IN THE COMPETITION APPEAL TRIBUNAL

Case Nos 1085/3/3/07

Victoria House
Bloomsbury Place
London WC1A.2EB

12th December 2008

Before:
MISS VIVIEN ROSE
(Chairman)

PROFESSOR ANDREW BAIN OBE
MR. ADAM SCOTT TD

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC Applicant
and
OFFICE OF COMMUNICATIONS Respondent

with Interventions by:

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

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CASE MANAGEMENT CONFERENCE
IN CAMERA

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

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 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 everybody. Miss. McKnight, I think you were going to give us your submissions on behalf of Vodafone.

MISS McKNIGHT: Thank you, madam. I have handed up a short speaking note, together with two additional documents, which everyone should now have – the other parties have had intimation that I was going to refer to these documents. By agreement among the MNOs who have spoken to date, it was agreed that I would handle principally issue 4 of the issues that have been agreed to be discussed at this case management conference. Those issues are set out at tab 15, but I do not need to take you to them. First, they looked at Question 1, the scope of BT's pleading. Question 2, the scope of Ofcom's powers, Question 3 focused on the Competition Commission's powers; and Question 4 focuses on the powers of this Tribunal in the light of all those other matters. In particular, the question that I will be looking at is whether, at the end of this appeal the Tribunal will have power either to direct Ofcom to re-determine the target average charges, the TACs for Years 1 and 2 and, alternatively, whether it would have power to direct Ofcom to set TACs for years 3 and 4, which would be designed to compensate for the alleged over recovery in Years 1 and 2.

Regrettably, I must back track over some of the ground that others have covered because the Tribunal's powers or the scope of the powers available to the Tribunal depend on three things: the scope of BT's appeal, the scope of Ofcom's statutory powers which we say set an outer bound to what the Tribunal can do, and they depend also on the statutory division of responsibilities between the Competition Commission and this Tribunal.

Looking at those in turn, we look first at the scope of BT's appeal and, in this regard, Vodafone adopts the submissions made by Miss Bacon for O2 to the effect that BT's appeal on its proper reading is limited to challenging the Year 4 TAC, because the only substantive grounds advanced to challenge Ofcom's decision focus on three distinct alleged errors in the computation of the efficient level of charge for Mobile Call Termination services, and that efficient level of charge is decisive only as to the Year 4 TAC. We say, as did others, that if the challenge is limited to the Year 4 TAC then the Tribunal's powers are likewise limited. Any remedial order would be limited to directing Ofcom to modify the Year 4 TAC in line with the Competition Commission's determination.

A point arose during the hearing last week where it was suggested that, if it became apparent, through the examination of the Competition Commission's reasoning, that the same errors which required modification of the Year 4 TAC also called into question the correctness of the previous years' TACs the question was would it be open to the Tribunal to invite Ofcom, of its own initiative, to revisit the TACs for the earlier years, and we agree

with what was said then by others that, yes, it would be open to the Tribunal to point out that the logic of the decision in respect of the year 4 TAC, the logic of the decision in this appeal, calls into question the correctness of the previous years' TACs and Ofcom should then of its own initiative consider whether it needs to re-open those. But, I would make very clear at this stage, that Ofcom's power to re-open its previous decision in respect of Years 1 to 3 is limited – and I will come on to explain why – by the outer bounds of its own powers to revisit the past.

Clearly the case is somewhat more straightforward if BT's appeal is limited to the Year 4 TAC, but for the remainder of this submission I proceed on the alternative basis that BT's appeal does challenge Years 1 to 3, as well as Year 4, and therefore questions do arise as to what form of remedial order BT might be entitled to in respect of each of the years of the price control period.

For convenience I assume in talking about the past and the future, that a new decision – a remedial decision – will be taken early enough to apply prospectively to Years 3 and 4, but I am happy obviously as we progress to take questions as to what happens if we encroach on Year 3 before a decision is taken. The division of past into Years 1 and 2, and future into Years 2 and 4 is for convenience, but obviously we cannot be sure that will happen.

I would like now to move on to look at the scope of Ofcom's powers, which set the outer bound to the powers of any remedial order that can be made. All of O2, Orange and T-Mobile have made the point that the power to set price controls is a power to regulate *ex ante* and therefore is a power only to set controls as to charges to be levied in the future. The Tribunal suggested to Miss Demetriou that whilst that is an uncontroversial proposition the really controversial question is how we judge the *ex ante-ness* of a price control by reference to what point in time do we judge whether a price control is to be regarded as *ex ante*? It was suggested that there was a question, where one is dealing with an appeal, whether the proper thing to do is to say the price control was *ex-ante* when it was set as of 2007, so any remedial order dealing with 2007 onwards is also *ex ante*, or whether one has to look at the point in time at which the remedial order is taken. Now, we say that you judge whether a price control condition is being imposed *ex ante* by reference to the point in time at which the new decision is being taken. We say that for several reasons. First, we look directly at the statutory wording of section 195(5), it may be useful to turn it up, it is at tab 29 of the bundle.

THE CHAIRMAN: Of which bundle?

MISS McKNIGHT: It is the first tab in bundle 2 that I have, but I think yours might have been differently divided, it is tab 29. Section 195(5) says:

> "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."

Mr. Pickford drew your attention to the word "otherwise" and he emphasised, correctly, I submit, that this means that this section as a whole does not have the effect of extending the powers which Ofcom would have had absent an appeal. It means that any remedial order may direct Ofcom only to do something which it could have done absent the appeal, and at this stage all that Ofcom, as of 1st April 2009, the beginning of Year 3, all that Ofcom could do – if it wished to modify the existing price control condition – is to adopt an amended *ex ante* condition as of that point in time.

We say that that construction is supported by the tense of the verb, "He may not direct him to take action which he would not otherwise have power to take". It is not action which he would not otherwise have had power to have taken. So it does not look back to when the original decision under appeal was taken. It looks to what power Ofcom now has as at the point in time when it is to act.

Our first submission rests on the wording of s.195(5).

THE CHAIRMAN: Do you accept that what we are doing here is modifying an existing price control, rather than quashing and retaking a decision a price control? You say, even in relation to a modification of the price control, you can modify it for the future only?

MISS McKNIGHT: Yes, that is correct.

THE CHAIRMAN: To what extent, in modifying a price control, can you take into account what has happened in the past?

MISS McKNIGHT: I will come on to that. I see two distinct questions. The first is, can you direct Ofcom essentially to re-take the decision or modify the decision as to what prices should have been charged in Years 1 and 2. I am saying, no, that is not something that is available to the Tribunal to do because it is not something that Ofcom could do. There is an entirely separate question, if you are correct, as to whether one can take account of the past in deciding what is the right thing to do for the future. I will come on to consider that in the context of what to do about Years 3 and 4.

My first point is that this wording supports the construction that one should be looking at it as of the time at which Ofcom takes the new modification decision. I think that is supported by an examination of what is the defining characteristic of a price control. A price control is not merely a declaration or statement as to what would have been an optimal price at

some point in the past. A price control – and the word "control" indicates this – is an obligation imposed to control prices that will be charged in the future. We say that if Ofcom were now to take a decision and to claim that it constituted a price control when what it purported to do was to tell mobile operators what they should have charged in the past, that would not be a price control. It could not validly be taken under s.88. We say that that is a well recognised distinction arising from competition law. I have directed you to, and have given you a copy of, the directions in the *Napp Pharmaceuticals* case. It is not necessary to turn them up, I can explain the point I wish to make.

In the *Napp Pharmaceuticals* case, the OFT found that Napp, being dominant, had committed an abuse by charging excessive prices for a particular pharmaceutical to customers in a particular market segment. It computed by a variety of benchmarks the approximate amount of that excess and found that there was an infringement, and, in the directions that you have, ordered Napp to bring the infringement to an end. By way of a specific remedial order it then required Napp on 15 days' notice to reduce the prices by 15 per cent. We say that that specific remedial direction is in the nature of a price control, but a finding of infringement that merely finds past excessive pricing or indeed current excessive pricing, and the excess being measured by a particular amount, is not and cannot be characterised as a price control.

So we say that if Ofcom were now, whether on your direction or of its own initiative, to purport to adopt a modification decision or a new decision claiming that it was setting new price controls for Years 1 and 2, it would be misdirecting itself because they could not be properly characterised as price controls.

MR. SCOTT: At the moment we are assuming that BT have asked for modification of MA.3 and MA.4, so that is our starting point. What you seem to be implying is that the direction that we give to Ofcom must suggest that the price control, the original MA.3 and MA.4 for Years 1 and 2, was set as a matter of policy and without regard to Year 4.

MISS McKNIGHT: No, I am not saying that.

MR. SCOTT: If that is not the case then what you seem to be saying is that we should instruct Ofcom to replace MA.3 and 4 with conditions that will reflect principles that the Competition Commission have decided are in error, or decide that, as a matter of policy, a glide path should be set, recognising the fact that the path has just passed, leaves Years 1 and 2 in place and then does something about Years 3 and 4, something to which you are going to return in due course.

MISS McKNIGHT: Yes.

MR. SCOTT: Are we right in not hearing you to suggest that we should, at the end of the day, have an MA.3 and 4 which in any respect leave in place numbers which represent principles that the Competition Commission have found to be in error?

MISS McKNIGHT: I think I got a bit confused by the negatives, but I can tell you what I am saying. What I am saying is that your remedy should not touch at all upon the figures for Years 1 and 2, you should say, "That has happened and nothing we can do can alter what you were directed to charge in Years 1 and 2". I am not in any sense saying at this stage that the fact that those figures might have been, to use some kind of neutral term, unduly generous is irrelevant to what happens in Years 3 and 4. I am going to come on to Years 3 and 4. I am discussing what form of remedy Ofcom can adopt, but I am saying it cannot alter Years 1 and 2.

MR. SCOTT: In what you say can you bear in mind the possibility that appeals in this process can go on so long that, for example, the SMP decision in 2004 against H3G is, as I understand it, the subject of an ongoing appeal which may well not be decided until we get into a year way beyond the end of that price. In that case there was not a price control so we do not face the same difficulty.

MISS McKNIGHT: I will bear in mind the point you have in mind, namely that it is the logic of my position that the longer we take to resolve the appeal the more the price control becomes beyond reach, to put it in those terms. I appreciate that that is the consequence of what I am saying.

My next point I think goes some way to explaining in what sense Years 1 and 2 are beyond reach. What we would say is that there is a single price control condition governing all four years. This is a point which Professor Bain raised last week. That is analogous to a contract which imposes a variety of different obligations on parties to be performed over a period of time. Once individual obligations have been fully performed at their due time those obligations are spent, they are discharged. No further legal consequences arise from them. It would make no sense to go back and vary them. We say that although it is one condition it is made up of obligations which fall to be performed in different years. To the extent that the MNOs have fully performed their price control obligations for Years 1 and 2 they are discharged. So by not amending them you are not actually inducing the parties to behave in a manner that is inconsistent with the Competition Commission's reasoning for the future. You are merely leaving there a record that they were subject to a more generous price control in Years 1 and 2 which may, and we will discuss, inform what you do about Years 3 and 4.

That is what I had to say about Years 1 and 2, but I want to explain, before I go on to Years 3 and 4, why we do not think there is any injustice in that outcome as regards Years 1 and 2. The first point is that, of course, what the MNOs have done to date in complying with the Year 1 and 2 TACs has been entirely lawful by reference to the price control decision that Ofcom took, which is still in force. Ofcom took, I think by any reckoning, a very careful and considered decision as to what the Year 1 and 2 TACs would be, and the MNOs have been complying with the Regulator's best estimate of what would be an efficient set of charges for Years 1 and 2.

BT has quite properly brought a merits appeal: it is not saying – although some of its appeal could be read as saying this – the legal substance of its appeal is not an argument that Ofcom exceeded its powers, its decision is manifestly irrational or based on some fundamental legal error which should have been apparent to all of us; it is a merits appeal. The architecture of the Communications Act provides that, if Ofcom makes a judgment as to what is the best charge to apply and it is appealed to the Tribunal and referred to the Competition Commission, if the Competition Commission disagrees with Ofcom as to what is the best and most efficient charge, whether, because it disagrees with its methodology or its appreciation of the facts or because it attaches more weight to new evidence, it is clear that, of those two judgments, the Competition Commission's judgment must prevail. But that does not, in any sense, suggest that what people did previously in observing Ofcom's charge control was unreasonable or outrageously unjust. Indeed, it is very noticeable that in its provisional determination the Competition Commission decides to depart from Ofcom's judgment, particularly as to the treatment of 3G spectrum values, by relying on evidence which was not available to Ofcom, so we are not today taking issue with what the Competition Commission has concluded, nor indeed with BT's right to introduce new evidence, but what we are saying is that it would be extremely unjust to the MNOs to impugn their conduct for the past by reference to evidence, reasoning and analysis which was not and could not have been available to the parties when they were setting their charges in reliance on Ofcom's charge control statement.

We see the cycle that is occurring, the SMP review, the Ofcom statement, the appeal, the reference to Competition Commission as a cycle of events which, at best, will lead to an ever more refined assessment of what is the efficient charge for MCT services, but, although we want to move progressively towards a better understanding of what is the optimal MCT charge, we have to accept that until we get there – and of course we never will get there, this is an eternal progress – we have to charge whatever the competent

regulator best judges to be appropriate pending further refinement, and that is what the MNOs have been doing. We would invite you to think about the Tribunal's own judgment in the TRD case in this regard You were faced with a situation where, of course, you were making a retrospective adjustment because the dispute determination provisions expressly contemplate that. A dispute is generated; it comes through Ofcom to the Tribunal for the Tribunal to determine what is a reasonable charge for a party to have levied. In one sense it would have been very sensible for the Tribunal to say "We cannot decide this, because we are waiting to hear what the Competition Commission tells us is the right charge", but quite correctly, given that there is within the Directives an impetus to decide disputes very quickly, because they are backward looking, the Tribunal said: "We have to judge what is reasonable by reference to the best benchmarks available to us".

By the time the Tribunal reached its decision on the TRD judgment it had the 2004 price control decision to look at and it also had the 2007 price control decision to look at, but quite correctly it could not pre-judge the outcome of the Competition Commission's review of that decision. So, very sensibly the Tribunal said by reference to the bench marks we presently have we judge a particular charge to be reasonable. But it is perfectly clear from the judgment that the Tribunal was well aware that that could turn out to be higher than the efficient charge, even the efficient charge for the period that the Tribunal was looking at, that will only become known once the Competition Commission's final determination is available. So we say that the MNOs, by complying with Ofcom's TAC for Years 1 and 2, have not committed a pricing abuse, they have not acted unlawfully because they were observing what is now a valid MCT price control, and they have charged a price which is reasonable as that term is used in dispute resolution terminology. All of those contribute to a conclusion that there is no injustice in allowing the past to lie where it is, Years 1 and 2 are beyond reach, but what happened in Years 1 and 2 is a potentially relevant fact when we get to Years 3 and 4. So that is where I would leave it on Years 1 and 2.

MR. SCOTT: One point on that. One of the points that was made to us when we met last week was that the prices charged were a bilateral contractual set of prices in each case were not the prices in the price control. Do you differ from that?

MISS McKNIGHT: The prices charged are charged pursuant to interconnection contracts and are therefore set by contract, and they differ by time of day and weekend and so on, but the MNOs have an obligation in concluding the contractual prices to set the prices to comply with the price control and, as far as I am aware they have done so. So the charges in the charge control are a cap, it would be open to the MNOs to charge a lower price subject to

non-discrimination obligations and so on. But, as far as I am aware the MNOs have set about agreeing their contractual charges with a view to meeting but not exceeding the TAC.

MR. SCOTT: I think that is our understanding as well. The reason I raised the point, the unattractive prospect of us going back into a TRD situation if parties decide that they want to have a discussion about whether the charges were proper in retrospect.

MISS McKNIGHT: It seems to me to be clear from para. 69 of your TRD rates' judgment – I have given it to you but I do not think it is necessary to look at it now – that the Tribunal thought one would not go back, one generates a dispute, then one decides the dispute and applies the determination to the period from when the dispute was generated, not by saying "Now, I deeply regret having agreed that contract for the last two years" so I do not think I see that as a risk in this case. In any event, if it were, I would invite you to decide the charge was reasonable because it was compliant with the then prevailing cap.

It was suggested by the Tribunal – I think by you, Mr. Scott – when we met last week that there is a sort of moral hazard here; this is the point that if it would take an awfully long time to resolve appeals such as this MNOs stand only to gain. We say that is not a fair analysis of the balance of incentives in part because of the powers available to the Tribunal in terms of case management powers and the award of interim measures.

I apprehend that Mr. Anderson is going to discuss whether there was a realistic prospect of interim measures or expedition in this case, he has handed some of us an extract from a transcript that suggests that. I would like to address a point about jurisdiction. The Tribunal suggested that as it is my submission and the submission of others that by the time this appeal is determined it will not be open to the Tribunal or Ofcom to go back and reset the charges for Years 1 and 2, then *a fortiori* it could not have been open to BT to obtain interim measures to interfere with those TACs in the meantime. We would say that is not strictly correct, but the situation is perhaps best illustrated by considering a High Court claim for breach of contract. If I were to go to the High Court and allege that a third party was contractually bound to me and was threatening an anticipatory breach of contract I could go to court and seek an interim injunction to restrain the breach from occurring. The court would apply its normal principles in deciding whether to give me that interim injunction and if it refused to do so I could nonetheless press on; if the breach occurred I would then have a claim that would sound in damages. But the fact that by the time I got to trial it was too late to restrain the breach from occurring and no injunction could be awarded does not mean that the court would have had no jurisdiction to give an interim injunction when I first applied for it.

THE CHAIRMAN: I do not think that is the point that was being made. The point is that Ofcom has no power that I can see to make an interim modification, or impose an interim price control. Suppose that after the May consultation, or even the September consultation, Ofcom had said: "We are almost sure that your prices are in excess of your efficient costs and therefore we want to do something now to bring those prices down before we actually issue the price control at the end of the day which we are not quite ready to do", are you saying that they would have power to have imposed an interim price control in September 2006?

MISS McKNIGHT: No, I do not think that is, with respect, the correct comparison. I think the correct comparison is to say that if Ofcom had taken its existing price control decision, had definitively made findings of SMP, which is a necessary pre-condition to setting any price control, had then adopted the present price controls, but six months later had said, "We are beginning to think we got this wrong, it appears to us that a lower level would have been appropriate", provided they were sufficiently confident and had adequate reasoning to justify an immediate modification they could have made that and then, subject to time for appeal, the initial decision and/or the modification decision, could have been the subject of appeals. I must admit, I had not appreciated that was the Tribunal's objection. I had thought that the objection was a different one, so I will consider that and revert to it later if I have any further submission to make on it.

To wrap up this point, assuming you were not precluded from ordering interim measures by any deficiencies in Ofcom's powers to make an interim price control decision, a question does arise as to whether it matters in any real sense that in this case it would have been difficult to justify doing so on all the facts and considerations. We would say that the appeal mechanism is adequate and removes moral hazard if you have power to take an interim measures decision in an appropriate case. In our skeleton argument at para.42 we did refer to an EC precedent for this, which suggested that a Member State's rules for ensuring effective judicial protection and effective remedies are adequate for EC purposes where they admit of the possibility of interim measures, albeit that in many cases interim measures will not be available on balance of convenience or by reference to other relevant considerations.

We would say that those matters also provide comfort that there is no systemic injustice or imbalance in saying that the past is the past and cannot be revisited by re-determining the Year 1 and Year 2 charge controls.

I would like then to move on to just one final point that Mr. Anderson relies on as to Years 1 and 2. He appears to suggest in his skeleton argument at para.70 that he relies now not only on the power in s.87(9)(a) for Ofcom to set a price control, but also what he portrays as a separate power in s.87(9)(d), to require MNOs to adjust their prices. By implication he suggests that the power to adjust is a backward looking power. We would say that exactly the same considerations that I have outlined, which suggest there can be no backward looking setting of a price control, apply equally to the power to adjust prices. We say that that does not render s.87(9)(d) otiose. Indeed, it seems to us that Ofcom has relied on s.87(9)(d), the power to require operators to adjust their prices, in adopting conditions MA.3.6 and MA.4.6, which are, of course, the provisions that allow correction between years or within Year 4 by adjustment to prices to ensure overall compliance with the TACs. We say that is not a separate stand-alone power to look backwards for all the substantive reasons I have given.

THE CHAIRMAN: Can I just raise one point with you, Miss McKnight. You have discussed the moral hazard point, and that is a point that we have canvassed. One concern I have is that, looking at the wording of s.195, it seems to contemplate that in the general run of cases the Tribunal will be able to, and indeed must, give directions to Ofcom to give effect to its decision. My concern is that if you are right and there is nothing that can be done about elapsed periods, then that opens a class of cases in which actually there is nothing that we can direct. In so far as the appeal challenges the whole period of the price control, in almost every case, one might think, the Tribunal is not going to be able to comply with what appears to be a duty to give directions as are appropriate for giving effect to its decision because, apart from stating what should have happened, there will be nothing that we can do. It is an unusual provision in that it does not appear to give us much discretion as to what we do. Of course, the words “if any” appear in parenthesis, and we have to consider it to be appropriate. The structure of it appears to envisage that, generally, we will give directions to Ofcom to give effect to the decision, which includes the incorporation of the Competition Commission’s determination.

MISS McKNIGHT: I appreciate that in a very extreme case if, horror of horrors, we were beyond Year 4 when this was resolved, there would be nothing that could be done in respect of any of the years, on my analysis. I think there is no prospect of that at all. We are talking about some of the price control period being elapsed, but by no means all of it. I would submit that whilst that is a theoretically possible outcome, that there would be no part of the original decision that was within reach of modification, I do not think that one can interpret

the substantive powers that set the outer bounds of Ofcom's powers by reference to this section so as to suggest Ofcom must have power to go backwards in order for this section to have effect. I think this section was clearly drafted to cope with the vast majority of cases, in fact probably all cases, where some remedial action can be taken. It could be suggested that that would only be remedial action to give effect to some part of the Tribunal's decision. I think, in a sense, this is potentially a circular argument, because we would say the extent of the Tribunal's decision must be informed by the extent of Ofcom's powers. So we would not get to a situation where the Tribunal would say, "Our decision is that all four years' TACs should be modified but we can direct you only to do half of that".

THE CHAIRMAN: I think the decision relates to the decision on the grounds of appeal, namely whether the spectrum costs were too high, where there should have been an externality charge. That is our decision. The question is how do we give effect to that decision.

MISS McKNIGHT: I think s.195(3) perhaps distinguishes between including – so you have to decide the appeal and that would be a decision that Ofcom erred in respect of all four years perhaps, but then you must include a decision as to what is the appropriate action for the decision maker to take. That is maybe a less extensive decision, so you could say, "Ofcom erred in respect of all of Years 1 to 4, that is our decision, but our second decision, or the second part of our decision is that the action to take is limited to Years 3 and 4". It is that part of the decision that is then the subject of the directions.

THE CHAIRMAN: So which decision is it that is being referred to then at the end of subsection (4)? Presumably the decision that we remit in the first line of subsection (4) is the complete decision?

MISS McKNIGHT: Yes, that is the decision under appeal, so that is not your complete decision, it is Ofcom's decision.

MR. SCOTT: It is the decision at the end ----

MISS McKNIGHT: I apologise, I thought you were referring to the first decision. So the Tribunal remits Ofcom's decision to Ofcom – "with such directions as the Tribunal considers appropriate for giving effect to the Tribunal's decision." I would say that that decision is a decision in subsection (3) which is included in its larger decision. So what you are remitting is a decision as to what is the appropriate action for the decision maker to take. An illustration would be you decide that Ofcom erred in certain respects in each of Years 1 to 4. You decide that the proper action for Ofcom to take is to modify the TACs for Years 3 and 4, and you remit Ofcom's decision to Ofcom with directions that it give effect to your decision as to what action it should take by making specific modifications to Year 3 and 4

TACs, or by considering what modifications to make to the Year 3 and 4 TACs, and we say that does not do violence to any of the language at all.

THE CHAIRMAN: Thank you.

MISS McKNIGHT: Thank you. As regards Years 3 and 4, we are working on the assumption that Ofcom will be in a position to take a new decision in time for Years 3 and 4 still to be in prospect. There is therefore no objection in terms of Ofcom's powers to the Tribunal directing it to modify the Year 3 and 4 TACs. Clearly, the substance of any direction which is given must take account of and be bounded by the form of modification that it would be open to Ofcom to make. We say that the issues presented for this case management conference ask whether it would be open to Ofcom to modify the Year 3 and 4 TACs for the purpose of compensating buyers of termination services for the fact they have "overpaid" in Years 1 and 2. We say that it would be a wrongful use of Ofcom's powers to use the mechanism of the Year 3 and 4 TACs to compensate for some alleged wrongdoing or overcharging in Years 1 and 2.

MR. SCOTT: It seems to me that the very use of the word "compensation" in this context is prejudicial, and the reason it seems to be prejudicial is that the task that the Competition Commission had been undertaking is to have regard to efficient cost-related pricing, and that what we are considering, for example, in relation to the recovery spectrum costs is the question of what costs are properly recoverable by an operator during the period in question. If we address the topic in that sense it seems to me that we are addressing the task that the Competition Commission are undertaking rather than addressing the possibility of compensation which it seems to me raises a different lot of issues as does the word "restitution".

MISS McKNIGHT: I could not agree with you more. The reason I use the word "compensation" is that BT proposed, I believe, and other parties agreed a list of issues for consideration today, and the question posed is: "After an appeal such as this one does Ofcom have the power to set revised price controls for the future at a rate reduced so as to compensate for over payments made in the past?" I would address that question first but I agree the far more important question is, disregarding motives of compensation, would it be proper in setting the Year 3 and 4 charge controls to have regard to the fact that the MNOs would appear to have recovered more of their costs in Years 1 and 2 than perhaps they should have done in some sense, but I will deal with the compensation question first, if I may. That question I was reading was from tab 15.

We say that for the very reasons I think, Mr. Scott, you were suggesting, the purpose for which a price control is set is to achieve efficiency objectives which are essentially forward looking, to prevent excessive pricing, to prevent margin squeeze, to maximise long-run interests of end users and so on, and compensation plays no part in that, Ofcom would be having regard to a collateral consideration, pursuing a collateral purpose if it were to use these price controls as a mechanism to compensate, and we say that in itself is the end of the matter.

We also make the point, of course, based on what I was saying about Years 1 and 2, that any suggestion that there was a need for compensation implies that there has been overcharging in some meaningful sense in the past and I have already made submissions at length as to why there is no injustice in leaving Years 1 and 2 as they are.

I would like to move on to the question which the Tribunal has raised, as to whether disregarding motives of compensation, there is some relevance in what has happened in Years 1 and 2 deciding what is the proper charge for Years 3 and 4.

First, I would make the point that we would recognise that how much MNOs have charged in the past can be factually relevant as to how the charge control should be set in the future. But, of course, even if one felt there had been an overcharging in Years 1 and 2 in some relevant sense, there is no *a priori* reason why the whole of the overcharge should be used to abate the whole of the charges in Years 3 and 4. One is looking at whether, to any extent, there is some relevant carry forward.

Whether there is any good rationale for carrying forward, or for using some overcharging in Years 1 and 2 to offset the TAC in Years 3 and 4 must critically depend on the reasoning that underlies the adoption of the TACs for Years 3 and 4. So we would accept that in many classic utility price control models, such as an electricity distribution price control the Regulator often sets about setting a five year price control by deciding how much revenue converted into a net present value figure the regulated entity is going to require to maintain, operate and develop its network, and provide services for the next five years. It comes up with a lump sum figure and then decides how to profile the recovery over each of the five years.

In that situation if there were an appeal and it were decided that the lump sum figure had been assessed too generously but Years 1 and 2 had already elapsed, it would make some sense to reduce the Years 3, 4 and 5 figures to reflect the extent of the over-recovery in Years 1 and 2 relative to the whole, because the underlying purpose of the price control is to generate a given lump sum at the end of the five years and, of course, normally the lump

sum is determined as being the amount which the efficient operator would incur and he earns a return on efficiently incurred past costs. So historic costs are a relevant input into the regulatory asset value on which the return is earned.

In this case Vodafone argued very strongly that cost recovery of historically incurred costs should be a very weighty consideration in setting the charge control in respect of 3G spectrum costs which are, of course, a very large input. Vodafone advocated very strongly to the Competition Commission a financial capital maintenance model. It said: "we paid the most efficiently determined price at the time we had to buy 3G spectrum, and we want to recover it over the life of the spectrum." Professor Bain, you look as though you want to say something?

PROFESSOR BAIN: I did not want to interrupt your flow, Miss McKnight, but it seems to me you are in danger of saying that the Competition Commission have reached the wrong conclusions?

MISS McKNIGHT: No.

PROFESSOR BAIN: If the Competition Commission have rejected your arguments they have been rejected so far as we are concerned.

MISS McKNIGHT: Yes, but for that very reason I am saying today we are not in a position to say whether we can impugn the Competition Commission's findings. We say the logic of their position is that historic recovery of 3G spectrum costs, or recovery of 3G spectrum costs over all is really not the point. The point is what is the value of 3G spectrum that should factor into future Years 3 and 4. They say that 3G MCT services are of no more value to users than 2G MCT services, and they are cheaper to provide in network cost terms. They set the 2G efficient charge for MCT services and then say, "We will not give you any more for 3G. To the extent that you can provide 3G services at a lower network cost, the residue amounts to the value of your spectrum". We may have to live with that. The point is if that is what the Competition Commission are doing that does not provide a logic for saying, "You recovered more of your historically incurred spectrum costs in Years 1 and 2 than you might have expected, so it is now depreciated and we can give you less in Years 3 and 4". So the internal coherence of the Competition Commission's position does not justify a carry forward.

THE CHAIRMAN: Presumably H3G have been recovering a contribution to their costs of the 3G spectrum in the charges that they have set in the period running up to the price control, and in so far as Vodafone charged a blended rate for a period before the start of the TRD dispute, you have also recovered a very small amount in relation to your 3G spectrum costs.

What you are saying is that the Competition Commission is not taking that into account because it is not dealing with spectrum costs as a fixed cost ----

MISS McKNIGHT: That is right, it is not saying, "This is a cost to be recovered over the life of the asset, how much have you already had?" it is looking at the value of spectrum as being essentially the cost advantage it confers on you when you are competing with a 2G provider. We say that it is correct to ask the question, "Does the over-charge in Years 1 and 2 bear on Year 3?" and the answer is, on this logic, no.

MR. SCOTT: The implied logic of the Competition Commission's position is this, that an efficient operator focusing on the provision of mobile call termination would not, in relation to the acquisition of spectrum for that mobile call termination, pay more than is justified by the premium that lies between the operating costs of 3G and the operating costs of 2G. In so far as an operator, in thinking about how much they would have spent on a spectrum licence, could contemplate that they would get a higher premium during a certain period than they would get in another period, I can see that there is a logic in saying that they would have paid as much as would be recoverable against both sets of premium. Is the logic of your position that the Competition Commission, in thinking about their final recommendations, should say, "An efficient operator would recognise that it takes time to get an appeal through and therefore we get the benefit of an additional premium in Years 1 and ", or that an efficient operator would say, "We would not get the benefit, we would get only the economically justifiable efficient cost against 2G, and we know what the 2G rates were because we have the example from before"? Which of those lines are you pursuing?

MISS McKNIGHT: I fear neither. I hate to disillusion you, but none of the MNOs I think valued 3G spectrum at the outset with the precision that you are suggesting. They did not contemplate, "We might get away with higher charges for two years pending the outcome of an appeal".

MR. SCOTT: In fact, we know that the MNOs spent a great deal of money in this and they did so for a variety of reasons, and those reasons are historic. The Competition Commission are considering an efficient operator having regard to the worth of 3G's spectrum solely in respect of MCT and not in respect of any other purpose for which that 3G spectrum could be used.

MISS McKNIGHT: I think what I would like to say is, in a sense, the very fact that you are raising this question illustrates the points that I want to make out of this. The questions posed in this case management conference are jurisdictional questions, "What are the powers of Ofcom?" Therefore, the relevant question is, "Would it have a power in setting a

modified charge control for Year 3, to look back at all, as a potentially factually relevant matter to what was charged in Years 1 and 2?"

What I am saying is, we do not rule out in principle the possibility that that could be a relevant thing to do, or a proper thing to do. What we say is one has to probe minutely the logic of the reasoning for setting the Year 3 charge control to assess to what extent, if any, what has happened in Years 1 and 2 bears on a decision as to what should happen in Year 3. We cannot decide that today and it would be a price control matter to decide. What I want to make clear is that if, at the end of this case management conference the Tribunal makes a ruling as to the questions posed, it is very important that its rulings should not trespass on questions as to what would be the proper extent to which the person deciding the price control question should have regard to Years 1 and 2. The question that is posed is, "Should a Year 3 charge be set so as to compensate for over-recovering in Years 1 and 2?" We say no, but for clarification that does not rule out the possibility that what has happened in Years 1 and 2 is factually relevant to the selection of the efficient charge for Year 3.

One more consideration is, of course, that the waterbed effect is very relevant. This is not a case where any over-recovery in Years 1 and 2 has resulted in profits that are retained by MNOs. The waterbed is not perfect but our reading of the Competition Commission's provisional determination is that they accept an academic paper suggesting it is about 90 per cent perfect. All we say is that these are factors which only the Competition Commission can incorporate into its thinking.

I would say, therefore, that this is a very important distinction, a distinction to be drawn between the power to pursue a purpose of compensation and a power to set the Year 3 charge by reference to all the potentially relevant facts which may include facts as to what happened in Years 1 and 2.

That completes my submissions for what are Ofcom's powers. I would like to move on now to consider ----

PROFESSOR BAIN: Are you going to say anything other than what you have in your speaking notes about consumers at (vi) and (vii)?

MISS McKNIGHT: I am happy to, yes.

PROFESSOR BAIN: What I wanted to ask you about that is, if consumers, for one reason or another, do not get as much benefit as, in the light of the Competition Commission's expected decisions, they would have done – in other words, their price has been too high in Years 1 and 2 – there is no redress through interim measures, or anything else, that gets the money back to the consumers in Years 3 and 4. If one regards providing the best possible

deal for consumers as the overriding objective, then some possibility of taking account of what has happened in Years 1 and 2 in Years 3 and 4 would be necessary, would it not?

MISS McKNIGHT: I fear that that would entail seeking to stretch the statutory powers beyond their proper extent in order to achieve what one might regard as a desirable outcome.

PROFESSOR BAIN: You have accepted that what has happened in Years 1 and 2 is relevant.

MISS McKNIGHT: May be relevant.

PROFESSOR BAIN: I am sorry, may be relevant. You accept that. If it were relevant then it would be relevant from the point of view of consumer benefit as well. There is a second point here the allocative efficiency and dynamic considerations. Would you agree that if a balance has to be struck between disrupting the affairs or the expected conditions for the MNOs and allocative efficiency to consumers, that is the sort of matter that Ofcom considered in determining there would be a glide path, and it is the sort of matter that the Competition Commission could consider if they were asked or expected to determine what the prices should be in Years 3 and 4?

MISS McKNIGHT: Regrettably, I do not think there is a straightforward answer to that at this point in the proceedings. The reason is that it would depend what were the grounds of appeal because we are looking at the outer bounds of what could be done pursuant to an appeal by reference to the outer bounds of Ofcom's powers. Of course, there is in any case a narrower bound which is determined by the scope of the appeal. BT, I think, has conceded it has not challenged the glide path. It has not said that Ofcom was wrong to take account of the balancing factors that came into the glide path and it has not suggested that they were weighted in an inappropriate manner. I would at the end be suggesting how we resolve this question of the uncertainty of what BT's case, but I think that BT would have had to make a positive case that the glide path has to be reconsidered in its totality, which I think it is far too late to make now if it wanted to introduce the kind of arguments that you are suggesting. We simply have not been in a position to address those arguments.

PROFESSOR BAIN: Thank you.

MISS McKNIGHT: You are right, I did gloss over p.8 of my note, because the gist of my submission is that this is not something to be determined today. Now that you have drawn attention to it we would say that it is perfectly consistent with the promotion of efficiency and maximising benefits to end-users that one could set the Year 3 charge control in a way that took no quantitative account of what happened in Years 1 and 2. That would be efficient because it would maximise allocative efficiency by setting the optimal charge for

Years 3 and 4 and not interfere with dynamic incentives to invest by disrupting what had happened in the past or appearing to revisit it in some way.

We also make the point – I think last week it was suggested that the glide path provides an element of "fat" for the MNOs that we can eat into without doing any real injustice. We would say the glide path is not under appeal, and the glide path is an element of Ofcom's decision as to what is the efficient path of prices. It is not a departure from the efficient path of prices. It is efficient to have a glide path. So we would say that one cannot start using the glide path as a convenience or a pocket out of which to take some element of over-recovery from Years 1 and 2.

If I may, I will move on to the division of statutory functions between the Competition Commission and the Tribunal. It has been well rehearsed of course that it is for the Tribunal to decide the appeal by reference to its grounds, but that any price control matters arising in the appeal must be referred to the Competition Commission and decided by the Competition Commission, and the Tribunal would then incorporate the Commission's determination into its own decision, subject to what I call the judicial review exception. The Competition Commission's decision will be set aside to the extent that it falls on judicial review grounds.

In its skeleton argument and in its oral submissions Ofcom suggested that only price control issues raised in BT's grounds of appeal as being errors in Ofcom's decision are truly specified price control matters. Consequential matters as to how one remedies those errors are not specified price control matters. We reject that distinction and we would say that if one looks at the rules made under s.193 of the 2003 Act, it is clear that a specified price control matter includes every price control matter which is disputed between the parties and which relates to what the provisions imposing the price control should be, including at what level the price control should be set. That is set out on p.10 of my note and is lifted from the rules. We say, therefore, that on a literal reading, the question as to what the modified price control should be is a specified price control matter.

So why, we wondered, is Ofcom trying to draw this distinction? We think that it is ----

MR. SCOTT: I am sorry, Miss McKnight, if you are saying that then what you are saying is that the provisions imposing the price control which are contained in that condition is a matter of dispute between the parties, whereas slightly earlier on I thought you told us that it was not a matter of dispute between the parties.

MISS McKNIGHT: I am not sure what I have said that gave rise to that impression.

MR. SCOTT: Let me explain to you. Nowhere in conditions MA.3 or MA.4 are the numbers which are disputed by BT in relation to Year 4 spelt out. Either the conditions are in dispute or they are not in dispute.

MISS McKNIGHT: I am sorry, I thought I had made clear that our case as to BT's scope of appeal is that they have only challenged Year 4 by challenging three distinct errors in the computation of the efficient charge which bears only on Year 4. The remainder of my submission necessarily is in the alternative. It is sensible to remind oneself of that, so you are quite right, if we are wrong and BT is challenging Years 1 to 4 ----

MR. SCOTT: So at this point in your speech you are back with the assumption that MA.3 and MA.4 are in dispute?

MISS McKNIGHT: Yes. I find that a strange and unnatural way to put it, that Years 1 to 4 are in dispute. Is that acceptable to you? I am not sure whether you have made some different distinction.

MR. SCOTT: The point that you are trying to make to us, as I understand it, is that you disagree with Ofcom as to what counts as a price control matter or not.

MISS McKNIGHT: Yes, that is correct.

MR. SCOTT: So you have taken us to the Rules, to 3(1)(c), and what 3(1)(c) is concerned with is the provisions that are contained in that condition, which in our case happens to be two conditions.

MISS McKNIGHT: Yes, MA.3 and MA.4.

MR. SCOTT: But that is governed by whether they are in dispute or not.

MISS McKNIGHT: Yes, my submission is that if O2 and the rest of us are wrong on our submissions as to the scope of BT's appeal and there is an implicit challenge indirectly to Years 1 to 3, then the conditions that set the charges for years 1 to 3 are in dispute and therefore this would be a specified price control matter, and it would be arising in the appeal – that is the wording of s.193(1). We consider that the reason that there is some superficial attraction in this distinction between issues raised in the appeal and the remedial matters is precisely because BT has not pleaded adequately to surface these issues. We say that if BT's case, on its correct construction, did extend to Years 1 to 3, it would have had to say not only what is the lower level at which it wants to see the Year 4 TAC set but what are the lower levels at which it would want to see Years 1 to 3 set, and how it would want any remedial order to be framed if it is too late to adjust the TACs for Years 1 and 2, as we say it now is. We say those are things that could have been contemplated either in the original Notice of Appeal or in some prompt amendment.

We say that the reason it appears that there are in this case remedial issues arising that are not raised directly in the Notice of Appeal is precisely because the Notice of Appeal is deficient in that respect. There are only two ways that can be resolved. One is by a recognition that the Notice of Appeal only challenges the Year 4 TAC; and the second possibility is a requirement to be imposed on BT that it clarify what its argument is in respect of Years 1 to 3, at which point it will become apparent that all of these matters are, to the extent they are admitted by clarification or amendment, specified price control matters which are in dispute between the parties. We say that there is an illusion that there are two sets of issues, some raised in the appeal and some not, but that illusion arises from the deficiency of BT's Notice of Appeal.

THE CHAIRMAN: The appropriate action for the decision maker to take, which is what we have to direct, might be something to do with price control or might not. Suppose the challenge to the price control had been on procedural grounds that there had been a failure of consultation or an inadequate putting back or something and if that had been well made, that point, we might have remitted it to Ofcom and directed them to do that. Would that then be a price control matter?

MISS McKNIGHT: No, it would not, I apologise. The reason that I did not draw attention to that as a third category of things one might do as a result of a deficiency in a price control is because, as I understood Ofcom's position, in this appeal the two categories are what is wrong with Ofcom's price control decision and what alterations to the price control decision should be made as a result of those errors and the passage of time.

You are correct, of course, that if there were a suggestion that the appropriate remedy was reconsideration by reference to some factors that had been identified but were not adequately evidenced to be considered in this appeal. Yes, that would be a third possibility. The decision as to what direction to make would not, itself, fall within para.(c) here.

MR. SCOTT: Just staying with practicalities, clearly when BT submitted their Notice of Appeal they did so without much regard to the time that would be taken to get us to the point that we have reached. We have reached a situation where, as I understand it, we are hoping to hear from the Competition Commission by 9th January, and the new year starts on 1st April. We have already had mention of the 60 day period which, for 1st April, I imagine, expires, or we need to have done something by the end of January. We are in a situation where if a price control is to be put in place for Year 3 then presumably the MNOs would expect to know what that price control is by the end of January and for us to direct Ofcom to implement it in the terms of Article 7.6 – in other words, on an urgent basis without first

going into Article 7 consultation, and to do so on a proportionate and provisional basis. I take it that once we have material from the Competition Commission, whatever that material may be, you would regard us making such directions as being within our powers, and although we would be having to do that on a provisional basis, given that there might be further appeals and might be further challenges, you would, in interim measures terms, expect us, if that was challenged, to direct that it be applied as an interim measure, subject to such submissions as people might make thereafter?

MISS McKNIGHT: If I understand it correctly, your suggestion is that once we get the Competition Commission's determination you would make an interim order directing Ofcom to act quickly pending your final decision – is that what is suggested?

MR. SCOTT: The point being that, unless we get on with it, Year 3 will slip away.

MISS McKNIGHT: I do not wish to sound unhelpful, but I think until we see the Competition Commission's determination we simply cannot comment on whether that would be the appropriate course of action. If there was manifest error in the Competition Commission's determination, we would say that would weigh in your decision as to whether it was appropriate to rush it into effect pending further submissions. I am not suggesting that we are in that position because I feel that it would be inappropriate to comment on what you should do when you receive the Competition Commission's determination until we have seen it.

PROFESSOR BAIN: Miss McKnight, in terms of what you expect then and in terms of the structure of MA.3 and MA.4 at the moment, what you would expect to see would be the Competition Commission recommending a change to the controlling percentages for Years 3 and 4. That is what the structure of the present condition seems to me to lead to. Is that right?

MISS McKNIGHT: If they were to do that, if the Competition Commission were to determine specific changes to be made to Years 3 and 4 TACs, we would say that would be a proper way of doing it.

PROFESSOR BAIN: That is a proper way of doing it.

MISS McKNIGHT: May I put in a caveat, that is provided they have all they need to justify reaching such a decision.

PROFESSOR BAIN: One would expect to see in the reasoning that led up to the recommendation of that all sorts of considerations that you thought were relevant, and perhaps additional ones that they thought were relevant. That has to be there – it has got to be transparent – or the reasoning has to be there. That may include quite a lot of figures in

the reasoning. The ultimate decision as to what is to be done has to be to change controlling percentages. There is some disagreement possibly as to whether they should be doing it for all four years and you say not. On your view, it should simply be the controlling percentages for Years 3 and 4.

MISS McKNIGHT: That would be the neatest, least intrusive change to the drafting to achieve the changes to Years 3 and 4, yes.

PROFESSOR BAIN: Thank you.

MISS McKNIGHT: To recap, as regards the division of functions between the Competition Commission and the Tribunal, we would say that to the extent that as a result of the questions referred and the matters raised in the grounds of appeal and otherwise arising in the appeal, the Competition Commission determines that specific changes should be made to the TACs for Years 3 and 4 by changing the controlling percentages, that decision is a price control matter and it falls to the Competition Commission to make that decision and the Tribunal to adopt it into an appropriate direction subject to the judicial review exception that the statute contemplates.

It has been suggested that it would be open either to the Competition Commission or to the Tribunal to go on and to suggest, by way of declaration or statement, that, for completeness, ideally the Years 1 and 2 TACs would have been different. We say clearly that will form part of the reasoning quite possibly that leads to the Year 3 and 4 TACs. Any such statement has no independent legal force, it is merely part of the reasoning, if it is at all, that leads to the adjustment to Years 3 and 4, and it would not in any sense amount to a re-determination of Years 1 and 2, and would not, therefore, have any bearing on the Standard Interconnect Agreement to which BT drew your attention last week.

THE CHAIRMAN: We cannot say whether it would or it would not. What the legal ramifications are of us saying, but not determining or not directing Ofcom to determine, what should have been the price control in Years 1 or 2 may or may not have legal consequences, depending on how one construes the contract. To back to your example, of course, the purchasers may have had an independent cause of action for over-payments in the past for breach of the competition provisions in that kind of situation. That, in a sense, arises from the fact that the import of the Tribunal's decision was not only that the price should be that henceforward, but by implication or by statement that was the price that ought to have been being charged in the past, given that there is no particular change in the cost structure that would indicate a difference.

MISS McKNIGHT: I think the competition law example is clearly correct, I accept that.

THE CHAIRMAN: As to what the legal repercussions of us saying what the price should have in Years 1 and 2 in our judgment, or the Competition Commission saying that in their determination, is it proper for us to take into account how that affects people's extraneous legal remedies?

MISS McKNIGHT: We would say no, we would say that the Tribunal should not be seeking to provide assistance or a platform for parties to pursue independently arising claims, if any. Our further submission is that if you were to do so, we consider that any finding that on the Competition Commission's reasoning the Year 1 and 2 charges would have been somewhat lower would not amount to support for competition law claim of excessive pricing because the excess is so minimal and, in any event, is an excess which is recognisable only with the benefit of hindsight. We consider, therefore, that it would not be evidentially helpful, let alone legally determinative.

THE CHAIRMAN: No, but you are not saying, I think, that we should avoid saying anything about what the price should be in Years 1 and 2 in order to prevent there from being an extraneous remedy.

MISS McKNIGHT: No, and indeed we think that possibly the debate is a little sterile because we suspect that it will be very clear from the Competition Commission's reasoning how one would extrapolate backwards, admittedly by reference to the multiplicity of potential glide paths that have been shown on various graphs, but the raw material will be there for people to extrapolate to their heart's content back into Years 1 and 2.

That completes my submissions on the core points that I was wishing to address in Question 4. Various additional points did arise from BT's skeleton argument and from the discussion last week, which I would like to address very briefly. The first is as to conditions MA.3.6 and 4.6. The Tribunal has asked on several occasions whether these conditions provide a mechanism whereby one can achieve the future adjustment option that BT have suggested is appropriate – that is one could re-determine the charge controls for Years 1 and 2 and then rely on MA.3.6 and 4.6 to allow Ofcom to say in Year 3, "You have over-recovered in Years 1 and 2 or in Year 2 by reference to the re-determined charge control and therefore you must adjust very substantially in Year 3 to compensate". I use "compensate" in a neutral sense.

We say, of course, that one should not be re-determining Years 1 and 2 so this question does not arise. If we were wrong on that, we would say that if you were to propose or to find that there should be a re-determination of Years 1 and 2, it would be necessary to make a consequential amendment to conditions MA.3.6 and 4.6 in order to ensure that they did not

incidentally acquire a much larger scope in practice. Ofcom have explained that the sole function of conditions MA.3.6 and 4.6 is to deter MNOs from wilfully over-charging by reference to the TAC that for the time being applies to them. Ofcom have explained that it is not a mechanism to deal with forecasting error because the way in which the TAC is computed relies on last year's weightings and volumes, so it does not rely on forecasts. So MNOs are able to set the charges in any year in the knowledge that they will or will not comply with the TAC. This is intended only as a deterrent to wilful breach. We say that if you were to re-determine Years 1 and 2 and then say, "It was not a wilful breach but it turns out in hindsight that you over-recovered and we now invoke MA.3.6 and 4.6", that would be an implicit amendment to 3.6 and 4.6 because it would entail a massive expansion of their scope and purpose.

An analogy arises from an example that Miss Bacon suggested to you. Imagine that Ofcom had determined a charge control to apply to the 2G/3G MNOs and then had, by entirely independent reasoning, determined a charge control to apply to H3G. If the H3G charge control came out coincidentally at 25 per cent higher than the 2G/3G charge control figures, then a very simple and lazy way of drafting the charge control conditions would be to have extensive drafting for 2G/3G MNOs and then just say that H3G's charge control TAC for any year was 25 per cent higher than the prevailing TAC for the others. If there were then a successful appeal against the 2G/3G MNOs' charge control, with the result that the TACs were reduced, it would clearly be entirely inequitable to leave the H3G drafting unamended because they would be dragged down in consequence, even though there had been no challenge to their charge control, and the reasoning in support of it was entirely independent. So in that situation it would be necessary in order to ensure that the modified condition achieved its proper purpose having regard to the extent of the success of the appeal, to modify the H3G charge control to make it self-standing or to adjust the percentages. We say that this is a very similar case. MA.3.6 and 4.6 are there to serve a very limited function and cannot be used as a mechanism to achieve something quite different.

We say that, if there is any suggestion that the Year 1 and 2 TACs are going to be re-determined, we would make submissions to the Competition Commission to the effect that they should determine that there should be a consequential modification to MA.3.6 and 4.6 because that would be a remedy in the form of a decision as to what the modified conditions of the price control condition should be, and it is, therefore, a price control matter.

THE CHAIRMAN: But Ofcom, I thought, agreed with you that one could not use MA.3.6 and 4.6 for the purpose that has been suggested.

MISS McKNIGHT: I think they agree with us because they agree that the Year 1 and 2 TACs cannot be re-determined, so the situation does not arise, which is our position.

In the alternative, I think they suggest that it would be entirely wrong to use MA.3.6 and 4.6 for that purpose. You may say we could simply rely on their discretion not to apply them in that way. We feel a more proper course of action would be to amend them so as to prevent that from happening.

MR. SCOTT: While you are thinking of amending 3.6 and 4.6 and contemplating again the practicalities of the process, would you expect us, in our directions as to the urgency, proportionate and provisional nature of what may have to be done for Year 3, to incorporate in a revised MA.3 and MA.4 a provision that if, as a result of the processes that follow the introduction of a new Year 3 and Year 4 price control, there were to be successful judicial review further appeal consultation changes then those should be reflected in subsequent adjustments or should not be reflected in subsequent adjustments – in other words, say a new price control for Year 3 were to go in, but in a year's time we were all back here and came to a conclusion that Year 3 had been improperly set in either direction, what would you expect to happen?

MISS McKNIGHT: I regret I simply cannot answer that question, because I think one needs to understand the nature of the error, the reasons, the precise amount of time that has passed. My next point is going to be about the year one tweak that Ofcom did. I am afraid I simply cannot commit to a position in such a hypothetical situation.

MR. SCOTT: It is hardly going to be hypothetical because in the course of the next little over a month we are going to have to direct if a change to MA.3 to MA.4 is to come into effect on 1st April, and the new conditions will have either to provide to leave 3.6 and 4.6 as they are and as they are understood by Ofcom or to amend them in some way to take into account the proportionate and provisional nature of what is being done in relation to Year 3 and Year 4 at this stage.

MISS McKNIGHT: Yes, but I think we will be in a better position to decide how any future adjustment to that provisional determination should be handled when we have the ruling on the issues that are before us today and we know what are the figures that are in question, what is the Competition Commission's reasoning in support of those figures. I think the multiplicity of possibilities available now is just far too great to contemplate.

If I may, I will move on to the tweak in Year 1. I think reference has been made already to the fact that when Ofcom came to set the charge control for the year starting 1st April 2007 it was unable to give sufficient notice to enable the MNOs to amend their charges contractually until two months into 2007, and it therefore took that into account in setting the Year 1 TAC. I think it has been suggested that this is an acknowledgement that Ofcom is willing to regulate retrospectively because the Year 1 TAC somehow required the MNOs to catch up in the subsequent ten months for the over-recovery in the first two months, and that this is a bit like the future adjustment option from Years 1 to 2 into Years 3 to 4. In case there is any misunderstanding I wanted to make clear that Ofcom did exactly the opposite. Ofcom decided what would be the appropriate TAC by reference to its glide path reasoning for Year 1 and because it could not introduce it until month three of Year 1, it then adopted a somewhat higher TAC to reflect the fact that the Year 1 TAC was essentially a weighted average or a blended TAC for higher pre-existing charges in the first two months and lower proper TAC charges in months 3 to 12. In my note I have referred you to the parts of the MCT statement which set out exactly what Ofcom was doing, but for fear that there was some suggestion that this was a point against us I wanted to make clear that it is a point in support of the position we are advocating.

THE CHAIRMAN: I think the fact that the adjustment that is made means that the controlling percentage between Year 0 and 1, and 1 and 2 are different and that is why we see they are different to compensate, but I do not think it has been suggested that they somehow clawed back that first two months of higher charges by reducing the TAC in the second year.

MISS McKNIGHT: In that case I wrongly thought there was a misunderstanding, I apologise. My final point is simply as to what should be done about BT's Notice of Appeal.

THE CHAIRMAN: Just on the "tweak" point, the 60 days' notice, that was I think described as a general practice by Ofcom, there is no regulatory or contractual obligation for that to occur is there – the 60 days' notice.

MR. HOLMES: No, madam, there is not.

MISS McKNIGHT: I am told that, by contract, Vodafone is required to give 60 days' notice to BT, but BT is sometimes willing to waive the requirement for 60 days' notice. But clearly, BT will wish to take instructions

As to BT's Notice of Appeal, we have emphasised that our principal position is that the appeal extends only to Year 4. I must admit – I am sure Mr. Anderson will draw your attention to the fact – that at one time Vodafone did not realise that. Vodafone appreciated, as others did, that the substance of BT's challenge was to three alleged errors in Ofcom's

computation of the efficient charge. Vodafone wrongly assumed that, if the efficient charge which determines the Year 4 TAC was wrong, because that efficient charge also played a part in the setting of the earlier year TACs there would be a consequential mechanistic adjustment back into whatever are still the prospective years. But we thought it was crystal clear from Ofcom's reasoning in support of the glidepath that the glidepath can never take account later or, to put it a different way, the glidepath could only be adjusted from wherever we were when the new decision is made to go down to the Year 4 TAC. So if you decide at the end of Year 2 that charges should be lower in Year 4 you glide from Year 2 to Year 4 in equal decrements each year. It has become apparent to us through the multiplicity of different interpretations and suggestions that others have put forward that one cannot say that it is implicit in BT's appeal that that must be the consequence. We therefore say that we were simply wrong, that BT has not pleaded a single, or indeed a number of alternative cases as to what should happen to Years 1 to 3; it has done nothing about Years 1 to 3. If we are wrong in that and BT is found implicitly to have challenged Years 1 to 3 we think the very lack of clarity as to what their case is and the fact it is not set down on one piece of paper in full means that it is very difficult for anyone else to answer that case and we would invite the Tribunal to request that BT articulate its case fully either by amendment, which we say should not be admitted at this stage or by clarification if it is found to be implicit, so that we can at least know what is the case we are answering and what are the price control issues that arise in t his appeal and that are disputed between the parties.

That completes my submissions. I am afraid I have overrun enormously but I apologise for that.

THE CHAIRMAN: Thank you very much, Miss McKnight. Miss Rose?

MISS ROSE: On behalf of H3G I would like to make two short points concerning the powers of the CAT and the powers of Ofcom following the ultimate disposal of the appeal, and to express the single concern that H3G has about the way that this hearing has developed.

First the two points. It is clear from the terms of s.195(5) of the 2003 Act that the CAT must not, when it disposes of the appeal, direct Ofcom to take any action which Ofcom would not otherwise have the power to take. The CAT can only direct Ofcom to act in accordance with its other statutory powers and duties; there is no free-standing power for Ofcom to act so as to implement a direction it receives from this Tribunal. We therefore agree with the submission that was made by Ofcom last week that the power that Ofcom will have to implement a direction by the CAT must be sought in sections 45, 47 and 88 of

the 2003 Act, will either be the power to impose an SMP condition in the form of charge control, or to modify the pre-existing charge control.

In exercising either of those powers Ofcom is bound to act in accordance with the pre-conditions set out in sections 47 and 88 and, as this Tribunal has already seen, those sections are very tightly drafted in that they preclude Ofcom from setting a charge control save where particular conditions are satisfied and also preclude it from modifying a charge control save where particular conditions are satisfied.

THE CHAIRMAN: But you have to adapt s.88 to some extent to take into account the fact that it is now being applied subject to the duty that Ofcom has to comply with the directions that have been given to it by this Tribunal. The power to set the SMP condition, the price control, is actually in s.87(9) of course, but it cannot be the case that once it is remitted to Ofcom with directions as to what they must do for Year 4 or Years 3 and 4 that they then have to go through the whole of the s.88 process of satisfying themselves. They may say: "We still think that we were right, we disagree with what the Competition Commission thought, we do not think there is an adverse risk, we do not think that these criteria are satisfied but we have been told by the Competition Commission and then by the CAT that we must do this, but in that sense s.88 must still be satisfied, must it not?

MISS ROSE: Madam, that goes exactly to the heart of the point that I am making, that there is an interaction here between the duty on Ofcom to comply with the directions given to it by the CAT, the limited powers that Ofcom has to set a charge control, and the duties that Ofcom has in the course of setting a charge control and – and this is crucial – the limitation on the power of the CAT in setting directions, because the CAT's power to set directions is in itself limited by reference to the scope of the powers that Ofcom has. So all of those considerations are in play. There is another element which must not be forgotten, the final element, is the normal public law duties of Ofcom when taking a decision in exercising its statutory powers, to have regard to all relevant considerations.

The situation in relation to some appeals may be relatively straightforward because if you have a situation where all relevant matters have been considered in the process of the appeal, and where the Competition Commission has reached a clear conclusion the charge control should be Xp per minute, and the CAT says: "Yes, we agree the charge control should be Xp per minute" straight forward Ofcom says: "We take that and we apply that charge control" because that fulfils the conditions in sections 47 and 88 because that is the judgment of the CAT applying the calculation of the Competition Commission. But, there may be other situations where there are relevant factors that are relevant for Ofcom's

decision making but which have not been fully considered on the appeal. To give an example, if the position of the European Commission in relation to the policy on the right level of charge controls has developed since the appeals were originally lodged, that is plainly a relevant consideration that Ofcom would be bound to have regard to in setting a charge control.

Equally, if there is a relevant matter, and I am sure no one in the room will be surprised when I say on-net/off-net price discrimination which has been excluded from the ambit of the appeal, but which is nevertheless a relevant consideration for the modification or a setting of the charge control. It cannot be left out of account by Ofcom, because Ofcom ----

MR. SCOTT: And you might add "self-supply" since self-supply was originally in BT's appeal but got dropped.

MISS ROSE: Sir, there could be a range of matters which were relevant to the determination by Ofcom of the relevant charge control, but which had not been determined on the appeal, and the point that I want to make is that those matters do not cease to be relevant to the final decision made by Ofcom because they have not featured in the appeal, and you can test that by this means: it would be open to any of these parties at any time to request Ofcom to modify the charge control on the basis of a change of circumstance on the basis of new evidence coming to light which indicated that the current charge control was inappropriate or inefficient. Ofcom would have a duty to consider whether that adjustment would have to be made applying s.47 and s.88 in its public law duties. That request can be made at any time. The fact that that request is made following an appeal does not warrant Ofcom ignoring the request, or ignoring the matters that are raised in it. The result of this logic may be that because, with respect, the decision made by this Tribunal to exclude certain matters from the ambit of the appeal it may not be possible lawfully for this Tribunal to make a simple direction to Ofcom to change the level of the charge control. In our submission the only lawful course open to this Tribunal would be to remit the matter to Ofcom for reconsideration in accordance with the determination made by the Competition Commission and having regard to any other relevant considerations.

It is a similar situation that you may see in other public law contexts when in some circumstances the Administrative Court may be in a position simply to say there is only one right decision, to quash the decision and to make a declaration as to what the right decision should be, then it is easy the decision maker simply makes the right decision, for other circumstances the Administrative Court says the decision maker must reconsider.

On that point as well we agree with the submission that was made by Vodafone this morning to the effect that the decision maker must reconsider the decision at the point it is remitted to it. With respect to Mr. Scott's points made last week there is no circumstance in public law where, when a matter is remitted for reconsideration, the decision maker pretends that it was still two years ago and makes a decision as if it were two years ago. If, for example, a decision to refuse asylum is remitted to the Secretary of State, the Secretary of State reconsiders the asylum claim now. So if political circumstances in the home country have changed in the intervening two years that will affect the fresh decision made on asylum; the decision must be made now in the circumstances that apply now.

THE CHAIRMAN: It is interesting that both the MNOs and BT have claimed that what they are urging upon us is the position in general in public law, but no one has actually cited any textbook or authority to us on this point. Now, you may or may not know the answer to this but with the asylum seeker is an interesting example, because attached to the status of being an asylum seeker or having been granted asylum go all sorts of other rights and benefits. Now, we have not been told whether, if a decision is taken that somebody should have been granted asylum when previously it is thought they were illegally here, are they then entitled to backdated benefits for the amount of time ----

MISS ROSE: Madam, there is case law on that and I do not want, on my feet, to say exactly what it says. In fact, I was not aware that BT were urging on the Tribunal the proposition that the right position in law is that when Ofcom comes to reconsider this matter it does so as if it were two years ago. My understanding was that that was something that had come from the Tribunal and not from BT. Had it come from BT it might be that the other parties would have addressed it more fully in their skeleton arguments.

THE CHAIRMAN: Mr. Anderson said that appeals generally operate *ex tunc* or *nunc*, whichever one it is! (Laughter)

MISS ROSE: I think he means *ex tunc* yes.

THE CHAIRMAN: Which we understood as meaning that he was saying that an appeal has to be backward looking and therefore when it is remitted the decision maker has to take the decision as at that time.

MISS ROSE: But that submission, of course, begs the question: what are the powers of the body allowing the appeal?

THE CHAIRMAN: Yes, well that is the question.

MISS ROSE: Because there are many circumstances on appeal where the appellate body will simply reverse the decision of the lower body and substitute its own decision, but this Tribunal is in an unusual position that it does not have the power to do this.

THE CHAIRMAN: Well the powers that we have under s.195 are very different from the powers that the Administrative Court has on an ordinary judicial review application.

MISS ROSE: Well may be not quite so different as has hitherto been believed if you would like to read the decision that has just been handed down by the Court of Appeal in the 2.6 appeal, but that is probably not for today.

Leaving that aside, of course the remedies you can give are different from those which apply on judicial review, but what they do not include is the remedy of substituting your decision for the decision made by Ofcom. It is clear that what is envisaged is a direction made, and a remission to Ofcom for Ofcom to take action, and Ofcom must take action now in the circumstances that apply now.

MR. SCOTT: Miss Rose, entirely taking your point that at any stage in this procedure you could go to Ofcom and say: "Things have change, and you ought to …" as they can "… reconsider", go back into consultation and re-do the whole market definition analysis, and so on. But we are not in that situation, we are in the midst of an appeal and Competition Commission reference procedure that was carefully crafted in the Act. It seems to me that had the legislators taken the view that you appear to take there would have been a major short circuit, and the major short circuit would have meant that instead of saying what s.195 says, it would say: "The Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the Notice of Appeal" and then, something like: "and if any error has been made shall quash the decision and cause Ofcom to retake the decision". That is not what it says. Instead, we have a very detailed section which explains what the Competition Commission are to do, followed by a very detailed section which explains what we do after the Competition Commission has done it and which suggests that Ofcom then abide by our directions.

If, during that proceeding, Ofcom came to the conclusion that everything that has happened has been overtaken by other relevant events then the proper course is for them then to withdraw the decision and to proceed to a fresh consultation. But, it seems to me, what you are doing is confusing the careful procedure laid out in the Statute and an alternative scheme which is Ofcom withdrawing and re-consulting. Now, in due course it would help to ----

MISS ROSE: Well first, I do not accept that I am confused, which you probably will not be very surprised about. What you have to recall, Sir, is that s.195 is not drafted solely to deal with

appeals against SMP conditions. Section 195 is the general provision that deals with all statutory appeals from decisions made by Ofcom, a very, very wide range of matters, including specific regulatory decisions made in relation to individual companies – perhaps the imposition of an individual universal service condition on a particular company, perhaps the resolution of a particular dispute between two undertakings ----

MR. SCOTT: But if you take that view then it seems ----

MISS ROSE: I am so sorry, I would rather you did not interrupt me in mid-sentence ----

MR. SCOTT: I do apologise.

MISS ROSE: -- I have not actually made my point yet. The point is the processes that you have in s.195 deal with a range of different decisions made by Ofcom, but the governing provision is always s.195(5), that there is no power in this Tribunal to make a direction to Ofcom which Ofcom would not otherwise have the power to make that decision. The difficulty, with respect, for this Tribunal is that Ofcom does not have the power to impose or modify a charge control without taking into account all relevant considerations before it does so. It has no power to do that, and therefore, with respect, this Tribunal has no power to order it to do that, and that goes again to the point that you were making this morning, sir, with the suggestion that Ofcom could in some way be directed to put in place an interim charge control while matters were sorted out. Ofcom has no power to do that, it only has the power to put in place or modify a charge control when the conditions in s.47 and 88 are satisfied. I know you are not going to accept that position, but that is what I want to say about it, and I realise I have only asked for a few moments, so can I move on to my second point, which is that the notion that the Tribunal may make free-standing declarations or decisions which are not forming a part of its judgment which then is implemented by its directions is, in my submission, wrong. Of course, it is right that the CAT will deliver a reasoned judgment and in the course of making its decision will set out many findings of fact which will be its findings, but those findings do not themselves constitute separate decisions or declarations.

Finally, I said there was a concern that I wished to raise on behalf of H3G, and the concern is this: the issues that were before this Tribunal for this hearing were very clearly defined in the list of questions at tab 15 of bundle 1 that is before the Tribunal. Those questions focus on the pleading issue, and secondly in broad terms on the question of the scope of the powers of the Competition Commission, the CAT and Ofcom in implementing the outcome of the appeal.

Our concern is that there have been times over the two days last week and this morning in which, with respect, it has seemed to us that this Tribunal has been tempted to stray into the question: "How should we exercise our powers ultimately when the decision of the Competition Commission is made?" That is not a question on which H3G has sought to make, or has made any submissions because it simply does not arise for today and we reserve our position entirely on the question of what is the right way to exercise the Tribunal's powers.

Just to give one example, it was suggested last week by Mr. Scott that the right starting point might be the rates as modified by the termination rate dispute appeals. Now, there are all sorts of reasons in our submission why that is not correct. Just to give one example it has never been suggested by BT that that forms any part of their appeal and, as the Tribunal will be aware the rates for Year 1 form a separate and distinct part of the conditions MA.3 and MA.4, they are separately set out and they have never been challenged on appeal, so that might be a complete answer to the point but we submit it simply does not arise for today in any event.

MR. SCOTT: The point was simply what happens if the principles which have been found to be erroneous apply to all the years not just to the final year?

MISS ROSE: Yes, but with respect that is not a matter that is before this Tribunal on this hearing. Unless I can be of any further assistance, those are my submissions.

THE CHAIRMAN: Thank you very much, Miss Rose. Mr. Sharpe?

MR. SHARPE: Madam, gentlemen, the one difference between last week and today is that I have come to the Tribunal with a very heavy cold, so if my voice should become somewhat falsetto I hope you will distinguish between the voice and the submissions.

I am here basically to act as an *amicus* for the Tribunal. We are neutral, but that is not the same thing as being indifferent, to the outcome. We have a strong interest in clarifying what the legal position is, and I hope that is obvious, if only because in a few years' time we may have to repeat the process. Indeed, if the contention that the Commission's responsibility diminishes over the period of an appeal is correct and upheld and higher termination charges can persist, relieved of any appeal, the likelihood of future appeals can only be described as a "racing certainty". So we have an understanding and we have a clear interest in clarity.

What I am proposing to do is first to describe how the Commission has approached the appeal so far, and what it is doing. Secondly, I am going to offer some third party, I hope neutral, submissions on the law, which is for you to accept or reject, and thirdly, I want to

go through, briefly, some of the practical implications of the forward adjustment solution which has been put to you.

On what the Commission is doing, the Commission has taken the view from the beginning that BT's Notice of Appeal and the Tribunal's reference charged it to find not only a number for 2010/11 but also for each of the preceding relevant years and to make a determination in those terms. We interpreted the reference in that way, and to that extent we anticipated BT on this point. I should add that we should have been required to do anything different has only been raised in the course of the very recent past. The matter has never actually been put to us that our powers were so confined.

As to whether we can offer anything less than a legal determination, perhaps some advice on numbers for Years 1 and 2 which would have, perhaps, advisory or some other significance. We say we have no power to do so and nor do we see any reason why we should be required to do so. We therefore respectfully disagree with Ofcom and the others that the only years for which the Competition Commission can make determinations are those years which, fortuitously, have yet to expire in the course of the appeal itself – if any by this time this appeal is concluded.

As for Ofcom's views on this, I will return to them in a moment but they are, in my respectful submission, based upon a legal fallacy which I will try and explain. So that is where we are today and, absent any changes, to those plans that determination will be available on 9th January or before.

On glidepath, the Commission's understanding is that BT did not expressly appeal against Ofcom's glidepath, but accepted an equiproportional decrement for each of the four relevant years, which makes the findings for those previous years not too difficult a task.

It is likely, as all the parties in this room know, that the Commission will follow Ofcom on this. There are a few "tweaks" (to use the technical term) but that is the direction of travel.

On the appeal itself, in our submission it is highly desirable that the appeal process should be made as effective as possible within the confines of the statutory framework, including Article 4 of the Framework Directive, and on that I make the following observations.

I listened very carefully to the submissions of Ofcom and the mobile operators on the nature of the appeal and their case that the Commission is disabled from making a determination on appeal for past years. You have heard their submissions, it is argued variously that to do so would constitute *ex post* regulation and such numbers could not operate in any meaningful way to govern future behaviour. As the Commission assumes identical powers to Ofcom it must follow that the Commission can do nothing for the past.

It is further argued, as we have heard, that s.195(6), the Tribunal can do no more than Ofcom can do, so as Ofcom cannot turn the past into the future it too is disabled from ordering Ofcom to set charges for past years. In our submission this all rests upon a fallacy. We are all engaged in an appeal from an Ofcom decision. The institutions involved are charged with substituting one set of numbers by another. The process, as is always the case in any appeal in public law, of a public body's decision is for the Commission to place itself in the position of the decision maker as at the date the decision was made, and to have regard to those matters which were known or ought to have been known to Ofcom as at that date. Indeed, I recall vividly Miss McKnight's admonitions on behalf of Vodafone in the very first case management conference, that the Commission should not stray beyond the pleaded case and the evidence led by the parties on appeal. It should look forward, of course, but only from behind.

That is exactly what the Commission has done. The Commission has not relied on facts and matters which were not available, or ought to have been available to Ofcom, prior to its decision in April 2007. Of course, it has heard lots of evidence in relation to the situation after the decision was made, but is not proposing to rely upon such evidence.

As I said, that is what the Commission has done and is doing. If the Commission, applying the Act and, in particular, s.88 has found errors in the matters contained in the reference, and provisionally it has in relation to BT's appeal, absent judicial review considerations, the Tribunal must decide the matter in accordance with that determination – s.193(6). In my respectful submission, you – the Tribunal – have no discretion to question the Competition Commission absent judicial review, and must – must – dispose of the matter, the appeal, and include a decision as to what would be the appropriate action by Ofcom, and any directions to give effect to that decision – s. 195(4). Ofcom has no discretion to question that decision and direction and, better, it has a duty to comply with those directions.

All these proceedings are predicated upon an Ofcom mistake. It had an opportunity to exercise its statutory powers and to the extent that the Commission finds that they have erred by reference to the Reference and the legislation and indicates ways in which that could be put right, and that determination survives your scrutiny in relation to judicial review, then Ofcom cannot turn around and say: "This is not quite right, we could do it better" at all; still less by having regard to facts and matters which exist today – as Miss Rose was seeking to submit to you.

Indeed, if we went down that particular road – just to take an observation virtually at random – any attempt to try and establish parameters of admissibility to this appeal would

simply have to be re-written; they would be written in jelly, because it simply means you can have a reference, you can have a Notice of Appeal but actually by the time it gets back to Ofcom, they can have regard to almost anything. That is not the nature of an appeal. Ofcom's mistake, respectfully, is to think its role is anything more than to give effect to directions made by the Tribunal which, in turn, to repeat, must reflect the Commission's findings.

You have been shown s.195(5), and you have been directed to the tense, and also to the word "otherwise". I suspect you are familiar with it so I am not going to detain you by taking you to it. It seems to me that the final words "in relation to the decision under appeal" shift the focus back to the specific decision under appeal which, of course, is in the past.

The relevant question is therefore, on a reading of the whole subsection, precisely what power Ofcom had at the time of taking the original decision. To the extent that they exercised those powers, then nothing hangs upon this section, it does not preclude Ofcom obeying the direction of the Commission and the Commission passing on the determination from the Commission in that respect.

The nature of the appeal is essentially to look at the old decision and, if the appeal is successful, to set it aside. It does not have any life after a successful appeal. The new decision that you order Ofcom to incorporate stands in its place as if it had been made in accordance with Ofcom's duties in April 2007.

The legal confusion, if I may describe it so, is essentially because the role of Ofcom in making the original decision and the appeal against it have been elided together. In fact, as I have said, the process confers an almost mechanical role upon Ofcom. It is for the Tribunal to assess applying the principles of judicial review, whether the Commission has gone wrong, and if the Commission passes that test, Ofcom must do as it is bidden, and it is not – as I said – for Ofcom to second guess the exercise of those powers, or even to abbreviate them.

It may assist you, and I am going to take you to s.192(8). This must be the one relevant provisions of the Communications Act you have not been taken to, which you will find at bundle 2, tab 29. So many of the problems here are that the focus of attention keeps bobbing backwards from prior to April 2007 to the Commission now, and then to Ofcom later.

I did not find s.192(8) a particularly easy paragraph to understand, and I do not regard it as the brightest jewel in the draftsman's crown. But the interpretation I give it and submit to

you is that in thinking about a decision under appeal one must focus at the time at which the decision was taken. The subsection is disabling the decision maker, anybody, to go beyond that period.

As is occasionally agreed, it is the nature of any appeal to be backward looking, but in the light of my submissions that what we are doing here is looking at the decision prior to April 2007, the Commission assessing whether it is good, coming to a view provisionally that it is bad, the next step is to replace those bad numbers by good numbers.

It is possible in my submission for a decision designed to govern future behaviour to be appealed against. If not, no appeal in many (if not most) circumstances where the process took any time could ever take place, and that is a nonsense. But this does not transform the regime to one of *ex post* regulation, as is claimed. It simply affirms the statutory scheme, underwritten by Community law, that *ex ante* regulatory decisions can be subject to appeal and necessarily all appeals must be *ex post*, but it does not follow that we are embarking upon *ex post* regulation.

Pausing there, we cannot make any legal sense of the proposition that the only legal determination the Commission can make must be for the unexpired years (if any) of the review period in the Ofcom decision.

In our submission, the Commission's determination and the process, "let us decide all the numbers in the decision", not just those fortuitously left, accidentally left to be applied in the future. Of course, the mobile operators say they acted lawfully in observing the Ofcom decision of April 2007 over the intervening years. Yes, but they followed something which, as a result of a successful appeal, and the resulting directions, legally did not exist. They ran the risk which they willingly took of that earlier decision being set aside in its entirety, and they must have been presumed to have proceeded with their eyes open. They took the risk and now they must take the consequences. We also have difficulty in accepting an interpretation which says that what the Competition Commission has to do depends entirely on the length of the price control period chosen by Ofcom. There is nothing magical about four years, Ofcom has had much shorter review periods – one of one year I recall, albeit on a very temporary basis.

So that is, on the one hand, the arbitrarily chosen review period, and then secondly the duration of the appeal process itself. That, of course, is a matter over which the Commission has limited control. It may indeed, be dependent on the actions of the parties who would stand to benefit from a long as opposed to a short procedure. It is not wholly inconceivable if this appeal proceeds to the Court of Appeal, or even on a reference to the

European Court, the four relevant years would have expired, and the whole process in the view of the operators and Ofcom, would be for nothing. I doubt if the Tribunal gave that outcome any consideration at all when it exercised its powers to establish a time table for the Commission's deliberations under Rule 5. If this were to happen it appears to us there is great force in the argument that Article 4 of the Framework Directive would not have been complied with, because irrespective of the question of compensation, or reimbursement, if the numbers themselves cannot be appealed against there would be no appeal at all, still less an effective one. No party, in their submissions, addressed what the rationale for such a non-appeal might have been, and how it squared with what I will call "the intention of Parliament". The nearest we get to an explanation is from Ofcom, when it is said that a non-determination might be useful, not in this periodic review but for the next one. How that assists the end-user I know not. It is also said that a non-determination might even assist BT in securing compensation, though no one has condescended to any detail how that might happen, absent a legal finding.

In my submission that falls well short of a cogent justification for extraordinary, unavoidable result. At least in *Jarndyce v Jarndyce* – if I remember correctly – the court did eventually give judgment. It was a pyrrhic victory because, unlike in these proceedings, the money had run out.

Now, madam, that deals with the effect of the Commission's determination and the order made by the Tribunal under s.195. What effect then does the replacement of bad numbers by good ones have. This brings me in part to the future adjustment option. I confess that from the beginning of this appeal in an idle moment when one wondered what the effect might be on BT and H3G, I had taken the view that the mechanism was as set out in the Act and in the SMP conditions themselves, and I have heard nothing to change my mind. The Commission would report to the Tribunal, the Tribunal would adopt its determination, translate that into a decision in the appeal before it and give directions. For the avoidance of doubt Ofcom would then be directed to revoke its April 2007 decision, or undertake to do so by exercise of its powers under s.46(10)(e) and replace that decision by a good one containing the good numbers. Once in place those numbers would then constitute the core of the SMP condition in force. This does not follow inevitably, after all the MNOs might have not wanted to take any risk, they may well have set termination charges less than the maxima ordained by the Ofcom decision – as I say, you are free to do so, and as Miss McKnight helpfully confirmed this morning.

If, on inspection, the termination charges, actually levied by the MNOs exceeded the figure in the SMP condition as it is finally determined on appeal, conditions 3.6, 4.6 would then take effect, and the overpayment would be rolled forward with the effect, of course, given competition at the fixed network level, of a fairly rapid reduction in marginal cost which I would guess would be competed away fairly quickly to the benefit of end users.

Against this, we have heard argument that conditions 3.6 and 4.6 should be marginalised or restricted in the manner suggested by Ofcom and by the MNOs in their submissions. I can see no good reason justifying any such restriction. It is said that all this does is provide an incentive to compliance – yes, the prospect of repayment may provide an incentive to compliance, but the more obvious role played by these conditions is that they confer a power on Ofcom to ensure compliance, and to provide a remedy for non-compliance. This is a special jurisdiction governing the parties, charge caps have been exceeded with specific provisions for Ofcom to enforce it. As for Ofcom's point about the language being restricted to an overcharge in on year and not two (as is likely to be the case here) I would merely invite you in what I shall euphemistically call "your leisure" to look again at 3.6 and 4.6 and see that the condition for any adjustment in the following relevant year is an over charge for Years 1, 2 or 3, which is satisfied here. So the adjustment can be made in the next relevant year following the accumulation of three past relevant years if necessary.

What happens if the review period is exceeded – an eventuality not conceded in these conditions, perhaps understandably. I suggest that the specific provision is without prejudice to the operation of sections 94 and 95 of the Act which provide Ofcom with specific powers of licence enforcement, and refer expressly to sect ions 95(3)(b) and 96(3)(b) to "remedying the consequences of any breach."

So Ofcom has the power directly, as part of its general jurisdiction to enforce breaches of licence conditions, first to notify the parties to put things right and if they should be slow in doing so, order them to do so, and I direct your attention to 96(3)(b) and the express reference to "remedying". If they should be so unwise as to ignore that there are additional penalties under s.96.

Contrary to what we heard Miss McKnight say this morning, there is nothing in conditions 3.6 and 4.6 which justifies the word "wilful" which we find at para.28 of her written submissions for today. No element of breach requires fault or blame on any operator's part, it is sufficient for there to be a breach.

THE CHAIRMAN: Well a "failure" I think is the word that is used. I do not have it in front of me, but that is my recollection, and the question is whether a failure to comply includes a

failure that has come about as we now know because the initially imposed TACs were wrong.

MR. SHARPE: Failure to secure, I think, is the language – yes, I accept that, but does that necessarily imply wilful. It just simply says "as a matter of fact the charge was exceeded." Again, it is a matter of interpretation and it is, I am pleased to say, for you to decide. But in our submission that does not necessarily confine it to intentional breaches. Indeed, this is not how I took Ofcom to be making their case on this. When Ofcom made their submissions on this I took them to mean that actually the scope for error was so limited, given the controls which exist, and the reporting structure, that anything likely to result in an overcharge were likely to be intentional as opposed to unintentional, but that is a different matter. That is a very useful but practical consideration, but it does not constitute a legal test which must be satisfied before 3.6 and 4.6 can be invoked. I would also say I see no particular reason if I can put it teleologically why it should be based upon intent. Human error, an innocent error ought to be remedied, after all, why should a consumer be worse off as a result of something that happened accidentally or, indeed, the operator by better off by something that happened accidentally because the fact of overcharge is the fact of overcharge.

THE CHAIRMAN: I think one of the points that was made was the scale of the adjustment that is going to be needed is likely to be different, that this is to do with small shortfalls, or excesses, whereas what may result from this appeal might be a much more substantial claim.

MR. SHARPE: I do not want to stray into the determination, but it might well be substantial in relation to past terms, I really do not want to comment on that, but I cannot see in 3.6 and 4.6 any formal restriction either in its terms – it would have been perfectly open to the parties to have agreed a term "any material over charge" or anything that was other than *de minimis* or something like that; they chose not to do that. What there is, of course, is the discretion vested in Ofcom, which I do believe, madam, you pointed out the other day, and it seems to me that that is the sort of check upon the excessive application of this. But it is a far cry from saying it does not apply at all in the situation I have been describing.

I now turn to compensation. We do see force in Ofcom's argument that s.88(1)(b) presents an obstacle to setting charges in Years 3 and 4 to reflect overcharging itself. While it is clear that, owing to the glidepath there is going to be a diminishing margin between the maximum charge over the efficient cost, which might leave some scope for an over charge to be recovered without offending a principle which we have followed quite carefully of the

lowest cost operator. I think this might have been where Mr. Scott's questioning was going the other day.

This is going to require quite a lot of analysis. We do not know is the answer, but let us assume that the compensation element is going to be greater than the revenue in the glidepath, which may not be an unreasonable assumption but at the moment we cannot make any judgment on that. It would mean, wilfully, that the charge would be set at a level which would be below the efficient level which the Commission would otherwise be identifying. That would create distortions in itself. They would be short run distortions in that prices would be lower than they would otherwise would be and there may be excess demand for calls to mobiles, maybe – theoretically at least. I guess in the longer run investment decisions would be distorted. Of course, we are not dealing with the long run here, we are dealing with one or two years. So I am not really being very helpful, but I am simply reflecting the sort of questioning that, as a group within the Commission we are throwing these arguments backwards and forwards.

We do see, it must be said, the purity of the s.88(1)(b) argument, and there might be some difficulty in expanding the notion of efficiency, competition, in s.88 to provide for compensation. I merely put those forward uncreatively as problems which we are considering, but it is not clear cut – a pure argument would militate against that. Looking at it in the round, and just analysing what the impact would be upon efficiency and distortion of signals, against the clear benefit to consumers must be examined altogether.

There is a lot to be said also for the Commission constituting a one-stop shop for this type of remedy, and again I just make an observation – not a submission – I do not know whether Parliament has actually intended that to be the case; it is for you, actually.

I want to conclude with a few brief observations on the practicality of the future adjustment option. These are important. It might be thought by some optimists that the task of recalibration was an easy one, it is not.

We foresee two possibilities and, madam, may I just say that I am making these submissions obviously for you to inform you. I cannot say that, having heard my submissions, you must make one decision as opposed to another. These are really quite severe practical considerations which may influence you insofar as you have a discretion at the margin. I am conscious of a wider audience, because if we are going to go down this road we, the Commission, are going to require a good deal of ready, quick co-operation from the parties.

THE CHAIRMAN: I think we might be straying in this aspect into what Miss Rose was urging us not to stray in, which is whether to exercise the power, if we have the power. At the moment we are just considering whether we have the power, whether the Commission, Ofcom, or we have the power to require there to be an adjustment for the unelapsed period to take account of overpayment in the previous elapsed period. Are you saying that the difficulties that there are in actually making that adjustment are so grave that one infers from that that there is no power to do it, or is it simply a question ----

MR. SHARPE: No, I cannot make that submission because those instructing me say quite clearly that this is do-able, but it is do-able as long as it is understood that the final product is quite likely to be a fairly marked movement from the unique number that we have been playing with over the last few months, to a situation where each number will no longer be the product of a hypothetical efficient operator, but will be based upon that and past imbalance between revenue between the parties.

I can put it very simply, but others have put it even more simply for me. Let us say there are six purchasers of termination services, that is four operators, H3G and BT, and there are five suppliers of termination services. That would yield a combination of 6 x 5 equals 30. They do not terminate for themselves, so we knock off 5, so at the very least we have 25 separate charges which would replace the single unique number we have now. That is going to be an under estimate because there are other fixed line operators other than BT. Now, why is this so? Because there is no consistency in market share, there is no consistency between calls which are ported, for example, calls which are the product of international roaming. There are marked imbalances – and I will not deal with them today in camera – between the operators. So for any one operator there is going to be a situation where we go down, some are going to have a greater burden than others. So any operation that we proceed with has to exercise a good deal of fairness between them and if we go down and cut for a rough and ready method it is very likely to give rise to rough justice as between them. As a group, these operators are not people who lay back quietly and see their interests being infringed. On the back of an envelope we can easily see that some of them are going to be winners – well, nobody is going to win absolutely, but some are going to lose more than others. So to do it properly is going to take quite a while. How long? All we can do is guess, but low months; that is one of the consequences of going down this road. I cannot be more specific than that because the work has not been done. There should be a very clear expectation that this is a major addition to the Commission's work, and will

necessarily postpone the 9 January deadline for several months with the implications that I think you are more than aware of.

THE CHAIRMAN: On the question of whether there is power to make this adjustment, you go no further than to say you see the force in what Ofcom says as regards whether it is a purpose that falls within s.88.

MR. SHARPE: Yes.

THE CHAIRMAN: Is that a summary of your position?

MR. SHARPE: I cannot assist you any further than that, because, as a Commission, we are neutral about it. I have tried to give both sides of the argument. Whatever you decide, we can do. I have juxtaposed it, the pure option and the impure one, but I have also, I hope, suggested an alternative in relation to conditions 3.6 and 4.6, which is what I think all parties to the SMP licence would have followed.

THE CHAIRMAN: As regards the first submissions you made very clearly as to the Competition Commission's power to substitute good figures for bad in all four years, as I understand it you are also saying, "And then the Tribunal has the power and indeed the duty to direct Ofcom to do that", and Ofcom then has the power and the duty to do that. You are not making any distinction between the Competition Commission's powers of determination and the subsequent stages in the 195 process.

MR. SHARPE: On this appeal we throw you the ball. You cannot look at it and modify it and say you want a different ball unless we have gone mad; and we will not. Once you have got it, and you have examined it and determined that it is fine, you cannot even unwrap it, it has got to go to Ofcom.

THE CHAIRMAN: We have to consider, I think, ourselves, whether it is something that we have power to order Ofcom to do if the Competition Commission and the Tribunal were to differ as to the nature of the powers. Your view of your powers cannot, in fact, extend the scope of what the Tribunal can order Ofcom to do.

MR. SHARPE: You are directed by 192(8) to focus your attention at the date of the earlier decision and we move forward. That is what the Commission has done. The way in which your concern can be articulated is not to look at this, as it were, free-standing, but to examine it, as you are required to do, in the context of judicial review – that is to say, if the Commission has gone wrong you can reject our findings. If the Commission has not gone wrong then they must be accepted. Your role then, respectfully, is to make the appropriate order and the ancillary directions which might, for example, if you are with me on 3.6 and 4.6, be a direction that Ofcom should exercise its powers, or not exercise its power of

discretion to do nothing, for example. This is the difference between Ofcom's jurisdiction, which was a fairly full jurisdiction, subject to s.47 and 88, and their jurisdiction on appeal, which is essentially to be the recipient of the combined wisdom of the Commission and the Tribunal.

THE CHAIRMAN: Yes, thank you very much.

MR. SHARPE: Madam, there is just one final point. It goes without saying that everybody in this room is looking for a very quick decision. Perhaps I do not need to labour the point.

MR. SCOTT: Mr. Sharpe, one small clarification, what you are telling us the Competition Commission sees as its task is to base its decision on evidence that either was or should have been available to Ofcom as at March 2007. Do we imply from that belief, as you have explained in terms of the steps that follow from 9th January, that you would not expect Ofcom to engage in an Article 6 consultation?

MR. SHARPE: The logic of that must be, yes, the Commission action here and its ability to take evidence, and so forth, guarantees a wide circulation of views among those with the deepest interest. I think the answer to your question is, that is right.

It is only fair to say that not everybody who appeared before the Commission would agree, but that is how the Commission has approached its view. They cannot make any serious judgment about the determination because they have not seen it. But the determination will not rely upon matters after April 2007. It does not mean to say we have not heard a great deal, particularly for example about spectrum valuation, the latest news, the writing off here and there, and so forth, very interesting background, but we are not relying on it.

MR. SCOTT: Thank you.

THE CHAIRMAN: Is there anything that you want to add to the discussion that we had with Miss McKnight about the consistency of making a change to the recovery of spectrum costs in Years 3 and 4 to take account of "over-recovery" in Years 1 and 2, whether that is consistent with the methodology that is likely to be applied in relation to spectrum costs?

MR. SHARPE: Not directly, madam. I would say though that I cannot see any justification for providing the Commission with 3.6 and 4.6 powers. I can see much force in leaving that where it is in the SMP condition and charging Ofcom with doing just that. That is, after all, what it should be doing. The greater the difference between the old and new and the over-charge, the more extraordinary any failure to exercise that jurisdiction would be, but I do not think it is a task for the Commission based upon those powers.

THE CHAIRMAN: Thank you.

PROFESSOR BAIN: Could I just be quite clear, Mr. Sharpe, the Competition Commission has got no firm view as to whether or not the future adjustment option would be compatible with 88.1(b)? You seem to be hedging.

MR. SHARPE: No, silence can be a very dangerous thing! It is right, there is no firm view. I might even go further and say there is more than one view within the Commission. I am trying to give you the arguments that have gone round the table, the one-stop shop on the one hand, and there is a lot to be said for that. There is the silliness of trying to confine efficiency to a very narrow theoretical situation, when, in fact, look at the situation, is this going to affect resource allocation at all over a relatively short period of time, and can it seriously be said that everyone is going to go out and make more calls because they are a few pennies cheaper maybe. How important is all of that? Those are the arguments on the one side, but the pure argument on the other which we have heard at great length from all the operators is that "Section 88 has a meaning and, you, the Commission have adopted a particular view that you are going to look at the efficient operators in that lowest cost sense".

If we were to depart from that, the argument no doubt will be made, "Where does that take us for the next review, where we can have a rather broader notion of efficiency, quite apart from any questions of reimbursement?" All I have done is actually relayed a tape of the discussions that have taken place within the Commission.

It is not an enviable position for me to put the Tribunal in and I cannot give you firm concluded submissions on this giving a Commission view.

PROFESSOR BAIN: Thank you.

MR. SHARPE: Those are the arguments.

THE CHAIRMAN: Thank you very much.

MISS DEMETRIOU: Madam, may I just make a brief point? Mr. Sharpe expresses no firm view on the future adjustment option. You have heard that he has expressed a very firm view on option one, and he submitted quite strongly to the Tribunal that Ofcom has the power retrospectively to set price controls in respect of Years 1 and 2. Unfortunately, this is the first we have heard of the Commission's stance on this question. The Commission, unlike the other parties in the room, has not put in a skeleton argument and Mr. Sharpe has advanced reasons, advanced submissions, which are additional to those advanced by BT and that we have had no chance to deal with. I raise, just by way of one example, the point on s.192(8) of the Act. It is the first we have heard of it, the first time we have had any chance to deal with it, and this has been raised after all the MNOs have made their own

submissions. So we can try and deal with them on our feet, as it were, but I think probably the best thing would be for the Tribunal to permit the parties to put in short written submissions dealing in reply with the points raised by Mr. Sharpe that are new.

THE CHAIRMAN: Let us get to the end of the hearing today and see where we are, but I understand your point, Miss Demetriou.

I think we will take a five minute break at this stage. Who else has got to speak now in reply? Mr. Anderson and Mr. Holmes?

MR. HOLMES: Madam, obviously BT has to reply and we accept that. There have been points made by Mr. Sharpe and Miss Rose which are new to the hearing today. They were not foreshadowed in any skeleton argument, and we would respectfully endorse the position advanced by Miss Demetriou that they raise a number of new points in relation, for example, to ss.94 and 95, in relation to s.192(8) and its implications. There is a novel interpretation of s.195 that none of the parties here, I think, has previously endorsed. In relation to those, certainly Ofcom would like an opportunity to make its position known. It may be difficult to do so within the bounds of today's hearing and perhaps short responsive submissions would therefore be the most appropriate way, but that is obviously a matter for the Tribunal.

THE CHAIRMAN: Just as far as the rest of today is concerned, Mr. Anderson, how long do you expect to be in reply?

MR. ANDERSON: I kept to my time in opening. I had an hour left over for reply, but my in calculations I have got pretty much exactly double the length of submissions to reply to as I thought I was going to, so I think it could well be two hours. It might be less. I certainly hope it will be, but I have got pretty much exactly nine hours of submissions to respond to, whereas I was expecting to have four and a half under the timetable that the parties agreed.

THE CHAIRMAN: Let us take a short break now, and then we will take the short adjournment at the usual time.

(Short break)

THE CHAIRMAN: Yes, Mr. Anderson?

MR. ANDERSON: May it please you, madam; we were pleased but not surprised to hear Ofcom agree with us – I should say I am starting with Question 1(a) – that on any fair reading of our Notice of Appeal a challenge was brought not only to Year 4 but to Years 1 to 3.

Mr. Sharpe, of course, for the Commission said the same thing. If Ofcom and the Commission consider that on a fair reading of the Notice of Appeal there is a challenge to Years 1 to 3 and if Orange and Vodafone came to the same conclusion, as we say that they

did from the statements that they have submitted to the Commission in April (para.46 of our skeleton argument), it is, with respect, hard to see how O2 and T-Mobile came to any different conclusion. O2 did say at one point, "It simply never crossed our mind that Years 1 to 3 were at all up for grabs". That was day 2, p.37, line 5.

Miss Bacon put that comment in context with her earlier, perhaps very revealing remark, and I quote from day 2, p.35, line 21:

> "As far as we were 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."

If O2 had given the matter a moment's thought they would surely have come to the same conclusion as those who did. After all, O2 and T-Mobile, like everybody else, attended CMCs and read submissions in which BT consistently urged a speedy reference to the Commission and a speedy determination by the Commission. Indeed, Miss Bacon referred to this on day 2, p.56, line 17.

Why did they think we were in such a hurry if the only changes we were seeking were to Year 4? Of course, everyone's submissions were focused on what the efficient charge level was for Year 4. That was the figure from which the other controls were derived, applying logic which was not challenged either by BT or by the MNOs. Why would BT, in seeking equivalent paragraphs to MA.3 and MA.4, have been appealing only one year of the period? No plausible explanation has been advanced.

O2 made three specific arguments in this respect. First, they suggested that the consequential changes to Years 1 to 3 produced by changes to the end point in Year 4 should have necessitated separate consideration as to whether those changes were a price control matter. That was day 2, p.35/32 to p.36/8. Those changes are plainly concerned with the level at which the price control conditions should have been set and so they are plainly a price control matter within Rule 3(1)(c). The MNOs who did understand what we were saying, of whom there are at least two, did not see the need for this separate consideration. So the point, in our submission, goes nowhere.

Secondly, O2 suggested that consequential changes to Years 1 to 3, had they been on the agenda, would have necessitated separate submissions or evidence from them about the effects of those changes. Those changes were no more than the application of the principles underlying the price controls, and here I stray into 1(b), principles which Ofcom clearly identified in the Statement and in its submissions to you. Again, those operators who did

think about and understand what we were doing did not see the need to put in submissions or evidence on the point.

Thirdly, an argument is made to the effect that the glide path was not smooth and was therefore capable of being broken into four glide paths with slightly different gradients, but this does not support O2's argument that there was only a challenge to Year 4. Ofcom has very clearly summarised at paras.4 to 8 of its speaking note the ingredients of its glide path approach: the end point in Year 4, the starting point and the steps applied to determine the trajectory or glide path between the two.

The approach to glide path is clearly stated in the Decision itself. So for the 2G/3G operators, and I am quoting from the Statement at 9.180, Ofcom chose a smooth glide path of four equal percentage reductions; and for the 3G operator it chose a first year level of 8.5p reduced by 20 per cent from the previous level, followed by, and I quote from the Statement at 9.190, a glide path of three annual reductions of equal percentage.

Those principles were varied or tweaked only to the extent that was necessary to accommodate the 60 day notice period, and the controlling percentages were merely derived from that approach. They are the mechanical means by which the equal percentage reductions were given effect while allowing for inflation. As we indicated, I hope clearly, in answer to Question 1(b), we accept all that and we are delighted to hear just now that the Commission itself appears to understand this perfectly.

Finally on this, O2's point was undermined by T-Mobile suggesting that there should be a smooth line from the date of the determination of the appeal. That was day 2, p.70, lines 26 to 31. You will remember Mr. Pickford saying that T-Mobile's position was not quite the same as O2's and that he preferred their yellow line to their pink one. That submission involves accepting that Ofcom's decision involved a constant or equal rate of reduction across the years of the price control, but saying that you should start from a different point than the point Ofcom's glide path started at.

MR. PICKFORD: Madam, that submission was in the alternative on the assumption that Miss Bacon was wrong.

THE CHAIRMAN: Yes.

MR. ANDERSON: In that case I am really not sure what is the difference between the two of them, but Mr. Pickford was saying at the time that his position was different from that of O2. Perhaps that is a mystery.

Would they have conducted their business any differentially, O2 or T-Mobile? No, they would not. We know this because the Competition Commission asked the MNOs at the

plenary of 21st October what provision they had made in their accounts for this appeal? It is the transcript, bundle 2, tab 57, pp.81-84, and the answers given in that session were interesting. For example, T-Mobile and Orange both indicated that they thought BT was unlikely to succeed and so made no provision in any year. H3G said that in their business planning they left their rates as in the Ofcom decision. O2 said it would have been impracticable for them to base their planning on unforeseeable contingencies. Vodafone sent a confidential letter of 31st October. What is significant for these purposes is that none of the MNOs have said that they made provision only for Year 4, so it cannot be said that anyone has made significant decisions on the basis of O2's and T-Mobile's supposed reading of the decision.

That takes care, I think, of 1(a) and 1(b). May I go on to 1(c) – we are still, of course, on the pleading – and it is said that we make two points which should have been pleaded but were not. I start with the re-determination option. The first is the point that Ofcom should be directed to determine the rate for years that are already in the past by the time that the re-determination is made, the subject of course of 2(a), 3(a) and 4(a) of the Questions.

Because I am dealing with Question 1 at this stage, I deal only with the comments that were made about BT's pleading of the re-determination option. We remain, frankly, rather mystified as to what more we could have done to plead it. We asked for the adoption of paragraphs equivalent to MA.3 and MA.4, paragraphs which set controls for all four years of the period. Inherent in that, as it seems to us, is the assumption that Ofcom has the power to set controls in respect of periods that are already past. There may be a legal argument as to whether Ofcom does or does not have that power. That is the subject of Question 2(a). There can surely be no doubt, if it is accepted that we challenged the rate for Years 1, 2 and 3 at all, that we were asking in our para.190 for revised rates to be adopted for those years, including, I might add, any parts of those years, or indeed the entirety of those years, that might be in the past by the time any revision was made.

The second thing that it is said we should have pleaded is that Ofcom has the power to make its re-determination in respect of a future period in such a way as to adjust for past over-payment – the future adjustment option.

As Mr. Holmes accepted in answer to Professor Bain, and this is day 2, p.11-12, Ofcom's position here is to say 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 then added, p.12, lines 17 and following, 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". We agree, but it does not follow from that that BT now needs permission to amend, as Ofcom has said. That is because BT did ask in its Notice of Appeal that such further or other findings be made or such other relief be granted as the Tribunal/Competition Commission shall consider necessary or appropriate". That is para.190.3. Those words are, in our submission, entirely appropriate to cater for a modification which only becomes necessary as a consequence of the time occupied unpredictably by the appeal.

As Professor Bain said, it must have been obvious to anybody that if an appeal was successful and end-users were to benefit, something would need to be done about the period occupied by the appeal. It is just that at the start of that appeal it was not at all easy to say in any detailed or meaningful way what that should be.

The MNOs knew that the SIA – the Standard Interconnect Agreement – provided for the future adjustment option at least in some circumstances. It knew that Ofcom were prepared to contemplate corrective price controls even as between different charge periods – para.91 of our skeleton. It may say now that it has thought better of the argument, but the point is it was out there.

I can demonstrate this by reference to the CMC of 26th July 2007 in which O2 specifically raised the possibility of a compensatory adjustment towards the end of the glidepath. I did hand up - and I hope you have copies - the relevant pages. I suggest it goes into Tab 59 of the bundle because we already have part of the transcript of that CMC. This is simply a couple of additional pages. (Same handed) I think we start on p.46. This is in the context of a dispute between BT and the MNOs. We were trying to get - and I think H3G were trying to get - the price control reference to go ahead without waiting for the non-price control judgment. The MNOs were contending successfully that it was sensible to have the non-price control judgment first. Mr. Green, who was leading for O2, on p.46, line 19 says,

> "It seems to us logical that you have to decide the non-price control matters first… There may be issues arising out of the BT appeal. There may be issues arising out of the BT appeal that could be referred now, but there are a large number of issues which remain to be resolved if one is going to send a coherent, composite reference to the Competition Commission".

The next sentence we rely on,

> "So far as prejudice is concerned, one can always adjust the pricing at the 'glidepath end', as it is described, rather than a sort of retroactive adjustment of prices. So, there are ways in which one mitigates any loss caused by a delay in

time. We do not believe we are dealing with a long period of time. We may be dealing with a month or so".

So, how the parties could suggest that this issue was one which they never anticipated until it hit them from left field a matter of weeks ago we do not understand.

Madam Chairman, I believe, came back to the point a little later on at p.56 when questioning Mr. Kennelly for H3G. I do not think much came of the question, but you will see near the top of p.56 that the Chairman says,

"Well you say 'irrecoverable loss', what do you say to the point that the glidepath could ultimately be adjusted to take account of that delay in making the reference?"

So, once again, the point had plainly registered and was voiced by the Tribunal at that point.

MISS BACON: Could you possibly read the answer?

MR. ANDERSON: Mr. Kennelly for H3G said,

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

So, there is no suggestion that Mr. Kennelly was taking issue with what had been said by O2 about the possible availability of this mitigation. He simply seems to be saying, "Well, that is not enough. It is about more than that. It is about loss of market share and competitive impact in the round."

Incidentally, and perhaps this is superfluous, but going back to Question 1(a), it is a little difficult to see why Mr. Green would have made the point in the way that he did if he believed that BT's appeal was limited to Year 4. Why else does he need to get into the question of adjusting the pricing at the glide path end? As you see from p.46, he is specifically dealing with the BT appeal in what he is talking about there.

The courts, and indeed this Tribunal, are quite properly strict when it comes to the pleading of new causes of action. Where a party does not have the opportunity to respond effectively to such a pleading in the time available, it will not be allowed. But, in relation to remedial

matters the courts are not at all as formalistic as Mr. Holmes' argument implies. It is recognised that there may well be room for argument as to what particular remedy is appropriate to a particular substantive result. It is recognised also that it will not always be possible to predict in advance what the appropriate remedy will be. There was an interesting illustration of that this morning when you will recall that Vodafone declined repeatedly to speculate as to what the Tribunal would, or could, do as soon ahead as next month, saying that it would be premature to do so until she had seen exactly what the Competition Commission had to say - this at the stage when we already have the provisional determination. Certainly there is no criticism intended by that, but simply an illustration of how difficult it is to look ahead. So, a general phrase such as that used in para. 190.3 will, in our submission, normally be a perfectly acceptable way of doing the job.

Now, I need to take you back to *Kirin-Amgen*, which is a case which Miss Bacon referred to. Seeing the time, it may be that you would rather save that treat until after lunch?

THE CHAIRMAN: Yes. Thank you. I think we will recommence at ten past two.

(Short break)

MR. ANDERSON: *Kirin-Amgen* is a case concerning, as you will remember, the meaning of the phrase "further or other relief". I think it is important to remember what the case is about. In short, as Miss Bacon said, the Claimant, Amgen, sought relief from the Defendant for infringement of its patent for the production of a valuable protein, EPO. I do not know if that is the one that is particularly valuable to cyclists, but it sounds familiar. The patent had various claims, including Claim 1 and Claim 26. You see that from paragraph 4 of the judgment. I should say I am at the first instance judgment where Miss Bacon also started. You will see that Claim 1 is set out there in the first two lines, and then continuing. Claim 26 is set out in the last two lines. Unlike Mr. Scott, I have never been a patent lawyer. But, you do see from a subsequent paragraph – [24], which I do not need to take you to now - that Claim 26 related to the product EPO, and Claim 1 related to the cell line which expresses the product.

Going on to para. 11, you see that the judge has already tried the issue of infringement. As he said at the end of that paragraph, he had already found that the Defendant infringed, in particular, Claim 26. I just interpolate at that stage that as we learn later on - indeed, from para. 23 - no infringement of Claim 1 had ever been pleaded.

The relief that was contested was referred to at para. 17. It was relief to restrain the Defendant from using UK-derived cells, requiring them to deliver up UK-derived cells, and so on. Then, at para. 18 there is an explanation of what a UK-derived cell is.

Going on to para. 23, and looking at the second sentence there,

> "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".

The judge adds at para. 24 that,

> "-- an allegation that one claim of a patent is infringed does not automatically carry with it an allegation that another claim for the patent is infringed".

Even if that may well follow as a matter of science, you still have to allege each class of infringement that you wish to establish.

At para. 25 which Miss Bacon showed you, the court comes on to Rule 16.2(5) of the CPR which, in fact, it had already set out at the end of para. 21:

> "The court may grant any remedy to which the claimant is entitled even if that remedy is not specified in the claim form".

That is an indicator, or an illustration, of the flexibility in remedial matters that I referred to before the break.

THE CHAIRMAN: Is that specific to patent actions, or is that a general rule?

MR. ANDERSON: No, I believe that is the general rule of the CPR, madam. It was not suggested that there was any material difference in that respect between this Tribunal and the High Court.

Then, at para. 25 Amgen is told that it cannot take advantage of Rule 16.2(5), but it is told that in terms which we rely on as favourable to us. Starting on the second line of para. 25,

> "-- 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".

Well, that was not so in the *Amgen* case because the relief sought related to use of cells, and the use of cells was protected by a claim of the patent that had not been challenged in the proceedings. I can express the ratio of the *Amgen* case as follows: the court refused to grant a remedy in support of a substantive claim that had never been made. That is very far from being the position here. The scope of our substantive case is very clear. It related to spectrum, network externality and administration costs. The relief that we seek is

consequential on the substantive findings that may be made in relation to those three matters. So, the *Amgen* case is distinguishable on its facts.

The court went on at para. 31 to make some general remarks about claims for "further or other relief". I would like to say a word about those in turn. Four points are made.

- First, it is said that "*relief will not normally be accorded in respect of a claim of a type which is not pleaded*". Well, that is certainly not the case here. The relief is sought in respect of a claim which has been very clearly pleaded - that is, that Ofcom erred in setting the level of the price controls.

- Secondly, it is said that "*relief will not be accorded which is inconsistent with the relief specifically claimed.*" Well, that is not suggested here. No such suggestion is made against us. But, it is interesting to note that the court went on to say,

> "-- but that does not, of course, preclude alternative relief being granted, for instance, damages or a declaration in lieu of an injunction or damages in lieu of specific performance".

That is a second illustration of the flexibility in relation to remedies that I referred to earlier - we say a very necessary flexibility when one looks at how, in practice, these cases tend to go.

Thirdly, "*relief will not be granted if not supported by the allegations in the pleaded case.*" That was perhaps the basis of the *Amgen* decision. But, here, the relief is supported by the key allegation advanced: that Ofcom erred in setting the price controls.

Fourthly, "*relief will not be accorded, save in very unusual circumstances, if the defendant reasonably claims that the claim for it takes it by surprise*". Well, Professor Bain, provisionally of course, answered that in questioning. He said that it must have been obvious to anyone that if an appeal was successful and end users were to benefit, something would need to be done about the period occupied by the appeal. Indeed, I showed you before the adjournment, in the transcript of the hearing of July 2007 that O2's leading counsel had not only been actively thinking about it, but was prepared to share his thoughts with the Tribunal and with all those present before it.

O2's position now seems to be that the longer the appeal went on, the less the ultimate effect of it was likely to be. They were entitled, in other words, to bank on the idea that their potential liability would diminish the longer the appeal could be kept going. In our submission that is not an assumption which could enable O2, or indeed any other MNO, to avoid what would otherwise be the consequences of a positive answer to Question 2.

Then, finally on this case, at para. 34 the court again gives expression - this is the third instance - to its characteristic flexibility where pleading relief is concerned:

> "It is true that on an inquiry into remedies the court is often invited to go wider than the pleading indicates."

That situation is distinguished from the harmful situation in which the substantive relief is not actually pleaded at all. Then there is a comment further on down.

> "However, in the light of the CPR ... 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".

Well, we say no surprise here. If we are right about Question 1(a) - the possibility that they would have to pay something for the past must always have been in the MNOs' minds because they knew we were seeking relief in relation to all four years of the period, and they knew that Ofcom had the power to make a determination in fact pursuant to para. 13 of the SIA to which they were parties. I will come on to the Standard Interconnect Agreement later on. So, they cannot say that they have been prejudiced by this in any way.

Going on to the Court of Appeal, as Miss Bacon said, it is a short passage in the judgment of the Court of Appeal. But, we say it is wholly supportive of our position. I do not know if you have it there. It is paras. 125 to 127. As the Court of Appeal says at para. 126, "Amgen had not pleaded that claim 1 was infringed". At para. 127,

> "-- a claimant's particulars of infringement must show which claims are alleged to be infringed . . . 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".

So, again, that underlines what I said to be the ratio of the case. The court refused to grant a remedy in support of a substantive claim that had never been made. That is not this case.

Amendment. Well, as we canvassed at the end of Friday, our primary case is that we do not need permission to amend, and the court indicated that it did not at that stage wish to entertain such an application from BT. Any such application, as the Tribunal will appreciate, were it to be necessary, would be made under Rule 11(1) rather than under the more stringent requirements of Rule 11(3) which is concerned with adding new grounds of appeal. So, I say no more about that, save to reserve my position in the event that the court should rule against me on one or more aspects of Question 1. If it does, then plainly BT should be given an opportunity to make an application to amend. The Tribunal heard what

Ofcom said about that. I did not get the feeling that the door was necessarily closed. I would not necessarily expect a similar reaction from perhaps the interveners.

Madam, that finishes what I had to say on Question 1.

I will go straight on, if I may, to Question 2(a) which we have called the re-determination option. It was, I think, generally agreed that Question 2(a) is relevant. Many of the parties seemed disposed to accept that the Tribunal has the power to simply declare what the levels should have been. But, as Miss Demetriou, for Orange, frankly accepted that course "could not lead anywhere" (Day 2, p.63, lines 13-17). If that is right, then it would be, in my submission, a perfect example of a "theoretical and illusory" remedy. The redetermination option gives us the possibility of a "practical and effective" one, and that is why we say it is relevant to know whether that option is available.

I explained why we said that the power existed. Two sets of arguments were advanced for the non-existence of the power to redetermine in respect of past periods as well as future periods. First, there was the construction of the Act to which I add the points that were made on the Standard Interconnect Agreement. Secondly, there was the "ex ante" argument to the effect that s.88 required any measure to be for the future and not for the past. Indeed, Mr. Sharpe has just dealt with that. I will take those in turn.

On the construction of the Act there is, in our submission, no difficulty in deriving the necessary power from ss.45 and 87 of the Act. They speak for themselves. They impose no temporal limitation on the power to set conditions. No more should need to be said. But, may I deal with some specific points that were made by Orange in relation to the Act.

First of all, Miss Demetriou submits that s.45 adds nothing to s.87, and that this is clear from s.45(8). That is the one which says that 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 (Day 2, p.61, lines 19-26). We accept, of course, that under s.45(8) an SMP services condition may contain only provisions which are authorised by ss.87 to 92 (or, indeed, under s.45(8)(b), but that is not relevant), and therefore that those conditions must comply with s.88. But, that does not mean that s.45 is irrelevant because to the extent that s.45 may indicate a power in Ofcom to act in relation to the past, it does bring something to the debate. Such a power, we say, is indicated by s.45(10)(e) - "a power to set a condition includes the "power to revoke or modify the conditions for the time being in force". In other words, if Ofcom sets a condition which turns out not to comply with s.88, it has the power to substitute a new condition which does comply.

As Miss Demetriou said, the power to revoke or modify applies to conditions 'for the time being in force' (Day 2, p.62, lines 3-12). But, that does not alter the fact that the power may be used in relation to the past. That is certainly inherent in the word 'revoke' which can only mean going back to the beginning of a condition which is currently in force and withdrawing it. 'Modify' read with 'revoke' must be viewed in the same light. So, MA3 and MA4 are in force; Ofcom may revoke them; it may also modify them. This power, it seems to us, is plainly sufficient to cater for the re-determination option.

In this regard I would refer also to a point made I think by Mr. Sharpe on s.195(4) where, again, in the same statutory scheme one has the provision for the Tribunal to remit the decision to Ofcom with such directions as the Tribunal considers appropriate for giving effect to its decision. I would adopt the submission that Mr. Sharpe made about that.

Section 195(6), while we are on that section -- It was suggested at one stage (Day 2, p.24, lines 11 - 17) that there might be a separate head of jurisdiction under s.195(6) of the Act - the duty on Ofcom to comply with a direction given by the Tribunal. The point was suggested, I believe in our favour, but we do not believe it can be right. The reason for that is s.195(5) which provides,

> "The Tribunal must not direct [Ofcom] to take any action which [it] would not otherwise have power to take…".

So, if the power to make retrospective determinations exists, it must be deduced from the general powers of Ofcom under the Act, and we say that that is very easy to do from s.45 and s.87. In that respect we agree with what H3G said in the first point that they made this morning.

THE CHAIRMAN: How much of what H3G said do you agree with?

MR. ANDERSON: Only that limited point. But, I think H3G have made precisely the point I have just made. I make it, as I say, against myself. But, we have difficulty in seeing that Ofcom have an independent statutory basis for what it does under s.195(6) simply because s.195(5) says it is linked to ----

THE CHAIRMAN: But, do you accept what I understood them to be saying, which is that when we remit it back to Ofcom, Ofcom has to satisfy itself that the criteria in s.88 are fulfilled ----

MR. ANDERSON: We most certainly do not agree with H3G about that. I hope I have now made it clear that the agreement was pleasant, but brief.

Vodafone. We have obviously only seen these fourteen pages this morning. It is always very helpful to see submissions in writing. There are quite a lot of them. But, in relation to

para. 12 of the speaking note handed up this morning there is another construction point taken on s.195(5) - a point taken this time against us based on the word 'otherwise' and based on the tense of the verb 'would have power to take'. S.195(5) of course says that,

> "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".

Well, that argument on the tense, in our submission, takes them nowhere because if we are right that Ofcom is able to determine a control in relation to the past, then the use of the present tense is entirely appropriate. It is very much the same as Rule 3. You will remember at the end of Rule 3(1)(c) you have that phrase 'at what level the price control should be set'. Well, the use of this tense does not determine either way the issue of whether Ofcom has the power to adopt decisions in relation to the past because if one assumed that they did have such a power, this would have been an entirely appropriate tense to use.

At 12.2 of the speaking note, Vodafone refers to the *Napp* case and says that although the obligations as to future pricing were price controls, the finding as to past over-pricing were not and could not, they say, have been addressed by the imposition of a price control. Well, the difference between this and the *Napp* case is that in this case we are all operating within the context of a price control regime. It is not just a case about excessive pricing at large - it is a case about a price control regime. In that case there were different levers. There was the possibility of a past penalty in relation to past behaviour, or a fine. There was the possibility, as was stated, I think by Madam Chairman, of an action in tort, an action in damages. This is not that case. One simply cannot read across one situation to the other.

In relation to 12.4, it is a long paragraph but I think the point that I wanted to deal with was on the *TRD* case in the last two sub-paragraphs.

> "-- where it is said that it falls to Ofcom to resolve a charging dispute, it may determine a charge to be reasonable even if it is not as finely tuned as it could have been . . . a firm should nonetheless be permitted from time to time to charge prices which are reasonable . . . no injustice is done by leaving them alone --"

Two points on that. First, the CAT in that case was making its judgment without access to the detailed determination of the Commission - hence perhaps some of the comments about them not being finely tuned. You, by contrast, will have access to that determination. It may also be that dispute resolution is a different matter and is meant to be dealt with more quickly and not involving the same scale of exercise as in price control regulation - a

difference that was recognised in the Tribunal's non-price judgment (which I do not take you to, but it is in Ofcom's little black bundle at Tab 5, paras. 107 and 123).

At para.15(i), still on the question of Ofcom's powers to act retrospectively, the point is made at the end of that paragraph,

> "Similarly, in 2011 Ofcom may decide to adopt a quite different approach to regulating MCT charges (e.g. pursuant to the EC Commission's draft recommendation on marginal cost charging) . But a decision to adopt such a regime in 2011 could not be 'read back' to any prior period".

Well, once again, they are not comparing like with like. Here we are in the context of an appeal which inevitably looks back. If one is looking to 2011, the world has moved on. The slate is clean, and one starts again in relation to a new price control period. There is no time, I think, to be exhaustive in relation to this document, but those are the main points that we took out of it on this aspect of the case.

The Standard Interconnect Agreement. I made the point in opening, relating this to Question 2(a) that we know from the SIA, para. 13.13 (appended to our skeleton - I have also circulated a copy of the whole paragraph, though I do not suggest you need to look at it now), that the parties to that agreement accepted the idea that charges, or the means of calculating charges, would sometimes be set with retrospective effect. The counter-argument was made on Friday that 13.13 provides for retrospective effect only because it could apply after a dispute. S.190 of the Act, as is correctly pointed out, makes specific provision for the making of retrospective orders after a dispute.

As to that, just two short points. First, para. 13.13 uses the words 'for whatever reason'. So, it cannot be confined to purely dispute resolution. The second point is that as indeed Ofcom has emphasised in argument for different reasons, the SIA pre-dates the Communications Act 2003. So, it cannot be assumed to have anticipated s.190 of the Communications Act. Paragraph 13.13 is deliberately drafted with considerable breadth. It would be wrong, in our submission, to limit it in the way suggested.

So, for that reason the SIA is consistent with our interpretation of the Act, and I do not need to take you again, I think, through the way in which I said it worked, though I may come back to that.

THE CHAIRMAN: Yes, but then there is this risk of double recovery because of s.192(d), because we clearly do have the power and nobody contended that we did not, to direct Ofcom to order the payment to adjust for underpayment or overpayment at the end of the TRD appeal, and through that mechanism the appellant will get the money back that they

have overpaid over the period, but it cannot be the case that you can then rely on para.13 of the SIA to say: "There has been a retrospective adjustment to the charge and so now we want to make a claim under that.

MR. ANDERSON: I wanted to come to double recovery when I had looked at both the routes that we have in mind. I can do it that way or I can try and anticipate myself.

THE CHAIRMAN: You do it as you can.

MR. ANDERSON: I will probably get in a muddle if I anticipate myself, but I promise I will come to double recovery. Can I just tick off one other point on the SIA before moving on, and that is the question of how, if at all, is it relevant to the construction of the Act. We accept that a contract is not in itself an aid to the construction of the statute, that is elementary, but it is nonetheless relevant to know that at the time of the introduction of the Act the commercial parties likely to be affected by the introduction of SMP controls understood that such controls could be imposed retrospectively at least in some circumstances.

That then became part of the factual matrix against which the Act was adopted. I am conscious I used that phrase in opening. The Tribunal will be particularly familiar with it, I imagine, as a phrase used in the construction of contracts but it has, of course, been applied also to the construction of statutes and I simply wanted to put before you one of the cases in which that was established, a very well known case – *Black-Clawson*. It has been handed out. It is a decision of the House of Lords in 1975. We have tried to copy the whole discussion, but if I could just indicate the passage that we are referring to, it is at 646 starting just under letter C where Lord Simon of Glaisdale says:

"In order to understand the meaning of the words which the draftsman has used to convey what Parliament meant to say, the court must so far retrace the path of the draftsman as actually to put itself in his position and that of Parliament."

And then there is some Latin, then he says:

> "All this is merely the counterpart of what…Lord Wilberforce, said…in relation to the interpretation of another class of written material"

- in other words contracts:

> 'The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations'."

Then he goes on to say:

> "I can see no reason why a court of construction of a statute should limit itself in ascertaining the matrix of facts more than a court of construction of any other written material."

It is a very simple proposition. I was conscious I had made it without support.

MR. SCOTT: You have emphasised the SIA existed before the passage of the Act. The SIAs were part of an approach to the regulation of interconnection at the time that the Act was passed, and from my recollection have been part of other Member States approach to this. So we are talking about something which was very much in the practice of the regulated industry.

MR. ANDERSON: So I believe, Sir. I suspect the Tribunal knows a great deal more about that than I do myself, but I am happy to agree with that, and I do not see any contradiction.

Still on Question 2(a), T-Mobile made an argument to the effect that the Act should not be construed so as to give a power to determine in respect of the past because of the legitimate expectations of the MNOs (Day 2, p.73, lines 10-16; p. 74, lines 12-33). He referred to what he called a "legitimate expectation" that the prices they charged will not be revisited. Of course, the thing about legitimate expectations in law is that they can always be overridden by sufficiently important considerations of policy, but more fundamentally still there can be no legitimate expectation that the law is otherwise than it is, so this is in a sense a "tail wagging the dog" point. The MNOs had the Act and there is no reason why they should not have interpreted it as we do, or at least have seen the risk that it would be interpreted as we say it should.

But we contest the notion that the MNOs had a legitimate expectation in any event. They had known of the challenge and the grounds on which it was made at the outset. They should have been aware, if they were not in fact aware, that the relief sought was for all four years, and they could have made provision in their accounts if they had chosen to do so – the fact that some of them did not is neither here nor there. They could not be certain that the appeal would take as long as it has to determine, so even if they were justified in the belief that relief could only be prospective they should still have anticipated that relief might come along a good deal sooner than, in fact, it will.

As Mr. Scott pointed out in argument: what about the expectations of mobile operators and fixed operators alike? These are entirely legitimate expectations that incorrect decisions will be set aside and that appeal mechanisms will be as effective as may be, using the phrase from *Klass* (Day 2, p.74, lines 3-11).

T-Mobile took the point a little further suggesting that MNOs might decide that, as he put it, the UK market was not worth the regulatory candle (Day 2, p.75, line 2) if they did not get to keep the charge even after it had been ruled on appeal to be excessive. Well no threat, I am sure was intended by that and certainly we are all capable of feeling hard done by. Equally colourful submissions could be made on behalf of fixed operators who might, for all I know have fairly strong views about an appellate system that results in the continuous expenditure of lawyers' fees for years on end and then produces a benefit only in respect of such period as may remain after they had finished, so it is knockabout stuff but it really does not take us anywhere.

Can I go on to the *ex ante* argument, which was the other main objection raised under Question 2(a)? To summarise the argument, because the whole concept of SMP conditions is *ex ante* one cannot impose a control in respect of date which is past when one imposes it. I addressed that argument in opening in the form in which it was raised by T-Mobile – that is our skeleton 72-77 and then it is transcript Day 1, pp.21-22. You would not, I think, thank me for repeating those arguments. We have sought to identify for you in those passages precisely the fallacy that Mr. Sharpe outlined much more shortly and eloquently this morning. It really depends on when you say that *ex ante* is to be measured from. We say from the finding of SMP, T-Mobile says it is to be measured from wherever you happen to be at the time, and that in our submission is a solution which provides arbitrary and haphazard results. There are a lot of ways of demonstrating that. One that occurred to me was when Mr. Pickford was being questioned by the Tribunal about interim relief (Day 2, transcript p.82, line 24 – p.83, line 8). Applying the logic of his position that the future starts from wherever you happen to be, he came up with the solution that it would have been possible for a 4p rate in Year 2 to have been ordered on an interim basis because at that stage it would still be in the future, but not on a final basis because by then it would be in the past. As the Tribunal pointed out that would mean that the Tribunal had the power to grant relief at the interim stage that it lacked the power to grant at the final stage, which would be contrary to all established principle in relation to interim relief. Another powerful reason, in our submission why the *ex ante* argument must be wrong.

Ofcom came off the fence in its oral submissions in relation to whether it had the power to act retrospectively. It thought that it did not, and it relied upon the requirement in s.88(1)(a) that there must be a "relevant risk" of adverse effects arising from price distortion (Day 2, p.21, line 11). Miss Demetriou made the same point in her submissions for Orange, (Day 2, p.59, lines 11-12). That submission is subject to exactly the same criticism as T-Mobile's, it

fails to allow for the fact that we are here concerned with an appeal against controls that were set at the start of the price control period. At that stage there was a relevant risk and, as a result, Ofcom was entitled to set a price control condition. All we are talking about here is whether it should have set some different price control condition.

Question 2(b) raises our preferred solution of the future adjustment options, the idea that the charge control for Years 3 or 4, or both, and we have no very strong feelings as to which of those options is preferable, could be depressed in order to adjust for its excessive level in Years 1 and 2 – a mechanism which falls within Ofcom's statutory powers in sections 45 and 87, subject of course to satisfaction of the s.88 requirements, and a mechanism for which there is at the very least a close precedent in MA.3.6 and 4.6.

I propose to start with MA3.6 and 4.6 and then go on to the main argument that is made against me on Question 2(b) which is s.88 and "two wrongs do not make a right". The procedure in MA.3.6 and 4.6 is strongly redolent of what we have called the "future adjustment option". I explained in opening the four things that we derive from MA.3.6 (Day 1, p.28). I do not repeat those here save to recall that the second thing we derived from MA.3.6 was that there are circumstances in which Ofcom has the power to make a future adjustment. It is an illustration we say of the statutory power that Ofcom must be taken to have pursuant to sections 45 and 87, because of course the power needs a statutory basis, it cannot simply be conferred by MA.3 or MA.4 themselves. What MA.3.6 demonstrates is an assumption by the parties that such a statutory basis exists. Where is that statutory basis? Why do I say it is in sections 45 and 87? T-Mobile, of course, originally suggested that the legal basis lay in sections 94 and 95 of the Act. We explained in opening why we thought that was wrong (Day 1, pp 29-30) and I believe that T-Mobile did not repeat the point orally, although no doubt Mr. Pickford will tell you that he is not abandoning it. Ofcom very deliberately, neither in its skeleton argument nor in its oral submissions, associated itself with the argument. Indeed it dissociated itself, because when the Tribunal asked Ofcom about the relationship between MA.3.6 and sections 94 - 95 it did not say "MA.3.6 has its statutory basis in sections 94 - 95" which is what T-Mobile had been saying. It replied using the words: "Belt and braces" and "duplicative compliance mechanisms" (Day 2, p.31, lines 22-23). In other words, two different possible ways of dealing with past overcharging, and we agree.

If the legal basis for MA.3.6 is not to be found in sections 94 - 95 then it must be found in sections 45 and 87 – no other basis was suggested. So what we say about MA.3.6 is that it

provides a practical illustration of precisely the power that we say exists under sections 45 and 87.

May I now address the view that may have been hinted at in some of the questions of the Tribunal and that was expressed by Mr. Sharpe this morning, that we could in fact rely on MA.3.6 and 4.6 more directly than we do, that in fact they may be the missing link, or the key to the effective remedy to which we are entitled.

You might find it helpful to have them open, though it may be that you know them by heart – tab 55 if anybody wants to dig them out.

As I understood what was being submitted on behalf of the Competition Commission, the solution that would work for us is effectively a hybrid. It begins with the re-determination option and then the application of MA.3.6 gives us a future adjustment such as to ensure that justice is done in the future to balance the injustice that was done in the past. I am summarising inelegantly but that, I think, is how he envisaged it happening. It would start with a re-determination as provided for in the SIA, and that would be retrospective so it would re-determine the TAC for the past years as well as for the future years. What would then happen is one would go to MA.3.6 and you would say: "The Dominant Provider has failed to secure that they Average Interconnection Charge has not exceeded the TAC for the First, Second, or Third Relevant Year", not the TAC that was in force at the time but the TAC that we have just substituted by exercising our re-determination. That means that Ofcom may direct that there should be adjustments in the following relevant years for the purpose of remedying that failure. That, I think, is how it went.

What I was not quite sure about was who would do what? It would seem that Ofcom would be directed to make a re-determination, but it would then seem that it is also up to Ofcom to exercise its discretion to remedy the failure by adjusting the charges in the following relevant years, so it is a sort of hybrid.

THE CHAIRMAN: Well, Mr. Sharpe went a little bit further and said that given Ofcom's evident reluctance to do that, that we might direct them to do that.

MR. ANDERSON: Whether it was his view that the direction would take as long to produce as he said the future adjustment option would take to perform I am not sure; or whether it was Mr. Sharpe's submission that there might be a rougher and simpler way of doing it under MA.3.6. Certainly, I think that is how it works; Ofcom has to take the decision, albeit with as much guidance, no doubt, as the Commission and the Tribunal can give it.

We are reluctant to reject any gift horse, particularly one with such a good pedigree, but we are nonetheless a little bit cautious about this solution and may I try to explain why we are.

The first reason we are cautious is that MA.3.6 comes into play only if a particular condition is satisfied, and that condition is that the dominant provider must have failed to secure that the AIC has not exceeded the TAC for the first, second or third relevant year. There is no suggestion, of course, that the MNOs have failed to secure that the AIC did not exceed the TAC currently in force; that is perhaps the most natural reading of MA.3.6 and on that reading there has been no failure and so there is no trigger for the use of MA.3.6.

THE CHAIRMAN: Well we will have to decide what those words mean, and whether they encompass the situation which would have arisen if there were to be a determination covering Years 1 to 3, to what the TAC should have been in those years.

MR. ANDERSON: The question is really: does the TAC include within it "any TAC which, while not in force during the relevant year, shall subsequently be substituted for it", and if one can read that into the provision then fine. It is not an impossible construction but it is certainly a strained one. It may be that there is also an element of circularity about it, because if the TAC is substituted, if a re-determination is made, then we are in SIA territory, because 13.11 and 13.12 of the SIA are activated by re-determination by Ofcom.

If we are right about Question 2(a) then we have a remedy under the SIA, and I do not think Mr. Sharpe commented on that, whether he agreed that that was right or not, I may have missed it but I did not hear him comment about that. So in a way, if that is the case we do not need MA.3.6. Put it another way, the future adjustment option only works if Years 1 and 2 are unchanged. But, if that is so, the TACs for Years 1 and 2 are not exceeded and MA3.6 is not relevant.

A subsidiary point - and Mr. Sharpe touched on this, but it is another thing that makes us cautious - is that MA3.6 appears to envisage adjustments being made in the Relevant Year following the failure. Assuming that no adjustment can now be made until Year 3, it is not obvious how MA3.6 could be invoked as a way of addressing any failure in Year 1. It is a point made by Ofcom at Day 2, p.34. Mr. Sharpe thought there was an answer to that. He may be right. If I am being very measured in the submissions I am making about this, it is because I am conscious that we are here in the realms of Article 4 of the Framework Directive. It is very much a submission that was made by T-Mobile in the other case - as was rightly said, a submission based on *Marleasing*, an obligation to interpret the statutory framework in a way conducive to the provision of a remedy. As the Tribunal well knows, that means that statutes do not always need to be given their natural and ordinary meaning. As long as the meaning is possible and it provides an effective appeal mechanism, well, one can read them that way.

But, the absolutely central submission we make on this is that although we think there are difficulties with saying that MA3.6 and 4.6 are directly applicable, it really does not matter. What matters is that there is a statutory power to make adjustments in relation to the future. MA 3.6 and MA4.6 support our argument that such a power exists in ss.45 and 87 of the Act because they are an instance of that power being uncontroversially used. No-one suggests that the use of MA3.6 is non-compliant with s.88 (I will get on to that in a moment). If that is right, the future adjustment option must be compliant as well.

So, that is the use that we seek to make of MA3.6 and 4.6. To us it feels a safer route than the route taken by Mr Sharpe, although we certainly do not dismiss it out of hand.

A couple of smaller points on MA3.6. We agree with Mr. Sharpe that there is nothing there limiting it to wilful failure. Nor is there anything there limiting it to small-scale. One cannot distinguish it on either of those bases.

Can I come on now to s.88 and "two wrongs do not make a right" - an argument that is really based on the three purposes listed in s.88(1)(b). Ofcom's answer is to leave the original wrong uncorrected. You set the charge controls for Year 3 and Year 4 using Ofcom's glide path approach. You do nothing to counter the effects of the past position. You leave the MNOs, or their customers, enriched at the expense of the FNOs and their customers, and you fail to correct the loss of FNO market share that has been the consequence of the excessive charge controls in Years 1 and 2. In our submission that is not efficient. It is not pro-competitive, and it does not look after the interests of fixed customers, or, indeed, customers viewed as a whole. In contrast, the future adjustment option is, in our submission, entirely consistent with s.88. That is because over the charge control period as a whole it produces charges set at efficient levels. It promotes sustainable competition, and it benefits fixed consumers and mobile consumers over the period of the charge control to an equivalent extent.

As Professor Bain noted (Day 2, p.25, lines 28-34) - and, of course, I am conscious that when anybody says anything, they are only expressing a very provisional view - that there is good reason for seeking to balance charges, which were too high in the first two years, with charges commensurately lower in the second two years. It benefits the fixed line consumers who have missed out. It benefits the fixed line operators, such as BT, not directly perhaps because the reduction in charges is liable to be competed away, but by enabling them to re-build their lost market share. It seems to us that that is a very important way of looking at the future adjustment option. It redresses the balance between them and their mobile equivalents over the period as a whole.

As Mr. Sharpe pointed out, there is also a group of purists in this matter. He referred to the 'pure option'. That is reflected in Ofcom's, we say, rather narrow focus not only on the issue of efficiency, but also on the timescale in which one views these matters. In response, that is really how Ofcom put their case. They focused on s.88(1) to say that prices should not fall below efficient charge levels in any one year. Similar points were made by T-Mobile and by Orange.

PROFESSOR BAIN: Mr. Anderson, can I just interject for a moment? Ofcom have pointed out that in their view the FNOs and the MNOs are not operating in the same market. You used the phrase, 'the FNOs' market share'. Does the same argument apply if they are not in the same market? When you are talking about the FNO's market share the implication of that phrase is that it is in the same market as the MNOs.

MR. ANDERSON: Yes.

PROFESSOR BAIN: If they are not in the same market as the MNOs is the degree of competition between FNOs and MNOs sufficient to have an effect, even though they may not be in the same market?

MR. ANDERSON: Well, it is certainly BT's belief that it is - if only because nearly everybody has both a mobile and a fixed phone. It is very often deciding which of them to use.

PROFESSOR BAIN: So, to make your point, even if you were not in the same market, then you would be arguing that there was an effect on the level of business of both elements - the MNOs and the FNOs.

MR. ANDERSON: Well, that is certainly our belief as a matter of business.

PROFESSOR BAIN: Thank you.

MR. ANDERSON: There are also findings - though I have not got them at my fingertips - in the non-price control judgment of this Tribunal in which remarks were made about a transfer of fixed rents, for example, from fixed operators to mobile operators as a consequence of excessively high charges.

PROFESSOR BAIN: I am just trying to see how you respond to the point that Ofcom quite specifically made on this.

MR. ANDERSON: Yes. Well, it seems to us, rather as one can view "efficiency" in an extremely narrow way, so equally one can view "sustainable competition" in an excessively narrow way. We do not say that before applying that one needs to do a detailed market analysis and work out exactly which sub-markets they are competing in. In our submission, on any realistic view, of course, we are competing with the mobile operators for calls to mobiles.

PROFESSOR BAIN: Thank you.

MR. ANDERSON: Why else are we all here? So, just a few comments in relation to efficiency. We would say that Ofcom's very narrow emphasis on efficient charge levels in the context of this case is not borne out by the more broad approach to "efficiency" that Ofcom adopts in other contexts. Efficiency may encompass a number of different interests, including the interests that are served by the tweaks, as Mr. Holmes confirmed to the Tribunal during O2's submissions. So, Ofcom happily prices above the efficient charge level where it considers it appropriate to do so in order to look after the concerns of the MNOs who must not have too abrupt a transition during Years 1 to 3 of the charge control period. It is quite capable of allowing periods of grace. That was the sixty day tweak.

Nor does Ofcom in other contexts apply rigorously a year by year approach. So, again, when setting its charge controls it does not apply a year by year approach. What it does is focus on the final year and what the correct result should be, sending efficient pricing signals in that year. Then it has a glide path for Years 1 to 3 to get to the right point in Year 4. Of course, it may be said it is having regard to efficiency in its broader sense in Years 1 to 3 and it is balancing the need for companies to adjust to reduced prices against the need for efficiency in the narrow sense. But, even so, it shows that Ofcom does not insist on having the same balance of interests leading to the same outcome for each individual year of a charge control period.

The clearest example, we say, of Ofcom countenancing charges which are below efficient levels for a year is, of course, the application of MA3.6 in Year 4 of the charge control period. Ofcom could have chosen various other methods of giving MNOs an incentive to comply, including the imposition of penalties for contravention of conditions under s.96, which would not impact on the prices paid by end users. But, instead, Ofcom has chosen, as one part of its belt and braces, to employ an incentive mechanism which has a direct and immediate impact on termination charges. So, for an overrun in Year 3 it reduces those charges perhaps below efficient levels in Year 4.

Well, if MA3.6 is a lawful condition - and I repeat that no-one has suggested otherwise - the principle of future adjustment must comply with s.88 even if it does result in the setting of controls below efficient charge levels.

It was said that you can explain that away by saying that MA3.6 and MA4.6 are simply designed to give MNOs incentives to comply. It was a line taken by Ofcom (Day 2, p.2, lines 24-26 and Day 2, p.30, line 22 to p.31, line 26). But, they are not just a deterrent, as the word 'incentive' might imply. They provide for a consequence - a consequence that takes the form of an amendment to charges quite possibly below efficient charge levels. So,

what these examples show, both the glidepath and MA3.6, is that focus on sending efficient price signals to influence consumers' choices can yield to other factors as part of Ofcom's balancing exercise, and quite appropriately so. Also, in deciding what is appropriate when setting a s.88 condition, Ofcom will not require all the s.88 purposes, narrowly understood, to be achieved in all periods, however small. It takes a more flexible approach. That is inherent in the whole concept of future adjustment.

What about the next price control period? Well, Ofcom makes the point that if you have a Year 4 price that is below efficient levels, difficulties will be caused for the next price control period when it may have to go up again. There are three very short answers to that. First, it is a possible consequence of MA3.6 to the same extent. Secondly, you should not avoid doing the correct thing now for fear of what might be the position in the future. Thirdly, in any event, there can be no certainty as to what the next charge control period will bring. The Commission is looking at other approaches. Ofcom was consulted on it too. Everything is up in the air. There is no certainty that the figures will have to rise in the next charge control period above what the Competition Commission selects as the appropriate levels for 2010/11 - even if those do end up being set at a rate which is below the efficient charge level for that year taken on its own.

A final point, which I think Mr. Sharpe alluded to and which the Tribunal will have in mind - it will not always be certain that charge controls would need to be set below efficient charge levels, even in one year, in order to give effect to the future adjustment option - the argument about fat in the glide path. I am not suggesting that this would necessarily happen here, although if the Competition Commission follows its provisional determination on spectrum, you will remember that it will be on the basis of the 2G cap, which is described as an 'upper bound'. But, it would be dangerous to answer a question relating to jurisdiction (which of course is the question before the Tribunal) on the basis of assumed facts that the FAO (future adjustment option) would in all cases drive the price down below efficient charge levels. That cannot be taken for granted.

Very briefly on Vodafone at para. 16, p.7 of the Vodafone note -- We do not, I hope, do it a great injustice to say that (i), (ii), and (iii) of that paragraph proceed largely by way of assertion. Paragraph 16(iv) appears to be returning to the *ex ante* point submitted by the MNOs on s.88 or the point taken by Ofcom about not doing anything for a remedial purpose. You will recall the distinction made between a remedial purpose and a s.88 purpose which we addressed in our skeleton and in opening.

Vodafone at (v) I think is saying that the MNOs may not have benefited from additional profits because they pass them back, because of the waterbed effect, to mobile subscribers. However, this has, of course, benefited MNOs in terms of making their prices attractive to customers. It does not deal with the fact that there are inequitable distributional effects because of transfers from fixed companies and consumers to mobile companies and consumers. Now I find the reference that I wanted earlier to the non-price judgment on that - it is para. 296.

On (vi) - this is the same point that T-Mobile has made about the disincentives to investors arising from interference by regulators with settled transactions. I should say that Miss McKnight, rather to my relief, said that (p.8) it did not really arise for determination today. So, very briefly, (vii) says the glide path is set to promote efficiency, but the point here is that the existing glide path has set the rates for Years 1 to 3 in error and there is good reason for making the adjustment. It is the benefits which the MNOs have enjoyed and the detriment to the fixed operators and their customers.

Then, in relation to (viii) it is said that fixed customers have also benefited because many of them also have mobiles. Yes, but what about those who have not? What about the distortion of competition? What about the potential effects on fixed investors and the benefits of any investments which they might otherwise have been able to make? Familiar ground, I know, for the Tribunal, but that is what we say about that.

The practical implications of the future adjustment option was a topic touched upon by Mr. Sharpe. He described the Commission's view that it was 'doable' so long as it was understood that the final product is likely to move from a unique number to a number which is based not just on an efficient operator, but also on past imbalance between the parties. He made points about market share and about roaming. He said a rough-and-ready method may result in rough justice. It may be that for all of us it is a little too early to comment in any detail on that. May I just give you one reference in relation to that which is the question of how hard the exercise would be to perform. I do not express any view on behalf of BT at this stage about that, but can I refer to something that was said by Ofcom at the plenary session on 21st October? It is found at Tab 57 in the second bundle. (After a pause): If you have it handy, that is wonderful, but -- This is Mr. Myers at the plenary session discussing the future adjustment option. Ofcom produced some very helpful slides for that session at which they actually illustrated how the future adjustment option might look. They thought you had to dip down in Year 3 and then back to efficient charge in Year 4. But,

they illustrated how it looked, albeit subject to a legal view which they had not at that stage formulated. Mr. Myers, near the bottom of p.37 says, at line 19,

> "How, then, should forward-looking charges be adjusted…? Well, it would seem inappropriate to change the final target charge… This would seem to imply that the only charge level that can be adjusted…is the third year, and that is what we calculated in this particular slide. Again, that is not a particularly hard calculation to perform. Essentially, it is ensuring that the net present value of gross revenue is the same as in the previous example, but not adjusting the first two years and leaving the fourth year as specified".

THE CHAIRMAN: Who is this speaking?

MR. ANDERSON: This is Mr. Myers, I believe. Dr. Myers. He is described as 'Mr' on p.29. Whether that is right, or not, I do not know.

MR. HOLMES: For the record, madam, it is Dr. Myers.

MR. ANDERSON: May we upgrade Dr. Myers.

THE CHAIRMAN: It starts at p.34, line 11. Is that still the same person talking at p.37?

MR. ANDERSON: I am doubly wrong, but we still have the authority of a doctorate behind these words. It is just that it was Dr. Teh and not Dr. Myers.

THE CHAIRMAN: Dr. Teh is an Ofcom ----

MR. ANDERSON: He is the Competition Policy Director of Ofcom. You see that from p.2. All I am saying is that there may be two views about how difficult or time-consuming this process is. A view might also have to be taken, if Mr. Sharpe's preferred option were available, of MA3.6 - whether a similar option would have to be performed in the exercise of the task that is mandated under that. That is, I think, all I can say about it at this stage, I am afraid.

Double recovery, and you have seen the way we put the two remedies, both of which we say there is jurisdiction to provide for. Plainly there should be no double recovery. The question has been discussed as to how that might be guaranteed. These are probably famous last words, but this does not seem to us to be a very difficult question. Just because Ofcom has jurisdiction to implement both the re-determination option and the future adjustment option does not of course mean that it should implement both in the same case. If the future adjustment option is available and is implemented, it will be by way of a re-determination in respect of the future period, so, let us say, for the sake of argument, the remainder of Year 3 and all of Year 4. The mechanics of what happens next are governed by the paragraphs of the SIA which I have shown you and indeed provided you with.

Paragraphs 13.11 and 13.12 permit such alterations to the Carrier Price List as are necessary "so that it accords with [Ofcom's] re-determination". So we would amend our price list in respect of that future period in accordance with those paragraphs.

I was asked about 13.13 and the right of recovery under that. 13.13 only applies "if any charge… has retrospective effect", and if we have gone down the future adjustment option then that condition would not be met, so one would secure payment under 13.11 and 13.12, but 13.13 would not be an issue because that is only activated if any charge has retrospective effect, and that we say would not be the case in respect of a charge that is set only for periods in the future.

MR. SCOTT: I know that one of the MNOs told us they disagreed with you on the SIA.

THE CHAIRMAN: It was Orange.

MISS DEMETRIOU: Yes, we do, yes.

MISS BACON: And we do as well.

MR. PICKFORD: For the avoidance of doubt, we do too.

MR. SCOTT: I rather felt that this was not ----

MR. ANDERSON: To see a bandwagon start off is ----

MR. SCOTT: It is not as decided a point as you might have thought it was.

THE CHAIRMAN: If one did that, what you are saying is, yes, we have the power to re-determine from Years 1 to 4, and we also have the power to make the future adjustment, but we would not have to do both those things, and in fact you are saying that we should not do both those things, even if we have the power to do them both. If we were minded to take the future adjustment option then we would probably only direct Ofcom to take a new decision in respect of Years 3 and 4. The difficulty, which you may be coming to, is how that fits then with Mr. Sharpe's very clear indication that what they intend to determine is Years 1 to 4.

MR. ANDERSON: Yes. Mr. Sharpe, I think, was unusual – I think, I might have got this wrong – in not accepting that there was a power in the Commission simply to declare what the position is for the earlier years. I think he may have been saying it was determine or nothing, but of course that is a matter of law which it is for the Tribunal to direct the Commission about.

THE CHAIRMAN: Yes, but you are saying they do have that power. So the question is, whose decision is it as to what combination of powers which you say we have should be exercised? I think that question can be asked without trespassing into the area of what we should, in fact, do. If the determination made by the Competition Commission covers all four years,

do we still have the option at the end of the day to direct Ofcom to make the future adjustment but not determine Years 1 and 2?

MR. ANDERSON: If the future adjustment were going to be made, there would have to be a direction and a determination in relation to the future years which would have to be depressed below what would otherwise have been there.

THE CHAIRMAN: You do say that this is a price control matter that the Competition Commission would have to determine if that is the outcome of this hearing?

MR. ANDERSON: Yes. I would like to come to the division of powers between the Tribunal and the Commission. If the prices are determined in that way so that the prices for Year 3 and/or Year 4 are depressed, then it seems to me that the question of double recovery is not a realistic one. Plainly no one is going to seek double recovery.

The obligation under 13.13, which is the one that people are worried about, is an obligation on the operator. It is on the MNO to adjust and re-calculate the charges and calculate the interest on any sum overpaid or underpaid at the Oftel interest rate. In circumstances where there is an adequate means of recovery by virtue of the future adjustment option, I would have thought it would not be beyond the wit of reasonable people to ensure that no double recovery would take place through that rate.

Of course, if you went the other way and you took the view that the re-determination option was the appropriate one to exercise then it would be very straightforward from the point of view that there would be no question of double recovery. There would simply be a determination at a lower level for all four years and there would be no future adjustment.

If my answer is not very complete, I apologise. I find it difficult to believe that this is really an obstacle, and I am mindful also of what Miss Rose said about plainly it is wise to think about the possibilities, but you are answering certain questions about jurisdiction. In our submission, those Questions, 2(a) and 2(b), should both be answered "yes". Although I am sure that the Commission would be very grateful for any guidance as to how the jurisdiction might be exercised and what constraints there might be on its exercise, I am a little reluctant to venture too far into the question of exactly how it should be done.

I am sorry if that has not been very helpful, but it seemed to me perhaps simpler than it was.

Effective appeal mechanism: we accept that it will not always be possible to redress the position within the context of an appeal, and the classic example submitted many times during this hearing is the case in which one party has lost money as a result of an error and the only way in which the position can be redressed is by a claim in damages. As we all know, there are thresholds, even as a matter of Community law, governing when a claim to

damages may be successful. We say there are really three principles that stem from or flow out of the principle of effective appeal mechanism. The first is that you have to do what you can to render the appeal mechanism effective; secondly, you have to do it, if you can, within the context of the appeal; and thirdly, where the mechanisms exist, you should use them. In this case they do, the two mechanisms exist. If they are not used then the effects, if any, of a successful appeal are going to depend on the accident of how long the price control period is, whether the matter can be determined and the willingness and ability of the parties to bring actions for which there may or may not be a basis under the private law. Such an outcome provides incentives for other parties to delay and we adopt very much the points that were made on moral hazard (day 2, p.28, lines 16 to 19).

On Article 4(1) of the Framework Directive, Mr. Pickford for T-Mobile really made three points. First, he said there is no right to compensation or restitution under Article 4; secondly, he said that if there were such a right that right has not been implemented in domestic law via the right of appeal under s.192; and thirdly, he said that even if the right has been implemented via the right of appeal, the construction advanced by BT is not open to it under the language of the 2003 Act.

I start with the first point, no right to compensation or restitution. The point is made that there is no universal right to either of these things as a general rule for breaches of Community law. We would agree with T-Mobile that the scope of the remedy available is "context dependent", as he said on day 2 at p.82, lines 5 to 6. BT's entitlement to an effective appeal in this particular context extends to entitlement to a remedy in respect of past over-payments. In our submission, Mr. Pickford has not advanced any basis on which to conclude that no such remedy is required to ensure an effective appeal in this particular case.

First, Mr. Pickford made the point that neither Article 4 itself nor the relevant passages from the judgment of the court and the Opinion of the Advocate-General in the *Tele2* case makes express mention of a guaranteed entitlement to compensation or restitution. As Mr. Pickford acknowledged, day 2, p.76, line 21, the analysis cannot end there, you need to analyse precisely what is the content of an effective appeal. Our simple point is that an appeal against a charge control which fails to remedy the fact that we have been obliged to pay excessive MCT charges for the period in question is wholly ineffective.

Then Mr. Pickford referred to the well known case of *Brasserie de Pecheur (Factortame)* for the proposition that three conditions must be met before there is an entitlement to damages against a Member State for breach of Community law. Again, this is not in

dispute, but as Mr. Scott pointed out, day 2, p.78, lines 25-27, this is not a case where BT is bringing an action for damages against Ofcom for unlawful conduct. The position under Community law when you seek reimbursement of sums overpaid is different and much more favourable. That is what we take from *San Giorgio*. The question of relief is context specific. *San Giorgio* is a closer case to this one than *Brasserie de Pecheur (Factortame)*. The distinctions drawn by T-Mobile of *San Giorgio* really boil down to one point, that in *San Giorgio* unlawful charges were imposed by the Member State concerned. In the present case, Ofcom set the amount of the unlawful charges since, in reality, I believe it is the case that none of the MNOs take advantage of the opportunity to charge less than the upper limit imposed by Ofcom. Those charges are given effect by means of private contractual relationships. From the claimants' point of view for the purposes of ensuring an effective appeal, that is a distinction without a difference. What difference does it make to us whether the charges result in over-payment to Ofcom or in over-payment to the MNOs? Of course, neither of these analogies are exact. We are in a price control regime here. The ultimate objective of the price control regime was to look after the interests of consumers. When one is looking at effectiveness one is not just looking, as in some litigation one is, at the interests of the parties assembled in the court. One is looking at the far more important interest of the only people not represented in this court room, who are the consumers, and one has to look at effectiveness with them in mind.

T-Mobile suggested rather tentatively that BT's answer may have lain in interim relief but it freely accepted (transcript day 2, p.82, lines 25-27) that there would have been "great difficulties" in making such an application, and we would respectfully agree with that and indeed endorse the even greater difficulties identified by the Tribunal to the effect that interim relief cannot be available if there is no power to grant on a final basis the relief that is sought on an interim basis.

So for that reason as well as those we have already given, we say that interim relief is no answer. Nor, we say, is it helpful for T-Mobile to refer (day 2, p.85, line 28 and following) to an OFT price control which was set in 2002, well over a year in advance of the date it was due to come into force. That did not happen here, and it is a factor over which BT, and indeed the consumers, have no control. It is no answer to the right to an effective appeal mechanism.

T-Mobile's second point is that BT's right to a remedy is implemented by initiating proceedings before the High Court rather than by virtue of this appeal, though he did not do

much to indicate what proceedings he had in mind or his grounds for supposing that they might succeed.

The Tribunal's judgment in *T-Mobile and O2 v. Ofcom*, which you have at tab 42, but which I do not ask you to turn up now, shows that Article 4 of the Framework Directive can be set aside either by an appeal to the Tribunal or by judicial review. Either procedure is capable of being an appeal within the meaning of Article 4 of the Directive. What that judgment does not show is that where an appeal to the Tribunal is available and where there is no alternative route in judicial review an appellant can be required to pursue separate, additional causes of action in different forums in an attempt to ensure the efficacy of the appeal, and that would be, in our submission, an extraordinary and illogical outcome.

Mr. Pickford's final point was that the construction advanced by BT is not available on the language of the 2003 Act. We find that submission hard to follow. I have already submitted that the 2003 Act contains a broadly defined discretion to set price controls. It does not expressly preclude retrospective amendment in the context of the appeal. Our primary submission is that the language of the Act is sufficiently wide itself to permit the correction of a price control following a successful appeal. Indeed, there are provisions that point firmly in that direction. I mention s.45(10)(e), "revoke or modify", and I mention s.195(4), "giving effect to its decision", just by way of examples. Even if that is not the case on the natural and ordinary meaning, there is certainly no barrier to reading such a power in consistently with Article 4 of the Framework Directive.

Ofcom says that nothing could be done for the past, but it might still have relevance for the next price control period. That is day 2, p.22, lines 23-25. That rather recalls the submission made by Ofcom in January 2008, referred to in para.91 of our skeleton argument, in which they seem to accept that charge controls in one period could be set so as to compensate for under-payment, or presumably over-payment, in a previous period.

We welcome the suggestion that an over-payment in one price control period might be adjusted for or corrected by a change to what should otherwise be the rates at another time, but we do not understand how, if that is accepted as between different price control periods, there can be any resistance based on principle to making an equivalent adjustment within a single price control period.

Questions 3 and 4 concern the allocation of competences between the Commission and the Tribunal. It seemed to us that under these Questions, at least as I have understood them – I have dealt with some of the issues under Question 2 – there is really only one issue between the parties. To the extent that either the re-determination option or the future adjustment

option are within the scope of our pleadings, will they fall to be decided upon by the Commission or by the Tribunal, and that in turn depends on whether they are price control matters. That depends upon the interpretation of s.193 of the Act and Rule 3 of the 2004 Rules. I cannot pretend that BT has very strong views on this matter. Indeed, our views have, I am afraid, wavered over the course of the past few weeks, but it does seem to us on balance, as it does to Vodafone, judging from para.21 of their written submissions, that they are price control matters. May I suggest two reasons for that: first, because in the words of s.193(10) these options "relate[ ] to the imposition of any form of price control", and that seems to us a notably broad formulation; and secondly, because in the words of Rule 3 they relate to "what the provisions imposing the price control which are contained in that condition should be (including at what level the price control should be set)". We understand Ofcom's position, which is that price control matters are defined by reference to the price control originally set by Ofcom – that is the point they made on day 2, pp.10-11. But we think that is a difficult submission because when price controls are expressly defined so as to include also "at what level the price control should be set" (not "should have been set"), that formulation is surely broad enough to cover the remedial relief that we are asking for. In that regard we entirely endorse the comments of Professor Bain on day 2, p.13. After all, the re-determination option would involve no more than a determination by Ofcom in accordance with the Tribunal's direction of the level at which the price controls should have been set in March 2007. Why should that not be a price control matter? The future adjustment option goes a little further by injecting the question of what allowance should be made for the past overpayment, but even that falls, as it seems to us, within the formulation at what level the price control should be set.

We understand the policy arguments that are made by Ofcom, along the lines that it would be desirable if the Tribunal did not have to refer these matters to the Competition Commission because it is well equipped to deal with them itself but, as the current procedure demonstrates, if the Commission requires legal assistance in the exercise of its functions it can and will receive it from the Tribunal.

Miss Rose made a couple of points – I have indicated the very narrow basis on which we agreed with one of them. The point we strongly disagree with, as I indicated earlier, is the idea that as part of what she called its general public law duty to take into account all factors relevant at the time, it could look into all sorts of other things as well, some of which H3G would like to have got into their appeal but did not, and others perhaps that will occur to them along the way. In our submission that is just wrong, it fails entirely to grapple with the

idea that this is an appeal, and an appeal in which the appellate bodies are not simply empowered to quash for reconsideration. This is not the classic judicial review where the local council wrongly refused a licence to a market trader so the licence is quashed and they are told to re-consider the matter again. This is part of a sophisticated price control regime governed by statute, governed by rules and in particular Rule 3(1)(c) that makes it plain that one of the functions of this appellate procedure is to decide at what level the price control should be set. The submission of H3G is, in our submission, very difficult to reconcile with that. As Miss Rose says, it depends on the powers of the appellate body and we agree with that. But, if you look at the nature of the powers of the appellate body in this case they are inconsistent with what she says about Ofcom's residual powers.

I have a note saying: "As Mr. Sharpe said …" but I cannot read it (Laughter) so I will simply have to say that Mr. Sharpe said something about that with which we also agree. (Laughter).

I would add that Miss Rose's point was perhaps a little ironic – the point that she took about this – because she went on to say that she was very worried that the Tribunal was being invited to stray from the questions before it. I did not see a question before the Tribunal about whether or not Ofcom had a general public law duty to take all sorts of other things into account when it eventually gets the result. It may be that she was simply flying a flag or firing a shot across the bows in advance of the 5th February, but that I think is all I need to say about that.

I have had exactly two hours and, unless I can help any further I think I have finished.

THE CHAIRMAN: So your stance is that as far as the outcome of today and last week's hearing is concerned, that on your case we should decide that we would have jurisdiction to order Ofcom either to make a re-determination for four years and we would also have power to order them to make the future adjustment, and then we leave it – because it is a price control matter you think on the balance of probabilities, if I can put it like that – it is really then up to the Competition Commission to decide which of those powers we ought to exercise at the end of the day, and they manifest that decision in the determination that they make. Is that how you see it?

MR. ANDERSON: Yes, and the calculation of the future adjustment option perhaps thankfully, if it is as complicated as Mr. Sharpe has suggested, would in those circumstances be for the Competition Commission rather than the Tribunal, but that is what we say.

THE CHAIRMAN: The decision on what the determination should be is in fact then rolled up with the whole of their determination of the price control matters that were referred to them?

MR. ANDERSON: Yes, which is not to say the Tribunal cannot give such guidance as it thinks appropriate, if it does take the view that both those options exist, 2(a) and 2(b) should both be answered in the affirmative. It seems to us there is no reason at all why the Tribunal should not, as part of the process of expressing its views and its judgment, indicate anything that it feels it helpfully could. I have no doubt the Commission will be as grateful for that as everybody else will.

THE CHAIRMAN: Thank you very much, Mr. Anderson. Mr. Holmes?

MR. HOLMES: Madam, as I indicated before the short adjournment, I have four or five very short points in response to new matters that were raised by Mr. Sharpe in his submissions relating to Ofcom's powers and duties and as to the scope of s.195. I can make those points now, madam, or we can make them in short responsive written submissions, we are very much in your hands in that regard. I understand that the interveners also have responsive points that they may wish to make insofar as I did not cover them, or if it were to be done in writing they would presumably make their own points. Mr. Pickford may, I think, prefer to make his submissions orally today, but of course that would also be subject to the Tribunal ----

THE CHAIRMAN: Well why do you not give us your submissions now, Mr. Holmes.

MR. HOLMES: Very good. As I say, I have five points, two relate to the interpretation of s.195, the third relates to the relevance (if any) of s.192(8), the fourth concerns sections 95 and 96 and their possible application as a means of remedying any overpayments made by BT in the first two years, and the fifth concerns the proper interpretation of MA.3.6 and MA.4.6.

The first point concerns Mr. Sharpe's suggestion that Ofcom's and the Tribunal's role in relation to price control appeals was very strictly limited following the Competition Commission's determination and I understood this to be to support a particular interpretation of s.195(5). He contended that the Tribunal can effectively do no more than to direct Ofcom to apply the revised price control figures specified by the Competition Commission and likewise he contended that all Ofcom can do is to apply those figures as then specified.

We say with respect that this is too rigid a construction of the Tribunal's and Ofcom's powers following the Competition Commission's determination. Section 195(4) provides for remittal in all cases. It follows that Ofcom may have some continuing role to play in

price control appeals following the Competition Commission's determination. This is confirmed by s.195(3) and s.195(4) which specify that the remittal is to be accompanied by a decision and directions as to the action to be taken by Ofcom. The Competition Commission's previous submissions to the Tribunal effectively acknowledge that in an appropriate case there may be a role for Ofcom. I simply give you the reference: tab 40, para.14 of the ruling referring the price control matters to the Competition Commission. There it is recorded that Mr. Sharpe indicated at that stage that the Competition Commission could not promise to specify a precise figure and that in the alternative it might specify a methodology which would then be for Ofcom to apply. So our first point is that Ofcom may have some further role; we do not say that it necessarily will have, it depends on the terms of the determination, but there may be a role to play on remittal. That is relevant because we understood Mr. Sharpe's construction of s.195(5) to rely in part upon the notion that this was a sort of conveyor belt exercise that the Competition Commission would necessarily determine the figure, that Tribunal would then necessarily direct that that figure would be implemented, and Ofcom's role would simply be to slot the figures in. He used that to show, as I understood him, that section 195(5) referred to Ofcom's powers at the time when the decision was originally taken because there would not be anything fresh for that provision to bite on. We say that is wrong, that Ofcom might well need to do further work, and that therefore the natural and ordinary reading of s.195(5) is limiting the actions which the Tribunal can direct Ofcom to perform in that regard, and the actions that Ofcom can then perform on the basis of the directions that it is given. So s.195(5) must be read as constraining the Tribunal's directions as to Ofcom's action on remittal at the time when matters remitted to Ofcom. We adopt Miss McKnight's submission in that regard as to the tense used in s.195(5), that provision does not specify that the Tribunal may not direct Ofcom to take action which Ofcom would not have had the power to take at the time of the original decision.

The third point relates to Mr. Sharpe's reliance on s.192(8). He admitted that this was a hard provision to discern the meaning of but he said that it showed that the Tribunal's focus under s.195(5) should be on Ofcom's powers at the time that its original decision was made. We say that s.192(8) sheds no light on the interpretation of s.195(5) it is simply a deeming provision as to when a decision should be understood as taken, and therefore as to when an appeal should properly be brought. It makes clear that a decision given effect to by the exercise of a power or the performance of a duty should be treated as made at the time when the power is exercised or the duty performed, and this serves two purposes, it ensures that

policy documents recording Ofcom's intention to take a decision pursuant to a specific statutory power or duty are not brought prematurely at a time when that policy document is published, but later when the power is actually exercised or the duty performed. It also supplies clarity in calculating the limitation period, which is provided for in subsection 192(4). So with respect we do not agree that that provision should inform your interpretation of s.195(5).

My fourth point concerns sections 94 and 95.

MR. SCOTT: My recollection is that we canvassed 192(8) in the context of the radio spectrum sequencing appeal, but it does specifically refer not just to the purposes of this section, which is the appeals' section, but it then goes wider in the following provisions of this chapter, which suggests that we are to read it in the context of the subsequent sections. The subsequent sections include 193 and 195, so that I think just limiting it the way that you have suggested may be limiting it a bit too far, perhaps?

MR. HOLMES: Sir, I see those words, and I see that it does relate to the entirety of the Chapter. Having said that it is a little difficult to read across the specific text of subsection 8 in a way which informs the interpretation of s.195(5) I would submit. I think it is a fairly minor point, sir, I would be content to leave it there.

As regards sections 94 and 95, Mr. Sharpe suggested that the next stage, following Ofcom's application of new price controls for the whole period would be for Ofcom to bring contravention proceedings against the MNOs. Madam, we are not clear that this is really a matter for you today, but we should record here our concern that such a course would, as it appears to us, amount to the clear imposition of a retrospective remedy on the mobile network operators. They did not contravene the rates legally applicable in Years 1 and 2, and to have fined them to have contravened on the basis of new rates applied subsequently appears to us contrary to the purpose of acting against contraventions of the legally applicable rate, interpreted in accordance with the well known and accepted principle of statutory construction that one avoids a retrospective result where possible.

Finally, madam, as to conditions MA.3.6 and MA.4.6, we would firstly endorse Mr. Anderson's first submission as to the appropriate reading of conditions MA.3.6 and MA.4.6, and we would also dissent from Mr. Sharpe's reading of those conditions as regards the point that I raised with you after the brief adjournment when I finished my submissions on Day 2. You will remember, madam, that I raised a concern about the extent about which one could roll over a correction in relation to a year other than the preceding year. Madam, we still adhere to that submission. For your note the reference in MA.3.6

and MA.4.6 is to the first, second, or third relevant year, which ever happens to be the relevant year in lines 2 or 3. We say that the following relevant year referred to in line 4 must be read as the year following which ever is the relevant year from the first, second or the third, but not all three taken together, or more than one year. That was certainly the intention of the draftsman madam. Perhaps I am taking this a little fast. If we were to go to MA.3.6 and MA.4.6.

THE CHAIRMAN: I think we have the point.

MR. HOLMES: You have the point, very good madam. Those are my submissions.

THE CHAIRMAN: I seem to have missed number 2.

MR. HOLMES: I am sorry, 1 and 2 were both related to s.195. The first point was simply to make the point that in some cases one would not immediately and necessarily find oneself in a position where you had a figure from the Competition Commission which would then be plugged in by the Tribunal by way of a direction to Ofcom which Ofcom would then be mandated to apply. There is room left for Ofcom to take independent action and that supports that construction.

Our second point is that that supports a construction of s.195(5) we say, which focuses on Ofcom's powers at the time when it comes to deal with the directions that are made to it following remittal. In other words, s.195(5) should be read according to its ordinary meaning which appears to relate to Ofcom's powers in relation to the matters that are before it following remittal.

THE CHAIRMAN: Yes, that was the point on which you said you agreed with Vodafone.?

MR. HOLMES: Yes, madam.

THE CHAIRMAN: What do you say the actual time is? On your argument, where there cannot be "retrospective" re-determination, is the time from which you can make a decision the time for the disposal of the appeal or the time of the Competition Commission's determination or the time when you actually make your decision following remittal?

MR. HOLMES: The logic of my position must be that it is the time when we actually make our decision because we are obliged, we say, to act prospectively and that must mean at the moment when we act?

THE CHAIRMAN: Yes. The final question: what do you say to Mr. Anderson's point that although he does not rely on MA.3.6 and 4.6 as being directly applicable in the way that Mr. Sharpe seemed to suggest, nonetheless he says: "There they are in the condition, nobody has said they are *ultra vires*, where does the *vires* for having that kind of adjustment come from?" Now, you have said in your point number 4, that it is not a 94 or 95 type

adjustment, because that clearly has a penalty provision attached to it, and that is for real contraventions, but were do you say the source of the power to include 3.6 and 4.6 in the condition is then?

MR. HOLMES: Madam, we say it is part and parcel of our power to impose a price control. It is imposed *ex ante* in order to condition the incentives of the mobile network operators, so we say that the power is in our provisions to impose a price control; it is simply part of the price control.

THE CHAIRMAN: But you do not accept that you can read from that that this is just an illustration of an exercise of a more general power to make an adjustment in future years for past over payments.

MR. HOLMES: So its implications for the future adjustment option – BT's argument is that one can justify a future adjustment in terms of the purposes of s.88(1), we say that that argument would need to be made out fully and carefully by reference to those purposes in order to show that the efficient charge level should be different from that which would otherwise prevail to reflect the past over payments. So the argument must be made in terms of the purposes in s.88(1). We say that those purposes are clearly met in the case of MA.3.6 and MA.4.6 because it conduces to an efficient outcome, and one which avoids competitive distortions and therefore serves the interests of end-users because it reduces or removes the incentive of mobile network operators to exceed the charge. They know that from the outset and it therefore conditions their incentives so it is therefore within those purposes specified.

THE CHAIRMAN: And how would you then express the purpose which Mr. Anderson is -- What would be the purpose of the future adjustment that Mr. Anderson is urging us that we have jurisdiction to make?

MR. HOLMES: Well, he has clarified that it is not a compensatory purpose in the sense of remedying BT in any simple or straightforward sense, but the fact that they have paid more than they should have done had the correct legal level applied. We say that that is a proper and necessary limitation of his case, given the purposes enumerated in s.88(1). It would then be for BT to make a fully reasoned argument as to why the purposes specified in s.88(1) require an adjustment to be made -- why the adjusted level would further the purposes set out in s.88(1). That is obviously for BT, but it remains our position that we do not think that that has yet been done. We have heard an argument about -- There was a suggestion that efficiency would be promoted for the final two years by adjusting for the first two years because of considerations of dynamic efficiency, as I understand it - not

short run allocative efficiency, but some other considerations relating to excessive pricing and the competitive distortion that would result therefrom. But, these are very complex arguments. I was not entirely clear what Mr. Sharpe understood to be the task of the Competition Commission when these matters went back, if the future adjustment option were the one that they were to pursue. But, the low months which he referred to I took to mean that the Competition Commission also recognises that this is quite a complex equation. It is not simply a matter, as Dr. Teh hypothesised in the transcript to which you were taken, of calculating the difference in net present value of the payments that have been made as compared with those that would have been made. That would be to fall into the trap of a compensatory purpose. Instead, it must be a more fine-grained and specific argument by reference to s.88(1)(b). Madam, I realise I am going slightly beyond my brief. So, if you give me a moment, I shall just check that I have not mis-stated the position.

THE CHAIRMAN: No. You are getting the thumbs-up very clearly there. You say that the compensatory objective would be outside s.88, and if you are going to make an adjustment for anything more subtle than the simple compensation for overpayment, then that is a very difficult task and one which has not really been explained.

MR. HOLMES: Yes. My understanding of Mr. Anderson's case is that he very fairly avoided making a straightforward compensatory claim. Unless I can be of further assistance, madam?

MR. SCOTT: There is one point in relation to MA3.6 and 4.6. Usually when I look at the end of an Ofcom decision I can find the precedent either in the rest of the statement or in the consultation which led up to it. Speaking for myself - and it may be because my memory is poor - I cannot actually remember where the precedent for MA3.6 and 4.6 comes and, therefore, what debate took place in reaching MA3.6. Now, you may not, like me, have an instant answer to this, but I just wonder whether it throws any light at all?

MR. HOLMES: Sir, you have given us a number of interesting and valuable questions. To be clear, we have taken those on board and we have been considering them - in particular, the question you have raised about practice in other Member States. Insofar as our researches turn anything up, it is our intention to write to the Tribunal, copying the parties as we have promised. So far we should say that we have not had any great success in finding experience from other Member States that has been helpful, but I am sure that we can, insofar as there is a precedent, inform you of it in short order. I doubt whether I can do that while I am on my feet.

MR. SCOTT: No. I understand. I should say that so far as I am aware, reading through the material that the Commission provides to us, I have not found an immediate example. But, those instructing you get all these documents for consultation. We do not. So, they are more likely to know than we are.

MR. HOLMES: Yes, sir. Indeed, we have had recourse to telephone calls to various of the other regulators to see whether that can turn anything up. We will inform you if anything does come to light.

MR. SCOTT: Thank you very much.

THE CHAIRMAN: Mr. Pickford?

MR. PICKFORD: Madam, I have two short responsive points which will take a few minutes.

The first of those is in response to a point raised by Mr. Sharpe. He said this morning of the MNOs that they ran the risk with their prices; they had an entirely free choice; and that the MNOs took the risk in relation to their prices and they must now accept the consequences. They may not be his exact words, but that was certainly the essence of the submission that he made. We were somewhat disturbed to hear the Competition Commission making that submission for two reasons. We say it is a bad submission. Firstly, Mr. Sharpe failed to explain how, as a practical matter, an MNO could possibly have attempted to set its prices not on the basis of the actual price control that was in place, but on the basis of some hypothetical price control that might be in place if BT was successful -- or, indeed, Hutchison, for that matter, was successful in relation to its appeal.

Given the multiplicity of different grounds that have been raised by the two parties bringing appeals and the various different possibilities to the extent to which some, or all, of them might have been accepted, we say that simply would have been an impossible task. The Tribunal is well aware that we had everything on the table from NPZ - namely, no termination rates at all - through to potentially termination rates increasing at least for some parties if Hutchison was successful in its appeal and also depending on whether the interveners were allowed to make the submissions they made in their pleadings potentially increasing for them. So, we say that as a practical matter that task would have been impossible.

But, moreover, there is a more fundamental objection, which is this: We say it betrays a misunderstanding of the economics of the call termination market because it is undisputed that there is a very substantial waterbed effect. We can argue about whether it is 90 percent, or whatever it is. But, the fact that there is such an effect is not in contention.

It is also undisputed that the retail market is effectively competitive. It follows from that that the competitiveness of one mobile operator in the retail sector is dependent on the wholesale rates that it can charge. If you unilaterally reduce your termination rate, that makes every customer that you attract less attractive to you than the same customer would be to your competitors who are charging a higher termination rate. That means that they can offer better retail prices than you can. That means that you will lose market share. So, given the competitive dynamics in the sector we say it would simply be impossible for a mobile operator to set anything other than the highest price that it is allowed to set under the price control because if it does not do that, it will immediately find itself losing out on a very substantial basis to its competitors. Given that each of the five competitors faces that same problem, they will all necessarily resolve it in the same way. So, we say, for those two reasons, that Mr. Sharpe's submission is not sustainable.

The only other point is a very short responsive point in relation to a submission made by Mr. Anderson in relation to the availability of interim relief. If I could just say this - and this also develops on a point that the Tribunal raised with me before: A Tribunal or a court has no jurisdiction to award final relief to a claimant who has no cause of action against the defendant from whom they are seeking final relief. That does not mean that that court has no jurisdiction to award interim relief to the same claimant. There is a difference in the position at an interim stage and the final stage. That explains potentially the apparently paradoxical result that was advanced by Mr. Anderson, and which was also put to me by the Tribunal.

THE CHAIRMAN: What you seem to be envisaging is that at some point during these proceedings we could have said to Ofcom, "Please lower the rate in the price control pending the outcome of this appeal". My supposition was whether, if BT had asked us to do that, you would have said, "Well, look, s.195 says you can only order Ofcom to do things that it has power to do. It has no power to make some kind of interim price control pending a final resolution of its investigation into what the price control would be. It has to carry out an investigation and then issue a price control". So, I am still not quite clear what your answer is to that point.

MR. PICKFORD: I think we would submit that the essence of whether one is granting interim relief or final relief it does to some extent depend on precisely where you are and who is granting the relief. The Tribunal cannot be required to jump through all of the same procedural hoops in relation to an appeal, we accept, as it would the very first time that it makes a price control decision. This goes back to the point that has been raised by H3G. It

would be entirely wrong to say, in the context of a successful appeal you simply go back to stage one and you go through everything again. So there has to be, in the procedural terms, we accept, some sort of difference between what happens following an appeal and what happens *ab initio*, the very first time around. What we do not accept is that in substantive terms there can be any difference. It is that that is the critical point of distinction between us and BT, and, in my submission, answers your point, madam, about the difference between interim relief and final relief. We say that really is a procedural difference, rather than a substantive difference.

THE CHAIRMAN: Thank you. Miss Bacon?

MISS BACON: I think I have to deal with Mr. Anderson's jury point this morning about Mr. Green's comments at the CMC.

THE CHAIRMAN: I thought, Miss Bacon, that you had some points you wanted to make in relation to Mr. Sharpe's submissions. I am not sure that you have a right to reply to Mr. Anderson's reply.

MISS BACON: My point is that this was a document that we have not been shown before this morning, so in the normal way I would have a right of reply to a new document which is produced only this morning. Mr. Anderson has had seven days to consider his reply and he could equally have produced it before his previous submissions. I think I should deal with it, if only briefly. It is unfortunate that we were not provided with the entirety of the transcript, nor have we had the time obviously to go and look at the skeleton arguments which preceded the CMC, on which many of the submissions in the CMC were based. Hindsight is a wonderful thing. I wish I could give the Tribunal some idea of what Mr. Green had in his mind when he made those submissions. I cannot. I actually have obtained the whole of the transcript, and reading the whole of the transcript does not shed any more light on it either. Certainly it has to be borne in mind that this seem to have been that this seems to have been an off-the-cuff remark made in the context of a CMC to decide two appeals, one of which was clearly raising the glide path submissions, and that was the context in which any discussion of the glide path arose.

So my first point is that I cannot say what was in Mr. Green's mind and the transcript sheds absolutely no light on it. He did not develop the point in any way as to what he understood by a prospective adjustment of the glide path.

Several things do come out of that CMC. First of all, in the passage immediately after the one to which Mr. Anderson took you this morning when a question was put to Mr. Kennelly, and I asked Mr. Anderson to read on, it is clear from what Mr. Kennelly said that

he certainly understood Mr. Green to have been talking about Ofcom's power to adjust the glide path. That may well be what Mr. Green himself had in mind. In other parts of the CMC there does seem to have been a discussion, including some comments made by Mr. Flynn at p.48 of the transcript concerning the respective jurisdictions of Ofcom and the Competition Commission. It was certainly in issue at that stage as to whether the Competition Commission or Ofcom would ultimately have the final power to make any consequential determinations.

The second point is that it can be seen from the urgency that was certainly referred to by both BT and Hutchison 3G, which everyone will be aware of, that it certainly does not seem to have been in either of their contemplation that the unexpired periods could simply be compensated for by a future adjustment. If that had been in their contemplation there would not have been the need for the degree of urgency which they were pressing on the Tribunal. I have in mind that part of what Mr. Kennelly was concerned about was loss of market share. He returned to it at a number of points in the transcript, including – though it is not provided to you – the point that every day that passed there were sums that, on his case, he was giving away to the MNOs that would not be recouped, and that was precisely the reason why he was asking for a degree of urgency greater even than the Tribunal was prepared to contemplate.

The third point is that nothing in the transcript from my quick reading of the whole transcript during the course of today gives any indications as far as I am able to see as to any of the assumptions as to the parties regarding the scope of BT's appeal.

Those were just a few short points. I did want to make one point on what Mr. Sharpe said, but that has been covered by my friend Mr. Pickford already.

Can I just say one thing on Miss Rose's comments. Again, we did not know what Miss Rose was going to say before today. This is perhaps the one point on which I agree with BT, which is that if the decision is remitted to Ofcom we do not consider that at that point Ofcom then engages in some kind of a free-for-all, including on matters that have not been the subject of an appeal. The part of Miss Rose's submissions with which we do agree, is the part in which she said, well, if it comes to the point when something is not within the jurisdiction of the Competition Commission or the Tribunal to address, then Ofcom can deal with it on remittal if it logically follows from the appeal. That was, I believe, the point put to me by Mr. Scott that even if it is the consequence of the way that BT framed their appeal that this Tribunal cannot deal with Years 1 to 3, then we accept that it is within Ofcom's powers to raise that as a logical consequence of the matters in the

appeal. What we do not accept is that Ofcom can go beyond that to matters which were entirely outside and were actually rejected by the Tribunal, such as the on-net/off-net issue.

THE CHAIRMAN: Miss Demetriou.

MISS DEMETRIOU: Madam, the points I wanted to make in response to Mr. Sharpe have been covered by Mr. Holmes and I am content simply to adopt his submissions.

THE CHAIRMAN: Thank you very much. Miss McKnight?

MISS McKNIGHT: Madam, I would like to supplement what Mr. Holmes said in just two respects. The first is as regards conditions MA.3.6 and 4.6. The Tribunal asked what is the statutory source or basis for those provisions. We would say that the price control itself is adopted pursuant to s.87(9)(a), but that conditions 3.6 and 4.6 are ancillary provisions which are adopted pursuant to s.87(9)(d) as obligations on the MNOs to adjust their prices in accordance with directions given by Ofcom. We would say that the whole of s.87(9) empowers Ofcom to adopt *ex ante* provisions, and is all governed by s.88. So we endorse what Mr. Holmes has said, that when Ofcom was adopting conditions 3.6 and 4.6 as a very slight enabling provision to tweak the TACs from year to year it did so within a very limited compass. It recognised that it had already decided what would be the efficient path for pricing the TACs for Years 1 to 4. Conditions 3.6 and 4.6 were intended to allow only the most minimal adjustments from year to year or within the year, and Ofcom reserved to itself a discretion to ensure that it would make directions only to the extent genuinely appropriate within that very narrow limit.

We used the word "wilful" to say that it was intended to address wilful default. We used that term to distinguish from a situation where there was a risk of forecasting error, because in this price control forecasting is not a necessary input to setting a charge that will comply with the TAC.

We also are mindful of the fact that MA.3.1 and 4.1, the basic provisions imposing the obligation to comply with the TAC, imposed an obligation to use reasonable endeavours to comply with it. This is not just a case where Ofcom says, "Here is a TAC, if you do not comply with it I might direct you to do something later". Because there is a stand-alone obligation to use reasonable endeavours to comply with it, Ofcom knows, in adopting 3.6 and 4.6, that there is a very limited scope, or likelihood of departure from the correct TACs. We say that if Ofcom had adopted MA3.6 and 4.6 in a form that allowed widespread reconsideration and carry forwards from one year to the next of under and over-recoveries we would have objected to it and said that it was *ultra vires* because it would contemplate many modes of exercise which would not be consistent with s.88. The only reason

Vodafone would have found this acceptable is because it was very much of a *de minimis* nature and had a very, very limited scope for use. It would, as I have submitted this morning, open up wholly different effects if it were to be maintained in a world where the TACs for years 1 and 2 had been redetermined. So, that would be tantamount to taking a new decision which would be wholly unacceptable.

The only other point I wanted to make at this stage is on a different point. Mr. Sharpe suggested this morning that I was mistaken in thinking that the Tribunal's determinations on, for example, the spectrum issue would rely on new evidence that was not available to Ofcom. I would just draw your attention to Footnote 2 to my speaking note this morning where I cited three instances where evidence has been put to the Competition Commission which could not have been available to Ofcom - brokers' reports that post-date Ofcom's statement, a detailed analytical report of Dr. Maldoom that simply was not drafted until it was commissioned for this appeal, and up-to-date evidence as to cheap handset prices which are said to support the case that there should be no externality surcharge.

In the provisional determinations the Competition Commission says in terms that 'whilst individual pieces of evidence of that sort were not compelling, collectively they were', at least as to the spectrum issue -- We perfectly accept that the Competition Commission may well be moving on from their provisional determination to reach their final determination, but from our reading of the provisional determinations the Competition Commission will have work to do between now and the final determination if their final decisions do not rest on new evidence.

THE CHAIRMAN: There is a difference, I think, though between new evidence which could have been available but was not at the time in March 2007 and new evidence about things which have only occurred since then. I think what Mr. Sharpe was saying is that, yes, they do rely on the former kind of new evidence, but not on the latter kind. Is that right, Mr Sharpe?

MR. SHARPE: Madam, I do not think I could have been clearer this morning. In fact, I drew attention to the spectrum ----

THE CHAIRMAN: But is that right?

MR. SHARPE: Well, it is right, but it is not the complete answer. I stated in terms, yes, we had looked at material supplied to us about the spectrum. I actually anticipated Miss McKnight's submissions now, but I made it absolutely clear that although we no doubt learned something, it was not our intention to rely upon it. I said that this morning, and I say it now.

THE CHAIRMAN: I think that is clear now then.

MISS McKNIGHT: Thank you. In that case, it serves to reinforce my point that until we see the final determination and see what it is based on, it would be premature to try to decide how any powers that are available to Ofcom should be exercised to take account of what we know now -- or, will eventually know -- to be a better estimate of the efficient charge.

THE CHAIRMAN: Thank you.

MR. SCOTT: Miss McKnight, while you are on your feet, just to make sure that I understand your point on MA3.6 and 4.6, what you are saying is that you go round between s87 and s.88. In s.87(9)(d) you can have a condition which has the adjustment provision in it provided that the whole condition satisfies s.88(1)(a) and (b), but that if you are going to exercise the discretion to make the adjustment in accordance with such directions given by Ofcom as they consider appropriate, then in exercising that discretion Ofcom have to go back and ask themselves the question, "Are we still inside s.88(1) in making those adjustments?"

MISS McKNIGHT: Yes, because where they have reserved to themselves in the condition a power to make a future direction, it is clear that that power has been reserved for the purposes of furthering the attainment of the objectives of s.88 and must be exercised accordingly. But, it must also be defined in scope accordingly. We say that the scope would be transformed if it were to apply to redetermined TACs for Years 1 and 2. A point I would make in passing is that I think s.192(8), to which Mr. Sharpe referred also, has some bearing here because if we were later to wish to challenge a decision by Ofcom to use its power to give such a direction, time for such an appeal would run not from when MA3.6 was adopted, but from when that decision was made, which is why it is helpful to have in s.192(8) a provision that tells us when time starts to run and therefore expires for an appeal.

MR. SCOTT: Thank you.

THE CHAIRMAN: Thank you very much, everybody. So, I take it then that nobody now wants to put in written submissions, and that we now have all the submissions that we are going to receive in relation to this matter. We are, of course, well aware of the fact that it is urgent for us to produce a decision on this, and we will do our best, but this is a very complicated matter, as has become apparent even if it was not apparent before we started last Thursday. Thank you to everybody for making yourselves available today for the continuation of the hearing. We will be in contact with you in the usual way when we are ready to hand down our ruling.