal numbering in that tab. (After a pause): S.88(1) provides that:

> "Ofcom are not to set an SMP condition falling within s.87(9) [in other words a price control in this case in relation to mobile call termination] except where it appears to them from the market analysis carried out for the purpose of setting that condition that there is relevant risk of adverse effects arising from price distortion".

Now, we say that the notion of relevant risk is an inherently forward-looking notion. We fail to understand how Ofcom could go about applying its mind to s.88(1)(a) other than for the future, considering whether there is a relevant risk going forward. If I might just complete this point, s.88(3) then supplies the definition of a relevant risk. Again, we say that this is inherently, intrinsically prospective in its formulation.

> "For the purposes of this section there is a relevant risk of adverse effects arising from price distortion if the dominant provider might so fix and maintain some, or all, of his prices at an excessively high level or so impose a price squeeze as to have adverse consequences for end users of public electronic communication services".

We say that for the preceding years prices have already been set.

PROFESSOR BAIN: But the condition applies to the four years. It is not a condition for each year separately. So long as for part of the period it is forward-looking then it is a forward-looking condition which could, arguably, satisfy these provisions. Obviously if the condition applied only to the past - if we were doing this in 2012 - what you are saying would clearly be correct. But, we are not doing it for 2012. We are doing it at a time when there are still two years, hopefully, for which the conditions can be changed. It is prospective for that. If it is prospective for that, the condition as a whole can be regarded as having prospective effect.

MR. HOLMES: Sir, Ofcom's position is that price controls have been imposed for a defined period running from 2007 to 2011. In relation to two of those years those price controls have already applied. In relation to Years 3 and 4 the price control has yet to bite; there has yet to be a price control in place.

THE CHAIRMAN: So you do not accept Mr. Anderson's submission that when you are considering whether something is prospective or retrospective you have to put yourself back in the position that you were in in March 2007, or the beginning of April 2007?

MR. HOLMES: Well it depends who the "you" is in that sentence. If the "you" is Ofcom, Ofcom can only act in accordance with its statutory powers. This connects with my prior submission that there is no need for a re-determination in relation to Years 1 and 2. The Tribunal and the Competition Commission which are involved with determining this appeal, and we accept that this appeal is of course partially backward looking, they can specify the levels of charge that should have applied had Ofcom not erred in relation to the first two years, but we say that when the matter comes back to Ofcom, Ofcom has to act within its powers which are specified in sections 87 and 88 and we say that the way in which s.88 is formulated is inherently prospective whatever the nature of this appeal process and would not allow Ofcom to specify any price control for any portion of time in relation to the past.

THE CHAIRMAN: So if the appeal takes the whole period of the price control then one really is in a *Jarndyce v Jarndyce* situation that there comes a day when everyone throws their papers up in the air and says "We can all go home because there is no point in considering this any more". (Laughter)

MR. HOLMES: The estate is squandered.

THE CHAIRMAN: Exactly.

PROFESSOR BAIN: That is the effect of an appeal mechanism as far as Article 4.1 is concerned?

MR. HOLMES: I do not accept that that appeal mechanism would be without any obvious purpose, because you would still have an indication as to what levels should have prevailed prior, and that will first of all determine the level at which one goes into the next price control period, which is a relevant consideration. Secondly, it may also allow BT to pursue other remedies, that is a matter for BT. In terms of their submission on effective judicial protection we say it would be for them to show that they do not have other effective remedies, it certainly would not be for Ofcom, it would be no part of our brief today to say how the parties should go about addressing adjustments for the past; that is really for them. To interpret our statutory powers, as Mr. Anderson appeared to be doing, in the light of the terms of his client's contractual relations with the MNOs appears to us to be the tail wagging the dog. The SIA is a contract, regardless of its position within the regulatory scheme, it is clearly not to be regarded as having equal status with the Communications Act, and therefore the provisions of the Communications Act cannot be read in the light of those

contractual arrangements, in order to provide for BT's contractual convenience the trigger that is necessary for it to obtain a remedy.

THE CHAIRMAN: I do not think he was saying that. I think he was saying that does this not show that they must have thought when they drafted this provision that it was going to work by way of re-determination. I do not think he was saying "In order to help us please could you order a re-determination?"

MR. HOLMES: And they drafted the provision in the SIA – I am sorry, madam, just clarifying.

THE CHAIRMAN: Yes.

MR. HOLMES: That, we would say, is a thoroughly bad point for two reasons. First, the SIA long predates the Communications Act 2003; and secondly, subparagraph 13 on which Mr. Anderson relies of course covers a multitude of different situations including a dispute resolution where you have a charge change notice and the charge change notice is issued and it all goes off to Ofcom to decide, and Ofcom decide subject to any appeals that the charge change notice is valid and, as a result, the amounts that have prevailed during the period when the charge change notice was being considered will need to be adjusted retrospectively. We do not accept that that shows any understanding on the part of the parties, it sheds no light on the understanding of the parties as to how sections 87 and 88 are to be interpreted, and even if it did reveal the views of the parties it could not possibly be of direct relevance to the Tribunal when deciding how to interpret according to their natural and ordinary meaning the provisions of a statute. We say however one looks at it, the SIA does not supply a good reason for the Tribunal to prefer an interpretation of Ofcom's statutory powers which would give rise to a re-determination in relation to past periods.

MR. SCOTT: If one thinks about the general principles of administrative law, is there a distinction that you are drawing between a public authority being instructed to correct a decision that it has made, and a public authority being directed to retake a decision as at the date upon which it is instructed to retake that decision, or upon the date at which it does retake the decision? Do you see the distinction that I am drawing?

MR. HOLMES: Yes, I do, sir.

MR. SCOTT: It seems to me that there are three possible considerations which flow from this.

MR. HOLMES: Sir, I am slightly conscious of the dangers of importing from general public law principles concepts which are not necessarily apt to deal with the specific, I suppose ----

MR. SCOTT: It may be quite crucial to understanding the interplay of general administrative law and the Act to understand precisely what it is that Ofcom think they are going to be doing following the remittal from us. If you think what you are doing is the exercise of general

powers to re-determine the price control then clearly you are doing so at the date on which you make that re-determination. If, on the other hand, if what you are doing is retaking the decision in accordance with the determination that has flowed from the Competition Commission through us to you, then it is possible you may be said to be re-doing it as at the date of your original determination, so flowing from April 2007 onwards rather than flowing from whatever date you get 'round to doing it.

MR. HOLMES: Any decision that Ofcom takes, or retakes we say must be under the framework of its statutory powers and duties, so the only powers that we have to retake a decision must be by reference to those powers that we are given in s.88 and we say that s.88 is a forward looking provision.

THE CHAIRMAN: I think the point is does s.195(6) give you the power and the duty to make a new price control if that is what we direct you to do, so that in making that new price control you are not relying on s.88 as the source of your power. Section 88 is still relevant because of the limitation on us on s.195(5), but one would then interpret that as saying "We cannot direct you to impose a price control that you would not have been able to impose as at 1 April 2007", so I think Mr. Scott is right, that the key is, if we direct you to make a new price control, is the source of that price control then under 195(6) and not under s.88 at all?

MR. HOLMES: Madam, in s.195(3), in case it would assist, we note that the language that is used is that the Tribunal's decision must include a decision as to what, if any, is the appropriate action for the decision maker to take in relation to the subject matter of the decision under appeal. It may or may not be the case that that indicates an intention to distinguish between the decision originally arrived at, with the notion that one could correct that decision retrospectively, and the subject matter of the decision. We would certainly say that whether we were revising the original decision or whether we were taking a new decision to impose a price control, we would still need in all cases to act within our statutory powers, and that follows clearly from s.195(5), which of course specifically draws the Tribunal's attention to the fact that the decision maker cannot take any action that it would not otherwise have power to take in relation to the decision under appeal. We say we would not otherwise have power to impose price controls in relation to past periods, given the clear structure and character of s.88(1) and the matters to which we are directed when we are setting price controls.

THE CHAIRMAN: Thank you.

MR. HOLMES: So, madam, that concludes my submissions on the retrospective adjustment points and I would like to turn now, if I may, to BT's future adjustment option. Again,

Ofcom says that it could not apply such an option compatibly with s.88(1). Section 88(1)(b) supplies the relevant purposes for a price control and we say that BT's proposal would not advance those purposes. BT says otherwise. It contends, as we understand it, that an adjustment is needed to secure efficiency across all four years of the charge control. We take that from para.85 of its skeleton argument. This implies that the adjustment sought in years three and four to compensate for years one and two would somehow cancel out the inefficiency resulting in years one and two.

Ofcom accepts that if prices are set too high above the efficient charge level in the first two years this is likely to lead to an inefficient structure of prices. Indeed, that was the basis for Ofcom's reasoning in imposing the charge control. Just for reference, the statement of course dealt with this argument at para.7.41 and 7.42. The high wholesale prices will feed through to consumers who will then make inefficient consumption choices. That will result in general inefficiency.

We say that those decisions have already been made in relation to the first two years, and they cannot be taken back. We say that BT nowhere properly explains why the lower charges in years three and four would be more efficient than the balance struck in the glide path, revised only as necessary to reflect the lower end point. Indeed, BT's proposed adjustment would, in fact, make matters worse, we say. BT could only be fully compensated for over-payments in the first two years by taking the price control in years three and four below the efficient charge level. This would not compensate for the first two years in David Anderson's sense of correcting for inefficiency during those years. It would instead mean that the price control was inefficient for all four years – for the first two years because it was inefficiently above the efficient charge level, and for the latter two years because it was below the efficient charge level. This would have exactly the same effect. It could be expected to have exactly the same effect on the efficient structure of prices for the last two years in reverse as resulted in the first two years – in other words, over-consumption of mobile call termination because it was being priced too low.

PROFESSOR BAIN: If you were to look at it from the point of view of the consumers, of course, having been over-charged for two years if they are under-charged for the next years, they come out square, which, if you are interested in consumers, looks to be rather a good thing. If you look at it not purely from the pricing structure but also from the profitability structure, in the first two years the MNOs get extra profits and BT gets less profits, not to the same extent because quite a lot of it has been passed on to consumers, but they still get some ----

MR. HOLMES: On each side, we would say.

PROFESSOR BAIN: On each side, yes, but the water bed effect is said to be incomplete, so a bit sticks. Then in the second two years the MNOs lose out but BT gets it back. So in terms of profitability there is an approximate balance.

MR. HOLMES: Would you excuse me one moment. (After a pause) Sir, as I am helpfully informed by those instructing me, the focus of Ofcom's statement was of course on an efficient structure of prices and on efficient choices, not excessive pricing. Given the extreme complexity of determining, first of all, what stuck in the MNOs' pockets given a partial, at least partial, water bed effect, and given the equal difficulties of determining what BT did in relation to the monies which came to it, it is extremely difficult to determine really whether there is an excessive pricing problem here or whether that excessive pricing problem needs to be compensated. We say that the appropriate focus is upon efficient structure of prices. That was the approach we took in the statement. Indeed, Mr. Anderson relies upon efficiency in para.85. He has arguments in relation to competition, which I will come to, and equally in relation to the effect on end users.

Dealing first with efficiency, we say that simply in terms of the efficient structure of prices, you would end up, we say, with an inefficiency in the final two years. I do not understand your comment to detract from that. You are simply pointing to other possible effects which may need to be considered as well in terms of the competitive positions of the parties and in terms of the redistributional effects between different classes of consumers.

The efficient structure of prices point holds irrespective of the point that you raised, does it not?

PROFESSOR BAIN: I am merely suggesting that there may be other elements that would outweigh that, and looking at three parts of 88(1).

MR. SCOTT: If we say with efficient pricing for a moment, one of the issues to which the Competition Commission must give attention in moving from their provisional findings to their final findings is the question of the recovery of spectrum costs. If the Competition Commission, bearing in mind the arguments that you have made before us, realise that your arguments have prevailed, then the Competition Commission are going to be faced with spectrum costs which have to a greater than efficient level already been recovered, and in considering the market place approach to spectrum costs, if there is an expectation in the market place that you should depreciate your spectrum costs early on while the income is still coming in and then depreciate them at a lower rate later on once appeals have gone through, then the logic of your argument is that the Competition Commission should be

taking into account whatever decision we come to in working out what the consequential efficient costs are in Years 3 and 4, bearing in mind that they are stuck with Years 1 and 2.

MR. HOLMES: Sir, I detect some anxious deliberation behind me. I think I should just take instruction on this point before I give the answer which occurs to me. (After a pause): Sir, I am instructed that the objective when setting 3G spectrum costs was sending efficient price signals and not based on a model of historic cost recovery. There is nodding of heads behind me. I am not sure whether that addresses your question.

MR. SCOTT: This is definitely a price control matter. This is not for us. This is for the Competition Commission. But, it does seem to me that there is an interplay of the implication for spectrum cost recovery of the approach taken to regulation because inevitably where you have a dominant player who, absent any regulation, could excessively price, and where the implication of what is going on is that that dominant player has been able to charge inefficiently high prices - whether they are excessive or not is another question - then there seems to me to be an implication that the Competition Commission might want to take into account. If the implication of your argument is such that it is really not relevant for them to look at Years 1 and 2 and they have got to focus on Years 3 and 4, but they know what happened in Years 1 and 2.

MR. HOLMES: Sir, I see that. Of course, that will be a matter for the Competition Commission when it considers the matter further. But, the import of your argument, if I understand it rightly, is to effect the efficient charge level which will result from the Competition Commission's deliberations at the end of the process.

MR. SCOTT: It is this: what Professor Bain has explained to you is that the condition is concerned with an efficient charge over the whole period. Now, what we know from the glidepath is that we are already dealing with something which is over the efficient charge for the whole period because of the glidepath. So, there is already an area of that graph which is too high. If the figures should in fact have been lower, the Competition Commission are faced with a situation where taking the period as a whole the area of excess there is enlarging. Taking the period as a whole, what you are saying is that the only suggestion that they can make is in relation to dealing with that in relation to Years 3 and 4. Now, your answer to that is that they are then likely to push the charges to a level that is below the efficient level for Years 3 and 4. I have not done the calculations and so I do not whether that is accurate ----

MR. HOLMES: If the orders provide compensation for the revenues lost in Years 1 and 2, yes.

MR. SCOTT: 'Compensation' was your word - not mine. I am looking at an efficient charge with some allowance for the glidepath, taking the period as a whole and thinking about what the implications for the Competition Commission are of the argument that you are making before us.

MR. HOLMES: Sir, with respect, that appears to us to fall into the fallacy that we submit underlies BT's analysis - that somehow by adjusting the level below the efficient charge level, however that is determined, you could correct for the fact that you had inefficiently high levels during a previous period. The consumption decisions of individual consumers are made obviously -- have already been made in relation to past periods, and have yet to be made for future periods.

Sticking for a moment with the efficiency of the structure of prices and the impact upon consumption decisions which result therefrom, we say that two wrongs do not make a right. The fact that you had higher charges during the first two years do not mean that by having lower charges during the second two years you get a more efficient outcome. On the contrary, you simply end up with inefficiency throughout the four years.

MR. SCOTT: But is there a moral hazard associated with suggesting to those who have the current advantage of higher prices sustaining for as long as possible their appeals in order to avoid efficient charges being introduced and how should either the Competition Commission or we deal with that moral hazard?

MR. HOLMES: Sir, obviously Ofcom's interest in these proceedings is to ensure that these decisions are made by the right parties and in accordance without statutory powers and duties as we understand them to be. In terms of protecting their commercial positions, it is obviously for the parties to consider whether to seek interim relief at any stage of the procedure.

MR. SCOTT: It is you who we see as representing the consumers, and it is the consumer interest that we are trying to foster there.

MR. HOLMES: Indeed, sir, but I do not understand there to be any allegation that until these problems were apprehended anyone had deliberately dragged their feet in order that the appeal go on for as long as possible. There has been no criticism at any stage of the MNOs' conduct thus far in any of the points that they have taken. Now, it may well be that moral hazard will now arise. Of course, the Tribunal needs to be alive to that. Ofcom will make submissions on that as necessary, as the proceedings go forward, in defence of the consumer interest as it understands it to be. But, for the question at hand, which is our statutory

powers and duties, we do not see that that moral hazard question is directly or immediately relevant.

PROFESSOR BAIN: Mr. Holmes, would Ofcom agree that the term 'promoting efficiency' could be interpreted more widely than getting prices exactly right?

MR. HOLMES: You mean getting prices to our estimation of the efficient costs ... (overspeaking) ...

PROFESSOR BAIN: -- two wrongs do not make a right. You are talking about narrow pricing efficiency. The term in the statute is 'promoting efficiency'. Would you agree that the term 'efficiency' could be interpreted more broadly than simply referring to the prices?

MR. HOLMES: Excuse me one moment, sir. (After a pause): Sir, we would of course accept that efficiency could extend to other factors besides a narrow concern with the efficiency of particular prices and the efficient structure of prices at any moment. However, sir, we say that BT's arguments, as we have read them, do not reveal any developed -- Certainly nothing that we have seen so far that we can respond to offers a developed economic analysis of why efficiency would lead to the appropriateness of an adjustment below the efficient cost level, which has been accepted - subject to points raised in Hutchison's appeal as to the appropriate measure of costs - as the appropriate basis. This appeal is ultimately an appeal, and its bounds are determined by the statement and the approach taken by Ofcom in the statement. You will recall, sir, from s.7 of the statement that Ofcom's focus in the decision was on an efficient structure of prices. That was its primary concern. Indeed, the other matters that we accepted in the statement as affecting efficiency all flowed from that. Now, of course, looking forward, if there are other good arguments affecting efficiency which might affect the Competition Commission's determination, the Tribunal's determination, and our assessment of our statutory powers, we will hear them. But, we say that they have not been made in any developed form to date.

PROFESSOR BAIN: Thank you.

MR. HOLMES: In relation to BT's other arguments there is also some reliance placed on sustainable competition. In relation to this we would note first that Ofcom has not accepted in the statement - and it is not subject to appeal in these proceedings - that the fixed network operators and the mobile network operators do not compete on the same retail markets. Sir, if a reference were needed for that, I believe one is given in the speaking note at the bottom of p.14.

MR. SCOTT: We have looked at that note and we recognise that as a statement of fact as to Ofcom's position without ourselves necessarily agreeing or disagreeing with the proposition contained in the footnote.

MR. HOLMES: Of course, sir. Indeed, until you are called upon to do so it is difficult to see why you would need to re-open that question. However, even if one were to accept the premise that MNOs and FNOs did compete on the same retail markets, we say again that any distortion resulting from prices that are too high in Years 1 and 2 would not be compensated by prices that were too low in Years 3 and 4.

Finally, as regards benefit to end users, we say in relation to s.88(1)(b)(iii) - the provision relating to end users - that this must be read together with the other purposes and that end users here means end users generally and not some specific sub-set of end users. BT's end users when compared with the MNOs' end users. Of course there are distributional consequences assuming a partial waterbed effect on each side of the equation. There are distributional consequences of setting prices below the efficient charge level for the mobile network operators' consumers.

We say that BT's adjustment cannot be achieved consistently with s.88(1)(b). I am very aware of the time, madam, and I will not deal with BT's attempts to resist this conclusion by reference to past statements of Ofcom. We say that this is really a jury point, Ofcom's views cannot affect statutory construction but in any event the quotations do not assist BT and are taken out of context. That leaves only the issue of MA.3.6 and MA.4.6 which, with the Tribunal's permission, I should like to deal with despite the time.

On this we say as follows: MA.3.6 and MA.4.6 are not analogous to the future adjustment option proposed by BT, and nor, we say, could they be used to effectuate as an alternative to the SIA system on which BT seeks to rely. We accept and adopt BT's submission that price controls must be set to achieve an efficient result throughout the charge control period in the sense that they should seek to achieve an efficient result in each year of that period. We say that BT's future adjustment option is flawed because it does not do so, it leads to price controls below the efficient level in two of the four years.

By contrast MA.3.6 and MA.4.6 have the objective, and are likely to have the effect of ensuring efficient price controls for all four years. Price controls will only promote the purposes set out in s.88(1) effectively if they are complied with. MA.3.6 and MA.4.6 seek to fix *ex ante* the incentives of individual MNOs to comply with the price control. They ensure from the outset that each MNO knows that if it fails to ensure its compliance with the price control it will be subject to subsequent corrections. They are a deterrent mechanism

and, indeed, to put matters crudely they are intended to punish individual mobile operators that depart from the terms of their price control. It was suggested yesterday that MA.3.6 and MA.4.6 are about forecasting error. We say that that cannot be the case. The price controls avoid the risk of forecasting error by using traffic volumes from the preceding year, that avoids the risk of error which arose in previous price controls where traffic volumes were estimated on a rolling basis. You applied the previous year's traffic volumes which, of course, are fixed and determinable empirically. So MA.3.6 and MA.4.6 operate purely and simply as a deterrent mechanism.

In relation to Years 1 to 3 the adjustments are highly unlikely to take charges below the level of cost. In the case of Year 4 the mechanism does raise the possibility we admit of an individual operator's price control dipping below the efficient charge level, which of course is the level applicable in Year 4, but their purpose is to deter operators from pricing above the efficient level, and if they succeed in that purpose they will never result in charges being below the efficient charge level. So whereas BT's approach will inevitably result in a charge below the efficient charge level, and we say that that simply could not be done consistently with s.88(1)(b), MA.3.6 and MA.4.6 do not have that inevitable consequence. They set *ex ante*, their intention is to avoid charges ever departing from the efficient charge level as estimated by Ofcom. In other words, it is not two wrongs make a right, which we say is BT's fallacy, it is rather that MA.3.6 and MA.4.6 remove the incentive for the first wrong.

THE CHAIRMAN: So what is the relationship between those and sections 94 and 95?

MR. HOLMES: I think we say they are belts and braces, but I shall check. (After a pause) Yes, they are simply duplicative compliance mechanisms, which save Ofcom, in relation to minor infractions, which of course might over time accumulate to significant amounts of money, from going through the rigmarole of the enforcement steps that are specified in sections 94 and 95.

That just leaves question of whether MA.3.6 and MA.4.6 could themselves be used to achieve the results sought by BT and here I rely on the submission that you already have, that there is no scope for BT retrospectively to re-determine, so here again the availability – of the ----

THE CHAIRMAN: No scope for Ofcom retrospectively.

MR. HOLMES: Forgive me, no scope for Ofcom retrospectively to re-determine, either the SIA mechanism or MA.3.6, MA.4.6 on our reading would depend upon charge control levels

which had been departed from for past periods, and we say there is no scope to vary the price controls that were fixed for those periods.

MR. SCOTT: Just one final point for completeness on that, were there to be a table of price controls for Years 1 to 4 you, as I understand it, have discretion under MA.3.6 and MA.4.6?

MR. HOLMES: That is correct, yes.

MR. SCOTT: We take it that you would not want us to direct you in a way that fettered that discretion?

MR. HOLMES: Absolutely, sir, I am instructed that that is the case. Unless there are any further points, those, madam, are my submissions.

THE CHAIRMAN: Just one small point on your speaking note, para.17, your primary position is that the appeal "encompasses only such adjustment to the glidepath as is strictly necessary to arrive at the new level of charge for Year 4." I am still not entirely clear what your case is on Year 3, assuming we get to the end of this before Year 3?

MR. HOLMES: This obviously depends on whether the prospective adjustment sought by BT, and equally the prospective adjustment to glidepath is or is not a price control matter. If it is a price control matter, then this is simply a matter for the Competition Commission and no issue arises in relation to any of the four years. What caused confusion to BT, and we appreciate that we may not have put this as clearly as we should have done in our initial skeleton, but if one accepts that there is a division of competence between the Competition Commission and the Tribunal where the Tribunal mops up subsequently arising remedial issues, if that submission found favour with the Tribunal we would say that whatever the Competition Commission's determination was it could not preclude the Tribunal subsequently from dealing with such remedial matters of a subsequent nature as were properly raised in the appeal. You have, of course, to determine the appeal in accordance with the Competition Commission's determination. But we say that the Competition Commission's determination should be read as limited to those points that were raised in the Notice of Appeal alleging error in Ofcom's original price control on the basis of our interpretation of Rule 3, and on the basis of our account of the division of competence, the statutory framework with a third stage for the Tribunal and a fourth stage for Ofcom in relation to new points that have arisen. Does that ----

THE CHAIRMAN: No, it does not.

MR. HOLMES: I am so sorry.

THE CHAIRMAN: Putting aside pleading points for the moment, and putting aside whether it is a price control or not, does Ofcom have the power to determine the price for Years 3 and 4, and hence we have the power to direct that you do so?

MR. HOLMES: Yes, madam, we would accept that for the subsequent periods we have the power to vary our price control. This is on the assumption that Year 3 is arrived at after the end of this appeal.

THE CHAIRMAN: Yes.

MR. HOLMES: Of course, there is a possibility that Year 3 may be time passed ----

THE CHAIRMAN: Yes, thank you very much.

MR. ANDERSON: I am sorry, I wonder if Mr. Holmes could just finish that sentence, because it seemed to me the bit we did not hear was quite important, if he said the appeal does not finish until Year 3 has started. I think he was going on to finish that sentence.

MR. HOLMES: I thought that I had finished the sentence. I apprehend that Mr. Anderson's concern is to know what then happens with Year 3 if the appeal does not end by then. The logic of our argument is that Ofcom cannot vary Year 3 ----

THE CHAIRMAN: Is that a part of Year 3? Are we getting into a part of Year 3?

MR. HOLMES: There is of course an issue as to whether a variation could be made in relation to parts of years and Ofcom's position is straightforwardly and clearly aligned with that of BT, that Ofcom, the Competition Commission and the Tribunal would have the power to vary parts of years. The question is whether it is time passed or time going forward, it is not portions of time.

THE CHAIRMAN: Thank you very much. I think, despite the fact that we have over-run and that is entirely our fault, not yours, Mr. Holmes, we had better have a few minutes for everyone to collect their thoughts. So we will come back at 12.30. Thank you.

(Short break)

MR. HOLMES: Madam, I am sorry. I am aware that I have already well-overrun, but I think there is one point that I should draw your attention to which has been explained to me by those instructing me in relation to MA.3.6 which may affect its suitability to achieve the remedy which the Tribunal has in mind. It would perhaps be sensible to turn this up at p.405 of the termination statement. In the fourth line there is a reference to the following relevant year. The point is that if you have an overcharge -- If you go above the level in the preceding year, you can correct it in the subsequent year. This would obviously create a

problem if Ofcom were to re-determine rates for Years 1 and 2. It could not then recover both the overcharge in Year 1 and the overcharge in Year 2 in Year 3. It could only recover the overcharge in Year 2 in Year 3 because that requirement ----

THE CHAIRMAN: You cannot roll it forward.

MR. HOLMES: You cannot roll it forward. Indeed. So, assuming that we were to revise our charges for all four years it would be necessary to pursue the compliance mechanism under ss.94 and 95 if they were applicable.

That was all, madam.

MR. SCOTT: The other question - which is not a question for you; it is a question for the operators- is going to be what view the operators take of BT's suggestion of using the SIA. But, that is for them - not you.

THE CHAIRMAN: I think that is your cue, Miss Bacon.

MISS BACON: Madam, just a few housekeeping matters to start off with. I have handed up a small clip of material which should be on the front. It is a single page - a contents page, if you like, of my oral submissions today. The second page is a graph which I will make clear. It is O2's actual prices set as against the various glidepath options. So, you can see what it actually looks like on our prices. The third thing in the clip is a case called *Kirin-Amgen*. Mr. Anderson has had this since Wednesday evening - so, I have not sprung it on him. There is a Court of Appeal judgment behind that. There is a single paragraph which simply upholds the point which is made by Mr Justice Neuberger at first instance. I will take you to that. Lastly, there is the CAT Guide to Proceedings. I hope not to take you to it, but it is there for the avoidance of doubt if we get questions on that.

So, the second housekeeping matter is timing. We did have three hours between the five MNO's. That is the time that we expected to take. Now, on the current timing that would take us to about half past four unless I am mistaken in my arithmetic. Was the Tribunal expecting to sit late today or go on until Monday?

THE CHAIRMAN: We will think about that over lunch.

MISS BACON: I had hoped to be finished by lunch, but I think that is possibly unlikely. Perhaps we will see where we are when we get to one o'clock.

The batting order. We have divided the issues between us more or less. There may be some overlap but the agreed position is that I should open on Question 1; Miss Demetriou, for Orange, will deal mainly with Question 2; Mr. Pickford, for T-Mobile, will deal with Question 3 and, I understand to some extent, Question 4. I also think he has a few things to say about his own position on Question 1. But, that should not take much time. Miss

McKnight, for Vodafone, is dealing mainly with Question 4 and Miss Rose, for H3G, has asked for five minute at the end. I have no idea what she is going to address. (Laughter)

It falls to me to address Question 1. I think it goes without saying that the Tribunal should take our written submissions as read. I am not going to repeat them. I should not be taken to abandon any point. I simply have not got time to deal with everything that we have said, even on Question 1. What I propose to do is address Question 1 by asking four questions. Those are at Point 3 to 6 on my outline.

The first question is: Does BT's substantive appeal expressly challenge the TACs in Years 1 to 3? The second is: Does it implicitly challenge the TACs in Years 1 to 3? The third is: Can a challenge to the TACs in Years 1 to 3 be read into BT's claim for relief - as opposed to its substantive grounds of challenge? The fourth is: If the answer to any of the above is "Yes", exactly what challenge does BT make to the TACs in Years 1 to 3 - or, in other words, what relief does BT say should be granted in relation to those years? So, if there is something to be read in, what are we actually reading in?

Before I come to those questions in detail I would like to make two initial points. Those are set out at Points 1 and 2 on my outline. The first is a clarification of our understanding of BT's case as originally pleaded. In its written submissions, and also in its submissions to you yesterday, BT has expressed some surprise that we are taking this point. It is repeatedly claimed that everyone - or almost everyone - must have understood its pleadings originally to encompass a challenge to all four years of the charge control. Now, I cannot speak for the other MNOs, but as far as we are concerned, the fact of the matter is that no-one gave a moment's thought to whether BT was challenging Years 1 to 3 until after the Competition Commission had reached its provisional determinations in respect of the Year 4 TAC. Until that point - until after the provisional determinations - as far as we were aware, the Competition Commission was dealing solely with the issue of the ultimate charge control or the end point for the simple reason that that is what BT's appeal was about, and that is what the referred questions on BT's appeal had been about.

This is entirely borne out by our submissions to the Competition Commission because those submissions, as has been noted by others, focused entirely on Year 4 and said nothing about the other years. Indeed, if a challenge to Years 1 to 3 had formed part of BT's case from the start and if we had known that it did, it is inconceivable that we would not have addressed the point. In the first place, there would have been a real issue as to whether this was a price control matter at all as you will have seen from the submissions yesterday and today. As a result, this would have inevitably formed part of the preliminary issue hearing that you

will recall was held in September last year concerning whether certain issues in Hutchison's appeal were properly price control issues that should have been referred to the Competition Commission. At that hearing the Tribunal would not only have had to consider in broad terms whether, as BT claimed, all of its appeal did fall as price control issues, but it would have also had to form a view then of what exactly BT's pleaded case was in respect of Years 1 to 3 because it is quite conceivable that one remedy, or one form of remedy claimed by BT in relation to Years 1 to 3 might have been a price control matter, but a different form of remedy would not.

So, if the Tribunal, following that hypothetical exercise which never actually happened, had gone on to find, as BT submits it should now rule, that BT's challenge to the charge controls in Years 1 to 3 was a price control matter, then, again, it is inconceivable that the questions referred to to the Competition Commission would not have explicitly addressed the point. We would necessarily then have been on notice to put in submissions, and we would have put in submissions to the Competition Commission as well as appropriate evidence supporting those submissions, whether factual or expert evidence, on whatever case BT was making. Just to give you an example, that kind of evidence would have included evidence about the investments made by our business; the pricing decisions we had taken on the basis of the charge controls determined by Ofcom; we would have necessarily made submissions on pass-through and the waterbed effect - if any kind of compensation was being claimed. We would have made submissions about the legal uncertainty for all of those with regulated businesses if we were forced to anticipate in our pricing the outcome of an appeal against a price control decision. We may also have had to consider issues such as if there were a compensatory adjustment would the burden fall disproportionately on certain consumer groups. We would have had to have made these points because the sums of money involved are so enormous. I asked my clients to give me some estimates, and just to give a very illustrative example, and I cannot state precisely, I have to give a very broad base, but if you take the difference between a drop only in Year 4, which is what we say was BT's pleaded case, and the new glidepath which Ofcom says is consequential on BT's appeal, over the period of the charge control the different charge controls that that would have entailed would have made a difference in revenue terms to O2.

So there can be no doubt at all that had BT raised this issue from the start we would have responded to it, and necessarily responded to it with our own submissions on what the glidepath should be. Ofcom points to the fact – and it is absolutely true – that we did not make any of these submissions in our pleadings, and we did not make them in our

statement of intervention, and says therefore that we are not entitled to suggest any adjusted glidepath other than the one it puts forward. But that precisely highlights the problem here. The reason why we did not address the issue of the glidepath, the reason why we never made these kind of submissions before was it simply never crossed our mind that Years 1 to 3 were at all up for grabs in BT's appeal. In fact, the first indication that we had that the glidepath might be at all relevant to BT's appeal came when we received the letter from the Competition Commission on 10th October this year, requesting submissions at the plenary session on: "Consequential adjustments to be made to the glidepath", and that was as far as the Competition Commission went. Even then, and I remember very clearly we did not know what BT's case was going to be, we had a discussion about it, we had no idea what BT was actually going to say until their skeleton argument arrived a week later on 17th October and, as you will know, in that skeleton argument they propose that there should be no glidepath at all, it should be entirely scrapped and that the relevant adjustment should be made for all four years of the price control. So it is entirely correct to say that this took us by surprise.

I should deal in that connection with Professor Bain's point, was it obvious to anybody that there would have to be a claim for a consequential adjustment? Of course, BT said from the outset that its appeal concerned price control matters that should be referred to the Competition Commission, they did not apply for interim relief, they must have known at that stage that there was some chance of some part of the price control period expiring. So it must have been obvious to BT at the time that it put in its Notice of Appeal saying in terms that this is a price control matter that needs to be referred to the Competition Commission, that there would be a Competition Commission reference with the consequential delay that that would entail. Given that it was claiming that, it was incumbent upon BT at that point to reflect that in its claim for relief. They would have no problem in pleading the point. I am afraid I disagree with Mr. Holmes on this point, BT could very easily have pleaded it, and while Mr. Holmes was making his submissions on this I simply wrote down off-the cuff what I think BT could have pleaded and it would have been very simple for them to have said in their claim for relief something along the following lines:

> "Further or alternatively if any part of the charge control period has expired by the time that a new decision is taken by Ofcom BT seeks such adjustment as may be appropriate to compensate BT for its over payment in the expired period."

I did not have very much time to do that, it is probably not very elegant, but that would have achieved exactly what BT is now saying it could not possibly have thought of doing.

My second preliminary point concerns the question of consumer benefit ----

MR. SCOTT: As you move on to consumer benefit it relates to that what you have just said and what Mr. Holmes said. Mr. Holmes took us to overall consumer benefit as being the criterion in s.88. You took us to differential burdens between consumer groups and so, as you develop this, you may want to relate his overall consumer benefit to what you say about differential burdens.

MISS BACON: I was not seeking to open a substantive issue of consumer benefit. What I was simply doing is giving examples of the kind of submissions we would have made, depending on what BT's pleaded case was, and the only point I was making on differential burdens was if BT had sought to claim from the start an adjustment which would involve going below the efficient price level we would have had to have made submissions on how this would be reflected through in the prices we passed on to consumers. It was a point made to me by one of my clients this morning, one of the issues that may have arisen in that context would be whether that would necessarily result in a higher burden on certain customers because of the way the pass through would have to be effected; that is the point that I was making – an illustration of the kind of evidence. I am not making an idle claim about having to put in evidence on this.

Moving on to my point about consumer benefit. This is simply a preliminary point as to what we are talking about because BT was quite silent on the point in its submissions despite the fact that there were several questions from the Tribunal. I think the reason that BT was coy about this was that it made quite clear at the Competition Commission plenary hearing that it was not seeking an adjustment to the glidepath in order to pass on the benefit to consumers, but rather in some way to redress its competitive position. All I want to do is refer you to the passage where this was actually discussed at the Competition Commission plenary hearing. It is in bundle 2, tab 57 at p.23 around line 4 of that page. There was a question from Professor Cubbin:

> "… if it turned out that the glidepath were retrospectively adjusted … how would such retrospective payments be made? If they were made, how would they be passed on to BT's customers …"

THE CHAIRMAN: Sorry, where are you reading from?

MISS BACON: Page 23 at tab 57 and in my copy it is lines 4 and 5.

THE CHAIRMAN: Yes.

MISS BACON: Mr. Richardson gave an answer which more related to the damages suffered by BT in terms of its market share, and the question was then posed again by Professor Cubbin, and that is at the bottom of the page, line 22:

> "But in terms of the question I asked, the direct answer to the question is that you have no plans to remit those back to BT's customers? It is more a matter of compensation for effects on your business, is it?"

Then the reply:

> "If we are talking about the rates going back two years, that is the only thing we can do. I do not think there is any practical way in which we could now make a refund to the customers."

Then just to draw your attention to the next comment:

> "Secondly, given the waterbed effect, would not any excess charges that have occurred in the past have already been passed on by the MNOs to their customers" A. (Mr. Richardson) That is a very hard question for me to answer."

Then Mr. Anderson came in conceding yes, there would be complications. Then at line 14 he then says because of that he is "not suggesting that reimbursement is necessarily the simplest issue".

THE CHAIRMAN: It was your Mr. Anderson.

MISS BACON: It was our Mr. Anderson, yes. (Laughter) and Mr. Richardson was for BT I should say.

MR. ANDERSON: While we are on it, madam, and to save me dragging out this bundle again at the end, I wonder if the picture could be completed by Miss Bacon taking you to p.26 of the transcript where Mr . Richardson dealt with what the position would be in relation to the future adjustment option.

MISS BACON: Is there any particular line?

MR. ANDERSON: Yes, it is Mr. Richardson on p.26.

MISS BACON: Yes.

> "One way of giving effect to the reimbursing issues, which may be after all a matter for another venue, would be to set the rates for the remainder of the period in such a way that they recouped any overpayment …"

Then he said:

> "… and those benefits would I think be passed on to customers. So that is a way of giving effect to reimbursement in a way that is guaranteed to benefit."

Then he corrected himself:

"… is more likely to benefit end users, if that is a concern which you had."

I am grateful to Mr. Anderson. The point I want to make is a very simple one, this is not a straight forward issue of anything that BT gets back being passed directly on to the consumers. I am not arguing against the position that in some way there may be a trickle down to consumers but this is not a straight case of us giving back all these profits that we are supposed to have held on to for the past years and BT simply making a refund to the original consumers. The position is far more complicated than that.

THE CHAIRMAN: But do you say it is not even guaranteed to get to consumers even if it is the future adjustment option?

MISS BACON: We would say that there is no guarantee that it would get to the consumers. Certainly there is no guarantee that it would get to the same consumers that had theoretically overpaid in the past, because there is no practical way of doing that.

PROFESSOR BAIN: I think that is accepted, but would you agree that the same competitive forces would be at work in the future as were broadly at work in the past so that cost reductions would be passed on to the same degree in the future as they have been in the past?

MISS BACON: I would have to accept, particularly given the water bed effect, we will be making exactly the same point in relation to our own consumers, that there is a degree of pass through to consumers. I was not trying to make a particularly blunt point, it was simply a nuance point, that there is no direct effect of repayment of the consumers that originally paid for the overcharge. It is more complicated than that, as BT said to the Competition Commission.

With that, can I turn to the first of my four questions, which is whether a challenge for the Years 1 to 3 was made explicitly in BT's substantive appeal. When I say "substantive appeal", I am referring to the grounds of appeal and the grounds of challenge, as opposed to the claim for relief. The short answer to that for the MNOs is no. As we said in our written submissions to the Competition Commission on this point, and I will not take you to them but you have them, BT advanced four substantive grounds of challenge. All of those were directed at the final year TAC. What BT would have had to do if it were advancing an explicit challenge to Year 1 to 3 TACs, which it could have done but it did not, would have been to add another section after its current grounds of appeal saying that it followed from the preceding sections that the charges set by Ofcom in the sections of the statement dealing with the glide path were also wrong, and BT would have then had to go on and say how, in its view, the error should be corrected, whether by reducing the charge controls immediately

to the level of the 2G cap, as was its position; or making a further adjustment to compensate for any expired charge control, or whatever other remedy BT sought, and it could have put forward alternative remedies. As we know, there was no hint of this in BT's Notice of Appeal. So that is the simple answer to whether the challenge was made expressly.

The second and obviously more difficult question is whether BT's substantive grounds of appeal carried with them an implicit challenge to the TACs in Years 1 to 3, and here we disagree, I think, with Ofcom. Our answer to that is, again, obviously no. As we have pointed out, Ofcom's conclusions on the glide path were made in an entirely separate part of its statement and were quite distinct from its conclusions on what the final year TAC should be. Indeed, quite different considerations were taken into account under each part of Ofcom's statement. The final year TAC on the one hand was determined on the basis of factual and economic assessment of the MNOs' costs, whereas the glide path on the basis of quality considerations, and that is reflected in the point, as Ofcom acknowledged, that for Years 1 to 3 the charge controls were set above the level at which Ofcom determined would be efficient pricing in 2010/11.

So it cannot be said in any sense that BT's challenge to the factual and economic considerations in relation to the final year TAC taken into account in assessment of, for example, spectrum costs, carried with it an implicit challenge to the very different policy considerations applied by Ofcom in determining the glide path.

In answer to that BT makes the following argument, and the way that it put its case at the start of the hearing yesterday, and I will come on later to the, I think, different way BT put its case at the end of the hearing, but at the start of yesterday afternoon, BT's case was the following. Since it failed to challenge the glide path in its grounds of appeal the necessary consequence of that is that Ofcom's reasoning must stand. In turn, the consequence of that is that there should be a smooth glide path from the existing rate – and I am quoting there – which BT says meant the TAC in March 2007 down to the TAC for Year 4. BT in its skeleton argument went further and said, "Actually that is what all of the MNOs have submitted at various points".

There are a number of answers to that which explain why, in fact, we did not make that submission. I do not understand any of the other MNOs to have made that submission either. The first point is that BT completely misunderstands what the glide path is. The glide path is not a line from one point to another, as BT seems to think. In reality, the glide path is simply a shorthand for Ofcom's determination of what the specific charge control in

Years 1, 2 and 3 before the Year 4 TAC is reached. That is why Ofcom's conclusions on the glide path are set out in tabular format at figure 9.6 of the statement.

I would invite you to turn that up because it makes another point I am going to come on to. It is in bundle 2 at tab 55, but I understand you may also have it loose, and it is at p.182. It is figure 9.6 and it is below para.9.243. I think there may be some different numbered versions, but I have got it at 182.

MR. SCOTT: We have it at 187.

MISS BACON: I am grateful for that. I think I had better just go on paragraph numbers then. It is the table below 9.243. The table, as you will see, deals specifically with each of the years of the charge control in turn. It is only the third and the fourth years that are lumped together. The first and the second years are dealt with separately.

MR. SCOTT: You seem to be drawing a distinction between the principal of equiproportional decrements adjusted in the way we have discussed the tweak and the concept of a policy decision of the rates in Years 2 and 3. It seems to me that the figure 9.6 is an outworking of the principal of equiproportional decrements rather than an independent policy decision of the price controls that should apply to Years 2 and 3. Are you differing from that? You seem to be suggesting that Ofcom, as a matter of policy, decided what the price controls in Years 2 and 3 should be without regard to the final year, whereas our understanding of the principle of equiproportional decrement is that you take the starting point, you take the end point, you work out what the compound rate of decline is and you then apply that subject to the tweak.

MISS BACON: I am not going that far. My submission is that, because of the tweak and also because of the way in which the charge controls were structured, it is not simply a straight line from A to B. It is actually a number of points on a line. When we talk about the glide path it is actually quite misleading. That comes to a point I was going to make about whether it is a smooth line, even disregarding the tweak. I think it is very misleading to speak of the glide path as being simply a line from A to B. It is not a line from A to B, it is a working out, as you, Mr. Scott, correctly say, of applying this principle of equiproportional decrement with the tweak which gets you to different points along the way. Those different points are the glide path, it is not the line. If you think about it in terms of a number of different points, a charge control for Year 1, a charge control for Year 2, a charge control for Year 3 and Year 4, that actually makes it easier to see why BT's submission that moving the end point necessarily moves the whole line is wrong.

My second point is actually related to this, which was that the glide path was not smooth, as the table shows and Ofcom has explained. Ofcom frequently refers to there being a gradient and BT has made the same point, there is a gradient. There is not one gradient, there are four gradients. If you did draw a line between the points, as we have done on the second page – this is our graph with the lovely colours. I am afraid they came out differentially when they were printed to when I actually had them on my screen. It is very difficult to show because the differentials are so small. I tried to get it blown up to a scale which would show it better. The top line, which is the dark blue, looks as if it is more or less straight, but it is not actually straight. If you had a large enough scale what you would see would be that the gradient would be shallower from Year 0 to 1 to take account of the ten month point, you then have a steeper gradient from Years 1 to 2, as you have the catch-up, and then you would have a shallower reduction for following two years. Of course, as Mr. Holmes pointed out yesterday, even if you ignored the tweak and you ironed that out, you still would not get a straight line, and that is because of the logarithmic scale point, because the percentage reductions are reductions on an ever decreasing base figure. So you still get a progressively shallower gradient. So it is not in any sense a line, it is four different lines joining five points. I think actually Ofcom would agree with the proposition – I am getting nods from over there.

The reason why I labour this point is not that I am trying to demonstrate my ability to understand logarithmic scales, which I do not, or that I am being pedantic. It is actually a very important reason why, in our submission, both Ofcom and BT are wrong about what BT's appeal necessarily entails. What it means is that even if you are thinking of the glide path in linear terms, which we say is the wrong way of looking at it. Changing the end point does not entail changing the entire line, but simply changing the last line. You can think of it visually. If you have a single line and you change the end point, keeping the start point as the relevant pivot, the entire line would go down. If you have got four different lines, if you change the end point the only necessary change is to the last line.

I can put the point another way using the words of Ofcom's own submissions to you yesterday and today. Ofcom said in its speaking note at para.10 that it considered that BT's appeal only challenged Years 1 to 3 in so far as that was necessary to arrive at the new end point. We entirely agree with that. Our answer to that is no adjustment to Years 1 to 3 is necessary, the only necessary adjustment is to Year 4.

My third point is going to be quite long. I am not sure whether the Tribunal would want to break at that point.

THE CHAIRMAN: Yes, I think we will, thank you, we will come back at two o'clock.

(Adjourned for a short time)

MISS BACON: Madam, before the adjournment I was down to no. 4 on my outline. That may be slightly deceptive as to how long the rest is going to take because it is 4 and 5 which are the main issues I need to deal with. Under 4, which is the second of my four questions, this concerns whether there is an implicit challenge to the Years 1 to 3 TACs and the BT substantive appeal. I have said that BT's argument that changing the end point carries with it a change to Years 1 to 3 was wrong for several reasons. I got down to the third reason.

The third reason is perhaps the most important one. It is the one we have foreshadowed in our written submissions. That is that there is no single mechanical way of applying Ofcom's reasoning to a new end point, particularly given the point of time that we are now at. On that basis we say that there are several quite different ways in which Ofcom's reasoning could be applied to the new final year TAC. We have attempted to represent some of those at least on the graph that I handed up.

Now, as you know, the top line - the dark blue line as it comes out - represents the position under the current MCT statement. The solution which I think represents Ofcom's position and, as I said, it seemed also to be BT's position at the start of the hearing yesterday, is to say that you should work out what the first three years of the charge control would have been, applying equal percentage reduction down to the new final year and taking into account the tweak. So, that is the burgundy line at the bottom of the graph.

Now, our response to that has actually been very eloquently put by Mr. Holmes this morning. We say, as he explained, that that is not the only solution because actually, in our submission, the correct solution would have to take account of the fact that Ofcom's glidepath on its own reasoning was entirely prospective. Not only that, but the glidepath in Ofcom's analysis started (and should start) at a point 60 days after Ofcom's decision for policy reasons. In our submission if you applied that to the situation in which we are now in it would mean that the start of the new glidepath would have to be, on Ofcom's analysis, transposed to the present case at some point after Ofcom's new decision after the matter has been remitted to it.

The alternative solution which would more closely correspond, we say, with Ofcom's reasoning would be for the descent to the new TAC to start from whatever TAC applies, 60 days at least after Ofcom's new decision, and that approximately is the yellow line on the graph. I say "approximately" because the yellow line assumes that it will descend from Year 2, obviously if we are into Year 3 the yellow line would actually start further along, so

the further into the charge control period we get the closer the yellow line gets to the red line, which we say is the correct approach.

That is not the only solution because we can also look at different aspects of Ofcom's reasoning and this is why I say there is no mechanical way of transposing the reasoning, because the reasoning has a number of different elements. Say, for example, that you were to consider that one of the essential characteristics of Ofcom's reasoning was the gradient of the glidepath and in fact BT made for exactly that point at footnote 39 of its skeleton argument, when it said that presumably it assumed that one of the characteristics of Ofcom's reasoning was the gradient, not least because it is the gradient that effectively makes its way into the table that I showed you earlier, because the gradient represents the percentage reductions. So if the gradient is an essential part of Ofcom's analysis, then the solution in our submission that does least damage to Ofcom's reasoning would be the one that maintains the gradient, or gradients – I explained this morning that there were four gradients for as long as possible.

MR. SCOTT: If it is the gradient that is determinative and defining a figure that Ofcom fixed, then you would have to suggest that the starting figure is deduced from the end figure in the gradient, that does not appear to be the case in the Ofcom statement.

MISS BACON: No, sir, that is not what I was suggesting. I was suggesting that there are so many elements of Ofcom's reasoning that one of them has to change and you have to decide which one is going to change. If you said it was the gradient that was going to stay fixed as far as possible, and it is common ground the start point should remain as is, then the solution that does the least damage is that you only change the gradient in Year 4. As I said, there are four gradients, and you only need to change the last one to get down to your Year 4 TAC. So if the gradient is the part of the reasoning that you are trying to preserve, that is the solution that gets to the red line on our graph.

My point is you have to change something but there is no one thing that you can say is the part of the reasoning that has to be changed so as to get to your new end point; there are a number of different ways of doing it. That is really the point I am making at this part of my submissions. I am not making a substantive submission as to what the glidepath should be. What I am trying to do is to illustrate that there is no single mechanical way, because Ofcom's reasoning had so many different assumptions, and that is the point about the prospective issue, that is one of the parts of Ofcom's analysis, the glidepath is prospective and starts 60 days after its decision; it does not back date. So if that is one of the parts that you are preserving you could not start the glidepath where Ofcom says it should be started.

Can I just address briefly then BT's alternatives which I have not tried to encapsulate on the graph, not least because I was not really sure before yesterday what they were. At the start of the hearing we thought that BT was agreeing with Ofcom, so it was essentially suggesting the burgundy line at the bottom. By the end of the hearing, if I understood Mr. Anderson correctly, where he got to was that Years 1 and 2 should remain intact, Year 3 should drop down below even the point that you would get to on Ofcom's solution and, in fact, probably below the efficient cost in order to compensate BT for Years 1 and 2, and then Year 4 would go back up to cost. On Ofcom's speaking note is the graph at 15(a) with a steep drop; it was the first of its graphs representing the alternative proposals.

THE CHAIRMAN: The one with the tick shape?

MISS BACON: Yes, the one with the tick shape, it is at para.15(a) of Ofcom's speaking note. As you will recall, madam, that prompted the exchange when you pointed out that this did, in fact, result in a different glidepath which did have a dog leg in it, and you asked Mr. Anderson if that was correct, and he said "yes". Just for your note it is at p.20 of the transcript lines 3 to 11.

So as I understood it, what BT seemed to be saying by the end of yesterday was that it is implicit in its grounds of appeal that going forward the glidepath should be completely abandoned and that there should be no glidepath or even some kind of a negative glidepath, certainly no attempt to stick to the glidepath or even Ofcom's glidepath reasoning, if that was his case, which I think makes the point for me. If there is no consensus between any of the parties as to what would be the result of applying Ofcom's reasoning to the new final TAC, and if BT itself has not put forward a consistent case on that question it cannot, in our submission, remotely be said that any adjustment to Years 1 to 3 was implicit in BT's appeal, because the question always arises well what is it that is implicit, and BT has not even been able to tell us over the course of a number of hearings and the Competition Commission plenary session what is its case.

Can I make a final point on this before I turn to my Question 3. This perhaps goes to the heart of what BT is saying on the scope of its appeal. Leaving aside the problem of exactly how BT puts its case in very broad terms what BT seems to be saying is that because the TAC in Years 1 to 3 were calculated by reference to the Year 4 end point, then changing that end point must necessarily mean in some way changing the TACs that were calculated by reference to the end point, and that is in very broad terms what BT seems to be saying.

Let us suppose an analogy on different facts. Supposing that during the consultation period Hutchison had succeeded in persuading Ofcom that as a new entrant into the market it

should be given high charge controls, and supposing that Ofcom set those charge controls by an uplift mechanism to the charge controls for the other operators. For example, it said that Hutchison's TAC in any given year should be O2 and Vodafone's TACs, which were the same, plus 25 per cent – entirely hypothetical.

Finally, let us suppose that Ofcom then had a single charge control provision in the SMP conditions as it did in the current case, when the O2, Vodafone and Hutchison TACs were all contained within a single condition MA.3, whatever. Now, let us suppose that BT explicitly challenged O2 and Vodafone's TACs for every single year of the charge control period and included in its claim for relief a generalised challenge to that charge control which I have just posited included Hutchison, but it simply forgot to bring a challenge to Hutchison's TACs because it overlooked it . You will probably see where this question is leading. My question is this: if BT succeeded in relation to O2 and Vodafone would it be entitled then to come back and say that its appeal must also implicitly challenged Hutchison's charge controls, because they were in the same charge control condition and because they were calculated by reference to O2 and Vodafone's TACs, possibly after a period in which the entire Competition Commission reference procedure had gone through, and in which Hutchison had not participated. In our submission of course they could not do that, it would be an absolutely outrageous submission, we say that is precisely what by analogy – and I accept it is an analogy BT are seeking to do in this case.

Can I then turn to my third question, this is number 5 on my outline, of whether if everything else fails and if the Tribunal accepts that BT's substantive grounds of appeal did not either explicitly or implicitly challenge the Years 1 to 3 TACs whether BT can rely on its claims for relief. I think I need briefly to take you to what BT's claim for relief were, I do not think you have seen them so far in the hearing and it is at bundle 1, tab 1 and it is in its Notice of Appeal. The first page I would like you to take is p.5. At para.17 BT summarises its relief:

> "The relief which BT seeks in this Appeal is the setting aside of Ofcom's price controls … and the substitution of equivalent paragraphs imposing price control set at a lower level than the current figures of 5.1 and 5.9 ppm in 2010/11 for the four MNOs."

Then in the following paragraph:

> "BT will make submissions as to what the appropriate figure should be in the course of its Appeal, and reserves its position on this question."

Then if you could turn through to p.61, "Relief Sought" at para. 190.2:

"in substitution for paragraphs MA.3 and MA.4 equivalent paragraphs containing SMP price control conditions set at a level which is lower than the current figures of 5.1 and 5.9 …"

which, as you know, are the end points.

As I have just shown you, BT said it was going to make a submission as to what the final figure should be, and it did it. That is at tab 2 of the same bundle, p.5. That is the conclusion of BT's submission on what the appropriate figure should be, exactly what it said it was going to submit. At para.18:

"For the above reasons, BT submits that the appropriate TAC should be 3.73 per minute in the final year of the price control (i.e. in 2010/11).

MR. ANDERSON: To save me having to drag this document out again, I wonder if Miss Bacon would be kind enough to read para.16 of that document as well?

MISS BACON: Yes:

"BT's proposed mobile termination charge does not contain a network externality surcharge of 0.3p per minute. This charge is not justified in the period between 2007 and 2011 for the reasons set out in BT's Notice of Appeal at paragraphs 160 to 184."

I know Mr. Anderson has referred to that. Given the conclusion, I do not think that that single paragraph can be taken as suggesting, contrary to everything else, that there was some kind of challenge in the relief sought to anything other than Year 4.

MR. SCOTT: If you turn either to para.17 on p.5 or the equivalent 190.2 on p.61, what they are asking for a substitution of new MA.3 and MA.4 in accordance with the purposes set out in 88(1)(b) of the Act. What is implicit in what you are saying is that we could have a situation in which, as a consequence of the Competition Commission saying that the wrong principles are being applied, you are saying that BT explicitly asking for relief which, notwithstanding such a finding, would leave in place figures for Years 1, 2 and 3 which reflected a principle which had been found to be in error. That seems to me to be not entirely consistent with at a level which is appropriate for the purposes set out in para.88(1)(b) in circumstances where the Competition Commission would have found that Ofcom have applied had been in error. That would seem to me to be a strange consequence of that paragraph.

MISS BACON: It is not implicit, it is explicit, in my submission, that that is the result. I think you can answer your question by looking at what the "which" refers to, a level "which is lower than the current figures of 5.1 and 5.9 and which", so the second "which", which

precedes the appropriate for fulfilling the purposes of 88(1)(b), relates to the words "a level". In our submission, what they were really doing in this claim for relief was saying that the end point should be set at a level lower than 5.1 and 5.9 because 5.1 and 5.9 was the end point, and that end point should be appropriate for fulfilling the purposes of 88(1)(b). As we know, Years 1 to 3, in any event, were set above the efficient price control level, so they could not have been asking, unless they had been asking for an immediate reduction to cost, for those to go down to a level that was appropriate. Anyway, grammatically, what we submit was plain to us – it may be that others read BT's mind better than we did – when we looked at this was they referred to a level, and they referred to the 5.1 and 5.9 which are only the end points.

As far as we were concerned, BT's intentions were absolutely clear from the claims for relief. BT was challenging the final year TAC, and in its submissions on what the appropriate figure should be at the conclusion of the document said in terms, "We are entirely focused on that final year".

Ofcom's response to that is that this argument is somehow inconsistent with the structure of the SMP conditions. I will not take you back to them because Mr. Holmes took you through them this morning. He says that the drafting of those conditions shows that the glide path was in some way an integral part of the charge controls so that BT's claim for relief, when it referred in general terms to MA.3.4 and MA.4.4 somehow specifically sought an amendment of Years 1 to 3, though it was expressed in terms of an amendment to the end point. The error in that logic is illustrated by the analogy I drew a few minutes ago. It is absolutely true to say that the conditions that BT challenges do contain the Year 1 to 3 charge controls as well as the Year 4 charge controls, although, in fact, as Ofcom explained this morning, you cannot actually get there by just looking at MA.3.4 and 4.4 on their own, you also have to look at the definition of "controlling percentage", which is in an earlier part. Even leaving that aside, we say the fact that the Year 1 to 3 charge controls are in conditions 3.4 and 4.4 does not mean that BT must have challenged them. Its challenge related to one year. It could quite conceivably have been challenging one year, just as in my example if you had Hutchison and O2 and Vodafone all lumped together and BT only challenged two, that does not mean it was also challenging Hutchison.

In fact, in our submission, if anything the structure of the charge controls shows exactly the opposite to Ofcom's submission. What it shows is that if BT was challenging the Year 1 to 3 TACs it would have made no sense at all for it to express its claim for relief in the terms that it did. What BT would have had to do was to ask for the substituted conditions to be

for Year 1 lower than the figures of 9.1 and 5.7, and so on, because that is what is set out in the charge control. It gives the figures for Year 1, and it would also have had to have asked for the definition of "controlling percentage" to be amended. Of course, it did not even refer to the controlling percentage which is actually the glide path. The controlling percentage defines the glide path.

PROFESSOR BAIN: Miss Bacon, I am looking for these figures 5.1 and 5.9 in MA.3 and MA.4 and I cannot find them.

MISS BACON: No, they are not there.

PROFESSOR BAIN: They are not there?

MISS BACON: No.

PROFESSOR BAIN: So what is being referred to is something that is not there that underlies everything that in these paragraphs.

MISS BACON: It is an incredibly badly drafted claim for relief, is the straightforward answer. The point is that BT was asking for the equivalent paragraphs to be substituted with the different end point. As I said earlier, it does not mean that because you have a different Year 4 point you have to automatically go back and change the rest, just because the rest were included in there. On any view, what could be done is substitute for those conditions and put in "include a Year 4 percentage which is different". Those conditions set out Year 1. It says that Years 2 and 3 are determined by relation to the controlling percentage. What you would do on BT's case is to say, "And Year 4 is X".

MR. SCOTT: Could you take us to the definition of "controlling percentage", please.

MISS BACON: It is bundle 2, tab 55 – you may also have it at a different page. We have established that we have different page numbers.

PROFESSOR BAIN: It is 401 on mine.

MISS BACON: It is tab 55. You have there the controlling percentage and, as I said a minute ago, it is the controlling percentage that effectively determines at least part of the glide path. It determines what the second, third and fourth year figures will be by reference to the percentages, and those relate back to the table that I showed you this morning.

Sir, to answer your question as to what you would have had to do precisely, if you turn forward a few pages to Condition MA.3.4, for example -- What you would do is to say that for the purposes of the second and third years you would leave that untouched and you would simply add a new condition, saying, "For the purpose of the fourth relevant year the figure is X, in the same way as for the purpose of the first relevant year the figure is set as being 9.1 and 5.7", and so on.

MR. SCOTT: So you could not do it, on your argument, by simply changing MA.3 and MA.4. So, in fact, there is no way, taking a strict interpretation of BT's request for relief, that they could achieve the result in MA.3 and MA.4 without changing the definition of the controlling percentage. Is that right?

MISS BACON: If what they are seeking to do is change the glidepath, they have to look at the controlling percentage because it is the controlling percentage that determines the glidepath. My point is that on any view, what they have pleaded in their claim for relief does not go strictly to the structure of these price control conditions. You do not get there.

MR. SCOTT: But if what you are saying is that implicit in the claim that they did make was the fact that you have to reopen the definition of 'controlling percentage' ----

MISS BACON: No, I am not saying that. I am saying that if you took a plain interpretation -- a common-sense interpretation of what they are saying, what they are asking is a change to the end point.

THE CHAIRMAN: How do you achieve that change to the end point? Suppose you are right. Suppose that all they are asking for is for the last year to be at a lower point. So, you have to change the controlling percentage that gets you from the third year to the fourth year ----

MISS BACON: No, madam, that is not what I am saying. I am saying that you essentially say that you leave these conditions exactly as they are, and you simply say that instead of having a controlling percentage to get to Year 4 you just say that the figure is X for Year 4, in the same way as for Year 1 it is said that the figure is 9.1 and 5.7, and so on. It is the way it has been done for Year 1.

PROFESSOR BAIN: You say that doing that would be an equivalent paragraph?

MISS BACON: Absolutely. (After a pause): In our submission, there is absolutely no ambiguity about BT's claim for relief. It referred in terms to the end point. They said they were going to put in a submission as to what the level was. They put in a submission saying that, "The level was this in Year 4". But, even if there were, in BT's claim to relief, some ambiguity, which we say there was not, we say that as a matter of principle the claim for relief would have to be read together with BT substantive grounds of appeal. That would get you to the same answer because, for the reasons given under my Questions 1 and 2, BT's substantive grounds of appeal did not, either explicitly or implicitly, challenge Years 1 to 3. So, purely as a matter of principle BT could not, in its relief, seek more than it was challenging in substance. That is a well-known principle of law.

But, just in case there is any dispute about that, I wanted to refer you to one authority. This is the one that I said I had referred my learned friend, the Kirin-Amgen case. That is the

third document to your clip. This was an action in the Patents Court. I think the headnote probably explains the facts as well as we need them, which is that the Patents Court in an earlier action had found several claims in a patent to be valid, and found that the Defendant had infringed the patent. Then, after the trial on liability there was a bit of a hoo-hah about what should be the relief granted because, in addition to the relief that had been pleaded, the Claimant then sought - and this is at H5 on the headnote - a post-expiry injunction as well as an injunction that the Defendant be restrained from using data generated in the clinical trials anywhere in the world, and so on. So, there were all sorts of claims for relief which were not originally pleaded.

The question was then two-fold - and it is very similar to the questions before the Tribunal today: firstly, was the claim for relief implicitly within the original pleading? If it was not, should the Claimant have permission to amend? Now, we do not have before us today an application for permission to amend. So, I will just focus on what the court said about the need for amendment in the first place. That is at pages.210 - 212. Picking up at para. 21 on p.210, Mr. Justice Neuberger as he was (Lord Neuberger of Abbotsbury, as he now is) started off by referring to Rule 16.2 of the CPR, saying that the claim form must contain a concise statement of the nature of the claim and specify the remedy (very similar, I should add to the CAT rules). Then there is a practice direction which says more or less the same thing - again, very similar to the CAT Guide to Proceedings which is at the back of the bundle. I am not going to refer to that though.

Then, at para. 23:

> "To my mind, so far as the contested relief is concerned, it seems fairly clear from these rules that all Amgen's various claims for the contested relief should be pleaded. The allegation that TKT's cells infringe is plainly an allegation of infringement of claim 1, and at the moment there is no allegation contained anywhere in Amgen's pleadings that TKT infringe claim 1. That such an allegation should be pleaded follows from CPR, rule 16.2".

Then, at para. 24,

> "In my view, quite apart from this, as a matter of principle, an allegation that a product infringes one claim of a patent does not automatically carry with it an allegation that the means of production of the product will infringe another claim of the patent. Even if it does so in a particular case (as there is, to put it at its lowest, a powerful argument for saying here, ----"

So, he is accepting that there is quite a powerful argument to say that one claim carries with it another --- He says,

> "-- that does not excuse the patentee from alleging each class of infringement he wishes to establish, so that the alleged infringer knows the case which is going to be made against him at trial on infringement, and in due course on the determination of relief to be granted".

Then he deals with an argument that the Claimant had made that their claim for further or other relief encompassed this. He says,

> "It does not seem to me that this assists . . . because it must be implicit, as a matter of obviousness and common-sense, that the remedy there referred to must be a remedy which is justified by virtue of the allegations made in the body of the pleading upon which the relief claimed is effectively contingent".

That is exactly the point I have just made.

> "Only in the most exceptional case will the court admit, without requiring an amendment, a claim based on an implied allegation, which is what Amgen's case, that it need not plead that TKT's cells infringe claim 1, involves. . . . It seems to me that Amgen's case must stand or fall on its claim for 'further or other relief'".

He then decides that the most pertinent authority is Daniell's Chancery Practice, the 1914 edition, which he then goes through. It obviously shows that this point is only rarely taken. (Laughter)

At the bottom of the page at para.31 on p.211,

> "In summary, it appears to me that where there is a claim for 'further or other relief', then, unless the claimant obtains permission to amend the particulars of claim to broaden the relief claimed, the position is as follows. First, relief will not normally be accorded in respect of a claim of a type which is not pleaded. Secondly, relief will not be accorded which is inconsistent with the relief specifically claimed . . . Thirdly, relief will not be granted if not supported by the allegations in the pleaded case. Fourthly, relief will not be accorded, save in very unusual circumstances, if the defendant reasonably claims that the claim for it takes him by surprise".

That explains why I started off making the point at the start that we really did not expect BT's claim as it currently transpired to be.

The only other paragraph I wanted to show you is para. 34 on p.212. "It is true that on an inquiry as to remedies the court is often invited to go wider than the pleading indicates.

However, in light of the CPR, the Practice Direction and the principles which I have suggested, it seems to me that it is the duty of a claimant to plead his case on liability and remedies in advance, so that if he succeeds on validity and infringement, the defendant has a fair idea of the possible consequences and risks so far as the enquiry as to remedies is concerned. It is a fundamental principle of justice that a party should not be taken unfairly by surprise".

Just to say, this case did go further. It went up to the Lords with a digression to the Court of Appeal in the middle. The House of Lords does not deal with the issue, but the Court of Appeal does in a single paragraph, which is why I have extracted that. It is a very long judgment. So, in order to save trees I did not copy the entire judgment. I just want to draw your attention to para. 127 at p.78 of the Court of Appeal. "As the judge pointed out, Practice Direction, White Book 2002, para. 6.1 makes it clear that a claimant's particulars of infringement must show which claims are alleged to be infringed and give at least one instance of each type of infringement alleged. That reflects the established practice which enables the court to decide all the issues of infringement. It follows that the judge was right to hold that Amgen needed to amend if they wished to recover relief . . .The judge was also right to conclude that the request for further and other relief did not encompass an allegation that claim 1 had been infringed".

MR. SCOTT: Can we just pause on this case for a minute? It is some time since I was a patent lawyer. What we have got here is a rather different situation where, as I understand it, having proved infringement of one claim in the patent ----

MISS BACON: Yes. There was relief claimed in relation to an implicit claim for infringement of another claim of the patent.

MR. SCOTT: That is right.

MISS BACON: I was about to make the point that I am not seeking to draw the analogy too far. I am not saying that the patents' procedure, which I accept is a very specific one which requires you to plead the infringements claimed is in any way transposable to this procedure. What you have though, is reliance on very similar provisions in the CPR rules as those in the CAT Rules which require the claimant to specify the claim, and the grounds of appeal and the relief sought for equally very similar provisions in the Practice Direction to those which are in the CAT Guide to Proceedings, which is the Practice Direction for the CAT. The decision is not merely by reference to the rule that you have to plead infringement, but by reference to more general principles, which I rely on in this case, which are firstly that the claim for relief cannot go beyond the substantive grounds of

appeal. You cannot get something in the claim for relief on which there is no basis in your substantive grounds for appeal. In other words, the claim for relief cannot broaden your substantive grounds for appeal if there is not a challenge there in the first place.

THE CHAIRMAN: Though what they seem to be saying **here** is that if there is a challenge in your substantive grounds of appeal then you can seek relief for that even if you have not pleaded the relief because of Rule 16(2)(5).

MISS BACON: But not the other way around.

MR. SCOTT: If I can bring us back to the facts of this case. It seems to me that a nearer analogy would be for us reaching this stage in the proceedings and for BT suddenly to find some other aspect of the costs' calculation that they wish to introduce, and that would be the equivalent of infringement of another claim. So we have had our discussions, for example, on spectrum costs but at this late stage we suddenly have a "While we are about it, we want to challenge these other costs." That, it seems to me, would be a nearer analogy for bringing in another patent claim which had not originally been claimed as infringed.

MISS BACON: Actually I would disagree with that because one of the points of this case was that the judge accepted that there was a very powerful case for saying that the implicit claim that had not been pleaded was consequential on the explicit claim that had been pleaded and he said that despite the fact that one seemed on its face to carry with it another, the actual claim had to plead the infringement of the second claim. That, I would submit, is very close to this case.

To use your analogy, Mr. Scott, what we would have to do is to say BT came along and said "Because we have succeeded on this ground there is another part of the analysis which is, in some way, consequential on the ground on which we have succeeded, and we did not plead that, can we plead it now?" and our answer would be exactly the same: the mere fact that it is consequential or may, in some sense, be consequential or based upon the ground upon which they have succeeded does not mean that they should be excused from pleading it, for the very principled reasons given by Mr. Justice Neuberger in this case, the defendant is entitled to know from the start the claim that is made against it and the likely risks to its business from the relief sought. That brings us back to the point that I made at the start, we simply were not aware of that, we made no provision for the kind of relief that BT is now claiming. We had no idea that this was the kind of case that was being brought against us. Given the huge sums involved if we had had any idea we would necessarily have addressed it in the course of the lengthy Competition Commission procedure that is now water under the bridge.

THE CHAIRMAN: So at the outset of these cases before the TRD cases came along it might have been thought in those heady days of the early case management conference in this and the H3G case, that we could have rattled through and come to a solution within 12 months of the first period. It must be your case that still, if we had been in that happy position, we would still have been then just cooling our heels for two years until actually any relief that we could give in these proceedings was able to kick in?

MISS BACON: Actually if that had been t he case and it had all gone on very quickly the position would be that BT would presumably have realised its error much earlier and it would have been able to apply much earlier to amend its case as it did actually, apply to amend its case in other respects, and Hutchison did and we had a hearing on the various amendments that were then sought to be made. If there was a proper application to amend I would not be standing here making submissions as to whether it was implicit . The reason why we are here is that there has not been an application to amend. Actually, probably what BT should have done is when it realised that time was ticking by, which it must have done by the end of last year, because the reference was only made in January of this year, but certainly it was around Christmas last year, it would have realised that time was ticking by. It made this point several times because it said: "We have to get on with the appeal because time is ticking by, it knew that this was the effect of the appeal procedure. What it should have done then is to say: "We suddenly realised we have not included any claim for Years 1 to 3, let us make a note to amend before it goes much further."

If they had made an application to amend back then there might have been different arguments made to the arguments that will now be made on our part if there is an application not amend at this stage a year and a half after the appeal, after we have had the full Competition Commission procedure with all of our evidence, that did not address this point.

MR. SCOTT: Can I just ask one more question while we are on this particular point. Mr. Holmes has referred to the general powers of Ofcom to reconsider price controls in any event. If, as a result of these proceedings, the Competition Commission do come to the conclusion that Ofcom erred, and we come to the conclusion that in the circumstances of BT's Notice of Appeal we are unable to give effect to that in relation to Year 3, would you be anticipating that the proper course, having regard to the consumer interest, for Ofcom to take is for them to ask that they withdraw the current decision and take a fresh decision which would reflect the Year 3 and Year 4 consequences of the Competition Commission's deliberation?

MISS BACON: Absolutely with the proper consultation. It is entirely within Ofcom's powers, if it realises that it has erred in the decision and that error has not been, for whatever reason of the pleading, reflected in the order that comes back to it, it is completely within Ofcom's powers to say "We will now consult to take into account this factor, which was not part of the appeal". Of course it could do so in other respects, if there were a new issue that were to arise at any point in time that it thought had to be properly reflected it does have powers within the scope of its statutory framework to re-consult, it could do that.

MR. SCOTT: And if we were in receipt of an undertaking to that effect would we then not need to give any further direction?

MISS BACON: I think the argument before you is not what you have to do ----

MR. SCOTT: No, no, no.

MISS BACON: Yes, of course the question is then going to be how fast could that determination be made, and there would have to be a proper consultation, but that would be the correct approach if, for a reason not pleaded by any of the parties, which we say is the case, it was appropriate there should be an adjustment, yes.

I am afraid I am going on. I can take my fourth question very shortly. I think I have dealt with the first three. My conclusion on my third Question is that there is, for these reasons, no implicit challenge in the claim to relief.

The last Question is: if you decide against my on my first three questions, in other words, if you decide against the MNOs on question 1(a) of the questions which we have asked you to determine, and you decide that it is possible to read a challenge to Years 1 to 3 somehow into BT's pleaded case, the question that then arises is: what is that challenge? That, as I understand it is what Questions 1(b) and 1(c) are seeking to determine. What is the implied appeal that BT is making, and what is the implied relief that it is seeking. That, it seems to us, is an *a priori* question that the CAT must determine, and determine precisely before it goes on to decide any of the jurisdictional questions that are raised in Questions 2 to 4 because you cannot decide whether Ofcom has the power to do something until you have actually determined what it is that Ofcom may or may not have the power to do. As I understand it, this was also the question that you, madam, were alluding to right at the start of the hearing yesterday when you asked whether the parties were in agreement as to what should be the glidepath if we were wrong on the scope of BT's appeal, Question 1(a)? I said I could take it shortly and I can because this brings me straight back to my point earlier about all of the different possible ways of moulding Ofcom's reasoning to fit a new Year 4 TAC. What the Tribunal has to do, we submit, is to decide exactly which of those multiple

solutions is, in fact, implicit in BT's appeal. Putting it in Ofcom's terms, what is the necessary adjustment that has to be made to Years 1 and 3 as a consequence of the change to the end point? As I understand it, BT's case now is that there should be a prospective adjustment to any unexpired period of a charge control to compensate for an overcharge in the expired part of the charge control. Very shortly, our submission is that, whatever is implicit in BT's appeal, it is not that.

That leaves the three alternatives – I think about three alternatives – Ofcom's proposal and the two proposals put forward by the MNOs, which are the ones that I have represented on our graph. Our submission is that the routes that would do least damage to Ofcom's reasoning, particularly having regard to the prospective point that we say is an essential part of Ofcom's analysis, would be either the yellow route or the red route, the red route taking into account prospective and the gradient, the yellow route only prospective, and slope down from Year 2 or whenever we get to.

So in terms of the specific questions asked by the parties, our answer to Question 1(b) is, yes, if we are wrong on 1(a), but the Tribunal then has to determine exactly how you do apply Ofcom's reasoning to a lower end point implicitly from BT's appeal, and we say either the yellow or the red line. Our answer to Question 1(c) is obviously no.

I am not going to say anything about amendment. I support what Mr. Holmes has said. There has not been an application to amend. If and when there is we will address it.

THE CHAIRMAN: Thank you very much, Miss Bacon. Who is going next, Miss Demetriou?

MISS DEMETRIOU: Madam, may I, first, on behalf of Orange gratefully adopt Miss Bacon's submissions on Question 1, and my task is now to address Questions 2(a) and 2(b) on behalf of the MNOs. I will start with 2(a), if I may. This is the question of whether Ofcom has power to set revised charges for the past in respect of past periods, and we say that the answer to that is no. This issue, as the Tribunal is aware, is relevant to BT's redetermination option. It is a necessary prelude to the action it says it can take under the standard Interconnect Agreement because on BT's case the SIA permits it to make changes to the carrier price list following a redetermination. So the question here is whether Ofcom has the power to make that redetermination.

May I, first of all, say that we disagree with BT's interpretation of the SIA. We do not think that it could take such action under the SIA, but that is not the issue for the Tribunal today. I am not proposing to make submissions on that, but merely just to flag the point that we do not agree with that construction. The question before the Tribunal today is whether Ofcom has the statutory power to set revised charges for past years. We say that BT needs to point

to that power first before any question of the SIA arises, and that the Communications Act and Ofcom's powers within it certainly cannot be construed by reference to the SIA, and we agree very firmly with the points made by Ofcom on that.

We say that it is clear from the statute that Ofcom has no statutory power to set price controls retrospectively, it only has the power to do so prospectively, because price controls are, on a proper reading of the Act, *ex ante* in nature. I am not going to labour this point too much because the Tribunal will be well aware of the points made on the construction of the statute, but perhaps I could just summarise briefly what they are and perhaps start with s.88. Could I just ask the Tribunal to turn up s.88. I will not take you to any other statutory provisions, I will merely summarise our points. As the Tribunal knows, the power to set an SMP condition, including a price control condition, under s.87 is conditioned by s.88. Under s.88 the power to impose an SMP condition only arises where there is a relevant risk of adverse effects, and we see adverse effects arising from the price distortion and we see that in s.88(1)(a). We say that that must mean a risk of adverse effects arising in the future, it can only mean that.

THE CHAIRMAN: I do not think that is disputed, Miss Demetriou, I think the question is, what is the future in this case? Is it only the period after Ofcom have had the decision remitted to them, or does the future in this case encompass the whole of the period from April 2007?

MISS DEMETRIOU: Madam, we say the future must mean the future from the point when Ofcom is required to retake the decision to set new price controls in the light of this Tribunal's determination of the appeal. That is when the question of "future" must be judged. BT's argument is that BT accepts, as far as I have understood, that the s.87 and s.88 provisions are of a prospective nature and they are to do with *ex ante* regulation and not retrospective regulation.

BT's argument is that the position is different following a successful appeal and it makes two related points. It says that, first of all, appeals are necessarily backward looking; and secondly, it says that there would be no incompatibility with the *ex ante* nature of the controls because Ofcom are still acting *ex ante* because it is putting itself back in the position it was when it first took the decision. We say that both of those arguments are wrong. We say that the second argument is wrong because to set a price control is quite a simple proposition, as I am advancing. To set a price control for a period in the past, which is what Ofcom would be doing following a successful appeal, is to set a price control retrospectively. The MNOs complied with and are complying with the price controls that Ofcom set. So in setting more onerous price conditions in respect of past periods we say is

plainly a retrospective act. Had the MNOs been subject to a lower price control, say in Years 1 and 2, then they would have acted accordingly. No doubt their business decisions would have been different. What BT is asking the Tribunal to decide is that Ofcom can retrospectively set the price conditions for Years 1 and 2 in a situation where the MNOs cannot retrospectively change the business decisions they made during that period. We say that demonstrates quite plainly that this is a retrospective setting of a condition.

MR. SCOTT: Are you suggesting that the legal advice received by your clients was so negligent that your clients were unaware of the consultative and appellate nature of the procedure by which prices are set? It seems unlikely. It seems to me that your clients were inevitably going to have to make their business plans against the possibility that Ofcom's decision would be altered.

MISS DEMETRIOU: Mr. Scott, that was a question that was put to us by the Competition Commission. The answer is, no, I think it is common ground amongst all of the MNOs that the MNOs acted on the basis that Ofcom's price controls were lawful. That is the basis on which they made their business plans. They are fully entitled to act on that basis. One acts on the basis of a decision of a public body on the assumption it is lawful until as and when it is quashed. So the answer is, no, my clients did not adjust their business plan according to the risk that the price controls might be overturned.

MR. SCOTT: I think you ought to give them a copy of the Act.

THE CHAIRMAN: It depends what you mean by "retrospective" and "prospective", does it not, and we will have to decide what those words mean in this context?

MISS DEMETRIOU: That is right, madam, I agree with that. Can I come back to an analogy that Mr. Scott drew during the course of, I think, Ofcom's submissions with the general position in public law. We say that that analogy assists us because we say that when a decision of a public body is quashed by the Administrative Court then the decision maker retakes the decision as of the new date. The decision maker does not put itself back in the factual situation it was when it took the decision that was quashed. That is the general position in public law. Quashing a decision of a public body is not backward looking in that sense. We say exactly the same applies here. The reason for that, the important factor in this case, is s.195(5) of the Act, because we say that that makes crystal clear that the powers of the Tribunal to direct a remedy are constrained by the powers of Ofcom and a remittal. So, you have to look at the act and see what the powers of Ofcom are. That is where we come back to s.88 which says that when setting a price condition the price condition has to be forward-looking. That applies as much after a successful appeal as it does in the first

instance. Madam, this comes back, I think, to an exchange you had with Mr. Holmes on behalf of Ofcom where you made the suggestion that if the Tribunal directs Ofcom to make a new price control following a successful appeal, the source of that power might be s.195(6). We would say that the answer to that is that it is not. That is because of s.195(5) - that what one comes back to are Ofcom's powers in the first instance. So, the Tribunal does not have any power under s.195 to expand the statutory powers of Ofcom which exist in the Communications Act. So, Ofcom must have the power under s.87 as conditioned by s.88 to set the new price condition. We say that when you look at ss.87 and 88 it is clear that it is looking at addressing a future risk. So, the new price condition has to address the future risk and has to be prospective-only. That is our submission.

Now, BT says that nothing in the statutory language -- nothing in the Act suggests that Ofcom's powers would not extend to a retrospective price adjustment. They say that at para. 70 of their skeleton argument. We say that is wrong for the reasons I have given. But we also say it is the wrong approach because the imposition of a retrospective charge runs counter to the general statutory presumption against retrospectivity. So, we say it is insufficient for BT to say there is nothing in the Act which precludes it. What they have got to do is identify an explicit power which permits it. They have failed to do that. The best they do is to point to s.45(10)(e) which is set out in their skeleton argument. I do not think it is in the bundle, but it is in their skeleton argument at p.25. We say that of s.45 that there is no such power - it does not expand the scope of Ofcom's powers under ss.87 and 88. We say that is made clear by s.45(8), which is not quoted in the quotation that BT has provided. But, it says,

> "An SMP services condition is a condition which contains only provisions which are authorised or required by one or more of ss. 87 to 92".

So, we revert, therefore, back to ss.87 and 88 of the Act. What s.45 cannot do is expand the power of Ofcom when setting a price condition.

We say, secondly - and this again raises -- If I could just interject and say that this raises the question of Madam Chairman's query about -- I think you posited the suggestion of a challenge to the 2004 statement and what the position would be. We say that quite plainly the position is that the result of that challenge cannot be to require Ofcom -- or, Ofcom would have no power retrospectively to regulate 3G call termination because that would be a retrospective measure which is not permitted by the Act. So, that is our answer to that example. That is what we say should happen to that example.

Our second point on s.45(10)(e) is that this is a power to revoke or modify the conditions for the time being in force. There are two points to make on this. The first is that BT is asking for the price control set by Ofcom to be set aside and replaced. So, it would not be a question of modifying something in force. But, that may not be a very significant point. But, the more substantive point -- the more substantial point is that more importantly there is no power to modify here a price control retrospectively because it says in terms that the price control has to be for the time being in force. So, that supports our argument. It is not a basis for retrospective regulation. It supports our argument that Ofcom's powers in respect of SMP conditions are prospective only because to the extent that a price control regulates a period in the past, it cannot, on a natural meaning of those words, be said to be for the time being in force. That just cannot be right. The price controls for Years 1 and 2 will no longer be in force. So, there is no power to modify them under this sub-section.

Professor Bain raised the point that Ofcom has framed this price control as a single price control covering the charge period and that since some of it is still in force, can it not be said that the whole of it is therefore still in force, and that would mean that Years 1 and 2 are still in force? But, we say, 'No' to that because Ofcom could equally have determined that the charge control period was one year or ten years, or -- It has discretion over the charge control period. We say that you cannot interpret the meaning of s.45 by reference to the administrative action that Ofcom chose to take in this case, and that the natural meaning of the words 'for the time being in force' means the obligation which for the time being is applicable to the MNOs. We say that that is not true on a plain meaning of the words of Years 1 and 2 charge controls.

This also provides, in our submission, the response -- or, the answer to the analogy drawn by BT with the H3G SMP appeal because, equally, the power to revoke a price control is the power to revoke one that is for the time being in force. So, if the court set aside the SMP -- if the court found that H3G no longer had SMP, then clearly it would set aside the price control but, as Mr. Holmes said, this would not require anything of Ofcom because Ofcom could only itself take action going forward. We say that this is entirely sensible when you look at the nature of SMP conditions because SMP conditions are not susceptible to being unravelled just by their very nature. This is a point which I think the Tribunal hinted at yesterday during the course of submissions. So, for example, looking at s.87(3) of the Act, that authorises the imposition of an SMP condition requiring the dominant provider to provide from time to time network access to the relevant network. But, if such a condition is imposed in respect of a previous year and the subsequently after that year has

expired it is quashed, or the court holds that it should not have been imposed - for example because the provider was not dominant - that is not something which can be unravelled because it has happened -- it has been and gone. This is inherent really in the nature of SMP conditions. That is why following an appeal the remedy, and Ofcom's powers to take action following an appeal, are of a prospective nature - because it follows from the very nature of SMP conditions. We say it makes sense when you look at the statute as a whole. There is nothing odd in the fact that Ofcom's powers are prospective.

So, in conclusion on this point, we say that Ofcom has no power to set price controls for periods that have already expired. That is our answer on Question 2(a).

THE CHAIRMAN: What does that mean about this power we may, or may not, have to declare or say in our judgment what the price controls would have been had Ofcom applied the correct principles as determined by the Competition Commission?

MISS DEMETRIOU: We would say that there would not be any utility in the context of this appeal in making such a declaration because Ofcom has no power to do anything about it under the Act. So, there would be no utility in making it. I accept what Mr. Holmes said - which is that in the course of the Tribunal's judgment then it may wish to make observations. That would not be unlawful, but it could not lead anywhere.

THE CHAIRMAN: What would happen in a case where the glidepath was challenged. Suppose BT had included in its claim that everybody should have had a percentage drop -- a 25 percentage drop from their existing rate and then continued the glidepath from the much lower rate to the end of Year 4?

MISS DEMETRIOU: Yes.

THE CHAIRMAN: So that by the end of Year 1 that has not happened and hence there is no point ever bringing an appeal challenging the glidepath, in the early year of the glidepath, is there because you would say you cannot appeal that because there is nothing that can be done or even said about it?

MISS DEMETRIOU: Madam, that is subject to two points. One, it obviously depends on the speed of the appeal, but probably more pertinently the question of interim measures, so it would be open to the appellant to apply for interim measures.

Secondly, we say that inherent in many appeals is an element of not being able to change the past, there is nothing odd about that.

THE CHAIRMAN: No, we have gone past the question of whether we can change the past, we are on the question of whether we can say what ought to have happened in the past.

MISS DEMETRIOU: Madam, it may be this is not something which is a question before this Tribunal, but BT appears to take the view that it may have other remedies, and so there may be some utility served if this were properly within the scope of the appeal in making comments about what the price control should have been, but there is nothing Ofcom can do about that retrospectively, that is our submission on Ofcom's statutory powers.

So turning to issue 2(b) we say that similarly Ofcom does not have the power to set price controls for the future so as to compensate for past overpayments, this is the future adjustment option. We agree with Ofcom's submissions.

Again, we say that this follows from s.87 and s.88(1) of the Act, and a number of points flow from s.88. The first is that Ofcom only has the power to impose a price control which is appropriate for purposes of meeting the three conditions laid down in s.88(1)(b) and it does not have the power conversely to impose a price control which is designed to meet some other purpose. We say that this would be designed to meet some other purpose, namely the purpose of compensating BT. I appreciate that BT says that is not really the purpose, it is not compensation in that sense, but it is compensation in the sense of adjusting in a mechanical way. But that is still a purpose, in my submission, that is not envisaged by s. 88(1).

THE CHAIRMAN: But you accept that what seems to have become known as the "Tweak" that that was a modification of the price control for a purpose which might appear to be extraneous to those purposes, but everyone seems to have accepted was within the power of Ofcom to make?

MISS DEMETRIOU: Ofcom in construing the purposes, there is a certain judgment that Ofcom brings to bear, and it has to balance various factors, and so if you look at s.88(2) one of the things it has to take account of is the extent of the investment in the matters to which the condition relates. So it has to take account of investment in networks when it is interpreting and applying the three purposes in (b).

What we say is that the dominant purpose of the future adjustment mechanism would be to adjust the rate because of a previous overcharge – that is the dominant purpose. The same is not true of the tweak.

THE CHAIRMAN: Well which of the purposes in 88(1)(b) would you say is the purpose for doing the tweak?

MISS DEMETRIOU: It is arguably in accordance with the purpose of promoting efficiency. I think that that is not for me to answer, but I think Ofcom could reasonably have taken that view. It may be that Mr. Holmes is better placed to answer that question.

MR. HOLMES: Madam, our position would be that it is relevant to the purpose of promoting efficiency.

MISS DEMETRIOU: So our first point has to do with purpose. Our second point is to do with efficiency, so we say that a price control designed to address an historic overcharge would necessarily have to be set below the efficient level which runs counter to s.88(1)(b)(i) and we adopt the submissions that Ofcom has made in respect of that. Broadly, I would just add that BT says that in response to this that the s.88 efficiency criterion has to be satisfied across the whole of the charge control period, but we say that is wrong for three reasons. First, is the reason advanced by Ofcom, which I will not repeat, which is its two wrongs do not make a right argument, which is expressed at para.34 of its speaking note, and which we support.

Secondly, we say that there is no power in the Act to do that and that is a very important point. If Ofcom is setting a price control for Year 4 or for Years 3 and 4 then it has to promote efficiency for those years. The position is not very different when Ofcom carries out a market review in the first place. Let us suppose that Ofcom carries out a market review in the first place and discovers that an operator has SMP and has, for a period of time, been charging excessive prices, we say it has no power then to set the price control going forward so as to remedy what may have happened in the past, because that follows from s.88(1) of the Act, which talks about addressing risks of future adverse conduct. We say the position is not very different in this case, in fact it is analogous.

Thirdly, and this comes back to a point which Mr. Scott made earlier that BT's submission is inconsistent with what Ofcom has actually done in this case, and with what Ofcom has done that is not challenged by BT namely the glidepath. The reason I say that is that Ofcom in this case set the efficient charge for Year 4 and then determined a glidepath or determined charges for Years 1, 2, and 3, which are at a level higher than the efficient level, and it decided that it was appropriate to do that in fulfilment of its statutory functions, and that approach sent appropriate price signals to consumers, so it decide that that was the correct approach in this case.

So what Ofcom did not say is that because the charges for Years 1 to 3 were higher than the efficient level then therefore the charge for Year 4 had to dip below the efficient level and then come back up again afterwards as a sort of yo-yo effect in pricing. That would be the analogous position to the position that BT is now positing. We say it did not do that, and BT is not challenging Ofcom's approach to its glidepath so we say in that respect BT's

submission about taking account of efficiency throughout the charge control period is inconsistent with its adoption of Ofcom's glidepath in this case and it failure to challenge it.

PROFESSOR BAIN: Miss Demetriou, you said that by setting prices on the glidepath above the efficient level Ofcom took the view that they were giving the right price signals to consumers. I was surprised at that, I thought what they were doing was avoiding undue disturbance to the MNOs, and in fact it was set at giving the wrong price signals to consumers.

MISS DEMETRIOU: What they were doing was pursuing their statutory duty of promoting efficiency and they decided that the best way to promote efficiency was to set the efficient charge for Year 4 and then to balance various factors in determining how the charges should come down in Years 1, 2, and 3.

PROFESSOR BAIN: Yes, I do not disagree with that, but it does not mean that they were setting the right price signals for consumers; they were setting the wrong ones for consumers but that in their view was outweighed by other considerations.

MISS DEMETRIOU: Professor Bain, I take that point. My point was merely to say that Ofcom decided not to pursue a path whereby it made up for the previous charges above efficient level by setting a lower charge than the efficient charge for Year 4, yet that would be the consequence of BT's argument if pushed t o its logical conclusion in this case.

MR. SCOTT: If you imagine that the outcome of all this is the decision that Ofcom can take the decision for the whole period, Years 1 to 4 as a consequence of these proceedings, that does not necessarily decide what Years 1 to 4 are going to be, it merely says that Ofcom are going to have to take a decision in relation to Years 1 to 4. Having regard to the point that you made earlier on about the business planning, not only of your own clients, but of others in the room, in approaching that and thinking of the principle of legal certainty, should those involved in taking a decision in relation to the years that are past, and I do appreciate that you say nothing can be done, have primarily in their mind the principle of legal certainty in terms of not adjusting those figures against which plans have been made, or have primarily in their minds the fact that people would have been wise to plan against the figures that should appropriately have been used in setting the price control in accordance with the principles that the Competition Commission will by then have outlined?

MISS DEMETRIOU: We say that is an interesting question, but we say very, very firmly the former. We say it is a fundamental principle that people are entitled to assume that a decision that has been taken is lawful until as and when it is set aside.

MR. SCOTT: The point I am making is this, that even if we conclude the whole period is going to be redecided, the implication of taking that position is that that does not necessarily mean that we now alter Years 1 and 2. It may mean that we do not alter Years 1 and 2 and we do alter Years 3 and 4. When I say "we", I am saying that without prejudice to whereabouts in the three of us that power is found to lie.

MISS DEMETRIOU: I am not sure I am understanding the question, but our submission is that Ofcom simply has no power.

MR. SCOTT: I am assuming if they have the power, or if any of us have the power, then the question is how is that power to be exercised? What you are arguing is that even if you have got the power you should not be changing Years 1 and 2.

MISS DEMETRIOU: Our submission is that you do not have the power.

THE CHAIRMAN: I think it was a question that was asked, the Competition Commission did ask people to say, "If we have the power is there any other reason why we should not do this?" I do not think anyone put forward any extra reason for not doing it other than it is not pleaded, and in any event there is no power, even if it is pleaded. I do not think there was any argument put forward that, "Oh, well, it would be terribly unfair for this or that other reason".

MR. PICKFORD: Madam, that is not correct, we did advance submissions on the basis that even if there was the power we said that it would not be the efficient and appropriate course for the Competition Commission to adopt.

THE CHAIRMAN: Let us leave that for the moment, I think.

MISS DEMETRIOU: So that leaves, I think, only conditions MA.3.6 and 4.6. As BT has made clear, they do not contend that those conditions are directly applicable and we say they are right not to make the argument for the reasons that we have set out in our skeleton argument. We say also that they do not help, they are of no assistance by way of analogy. Here we agree with Ofcom's submission that the conditions are of a very different nature to BT's future adjustment option. I will not repeat the points that Ofcom has made. The other point that we make is that the Communications Act cannot, of course, be interpreted by reference to those conditions, so either Ofcom has the power to implement the future adjustment option under the Act or it does not. The existence of these conditions cannot help, they are not a guide to the interpretation of the legislation. To treat them as being so would be to put the cart before the horse, it would inappropriate. In any event, Ofcom has a discretion to act under those conditions. It is not required to act. So when Ofcom is considering whether or not to act then no doubt Ofcom would have to consider its duty

under s.88 and would have to satisfy itself that it was complying with s.88 before exercising its discretion. That is the way that you reconcile the conditions with the statutory duty. So it is a discretion which has to be exercised, as all discretions do, in accordance with the legal obligations which govern the exercise of Ofcom's power. That is what we say about the conditions.

In summary, we say in relation to both Questions 2(a) and 2(b) that Ofcom has no power under the statute to pursue either the redetermination option or the future adjustment option, and those are my submissions.

THE CHAIRMAN: Do you say that (a) and (b) have to be answered in the same way, that they stand or fall together, or do you say that even if they have power to redetermine they might not have power to make the future adjustment?

MISS DEMETRIOU: They are presented as distinct points, but the reason why we say there is no power is linked up. If the Tribunal accepts my submission that there is no separate power under s.195(5) of the Act for Ofcom to take action, that its power to take action on a remittal is constrained by s.87 and 88, and then that those provisions are forward looking, and so Ofcom, when it is resetting the price conditions can only do so prospectively, then, in my submission, that provides an answer to both Question 2(a) and Question 2(b), even though those questions are slightly different.

THE CHAIRMAN: If we accept BT's view that actually you just have to go back and look at what you could have done as at April 2007, I suppose that is your inefficiency in the third and fourth year point, that even then they would not have power to drop the charges?

MISS DEMETRIOU: Madam, yes, because it would not be compliant with s.88(1).

THE CHAIRMAN: Right. Thank you very much, Miss Demetriou. Mr. Pickford?

MR. PICKFORD: Thank you very much, madam. The scheme of my submissions is that I am, firstly, going to address a short point on the glide path and then, secondly, the topic which is the focus of my submissions, Questions 3 and 4 concerning the jurisdiction of the Competition Commission and the Tribunal. I will attempt to avoid duplication, but obviously there is some degree of overlap of issues between 2 and 3, and it is quite difficult to articulate the points in relation to 3 and 4 without, to some extent, covering ground which we have already trodden, but I will go lightly over it. I should also add that, of course, I adopt everything that I have said in my skeleton argument already. I do not resile from any of that.

Turning then to the glide path, we fully endorse O2's submissions on Question 1. It was not some wild flight of fancy of O2's, it was precisely our understanding of BT's case too. We

made the same points quite independently of O2 at the appropriate time, which was as soon as we discovered that BT was arguing something different to what we thought it had previously been seeking.

We also say in the alternative to the final submissions that were advanced by Miss Bacon, to the extent that there is one element of glide path that is truly key, it is not that that has been highlighted by Ofcom and apparently, at least in one of its cases, as I understand it, adopted by BT. Ofcom's mechanical approach to recalculating the glide path has some, we would say, superficial attraction in its simplicity. It is, in fact, over-simplistic and ultimately wrong, and the reason for that is that it ignores the underlying economic purpose for which the glide path was originally allowed in the first place. Ofcom did not allow a glide path simply for the fun of it or because it had some particular predilection for equiproportional decrements with little kinks in them. It allowed the glide path for a specific reason. We can see the reason quite clearly articulated in the decision at para.9.172 to 9.173, in Vol.2, Tab 55 at p.157. What Ofcom says there is that,

> "In broad terms , the path of reductions in charges should give due consideration to balancing two objectives: reduction should be achieved sufficiently quickly in order to deliver substantial benefits to consumers, including benefits to be derived by addressing possible competitive distortions; and reductions should allow sufficient time for operators and customers to adjust to new levels and structures of mobile charges and take these changes into account in their business plans and planned capital expenditure.
>
> The first point seeks to ensure that consumers are able to benefit from lower prices for network serves (including fixed to mobile calls). The second point notes that benefits to callers to mobiles should not be at the expense of unacceptable disruption to the mobile sector, the industry and consumers more generally (e.g. through adverse effects on investment)".

Now, returning to the second bullet and the words there -- that the purpose of the glidepath is to allow time to adjust -- That prompts the question: Well, adjust from what? We say it would make no sense of that reasoning to adjust on a hypothetical level of prices that has never existed in the market, which is what, on Ofcom's reasoning the adjustment takes place from. The adjustment can only logically apply to where you currently are, to take you to where you want to be -- to adjust from one hypothetical place to a future destination. We say it just does not make sense of the ordinary language of that section.

The reason why this is of course relevant to the discussion in relation to Question 1 is not because this is in itself a point on jurisdiction for the Tribunal to determine, but because it highlights that BT's failure to challenge the glidepath does not lead inevitably and necessarily to Ofcom's solution which has now been adopted by BT. If that is the case, then it cannot also be the case, therefore, that BT's case on Years 1 to 3 is implicit in its Notice of Appeal. To be implicit it must necessarily follow and we say that it simply does not. Indeed, the fact that BT has found it so difficult to work out what case is implicit in its Notice of Appeal underscores the fact that there is no case which can be said to be properly and necessarily implicit in its Notice of Appeal.

THE CHAIRMAN: Mr. Pickford, could you just go back to Bullet 1 and the first few words - "Reductions should be achieved sufficiently quickly in order to deliver substantial benefits to consumers ----"

MR. PICKFORD: Absolutely.

MR. SCOTT: Any delay in moving down towards an efficient level of prices can hardly be compatible with 'achieved sufficiently quickly in order to deliver substantial benefits to consumers'.

MR. PICKFORD: There is clearly, as articulated in para. 9.172, a balancing. There are two objectives and they are necessarily competing objectives.

THE CHAIRMAN: Miss Bacon addressed us on this. You seem to be going back to Question 1, and we thought you were going to be addressing us on Question 3.

MR. PICKFORD: I am primarily, but, as I said at the outset, I had one short point to make on the glidepath because, as I understand it, O2's position on the glidepath is not quite identical to ours.

THE CHAIRMAN: Perhaps you could just explain briefly then what is the difference between your position and ----

MR. PICKFORD: The difference between our positions is that if one was to pick up the graph which Miss Bacon produced, we say that the correct line -- The only line that can really be said to flow from the reasoning underpinning the glidepath is the yellow line. It is important, I think, for our purposes to distinguish ourselves from the pink line which we say is not the appropriate approach to adopt if Years 1 to 3 are indeed in issue. My point is to align ourselves very firmly with the yellow line that Miss Bacon has put in her graph. But I say, and adding to that in passing, that of course my submission does actually reinforce the point that Miss Bacon makes because my point is that what Ofcom says about the inexorable implication of BT's pleading is not correct.

Finally on that, there is a very short point on the issue of amendment. I do not intend to take up the Tribunal's time with it for any material period, but simply to note that we support the point that Ofcom makes on amendment. This is an extract from a case management conference. If one looks down at line 18, the Tribunal reads there that the Chairman of the Competition Appeal Tribunal at that point, the late Marion Simmons, made the same point about not tucking applications away somewhere in a skeleton - you need to make them properly on notice. That is all we have to say about that.

If we turn to the substance of my submissions - Questions 3 and 4 - I am going to look very briefly at the 2003 Act. That has been, to some extent, traversed already, but I think it is important just to go back to it briefly to put the submissions in context. I will then go on to look at the implications of Article 4. I essentially address Questions 3 and 4 together. Miss McKnight, to the extent that there are any distinctions between the powers of the CAT and the Competition Commission, will deal with those issues amongst various other points that she is going to make in her submissions.

So, if we pick up the Act, and in particular s.195 at Tab 29 of the bundle -- We say that the answers to the questions posed in Question 3 can be seen quite simply from this provision, s.195. S.195(2) provides,

> "The Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the Notice of Appeal".

We say the implication of that is that clearly if something is not in the Notice of Appeal it is not for the Tribunal or the Competition Commission to decide. The next point - and this is the really crucial point - is s.195(5),

> "The Tribunal must not direct the decision-maker to take any action which he would not otherwise have power to take in relation to the decision under appeal".

Now, as we have heard, BT accepts -- they concede that but for the issue of an appeal, ex ante price controls are just that. They admit that they are ex ante. Indeed, they say at para. 72 of their skeleton,

> "The starting point for T-Mobile's argument is the point that price controls imposed under s.87(9) are designed for use ex ante. That is undoubtedly true. T-Mobile's error lies in concluding from this that Ofcom lacks the power following an appeal which declares its original decision to have been in error and to substitute a new charge control conditions to operate with effect from the beginning of the charge control period."

So, it all hinges on what happens in an appeal. It is for the appeal to change the nature of Ofcom's powers. But, if one reads s.195(5) that simply cannot be the case because the legislation says there, in terms, that the Tribunal must not direct the decision-maker to take any action which he would not otherwise - that is, but for the appeal - have power to take in relation to the decision under appeal. So, if Ofcom does not ordinarily have those powers, it does not then gain those powers as a result of the appeal mechanism. Its powers are the same powers that it has at all times.

One sees that point demonstrated throughout the Act. For example, there is clear use of different language in the Act depending on whether Ofcom's powers may be applied ex post or ex ante. So, as we have seen under s.192(d) where there is a power of ex post adjustment, it is clearly framed in language that would allow an ex post determination by the Tribunal. In fact, it would not be the Competition Commission in that case because it would not be a price control matter. Similarly, in s.195(3) there is an express power to enforce the condition which has been breached.

However, there is simply no general power - and BT has been unable to point to it - which allows the imposition of ex ante price controls on an ex post basis, or any power to achieve the same object by the back door of the prospective adjustment which they have advanced. The key point to make in relation to the prospective adjustment - and I believe, Madam Chairman, that this may have been an observation that you made yesterday, and if it is not I apologise - is that it may be that on the facts of this case a better mechanism for achieving what BT seeks would be a forward looking compensatory adjustment, which takes account of what they say should have happened in the past, that is a mechanism. But it is no less unlawful, we say, because it ultimately seeks the same objective which is a backward looking objective, and that is not a legitimate one under this piece of regulation which is entirely *ex ante* in nature.

There is one additional point here to be made in relation to condition MA.3.6 which I do not believe has been made so far. Mr. Anderson said it is the existence of MA.3.6(b) that demonstrates that he must be right and that we are wrong because he says there, there is in fact a power to revisit prices before they have even been breached in order to tell the prospective MNO to adjust their prices, but that is entirely consistent with our scheme of the Act, that is merely an aspect of a prospective instruction being given by Ofcom, where it suspects or fears that there may be an infringement. That does not in any way undermine our submission.

When one considers the statutory objective behind the various provisions we say that the limitations which exist on Ofcom's powers are perfectly explicable. *Ex ante* price regulation is recognised to be a last resort, we see that from the Framework Directive recital 27 which says that it is only to be imposed where there is not effective competition and where national and community competition law remedies are not sufficient to address the problem.

It is also recognised as being highly intrusive. Ofcom refers to it in the Decision at 8.67 as "one of the more obviously intrusive forms of regulation", and it quite plainly is intrusive.

THE CHAIRMAN: But what you say must apply to whatever SMP conditions are set, it is not specific to the price control.

MR. PICKFORD: It is true, certainly any *ex ante* price control.

THE CHAIRMAN: Any *ex ante* SMP ----

MR. PICKFORD: Our argument would help that, but we say it is *a fortiori* the case in relation to price controls, but the logic of our argument applies across the board. We say it is entirely proper in these circumstances that Parliament has provided in the Act for a system where any party which is subject to a price control, and has complied with it and no doubt relied on it, as a legitimate level of pricing in their commercial decision making has a legitimate expectation that that price level is not going to be revisited in one way or the other in the future.

If I could address a problem that clearly concerns the Tribunal, and rightly so, which is: how does this all fit in with the role of benefiting consumers? It is plainly a key objective of the Act, the paramount objective, that consumers must benefit from these controls. However, the provisions that provide for consumer benefit such as s.88(1)(b)(3) cannot override what are otherwise clearly limits on the jurisdiction of the Tribunal identified in the Act. So as an example BT accepts that if a point is not raised in the appeal the Tribunal cannot decide it, notwithstanding the Tribunal might personally think that it would be in consumers' interests if it did but that is not how the Act is structured and BT accepts that point. But we say, moreover, our submissions are entirely consistent with consumer benefit, consumers plainly have an interest in low prices and we do not dispute that. But, as Mr. Holmes has said, they also have an interest in there being an efficient structure of prices, because we are not merely talking about fixed consumers, we are talking about consumers of mobile services too, and we have to take account of the fact that there is at least a substantial waterbed effect and price changes for one group flow through into price changes for another, so structure is also another aspect which is key.

BT argues that the s.88 conditions need to be satisfied over the whole period, and we have already heard the responses of Ofcom and Orange on that and we endorse their submissions. The only additional point we make in that respect is that economic incentives for an efficient market can only operate on a forward looking basis, you cannot consume more or less telecoms' services in the past on the basis of a change made to prices in the future.

MR. SCOTT: Against that, you have the expectation of good administration and the deterrence of poor administration, and we are all operating in a regime where we know that if Ofcom make an error there are mechanisms for addressing that error. Now, we are discussing how that error should be addressed, but it seems to me to be a poor approach to public policy that people should have expectations that bad decisions will in some way be sustained. It may be that the legislation as it is means that one is unable to put certain errors right and it may be that as we have heard there are examples where you cannot put things right. In circumstances where things can be put right it seems to me that there is a legitimate expectation that things should be put right.

MR. PICKFORD: It depends, sir, on what one means by bad decisions being "sustained". We entirely accept that going forward if there was a bad decision it should be changed, and it should be changed in a way that is permissible under the Act. What we say is not appropriate, because there is equally a public policy interest in this also, and there are competing objectives here, we say that the way that the Act has resolved them is quite clear. The way that the Act has resolved them is that mobile operators, or indeed any other fixed operator subject to SMP controls: do you have a legitimate expectation that the prices that they charged are history, as long as they adhered to the controls that were in force at the time they will not be revisited because otherwise there is no basis on which they can properly run their businesses. They of course always have to guard for the future and accept that it may very well be the case that an appeal will be successful and they will have to change their behaviour going forwards and that may require adjustments. But what they cannot do is go back and undo their previous decisions, they have no means of doing that and we say that is why the Act is shaped in the way it is, and it has resolved that inevitable tension in the way that it has done.

Moreover, we say that that is still very much consistent with consumers' interest because consumers, as I have said, have an interest in lower prices, and I might term that a short term interest. They also have a longer term interest in the regulatory system being a predictable and fair one, and one that respects the legitimate expectations of mobile network operators, and the reason why they have that interest is because if the system is not such a

system that will deter potentially future investment in the UK, and that may in the long run have serious adverse consequences for consumers.

For example, suppose that one of the MNOs decided that participation in the UK mobile market simply was not worth the regulatory candle because they tried to make decisions and someone came along and opened them up after the event, even though they had done nothing wrong. If a mobile operator exited the mobile market that would not be good for consumers, or if some of the MNO's decided that because of regulatory risk they were going to prioritise rolling out next generation technology in France, Germany and Spain over the UK, that would not be good for consumers either, and so consumers also share in the interests of the MNOs to this extent. So it is in no way a situation where you can say that consumers' interests are being suppressed in an inappropriate manner under my construction of the Act.

Just a final point on that, Mr. Scott, to pick up on a point that you made yesterday, as I understand it – I will be corrected if I am wrong – it was suggested that a system of ex post-readjustments was not really punitive, it was merely corrective. We say, with respect, that would not be right because it would be punitive in the sense that revisiting positions that you cannot undo, even if it is not punitive by object it is punitive by effect.

Those are my submissions in relation to the 2003 Act. The next step is to consider whether that position changes when one considers Article 4. BT's argument in relation to Article 4 makes no explicit mention of *Marleasing*, but, as I understand it, it is a *Marleasing* argument. They say that one must interpret the 2003 Act consistently with the right that they say exists under Article 4. Now we have the difficult bit. I was going to say "compensatory remedy" because until yesterday that is what we always understood it to be. That is how BT described, that is how BT in fact described it in the issues that we are addressing today. Apparently it is now not so much a compensatory remedy, as I understand it, as a restitution remedy. It does not really matter whatever term you apply to it. I would probably still adopt the word "compensatory", but my point applies however one labels the BT remedy.

For BT to make good its arguments under Article 4 it needs to demonstrate two things: firstly, a matter of the content of Article 4, there is the right to compensation or restitution that it says exists; and secondly, if it is right about content it further needs to demonstrate that the United Kingdom has chosen to implement that right through the appeal mechanism in s.192.

I make three points in response to this: firstly, there is no right to compensation or to restitution under Article 4. Secondly, in the alternative, and it is important to explain that this is in the alternative, if there were such a right that right has not been implemented in domestic law via the right of appeal under s.192. The reason why I stress the point that it is in the alternative is that I heard a little disquiet, as I understand it, from Ofcom that we appear to be advancing a submission which they thought was inconsistent with the position that we had advanced in our own appeal, madam, that you will remember came before this Tribunal only a few months ago. This submission is in the alternative to our primary argument, of course, that Article 4 does not embody the rights that BT says that it does. My third point is that even if the means of implementation adopted by the UK is defective, which we say it is not, that does not assist BT with its *Marleasing* point. If I might develop those submissions. If we turn, first, to Article 4 itself, I do not believe that BT actually took you to Article 4 yesterday. I apologise if they did. It is at tab 35 of bundle 2. Could I just allow the Tribunal to read Article 4 to itself. It talks about an effective appeal. It does not anywhere provide for a right to compensation or to restitution. Those types of words are completely absent in the text of Article 4 itself.

MR. SCOTT: Just pause for a moment. If you go further up the Article, and you have got this party who has been affected, so your right of appeal comes from the fact that you have been affected. It then talks about an effective appeal mechanism. There would seem implicitly, if not explicitly, to be some linkage between the fact that you are a party upon whom this decision has had an effect and the effectiveness of the appeal mechanism, otherwise it is difficult to know what qualifies the word "effective". In other words, to get in you have got to have been affected and by the end the appeal mechanism needs to have been effective. What do you mean by "effective" if it has no impact on the affectation at the beginning?

MR. PICKFORD: Sir, my point is not that one can just stop having read Article 4 and conclude from the fact that it does not mention compensation or restitution that that is the end of the story. Clearly we need to go on and analyse what precisely is meant by "effective". It is nonetheless, I say, a relevant and important point that those words, or similar words, are absent expressly from Article 4. They could have been there. The Community legislature could have said, "And in all appropriate cases there shall be compensation or restitution or something similar", but it did not. That is a point that I make now. I am going to come on to deal with what I say is meant by "effective".

THE CHAIRMAN: It does not, because, as I understand it, those framing the Directive had in mind subsidiarity and the competence of the Member State to give effect to Article 4 in a way that is consistent with their own local ways of doing things.

MR. PICKFORD: Quite. I would endorse that point. What BT needs to demonstrate is that Article 4 itself contains a particular right. If your point is correct, sir, it rather suggests that it does not contain the right that BT says it does, because of course one does have to have respect to the subsidiarity and the legal systems of Member States. I intend to develop this submission because it does not rest, as I say, purely on the language of Article 4, important as it is.

BT relies on the case of *Tele 2*. They did not take you to it yesterday so I think I probably need to take you to it today. It is at tab 52 of the same bundle. It is para.30 of that decision upon which BT relies:

> "As stated by the Advocate General in point 22 of his Opinion, Article 4 of the Framework Directive follows from the principle of effective judicial protection, which is a general principle of Community law stemming from the constitutional traditions common to the Member States and which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms … pursuant to which it is for the courts of the Member States to ensure judicial protection of an individual's rights under Community law."

Again, there there is no mention of compensatory or restitutionary measures. There is a reference to the Advocate General's Opinion at para.22. It may be helpful, therefore, to see what the Advocate General in fact said. Those who compiled my authorities bundle may have been more efficient than others in including all the Advocate General's Opinions as well. If I could just quote what the Advocate General said. It is a short paragraph and I will read it relatively slowly to the Tribunal:

> "First of all, I agree with the Commission, *Tele 2* and the Belgian Government that the Article at issue [Article 4] follows from the principle of effective judicial protection. The court has consistently held that that general principle, which underlies the constitutional traditions common to Member States requires that individuals must be able to avail themselves of effective judicial protection of the rights they have under the community legal order"

There must, therefore, be effective judicial scrutiny of all decisions of national authorities refusing the benefit of a right conferred by community law. The key point there is effective judicial scrutiny.

THE CHAIRMAN: What paragraph is that?

MR. PICKFORD: That is para. 22 of the Advocate-General's opinion. Now, it is quite clear that there is, in fact, no right to compensation or restitution as a general rule for breaches of community law. One sees that in the case at Tab 49, which is the well-known *Brasserie de Pecheur* case, or the *Factortame* litigation. If one goes to para. 17 one sees the proposition there that in joined cases C-6/90 and C-9/90 *Francovich and Others*,

> ".. the court held that it is a principle of Community law that Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible".

If one then goes on to para. 38 on p.17 of the transcript,

> "Although Community law imposes a State liability, the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage.
>
> In order to determine those conditions, account should first be taken of the principles inherent in the Community legal order which form the basis for State liability, namely, first, the full effectiveness of Community rules and the effective protection of the rights which they confer ----"

So, again, that is the same phrase that we have seen *Tele 2* in relation to Article 4. So, it is the same principles at stake here. But, what is the conclusion of the court in relation to the content of the rights that flow from that? If one carries on down the page -- It is probably actually easiest if the Tribunal reads to itself paras. 40 to 45. (After a pause): The conclusion which the court reaches is that the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers. If one then turns over at para.51, it then sets out the particular conditions that must be met for there to be a right to reparation. There are three of them: that the rule of law infringed must be intended to confer rights on the individuals; secondly, that the breach must be sufficiently serious; and, thirdly, that there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.

MR. SCOTT: With respect, this seems to me to be the situation where BT, to be bringing an action against Ofcom or having disadvantaged BT by the nature of the decision they have made -- This is all about actions against Member States or the Community itself.

MR. PICKFORD: It may be that that is BT's remedy. I am not making that submission, not suggesting that they would ever win such an action.

THE CHAIRMAN: The point being made is that the balance then is completely different because Ofcom and all other public bodies are making decisions every day which have huge impact on people. If they were liable in damages every time they got it wrong, then huge amounts of budget would have to be diverted to support that. But, that is not this case, is it?

MR. PICKFORD: No, but there are certainly specific policy considerations at work there. We say that in fact there are specific policy considerations at work in relation to the Common Regulatory Framework too, albeit different ones. But, the key point to draw from this authority is the reference to the principles that are set out in para. 39 ----

THE CHAIRMAN: They do not necessary ... (overspeaking) ...

MR. PICKFORD: -- the full effectiveness of Community law and the effective protection of the rights. That does not lead one to a right to reparation. That is a key fundamental principle, we say that can be drawn from this authority.

THE CHAIRMAN: Yes.

MR. PICKFORD: We say, similarly, that there are no such rights - automatic rights - to compensation or reparation under the Strasbourg jurisprudence. I do not understand, in fact, Mr. Anderson to be arguing that there are. I do not understand him to be saying that if he cannot get home under Community law, then he has got some alternative ECHR arguments. I do not intend to pursue that particular point, save for this one issue: he referred to the *Klass* case. It may just be helpful for the Tribunal to turn that case up very briefly. It is at Tab 53. If one turns to para. 69 -- As Mr. Anderson noted, this was a case concerning secret surveillance - a somewhat different context, I am quite happy to concede. The court says,

> "For the purposes of the present proceedings, an 'effective remedy' under Article 13 must mean a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in any system of secret surveillance".

Now, the parallel we draw here is that in our case one has to have regard to the restricted scope for any backward-looking remedy inherent in a system of ex ante regulation.

Now, the final authority that I am going to deal with that Mr. Anderson relies upon is the San Giorgio case at Tab 47. If the Tribunal can bear to read it, if one begins at para. 2,

> "It appears that between 1974 and 1977 SPA San Giorgio, the plaintiff in the main proceedings, was required to pay health inspection charges which were levied contrary to Community law on the importation of dairy products from Member States of the EEC.

> SPA San Giorgio brought an action before the Tribunale de Trento reclaiming the amounts in question. After summary proceedings the President of that court directed that the State finance administration should repay SPA San Giorgio .. and authorised provisional enforcement of that order".

So, that is the background. Then there was an appeal by the State finance administration. The matter came before the European Court and the question that was asked is set out at para. 11.

> "In essence the first question asks whether a Member State may make repayment of national charges levied contrary to the requirements of Community law conditional upon proof that that those charges have not been passed on to other persons ----"

What is then said by the court is:

> "In that connection it must be pointed out in the first place that entitlement to the repayment of charges levied by a Member State contrary to the rules of Community law is a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions prohibiting charges having an effect equivalent to customs duties or, as the case may be, the discriminatory application of internal taxes. Whilst it is true that repayment may be sought on within the framework of the conditions as to both substance and form, laid down by the carious national laws applicable thereto, the fact nevertheless remains, as the court has consistently held, that those conditions may not be less favourable than those relating to similar claims regarding national charges and they may not be so framed as to render virtually impossible the exercise of rights concerned by Community law".

Those are the well-established principles of effectiveness and equivalence. Then the Tribunal goes on at para. 13,

> "However, as the court has also recognised in previous decisions, and in particular in the aforesaid judgment in *Just -v- Ministry for Fiscal Affairs*, Community law does not prevent a national legal system from disallowing the repayment of charges which have been unduly levied where to do so would entail unjust enrichment of the recipients. There is nothing in Community law, therefore, to prevent courts from taking account, under their national law, of the fact that the unduly levied charges have been incorporated in the price of the goods and thus passed on to the purchasers ----"

MR. ANDERSON: Would you read 14 as well, please?

MR. PICKFORD: Yes.

> "On the other hand, any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to Community law would be incompatible with Community law. That is so particularly in the case of presumptions or rules of evidence intended to place upon the taxpayer the burden of establishing that charges unduly paid have not been passed on to other persons or of special limitations concerning the form of evidence to be adduced."

So what points can we draw from *San Giorgio*? The first point to note is that the charges in *San Giorgio* were levied by the Member State which was itself a party in breach of Community law, whereas in our case BT seeks a remedy not from the party alleged to have been in breach of Community Law but if there is one it is Ofcom, but from the innocent third parties, the MNOs, who have merely complied with the price control that was in force at the relevant time.

The second point to note is that, and it is a further aspect of this – it is a point potentially that I have already made – that the MNOs have to take commercial decisions on the basis of the charges that they are allowed to make and it is impossible to rewind the clock commercially, whereas it is perfectly feasible for the State to refund unlawful imposed taxes without all of the complications, we say that follow, from attempting to do the same in relation to the mobile network operators.

The third point is that BT in its skeleton argument, in trying to align itself with the *San Giorgio* case said "But the charges in this case are imposed by the Member State but given effect by means of contractual relations between the parties". We say that is simply a legal fiction, the charges are imposed solely under private contractual relationships and it is the limit on the charges which may be sought from one of the parties to another that are imposed by the State. But the charges themselves are not imposed by the State.

A further point of distinction, a fourth point to make in relation to this case is that the charge having equivalent effect to a customs' duty was itself levied in contravention of community law whereas in the present case we do not accept that Ofcom's error in relation to the price cap necessarily means that any particular charges made by the MNOs were themselves unlawful. It follows from the third point that I made. The final point to note in relation to this case, perhaps unsurprisingly, Community Law does not sanction unjust enrichment, so Member States are quite free to prevent recovery of sums which

have passed on downstream to an appellant's consumers. We say it is actually rather ironic that BT in its skeleton now seeks to characterise its remedy as some form of restitution one, as I understand it, an unjust enrichment case when in fact it may well, or indeed is likely to be the case, but certainly under a number of the remedies that have been proposed to you by BT it would be BT that will be being unjustly enriched.

We say that the analogy that BT attempts to draw with the *San Giorgio* case is entirely inapt. Drawing the strands together, where we left is that there is no universal right to compensation or to restitution under Article 4. The scope of the remedy that is available is context dependent.

There may be cases under Article 4 where there could be a retrospective remedy and we have seen that in relation to the TRD cases, they are a good example but, and this is our central point, the nature of *ex ante* regulation is such that it cannot be imposed retrospectively and therefore the regulatory framework in the present case conditions the scope of the relief that may legitimately be sought. It also conditions of course therefore the obligation under Article 4 on a Member State to provide for effective mechanisms.

We say that the effectiveness of the mechanisms in domestic law do depend on the availability of matters such as interim measures and expedited procedures. I saw some raised eyebrows in Members of the Tribunal when this point has been suggested before, but it is a point that we make very seriously. BT says that it would never have succeeded in getting interim relief, it could not have got greater expedition and we are disingenuous for even mentioning these types of remedies, because we no doubt, it says, would have opposed such applications.

THE CHAIRMAN: Well it is a more fundamental point than that. You can only grant interim relief if you have the power to grant that relief at the end of the day, so I cannot see how you can say "Well, you do not have power to do that at the end of the day, but it does not matter because you could have granted that relief on an interim basis".

MR. PICKFORD: Well you could grant it on an interim basis if at that point it is prospective. What you cannot do is go back and revisit the past. We agree with BT that there would have been great difficulties in it successfully making an application for interim relief, that is not a point that we dispute. I will come to our key points on this at a moment, but in relation the point that you have just asked me, Madam Chairman, it would have been permissible for BT at least to make an application for relief on a prospective, and on an interim basis to protect itself against the harm that it is now claiming. Of course, it all gets a bit difficult because it used to be that BT was saying that their remedy was a

compensatory one to protect them from harm, now they do not put their case that way, they are now saying it is a restitutionary one, it is all just about making sure that one adjusts the numbers, it is just purely mechanistic. It may be more difficult for them to even articulate what their restitutionary interim case would have been, but they could, if they had wished, have attempted to make such a case.

THE CHAIRMAN: What then would have happened? Supposing we had granted interim relief that for, say, Year 2, the MCT charge should have been, say, 4, then the case trundles on and at the end of the day we have to dispose of the case, you then say that because we had granted that interim relief we would then have power to order that in Year 2 the rate is 4, even though if we had not granted interim relief our powers do not extend to ordering what would have been the rate in Year 2?

MR. PICKFORD: As I said, I accept that the issue has become quite difficult and quite complex, but in principle that is certainly an argument that BT could have made. It is not inconsistent with ----

THE CHAIRMAN: Is it an argument that you are making to us in support of your case, Mr. Pickford?

MR. PICKFORD: Yes, but my argument is that they had that option available to them, and I am not criticising them for not making it, and my point is that these remedies do exist as a matter of principle and, in particular, expedition also exists.

THE CHAIRMAN: Well expedition is a different matter, but interim relief either we have the power to do this or we do not, and I do not see that we can have it on an interim basis if we do not have it at the end of the case.

MR. PICKFORD: The key distinction is that you have the power to do things prospectively, but you do not have the power to do things retrospectively.

MR. SCOTT: If we stick with the point that you made earlier on; what you said earlier on is that Ofcom's statement sets limits, but the actual charges between the various operators are contractual?

MR. PICKFORD: Yes.

MR. SCOTT: So what you are suggesting is that only way of going backwards is that BT should at the same time as having launched their appeal have given notice under the SIA, set out in the SIA the rates they thought were appropriate and then we could have had a parallel TRD appeal which we decided after we had had the Competition Commission determination so that we knew what the rates should be for the period of the interim.

MR. PICKFORD: That is an interesting proposition. They did not and ----

THE CHAIRMAN: We are all wiser now, Mr. Pickford!

MR. PICKFORD: Wiser and older!

THE CHAIRMAN: That may be a point, certainly that we have all got a lot older over the last day and a half, at which we should pause to think where we are getting to. How much longer do you think you are going to be?

MR. PICKFORD: I think I will probably be about another 15 to 20 minutes.

THE CHAIRMAN: Then Vodafone, it is your turn then?

MISS McKNIGHT: I anticipate that I would require about 40 minutes.

THE CHAIRMAN: Forty minutes?

MISS McKNIGHT: Forty.

THE CHAIRMAN: Then we have the mystery five minutes from Miss Rose.

MISS ROSE: Yes, madam.

THE CHAIRMAN: And then Mr. Sharpe is going to tell us what we ought to do! How long do you think that is going to take?

MR. SHARPE: I would think somewhere between 20 and 30 minutes.

THE CHAIRMAN: Clearly we are not going to finish today because then we have the reply. Equally clearly, we need to crack on with this as fast as we can because anything that we need to tell the Competition Commission they should do, they need to be able to do by 9th January. As far as next week is concerned, this court is very much occupied on Monday and Tuesday, but we are prepared to sit on the Wednesday to finish this. I realise that that places people in a lot of difficulty, but I think the most we can say about that is that if people wish to appear by their juniors rather than by their QCs, for those to whom that is relevant, then they can, but things overrun and other things have to give way.

We have further thought about whether we could ask for the reply at least in writing, but that would deprive us of the ability to ask questions of the BT team, which is an opportunity we have certainly taken advantage of in respect of other counsel. I am very reluctant to leave us in a position where the reply would be only written and therefore we would not be able to ask questions to clarify matters on which we are still unclear.

I do not want to raise this now. I am sure that everyone has got anxieties about what I have just said, but can we just leave the possibility there for the moment. You think you are going to be another ----

MR. PICKFORD: I would hope within 20 minutes, possibly less.

THE CHAIRMAN: I do not want to interrupt your submissions any further, Mr. Pickford, so why do we not get to the end of your submissions.

MR. ANDERSON: I am sorry, madam, I do not want to start a debate, but could I ask that the Tribunal, at least for now, keeps open the possibility of a written reply. I say that because my diary is full for Wednesday, and it may be that I may be one of those less easy to leave the reply to others, though no doubt they could manage, but I have done the case so far.

THE CHAIRMAN: Let us finish Mr. Pickford's submissions and then take stock.

MR. ANDERSON: Yes.

MR. PICKFORD: I think I was on interim relief and expedited procedures. Could I finish the submissions in relation to interim relief. Can I attempt to illustrate the point by reference to an example: suppose that we were in the High Court and suppose that Company A wants access to its competitors' technology, and competitor Company B refuses to supply and says, "No, that is a breach of our IP rights", and suppose then that Company A brings an action for interim relief seeking to compel Company B to supply it or that Company B brings an action for interim relief saying, "You are breaching my IP rights". Both companies may say, with justification, that they will not be able to quantify the damage to their competitive positions that would arise if the other side's putative rights were enforced in preference to their own, and so damages would not be an adequate remedy. The judge would then have to make a difficult decision. The loser of the application for interim relief would potentially suffer prejudice that it could not recover. The fact that, as a matter of practice, one of those companies that was unable to succeed in an application for interim relief suffers prejudice does not render the ordinary civil system of law in this country incompatible with Article 6 or 13 of the Convention. It simply reflects the unavoidable reality that there is no judicial time machine and the courts have to do their best in difficult circumstances, balancing the competing rights of different parties within the relevant legal framework. I will not elaborate again on what we say the relevant legal framework is here because the Tribunal has my point.

We say, therefore, that the fact that BT may not have succeeded in an application for interim relief does not mean that, as a matter of principle, it is there, it is part of what the Member State has done to give effect to the requirements under Article 4 for there to be an effective appeal mechanism.

Finally, in relation to the *Jarndyce v. Jarndyce* point that was canvassed with Mr. Holmes, it is just worth noting what happened in 2002 in the price control that was set then. Oftel in that case took a decision well over a year in advance of when the price control was due to come into effect in 2003. They did so to allow for a full Competition Commission reference to take its course and also thereafter an expedited judicial review in the High Court and all

of that ran its course. I was involved in it and it was difficult. It was certainly quite a tight timetable. It all ran its course before the price control came into effect. We say that the types of difficulties that have been identified in this case are not an inevitable feature of every appeal. There are ways and means and mechanisms of, in practice, trying to deal with what are ultimately quite difficult issues.

My next point is that, even if I am wrong on my first point on Article 4 and there is a right to some sort of compensatory remedy under that Article, that right has not been implemented in domestic law by the right of appeal under s.192. As I said earlier, it is not entirely clear precisely how BT puts the nature of its remedy. Sometimes it is compensatory. Sometimes it is restitutionary. But, whatever way it is expressed one does not see any of those types of remedies embodied in the procedures in s.192 or the other relevant parts of the 2003 Act. But, of course, compensatory remedies and restitutionary remedies do exist in private law. If BT was to win before the Competition Commission and ultimately obtain a judgment in its favour from the CAT, there is nothing to stop BT from bringing an action for damages or for restitution against whoever it considers to be the appropriate Defendant in the High Court. Madam Chairman, you will recollect that, of course, in the T-Mobile case which is at Bundle 2, Tab 42 - and I do not know whether it would be helpful for the court and the other Tribunal members to turn it up –

> "The Tribunal concludes therefore that Parliament's intention, as manifested in s.192 and Schedule 8 to the CA 2003, was that some decisions falling within Article 4 should be subject to an appeal on the merits before the Tribunal, but that should be subject to challenge only by way of judicial review".

Now, obviously, it was the judicial review that was the right in issue in that case, but we say that that reasoning would equally apply in relation to this case in relation to the types of remedies that BT has mooted. BT has advanced no authority at all for the proposition that you must interpret your jurisdiction so as to ensure that all related claims must come within the same forum. We say there is no basis for that assertion. BT can quite easily go on to pursue a private law action for restitutional damages in the appropriate forum. That is not excessively difficult for it to do, particularly because these matters are sequential. It does not necessarily have to do them at the same time - although it could potentially, subject to the possibility that the one action might get stayed until the determination of the other. Indeed the fact that this appeal is explicitly split between two different forums we say demonstrates that Parliament cannot have intended CAT to be the exclusive one-stop shop

in relation to everything concerned with Article 4 because, of course, as we all know, part of this appeal has been sent off to the Competition Commission.

Another feature which is worth noting of course in relation to such private law remedies is that they would have to be properly pleaded. So, if BT's case is a restitutionary one, its pleadings would need to address whether there has been enrichment, whether it was unjust; whether there is a defence of change of position. Now, none of these matters have been pleaded out before this Tribunal. They are all matters that would be capable of resolution before the High Court. But, we say they are certainly not capable of resolution in this Tribunal at the current time on the nature of the sort of pleadings that we have in front of us at the moment. As Miss Bacon said, had we understood BT's case to be the case that they are now making we would have wanted to advance all sorts of evidence and arguments and submissions in response to it. That deals with the point Mr. Holmes raised. He said, "Well, the interveners have not pleaded their cases on the glidepath". Well, we cannot be blamed for that because we did not appreciate that this matter was in issue. We are now responding to what has been put in issue by BT. But, we can hardly be blamed for not having put them in our statement of intervention.

To summarise, where we have got to is that Article 4 does not provide the compensatory right that BT claims. Even if it does, it is properly implemented in domestic law through the system of claims before the High Court - not before the Tribunal. But, even if I am wrong on both of those points, where does that leave BT? We presume at least that BT's point is a *Marleasing* one. It rightly certainly does not claim direct effect of Article 4 as against the MNOs because that would be impermissible horizontal direct effect. But, *Marleasing* is merely an interpretive obligation. It enables the Tribunal to choose from competing constructions that are open to it. However, we say that BT has wholly failed to demonstrate how the construction that it urges upon the Tribunal is open to it on the language of the 2003 Act. We say it simply is not there. So, *Marleasing* does not even have applicability in this case, even if it succeeds on the first two points.

I think I have beaten my own twenty minute time estimate with perhaps ten minutes to spare. Unless there are any further ways in which I might be of assistance ----

THE CHAIRMAN: No. Thank you very much, Mr. Pickford.

Now we have to decide what to do. It seems a little late in the date, Miss McKnight, to ask you to make a start. The options that appear to be available for the Tribunal are either Wednesday or Friday of next week. We will rise for five minutes to allow you all to confer and then come back and see where we have got to.

(Short break)

THE CHAIRMAN: I gather that Friday is slightly less inconvenient for everybody than Wednesday, and therefore we will continue then. I think we will start at 10 o'clock on Friday and hope very much to be through by lunch time. Is there anybody then who wants to say anything now before we rise for the evening. Miss Bacon?

MISS BACON: Madam, there is a slight risk that I would not be here on Friday and, as you know, I am the only counsel for O2, having said that we have had our say, so to speak, and the only thing we might want to do is if Mr. Anderson raised new points in his reply to come back on them and I appreciate that when he stood up yesterday he said he was not going to effectively develop his case on our main issue which is 1(a) and was going to wait until he saw what we said. So if I am not available on Friday could I just reserve the right to put in very brief written submissions which would deal only with any new points raised by Mr. Anderson?

THE CHAIRMAN: Once you have seen the transcript?

MISS BACON: Once I have seen the transcript, yes, and within a short period of time. I would be very happy to do that. As I said, I am likely to have finished – I am in another case on Wednesday and Thursday that just might overrun.

THE CHAIRMAN: Yes, Mr. Anderson.

MR. ANDERSON: I did not wish to interrupt anybody, perhaps just a brief reaction to that. Of course, it is understood that the person who goes first has a reply, there is not normally any sort of response or rejoinder to a reply unless, of course, I rely upon some new document or new case that was not relied upon in opening, so I do understand what Miss Bacon says and I understand these exceptional circumstances arise, but I would not want the mood to get around the room that there is going to be an endless round of responses to responses.

THE CHAIRMAN: Well we have certainly seen a great deal of written submission in this case so we also are not inviting more, but let us cross that bridge when we come to it, but we understand your point, Miss Bacon.

MR. ANDERSON: There is just one other point perhaps to mention. There is this question of the amendment which, of course on our primary case is not required at all. There was our skeleton argument. I did say yesterday that in the alternative we make that application. Various people have said today if we are going to make it they ought to see the form of words and they ought to have a formal application. One is very reluctant to do that, being proper about it, until one knows that our case is not properly pleaded as it is, and we say very strongly that it is. I wonder if it might be sensible in the circumstances, given that we

have a bit of extra time for us to make a short written application in the alternative, perhaps on Monday. If anyone wants to come back on that then they could do so again shortly, either in writing by Wednesday night, or at the hearing on Friday – just a thought as to how the time might be used.

THE CHAIRMAN: No, Mr. Anderson, I think we will find other uses for the time between now and then, other than that. I understand your point, but without wishing to pre-judge anything at all I find it difficult at the moment to think that this case is going to stand or fall on whether you have made a proper application to amend your pleading and unless I thought it was much more likely to be key than I currently do, I do not think it is an appropriate use of time for the parties to deal with that.

MR. ANDERSON: Well I have expressed our willingness to make an application to amend. You have told me, madam, it is not necessary for me to do so, and so on. On that basis I do not make the application that otherwise I would, so thank you.

THE CHAIRMAN: Well everyone has heard what I have said. So we will reconvene then at 10 o'clock then on Friday morning. May I just say thank you very much to everybody for what has been a very long day, particularly perhaps to Mr. Holmes who had a lot of questioning from the Bench with which he dealt extremely well, if I may say so.

(The Tribunal conferred)

THE CHAIRMAN: On the question of the transcript, let us just be clear that as this hearing is in camera the transcript will not be put on the web in the usual course, but it will be circulated to the parties who must not then make it public beyond those who need to see it. It is our intention that once the Competition Commission has notified us of its determination then the transcript will be put on the web and whatever ruling comes out of this hearing will also then be published at that point, and we assume that was what people were expecting. Thank you very much.

(Adjourned until 10.00 a.m. on Friday, 12th December 2008)