Neutral citation [2009] CAT 1

IN THE COMPETITION APPEAL TRIBUNAL

1085/3/3/07

Victoria House
Bloomsbury Place
London WC1A 2EB

22 January 2009

Before:

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

Sitting as a Tribunal in England and Wales

BETWEEN:

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

HUTCHISON 3G UK LIMITED

Interveners

JUDGMENT ON THE SCOPE OF THE TRIBUNAL'S POWERS ON DISPOSAL OF THE APPEAL

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 appeared on behalf of the Office of Communications

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

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

Miss Kelyn Bacon (instructed by SJ 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 appeared on behalf of the Competition Commission.

1. On 4, 5 and 12 December 2008 the Tribunal held a Case Management Conference to consider an issue which has arisen in the course of the Competition Commission's investigation into the price control matters referred to it by the Tribunal in this appeal. The background to this appeal is set out in the Tribunal's judgment of 20 May 2008 ([2008] CAT 11) and we use the same abbreviations as were used in that judgment.

2. The appeal is brought under section 192 of the Communications Act 2003 and is subject to the procedure set out in section 193 of that Act. That procedure requires the Tribunal to identify whether an appeal raises any "specified price control matters" as defined. The price control matters to which the procedure applies have been specified in rule 3 of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (SI 2004 No. 2068) ("the 2004 Rules"). If an appeal does raise specified price control matters, then those matters must be referred by the Tribunal to the Competition Commission ("the CC") for determination. Matters raised by the appeal which are not specified price control matters are to be decided by the Tribunal. Once the CC has notified the Tribunal of its determination of the price control matters referred to it, the Tribunal must decide the whole appeal on the merits and, in relation to the price control matters, must decide those matters in accordance with the determination of the CC, unless the Tribunal decides, applying the principles applicable on an application for judicial review, that the CC's determination would fall to be set aside on such an application.

3. It was common ground from an early stage in this appeal that all the matters raised in BT's appeal were specified price control matters. The matters were referred to the CC by the Tribunal on 8 March 2008 (see [2008] CAT 5). Following the grant of extensions of time by orders dated 15 September 2008 and 7 January 2009, the CC is required to notify the Tribunal of its determination of the specified price control matters by 16 January 2009.

4. The price control challenged in BT's appeal was fixed in the 2007 Statement and is set to operate from 1 April 2007 until 31 March 2011. In that Statement OFCOM

set out its conclusions as to the level of costs of providing MCT that would be incurred over the four year period an efficient 2G/3G MNO and by a efficient 3G-only MNO. The levels identified were substantially below the prevailing prices being charged for MCT by the MNOs as at 1 April 2007. OFCOM concluded that prices should move towards the level of efficient cost over the period. The cost/price levels identified by OFCOM for the year 2010/11 were 5.1 ppm for the 2G/3G MNOs and 5.9 ppm for the 3G-only MNO (both prices expressed in 2006/07 values).

5. OFCOM then considered whether the higher prices in fact being charged by the MNOs as at 1 April 2007 should be reduced to the efficient cost level immediately or whether there should be a gradual reduction or "glidepath" over the course of the price control period. In deciding how quickly the prices should be aligned with efficient cost, OFCOM needed to balance two objectives (see paragraph 9.172 of the 2007 Statement). The first objective is to achieve price reductions sufficiently quickly to deliver substantial benefits to consumers, including benefits from addressing possible competitive distortions. The second objective is to allow sufficient time for operators and customers to adjust to new levels and structures of mobile charges and take these changes into account in their business plans and planned capital expenditure.

6. In the section of the 2007 Statement headed "2G/3G MNOs' path of charge reductions" OFCOM noted that BT supported the proposal for a smooth glide path to 2010/11 starting with the headline regulated charge for 2G MCT set by the 2004 Statement (as extended) for the year 2006/07. OFCOM concluded that the 2G/3G MNOs should be required to reduce their charges in line with a smooth glide path of four equal percentage reductions, starting with the headline level of the charge controls then in force for 2G MCT and finishing with the charge in the final year of the price control set at the level of efficiently incurred costs.

7. OFCOM then made an adjustment – referred to by all parties at the hearing as "the tweak" – to take account of the fact that the price control was being introduced immediately on the expiry of the control set in the 2004 Statement, that is on 1 April 2007 whereas it was generally the practice of OFCOM to give 60 days

notice of the imposition of a new charge control. OFCOM therefore adjusted the Year 1 price levels by weighting the glidepath as though it applied for only 10 of the 12 months of the control and as though for two of the 12 months the existing headline regulated 2G MCT charge applied. This in turn meant that the size of the percentage reduction from the first to the second year of the price control was increased slightly.

8. For the 3G-only MNO, H3G, there was a much greater discrepancy between the unregulated price it was charging as at 31 March 2007 and the level of efficiently incurred costs as found by OFCOM. BT's stance as regards whether there should be a glidepath for H3G was different from its stance as regards the 2G/3G MNOs. OFCOM noted at paragraph 9.188 of the 2007 Statement, that BT argued that H3G should be required to reduce charges to cost immediately with charges tracking cost thereafter. OFCOM concluded, however, that there should be an immediate and substantial reduction in H3G's charges at the start of the new price control period followed by three annual reductions of equal percentages so that charges would equal cost by the final year of the charge control (see paragraph 9.190 of the 2007 Statement). OFCOM concluded that the appropriate charge level for the first year was 8.5 ppm (2006/07 prices) which corresponded to a reduction of just over 20 per cent from the price being charged by H3G as at 31 March 2007. After that initial drop, the glidepath of H3G's prices would be "smooth" down to the 5.9 ppm level and would incorporate the "tweak" in year 1 to take account of the absence of 60 days notice.

9. The text of the price control was set out at Annex 20 to the 2007 Statement. The control sets a target average charge ("TAC") for each of the years of the price control. For the first year of the price control the TAC is expressed as an absolute amount, namely 9.1 ppm for H3G, 6.2 ppm for Orange and T-Mobile and 5.7 ppm for O2 and Vodafone. It is not possible, however, to express the subsequent years in absolute amounts because account must be taken of the rate of inflation in each year so that the sum arrived at in the final year is not in fact 5.1 ppm for the 2G/3G MNOs or 5.9 ppm for H3G but those sums adjusted for inflation. The change from year to year must therefore be calculated by combining the annual reductions of equal percentage by the choice of the smooth glidepath (but incorporating the

"tweak") with the amount of change in the Retail Prices Index in each year. This combination results in "Controlling Percentages" which are set out in the price control condition. This means that the figures 5.1 ppm and 5.9 ppm do not actually appear anywhere in the price control. Rather the price control sets the charge for the first year and then describes how one arrives at each subsequent year's TAC by applying the Controlling Percentage set for each year. This will, by year 4, bring prices down to sums which are the 2010/11 equivalent of what was 5.1 ppm or 5.9 ppm in 2006/07, taking account of inflation.

10. Finally it is important to note that the effect of the price control is not that the MNOs must charge a single amount for MCT, for example 9.1 ppm or 6.2 ppm or 5.7 ppm in the first year. The charge set is an *average* charge which leaves the MNOs a discretion to set different charges for example, for daytime, weekend or evening minutes and to change their prices during the course of the year, provided that they can show OFCOM at the end of the year that their average charge per minute over the year as a whole did not exceed the target set for that year in the price control. The condition also sets a cap on charges rather than setting the charge itself. MNOs are free to set prices below the cap fixed by the charge, although we were told in fact they always set their prices to achieve the cap rate.

11. The price control set by the 2007 Statement came into effect on 1 April 2007 and the prices charged by the MNOs have been set since then in accordance with Annex 20. By the time the CC notifies the Tribunal of its determination on the price control matters and the Tribunal finally disposes of BT's appeal, a substantial proportion of the period covered by the price control will have elapsed. The question on which the Tribunal's ruling is now sought is what should happen if the CC determines that the target prices to which the glidepath tends were too high. At present this issue arises hypothetically because the CC has not reached its final determination on whether any of the grounds of challenge to the price control are well founded and, if so, what effect they have on the level of efficiently incurred costs and hence the ultimate TAC. But the CC may conclude that the efficiently incurred costs of the MNOs were and are lower than OFCOM found, and hence that the MCT prices should be lower than those set in the 2007 Statement. If that happens, the amounts that the MNOs' customers (including other MNOs) will

have overpaid for MCT as a result of OFCOM's errors will be very substantial. Although the difference in pence per minute may appear small, there are many billions of minutes terminated by the MNOs each year. For the MNOs there is some netting off of these amounts since the MNOs are both payers and recipients of MCT charges but, across all the wholesale customers buying MCT, the changes arising from the successful appeal are likely to equate to hundreds of millions of pounds. In light of this, what should be the result of the CC's conclusions so far as amendment of the price control is concerned?

12. For convenience, the submissions have been based on an assumption that by the time the appeal is disposed of and OFCOM complies with the Tribunal's directions, years 1 and 2 of the price control will have elapsed and years 3 and 4 will remain in the future. It is by no means certain that this will occur, but for reasons of convenience, this judgment also assumes unless otherwise stated that that is the case.

The Tribunal's jurisdiction to rule on this issue.

13. All the parties except H3G were content for the Tribunal to consider submissions on the issues in dispute now, before the CC notifies us of its determination of the price control matters. H3G submitted that since the issue was a specified price control matter within the meaning of the 2004 Rules, it was a matter for the CC to determine and that any challenge to the CC's determination on the issue could and should be raised once the Tribunal is invited to consider, in accordance with section 193(7) of the 2003 Act, whether the determination falls to be set aside on the basis of the principles applicable to an application for judicial review.

14. As the arguments developed in preparation for the CMC, it became clear that the areas of dispute included first, the interpretation of section 195 as regards the powers that the Tribunal would have when it comes to dispose of the appeal, secondly whether an additional specified price control matter needed to be referred to the CC and thirdly whether BT needed to amend its Notice of Appeal to encompass the relief that it was now seeking. All those are matters within the Tribunal's remit. We therefore consider that we have power to rule on the matter that has arisen and that it is convenient for us to do so at this stage.

15. All the parties except for H3G provided substantial written submissions as well as oral argument. No discourtesy to counsel is intended by our failing to refer to all their submissions. We have considered all the written and oral submissions in coming to our conclusions.

The range of possible outcomes

16. The Tribunal's powers in disposing of the appeal are set out in section 195 of the 2003 Act ("section 195"):

> "**195 Decisions of the Tribunal**
>
> (1) The Tribunal shall dispose of an appeal under section 192(2) in accordance with this section.
>
> (2) The Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal.
>
> (3) The Tribunal's decision must include a decision as to what (if any) is the appropriate action for the decision-maker to take in relation to the subject-matter of the decision under appeal.
>
> (4) The Tribunal shall then remit the decision under appeal to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its decision.
>
> (5) The Tribunal must not direct the decision-maker to take any action which he would not otherwise have power to take in relation to the decision under appeal.
>
> (6) It shall be the duty of the decision-maker to comply with every direction given under subsection (4).
>
> …"

17. It is fair to say that BT's arguments have shifted considerably since this issue was first discussed at the October plenary session with the CC. The arguments deployed in response by OFCOM and the MNOs inevitably changed too. By the time of the hearing, the issues between the parties could be summarised as follows:

    (a) Given that the Tribunal must dispose of the appeal "in accordance with the grounds of appeal", what does a fair reading of BT's Notice of Appeal indicate was the scope of BT's challenge to the price control and what was the relief that BT was seeking?

(b) Does the Tribunal have power under section 195(4) to direct OFCOM to retake the decision so as to substitute for the existing price control a new price control covering the whole of the period covered by the 2007 Statement (namely 2007–2011) or does it only have power to direct OFCOM to revise the price control as from the date of the disposal of the appeal so that the new price control applies only to the unelapsed period which remains at that moment? In this ruling we will refer to a price control which covers the whole of the period as a "replacement" price control and a price control which covers only the unelapsed period as a "revised" price control.

(c) If it becomes apparent from the CC's conclusions on BT's grounds of appeal that prices set by the 2007 Statement have, during the elapsed period of the price control, been too high, does the Tribunal have power, on disposal of the appeal, to direct OFCOM to reduce the TACs applicable during the unelapsed period of the price control to counteract the effect of the overpayment? We refer hereafter to a price control in which the TACs applicable for remaining years reflect the fact that the TACs in past years are now shown to have been too high as a "future adjusted" price control.

(d) If the Tribunal does have power to direct OFCOM to adopt a substituted price control and/or a future adjusted price control, does the decision whether to exercise those powers fall to the Tribunal, or is it a specified price control matter within the remit of the CC? If the latter, is it in fact included in the price control matters which were referred to the CC in March 2008?

18. As regards the first issue concerning the scope of BT's Notice of Appeal, the 2G/3G MNOs argue BT's appeal focussed entirely on challenging the means by which OFCOM arrived at the ultimate cost/charge figures of 5.1 ppm for the 2G/3G MNOs and 5.9 ppm for H3G. BT did not raise any challenge to the glidepath set by OFCOM and the MNOs have, they say, conducted their interventions in this appeal, and planned their business, on the assumption that nothing can change as a result of this appeal other than the price that they may

charge in Year 4. The only possible outcome of BT's appeal would be a revised price control which adjusts the final year, since that is the year in which charges are intended to be reduced to the levels which correspond to 5.1ppm or 5.9 ppm (adjusted for inflation). They argue therefore that the issues as to the scope of the Tribunal's or CC's statutory powers do not arise in this case.

19. Even if they are wrong on their reading of the Notice of Appeal, the 2G/3G MNOs argue that the Tribunal does not have the power, on a proper interpretation of section 195, either to direct OFCOM to adopt a replacement price control or to direct the adoption of a future adjusted price control.

20. OFCOM takes a different stance. They agree that BT in its Notice of Appeal focussed on the calculation of efficient costs and hence on the ultimate TACs of 5.1 ppm and 5.9 ppm and that BT did not raise any challenge to the glidepath adopted by OFCOM. But they do not conclude from that that the TAC rates set for Years 1 to 3 must remain at the levels set in the 2007 Statement. Rather they argue that the glidepath needs to be recalibrated so that the same principles that were applied by OFCOM in moving from the MNOs' 31 March 2007 prices to the price that should pertain in 2010-2011 are applied to move instead from the 31 March 2007 prices to the new TAC computed in accordance with the CC's determinations on the specified price control matters.

21. OFCOM agrees with the 2G/3G MNOs that the Tribunal does not have power under section 195 to direct OFCOM to set a replacement price control covering the whole period 2007-2011. The Tribunal's powers are, OFCOM contends, limited to directing OFCOM to revise the price control for the period which has not elapsed by the time the appeal is disposed of.

22. Further OFCOM agree with the 2G/3G MNOs that the Tribunal does not have power to direct OFCOM to adopt a future adjusted price control to take account of the fact that customers have paid higher rates during the elapsed period. Again, OFCOM argues that no such adjustment was sought in the Notice of Appeal and that in any event it would be *ultra vires* for the Tribunal to direct any such adjustment.

23. OFCOM's case is therefore that the only relief which the Tribunal may provide if the CC determines the price control matters in BT's favour is to direct OFCOM to revise the price control for the unelapsed period and set the new prices at the levels that result from recalibrating the existing glidepath to arrive at the lower final year TAC. We refer to this adjustment as a "recalibration" of the price control.

24. BT argues that its pleading covers the whole range of possible outcomes for which it is now contending. BT also argues that the Tribunal has power under section 195 to direct OFCOM to adopt a replacement price control covering the whole price control period and further that we have power to direct OFCOM to make a future adjustment to the price control in the unelapsed period. Their stance on the question whether it was for the Tribunal or the CC to determine was ambivalent.

The scope of BT's appeal

25. In the Tribunal's judgment, BT's Notice of Appeal clearly challenges the level of the TAC set in all four years of the price control. It is true that BT did not challenge the glidepath because it accepted the principles that OFCOM applied, namely that -

    (a) prices should only be reduced to the level of efficiently incurred costs by the fourth year of the price control rather than in an earlier year;

    (b) the glidepath should start at the level of headline 2G regulated rates for the 2G/3G MNOs and at 8.5 ppm (adjusted for inflation) for H3G;

    (c) the first year of the price control should be "tweaked" to take account of the absence of 60 days notice;

    (d) aside from that, the glidepath should descend in annual reductions of equal percentage each year, reflecting the balance struck by OFCOM between the two objectives referred to in paragraph [5] above.

26. It is not open to BT now to resile from its acceptance of those principles and, at least by the time of the hearing, BT accepted that position.

27. We reject the arguments of the MNOs that the appeal was limited to challenging only the TAC in year 4 and not in the previous years. We reach this conclusion for two reasons. First, the wording of the Notice of Appeal makes this clear. In paragraphs 17 and 190 of the Notice BT summarises the relief that it is seeking as the setting aside of the price controls in paragraphs MA3 and MA4 (as contained in Annex 20 of the 2007 Statement) and the substitution for those paragraphs of equivalent paragraphs imposing price controls set at a lower level than the current figures of 5.1 and 5.9 ppm in 2010/11 and which is set at a level appropriate for the purposes set out in section 88(1)(b) of the 2003 Act. The appeal is not therefore limited to replacing the Controlling Percentage required to move from Year 3 to Year 4. It covers the whole of the price control, including, for example, MA3.1 which provides that the MNOs shall take all reasonable steps to secure that, "*during any Relevant Year*," the MCT charge does not exceed the TAC for the provision of Network Access.

28. Secondly, having regard to the substance of BT's appeal, there is no conceivable reason why they would have limited their appeal to the fourth year of the price control. BT challenged three planks of OFCOM's calculation of efficiently incurred costs in the 2007 Statement. First, BT alleged that OFCOM's approach to spectrum costs was seriously flawed for a number of reasons, including that OFCOM placed undue reliance on the auction fees paid for 3G spectrum in the 2000 auction; they failed to cap spectrum costs at the 2G level and they included notional holdings costs which inflated asset values. Secondly, BT alleged that OFCOM had erred in its appraisal of the MNOs' administrative costs which ought properly to be included in the cost base and had assumed that the level of costs incurred by the four 2G/3G operators would remain constant in real terms until the end of the price control period (see paragraph 153 of the Notice). Thirdly, BT argued that the network externality allowance of 0.3 ppm was not justified.

29. Each of these 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. It makes no sense to read the Notice of Appeal as indicating that BT accepted that the TAC in Years 1 to 3 should be based on 2000 auction prices or that it was legitimate to include an externality allowance in the price charged for those years.

30. We therefore accept the submissions of BT and OFCOM that, on a sensible reading of the Notice of Appeal, the elements attacked by BT were attacked in so far as they affect the setting of the TAC in each of the relevant years of the price control. The relief which the Tribunal is empowered to grant on the disposal of the appeal is, at the least, to direct OFCOM to adopt a revised price control condition that sets a new price control for the unelapsed period based on the recalibrated glidepath.

31. Further, we accept BT's submission that a fair reading of the Notice of Appeal indicates that it was seeking a replacement of the whole of the price control not simply a revision of the price control over the unelapsed period. As we mentioned earlier, the relief sought is the "setting aside" of the price control and the "substitution" of equivalent paragraphs incorporating the lower final figure. This does not, of course, mean that the Tribunal has the power under section 195 to direct OFCOM to adopt a replacement price control rather than a revised price control. But the Notice of Appeal does not, in the Tribunal's judgment, preclude BT from asserting that it should be granted that relief if we find that the Tribunal does have the power to do so.

32. More difficult is the question whether the Notice of Appeal encompasses the possibility of the Tribunal directing the future adjustment of the price control. We return to this question when we consider BT's case on possible future adjustment.

A replacement price control

33. We turn then to the question whether section 195 confers on the Tribunal the power to direct OFCOM to adopt a replacement price control covering the whole period rather than only for such period as has not elapsed by the time the matter is disposed of. This issue turns on the proper interpretation of section 195, in particular subsection (5), and the provisions of the 2003 Act which confer on OFCOM the power to impose a price control.

34. Section 45(1) of the 2003 Act provides that OFCOM shall have power to set conditions under that section and lists the kinds of conditions that can be set. These include "SMP services conditions" which are authorised by one or more of sections 87 to 92. Section 47 of the 2003 Act sets out the test which must be satisfied before a condition under section 45 can be set or modified. This test is fourfold: the condition must be objectively justifiable in relation to the services to which it relates; it must not unduly discriminate against particular persons or classes of persons; it must be proportionate to the aim it is intended to achieve and it must be transparent.

35. Section 87(9) authorises the imposition of price controls in relation to network access although the authorisation is expressed to be "subject to section 88". Section 88 then provides that OFCOM must not set a price control unless certain criteria are satisfied, in particular:

> " **88**(1) OFCOM are not to set an SMP condition falling within section 87(9) except where --
>
> > (a) it appears to them from the market analysis carried out for the purpose of setting that condition that there is a relevant risk of adverse effects arising from price distortion; and
> >
> > (b) it also appears to them that the setting of the condition is appropriate for the purposes of-
> >
> > > (i) promoting efficiency;

(ii) promoting sustainable competition; and

(iii) conferring the greatest possible benefits on the end-users of public electronic communications services.

(2) In setting an SMP condition falling within section 87(9) OFCOM must take account of the extent of the investment in the matters to which the condition relates of the person to whom it is to apply.

(3) For the purposes of this section there is a relevant risk of adverse affects arising from price distortion if the dominant provider might-

(a) so fix and maintain some or all of his prices at an excessively high level, or

(b) so impose a price squeeze,

as to have adverse consequences for end-users of public electronic communications services."

36. On this point OFCOM joined forces with the 2G/3G MNOs in arguing that there is no such power because:

(a) According to section 195(5), the Tribunal must not direct OFCOM to take any action which they "would not otherwise have power to take in relation to the decision under appeal";

(b) The Tribunal can therefore only direct OFCOM to adopt a price control which is of a kind authorised by section 87(9) of the 2003 Act;

(c) Section 87(9) only authorises the adoption of SMP conditions which control prices for the future, not which purport to set prices for periods in the past;

(d) Further, the conditions set in section 88 are all directed at preventing future adverse effects not for remedying past adverse effects.

37. BT argued that an appeal by its very nature requires you to look back at the time when a measure was adopted and to correct it – an appeal operates *ex tunc* rather than *ex nunc*. The 2G/3G MNOs also referred to the "general position in public law" which, they say is that when a decision of a public body is quashed by the Administrative Court then the decision maker retakes the decision as of the new

date and does not put itself back in the factual situation it was when it took the decision that was quashed.

38. Neither side referred us to any text book or case law in support of their contrasting submissions as to what was the norm more generally in public law cases. In any event we consider that what happens in judicial review proceedings is of limited relevance here. These proceedings differ from judicial review proceedings in two significant ways. It is clear that the Tribunal is expected, together with the CC, to delve into the merits of the 2007 Statement rather than simply review OFCOM's decision on traditional judicial review grounds. Further, although mandatory orders are a rarity in judicial review proceedings, section 195 clearly expects the Tribunal to give directions to OFCOM as to how to change the decision it originally took. This issue must therefore be resolved by a proper construction of the relevant statutory provisions rather than by reference to the practice in other areas of the law.

39. We agree that SMP conditions are intended to constitute *ex ante* regulation rather than *ex post* regulation such as the application of the prohibitions in the Competition Act 1998. To that extent the MNOs are right when they argue that the exercise of the power to impose SMP conditions is intended to operate "prospectively" and not "retrospectively". The question is what those terms mean in this context and in particular whether, if the Tribunal were to direct OFCOM to set a replacement price control rather than just a revised price control, we would be offending against the principle and therefore directing OFCOM to do something which it does not have power to do.

40. In the Tribunal's judgment section 195 does envisage that the Tribunal can direct OFCOM to adopt a replacement price control covering the whole period covered by the price control which has been found to be based on erroneous principles. Section 195(3) *requires* the Tribunal to include in its decision a decision as to what (if any) is the appropriate action for OFCOM to take in relation to the subject-matter of the decision under appeal. Then the Tribunal is *required* to remit the decision to OFCOM with such directions (if any) as the Tribunal considers

appropriate for giving effect to its decision. OFCOM is then *required* by section 195(6) to comply with every direction given.

41. The statutory scheme therefore contemplates that the Tribunal has sufficient powers generally to give effect to its decisions by directing OFCOM to take action. It is true that this is qualified by the words "if any" in parentheses. But it contemplates that in the generality of cases there will be something that the Tribunal can, and hence must, direct OFCOM to do in order to put right the errors which have been identified.

42. If the interpretation urged on us by OFCOM and the 2G/3G MNOs is correct there will be a large number of cases where the Tribunal is unable to "give effect" to its decision when it remits the decision to OFCOM because of the time that has elapsed during the hearing of the appeal. For example, if BT's or H3G's appeal against the 2007 Statement had been limited to an issue which was only relevant to the starting point of the glidepath, the Tribunal would be unable to give effect to a decision if the appeal was concluded after the price control had come into effect. In any appeal like the current one where the challenge is to the principles adopted in setting the price control over the whole period, the Tribunal would be unable fully to "give effect" to its decision because the appeal will be determined only after some part of the price control period has expired.

43. The 2G/3G MNOs argued that this perceived problem could have been avoided by BT making an application for interim relief at the start of the appeal process, though they frankly acknowledge that they would have strongly contested any such application. They conceded that an application for interim relief would have raised difficult and complex issues. The Tribunal agrees that there would have been serious issues as to whether interim relief could, as a matter of law, be granted in this appeal as well as to whether it would have been appropriate for the Tribunal to exercise its discretion, if such a discretion existed. Similarly the suggestion that OFCOM could have set the price control sufficiently in advance of the date on which it comes into force for the appeal to be completed before it takes effect is unrealistic.

44. The 2G/3G MNOs relied on the wording of section 195(5), in particular the tense used to describe how the scope of OFCOM's powers limits the Tribunal's powers of direction. They say that the way the limit is expressed: we cannot direct the decision maker to take "any action which he would not otherwise have power to take" is forward looking. If it had expressed the limit in terms of the action that the decision-maker *would have had* power to take, that would clearly have indicated that the Tribunal stands in the shoes of the decision-maker as at the time he took the original decision not as at the time of retaking the decision after the appeal has been disposed of. The fact that the subsection does not use that wording indicates, they argue, that the Tribunal stands in the shoes of the decision-maker as at the time he comes to take the decision in compliance with the Tribunal's directions on the disposal of the appeal.

45. We do not accept that the wording of the subsection gives any clear support either for BT's interpretation of the provisions or for the MNOs'. We must read and interpret this wording in the context of the overall appeal procedure set up by sections 192 onwards. In the Tribunal's judgment the primary task of the appellate body in challenges to SMP conditions is to determine first whether OFCOM fell into error when devising the price control and, if it did, what OFCOM ought to have done. As we indicated in the ruling with which we referred the specified price control matters to the CC ([2008] CAT 5), it may not be possible in every case for the CC and the Tribunal to come up with substitute numbers. This will depend on the nature of the error identified. But the statutory framework directs us and the CC to do this as far as possible. It follows from this that our powers must extend to being able to fulfil that primary function and that those powers are not truncated or frustrated in an arbitrary way dependent on the length of time it takes for the appeal to be resolved.

46. The Tribunal is unanimous in concluding that our powers to direct OFCOM as to what the price control should be cover the whole of the price control period and are not limited to the unelapsed period of the price control at the conclusion of the appeal.

47. Further we consider that BT's Notice of Appeal clearly encompasses this relief and that the questions referred to the CC by the order of 8 March 2008 do, as the CC has always assumed, ask it, if possible, to determine the TACs for all four years of the price control.

Taking account of the expiration of part of the price control period

48. The third issue for the Tribunal is whether there is power under section 195 to adjust the TACs in the unelapsed period of the price control to take account of the fact that the prices charged by the MNOs during the conduct of the appeal were higher than would have been charged if the recalibrated glidepath had been in operation as from 1 April 2007.

A lump sum reimbursement

49. Initially, in its submissions on this issue to the CC, BT suggested that the MNOs should be ordered to pay a lump sum in "compensation" to reimburse it for the overpayments it had made prior to the disposal of the appeal. The MNOs objected to this on a number of grounds. They argued that BT had passed on these higher prices to its own customers (whether transit or retail) and so had not in fact suffered any loss for which it was entitled to be compensated. Since there was no power to require BT to pass on any such compensatory payment to customers who had paid higher prices during the course of the appeal, the compensatory payment would be a windfall for BT.

50. The MNOs' more fundamental objection was that OFCOM would not have power, in exercising its powers under sections 45 and 87(9) of the 2003 Act, to order such a lump sum payment and, applying section 195(5), such an order cannot therefore be a proper outcome of this appeal.

51. This is undoubtedly right and can be contrasted with the position of the Tribunal when determining an appeal brought under section 192 against OFCOM's determination of a dispute using its dispute resolution powers in section 185. Section 190 sets out OFCOM's powers when resolving a dispute referred to it under section 185. This includes (section 190(2)(d)) a power -

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

52. Thus at the end of the Termination Rate Disputes appeals (Tribunal cases 1089–1092/3/3/07) all parties accepted that the Tribunal had power to direct OFCOM to order an account to reconcile the sums in fact paid over the period of the disputes with the sums that should have been paid if the prices determined by the Tribunal had prevailed (see order dated 17 November 2008).

53. In considering whether the Tribunal has power to direct OFCOM to set any kind of future adjusted price control, BT urged us to bear in mind that the appeal mechanism in sections 192 *et seq* of the 2003 Act is intended to implement Article 4 of the Framework Directive. That provides:

> "**4. Right of Appeal**
>
> 1. Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise available to it to enable it to carry out its functions. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise."

A future adjustment of the price control

54. In its written submissions to the Tribunal, BT abandoned its request for a lump sum payment. Instead, BT focused its submissions on the power to make a future adjustment of the price control to take account of the overcharging in the elapsed period. This was a more attractive option in that it would make it more likely that consumers would ultimately benefit from lower prices rather than the benefit accruing solely to BT.

55. BT's case on the future adjustment was developed and clarified at the oral hearing before us in December. At the hearing two different approaches were canvassed by the parties. One possible approach focused on *compensating* the MNOs'

wholesale customers for the overpayments they had made during the time taken for the appeal to be determined. This could be done by working out how much each customer had overpaid having regard to the number of minutes it had terminated at the prices prevailing under the 2007 Statement and then factoring a reduction into the prices for the remaining period so as to cancel out that overpayment. The Tribunal is unanimous in rejecting this as a possible outcome of the appeal, for reasons which are discussed below.

56. BT also put forward a more subtle argument in favour of a modified future adjustment. Rather than arguing for a compensatory adjustment designed to put MNOs' customers in the same financial position as if the recalibrated glidepath had prevailed, they framed the argument in terms of re-establishing the *overall efficiency* of the price control to ensure that the ultimate price control operating fulfils the criteria in section 88, taking the four year period as a whole. We refer to this kind of future adjustment as a "section 88 criteria adjustment". The method of achieving this that was now proposed was to work out in pence how much higher, cumulatively, the 2007 Statement prices were compared with the recalibrated glidepath over the elapsed period and then deduct that amount in pence from the TACs in the remaining years of the price control. For example, if the 2007 Statement TACs for the four years (in ppm before allowing for inflation) had been 6.5, 6.3, 6.0 and 5.8 and the recalibrated glidepath indicates those figures should have been 6.3, 6.1, 5.8 and 5.6 then the overpayment in years 1 and 2 amounts to 0.4 pence which could be carried forward by reducing the TACs for years 3 and 4, for example, to 5.6 and 5.4. We refer to this method hereafter as "the Proposed PPM Method".

57. On this possibility, the Tribunal has been unable to reach a unanimous decision. The majority of the Tribunal has concluded that in the circumstances of this case, it would not be right for either the CC or the Tribunal to investigate further whether a section 88 criteria adjustment should be made.

58. Dealing first with the compensatory adjustment, the Tribunal is unanimous in concluding that the Tribunal's task on disposing of a challenge to an SMP condition does not include attempting to enable wholesale customers to recoup

from the MNOs or their transit customers any overpayments during the expired period of the price control. There are always "winners" and "losers" in financial terms arising from the fact that the regulator erred; that it took some time for that error to be identified and corrected and that, in the interim, private parties have acted on the basis of the original regulatory decision. There are some instances of the Tribunal's jurisdiction under section 192 where the legislation recognises the hybrid nature of the proceedings, in particular as regards appeals from dispute resolution under section 185. As we have noted above, in determining such disputes OFCOM has an express power to order a reconciliation between amounts in fact paid and the amounts which would have been paid if the prices determined by OFCOM had prevailed during the course of the dispute. In relation to appeals against the setting of an SMP condition, the legislature has provided no clear mechanism for this to be redressed. It would have been a simple matter for the legislature to include in section 195 a provision similar to section 190(2)(d). The fact that the statute does not do so indicates that the Tribunal's role in such appeals does not extend to adjusting the position of private parties for the purpose of compensating those who have overpaid.

59. We do not consider that this result is inconsistent with the direct effect of Article 4 of the Framework Directive and the requirement in that Article for an "effective appeal mechanism". The question of the application of Article 4 is considered further below.

Relevance of Conditions MA3.6 of the price control

60. BT relied on the existence in the price control of provisions which enable OFCOM to adjust later years of the price control to reflect over recovery by the MNOs in earlier years. Condition MA3.6 provides that, notwithstanding the obligation imposed on each MNO to take all reasonable steps to secure that it does not exceed the TAC in any relevant year of the price control, if an MNO fails to do so in any of the first, second or third years, OFCOM may direct that it makes an adjustment to its charges for the following relevant year "for the purpose of remedying that failure". If OFCOM concludes that the MNO is likely to fail to meet the TAC in the fourth year of the price control it may direct the MNO to make adjustments to its charges for the remainder of the year for the purpose of avoiding that failure.

61. BT did not contend that OFCOM would have a discretion, using this provision, to make a future adjustment following its replacement of the price control. BT however did rely on condition MA3.6 in support of its contention that the Tribunal has power to direct the future adjustment because the inclusion of this condition indicates:

    (a) that a reduction for the future is an established way of correcting for overcharging in the past – it is, as Mr Anderson QC put it on behalf of BT, "a concept which is firmly grounded" in the price control;

    (b) that there are circumstances in which OFCOM has the power to make such a future adjustment. The source of this power must be section 87(9) in conjunction with section 88 of the 2003 Act;

    (c) that, in considering whether the conditions set in the price control satisfy the criteria in section 88, one must look at the price condition as it applies over its whole duration not just in one particular year;

    (d) that a future adjustment may set the rate for year 4 at below the efficient level of costs. At the hearing OFCOM accepted that this could result the price in year 4 dipping below efficiently incurred costs.

62. In the Tribunal's judgment, condition MA3.6 does not provide support for the existence of a more general power to adjust the latter years of a replacement price control to take into account overpayments occurring during the course of an appeal. We accept Mr Holmes's submissions on behalf of OFCOM as to the purpose of MA3.6. The purpose of giving OFCOM a discretion to make this adjustment is to remove any incentive on the part of the MNOs to deviate, even in a minor way, from the TACs set for each relevant year. This is a supplement to OFCOM's separate powers in sections 94 to 104 of the 2003 Act for punishing more substantial or deliberate contraventions of SMP conditions. We accept therefore that the inclusion of condition MA3.6 can be said to promote efficiency and confer benefits on end-users because it forms part of OFCOM's enforcement

powers. It does not demonstrate that OFCOM has power to make a future adjustment for any other purpose.

63. In the light of our conclusion that there is no power to direct the making of a compensatory future adjustment we do not need to consider further whether a request for such a compensatory future adjustment was included in BT's Notice of Appeal.

Re-establishing an overall efficient price control by adjusting years 3 and 4

64. We all agree that restricting the possible remedy in this case to a determination of the recalibrated glidepath may mean that the price control which ultimately operates over the four year period is not optimal. Consumers through their originating operators, both fixed and mobile, have already paid amounts that reflect the 2007 Statement price control condition as it applied in Years 1 and 2. If the CC sustain their provisional findings, all wholesale customers and therefore many consumers will have paid too much for MCT. There are likely to be consumers upon whom an inefficiently high set of retail charges will have had an impact. For that type of customers, adjusting future tariffs could have an offsetting effect though the set of past higher payers will not exactly match the set of future lower payers because the extent to which they were overcharged during years 1 and 2 and the extent to which they will benefit in years 3 and 4 will be affected by any changes in their behaviour.

65. Further, higher MCT charges may favour traffic originated by MNOs over traffic originated by FNOs because MNOs are recipients as well as payers of MCT charges. The use by MNOs of some of their MCT receipts to improve their retail offering means that overpayments can affect the relative levels of business as between fixed and mobile service providers. It may well be possible to address these inefficiencies by making an adjustment to the unelapsed period of the price control.

66. We have approached the question of whether the Tribunal has power on disposing of the appeal to direct OFCOM to make a section 88 criteria adjustment in stages:

(a) the first stage is to consider whether the statutory framework in effect imposes a *duty* on the Tribunal to make such an adjustment in order to ensure that the final price control condition is as close as possible to the one which best fulfils the section 88 criteria;

(b) if the answer to that question is no, the next stage is to consider whether there is a *power* for the Tribunal to do so when disposing of an appeal in accordance with section 195;

(c) If the answer to that question is yes, the final stage is to consider whether as a matter of process, it is appropriate in this appeal to investigate what that better price control condition might be.

Is there a duty to make a section 88 criteria adjustment?

67. As regards whether there is a *duty* to make a section 88 criteria adjustment, the argument runs as follows. Sections 87(9) and 88 provide that OFCOM *must not* set an SMP condition except where it appears to them appropriate for the purposes of fulfilling the criteria in section 88(1)(b). Given that section 195(5) provides that the Tribunal *must not* direct OFCOM to do something that it does not otherwise have power to do, this means that the price control that the Tribunal directs OFCOM to adopt on the disposal of the appeal must be a price control which fulfils those criteria. In determining the TACs for all four years, the CC must therefore direct its mind to how those criteria are to be fulfilled. In doing so, the CC should take into account that the TACs prevailing in Years 1 and 2 were at the level set in the 2007 Statement. Clearly if there is a duty to ensure that the ultimate price control condition is the best fit with the section 88 criteria, then there must be a corresponding power on the part of the Tribunal to do so.

68. The conclusions of the majority of the Tribunal on this point are as follows. The obligation to set an economically efficient price control condition at the conclusion of the appeal must be interpreted in the context of the overall constraints of the appellate process. One can envisage circumstances in which, despite that obligation, the disposal of the appeal could lawfully result in the setting of a price control which is less than optimal in terms of the section 88(1)(b) criteria. For

example, the grounds of appeal raised by the appellant may be very limited in scope. There may be other aspects of OFCOM's decision which the Tribunal or the CC would have found were wrong but which were not challenged by the appellant and which cannot therefore be corrected by this appellate process.

69. Moreover, parties, whether appellants or interveners, may seek during the course of the appeal to introduce new issues by amendment of their pleadings. The Tribunal must be able to exercise its discretion to allow or reject such applications in accordance with the Tribunal's Rules without having to decide in respect of each proposed new issue whether, if the issue were excluded, the appeal could ultimately result in a price control which was sub-optimal in terms of the section 88 criteria and which therefore was "unlawful".

70. Finally, it may become clear that one or more of OFCOM's assumptions as to how the market would develop is not borne out by the events as they unfold as the appeal runs its course. Yet if the Tribunal were required to take such points into consideration in order to avoid arriving at a price control at the end of the process which it knows to be sub-optimal, this would make the efficient case management of these appeals much more difficult.

71. If sections 195(5) and 88 really prohibited the Tribunal from arriving at a price control condition which is less than optimal in all the circumstances prevailing as at the date at which the modified condition is published, then the appeal process would need to be very different from the process that has been laid down in the 2003 Act. The obligation imposed by sections 195(5) and 88 is an obligation to arrive at a price control which is as good as is achievable within the limits of the powers conferred by the Act and which is consistent with the orderly conduct of the appeal. There is no self standing power arising from an overriding duty to ensure that the section 88 criteria are fulfilled.

72. In the judgment of the majority of the Tribunal on the proper application to this case of section 3, especially subsections (1)(a), (5) and (7), along with sections 47(2), 87(9), 88(1)(b) and 195(5), a price control set following the disposal of the appeal would be lawful if it incorporates changes to the TACs in each year that

follow arithmetically from the CC's findings on each of BT's grounds of appeal which the CC considers are well founded.

Is there a power to make a section 88 criteria adjustment?

73. As to whether there is a power to adjust the unelapsed part of the condition because of the time taken by the appeal, the majority has not reached a firm conclusion. At the hearing, OFCOM, in the light of their submissions relating to condition MA3.6, did not rule out that BT could in some circumstances justify a future adjustment as fulfilling the purposes of section 88. But, OFCOM argued, the argument would need to be made out fully and carefully by reference to those purposes to show that the efficient charge level should be different from that which would otherwise prevail. It must, Mr Holmes said, "be a more fine-grained and specific argument by reference to section 88(1)(b)".

74. On behalf of the MNOs, Ms McKnight for Vodafone, in her clear and helpful submissions, accepted that how much MNOs have charged in the past can in some circumstances be factually relevant as to how the charge control should be set in the future. But the extent to which this is the case depends critically on the reasoning underlying the setting of the price control. She then went on to explain that the CC proposes in its provisional conclusions to deal with the recovery of spectrum costs by determining the net present value to the operator of using 3G spectrum rather than linking the TACs to the cost of acquiring that spectrum. In the light of this, she argued, it would be inconsistent to try to make a future adjustment because prices during the elapsed period of the price control were too high.

75. Since both OFCOM and Vodafone (speaking for the 2G/3G MNOs) did not rule out that such an adjustment might be legitimate in certain circumstances we are also not prepared to rule it out. However, the majority see serious difficulties in the exercise of any such power. Where the errors alleged in OFCOM's reasoning are of a limited nature, the kind of inquiry that would be needed to establish whether and how those errors led to the price control deviating from the section 88 criteria may well set in train a much more extensive investigation into how the market actually works than would otherwise be needed simply to decide whether

the grounds of appeal are well founded. Making a section 88 criteria adjustment will inevitably prolong and complicate an appeal where the appellant chooses at the outset to seek this kind of relief.

76. The posited power also suffers from the same defect as the compensatory future adjustment namely that there is no statutory provision unambiguously empowering the Tribunal to direct OFCOM to take steps to counteract the adverse effects resulting from an erroneous price control at the end of an appeal under section 192. As we have mentioned earlier, the possibility of reversing those adverse effects in the present appeal arises only if enough of the price control period remains unelapsed to enable the future adjustment to be made in a sensible way. The fact that the possibility of making the future adjustment arises or might arise as a matter of chance in this case again indicates that this is not an exercise that the statute contemplates should be carried out.

Should the CC be asked to investigate what would be a suitable section 88 criteria adjustment in this case?

77. The majority of the Tribunal has reached the firm conclusion that the CC should not be asked to embark on this exercise at this late stage of the appeal. The consequences for efficiency, sustainable competition and for consumer welfare of overpayment in the first two years of the price control are not reversible in any simple manner. The direct effect of overpayment on wholesale customers may be small. FNOs pass the payment through to their own retail and transit customers. The pass through by MNOs is more complicated because of the waterbed effect[1] and because the relationship between the retail price and the cost of providing the service varies greatly as between MNOs and as between different tariffs offered by the same MNO. The indirect effect of overpayment is also complex. The question of how far consumers of mobile and fixed services have been affected and whether it is possible to reverse this effect by dropping the prices in years 3 and 4 is an issue on which strongly divergent views may reasonably be held.

[1] The "waterbed effect" refers to the fact that revenues from MCT charges are, in part, competed away by the MNOs in the retail packages they offer.

78. The Proposed PPM Method (described in paragraph [66] above), of reducing the future TACs by the cumulative total of the difference between the past TACs and the recalibrated TACs, is a short cut. It assumes that the competitive conditions affecting public communication providers will remain broadly the same throughout the control period so that MCT charges will be passed through to the consumers broadly to the same extent in the future as they were in the expired period. We have serious concerns that for the CC to start investigating now whether this assumption is warranted will open up many new areas for debate. The 2007 Statement is based on a wide range of different predictions about how the market is likely to develop over the course of the price control period. We do not know how many of these the MNOs would wish to contest if it became apparent that they were relevant not to the matters raised by the grounds of appeal but to the making of a section 88 criteria adjustment.

79. At the hearing, Miss Rose QC, on behalf of H3G reminded us that we were not at this stage considering what directions we would in fact give to OFCOM on the disposal of the appeal but only what the scope of the Tribunal's powers were in that regard. The majority of the Tribunal concludes therefore that it would not be proper to ask the CC at this stage simply to calculate what effect the Proposed PPM Method would have on the unexpired portion of the price control. If the question of whether a section 88 criteria adjustment is appropriate is a "specified price control matter" and therefore properly within the remit of the CC it would not be right for the Tribunal to direct the CC to limit its options to choosing only between adopting the Proposed PPM Method or making no adjustment. The choice for the Tribunal is therefore either to decide that this is not a route that we should go down or to ask the CC to conduct a proper investigation into what section 88 criteria adjustment should be made.

80. If the CC were asked now to devise a section 88 criteria adjustment, this would inevitably delay the ultimate disposal of the appeal. Ensuring the maximum benefit to end users is only one of the section 88 criteria. The CC would have to consider whether an adjustment promoted efficiency and sustainable competition as well. Further the CC would have to strike a balance between the same conflicting objectives that OFCOM considered when setting the glide path (see

paragraph [5] above). It may conclude that the Proposed PPM Method is a fair and appropriate way to do it or it may not. The Tribunal at present cannot assess how difficult a task this new exercise would be for the CC or what the ultimate outcome is likely to be. All that is known is that the CC has not so far conducted its investigation over the past nine months on the basis that it would have to carry out this future adjustment exercise. It is also clear that the parties are very unlikely to agree on what is a fair and appropriate adjustment to make.

81. We are prepared to assume for this purpose that BT's Notice of Appeal does include a request for relief along the lines that they now seek. But the Notice does not set out the Proposed PPM Method as the one that BT is asking the CC to adopt, assuming that the CC is the body which should undertake this exercise in the context of this appeal. In paragraph 18 of its Notice of Appeal, BT stated that it would make submissions as to what the appropriate figure for the Year 4 TAC should be in the course of its appeal and reserved its position on this question. BT's submissions were sent to the Tribunal and the CC on 7 March 2008 to ensure that "the other parties and the Competition Commission should know what BT's proposal is at the earliest stage of the Competition Commission proceedings". In those submissions BT set out in detail the adjustments that it argued should flow from the success of its various grounds of appeal. The effect of those grounds was set out in a table which showed what the ultimate ppm price should be in the final year of the price control. BT noted that in the event that only some of its grounds were to succeed, the proposed price should be adjusted. These submissions made no mention at all of a further adjustment to take account of the time elapsed during the appeal. This point was only raised with the other parties at a plenary session before the CC on 21 October 2008.

82. We have in several previous rulings in this appeal stressed the need to keep the appeal within manageable bounds and on track to reach a conclusion before the whole of the price control expires. At the end of our ruling on the admissibility of H3G's pleadings ([2008] CAT 10) we said-

> "These proceedings have now been underway for a year and the Tribunal will deal very firmly with any attempt to raise matters which expand the ambit of the appeal beyond the issues which now properly form part of it."

83. The majority of the Tribunal therefore conclude that whether or not the Tribunal would otherwise have the power to do so, it will not be open to the Tribunal, when disposing of this appeal, to direct OFCOM under section 193(3) of the 2003 Act to set a price control in which the TACs set for the unelapsed period covered by the 2007 Statement are adjusted to take account of the fact that the prices were set too high in the elapsed period covered by that Statement. There is therefore no purpose to be served by the CC embarking on consideration of whether such an adjustment is appropriate.

84. The majority does not consider that this result is inconsistent with Article 4 of the Framework Directive. The question of what is included in the bundle of rights conferred on a person affected by the regulator's decision by Article 4 has been the subject of judicial consideration both in our domestic courts and in the European Court of Justice. We were referred to the Court of Justice's decision in Case C-426/05 *Tele2 Telecommunication GmbH v Telekom-Control-Kommission*, judgment of 21 February 2008 in which the Court stated that-

> "Article 4 of the Framework Directive follows from the principle of effective judicial protection, which is a general principle of Community law stemming from the constitutional traditions common to the Member States and which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms…".

85. BT referred us to some case law on the scope of the rights under the Human Rights Convention referred to in that quotation from *Tele2*. In Application No. 2015/02 *Jakub v Slovakia* judgment of 28 February 2006, the Strasbourg Court, in rejecting the Respondent's contention that the Applicant had failed to exhaust domestic remedies, referred to the fact that the Convention "is intended to guarantee rights that are not theoretical or illusory, but rights that are practical and effective". We were also referred to the well known decision in Cases C-6&9/90 *Francovich v Italy* [1991] ECR I-5357 where the Court of Justice set a high hurdle to be overcome by a claimant seeming damages from a public authority which has acted in breach of the law.

86. We were not referred to any authority precisely on the point as to whether the right to an "effective appeal mechanism" includes the right on the part of the affected

person to require a future adjustment to counteract the effect of the regulator's error as is now sought in this case. In our judgment, Article 4 does not require the Member State to provide for a future adjustment to make good the adverse effects caused by the regulator's error. This follows from the decision of this Tribunal in *T-Mobile (UK) Limited and Telefónica O2 UK Limited v OFCOM* [2008] CAT 15 where it was held that judicial review can be an adequate appeal route for some decisions covered by Article 4. As Jacob LJ stated in the Court of Appeal judgment upholding that decision ([2008] EWCA Civ 1373) "What is called for is an appeal body and no more, a body which can look into whether the regulator had got something material wrong".

87. Neither the Framework Directive nor any other instrument in the Common Regulatory Framework for electronic communications stipulates in more detail what arrangements the Member States must make in their domestic implementation of the Directive to ensure that Article 4 is complied with. The precise scope of the remedies available is therefore left to the Member State. Whether such a right exists depends on how the Member State has chosen to implement this provision in its domestic law.

88. In the light of that conclusion the majority does not need to reach a conclusion on the fourth question as to the allocation of responsibilities between the Tribunal, the CC and OFCOM.

Conclusion

89. The Tribunal unanimously concludes that -

    (a) BT's Notice of Appeal puts in issue the TACs for all the years covered by the price control not just the fourth year;

    (b) The Tribunal would have power on disposing of this appeal to direct OFCOM to reset the price control for the whole of the period 2007 – 2011;

90. By a majority the Tribunal further concludes that -

(c) The Tribunal will not, when it comes to dispose of this appeal, direct OFCOM to make an adjustment to the future years of a new price control to reflect the fact that the MCT prices charged in accordance with the 2007 Statement have been found to have been too high. There is therefore no purpose to be served by the CC investigating whether or how to make such an adjustment.

Andrew Bain: reasons for dissent from majority opinion

91. I agree with the conclusions set out above at paragraph 89. However I disagree with the majority opinion as regards the nature of the Tribunal's duty in relation to section 88 of the Act, the appropriateness of the replacement price control remedy in relation to that section and the desirability of enabling the CC to consider a section 88 criteria adjustment at this stage.

The Tribunal's duty in relation to section 88 of the Act

92. At paragraphs 68 to 72, the majority consider whether there is a duty to make a section 88 criteria adjustment. I agree that there is no duty under the Act to make a section 88 adjustment to substitute a price control that takes account of matters outwith the grounds of appeal or of changes in circumstances since the OFCOM Decision.

93. The point of disagreement is whether, within the parameters set by the appeal, the task of the Tribunal is to ensure that the ultimate price control condition fulfils the section 88 criteria. In my opinion, the primary task of the Tribunal should be to ensure that the SMP conditions over the control period taken as a whole serve the purposes of the Act, as set out in general terms in sections 3 and 4 and more specifically in section 88.

94. In the appeal process the methodology employed by OFCOM in arriving at the SMP conditions is taken as given, save where challenged by the grounds of appeal. The modified SMP conditions resulting from an appeal must adhere to that methodology except insofar as the appeal has found errors which need to be

corrected. The problem arises when as a direct result of such errors the resulting SMP conditions are plainly at odds with the section 88 criteria. In that case a section 88 criteria adjustment may allow a better fit.

95. In my opinion, the duty of the Tribunal is to do the best it can in the circumstances to pursue those objectives, in particular those of furthering the interests of consumers and not favouring particular forms of electronic communications networks. The choice of an appropriate SMP condition should not therefore be constrained by the remedies sought by the Appellant. It is not appropriate to restrict the SMP conditions to those which the Appellant perceives to further its own narrow interest rather than to impose conditions which in the view of the appropriate expert body – in the case of a price control appeal, the CC – best serve the purposes of the Act.

96. In this case, while BT in their notice of appeal stipulated that the remedy should comply with the section 88 criteria, I agree with the majority that if the CC wished to pursue a section 88 criteria adjustment, in the absence of any elaboration at an earlier stage of the appeal, further consultation with the parties would necessarily be involved. However, whether or not this particular remedy was properly pleaded is not in my view critical to determining whether or not it should be considered by the CC.

Compliance of the replacement price control and section 88 criteria adjustments with section 88 of the Act

97. The benchmark for considering how well the replacement price control and the Proposed PPM Method of making a section 88 criteria adjustment comply with those criteria is OFCOM's existing SMP conditions, corrected for errors in the final year TACs, and with Years 1 to 3 recalibrated in line with OFCOM's decisions regarding the glidepath. If these conditions had been brought into force from April 2007 they could have been assumed to comply with the section 88 criteria.

98. The majority concede (paragraph 64) that the replacement price control may not be optimal as regards section 88. In fact, set half way through the control period, the replacement price control will have the following effects: prices averaged over the whole control period will be appreciably higher than the benchmark and therefore not efficient; the MNOs will have enjoyed a marketing advantage in the first two years that will not be offset by a corresponding disadvantage in the second half of the period; and end-users making calls to mobile numbers will have been overcharged by several hundred million pounds over the first two years with no corresponding undercharge later. In my opinion these deviations from the benchmark are such as to call into question whether the resulting SMP conditions would comply with the section 88 criteria.

99. In contrast, taking the control period as a whole, the PPM method of making a section 88 criteria adjustment, while necessarily imperfect, would provide a prompt and practical means of approximating the benchmark conditions. In particular, prices would average the efficient level of prices over the control period; the marketing advantage enjoyed by the MNOs in the first half would be balanced by a broadly compensating disadvantage in the second half of the period, thus promoting sustainable competition over the period as a whole; and while some individual end-users would either gain or lose, end-users as a group would be charged much the same as in the benchmark conditions.

100. OFCOM and the MNOs argued that to adjust the price control conditions in this way would be in conflict with the requirements of section 88 in that by potentially reducing the TAC to below the efficient charge level in one or more years the condition would not "promote efficiency" in those years. I do not accept those arguments. First, the condition in question applies to a four-year period. The question whether the condition promotes efficiency must therefore be assessed over the four-year period of the charge control as a whole, rather than for each individual year. Second, as OFCOM accepted, "efficiency" is a much wider concept than short-term allocative efficiency and dynamic efficiency considerations frequently justify departures from short-term allocative efficiency. In the particular circumstances of this case, the duration of subscriber contracts and

subscriber retention are such that misallocation of resources due to pricing errors in the elapsed period will, if left uncorrected, persist for several years afterwards.

Power to make a section 88 criteria adjustment

101. I note that the majority are not prepared to rule out a section 88 criteria adjustment as *ultra vires*. Since OFCOM, Vodafone (for the MNOs) and BT have all accepted that it might be appropriate in some circumstances, I assume for the purposes of this judgment that the making of such an adjustment falls within OFCOM's powers.

Practical considerations regarding the expediency of making a section 88 criteria adjustment at this stage

102. The PPM method does not involve access to new information or complex calculations. The raw material is simply the difference between the prices in the original OFCOM conditions for each year and those on the recalibrated glidepath. There are no calculations involving the actual or expected volume of business and the arithmetic is trivial. It would be for the CC to determine the application of the uncontested glidepath principles (see paragraph 5) in a non-discriminatory manner for all the MNOs to allocate the cumulative pricing overcharge over the remaining period. Making such an adjustment does not open any issues currently outwith the ambit of the appeal or re-open any issues within it. In my opinion, the fears expressed by the majority in paragraphs 77, 78 and 80 as regards the complexity of such an exercise and time necessarily involved are much exaggerated.

103. In contemplating any practical disadvantages of a section 88 criteria adjustment it is relevant also that the replacement price control option has substantial disadvantages of its own.

104. Complex and complicated appeals of this kind are liable to drag on. In these particular proceedings, even after the CC issues its determination, there is the possibility of a review of its determination by the Tribunal pursuant to section 193(7) of the 2003 Act and the possibility that OFCOM may need to conduct some

further consultation prior to implementation of a modified condition. Implementation of the modified condition may therefore be further delayed well into year 3 or year 4 of the charge control period. In future cases, where the charge control period might be shorter, the charge control period could well be exhausted prior to any appeal process being completed. If parties know that extending proceedings will enable them to continue to enjoy substantial benefits that they will lose after an appeal is upheld, there is clearly a risk that proceedings will become even more protracted.

105. If the outcome of these proceedings includes redetermination of the TACs for Years 1 and 2 it is likely to give rise to further litigation. BT asserts that if the TACs are "redetermined" it would have a right under its contractual arrangements with the MNOs to repayment of charges over and above the redetermined TACs in those years. The MNOs – understandably, given the very large sums of money involved – contest that assertion. In the circumstances further litigation challenging the ruling of this Tribunal or the construction of the contractual arrangements, or both, is a racing certainty.

106. Furthermore, if BT is in fact entitled to repayment of these charges, they will receive a very large windfall, part of which is likely to be passed on to transit customers. There are, however, no market forces that will compel BT or its wholesale customers to pass on any repayment to their retail customers, who will have been charged rates for calls to mobiles that reflected the higher charges in the first place.

Conclusion

107. For the above reasons, I conclude that the Tribunal should advise the CC that it is entitled to consider the possibility of a section 88 criteria adjustment before reaching its determination, if necessary applying for an extension of time in order to complete its work.

Vivien Rose Andrew Bain Adam Scott

Charles Dhanowa 22 January 2009
Registrar