Neutral citation [2009] CAT 11

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1083/3/3/07
1085/3/3/07

Victoria House
Bloomsbury Place
London WC1A 2EB

2 April 2009

Before:

VIVIEN ROSE
(Chairman)
PROFESSOR ANDREW BAIN OBE
ADAM SCOTT OBE TD

Sitting as a Tribunal in England and Wales

BETWEEN:

HUTCHISON 3G UK LIMITED
BRITISH TELECOMMUNICATIONS PLC

Appellants

-v-

OFFICE OF COMMUNICATIONS

Respondent

- supported by -

TELEFÓNICA O2 (UK) LIMITED

T-MOBILE (UK) LIMITED

VODAFONE LIMITED

ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED

Interveners

JUDGMENT ON THE DISPOSAL OF THE APPEALS

APPEARANCES

Miss Elizabeth McKnight (Partner, of Herbert Smith LLP) appeared on behalf of Vodafone Limited.

Mr. Jon Turner Q.C. and Mr. Meredith Pickford (instructed by Regulatory Counsel, T-Mobile) appeared on behalf of T-Mobile (UK) Limited.

Mr. Tom Sharpe Q.C. and Mr. David Caplan instructed by and appeared on behalf of the Competition Commission.

Miss Dinah Rose Q.C. and Mr. Brian Kennelly (instructed by Baker & McKenzie LLP) appeared on behalf of Hutchison 3G UK Limited.

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

Miss Kelyn Bacon (instructed by SJ Berwin LLP) appeared on behalf of Telefónica O2 UK Limited.

Miss Sarah Lee (instructed by BT Legal) appeared on behalf of British Telecommunications Plc.

Mr. Josh Holmes instructed by and appeared on behalf of the Office of Communications.

INTRODUCTION

1. On 18 March 2008 the Tribunal referred to the Competition Commission ("the CC") the specified price control matters arising in these two appeals pursuant to section 193 of the Communications Act 2003 ("the 2003 Act"). The reference comprised eight questions. Question 1 asked the CC to determine the specified price control matters arising in BT's appeal. Questions 2 to 7 asked the CC to determine the specified price control matters arising in H3G's appeal. Questions 2 and 3 raised issues about whether the price control set H3G's MCT prices too low because they did not take account of various factors relating to H3G's particular circumstances in the market. Question 8 related to both appeals and asked:

> "Having regard to the fulfilment by the Tribunal of its duties under section 195 of the Communications Act 2003 and in the event that the Competition Commission determines that [OFCOM had erred in any of the ways alleged in the appeals] the Competition Commission is asked to include in its determination:
>
> (i) clear and precise guidance as to how any such error found should be corrected; and
>
> (ii) insofar as is reasonably practicable, a determination as to any consequential adjustments to the level of the price controls".

2. On 16 January 2009 the CC notified the Tribunal of their determination of those price control matters ("the Determination"). Broadly, the CC rejected H3G's appeal so that the CC's answers to Questions 2 to 7 disclosed no errors on the part of OFCOM. The CC determined in relation to Question 1 that OFCOM had erred in two respects: in its approach to the inclusion of spectrum costs and in its inclusion of a network externality surcharge in the target average charge ("TAC"). The CC therefore had to consider the answer to Question 8 in relation to those two errors. As regards the second error the correction to be made and the consequential adjustment to the price control was straightforward: the amount that OFCOM had included for the externality surcharge could just be deducted from the TACs. But the answer to Question 8 in relation to the errors found in OFCOM's approach to the inclusion of spectrum costs was much more complicated and is, in large part, the subject of this judgment.

3. According to section 195 of the 2003 Act the Tribunal must now dispose of these appeals by deciding the appeals on the merits, by reference to the grounds of appeal. According to section 193 of the 2003 Act, we must decide the price control matters arising in these appeals in accordance with the determination of the CC except to the extent that -

> "… the Tribunal decides, applying the principles applicable on an application for judicial review, that the determination of the [CC] is a determination that would fall to be set aside on such an application" (see section 193(7) of the 2003 Act).

4. Many of the CC's key decisions have been accepted by the parties. Indeed, neither of the appellants challenge any aspect of the Determination even though all of H3G's grounds of appeal were dismissed and BT did not succeed on one of its grounds of appeal. But three of the Interveners, Orange, T-Mobile and Vodafone, have argued that certain aspects of the determination cannot stand and should be set aside.

5. The challenges brought by the three Interveners focus on three aspects of the Determination. The first is the way in which the CC applied the 2G price cap when assessing the value of 3G spectrum to the MNOs. The second is the asymmetric treatment of H3G, namely the fact that H3G's final year TAC was set at a higher level than the TAC of the 2G/3G MNOs because of the CC's approach to the inclusion of spectrum costs and network operating costs. The third is the fact that the CC concluded that OFCOM should be directed to redetermine the TACs for all four years of the price control and not just for the period that remains unexpired at the time when the redetermination takes place. The following more detailed account of the CC's Determination therefore focuses on those three aspects.

THE CC DETERMINATION

6. The question of how the MNOs' use of 3G spectrum should be reflected in the price control conditions was a key issue in BT's and H3G's appeals. The CC rejected the way that OFCOM had dealt with 3G spectrum costs and found in particular that OFCOM had erred in relying on the fees paid for 3G spectrum by the MNOs in the spectrum auction held in 2000. None of the parties is seeking to

reinstate the way in which OFCOM valued 3G spectrum in the March 2007 Statement.

7. Having rejected that approach, the CC then considered an alternative approach proposed by BT. This approach was referred to as the 2G cap and was discussed in section 2.9 of the Determination. The justification for the 2G cap approach to valuing 3G spectrum was as follows. The CC found that there is no material difference in the quality of the service that is provided when a call is terminated on a 3G network as compared to when it is terminated on a 2G network. In a competitive market, therefore, MNOs would not be able to charge a higher wholesale price for termination on the 3G network than the price charged for 2G call termination. The price for 2G voice call termination would therefore be the cap or upper bound of the amount that MNOs can charge for terminating calls using 3G spectrum. Secondly, it was accepted that 3G technology is more efficient than 2G for carrying voice traffic. The 2G price cap would allow the MNOs to keep any cost savings that they derived from using 3G technology for terminating voice calls. As the CC put it (paragraph 2.9.12 of the Determination) "to the extent that 3G spectrum could be said to have been acquired to save costs in the provision of voice services, efficiently incurred costs could be reimbursed by adopting the principle of the 2G cap".

8. In order for the MCT charges to provide efficient price signals to consumers, the CC said that the charge controls should be set at levels that enabled MNOs to recover the opportunity cost of using 3G spectrum for voice call termination. The CC recognised that in assessing that opportunity cost, it was important to consider whether the use of the spectrum for voice call termination would displace more valuable data services. If it would, the value of those data services would be the opportunity cost of 3G spectrum for voice termination. This implied that the 2G price cap would not be appropriate if (a) there were or would be capacity constraints on the use of 3G spectrum over the explicitly modelled period, so that it could be said that using that spectrum for voice services was displacing its use for data services and (b) those displaced data services were more valuable than the voice services. The CC said that whether those two conditions exist "is in principle an empirical matter". Further, the CC said "While determining whether

they exist may be a difficult task given the different ways in which network capacity can be flexed and the uncertainty associated with long-term forecasts, ... we do not think that this assessment can be avoided if the charge controls are to be set to correctly reflect the opportunity cost of 3G spectrum." (See paragraph 2.9.17 of the determination.)

9. The CC found that neither of the conditions existed - there was no capacity constraint on the use of 3G spectrum for data services and the value of data services which would be displaced if there were such a capacity constraint was lower than the cost savings derived from terminating voice calls on 3G rather than 2G network. There was no need therefore for the charge controls to exceed the 2G price cap to enable the MNOs to recover the full opportunity cost related to data services.

10. The CC then considered whether, looking at the way that the MNOs are charged for the use of 2G spectrum, it is right to treat the spectrum allowance in the 2G MCT price as properly representing the opportunity cost of 2G spectrum. Only if it does would it make sense to treat the 2G cap as an upper bound for the cost of 3G voice termination. The 2G spectrum costs included in the current 2G price cap are set pursuant to the Wireless Telegraphy Act 2006 to reflect a range of spectrum management objectives in a process known as Administered Incentive Pricing or AIP. OFCOM and the Interveners argued during the CC's investigation that there were various reasons why, even if the 2G price cap idea was accepted as a matter of principle, it was not fair to rely on the 2G price cap actually in place because of the way AIP charges are calculated. The CC described the objections that were raised relating to the way that AIP works but concluded that the use of the current 2G AIP levels to derive the level of the 2G cap was appropriate.

11. The CC then had to deal with how the 2G price cap applied to H3G which operates only a 3G network. The CC concluded that as a matter of principle the 2G price cap was appropriate for a 3G-only operator although this "would not necessarily lead to the same ppm rate as for the 2G/3G MNOs" (paragraph 2.9.153). Whether the ppm rate for H3G should be the same as that for the 2G/3G MNOs was then

considered in section 16 of the Determination. That is the section which responded to Question 8 of the March 2008 price control reference.

12. The CC approached Question 8 by considering what should be the TAC in the final year of the price control (that is 2010/11) and then considering the glidepath from the start of the price control period (that is 1 April 2007) until that final year. For the 2G/3G MNOs the CC found that the consequence of accepting the 2G price cap was clear. The 2G price cap was 3.7 ppm. This was sufficient to cover the 2G/3G MNOs' network costs of 2.7 ppm. Applying the price cap would therefore mean that the value of 3G spectrum was set at 1.0 ppm for the 2G/3G MNOs. This was most likely more than enough to reflect the marginal forward looking opportunity cost ("MFLOC") of 3G spectrum. To this was added the 2G/3G MNOs' administration costs per unit which, it is now accepted on all sides, should be 0.3 ppm. This gave a final 2010/11 TAC of 4.0 ppm for the 2G/3G MNOs.

13. The CC noted that the position is not so straightforward when it comes the H3G, the 3G-only operator. It was recognised that H3G's efficiently incurred network costs per unit of MCT were higher than the corresponding network costs of the 2G/3G MNOs: 2.9 ppm compared with 2.7 ppm. This meant, according to the CC, that there were two "competing considerations" to be balanced. On the one hand the reasoning behind the adoption of the 2G price cap implies that any MCT charge differentials between operators would not be sustainable in a competitive market. This points in the direction of subjecting H3G to the same cap on network and spectrum costs as the other MNOs. On the other hand, OFCOM had previously allowed for certain differences in the level of efficient costs to be reflected in the final charge control level and there was widespread recognition at the European level that such a differentiation could be legitimate, depending on the particular circumstances of the national market – at least on a temporary basis. On balance, the CC concluded that the element incorporated in the price cap to reflect the value of 3G spectrum should be the same for H3G as for the 2G/3G MNOs but that H3G should be allowed a higher amount to reflect their higher unit 3G network costs (2.9 ppm rather than 2.7 ppm) and higher administration costs (0.4 ppm rather than 0.3 ppm).

14. There was then a debate about how to ensure that the spectrum value allowed to H3G was "the same" as the spectrum value allowed to the 2G/3G MNOs. A simple way to do this would be to say that in constructing the 2G/3G MNOs' charge an amount of 1.0 ppm had been included for the value of spectrum. One would then add to that 1.0 ppm H3G's higher network costs (2.9 ppm) and administration costs (0.4 ppm) and arrive at a TAC of 4.3 ppm. A more complicated way of treating the value of 3G spectrum was to work out using OFCOM's cost model a capital value corresponding to 1.0 ppm in 2010/11 for the 2G/3G MNOs and then, applying the same model, calculate what ppm in 2010/11 would be consistent with H3G recovering that capital value.

15. In the Determination the CC chose the latter more complicated route. They worked out that this method – referred to by the parties as "reversing out" the 3G spectrum value – translated into an allowance of 1.1 ppm in H3G's price. To this they added the network costs of 2.9 ppm and the administration costs of 0.4 ppm and came to a final year TAC of 4.4 ppm for H3G.

16. These final year TACs for all the MNOs are substantially lower than the final year TACs set by OFCOM in the March 2007 Statement which were 5.1 ppm for the 2G/3G MNOs and 5.9 ppm for H3G (all sums expressed in 2006/07 prices).

17. The CC then considered the glidepath that should apply to move the MNOs from the MCT rates they were charging at the start of the price control period to the new final year TAC. The CC concluded that they should not disturb the principles that had been applied by OFCOM in setting the TACs for the intervening years. They determined that OFCOM should make such changes as were necessary to the price control conditions to generate TACs for each year of the price control which are consistent with the CC's views on the glidepath so that they arrive at the 2010/11 TAC for each of the MNOs.

18. The Tribunal held a case management hearing on 2 February 2009 after the parties had had an opportunity to consider the CC's Determination. The three Interveners urged the Tribunal to hold a further hearing to consider all their judicial review points. One of the Interveners submitted that for the Tribunal to decide the issues

on paper would deprive them of the most basic rights of the English judicial system, namely a hearing at which they could challenge the CC's Determination. Another said that they "would vehemently resist any determination of this matter solely on paper". The Tribunal rejects the suggestion that any party has a "right" to an oral hearing when the Tribunal comes to the stage of deciding whether it should set aside all or part of the CC's Determination of price control matters. There is no proper analogy here with the procedural position of an applicant in judicial review proceedings in the Administrative Court. In the procedure set out in sections 192 – 195 of the 2003 Act, the Tribunal is not a superior, appellate body vis-à-vis the CC: both bodies are acting in an appellate capacity in relation to OFCOM's decision. This is the penultimate stage in what has been a very long and complex procedure. All the parties and this Tribunal are very familiar with the issues to be considered. The Tribunal notified the parties on 11 March 2009 that it had decided it was necessary to have an oral hearing only with regard to the substantive aspect of Ground 2. That hearing took place on 24 March 2009. The other grounds of challenge have been resolved following the Tribunal's consideration of the detailed and comprehensive written submissions from the parties and the CC.

The correction of an error in the CC's reversing out calculation

19. Shortly before the hearing, OFCOM wrote to the CC pointing out an error in the way that the CC had calculated the "reversing out" of the 3G spectrum value in the 2G/3G MNOs' charge and its transposition into the H3G charge. The error was to leave out of account the fact that in OFCOM's MCT costs model the 3G-only operator incurs its 3G spectrum cost one year earlier than the 2G/3G MNOs, that is in 2003/04 rather than in 2004/05. As a result the CC had inadvertently attributed a higher capital value to 3G spectrum for H3G than for the 2G/3G MNOs. The effect of correcting the error is to reduce the final year TAC for H3G from 4.4 ppm to 4.3 ppm. The CC and the other parties have all accepted that this was an error. The upshot of this is that it makes no difference now whether one adopts the simple method of translating the 3G spectrum value or the more complicated reversing out method described in paragraphs [14] and [15] above.

20. Ms McKnight on behalf of Vodafone made clear at the oral hearing that one of their objections to the CC's Determination was that by using the so-called reversing out methodology, the CC had arrived at a pence per minute spectrum allowance for H3G of 1.1 ppm instead of the 1 ppm which is allowed to the 2G/3G MNOs under the simple application of the 2G cap. They also argued on procedural grounds that they were not given sufficient notice of the choice between the two methods to be able to comment properly on what the CC intended to do. Since this now makes no difference to the end result, there is no need for us to consider either the substantive question or the procedural challenge to the reversing out method. But we acknowledge that if it had made a difference to H3G's final year TAC the three Interveners would have argued that, as Ms McKnight put it, the CC should "have gone for an equivalent pence per minute allowance *simpliciter*" rather than the reversing out method. (See Transcript of the Hearing of 24 March, pp 8-9.) The issue of what the Tribunal should do about this correction is discussed later.

THE RELEVANT JUDICIAL REVIEW PRINCIPLES

21. It is firmly established that although this Tribunal is itself a specialist body, the judicial review principles which it must apply under section 193(7) of the 2003 Act are precisely the same as would be applied by an ordinary court: see *Office of Fair Trading & Ors v IBA Health Ltd* [2004] EWCA Civ 142 and *British Sky Broadcasting Group plc v Competition Commission & Anor* [2008] CAT 25 (both of which cases concerned section 120(4) of the Enterprise Act 2002 which also refers to applying judicial review principles). We regard this case law as particularly pertinent here where the procedure prescribed by the 2003 Act is unusual in splitting the appellate function between two bodies; the CC and the Tribunal.

22. In their submissions on the intensity of the Tribunal's review, the CC and H3G relied on the case law which emphasises that the court should be slow to interfere with the decisions of a regulatory body to which Parliament has entrusted decision-making powers, particularly as regards the "educated prophecies and predictions for the future" made by that regulator: see *R v. Director General of*

Telecommunications ex parte Cellcom [1999] ECC 314 and *R v. Securities and Futures Authority ex parte Panton* (20 June 1994, unreported).

23. The three Interveners countered with the citation of cases which point to a more intense level of scrutiny. Mr Turner QC on behalf of T-Mobile also relied on the often cited decision of Laws J (as he then was) in *R v. MAFF ex parte First City Trading* [1997] 1 CMLR 250. Mr Turner argued that the domestic provisions that the Tribunal is considering in this case derive from the Common Regulatory Framework ("CRF") so that the "tighter" European model of judicial review propounded by Laws J applies. We are not convinced either that the "tighter" test is engaged here or that in the circumstances of this case, the European model calls for any greater degree of scrutiny than would apply under domestic law. On the same day as our hearing on 24 March, the Court of Appeal handed down its decision in *R v. Secretary of State for Energy and Climate Change ex parte Mabanaft* [2009] EWCA Civ 224. In that case it was common ground that the Secretary of State's decision was subject to judicial scrutiny in accordance with the judicial review principles laid down by Community law and that those principles were in general stricter than the domestic law (see paragraph 30 of the judgment of Arden LJ). Nonetheless the court allowed the Secretary of State "a large measure of discretion" in deciding the appropriate method for implementing the Community law obligation at issue in that appeal. In any event, having regard to our findings set out below, this is not a case where the considerations are so finely balanced that it would make any difference to the final result which strand of case law we followed.

GROUND 1: THE USE OF THE 2G CAP IN VALUING 3G SPECTRUM

24. The first challenge was to the CC's conclusion that there was no need to adjust the 2G price cap to reflect the opportunity cost of using 3G spectrum for voice traffic rather than data traffic. This ground is covered in detail by Orange in its written submissions. Vodafone also supports this ground, as an alternative to its own challenge on the basis of Ground 2. Orange argued that the CC's conclusion that there will be no 3G capacity constraint for the duration of the charge control period "rests on a very shaky evidential foundation". To assess whether there are likely to

be capacity constraints, one must try to predict what the volume of voice traffic is likely to be over the relevant period. The CC's prediction about the future demand for voice traffic was based on one of the demand scenarios that OFCOM had used in the March 2007 Statement. The CC took OFCOM's medium-demand forecast and looked at whether, on the basis of that forecast, 3G spectrum would be fully used at any point during the period covered by OFCOM's model. Orange argued that the CC was wrong to rely on the medium-demand scenario; they should either have fully investigated the issue of capacity constraint themselves or remitted the issue to OFCOM for further investigation.

25. We have no hesitation in dismissing this challenge. Orange's complaint is in truth that the CC rejected the Interveners' case about the likely demand for voice call termination over the relevant period. The CC set out in some detail (paragraphs 2.9.19 of the Determination onwards) the evidence and submissions that were put before them regarding the relationship between voice traffic predictions and both 2G and 3G network capacity. As well as considering the information supplied by the MNOs, the CC considered two reports, one by FMS Solutions provided to the CC by BT and one prepared by Analysys Consulting and Mason Communications as part of a spectrum demand study for the Independent Audit of Spectrum Holdings team. The CC explained in a later section of the Determination (paragraphs 2.9.159 onwards) why they had treated the medium-demand scenario rather than any of OFCOM's other demand scenarios as the "base case". They noted that OFCOM had stated that the medium-demand forecast was based on predictions towards the lower end of the range obtained from the available information and also that there will be opportunities in future price control periods to make any adjustments deemed necessary if the actual traffic outcomes differ from the forecasts. The CC therefore decided that there was no reason to adjust the medium-demand forecast.

26. Predictions about future traffic levels are inevitably subject to some uncertainties and judgment must be brought to bear in arriving at the best of a range of imperfect approaches. The CC are well able to consider the merits of various different approaches and to choose which is the most appropriate. There is nothing in the Determination which indicates that they did not understand the task that they were

undertaking, the importance of that task to the final outcome and the advantages and disadvantages of the approach they adopted. The reasonableness of OFCOM's traffic forecasts had not been challenged in the appeal so it may well be, as the CC argued, that it was not open to the CC to reject the forecasts and devise new ones, particularly on the basis of information which post dated the March 2007 Statement. But in any event, we can see nothing in the CC's discussion of the issue of 3G capacity constraint which can properly be criticised, let alone characterised as perverse or irrational.

27. We reject Orange's submission that the statutory framework indicates that the usual course should be for the CC to remit to OFCOM any factual issues which arise from the CC's findings in relation to OFCOM's original methodology. The CC's appellate function does not preclude them from investigating and making findings in relation to factual matters. On the contrary, the purpose of involving the CC in determining price control matters is precisely to bring the benefit of their expertise and experience to these issues. Orange is wrong to say that the CC failed to address the question of whether the proposed new price control fulfils the section 88 criteria – at paragraph 16.34 of the Determination the CC expressly state that they are satisfied that the imposition of a new price control arrived at will comply with the section 88 criteria. Orange's assertion that the CC failed to take account of submissions and evidence or reached their conclusions on an inadequate evidential basis is, in our judgment, simply an attempt to clothe the CC's rejection of Orange's submissions in judicial review wording.

28. A number of the MNOs argued before the CC that their own internal traffic forecasts were more optimistic than OFCOM's medium-demand forecast. The CC therefore went on to compare the savings that the MNOs achieve when they terminate a call on a 3G network with the profitability of the marginal data services which would be displaced if there was in fact a shortage of capacity: see paragraphs 2.9.54 of the Determination onwards. They concluded that on balance even if capacity did become fully used in the medium term, 3G voice termination would still not be displacing higher value data services. This was another reason why no adjustment to the opportunity cost of 2G spectrum was needed. None of the MNOs has challenged that finding and that would have been enough by itself

to support the CC's conclusion. We reject the suggestion in a footnote in Orange's written submissions that the CC did not consider the relative value of voice and data services fully because of its conclusions on 3G spectrum capacity. Although the CC acknowledged that it was not "strictly necessary" to consider the comparative value there is nothing to suggest that its analysis of the evidence supplied by the MNOs was insufficient to support the CC's conclusion.

29. Orange's second complaint relates to the CC's conclusion about whether the AIP fees which comprise the payment that the MNOs make for 2G spectrum properly reflect the opportunity cost of 2G spectrum. Again, we entirely reject the submission that the CC failed to take account of evidence demonstrating that AIP fees are set conservatively or of the parties' submissions to the effect that the way that 2G spectrum was priced made it inappropriate to use it for the 2G cap on 3G spectrum costs. The CC devoted a substantial section of the Determination (paragraphs 2.9.81 to 2.9.126) to responding to various criticisms made by the parties of use of the AIP fees. As far as the point about AIP fees having been set conservatively by OFCOM is concerned, the CC noted at paragraph 2.9.93 that this was an important point which they investigated carefully. They concluded that, although there were inevitably uncertainties surrounding any method of arriving at a valuation of 2G spectrum, the AIP fees were a sufficiently reliable proxy for the opportunity cost of 2G spectrum for the purposes of setting the 2G cap. The CC explained its approach to the potential impact of "liberalisation" of 2G spectrum, that is to say that the value of 2G spectrum would increase if in future the restrictions on the uses that MNOs can make of it were relaxed: see paragraphs 2.9.110 – 112 of the Determination. In our judgment Orange's criticism of the CC's handling of this issue is entirely without merit.

30. In the light of these conclusions, we do not need to consider the question whether the CC would have had power to remit the issues to OFCOM for consideration, as Orange assert they should have done.

GROUND 2: ASYMMETRIC REGULATION OF H3G

31. Orange, T-Mobile and Vodafone all challenge the CC's decision to fix a higher final year TAC for H3G than for the 2G/3G MNOs. The challenge to this aspect of the Determination is both a substantive one and a procedural one.

The substantive challenge to the final year TAC asymmetry

32. The substantive challenge is that allowing H3G a higher final year TAC than the 2G/3G MNOs to reflect higher network operating costs is inconsistent with the application of the 2G price cap by the CC. The Determination is therefore self-contradictory. Alternatively the three Interveners argued that there is insufficient reasoning in the Determination to explain why the CC departed from the logic of the 2G price cap so as to allow H3G a higher network cost allowance. The CC had recognised that such an asymmetry can only be justified on the basis of an analysis of the particular market circumstances in the United Kingdom but had failed to carry out any such analysis.

33. At the hearing held on 24 March 2009 it emerged that there was an important difference of view between the parties as to how far, if at all, it had been necessary or appropriate for the CC to investigate whether the market conditions in the United Kingdom supported a continuing higher final year TAC for H3G. The three Interveners understood that the foundation of the CC's final conclusion was that those market conditions did justify continuing asymmetry. Hence the three Interveners' argument that making such a finding was inconsistent with the 2G price cap and/or that the Determination did not adequately set out how the CC had arrived at that conclusion. But at the hearing, H3G and the CC argued strongly that no such investigation by the CC was called for and that the CC's conclusion to allow continued asymmetry was not, and should not be, based on any conclusion about the market conditions in the United Kingdom. All that the CC had to do, having decided to value 3G spectrum by applying the 2G price cap, was decide whether that necessarily meant that the overall TAC – and not just the spectrum element – should be capped at the overall 2G price cap. Having concluded that there was no such logical requirement, the CC was then bound to accept OFCOM's conclusion in the March 2007 Statement that H3G should be entitled to

recover the 0.2 ppm cost difference for its network costs over the life of the price control. That part of the March 2007 Statement had not been challenged on appeal. No one had challenged (a) the fact of the 0.2 ppm difference in H3G's efficiently incurred 3G network costs; (b) the appropriateness of allowing H3G to recover this in the conditions prevailing in the relevant market or (c) the continuation of the resulting asymmetry for the whole four years. In the absence of such a challenge the CC had been bound to carry forward those OFCOM decisions into its final Determination unless the CC concluded that this was inconsistent with its findings in relation to the valuation of spectrum.

34. Vodafone and T-Mobile in their written reply following the hearing described this argument as "as adventurous as it was unexpected". Certainly the CC does not appear to have stressed this point to the parties during its investigation and did not emphasise it in the Determination itself. Issues about admissibility were not in the forefront of the CC's written submissions in the run up to the hearing either. Nonetheless, we agree that this is the right way to look at it. We have looked carefully at BT's amended Notice of Appeal and at the passages relied on by Vodafone and T-Mobile in that Notice and in BT's Reply. We find that BT's assertions about the use of the 2G price cap are limited to a challenge to the valuation of the 3G spectrum element within the price control. Those parts of the Notice of Appeal and the Reply which refer to the 2G cap principle focused exclusively on spectrum cost and the errors BT alleges in relation to 3G spectrum, namely reliance on the 2000 auction fees, the use of scenarios as a way of resolving uncertainty and the inclusion of holding charges. BT does not assert that there should be different spectrum values for different operators. On the contrary, at paragraphs 132 and 133 of the Reply, BT puts forward the spectrum value of £1.4 billion as a reasonable estimate of the maximum that a rational operator would to be willing to pay to use 3G technology and asserts that the inferred value in Scenario 7 should be taken as an upper bound for the purpose of setting termination rates. As we point out below, the Scenario 7 devised by OFCOM clearly envisaged that the £1.4 billion valuation would apply to all five MNOs. BT does not challenge OFCOM's conclusions on network costs at all and certainly does not assert that the 2G price cap approach, if adopted, precludes those higher costs being reflected in a higher TAC. Although BT does challenge the higher

administration costs allowance for all the MNOs, this is not based on arguments relating to the 2G price cap but on other unrelated arguments.

35. The question for the Tribunal is therefore whether the CC adequately explained why they did not regard their decision to value 3G spectrum using the 2G price cap as meaning that they must actually set the whole price control at the 2G cap. The relevant paragraphs in the Determination are paragraphs 16.8 to 16.20. These are reproduced in Annex 1 to this judgment. Paragraph 16.12 records that H3G urged the CC to apply to the 2G cap to the 3G-only operator consistently with OFCOM's MCT cost model with the result that network costs differentials and the extra administration allowance should be reflected in its TAC. They also argued (paragraph 16.13) that any calculation which resulted in H3G receiving a lower allowance for 3G spectrum than the other MNOs would be inconsistent with the forward-looking opportunity cost approach. At paragraph 16.19 the CC concludes that it has on balance decided that the position taken by H3G on this point should be adopted. The CC then explains why they conclude that it is not necessary or appropriate to expand the use of the 2G price cap idea from its limited role as a way of valuing the 3G spectrum element in the final year TAC to an overriding role in implying a single TAC for all MNOs. In our judgment paragraph 16.19 does properly explain why the CC did not expand the role of the 2G price cap in the way that had been suggested by BT and the 2G/3G MNOs.

36. The three Interveners' argument however does not end there. They say that the CC erred in concluding that because it is right to allow H3G to recover 0.2 ppm more than the other MNOs in network costs, that means that H3G's final year TAC must be at least 0.2 ppm higher than the 2G/3G MNOs'. This proceeds from the mistaken assumption that the spectrum value must remain constant across all the MNOs. This assumption is in turn based on OFCOM's assertion, which the CC accepted, that "there can be only one value for the opportunity cost of 3G spectrum" – hence the complicated calculation undertaken by the CC to reverse out the value of 3G spectrum in fact being allowed to the 2G/3G MNOs and then transpose that across to the H3G TAC. This is mistaken, say the three Interveners, because the value that the CC was in fact including in the final year TAC was not really the opportunity cost of the 3G spectrum but the value in use of that

spectrum. They refer to the way that OFCOM dealt with the difference in network costs between the 2G/3G MNOs who had both 900MHz and 1800MHz spectrum with those who had only 1800MHz. The modelled network costs of the latter were higher than those of the former but they were still had the same TAC, meaning that a lower value of 3G spectrum was in fact included for them in that TAC. If the value in use of the 3G spectrum is simply the difference between the 3G network costs and the 2G price cap, then there is nothing untoward about that value in use being regarded as lower for H3G than for the 2G/3G MNOs because of H3G's higher network costs.

37. In our judgment, it is important to understand precisely what the CC was doing when it considered the valuation of 3G spectrum. By rejecting the use of the 2000 auction fees as a proxy for 3G spectrum costs, the CC was not rejecting the overall approach adopted by OFCOM that a price for MCT based on efficiently incurred costs was the best way to ensure that appropriate signals were given for efficient consumption. That was made clear in paragraph 16.19 of the Determination. Further, the CC did accept that the proper value to be ascribed to 3G spectrum was the MFLOC of that spectrum. The CC simply found that the auction fees were not a valuable indicator of what the MFLOC of 3G spectrum is. The question for the CC was then how to arrive at the opportunity cost of 3G spectrum without relying on the 2000 auction fees. In theory this would be the value that 3G spectrum could fetch in a competitive market (and hence would be the same for each MNO). But there is no competitive market for 3G spectrum. As Vodafone and T-Mobile pointed out at the hearing, the CC then considered what the Interveners referred to as the value in use of the spectrum namely the difference, for the 2G/3G MNOs, between their network costs and the 2G price cap. This value in use was likely to be higher than the true opportunity cost, for example because, as the CC found, data services were a less valuable use of 3G spectrum than termination of voice services. BT, as the proponent of the 2G price cap idea, was not pushing for a lower figure for the value of 3G spectrum than the 2G price cap and no lower figure had been put forward in the appeal. The CC concluded that the 2G price cap "gives, in principle, an upper bound on the forward-looking opportunity cost of 3G spectrum that it is appropriate to allow the recovery of through MCT charges" (paragraph 2.9.80).

38. The decision by the CC to adopt this approach to valuing 3G spectrum was well within its discretion. There is nothing irrational or perverse about it and there are no grounds on which the Determination falls to be set aside. In adopting the 2G price cap as the cap on 3G spectrum the CC was not abandoning the concept that MFLOC was appropriate, on the contrary it was treating the value in use as being at least as high as the MFLOC. The 2G cap was a "useful construct" (see paragraph 2.9.156(c)). Although the CC accepted as a general principle BT's argument that the introduction of 3G technology should not lead to an increase in price for an existing service, that would not have justified a wholesale revision of other aspects of OFCOM's methodology which were either not subject to appeal or were not found to be wrong. The CC's Determination was therefore rightly limited to concluding that the 2G cap gave in principle an upper bound for the 3G spectrum allowance within the MCT charge.

39. The CC's approach reflects how OFCOM dealt with "scenario 7" in the March 2007 Statement. OFCOM had included the 2G price cap approach as the "scenario 7" in the range of scenarios which it used to arrive at a value for 3G spectrum. It explained (paragraph A14.96 of the Statement) that in scenario 7 the MFLOC of 3G spectrum had been lowered to a level that, for a 2G/3G operator in 2010/11 under a medium voice and data scenario, would equate the 2G and 3G unit costs of termination. This was intended, the Statement said, to explore the potential consequences of the alternative approach advocated by BT. Importantly the table setting out the various scenarios shows the 3G spectrum cost in scenario 7 as £1.4 billion for all the 2G/3G MNOs and for the 3G only MNO. However in the table in paragraph A13.62 which set out the overall TACs for scenario 7 (which was the medium demand £1.4 billion scenario) the ultimate TACs for the 2G/3G MNOs and for the 3G-only operator reflected the 0.3 ppm difference (made up of 0.2 ppm higher network and spectrum costs and 0.1 ppm higher administration costs).[1] Thus it was always envisaged in the 2G cap approach that H3G would have a higher final year TAC because of their higher efficiently incurred costs.

[1] The figures included in that table were 4.3 ppm and 4.6 ppm rather than 4.0 ppm and 4.3 ppm because of the inclusion of the 0.3 ppm externality surcharge which the CC held should be excluded.

40. We therefore agree with the CC and H3G that having properly decided that it was not an inevitable consequence of its approach to valuing 3G spectrum that the overall price would be the same for all MNOs, the CC was bound to allow the same opportunity cost of spectrum for H3G as it allowed for the 2G/3G MNOs and to reflect the other higher costs throughout the four year price control period. It would have been beyond the scope of the appeal for the CC at that stage to start investigating whether this was the right thing to do. OFCOM had investigated it and had made their findings; there was nothing in the appeal and nothing in the CC's conclusions on spectrum valuation that warranted any interference with those findings.

41. As well as supporting the argument relied on by H3G, the CC also argued the Determination did give adequate reasons why continuing cost-based asymmetry was justified for H3G. They pointed to the reference in paragraph 16.10 back to the discussion in an earlier section of the Determination of "a widespread recognition at European level of the legitimacy of reflecting differences in efficient costs in the case of later entrant operators, at least temporarily". In the Tribunal's judgment the CC would have had a much harder task to persuade us that there was sufficient reasoning here. Section 5 is very much focussed on explaining why H3G's claims to greater non-cost based asymmetry should be rejected because they are not consistent with European practice. That is not surprising since that question was dealing with the arguments H3G raised that there should be greater non-cost based asymmetry in the final year TACs. There is quite a jump between that discussion and a conclusion that cost-based asymmetry in 2010/11 in the United Kingdom is consistent with European practice given what the EC Commission and the ERG have said and given also the position of H3G in the United Kingdom market.

42. But since we conclude that it was, in the context of BT's appeal, not incumbent on the CC to justify that jump, the question of inadequate reasoning does not arise. We decide this ground of appeal solely on the basis put forward by H3G. Orange has submitted in its written reply following the hearing that if we find that if the CC's conclusion was really that the scope of the appeal did not allow it to revisit the question of asymmetry then the only lawful course would be for OFCOM to be

asked to reconsider whether, on the basis of the CC's decision as to how spectrum should be valued, it still remained of the view that asymmetry for H3G was justified. This is an entirely misguided suggestion. The CC did not decide that as a matter of principle all MNOs should have a final year TAC based on the 2G price cap. It decided that the 2G price cap was a suitable way of overcoming the difficult problem of how to arrive at a sensible MFLOC for 3G spectrum. There is no need for its conclusion on that issue to upset OFCOM's conclusion on a very different issue namely whether the 3G-only operator should be allowed, over this period of price control, to be able to recover its efficiently incurred higher network costs. There is nothing that OFCOM should be asked to reconsider even supposing that the 2003 Act allowed such a course to be adopted.

The procedural challenge to the final year TAC asymmetry

43. The second aspect of Ground 2 is the allegation that the CC did not provide a fair and adequate opportunity for the parties to comment on how the 2G cap principle was going to be applied to H3G or to respond to how the CC was minded to apply it. The relevant chronology is set out in Part A of Annex 2 to this judgment. Section 193(2)(c) of the 2003 Act states that the CC should adopt such procedure as they consider appropriate when investigating specified price control matters referred to them by the Tribunal. The CC's Rules of Procedure (2006 CC 1) provide that the CC's general rules apply to price control references subject to the Tribunal's rules and to any directions made by the Tribunal in respect of the reference.

44. We fully accept, as was urged on us by the three Interveners, that the impact on their businesses of the difference between H3G's final year TAC and their own is likely to be significant and that they therefore have a substantial commercial interest in this issue. Our attention was drawn to the decision of the Court of Appeal in *R v. North East Devon Health Authority ex parte Coughlan* [2000] 2 WLR 622 where the Court of Appeal sets out what it calls the Gunning criteria, namely that:

> "to be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response;

> adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken."

45. We note that the Court of Appeal took into account in the *Coughlan* case the "pre-history" of the consultation, that is to say the fact that the consultation period that was under attack in those proceedings was not the first time that the applicant had had an opportunity to make representations: see paragraph [114] of the judgment.

46. The Tribunal's findings on this point are as follows. The discussion about the application of the 2G cap principle to the 3G-only operator followed very shortly after the issue of the CC's provisional conclusions on the adoption of the 2G cap. The issue to the forefront of everybody's mind from that point on was whether the logic of the CC's methodology meant that the same amount should be allowed to H3G for spectrum and network costs as was allowed to the 2G/3G MNOs as a matter of principle. It is clear from the chronology that this was one of the key issues in relation to the determination of Question 8: all the parties recognised this and the arguments that were put forward over weeks of correspondence and at the 28 November 2008 plenary hearing were very similar to those that have been submitted to us on this same issue. The issue was raised as soon as it reasonably could be (particularly given that the CC was only in a position to disclose its provisional rejection of H3G's grounds of appeal about non-cost based asymmetry on 20 November 2008). The Interveners had ample opportunity to make their submissions and they made extensive use of that opportunity. We agree with the CC that the principles of fairness do not require in all circumstances that a provisional determination be issued. Once the parties were aware of the likely direction of the CC's findings on the grounds of appeal they were in a position to make whatever submissions they wished on the consequential adjustments of the price control arising from those findings.

GROUND 3: DETERMINATION OF TACS IN THE EXPIRED PORTION OF THE PRICE CONTROL PERIOD

47. The final ground on which the three Interveners rely relates to whether the price control should be remitted to OFCOM with a direction that they should redetermine all four years of the price control rather than just the period that

remains unexpired when the redetermination takes place. The parties do not challenge the CC's decision to apply the same glidepath principles to Years 1 to 3 of the price control as were applied by OFCOM in the March 2007 Statement. But they dispute the CC's decision to determine that OFCOM should make such changes as are necessary to the price control condition "to generate TACS *for each year of the price control period* that are consistent with our views on the glide path" (emphasis added). Vodafone made detailed submissions on this ground and Orange and T-Mobile were content to adopt Vodafone's submissions.

48. The CC's decision in this regard took place against the backdrop of the issues that were argued over three days of oral hearing in December 2008 ("the December hearing"). The issues were determined by the Tribunal in the judgment handed down on 22 January 2009 ([2009] CAT 1, "the Disposal Powers Judgment"). In the following paragraphs of this judgment we use the same nomenclature as was adopted in the Disposal Powers Judgment. The Tribunal considered, amongst other things, whether it would have jurisdiction on disposing of the appeal to direct OFCOM to adopt a replacement price control and not just a revised price control (see paragraph 17(c) of the judgment). The Interveners had argued strenuously at the December hearing that the Tribunal had no such power and that the most that could be done at the end of the appeal was to redetermine the price control for the unelapsed period. The Tribunal rejected those arguments and held that its powers would not be so limited: see paragraphs [40] to [46] of the Disposal Powers Judgment.

49. Although the Disposal Powers Judgment was formally handed down on 22 January 2009 and the CC's Determination is dated 16 January, the Determination was in fact issued after the CC and certain key individuals from the parties to the appeal had seen an embargoed copy of the Disposal Powers Judgment received by them on 12 January 2009. Contrary therefore to what the dates might suggest, the CC and the parties did have an opportunity to consider the import of the Disposal Powers Judgment before the Determination was finalised.

50. The Tribunal emphasised that the December hearing was only about the scope of its power to make such a direction and did not encompass the question whether

such a direction should be made in the instant case: see paragraph [79] of the Disposal Powers Judgment. Vodafone now complains that the CC nonetheless jumped from the Tribunal's ruling on the existence of its powers to a decision on the exercise of those powers to direct the adoption of a replacement price control in this particular case. The CC failed, Vodafone contends, to address what Vodafone calls "the Appropriateness Question" that is the question whether it was appropriate to exercise those powers in that way, once it had been established that the powers exist.

51. We do not consider that that is a fair reading of the Determination. It is clear that the CC distinguished between the task of calculating what the price controls in all four years would be, applying the overall glidepath methodology to the newly established final year TAC on the one hand and the task of deciding whether the redetermination of the price control should cover all four years or not. The first task is carried out in paragraph 16.22 of the Determination where the CC sets out its recalculation in Table 16.1. The second task is referred to in paragraphs 16.27 and 16.28. The CC refers to the skeleton argument that T-Mobile had served for the 21 October 2008 plenary session. In those submissions T-Mobile had argued that there was no justification for attempting to achieve some form of retrospective modification of the glidepath by calculating what the price control would have been had the CC's decision been implemented in 2007.

52. The CC took part in the hearing before the Tribunal in December 2008 and read and heard the submissions from the Interveners as to the advantages and disadvantages of re-determining the price control for all four years. The arguments that Vodafone puts forward as to why it was not appropriate to direct a replacement price control (see paragraph 60 of their written submissions) are very similar to the arguments that were deployed by the Interveners at the December hearing and with which the Tribunal dealt in the Disposal Powers Judgment. This was well trodden ground by the time the CC came to decide what the answer to Question 8 should be.

53. The CC does not say in so many words that it regards the Appropriateness Question as a specified price control matter falling within its remit rather than a

matter for the Tribunal to decide when finally disposing of the appeal under section 195 of the 2003 Act. Vodafone submits that the Appropriateness Question is a price control matter within the CC's remit. H3G submits that this is not a price control issue but is for the Tribunal to decide when it comes to dispose of the appeal. This point was left open by the Tribunal in the Disposal Powers Judgment: see paragraph [88]. We do not need to decide whether the Appropriateness Question is a price control matter or not because the Tribunal entirely agrees with the CC's conclusion that it is appropriate in this case to direct OFCOM to modify the price control in respect of all four years.

54. We do not accept the analogy that Vodafone draws between the Tribunal's power to give directions to OFCOM under section 195 of the 2003 Act and the Office of Fair Trading's powers under sections 32 and 33 of the Competition Act 1998 to give directions to an undertaking to put an end to a competition law infringement. The situations are not at all the same. Under the Competition Act 1998 it is the finding of infringement which of itself affects the rights and liabilities of those involved in relation both to the past and the future. Strictly speaking, there is no need for directions to be given under sections 32 or 33 in order for the OFT's decision to have an effect in the market. In the present case, as Vodafone itself asserts, there is no finding that the conduct of the MNOs was illegal – the CC's Determination is not self-implementing but depends for its effect on the directions given by the Tribunal to OFCOM and on OFCOM's compliance with those directions. That is why the wording of section 195 of the 2003 Act is much stronger than the wording of sections 32 and 33 in requiring the Tribunal to arrive at a decision about what is the appropriate action for OFCOM to take and to include such directions as are appropriate for giving effect to its decision.

55. We also agree with the way that the CC approached this point. As the CC put it in paragraph 75 of their written submissions: "The CC had been asked to identify and correct errors in the MCT Statement which embraced four years' TACs and it did so (it being reasonably practicable to do so). It would have been bizarre and wholly inappropriate for the CC to have detected error, to have been in a position to determine the consequential adjustments to be made to correct for those errors, yet, simply because of the delays in the appeal process, decline to determine such

consequential adjustments." In this case, as we stated in the Disposal Powers Judgment (paragraph [29]), as regards the scope of BT's appeal:

> "Each of [BT's] grounds of challenge, if upheld, affects all four years of the price control. The TACs in the intermediate years are calculated by reference to the efficiently incurred costs in 2010/11 because they are steps on the glidepath towards a price which is supposed to reflect those costs. Because of the way the TACs in Years 1 to 3 are calculated, it is clear that the errors alleged are errors made in relation to all the years, not just the final year. Thus, if it is wrong to base spectrum costs on the 2000 auction fees when calculating the TAC in the fourth year of the price control then it is just as wrong to base spectrum costs on those fees in Years 1 to 3. If the inclusion of an externality charge is not justified for the reasons set out by BT in its Notice, then there can be no justification for including an externality charge in the assessment of costs in Years 1 to 3 of the price control. BT does not differentiate between the different years of the price control in setting out its challenge to the principles applied by OFCOM in the 2007 Statement. The glidepath methodology means that they are still partly reflected in the TACs for those years."

56. The logical consequence of the errors found by the CC and the way in which this particular price control is formulated mean that it makes sense for the whole of the price control to be modified to reflect the CC's findings. The price control condition is a single condition lasting for four years. If the three Interveners' submissions were accepted there would be in place at the end of this appeal a price control which properly reflected the CC's findings in respect of half its duration but which was based on principles which have been found to be seriously erroneous in respect of the other half. We do not see that there would be any justification for arriving at such an unsatisfactory position.

57. Vodafone put forward various points in paragraph 60 of its written submissions. We do not agree that there is no point in directing OFCOM to modify the price control in respect of periods that have elapsed. The point is to "give effect" to our decision as to what is the appropriate action for OFCOM to take, as we are required to do by section 195. The argument that this is inconsistent with the forward looking nature of price control conditions and does not contribute to the attainment of the section 88 objectives echoes the points that were made and rejected at the December hearing. The CC expressly stated that they were satisfied that the adjustments to the price control levels that they determine should be made fulfilled the criteria in section 88 of the 2003 Act (see paragraph 16.34 of the Determination).

58. Vodafone submits that to the extent that the CC decided that the TACs for Years 1 and 2 should be adjusted in order to facilitate a subsequent claim for compensation by BT and others who have bought MCT services in Years 1 and 2 then that is a collateral and unlawful purpose. The CC confirms in its submissions that the facilitation of a civil remedy for BT formed no part of its decision. The background to this, as became apparent during the December hearing, is that BT considers that the terms of its Standard Interconnect Agreement ("SIA") with the MNOs allow it to recoup monies from them in the event that the level of MCT charges is altered by the regulator. The wording of the SIA indicates that this entitlement might depend on whether the MCT charge is formally re-determined by OFCOM rather than just found, at the end of the appeal process, to have been wrong. The MNOs strongly dispute the existence of any such right.

59. Like the CC, the Tribunal is in no position to form any view as to the rights and wrongs of these arguments or as to whether it would make any difference to BT's claim if OFCOM modifies the Years 1 and 2 TACs rather than the CC simply setting out in Table 16.1 of the Determination what those TACs should have been. We certainly agree that it would be wrong for the CC or the Tribunal to give directions in order to facilitate such a claim. Equally it would be wrong to decline to give directions in the hope that it would frustrate such a claim or prevent what the Interveners see as a "windfall" for BT if it were able to recoup overpayments without then passing them on to its customers. Arguments about the legal effect of the redetermination in conjunction with the SIA; the relevance of the "waterbed effect" in competing away any overcharge; or the availability to BT of the section 185 dispute resolution procedure as an alternative to whatever rights it may have under the SIA have not affected and should not affect our consideration of the Appropriateness Question.

60. We therefore reject the arguments of the three Interveners that the CC failed to address the Appropriateness Question or that it arrived at the wrong conclusion on the issue. We agree with the CC that it is appropriate to redetermine the whole of the price control condition by setting TACs for all four years.

61. Vodafone also argue that the CC failed to consult adequately or at all as to how it was minded to deal with the elapsed parts of the price control period. A chronology of the correspondence on this issue is set out in Part B of Annex 2 to this judgment. The Interveners were invited by the CC early in December to make submissions to the CC on the resolution of Question 8. Everyone knew by that date that if the Tribunal rejected the Interveners' arguments and held that it did have power to direct OFCOM to modify the TACs for all four years of the price control, the CC would need to consider very rapidly whether to recommend that the Tribunal exercise that power. It would have been perfectly possible for the Interveners to make submissions to the CC to cover that eventuality without prejudice to their continued contention before the Tribunal that the power did not exist. This point was clearly separate from the more complicated point covered by the December hearing about whether a future adjustment should be made to the Year 3 and 4 TACs.

62. For whatever reason, the Interveners declined to make any submissions on the issue, preferring repeatedly to "reserve the right" to make submissions only after the Tribunal had decided the jurisdiction question. They maintained this position even after the CC made it clear that it did not intend to issue a provisional determination on Question 8 and that it was not necessarily going to seek further submissions from the parties following the Tribunal's judgment. In the event the CC decided that it did not need to delay finalising its determination in order to engage in another round of consultation on these points. Vodafone was able in its letter of 13 January to put forward broadly the same points that it has raised before the Tribunal now. BT was able to make contrary submissions.

63. H3G cited the speech of Lord Diplock in *Hoffmann-La Roche v Secretary of State for Trade and Industry* [1975] A.C. 295. In that case their Lordships were considering an application for interim relief pending the determination of a challenge to the validity of an order following on from a Monopolies Commission investigation into Hoffmann-La Roche's pricing of certain tranquilliser drugs. Lord Diplock noted that the Appellants had been informed by the Chairman at a hearing before the Commission that the Commission's intention was to recommend that the company could recover only a reduced proportion of its

research costs from the price of its product. The Chairman had invited Hoffmann-La Roche to suggest ways in which such a reduced contribution could be calculated. Lord Diplock noted that the company "for what no doubt appeared to them to be good tactical reasons" declined to do so. Lord Diplock stated that the rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties have a further opportunity to comment ([1975] A.C. 295, at p 369).

64. In the circumstances of the present case the CC were not required, in our judgment, to hold a further round of consultation following the handing down of the Disposal Powers Judgment. The parties had had sufficient opportunity to make whatever points they chose to make -- there was no unfairness in the procedure that the CC adopted.

Conclusion on judicial review challenges

65. In the light of the above reasoning, the Tribunal unanimously rejects the challenges that have been made to the CC's Determination of the price control matters in these appeals.

OTHER ISSUES ON DISPOSAL

66. Some of the parties made submissions to the Tribunal on the form of the directions that should be sent to OFCOM when the Tribunal remits the decision. We set out here our conclusions on the points that need to be resolved before the Tribunal can finally dispose of these appeals.

Taking account of possible partial elapse of Year 3

67. O2 raised the question what will happen if OFCOM is not able to comply with the Tribunal's directions and issue a modified price control before the start of Year 3 on 1 April 2009. They argue that there will need to be an adjustment to the TAC for that year to take into account that the modified price control comes into effect part way through that year. OFCOM say that there is no need to adjust the Year 3 TAC. When they come to assess compliance by the MNOs with the Year 3 TAC, OFCOM will assess that compliance against a weighted average of the original

third year TAC (for the period before the modified price control is adopted) and the re-determined TAC (for the remainder of Year 3). Some of the Interveners were unhappy with this approach and wanted the Tribunal to make a ruling on this point. We recognise that this issue is intertwined with the issues about the "retrospective" application of the modified price control discussed in the Disposal Powers Judgment. However, we consider that OFCOM's proposed approach is an eminently sensible way of arriving at a fair outcome for the parties without prejudging any consideration by a higher court of those issues.

The use of actual inflation figures rather than forecasts

68. The second point is the use of actual inflation figures rather than HM Treasury estimates or forecasts in relation to the expired years of the price control for which actual figures are now available. This was a point raised by O2 in its letter to the Tribunal of 29 January 2009. Vodafone has also made this point and has set out a proposed revised methodology for arriving at the intervening year TACs. As we understand it the point of principle is the same as between Vodafone and O2 but what they suggest should be done about it is slightly different.

69. We agree with OFCOM and BT that as a matter of principle it would be wrong to start unravelling aspects of the price control condition to take into account factors arising since March 2007. No one challenged the use of HM Treasury forecasts in the appeals. We are told that there are a range of other actual data available now which could be used to replace or fine tune other forecasts used in the CC's calculations, perhaps to the detriment of the MNOs. As with almost every aspect of the price control condition, something that appears at first blush to be a reasonably straightforward adjustment is likely to generate a range of competing methodologies, calculations and proposals for consequential amendments. We reject the submission that we should start exploring how actual figures could be used to replace forecasts in the setting of the price control. The CC adopted an approach of doing least violence to the OFCOM price control consistent with bringing it into line with the findings the CC had made on the specified price control matters. We agree with that approach. The aspects of the OFCOM model which have not been challenged should remain as they are.

Use of rounding in the calculation of the determination of the controlling percentages

70. O2 has raised an issue relating to the use of rounding in OFCOM's calculation, in particular whether figures in the price control should be rounded to one, two or more decimal places. The "issue of rounding" is, therefore one which OFCOM will need to determine when it comes to revise the Statement following disposal of the appeal.

71. In our judgment there is no "issue of rounding" in BT's appeal. If rounding had been challenged, it may well have been categorised as a matter relating to the calculations used in determining the price control and hence referred to the CC along with the other specified price control matters. It is certainly not open to the Tribunal to rule on such an issue at this stage of the appeal or for OFCOM now to adopt some different approach to rounding from the approach taken in the original price control.

Is the wording of the Tribunal's directions affected by any subsequent duty on the part of OFCOM to consult before modifying the price control in compliance with the Tribunal's directions?

72. Some of the parties made submissions about whether OFCOM is required to engage in any consultation before it implements the directions that the Tribunal gives under section 195. This might be domestic consultation under the 2003 Act or notification to the European Commission pursuant to Article 7 of the Framework Directive ([2002] OJ L 108/33). O2 and Orange argued that such consultation must take place and moreover that the Tribunal must refrain from directing OFCOM to adopt specific TACs for the years of the price control in order to avoid prejudging the outcome of any such consultation. Their position is that nothing in the 2003 Act or the CRF states or implies that the statutory requirement for OFCOM to consult before adopting or modifying a price control is overridden by the determination of an appeal such as the present appeal. OFCOM takes a different view. They say that if the Tribunal at the end of the day is able to direct OFCOM precisely what TACs should apply in each year of the price control, then it would be either pointless or inappropriate for any such consultation

to be attempted. They argue that the 2003 Act requirements for consultation must be read as subject to an implied limitation as a consequence of section 195.

73. The parties are also not agreed as to whether the Tribunal can or should rule on the question of whether OFCOM must consult – beyond whatever ruling is necessary in order to dispose of the point about drafting the final order so as not to prejudge the outcome of any consultation. As a practical matter OFCOM flags up the desirability of the Tribunal including a ruling on the point in this judgment rather than leaving the matter over to be raised at some subsequent time after OFCOM has, if it adheres to its current view, decided not to consult before adopting a modified price control condition.

74. The Tribunal's conclusion on this point is that our jurisdiction to decide the consultation point only arises if the parties are right in saying that the existence of a duty to consult affects the way in which the Tribunal should draft the final directions. We are firmly of the view that O2's submission turns the matter on its head. The scope of any duty to consult once the decision is remitted to OFCOM is determined by the terms of the Tribunal's final directions – not the other way round. The specificity of those directions is in turn determined, so far as the price control matters are concerned, by what the CC has decided. If the CC's determination is not set aside on judicial review principles then according to section 195 that determination prescribes what is included in the Tribunal's decision, that decision then determines what directions are given to OFCOM and those directions then prescribe the action of the regulator when the decision is remitted.

75. Once it has received our directions, it is up to OFCOM to decide what action it must take in order to comply with its obligation under section 195(6) of the 2003 Act to implement the directions that the Tribunal gives. OFCOM has in fact made clear in correspondence that if the Tribunal confirms the entirety of the CC's determinations, OFCOM will be able very rapidly to implement a direction to modify the price control in accordance with that determination. They have circulated to the parties details of how they would do this. We have seen nothing that gives the Tribunal jurisdiction to interfere with that.

Correcting the CC's error of calculation

76. We referred earlier in paragraph [19] to the fact that all parties were agreed that the CC had made an error in the calculation of H3G's final year TAC and that, if we rejected all the challenges by the three Interveners, the CC's conclusion should have been that the final year TAC was 4.3 ppm not 4.4 ppm. Is it open to the Tribunal simply to make that revision? In our judgment it is. What has happened is that OFCOM has alleged that the CC was wrong in one aspect of its determination and the CC (and the other parties) has accepted that is the case. The 2003 Act is silent as to what happens if the Tribunal decides under section 193(7) that all or part of the CC's determination does fall to be set aside. Some of the parties argue that it is then up to the Tribunal to decide those price control issues for itself before disposing of the appeal; some argue that we would have to remit to the CC, even if in this instance this amounted to no more than an exchange of letters; some argue that we would have to remit to OFCOM.

77. In our judgment the Tribunal's primary duty is to dispose of the appeal on the merits in accordance with section 195(1) of the 2003 Act. At least where there is no question of any discretion having to be exercised to resolve the issue, the right thing to do is make the correction ourselves and then remit to OFCOM. This is a common sense and practical way of interpreting the legislation.

CONCLUSION: THE DISPOSAL OF THE APPEALS AND DIRECTIONS

78. We have previously dismissed the non-price control matters raised by the H3G appeal: see our judgment in that appeal, [2008] CAT 11.

79. Pursuant to sections 193(6) and 195(2) of the 2003 Act the Tribunal now unanimously decides that:

(a) in accordance with the determination of the CC, the remainder of H3G's appeal is dismissed.

(b) BT's appeal is upheld to the extent set out in the CC's determination.

80. Pursuant to section 195(3) of the 2003 Act, the Tribunal unanimously decides that the appropriate action for OFCOM to take in relation to the subject matter of the March 2007 Statement is to adopt a revised price control condition which makes such changes as are necessary to SMP Conditions MA3.4 and MA4.4 and to the definition of 'Controlling Percentage' in Schedule 1 to Annex 20 of the March 2007 Statement to generate TACs for each year of the price control period that are consistent with the CC's determination of the price control matters raised in BT's appeal.

81. Pursuant to section 195(4) of the 2003 Act the Tribunal hereby remits the decision under appeal to OFCOM.

82. Further, pursuant to section 195(4) of the 2003 Act, the Tribunal considers that the following directions are appropriate for giving effect to our decision and directs OFCOM accordingly.

DIRECTIONS TO OFCOM

(a) For the 2G/3G MNOs OFCOM shall adopt a price control in which:

(i) The glidepaths start at the level of the headline regulated 2G rates in 2006/07.

(ii) The TACs descend in annual reductions of equal percentage each year from the starting points of the glidepaths to arrive, in 2010/11, at the level of 4.0 ppm (in 2006/07 prices).

(iii) The TACs for the first year of the price control period are adjusted so as to take into account the absence of 60 days' notice.

(b) For H3G OFCOM shall adopt a price control in which:

(i) The pre-adjusted TAC for the first year of the price control period is 8.5 ppm in 2006/07 prices.

(ii) The TACs descend in annual reductions of equal percentage each year from the pre-adjusted first year TAC to arrive, in 2010/11, at the level of 4.3 ppm (in 2006/07 prices).

(iii) The pre-adjusted TAC for the first year of the price control period is adjusted so as to take into account the absence of 60 days' notice.

(c) In each case, OFCOM is directed to ensure that the adjustments to take into account the absence of 60 days' notice in the first year of the price control, the calculation of nominal figures (where such calculation is required), the approach taken to rounding and the methodology for deriving the controlling percentages are carried out consistently with the methodology adopted by OFCOM in the March 2007 Statement.

Vivien Rose Andrew Bain Adam Scott

Charles Dhanowa
Registrar Date: 2 April 2009