IN THE COMPETITION Case Nos 1083/3/3/07

APPEAL TRIBUNAL 1085/3/3/07

Victoria House
Bloomsbury Place
London WC1A.2EB

25 February 2008

Before:
MISS VIVIEN ROSE
(Chairman)

PROFESSOR ANDREW BAIN OBE
MR. ADAM SCOTT TD

BETWEEN:

HUTCHISON 3G (UK) LIMITED
("H3G") Appellant / Intervener

and

OFFICE OF COMMUNICATIONS
("OFCOM") Respondent

and

BRITISH TELECOMMUNICATIONS PLC
("BT")

Appellant / Intervener

and

OFFICE OF COMMUNICATIONS

Respondent

With Interventions by:

O2 (UK) LIMITED ("O2")
ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED ("ORANGE")
T-MOBILE UK LIMITED ("**T-MOBILE**")
VODAFONE LIMITED ("VODAFONE")

Also present:

COMPETITION COMMISSION

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Miss Dinah Rose QC and Mr. Brian Kennelly (instructed by Baker & McKenzie) appeared on behalf of Hutchison 3G

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

Mr. Peter Roth QC (instructed by the Office of Communications) appeared for the Respondent.

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

Mr. James Flynn QC and Miss Marie Demetriou (instructed by Field Fisher Waterhouse) appeared on behalf of the Intervener Orange.

Mr. John Turner QC and Mr. Meredith Pickford (instructed by Miss Robyn Durie, Regulatory Counsel, T-Mobile) appeared on behalf of the Intervener T. Mobile.

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

Mr. Tom Sharpe QC and Mr. David Caplan appeared on behalf of the Competition Commission

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THE CHAIRMAN: Good morning, ladies and gentlemen. Thank you very much for your submissions, and also for the timetable that you have produced which we will attempt to follow. Just one point to make in case this helps us to shorten proceedings. The Tribunal's provisional view in relation to Question C, which is the inclusion of references to the statements of intervention in the questions referred to the Competition Commission, our current view - of course subject to what we hear during the course of today - is that it would probably be sufficient to include a recital in front of the questions referring to the statements of intervention, but not to split out in relation to each question which paragraphs of the statement of intervention are relevant. In relation to Question F on whether the question relating to the NPZ suggestion from H3G should just relate to the payments as between the MNOs and H3G, or whether it should relate to payments between all the MNOs inter se, again, our current view is that the question should be left as it is, but, again, subject to anything anybody wants to say to the contrary today.

Following those two indications, perhaps we could get started. I think, Mr. Anderson, are kicking off then on Questions B to D.

MR. ANDERSON: Thank you very much, madam. Question B asks whether the questions to the Commission should require it - and that word is underlined - to devise a substitute price control in the event that it finds that one or more of the grounds of appeal is made out. I can start perhaps with a very modest measure of agreement. None of us here has submitted that the CC should be required, in all circumstances, to devise a substitute price control. The real debate is between those who say, for various reasons that the CC is not even allowed to devise a substitute price control, and, as I read the written submissions, they are Orange, T-Mobile and O2, although some of them do try to sugar the pill by accepting that the CC is at least allowed to give a strong indication as to the appropriate level of the price control (O2 at para. 6). That is one camp.

The other camp is those who say that the CC is allowed to devise a substitute price control – that is BT, H3G, Ofcom, Vodafone – and it would seem the CC itself, which is reticent about doing it, but does not contend, at least in writing, that it is legally precluded from doing so. The points that it makes are practical points, not legal points. We submit not only that the CC is allowed to devise a substitute price control, but that it should be strongly encouraged to do so.

You have got various draft versions of question 7 before you. May I take this opportunity to simplify things but associating BT with Ofcom's draft, which we say in a spirit of generosity is better even than ours. This is para.11 of Ofcom's submission, which you may

have at tab 50 of bundle A, or you may have put it somewhere more convenient. Let me read it out for the record, it is not very long:

> "… 'insofar as is practicable to indicate the level of the price control that Ofcom should be directed (subject to consultation) to apply; and otherwise to provide clear and precise guidance as to how Ofcom should determine the level of the price control'."

Madam, we adopt that as our own draft, subject only to the words in brackets "subject to consultation", which we do not think are necessary and which I will address you on in due course.

We like Ofcom's draft because while it does not require the CC to indicate a price in all cases, it requires to do so when that is practicable. We like it because, even in cases where it is not practicable to indicate a price, it still requires the Commission to provide clear and precise guidance as to how Ofcom should determine the level. That is consistent, I believe, with our written submissions. It is simply that we think that Ofcom may have had a slightly better shot at the draft.

I propose to deal first with the legal point that the CC is allowed to devise a substitute price control; and secondly, with the practical point that it should be given every possible encouragement to do so. Then if time permits at this stage I shall something about the points made against us.

Before I embark on that may I identify two overriding considerations which have a bearing both on the interpretation of the legal provisions and on the practical question. First, there is the need to have an appeal process that is effective, a legal requirement of the Framework Directive, Article 4, and something that is not possible unless the appeal process is reasonably prompt. The tribunal will not need reminding of the maxim that justice delayed is justice denied. Translated into European law by reference to Article 6 of the European Convention that means a right to the determination of a civil dispute within a reasonable time, the "reasonableness" to be judged in all the circumstances. We do not consider that it can be reasonable for an appeal against a four year price determination to be decided only once that period is half or three-quarters over. We have dealt with that point at paras.43 to 47 of our written submissions.

The other consideration is that if the right to appeal and the statutory deadline for the bringing of an appeal are to mean anything at all, it is crucial that the scope of the appeal should be defined by the notices of appeal served by the appellants. The appellants are

bound by that. Similarly, the interveners must be bound by that. Once the deadline for appeal has passed other aspects of the decision are simply not open for debate.

It is important, in our submission, to avoid either an excessively broad remission back to Ofcom or excessively broad reconsultation on issues unconnected with the appeal and the adoption of an appeal that differs from the original decision for reasons unconnected with the appeal. That is the point that we make at para.16 of our submissions and it is central to what I say this morning. Of course, those two considerations are linked. Too broad a reconsideration and reconsultation will produce delay, an ineffective appeal process and perhaps even further challenges.

I come now to the legal point, and this is addressed at paras.18 to 42 of our written submission. I do not think I need take you to that, though it is at tab 46, but may I take you to ss.193 and 195 of the Act, which, as the Tribunal identified, really present the key to so many of these questions. If you are using bundle B, then those sections are at tab 7 of the bundle right at the end. I will also be referring to the 2004 Rules which are at tab 8.

Could I start with s.195, which is on the last or penultimate page of tab 7, which deals with the powers of the tribunal on appeal. 195(2) says:

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

However, by 195(3) that decision must:

> "… include a decision as to what (if any) is the appropriate action for the decision-maker to take …"

Pausing there, that language is highly prescriptive, that use of the word "must". It does not say that it "may", and it refers to a decision as to what is the appropriate action for the decision maker to take. It does not refer to a recommendation or appropriate action or an indication of the range of the appropriate actions.

THE CHAIRMAN: In your view how does that work if all the grounds of appeal are dismissed, if the Competition Commission comes back and says, "We think Ofcom did a perfectly good job, there is nothing that we can see that is wrong with it", do we still have to remit or do ----

MR. ANDERSON: I think that is where the words "if any" might come into play, because in those circumstances if there was no appropriate action for the decision maker to take then plainly no such decision is necessary. Those words "if any" are in there perhaps to cater for that precise possibility. The decision may be that the appropriate action is X, Y or Z, or

the decision may be that no action is necessary because the appeal has dismissed. Both possibilities, in our submission, are countenanced by 195(3).

THE CHAIRMAN: If the appeal is dismissed in its entirety is there still another decision taken by Ofcom after the result of the appeal comes out or is it just the previous decision remains undisturbed?

MR. ANDERSON: I had certainly assumed not, madam, and that it was simply the previous decision that remains undisturbed. It is true that 195 is drafted not in two parts, what if the appeal succeeds, what if it does not succeed, perhaps understandably, because one then gets into questions of what if it succeeds in part or something along those lines. One does have the words "if any", which cater for the situation in which there is no need for the decision maker to take any action, which one presumes will be the case if an appeal has been dismissed.

Those are strong words and the word "must" is strong; and the word "decision" is strong. When someone with authority to do so says, "I have decided what you need to do", you do it, and you do it whether what you need is to substitute a particular decision for the one you have already taken, or whether what you need is to reconsider in the light of particular factors something that you got wrong first time around. 195(3) is broad enough to cater for both possibilities.

Then you see that also from 195(4) where:

> "The Tribunal shall then remit the decision under the appeal to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its decision."

Section 195(4) you may well think is drafted perhaps on the assumption that the decision has been impugned in some respect during the appeal process. Depending on what the tribunal has decided it may need to direct a reconsideration but again, if any, the decision may speak for itself. It may be that nothing needs to be directed in order to give effect to the decision, either because the appeal has been unsuccessful, or because the judgment of the Tribunal simply speaks for itself.

There is only one limitation on the scope of the direction that maybe made, and that is in 195(5):

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

It is hardly surprising that the Tribunal should not be able to direct Ofcom to exceed its statutory powers, but what is interesting about 195(5) is what it does not say. Despite the

fact that Parliament thought fit to spell out the prohibitions on what the Tribunal can order, even perhaps self-evident prohibition such as this one, there is no prohibition on the Tribunal directing Ofcom to substitute a particular price. The setting of a price, of course, is something that Ofcom does have the power to do, and s.195(5) is wholly consistent with the Tribunal ordering Ofcom to do it. So it operates, if you like, as the functional equivalent of Schedule 8, para. 32(e) of the Competition Act which O2 refers to at para.5 of its written submission.

MR. SCOTT: Just staying with that point for the moment, Ofcom cannot take a decision itself without engaging in the Article 7 proceeding, but you seem to be arguing that it does not need to if what it is doing is the result of an appeal. It seems to me there is a clash between what you are saying about sub(5) and the position of Ofcom in normal life, as it were.

MR. ANDERSON: I would like to come to the question of consultation, perhaps at the end; views plainly are divided on that, and there is an issue as to what the Directive means in Article 6 and Article 7 when it says that the decisions shall be consulted upon. Certainly it is not a very happy position if those against us are correct, that one should have had a decision, subjected it to the normal judicial processes with a very clear result and then, let us say the European Commission comes up with a different opinion, what is the respective status to be of the binding decision of the Tribunal and the views of the Commission? That is just one of the factors that to us indicates that one has to read the consultation requirement in Article 6 and Article 7 in a realistic way, as applying to initial proposals for decisions, rather than to implementations of what the Tribunal has directed Ofcom to do, particularly when the direction is a precise one as we say that it can be – even so precise as to direct the implementation of a particular price. We will come back to that if we may; thank you for reminding me of the point.

195(6) requires Ofcom of course to comply with the direction if there were any doubt about that. So, that is 195 and that is the standard provision relating to what the Tribunal can and must do in consideration of an appeal.

193 – we accept of course that the reference of price control matters to the Competition Commission is part of the overall appeal process. The Competition Commission's determination must be fed into the Tribunal's decision. The fact that a price control matter may have been referred to the Commission cannot enlarge the scope of the Tribunal's own jurisdiction to determine an appeal. But s.193 is still important, first because it demonstrates what is expected of the Commission and secondly because it sheds further

light on what the Tribunal is entitled to do under s.195 in direct light, perhaps but illuminating nonetheless.

Our first point here is a general one, why is the Reference procedure to the Competition Commission provided for at all? There can really be only one reason because, as the Tribunal recognised in its ruling on 4th October on the preliminary issue, which we do not need to turn up, but it is bundle C10(4) – in fact, I think we have quoted it at para.33 of our submission – the Competition Commission is better placed to investigate the detail of the price control than is the Tribunal.

We set out at paras. 39 to 42 of our submission the powers of the Competition Commission in that, and the point – without taking you to that – is a simple one, the Competition Commission has all its normal powers including the power to consult third parties, commission surveys and so on.

Nobody I think disputes that those powers are sufficient to allow the Competition Commission in an appropriate case to make its own determination of the price level. The Competition Commission itself says at para.4 of its submission that there will be cases in which it is difficult. Indeed so, difficult – but somebody has to do it, and "difficult" is no doubt why there is open-ended provision in the rules to extent the four month period if necessary. It is precisely because of the expertise of the Competition Commission and the nature of its powers that it is entrusted with issues of price determination.

If, as T-Mobile suggests at paras 4 to 5 of it submission, the only admissible questions as regards the level of prices are questions of principle and methodology, there is no reason why Parliament should have provided for them to have been referred to the Competition Commission at all, they would have been well within economic competence of this Tribunal. The fact that the Reference procedure is provided for is, in itself, a demonstration that the Competition Commission was expected to do something beyond what it is feasible for the Tribunal to do.

That was a long prelude to s.193. There are two more specific things that we take from it. The first is that it envisages price control matters being determined by the Competition Commission and that is the language of s.193(2) and s.193(3) and 193(4) – they all use the word "determine", or "determination". Then decided by the Tribunal in accordance with that determination so long as the Tribunal does not consider the determination to be unlawful in a public law sense, and one gets that from 193(6), and 193(7). So there is a link between the two, an expectation that what the Competition Commission is able to determine, the Tribunal is able to reproduce in its decision.

The second point we get from s.193, which is the reference of price control matters to the Competition Commission is delegated to the rules of the Tribunal, themselves of course laid before Parliament and to the directions of the Tribunal. So 193(1) looks to the rules to specify which price control matters must be referred from the broad range as defined in 193(10).

193(2)(a) looks to the rules to specify how the Competition Commission is to determine the price control matter, and 193(2)(b) allows the Tribunal's directions to determine the procedure of the Competition Commission. As you see from 193(2)(c) the Competition Commission's powers to decide what it considers appropriate arise only to the extent that the rules and directions of the Tribunal do not govern the matter.

Going over to tab 8, and seeing those 2004 rules, you see the definition at rule 3(1)(c) which says that price control matters must be referred to the Competition Commission when they relate to:

> "what the provisions imposing the price control which are contained in that condition should be (including at what level the price control should be set)."

You see rule 5, which requires the Competition Commission to determine again every price control matter within four months or longer if the Tribunal so directs, as I said, it is an extendable period.

For those reasons we say that the Competition Commission does have the power to determine a particular price, referring in particular to rule 3(1)(c) and it appears to accept, at least in its written submission, that the Tribunal has the power to decide that it is appropriate for Ofcom to substitute that price.

Since those powers exist it is, in our submission, obviously appropriate that they should be exercised whenever it is feasible to do so. The expertise of the Commission and the considerable time occupied by the reference to the Commission are thereby put to valuable use. Ofcom receives the precise direction that it obviously and understandably craves and everybody knows where they stand at a stage which allows one to say that the appeal process is effective in its ability to determine the prices actually charged to consumers during the relevant four year period.

May I pick up briefly some of the points made against us on Question B. Most of them relate to the interpretation of ss.93 and 195 on which you already have my submissions. But, may I just pick up a few others?

First of all the scope of the appeals. T-Mobile attempts to attach significance to the fact that BT did not specify in its notice of appeal at what level the price control should be set.

That is a point they make at para. 4 of their written submission. The question of at what level price controls should be set is, in our submission, raise fair and square by BT's appeal. Looking at that notice of appeal at Bundle A. Tab 3, right at the end, under the head 'Relief Sought', at para. 190, we see that BT seeks orders from the Tribunal and/or the Competition Commission not only that Ofcom's price controls be set aside, but that price controls be set at a level lower than the current figures. There is more on that in the body of the notice of appeal. The determination of that question is, by Rule 5, reserved to the CC. The fact that BT did not specify in its notice of appeal at what precise level the price control should be set is entirely beside the point. A convicted defendant, who appeals against a five year sentence is not expected to specify an alternative figure. He simply claims that five years is too long, and asks the Court of appeal to substitute a lower term. Exactly the same applies here. The point is not whether BT and H3G have given their own figures - it is whether they have placed in issue the figures given by Ofcom. In any event, to the extent that it is relevant, we have gone further. We have specifically asked the CC and the Tribunal to substitute its own figures, and, as trailed in our notice of appeal, we intend to specify our own figures in any supplemental document that we are ordered, or invited, to place before the Commission.

The next point - reconsideration by Ofcom.. Orange argues at para. 9 of its submission that Ofcom must have the opportunity on reconsideration to re-assess its entire original reasoning, including aspects of its reasoning in the statement which are not challenged in the appeals. This is said, at para. 10:

> "The need to allow Ofcom to re-assess everything is said at para. 10 to preclude the Competition Commission from determining the price control matters in a way which fetters the Tribunal's power to order a full reconsideration".

That is expressed as a general principle - the substitution of price controls by the CC is given as just one example of this supposed vice.

That approach is, in our submission, the antithesis of what Article 4 of the Framework Directive seeks to produce. What it would mean in practice is that the application of the Tribunal's and the Commission's expertise and hard work would have no outcome other than the binary one of deciding that the level of price control decided upon by Ofcom either is, or is not, flawed in the respect alleged by the appellants. Ofcom would then have to begin again to all intents and purposes from first principles, and parties which, on good commercial advice, took the decision not to appeal first time round would be entitled to appeal aspects of the same decision second time around, thus removing the legal certainty

which is provided by the time limits on appeal and which, of course, is one of those principles of European law underlying the directive. This solution disregards the fact, in our submission, that under s.193 and Rule 3 it is the function of the Commission to decide "what the provisions imposing the price control should be, including at what level the price control should be set", and that under s.195 it is a function of the Tribunal to give Ofcom "such directions as it considers appropriate".

So, there is every reason why these powers not only exist, but should be used. Orange's approach to exhorting appellate bodies not to fetter the discretion of the decision-maker would subject the imposition of price controls to a constant sequence of litigation from whom the only winners, other, of course, than all of us here present today would be those who benefit commercially from delay.

Linked with the subject of reconsideration is the subject of re-consultation, which I touched on briefly in response to Mr. Scott. You already have our points on re-consultation at paras. 48 to 56 of our submission. In view of the time I have left, I do not want to dwell on them for long. In short, our case is that consultation is required under Articles 6 and 7(3) of the Framework Directive only when measures are first being proposed by the NRA. It is not required for the distinct task of giving effect to the Tribunal's decision, as Ofcom's task is described in s.195(4).

THE CHAIRMAN: Which tab is the Access Directive in?

MR. ANDERSON: It is Bundle B, Tab 4.

THE CHAIRMAN: You did not expressly deal in your letter with Article 8(4) of the Access Directive, which seems to impose - though you may say it does not - a separate obligation for consultation --

> "Obligations imposed in accordance with this Article shall be based on the nature of the problem identified . . . such obligation shall only be imposed following consultation in accordance with Articles 6 and 7".

That, to some extent, duplicates the reference in the Framework Directive to the application of Articles 6 and 7 in relation to decisions taken under this provision, but can that also be qualified in the way that you suggest Articles 6 and 7 are?

MR. ANDERSON: We say that Article 8(4) has in common with Articles 6 and 7 the fact that it makes no mention -- in fact, it is distinct from -- any consideration of the question of appeal. You will recall that that is treated, of course, in Article 4 of the Framework Directive. It would be very strange, in our submission -- Supposing this obligation did extend to giving effect to the directions of the Tribunal, that that was not stated in Article 4,

just as in Article 8(4), as the Tribunal has helpfully pointed out, there is a specific reference to consultation being performed in accordance with Articles 6 and 7 of the Directive where there is to be imposition, amendment or withdrawal of obligations, but not in the context of an appeal. Had it been intended to apply in the context of an appeal, one would have expected perhaps to find similar words in Article 4 of the Framework Directive.

THE CHAIRMAN: The fact that our legislation requires us to remit the decision back to Ofcom, is that pursuant to a requirement in the directives that the appellate body should remit the decision back to the NRA, or is that just something that our domestic legislation has come up with?

THE CHAIRMAN: Of course, it does say 'remit', but it also says 'the decision, in accordance with such directions, if any', as the Tribunal chooses to give. So, one could say that the United Kingdom legislation is not necessarily requiring any further discretion to be exercised, or any further process of reconsideration even, let alone re-consultation, as will be very often the case in an appellate context, when an appellate body gives its ruling. So, I am not sure there is really a distinction there. I do not think that the concept of remission necessarily implies that there is a further decision to be made, though I quite accept that there may be circumstances in which there is. The question is: is one then obliged to re-consult. The question is, is one then obliged to reconsult on something which has not only been the subject of consultation the first time round, it has also been the subject of an appeal and an unusual appeal where price control matters are concerned, because if one goes before the Competition Commission which has the power, as we have seen, to take evidence, and so on, from third parties, to hear what people have to say, even people who have not intervened in the case or are not parties to the case. There has really been in practical terms a very high degree of participation by the time the thing comes back to Ofcom for the last time.

I think the other reason against it is the point I alluded to earlier: how is one to rank that – take the Article 7 consultation, or take the Article 6 consultation, people domestically might have had things to say or the European Commission might have had things to say. How does that stand against the binding judgment of this tribunal directing Ofcom what to do? In our submission, it is not easy to combine the concept of the appellate process with the concept of consultation. Had it been required to be performed for a second time one would have expected to see something about that in Article 6.

THE CHAIRMAN: Is it your case that however different the outcome is, suppose that quite a lot of your appeal succeeds and the answer that comes back from the Competition

Commission is that actually they should have ignored the spectrum completely and that the figures should be much lower and they do come up with figures and we therefore direct Ofcom to do what, take another decision with those figures in? The question is, can that stage when Ofcom implements the directions given, is it your case that that is never then a measure taken within the meaning of the Directives to which the obligations of consultation can adhere, or that it sometimes is?

MR. ANDERSON: Our case, madam, is that it is never, and the key to understanding that is the function of this tribunal. Of course this tribunal is not a policy maker, it is not taking decisions of a policy nature. All it is doing is testing through the appeal process whether the original conclusions of Ofcom are lawful. That means, are they based on an error of law or are they based on an error of fact, questions of fact being determined by the rigorous consideration of evidence. When one sees that that is the function of the tribunal, albeit one might end up with a different figure, the two processes are complementary. One might consult the Commission for a policy steer, but in relation to matters of law, legal approach and getting the facts right, the tribunal's ruling, in our submission, is all that is needed.

MR. SCOTT: Can I pick you up on two points that you made. The first you have just mentioned, having a steer from the Commission, and one of the things which interests me about the point that we are considering, is that it has not come up for discussion so far in meetings of the communications law judges between Member States. So we have not had the benefit of the advice of our brothers and sisters on how they have handled this matter. I am conscious that a number of parties here have businesses in other Member States and Ofcom was a member of ERG and in frequent touch with the Commission and may be better advised than we are on what has happened in recent times. That is an issue on which others may have views.

The other point that you made was that the Competition Commission have the right to consult third parties, parties who have not intervened in these proceedings. Mr. Sharpe may come back to this in due course. As I understand the procedure that has been envisaged so far there was not going to be that proposed remedy consultative stage that would happen in a normal Competition Commission investigation. I think our understanding was that the Competition Commission would receive the pleadings, might ask further investigatory questions which I think we envisaged going to the parties, including the interveners, and would then come to a decision on which it did not consult.

Are you suggesting that, in fact, a rather different sort of approach is going to be taken, or should be taken by the Competition Commission which would involve some broader consultation in that phase of this process?

MR. ANDERSON: Again, I am very grateful for both questions. May I give a partial answer by referring the tribunal, but not in real time, to footnote 1 on p.14 of our submission where we pick up what has been said in the 2002 of the CC in relation to procedures, and we do endorse the idea that the provisional report is not always going to be necessary.

Secondly, may I plead the fact that I am time limited. This is only one small part of our submissions on question B. I have to deal also with question C and, if at all possible, without throwing out the tribunal's timetable I would like to go on to that, and perhaps come back in the light of what Ofcom says on your first question and the Competition Commission on your second one.

PROFESSOR BAIN: I have just one quick question, Mr. Anderson. It seems to me that what you are saying is that the Competition Commission's determination should leave no scope for Ofcom to exercise its discretion, otherwise you have to give clear instructions rather than merely guidance. For example, in the decision Ofcom exercises discretion about what weight to give to alternative scenarios, it would be possible for the CC to say you should give more weight at one of the range of possibilities and less at another. That would leave Ofcom with discretion. It would also be possible to say, "You must give 50 per cent weight to that and 20 per cent that, and 30 per cent to something else". If Ofcom has discretion does it not follow that it may have to enter into consultation about how it uses discretion? If you are right in this, I think you are saying there should be no discretion left to Ofcom.

MR. ANDERSON: No, I am not saying there will always be no discretion left to Ofcom. Indeed, the formulation of Ofcom that we adopt in relation to the question is that, so far as it is practicable, the level of the price control should be a matter for direction, but we do accept that there is a fall-back position in which clear and precise guidance might be provided instead as to how Ofcom should determine the level of the price control. It is an attractive formulation because Ofcom gets what it wants, which is a very strong steer as to what it ought to be doing and the level of discretion is thereby less. Regardless of the question of legal obligation, if for the sake of argument there were a question on which Ofcom were left with a very significant discretion, we would not necessarily rule out the option of a voluntary consultation on Ofcom's part.

Our point is on the Directive and our point is that Articles 6 and 7 should not be interpreted so as to apply to a determination made after an appeal.

I am conscious that I am taking far too long on ----

THE CHAIRMAN: No, this is a point that really does concern us, so regardless of the parties' timetable we do want to explore it. Certainly you can come back after Ofcom have given us the benefit of their views. The other question perhaps to keep in mind is that if we come to the conclusion that it is not clear on the wording of the Directives whether the obligation to consult arrives under any scenario following the exercise of the appellates' role, that is clearly a question on the interpretation of the Directives. Nobody is urging us for obvious reasons to refer that question, but is there a way in which, if it proved to be relevant, that question could get to Luxembourg at some later stage without us having to decide it now?

MR. ANDERSON: May I then make a last submission on this point which you have led into, if I may say so, beautifully, madam. I was going to make it anyway, but only in the alternative. That is if the tribunal were minded not to decide or if it felt perhaps it was not desirable to have to decide this issue on the interpretation of the Directive at this stage, looking at Ofcom's draft question, why are these words necessary anyway? It would be perfectly possible to ask the question without the words in brackets "subject to consultation". It would simply then be an invitation to the Commission, if practicable, to direct the level of the price control, otherwise to provide clear and precise guidance. It is no concern of the Commission whether Ofcom is going to have to reconsult when the Commission has reported to the tribunal and the tribunal has directed Ofcom, and in a sense one is promoting the point much further up the order than it needs to go by gratuitously bringing into a question. That is why we had that one qualification on Ofcom's question. In our submission, there might well be sense, if the tribunal did not feel confident enough to determine it now, simply to take those three words out and then take it from there. It may well be that the issue would not arise, either because seemingly you rule it to be possible that the Commission gives the precise directions or the precise price that many of us want so that there is no discretion and nothing to consult on; or because, who knows, if Ofcom is left with a broad discretion maybe there would be some question of a voluntary consultation. I make no concession in relation to that. Very often perhaps the way to deal with these points is not to decide them and see whether, in fact, in the end they are going to be necessary. Certainly, I would agree entirely with what you said about the undesirability of a Reference to the European Court at this stage, it is – even if a hypothetical question – certainly a highly contingent one.

Question C – if I may – asks whether the Commission should be allowed to determine that the charge control should be set at a higher rate? We think that it should not and we are pleased that H3G are of the same view. We were also pleased that Ofcom appeared to be of more or less the same view until about 20 past 9 this morning, when we were told that it is not, so Mr. Roth will tell you all about that. The key to this question lies in the fact that these are appeals in which both appellants are content only – certainly as we relate 3G's appeal – that the controls were fixed at too high a level. The Act envisages that only matters arising in that appeal are in issue and that the appeal must be decided by reference to the grounds of appeal at sections 193(1) and 195(2).

May I deal with some of the points made against us? First T-Mobile, which points out at para.12 that interveners may raise facts and arguments responsively in opposition to the appellants. Well of course they may, but they may do so only within the scope of the appeals. There is a difference, as we pointed out at para.73 of our written submission, between a debate over whether Ofcom correctly applied an MFLOC approach, which is in issue as between BT and Ofcom, and the question of whether an MFLOC approach was appropriate in the first place, which is not.

O2 and T-Mobile put forward analogies from European and domestic law, which they say are of value, and the trouble with each of those analogies turns on the wording of the provision in issue. So O2 at para.9 refers to the jurisdiction of the Court of First Instance in cartel cases, but Article 31 of regulation 1 of 2003 gives the Community Judicature "unlimited jurisdiction" to substitute its own appraisal for that of the Commission, and consequently to increase as well as to reduce the fine imposed where the amount of that fine is questioned before it. The authority relied on by O2 is *BASF* (bundle C, tab 10, para.213) does no more than acknowledge that fact.

The same is true of the *JJB* case (bundle C, tab 9) relied upon by T-Mobile. The Tribunal at para.214 based itself in that case very specifically on the words of Schedule 8 to the Competition Act, para.3(2)(b) which gave the Tribunal jurisdiction to impose or vary the amount of a penalty, as the Tribunal pointed out that word includes on its ordinary meaning the power to vary upwards as well as downwards.

So there is no reason, we quite accept, why Parliament should not provide for penalties to move in either direction should it wish to do so, but they do not always do so and I repeat my example of a criminal appeal, and they did not do so in the 2003 Act.

To use these isolated examples in support of a general principle that such a power is always to be implied into appeals in our submission just goes too far.

The level of legal policy – an important argument is that made by our friends H3G at 5.5 of their written submission (tab 48). If T-Mobile's approach is correct, interveners in someone else's appeal are effectively free to take that appeal in whatever direction they wish by introducing not only new arguments but new and opposite grounds of appeal, this despite the fact that they have chosen not to appeal themselves. The Tribunal has throughout, and even prior to my limited involvement, devoted considerable efforts to ensuring that the scope of these appeals does not extend beyond the issues placed in issue by the appellants – quite rightly, in our submission as they would quickly become unmanageable if any other course were taken. If T-Mobile thought these charges were set too low it could and should have brought its own appeal, the reason the time limit is legal certainty so that people know where they are.

THE CHAIRMAN: So having said that in ordinary litigation it is open to the respondent to an appeal to bring a cross-appeal, even after the time limit for appealing afresh has passed. So it is in ordinary litigation open to a respondent to say "We would not have raised this if the cage had not been rattled, but since the decision is now reopened, we want to make our own points and argue that it should go in the other direction", but is that the case in challenges to other bodies as well, or is that only in ordinary litigation?

MR. ANDERSON: Well it depends what system you are looking at and Vodafone, in our submission, made a very interesting point. They indicated this morning they would be relying on an EC case – I have forgotten which one it was – a case from the Court of First Instance, and there of course the intervener is limited to supporting the form of order sought by either the appellant or the respondent, so there is a very strict limitation in that context on the form of order sought. One really cannot go beyond that. So it is simply a question of trying to keep the litigation within some sort of manageable bounds, and this we say is the way that it is done. There is absolutely no reason why they should not have appealed, whether you call it a "cross-appeal" or not. If you think it is wrong you appeal it. It should not be a tactical game where you wait to see if someone is going to get it smaller before you try to get it bigger, and that is childish. It is not the way the Tribunal should encourage the parties to behave. You put up or you shut up.

MR. SCOTT: Yes. I think one of the interesting things here, bearing in mind our genesis from the CFI, and we have had it in relation to how to title these cases, we always used to start by putting the intervener down as "in support of" either the appellant or the respondent. We have found that quite difficult to do in these matters, because it is a much more

complex situation and you rightly perceive that one of the things with which we are wrestling is how do we handle interventions in circumstances like this.

MR. ANDERSON: And that is not only a matter of the Tribunal's practice of course, it is a matter of the Tribunal's Rules, and in particular Rule 16(5), which says in terms it requires an intervener to support the position of one of the existing parties, and my friend, Mr. Turner, cites Rule 16(9) of the Tribunal's Rules procedure – fair enough, but it has to be interpreted consistently, we say, with 16(5). We support H3G in particular a succinct statement of principle at s.6 of their submissions which I do not take you to.

What about the overlap between B and C? This is something the Tribunal touched on in its letter (paras. 21 and 22). We do not accept the implication that if we are right on C so that the appeals could only result in a reduction in rates, we are more likely to be wrong on B, the thinking being that it can hardly have been expected that the Competition Commission should perform its own evaluation of the correct price in circumstances where on one category of conclusions a higher price is closed to it. I think that was the thinking – only an observation, not any sort of provisional conclusion.

We would point out that on the contrary, our position on question C is capable of reducing the amount of work that the Competition Commission may have to do, and thus removing one of the principle objections that is made to our position on question B. Like the Tribunal the Competition Commission has to work within the ambit of the notices of appeal, and I go back to the point I made at the start by reference to para.16 of our written submission. It is precisely because neither the Competition Commission nor the Tribunal has to conduct a complete market review because Ofcom has to reconsider only to the extent that flaws have been identified by those bodies this whole process is feasible within a reasonable timescale. Once again, right at the end, an alternative submission: if we are wrong in what we have submitted to you about question C there is still, in our submission a need for very great caution in not opening the scope of the appeal too far. In that connection, and as an alternative we have noted the written formulation of Vodafone in its submissions at tab 45, where they say it would be premature to rule out the possibility that the Competition Commission might conclude that charge control should be set at a higher rate than that set in the MCT statement. But the questions to be posed to the Competition Commission should make clear that its conclusions as to any adjustments which should be made to the 2G/3G MNOs, charge controls should be limited to such adjustments as are justified by reference to the appellants' grounds of appeal or are consequential upon such grounds.

Madam, question D, I think in the light of what you said, I can deal with this very briefly indeed. Yes, the questions must be framed broadly enough to enable the interveners' legitimate arguments to be taken into account to the extent that those arguments support or rebut the pleadings of the appellant and respondent. But, as the Tribunal intended - and we have this from para. 25 of your letter - and as Ofcom considers (at para. 14 of its submission), together with O2, Orange and Vodafone, the questions are already broad enough for that purpose. I am not sure what sort of recital the Tribunal had in mind. Perhaps it was a very general recital, and in our submission that will be quite sufficient. Unless I can help you further - and I am afraid a little over time - those are my submissions.

THE CHAIRMAN: That is very helpful. Thank you very much, Mr. Anderson.

MISS ROSE: Madam, I can be very brief, having had the advantage of hearing Mr. Anderson. We do adopt the submissions which have been made by BT.

As Mr. Anderson has submitted, this is simply a question of the construction of the relevant provisions of the 2003 Act, read with the Rules which delegate the powers of the CAT to the Competition Commission. There is very little to be gained from seeking to draw analogies with different legislation where there are different powers and jurisdictions imposed. We submit that when you look at the statutory framework there are some basic principles that can be derived from it. I adopt the analysis of the statutory framework that you have already been given by Mr. Anderson.

First of all, we submit that it is clearly correct that the Competition Commission functions within the overall ambit of the s.192 appeal, and that the CAT has no power to refer to the Competition Commission any price control matter which is not disputed between the parties. The Tribunal has seen that in the preamble to Rule 3, in order for a matter to be a specified price control matter, it must be a matter that is in dispute between the parties. That means a matter that is in dispute between the appellant and Ofcom - not a matter that an intervener wishes to raise. We submit that is obviously very significant when you look at the question of whether there is any power to raise the price.

Secondly, it is equally clear that the Competition Commission must be intended to add something of value to the CAT's appellate process. What that is is clear: the economic expertise of the Commission and is broader powers to investigate rather than being confined rigidly to an adversarial structure, as this Tribunal is. Therefore, we submit it is clearly right that the Commission is intended to investigate the merits of the principles applied in setting the price control, the methodologies and calculations applied by Ofcom

in setting the price control, and the question of what the price control properly ought to be. Those are the three sub-categories of specified price control matters set out in Rule 3 - all of those to be referred; all of those to be investigated fully on their merits by the Competition Commission. We submit that it would be entirely contrary to that express statutory scheme if it were to be held that the Competition Commission did not have the power to set the price control. It says in terms in Rule 3 that one of the issues to be referred to them is: What should the proper level of the price control be?

We therefore are talking about an appellate function within the four corners of the notice of appeal, but an intrusive merits-based appellate function. We submit that there is, first of all, considerable flexibility for the Competition Commission to decide what process -- what procedure it wishes to follow: whether it wishes to follow its normal processes or whether it wishes to truncate them; the extent to which it wishes to ask supplementary questions to the parties and receive further evidence.

Equally, given the expertise of the Competition Commission there is no reason for it to operate any deference for the decision of Ofcom, or for it to give any margin of discretion to Ofcom. For example, when the Competition Commission is considering the question of whether the welfare analysis has been properly conducted -- whether the costs model has been correctly analysed -- There is no reason for the Competition Commission to say, "Well, we disagree with what Ofcom has done, but it was a reasonable decision". It is the task of the Competition Commission to decide whether what Ofcom did was right - not simply whether it was reasonable or permissible.

Finally, as I have already submitted, there is no doubt that the Commission does have the power to determine the level of the price control. Equally, we say there is no doubt, under S.195, that this Tribunal has the power to make a direction requiring the Competition Commission to do so, and then, in terms, requiring Ofcom to implement that direction. The question is whether it is appropriate to require to Competition Commission to do so in this case.

Turning then to Question B: we do not understand BT now to be submitting - it perhaps was not quite so clear from their written argument - that the Competition Commission should be required to fix the level of price control. We respectfully agree with the formulation of the question as drafted by Ofcom with the removal of the words in brackets. So, we adopt BTs position on this: that it should fix the price control insofar as it is practicable, and, if not, give clear and precise guidance for Ofcom.

Now, the problem, as the Tribunal will be aware, from our perspective here is that, of course, we have two alternative cases that we are running - one is that we say that the proper approach is the NPZ solution; the alternative is that we say that if that is rejected, that there should have been a greater degree of asymmetric regulation to take into account the position of H3G in this market. Now, so far as the second ground is concerned, that raises immediately the decision by Ofcom that the causes of our traffic imbalance, and the fact of our traffic imbalance, were irrelevant to its decision. That then raises the question of on-net/off-net price discrimination. Now, as a result of this Tribunal's decision on permission to appeal, we are precluded from running a positive case before the Competition Commission that the cause of the traffic imbalance was the on-net/off-net price discrimination practised by the other MNOs. But, if the Competition Commission concludes that the causes of the traffic imbalance should have been investigated by Ofcom, and were relevant to the decision as to what the level of regulation should be, then we submit that it will not be possible in this case for the Competition Commission to determine the level of the price control because the difficulty there is that the Competition Commission will have recognised that Ofcom failed to take into account this relevant consideration, and that as a result of this Tribunal's ruling the Competition Commission will not have before it the full picture of what we say the considerations are for the causes of the traffic imbalance. Therefore, if our alternative case succeeds, the only possible solution, we submit, would be for the matter to be remitted to Ofcom for Ofcom properly to investigate the causes of the traffic imbalance. To that extent there would have to be a further exercise of discretion by Ofcom.

We agree again with Mr. Anderson that in that situation, if Ofcom is being asked to exercise a further discretion, it might well be appropriate, as a matter of domestic procedural fairness for Ofcom to conduct a further consultation because it will be looking at the question of the details of traffic imbalance and on-net/off-net price discrimination. One can see that that is a matter on which there would have to be further consultation. With respect, that whole process could have been short-circuited if the matter had been put to the Competition Commission. But, that is not the path that this Tribunal has chosen to go down. Now, subject to what happens in the Court of Appeal, we submit therefore that it will have to go back to Ofcom for further consideration.

There are other issues where we agree with Mr. Anderson that it will be possible for the Competition Commission itself to set particular levels of price or to determine the

methodology that should be used to set the price. In particular, of course, it would be open to the Competition Commission to conclude that the right course is the NPZ approach.

MR. SCOTT: Miss Rose, while you are in that area, one of the points that the Competition Commission will read when they read the notice of appeal (which they may already have done) is the point of self-supply upon which BT are not currently relying, but upon which they have reserved their position. Presumably similar considerations would apply if, when they look at the notices of appeal, they think that the concept of self-supply, and thinking that through was also of relevance. It would be outwith the scope ----, as I understand it, because ----

MISS ROSE: -- of the price control matters.

MR. SCOTT: Yes, because BT are not relying on it. Nonetheless, it might be something that the Competition Commission felt ----

MISS ROSE: Of course, sir, as you will be aware, the question of self-supply is intimately related to the question of on-net/off-net price discrimination. There is a very close connection between that issue, as raised by BT, and our case on on-net/off-net price discrimination. We do submit that the Competition Commission ----

THE CHAIRMAN: When you say that if the matter did have to go to Ofcom, you said as a matter of domestic procedural fairness, do you then say but not as a matter of European law?

MISS ROSE: Yes, again we agree with and adopt the submissions made by BT in relation to the Framework Directive and also the Access Directive. In our submission, the structure envisaged by those Directives is that so far as the national regulatory authority is concerned you have a period of consultation, including consultation with the Commission, then a decision is taken, and then under Article 4 there must be available an effective appeal process. We submit that it would undermine that structure if you then said, "Actually, whatever is decided on appeal, there would have to be further consultation before a fresh decision was taken". We submit that cannot be the intention.

Looking at it globally, this is a decision on which consultation has already been made. There has already been a period of consultation. The Commission has already been invited to give its view, but BT and H3G's position is that when the taking the decision following the consultation Ofcom has fallen into error and therefore that needs to be corrected by the Competition Commission and by this tribunal, and there is no need for further consultation before those errors are credited.

MR. SCOTT: You may not have yet had an opportunity of catching up with the decision of the ECJ last week in the *Tele.2* decision.

MISS ROSE: You may well be right, sir, because I was in the Lake District last week.

MR. SCOTT: We will have to have regard to the fact that, as a national court, we must ensure that:

> "… national procedural law guarantees the safeguarding of the rights which users and undertakings in competition with an undertaking (formerly having significant power on the relevant market derive from the Community Legal Order) in a manner which is not less favourable than that in which comparable domestic rights are safeguarded."

MISS ROSE: That is a normal principle.

MR. SCOTT: What has happened is that the issue is in Austria and it has to do with the rights of those who are not addressees of an SMP decision. One of the points for us, and that is why we put the point to Mr. Anderson earlier, is what are the rights of those who have chosen not to intervene if what happens in the CC proceeding is going to result in a change to the levels.

MISS ROSE: The answer to that question is that they receive procedural protection through their right to intervene. That is precisely the purpose of the right to intervene. It is to enable them to protect their position by saying, "No, the Ofcom decision is right, we want it to be maintained". That provides them with protection. In my submission, there is no problem with that.

Where you might get an issue is if the Commission were to say, "We are not happy with what the appellate body has done". In my submission, that is not going to arise because the Commission has already had an opportunity to put forward its response to Ofcom's decision. Of course, that is a matter that the Competition Commission will take into account anyway when making its decisions.

When I said "as a matter of domestic procedural fairness", that is simply to recognise that if Ofcom is actually going to be asked to take a new substantive decision in relation to traffic imbalance and on-net/off-net price discrimination, there are factual questions there which will not have been investigated by the Competition Commission as a result of the way the appeal is going forward and on which, therefore, a matter of domestic procedural fairness it would be appropriate for Ofcom to consult. That is not derived from the Directive.

PROFESSOR BAIN: Are you saying, Miss Rose, that if, for the sake of argument, Ofcom's view on the treatment of spectrum was identical with that of the Commission, and the CC were to take a view that was somewhat different from that of Ofcom, then Ofcom would not need to go back to the Commission to consult where there was this possibility of a disagreement between the appellate body and the Commission?

MISS ROSE: Yes, sir, because the Commission has already been consulted on that issue and its views are available for the Competition Commission.

PROFESSOR BAIN: And it would have no further say, even though the Competition Commission might not have agreed with those views?

MISS ROSE: Indeed, because of course there is no obligation on the NRA or on the appellate body to follow an opinion that is given by the Commission. The important thing is that the Commission has had the opportunity to make its views known. We submit that if that process is not adopted you do seriously undermine the effectiveness of the Article 4 appeal because the process becomes so long and drawn out that, as Mr. Anderson has submitted, and indeed this process is already in danger of elongating to a point where it becomes simply futile from the perspective of H3G, because we are now looking at a projected timetable where it is suggested that the Competition Commission reports in October, which is already 18 months into a four year price control. Of course, after that there will presumably have to be a further hearing before this tribunal to decide what directions are to be given to Ofcom. So we may well be looking at a situation where some time towards the end of this year a decision is made by the tribunal which no doubt will then be appealed. There is a serious problem about the timescale. In my submission, if Ofcom is directed to adopt a particular approach to spectrum costs, welfare analysis, social, then Ofcom has to conduct a further consultation process on a *Pan-European* basis. In my submission, the whole system at that point simply breaks down.

PROFESSOR BAIN: I was not suggesting it was necessarily desirable, Miss Rose, I just wanted to get your view of what had to be done.

MISS ROSE: Indeed, sir, but sometimes testing the proper approach to construction, the desirability or the absurdity of a construction may be a useful guide as to whether it was actually intended. We submit that it is significant that there is no provision in Article 4 that says that a decision of an appellate body directing the NRA to change its decision must then be consulted upon. It is quite clear from the structure of the Directives that what it envisages is consultation, a decision by the NRA and then an appeal.

Very briefly then, in relation to question B, we adopt the position of BT in relation to the appropriate draft question.

Question C: should the questions permit the Competition Commission to determine that there should be a higher level of price control? Again, we adopt the submissions of BT. The tribunal has our skeleton argument on this, particularly para.5.5, and we submit that it really would be grotesque if the position was that the appellant is strictly confined to the terms of a notice of appeal but that interveners who chose not to appeal that decision, with the benefit of very quality legal advice, should then be permitted at a later stage to argue anything that they like. They simply are not in a position to seek relief which is not being sought on the appeal.

This is a jurisdictional question because this tribunal only has the power to refer to the Competition Commission specified price control matters under Rule 3. Those matters are defined as being matters that are in dispute between the parties. The question of whether the 2G rates should have been higher is not a matter in dispute between H3G or BT and Ofcom and therefore is not a matter that can be referred to the Competition Commission.

There is just one small point I should clarify here. As the tribunal knows, it is our position that there should be a free-standing question in relation to an unmerged 2G/3G rate, and we do not seek to say that the 3G rate should necessarily be lower than that in merged rate. It follows from the splitting of the merged rate that the 2G rate should be lower and the 3G rate might be the same or it might be higher. You would expect there to be divergence if you de-merge the merged rate. Neither appellant in these appeals is suggesting that the 2G rate should be higher than it is.

Finally, question D, we are content with the approach suggested as being the provisional view of the tribunal.

Is there anything else?

THE CHAIRMAN: No, I do not think so. Thank you very much, Miss Rose. Mr. Roth?

MR. ROTH: Madam, can I say that while Ofcom does not agree with everything that the appellants say, as I shall explain, in particular on consultation, we do strongly support the main thrust of their submissions that the objective must be that the outcome of the procedure before the CC is that if the CC should accept any of the grounds of appeal against what Ofcom did – of course we hope they do not, but if they did – then on remittal to Ofcom by this tribunal under s.195(4) one wants to reach a position where revised MCT charges can be finalised without long delay, and in particular to avoid a situation where there are main issues that require substantial further work and the exercise of judgment, as

Professor Bain has pointed out, since that not only takes time, it leads, if we are right, to a potentially longer consultation, and I will come back to that, and it means that when Ofcom then does decide on revised charges there may well be further appeals against that. These being, by definition, price control matters and there has to be a further reference to the CC, then we go through this all over again. That, we submit with respect, cannot be right and cannot be what this process of the reference of price control issues to the CC under the Act was designed to achieve.

Can I perhaps illustrate the point with some specific examples, because the discussion has been conducted at a rather abstract level – it is perhaps always easier if one looks at some concrete possibilities – by reference to BT's notice of appeal, which you have in bundle A at tab 3. Under that notice of appeal at tab 3, of course a major issue, as you know, is Ofcom's use of the valuation of 3G spectrum costs. The auction prices paid were not, in fact, the only factor to which Ofcom had regard, but it was one of the factors and BT contend it should have been ignored altogether.

They also advance a positive case. If you turn to p.40-41 in the document, you see paras.114 and 115 of BT's notice of appeal.

> "114. Ofcom should also have looked at broker information concerning the current value of the MNOs."

And some details that are referred to in a witness statement. Then 115:

> "Further, Ofcom should have investigated achieved spectrum prices across countries and across time and used this to predict a current price of a UK 3G licence using statistical techniques to allow for factors such as time trends, the type of spectrum, the size of country, GDP per head, population density and urbanisation, regulatory environment [including virtual network obligations] and licence duration. Again this is likely to have indicated that using the auction fees from 2000 significantly overvalued the 3G licences."

In other words, use econometric analysis based on data from other countries. A possible determination by the CC would be that Ofcom should have carried out such an econometric analysis and the outcome of that analysis should determine the value of the 3G spectrum used in setting the charge controls. If that were what the CC said then Ofcom would have to carry out that econometric analysis. This may involve some evidence gathering, assembling a suitable data set, it would certainly involve new analysis, how should the model be specified, what variables do you take into account and how, should the model only use data from other European countries, should it be worldwide? The outcome of that

analysis will not give a precise answer, as Dr. Muldoon, BT's expert acknowledges in his report, so Ofcom would have to exercise its judgment, should it use central estimates, should it make an adjustment upwards or downwards to reflect uncertainties. All of that would increase the time that Ofcom would have to take, the work Ofcom would have to do and, if we are right, and the length of any consultation period, and then increases obviously the risk of a new decision.

THE CHAIRMAN: Are you saying that it is not for the Competition Commission to undertake that task if it decides that Ofcom should have done this?

MR. ROTH: No, we are saying that we hope it is. What I am explaining are the difficulties if they do not, and if they give a determination in very general terms the amount that then is left for Ofcom to do, and therefore the extended duration and the risk of getting into the scenario that I outlined at the outset, which is one that I think we all wish to avoid.

MR. SCOTT: This is going to be important in terms of the scale of task that the Competition Commission envisage undertaking and therefore the time that they seek in terms of undertaking that task. For example, evidence would be forthcoming from the auction that has just taken place of values. One of the questions that is going to come up is how much investigation do the questions that we put to the Competition Commission spark. No doubt, Mr. Sharpe will return to that in due course. As between his position and your position, it is going to be important that we have some clarity.

MR. ROTH: I fully see the point about the time that it will take. If, as a result, the Commission say, "We need longer than four months, we need six months, seven months", so be it. But if the Commission were to take six months and then to come back with rather general answers and then Ofcom has to do all its work which undoubtedly would take as long again, that would be wholly undesirable.

MR. SCOTT: Understood.

MR. ROTH: It is really the point that Mr. Anderson and I, and I think supported by Miss Rose, were making. I am seeking really to put some sort of concrete flesh on it by reference to the actual issues that the Competition Commission is going to have to look at on the notices of appeals. One can take a number of them. I have taken one example. It would be even worse, as it were, if the Commission were to say, "Yes, Ofcom should have done that analysis, we the Commission are not going to do it", but that should not be the basis that determines the charge, that is something that Ofcom should take account of along with all the other things that it took account of because then really you do get to the discretionary area of judgment that Professor Bain referred to and a still greater likelihood

of the subsequent appeal saying that in exercising its discretion Ofcom got it wrong and here we are again. That is what I am trying to illustrate in saying why we put forward the draft question which I am happy to see BT and H3G now support, subject to the point on consultation.

It may be that they cannot precisely specify the level, but we seek as precise guidance as possible. I fully accept the point just made by Miss Dinah Rose that if the Commission concludes that there should have been a thorough examination of the cause of traffic imbalance that is something that Ofcom did not do. If Ofcom simply concluded that the alleged cause, namely mobile number portability was not the cause, but they did not investigate, then that would have to come back to Ofcom because that really is no longer an appellate function, because it is not appealing any concluded reasoning by Ofcom. Then you would need a full consultation, and I can see that that would be an exceptional case where that would follow. Otherwise, we fully agree with Mr. Anderson that we do not accept at all the position advocated by at least some of interveners that if the appeal were allowed then the whole question of the level of the charge control is opened up, such that it should go back to Ofcom and then interveners or anyone else can put forward other reasons why it should be lower. Mr. Anderson, I think, referred to Orange's skeleton argument. The same point is made in their statement of intervention, para.2.14, and we strongly reject that.

Madam, I move to the one issue which I think divides the appellants and Ofcom as respondent on this, namely the consultation point. First of all, why did we put it in the question? Mr. Anderson said it is not needed. With respect, we thought that it was needed for this reason: under s.193(6) of the Act, which I think is bundle B, tab 7:

> "Where a price control matter arising in an appeal is required to be referred to the Competition Commission under this section, the Tribunal, in deciding the appeal on the merits under section 195, must decide that matter in accordance with the determination of that Commission."

So if the Commission were to say, for example "You should ignore auction prices", then the Tribunal must decide the appeal on the basis of that determination by the Commission and then in s.195(4), you remit the decision to Ofcom with directions. Well the directions would have to be following the Commission's determination and under 195(6) Ofcom must then comply and therefore the scope for consultation has been precluded. That is why we say it is right to put in that proviso in the question and that is why we put it there.

So one gets to the substantive question: "Is there an obligation to consult or not?" The starting point is obviously not the Act but the framework, and you are well familiar with Articles 6 and 7 of the Framework Directive, and as madam Chairman pointed out Article 8, para.4 of the Access Directive, and it has to be approached as a matter of principle, because we are dealing with interpretational directives, and not just on the basis of the facts of this specific case.

We think, with great respect, that the Tribunal was correct, when you said in your letter of 17th December last year that the consultation process would apply if the decision were remitted to Ofcom. Ofcom indeed adopted a measure in its decision as to what SMP conditions to impose. If the outcome of the appeal is that this was remitted with a direction to amend or reconsider the price conditions then as a matter of ordinary language Ofcom would be modifying that measure. Indeed, you do not have jurisdiction to quash the price controls; you remit the offer to Ofcom, and it is then for Ofcom to take a decision in accordance with your direction and it will be Ofcom that modifies the price controls in accordance with your direction. So Ofcom, as the national regulatory authority, is modifying its measure. It might be a very slight modification on which, even if there were consultation, nobody would be at all interested, but it might be a very significantly different measure; that is true on any appeal if one is speaking generally, but even on, say, the H3G appeal, if the Commission concludes that Ofcom should indeed have adopted an NPZ approach well that is something fundamentally different from the way Ofcom approached it in the measure it adopted, and on which the Commission gave its views. The Commission has not had a chance to express any view on such a proposed measure, nor have other regulatory authorities. Or if, on H3G's alternative case, you should direct that there should be a much greater degree of asymmetric price regulation having regard to H3G's position as the new, later entrant and so on. We know from other cases that were cited in the earlier hearing that the European Commission has indeed expressed views where national regulatory authorities have taken the course of asymmetric price regulation decisions. So we say there is no basis for shutting out the Commission just because a measure of that kind is proposed as the result of a successful appeal against an earlier measure which had been notified in draft, because the measure that then is proposed to be adopted is quite different from the one that was notified before, and the Commission has had no opportunity to express its view on what is now proposed to be adopted. One cannot minimise the significance of what might be done by saying "You are just substituting one figure of charge for another because it is the underlying principles that are at stake."

This is also reflected, we suggest, in the domestic statute because, as I said, what you would be doing is directing Ofcom to take a decision in accordance with your ruling. Ofcom would then be modifying an SMP condition under s.47 of the Act (its powers under s.47), which gives Ofcom the power to modify an SMP condition – an SMP condition is a condition under s.45 – and when Ofcom does that it must consult, which is the domestic consultation as in s.48. There is no exception for where it does so, pending the result of an appeal, or a direction under s.195, and it must deliver a copy to the European Commission and the other NRAs, and that is in s.50(3).

THE CHAIRMAN: But what is the point of that consultation if Ofcom is bound by s.195 – give effect to the direction from the CAT?

MR. ROTH: If direction does not include a proviso "subject to consultation" then there would be no point. But if the proviso is subject to consultation the effect is that if the Commission, which obviously it will look at not just the proposed measure but the Competition Commission determination and the judgment of this Tribunal as to what lies behind the formulation of the new measure, but if the Commission looking at it on a pan-European basis, as it is responsible for doing, concludes that this causes a problem, Ofcom would have to take account of that even though that were the result of the appeal process.

THE CHAIRMAN: But does that not mean that the direction that we give at the end of the day should have those words in it rather than the question that we send to the Competition Commission should have those words?

MR. ROTH: My only concern was that the direction you give at the end of the day it seemed to us might be bound because of the language in s.193(6) by the determination of the Commission. If you have that flexibility, notwithstanding the determination, then it does not have to be in the question.

MR. SCOTT: It seems to me that (a) under s.195(5) we cannot direct Ofcom to take any action which they could not otherwise have the power to take in relation to the decision under appeal. That has to be read in combination with Article 7(5):

> "The national regulatory authority concerned shall take the utmost account of comments …"

and were the Commission to attempt to tell us to do something which we felt was inconsistent with those provisions then under our judicial review powers we would simply refuse to do it on the grounds that it was *ultra vires* to do so. Do you see the logic of the position? So whatever we do it seems to me has to take into account 195(5) and therefore our understanding of the regulatory framework.

MR. ROTH: So it comes down almost to a semantic point whether one needs the proviso in the question, or whether one can deal with it afterwards, and if you are satisfied you can deal with it afterwards in the direction, one does not need the proviso in the question, and one can perhaps have the debate again in due course. I do not think the proviso in the question actually affects what the Competition Commission does in any event, but that is why we put it in really to cover that position.

In answer to Mr. Scott's observation earlier made to Mr. Anderson, I am sorry, sir, we do not have any experience of what has happened in other Member States subsequent to appeals, and notification of the Commission. We have no information that we can share with you on that.

I would point out that the period required for notification and consultation with the Commission is only a month, provided it is only a month in domestic law. So given the totality of the period that this exercise is taking it is not the case that this is a vastly expanding exercise. Obviously if the Commission comes back with critical and negative comments then that may lead to an extension because Ofcom has to take account of them, but as I say, one would hope very much – given that there will be a judgment in this Tribunal and a determination of the commission which forms the very full rationale on which that judgment is reached – that we will not get into a situation where the Commission has an adverse comment, but as a national authority we say we cannot preclude that and one cannot shut them out of the process, and that is why we say that is the position.

Can I move on to question C to which we at Ofcom have given further thought in the light of the observations in the skeleton arguments from the interveners and the Commission. We agree, on reflection, with the Competition Commission in para.9 of their letter to the Tribunal that if, on consideration of the arguments and evidence on a particular ground of appeal, and we emphasise that – on a particular ground of appeal – that leads the Commission to conclude that the price set by Ofcom is too low or too high, even if that were contrary to the direction argued by an appellant, since these are questions of regulation in the public interest. It would be unfortunate if the Commission were precluded from reaching that conclusion, and expressing its view. Our initial view, which was expressed in our skeleton argument was that although that seems the desirable result it was not permitted because of the wording of s.195(2) of the Act. But we can see the force in the argument of T-Mobile that that wording is identical to the wording in schedule 8, para.3(1) of the Competition Act, and that this Tribunal held on a penalty appeal that if

new matters come to light during the appeal process it could increase the penalty, and they did so not simply on the basis of paragraph 1(2), but analysing the overriding restriction in para.3(1), and that is the "football kit" case. I shall leave it to Mr. Turner to develop the argument set out in his skeleton on that. As I say, on reconsideration we think that that is correct and that being identical wording in domestic statute the same considerations should govern here too.

We do not, with respect to O2 think that one gets much help from the European regime. Mr. Anderson has addressed you on that, we agree with him that there is express power there in the regulations, it is a different regime, and we do not think it can help.

I want to emphasise that it is only within the scope of a specific ground of appeal, this is not an opening up of the whole MCT determination and it does not mean that the interveners can argue anything they like.

Again, perhaps an example might assist as to how we urge that it must be limited. Sticking with BT's notice of appeal which I think you may have open before you, which is in bundle A, tab 3 and go to p.53, you will see there is a whole section 3 starting under the heading "Network Externality Allowance". BT basically says – summarising and, I am sure, oversimplifying – that Ofcom got the allowance which Ofcom set at 0.3p per minute wrong, (the externality surcharge) because it was based on false assumptions and a false methodology; they explain that in considerable detail, and that is this whole section.

One supposes that the Commission, in looking at this, conclude that Ofcom was right to take account of network externality as a matter of principle, but some of the assumptions and methodology are indeed flawed, and that if you apply the correct assumptions and method that should be applied, which are different, you in fact get a higher figure than 0.3.

That is the argument, indeed, which T-Mobile advance as interveners. That is in their statement of intervention which you have here in the same bundle at Tab 27, paras. 28 and 29. They say,

> ".. it is correct in principle to allow for an externality."

This is at pp.14 and 15 of the T-Mobile statement of intervention at Tab 27. That, we say, is an example that should be open to the Commission to reach that conclusion and say that, "Ofcom's method is wrong. The right method is this. If you apply the right method, you get 0.35", or whatever it is.

THE CHAIRMAN: Do you say that that is the case because this has been raised by an intervener, or are you saying that because of the public interest nature of this jurisdiction once a number has been put in issue, then if the Competition Commission - even if there

had been no interveners - came to the conclusion that it should be a higher rate, that they would be entitled to say that, and that we would then be bound to determine that.

MR. ROTH: We say as a matter of public interest that once the method has been challenged, and it has been said the method is wrong, they are not left just with, "You can only have Ofcom's method or the appellant's method". They can look at it and say, "We think the right method is X". It is reinforced by -----

THE CHAIRMAN: But you nonetheless say that if there were other things that they thought were very wrong in the determination, but which had not been the subject of an appeal, they then cannot do anything about those.

MR. ROTH: Yes, that is right, and they should not even spend time looking at those other things, because if they did they would need not seven months but twelve months. Once this is actually going to be looked at by them - because it has been challenged on appeal - and we think it is reinforced by the fact that the Act allows for the role for interveners in the appellant process and therefore in the reference, but we start from the position of the public interest.

PROFESSOR BAIN: You are saying, Mr. Roth, that this applies to the elements of Question 1 individually where the separate grounds of appeal are shown and that there is no sort of balancing to be done there. It had occurred to me that it might be sensible for the CC to take a particular case. You say that the network externality allowance should be higher. But, looking at the four grounds of appeal overall, would the CC then say that the price should be higher, or would they say that there should be a balancing exercise done within the grounds of appeal in Question 1, and that they could only come out with the argument that on the basis of the analysis, the price should certainly not be reduced, but that it should not be increased? You see, there could be some items that went up and others that went down. Clearly from what you were saying there would be a balancing exercise to go on within that, but if the net result came out as an increase, is it going to be open to us, as the Tribunal, to say that the price should go up given that we have to decide the appeal on the basis of the grounds of appeal rather than saying that the CC, on the basis of their analysis, have found that the price should certainly not be cut. The analysis would be there showing that there was an argument for it going up, but the conclusion of the Tribunal would be that it should not be cut.

MR. ROTH: If I may say so, that is a very good question. (After a pause): As I thought, the answer is that given that one is looking at this point from the point of view of public interest, yes, it is open to reach that conclusion, as you suggest.

THE CHAIRMAN: That ultimately this Tribunal could order an increase in the price of the 2G/3G ----

MR. ROTH: Based on the determinations of the CC.

THE CHAIRMAN: Thank you.

MR. ROTH: One would hate the CC, looking at the various sub-questions in Question 1, itself reach the conclusion and saying, "Having regard to Points 2 and 4, taken together, the result is" and that it would come from the CC -- It is more the task of the CC to actually do the balancing - not that it comes back with answers and we have a big argument here. The end result would the same, but we would respectfully suggest that it is in the lap of the CC to take that consideration, looking at those four points, which are the four points raised by the grounds of appeal, but not to look at other matters outside those four points, saying, "Well, there's a whole other area which no-one has raised". That takes one back to the scheme of the 1984 Act and not this appellate ... There is a line to be drawn.

Madam, that is what we wish to say on Question C.

On Question D, we are content with the formulation that you indicated at the outset.

THE CHAIRMAN: Thank you, Mr. Roth. Mr. Turner, are you going next?

MR. TURNER: Madam, I will begin with Question B. Should the questions require the Competition Commission to devise a substitute price control? We have head BT's position today. Suffice it to say they have thankfully changed their position from the one that was indicated in their letter in which they submitted that the rules require the CC to make a decision as to the appropriate level if such relief is sought by the intervener. They now have a more nuanced approach to the problem which accords, I am happy to say, with our view as well as that of the other parties in large measure.

I do need to add, however, the following points. First, they have, to some extent, mis-characterised T-Mobile insofar as we never said that the Competition Commission could not arrive at a particular number - only that if it does arrive at a particular number, that is indicative and it is not of course a binding number. I will return to that briefly in a moment. Secondly, we did not say that the Competition Commission cannot look at the level of a particular price control in any case. What we did do is draw attention to the notice of appeals in this case, and, in particular the BT notice of appeal which Mr. Anderson took you to in his address to show that the focus of these appeals is indeed on the principles and on the methodology that were applied by Ofcom. If you pick up the BT notice of appeal in Bundle A1, Tab 3, and go back to para. 190, you see there that rather than seeking an order that the Tribunal set a particular number, they are seeking an order

from the Tribunal and/or the Competition Commission that in substitution for the paragraphs in which a particular level is fixed, there be adopted equivalent paragraphs. So, that is compatible, in our submission, with the requirement from the Tribunal - if one ever gets there - that there should be a direction for a price to be fixed which is appropriate in accordance with that language for fulfilling the statutory purposes - efficiency, sustainable competition, benefits for end users - in accordance with s.88(1)(b) of the Act, and that there is nothing which is incompatible in what has been prayed for by way of relief with the CAT remitting the matter for Ofcom to decide on the final number. Indeed, that is consistent with all of the submissions that you have heard so far this morning.

The other point which I mentioned a moment ago related to the binding nature of the determination, which is made by the CC or otherwise. It is critical to appreciate that the Competition Commission's determination is part of a wider statutory context, and it is not a free-standing or binding fixing of a price. The Competition Commission makes a determination in respect of the price control matter which has been referred to it. But, then, if you go to para. 6 in s.193 you see that the Tribunal then decides that very same matter in accordance with the Competition Commission's determination. So, it is first determined by the Commission, and then it moves over and the Tribunal decides the matter in accordance with the determination.

It does not stop there, because if you then turn the page and look at s.195(3), that decision of the Tribunal itself 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.

So, to some extent it is Chinese boxes, but what one certainly sees is that there are two further steps after the Competition Commission's determination. Those two further steps show that the Competition Commission itself is not intended by the statute to fix a final binding price. This recognises, among other matters, the reality that there may be repercussions for other elements of Ofcom's regulatory controls - perhaps outside the framework of the instant appeal. One example might be that H3G says that the CARS costs should have been allowed for in the price control, and if they should have been allowed for in that price control, then maybe they should then be allowed for in the other operators' price controls as well, which is a matter which, as a consequential issue, Ofcom may then wish to consider.

So far as consultation I concerned, we align ourselves with Ofcom very largely. We do consider that there will need to be consultation in accordance with the CRF and the provisions of the directives before Ofcom re-takes the final binding decision, assuming that

it has been, at least in part, a successful appeal. There are three situations that one may distinguish, and in each of which case we say there will be consultation, although the intensity or extent of it will be different. In the first case, it may be the result, one hopes, following what Mr. Roth has said, that it will not be that one arrives at a decision that there are certain principle that ought to be applied of a general nature by Ofcom in re-taking a decision.

Now, plainly, there is a large measure of discretion that will be accorded to Ofcom on a remittal, and it is appropriate that there should be consultation. That must be clear in our submission. A second example might be a situation along the lines of my earlier suggestion, where H3G, for example, succeeds in its submission that CARS costs should have been taken into account in its price control. It comes back to Ofcom, and then Ofcom needs to consider what the impact -- the repercussions are for other price controls. Plainly, again, if there is going to be that kind of modification there will need to be consultation. But, we say that in any event the intention must be that even if the Tribunal itself directs Ofcom to fix a particular price after a remittal and then Commission has not had an opportunity to comment upon that, that it must be the intention of the directive that the Commission should be enabled to comment upon that, so that the pan-European approach can be taken into account, and that that also is the result of the directive's Article 7(3).

So, that is broadly all I wanted to say in relation to Question B. I would like to add that we must not be taken for one moment, for our part, as implying that further consideration by Ofcom after a remittal would result in any lengthy delays, or that consultation would allow the complete mischievous re-opening of everything that has already been decided by the original Ofcom decision and the appeal process. So, if, for example, H3G's appeal were successful on the CARS point only, then H3G could not legitimately use the opportunity to raise the off-net/on-net pricing issue again at the stage of a remittal to Ofcom. I take that purely by way of example. So, when the statutory appeal process is followed, the appeal is therefore fully effective in line with the intention for common regulatory framework. Finally, we support the formulation of the question in para. 11 of Ofcom's submissions which has been canvassed with the Tribunal. We take the Tribunal's point about whether one needs the parenthetical provision 'subject to consultation'. From our perspective it makes no difference.

Then I turn to Question C. This essentially raises a question of construction of ss.193 and 195 of the Act. The central question is whether deciding an appeal on the merits by reference to the grounds of appeal means that the result can only be that the price moves in

one direction - that is, if the appeal succeeds in whole or in part - or else it stays in the same place if the appeal is unsuccessful. We say the answer is, no, the reason is, as Madam Chairman, in your canvassing with Mr. Roth brought out, that the grounds of appeal put the matter in issue in the appeal. That issue is then decided on the merits by the Tribunal and by the Competition Commission if it is a price control matter. The Tribunal and the Competition Commission arrive at their own decision on the basis of all the evidence and the arguments which presented to them. There is no reason whatsoever to preclude the Tribunal -- or, to preclude the Commission from arriving at a conclusion on the issue which turns out - the outcome - to be more adverse to the appellant, for whatever reason, than Ofcom's original decision.

So, that, we say, is the position. We say that the principle is supported by the following main considerations: (1) It may well be the case that facts or evidence, or arguments become available in an appeal process which were not available before. It has got to be wholly wrong, especially in a public interest setting, if the Tribunal or the Competition Commission have to be blinkered or fettered in their approach to what can be taken into account on the merits in their decision. This issue - or something very close to this issue - arose in the *All Sports* case - a judgment connected with the final decision on penalty which was referred to in our written submissions. I have handed a copy of the *All Sports* case to my friends, and there should be copies for the Tribunal as well. This was an interlocutory judgment of the Tribunal in one of the appeals brought against a decision of the Office of Fair Trading, finding that a number of parties had infringed the Competition Act by fixing prices of football kit. One of those parties - All Sports - took an early objection to the fact that in its defence the Office of Fair Trading was putting forward what it considered to be brand new material - new arguments, new evidence - in its defence. So, it applied against the Office of Fair Trading for summary judgment.

If you turn in the copy to paras. 19 and 20 on pp.14 and 15 you will see there, by way of introduction, what All Sports was applying for. It wanted to strike out the OFT's defence or get judgment on one of the two principal allegations made against it. It was saying, "Well, the Office of Fair Trading is now running something which it never argued before, and said that it would be contrary to the scheme of the act - unfair and so on - for the Tribunal to allow those new cases to be advanced". What is interesting is the way that the Tribunal dealt with that. If you go first to para. 49 on p.22 -- Simply for reference you see there the wording of para. 3 of Schedule 8 of the Competition Act. In para. 3(1),

"The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal".

So, that is the first, and major, constraint. Then you come on to what the Tribunal said about the application - in particular at para. 61 on p.27. We can begin at para. 60, but that paragraph merely records the Tribunal saying that it needed to strike a balance between various competing considerations.

In para.61 the Tribunal said:

> "In deciding where, in an individual case, the line is to be drawn, it is also important to bear in mind that an appeal before the Tribunal especially an appeal such as the present involving witness evidence, is by its nature a dynamic process. In the course of the appeal the appellant may, as here, produce further witness statements. In responding to those statements, the OFT may wish to adduce new elements. The Tribunal may, as here, order the disclosure of further documents, not available at the administrative stage, or may itself ask for further documents, as in *Napp*. Witnesses giving oral evidence may say things under cross-examination which form part of the Tribunal's record but which, by definition, were not part of the administrative procedure. By this natural process of litigation new facts may emerge, or existing facts may assume a greater (or less) relevance than was first supposed. It is in our view inevitable that matters will often be gone into in more detail on appeal than was possible at the administrative stage, particularly since at that stage the OFT has no power to compel witnesses or to cross-examine. As a matter of general approach, we do not think we should seek artificially to limit or inhibit a deeper development of the case at the appeal stage, always provided that the basic procedural framework, and the overriding principle of fairness, are respected."

At para.62, if you read that for yourselves, you will see that the tribunal said that if this were not so the appeal process could become lopsided to the undue advantage of appellants who, for whatever reason, chose not to put in evidence beforehand.

So that was the position std by the tribunal in that context and we say that essentially the point that you take from that is that this appeal process, with all its differences, is still a dynamic appeal process in which new facts, new evidence, come out. Indeed, *a fortiori*, one might say, given the Competition Commission element with its investigative role where the Competition Commission has the power to gather new evidence and investigate

things in a more wide ranging way, and therefore to bring into account new facts and evidence that had not previously been considered.

THE CHAIRMAN: But it is not saying that it could then rely on that to come up with an answer that was outwith the extremes of what the case was that was put forward by the appellants?

MR. TURNER: I will come to in a moment what the constraints are, what the parameters are set by the Act, because you will see the tribunal did refer to the procedural framework needing to be respected.

So far as coming outside the grounds of appeal and what was sought by the appellants is concerned, we say, no, the reference is to deciding the appeal by reference to the grounds of appeal and that that is not the same thing as saying that this tribunal or the tribunal in the Competition Act case is required only to decide the case in the direction that the appellant wants. Once the appellant has put a matter in issue in the appeal, the other parties, principally Ofcom but also the interveners who are parties to the appeal process, can respond. It is within that structure that the debate takes place in the appeal. Otherwise one really would end up with a lopsided process that would be contrary to the public interest.

My first point here, however, is merely to draw to the tribunal's attention that in that separate context where there is a strong basic analogy the tribunal has already said that, as a matter of general approach, new material comes out in an appeal which is, by its nature, a dynamic process.

The second point relates to the intervention procedure envisaged by the rules. The intervention process is not necessary, madam, in relation to the question that you posed before, to get to the conclusion that the result of an appeal could be to move the price in a direction against the appellant. We do not take that view. We align ourselves with what Mr. Roth said, that follows from the public interest nature of the process.

The tribunal or the Competition Commission can receive evidence or arguments even without any interventions from Ofcom or it can receive them from third parties, particularly in the case of the Competition Commission. Nonetheless, the intervention procedure remains an important indication that the tribunal and the CC might end up reaching a different merits decision to the one that has been reached by Ofcom, and one which is more adverse to the appellant.

Mr. Anderson briefly referred to our submission in relation to Rule 16(9) in the Tribunal's Rules. Perhaps the tribunal might turn that up for reference. It is a short point.

THE CHAIRMAN: Where is that in the bundle?

MR. TURNER: We do not have the Tribunal's Rules. The short point is that Rule 16(9) specifically envisages the intervener putting forward their facts, their arguments and their evidence, and indeed in the context of the tribunal's jurisdiction, and it applies equally to Communications Act cases, they may seek their own relief. Mr. Anderson said that in the European context interveners cannot seek independent relief. Absolutely. This is our context, and you can.

Mr. Anderson also said in Rule 16(5), if you go up a few paragraphs, you see there that in the statement of intervention there should be a statement of the name of any party whose position the person making the request intends to support. Mr. Anderson suggests that that condition in 16(9) must be read subject to that. We disagree. There is no reason why it should be read subject to that. You may as well say the reverse. The two are there together and Rule 16(9) clearly envisages that the intervener may seek their own independent relief.

Miss Rose suggested that the interveners are not parties. We found that a very puzzling submission indeed. They are plainly parties. Even in an ordinary domestic judicial review the interested parties are parties, and the interveners here are just as much parties to the appeal process as here Ofcom or the appellants.

So, to summarise, the intervention process and how it is spelled out in the Rules lends support to the idea, although it is not decisive, that there shall be the opportunity for a decision to move against an appellant when they have opened an issue.

Then I need to grapple, madam, with the fundamental point that you have raised, which is the proposition that the price resulting from a price control appeal might move in a direction against the appellant and where I get that from. We have referred by analogy to this tribunal's decision in the final penalty judgment in the *Allsports* case, which you should have in your bundle in C2 at tab 9. The relevant parts are on pp.55 and 56 under the heading "Jurisdiction to increase penalty".

THE CHAIRMAN: Say those paragraph numbers again?

MR. TURNER: It is paras.213 to 216 on pp.55 and 56 of the print-out in my bundle. In the Competition Act context, the tribunal is equally required, as we saw a moment ago by para.3.1 of Schedule 8, to decide the appeal by reference to the grounds of appeal. It is materially identical language. Where in this case the appellant appealed against the imposition and sought a reduced or nil penalty the tribunal nonetheless found it had the jurisdiction to increase it. You will see, if you look at para.215 in particular, that JJB but not Allsports submitted that such a course – I will begin with 214 as well:

> "As a matter of construction it seems to us that the word 'vary' in sub-para.(2)(b) of Schedule 8 includes on its ordinary meaning the power to vary upwards as well downwards."

I mention that, and I am grateful to Mr. Anderson because he claimed in his address that this was, as it were, the distinguishing feature of this case. Well, as you see, it is not the distinguishing feature, it was a factor that was referred to by the Tribunal but it then went on in its reasoning to consider other points that had been raised relating to the existence of the jurisdiction. So first of all, going on from that in 214, the Tribunal pointed out that "a great deal of new material may well come to light", and it said:

> "It would seem consistent with the scheme of the Act for the Tribunal to have jurisdiction, when assessing the penalty, to be able to take into account all the facts and matters before it. In some cases new facts might show that the infringement was more serious than was first thought. It is true that in those circumstances one option for the Tribunal would be to remit the matter for the OFT to reassess the penalty."

There one sees a link into the scheme we have here.

Then one comes on to para.215 where the Tribunal grappled specifically with the submission that because it was obliged to decide the appeal by reference to the grounds of appeal set out in the notice of appeal that it was precluded from moving in the other direction. It says: "Since no notice of appeal ever seeks an increase in penalty, the jurisdiction to increase the penalty cannot arise."

I shall not read para.216 aloud, if the Tribunal wants to read that for yourselves, save for the crucial part:

> "T he words 'by reference to the grounds of appal' are in our view intended to indicate that the appellant may not rely on grounds other than those set out in the notice of appeal. The appellant cannot advance new grounds of appeal without permission, and the Tribunal cannot dismiss the appeal without dealing with the grounds put forward. However, paragraph 3(1) does not, it seems to us, necessarily preclude the Tribunal from taking into account other matters raised by the OFT in response to the notice of appeal. In particular, we do not read paragraph 3(1) as limiting the wide scope of the wording of paragraph 3(2).
>
> Accordingly we reject JJB's submission based on paragraph 3(1) of Schedule 8."

So what you get from that is that the Tribunal is looking at materially identical wording and is saying that it does not shut out the interpretation for which we contend.

I apprehend from my friend's interventions that he will still wish to say in reply that nonetheless the statute has a materially different construction here. I cannot take it any further, the Tribunal has seen it and we say it is materially identical.

THE CHAIRMAN: We will have to make up our minds on that.

MR. TURNER: And you will make your minds up. The fourth point is this: Parliament cannot have intended that an appeal on the merits in a public interest setting should be a guaranteed one way bet, but there are two separate legislative policy aspects to that conclusion. First, that this is not just a matter of the private interests of an appellant. Your concern is that he appeal process gets the right answer in light of the statutory policy objectives in the Communications Act and the Directives.

The second is that you have the consideration which we pressed in our submissions and which Ofcom have also indicated that they are concerned about that otherwise you will see a proliferation of appeals – some protective, some adventurous (if it is a guaranteed one way bet) which would result in our submission from an unduly narrow interpretation of the Act.

Fifthly, we say that the interveners – and it follows from everything I have said – do not take the appeal off according to H3G's submissions in new and unpredictable directions. We are constrained to address the matters which have been put in issue by the grounds of appeal.

Mr. Anderson referred to Vodafone's submission with approval on this point if he was wrong on the main point that the price can never go up. We do not demur from that; we do not seek to run riot with horns and tail through the Tribunal's procedures at all. We accept that that is the constraint.

THE CHAIRMAN: But does that not then create your proliferation point? How does get away from the potential proliferation of appeals' problem, if you accept that you are limited to the grounds of appeal that have been raised by the appellants, which you may have thought there were other points that need to be put in the balance if those points are being raised?

MR. TURNER: It removes the one-way bet element; that is the main point. It means that what I was finally intending to do, although Mr. Roth has trailed his coat over this ground to some extent, and I see the clock, was to show the Tribunal how we had done it in case it was not fresh in your minds, because a suggestion has been made by Mr. Anderson – merely a suggestion because he did not take you to any of the documents – that we have somehow hared off in a different direction at a tangent. We have not done that at all. What we have done is fairly and responsively and without any criticism from anybody, to pick up what the

parties – and in particular BT – have said in their notice of appeal and to say "That is wrong, this is the correct position.

THE CHAIRMAN: Well if we were to go down this route we would make it clear the limitation that you say you accept applies, and it would be for the Competition Commission to take a robust approach for any attempts to deviate from that. I do not think it would be helpful for us to say whether any of the current pleadings deviate from that or not.

MR. TURNER: Yes.

THE CHAIRMAN: Our concern is whether raising this possibility, even to the narrow extent that you have suggested, that the price may go up as well as down, makes it more difficult for the Competition Commission to keep the interveners within the balance of the grounds of appeal.

MR. TURNER: It should not do so, the issue having been opened by the grounds of appeal. The Competition Commission has not suggested, and nobody has suggested that somehow any party is moving like cats with a herder in all kinds of directions. One is simply addressing the very points that have been raised. I was going to choose an example on the pleadings relating to the auction and spectrum costs, but it is the same point that Mr. Roth raised in relation to the network externality element. Where a point has been raised, and where an appellant has said: "This is the right way to look at this", what else is an intervener to do if not to be able to say: "No, that is wrong for the following reasons, and this is the correct way to look at the issue which you have now engaged the Tribunal and the Competition Commission to decide."

THE CHAIRMAN: But there are instances of points that are in issue which lend themselves to that kind of analysis, but there are other points which do not lend themselves to that kind of analysis, and that is the danger, whether one does risk opening up the Competition Commission's investigation. Of course, if you are right that the end result might be that the price goes up as well as down, then there is no alternative but to do that.

MR. TURNER: That is so, madam. The alternative contended for by BT and to an extent by H3G but to a lesser extent, one turns one's face against allowing interveners to raise arguments in response to issues which have been opened in their notice of appeal which simply cannot be right. It may be that it needs to be addressed on a point by point basis, as you say, to keep a watchful and beady eye open, but you will recall also that the Competition Commission itself, from whom you will hear shortly, have specifically asked you in their submissions for the flexibility to be able to consider matters in this way. So they do not see this as a danger, they see this as the correct way to approach the matter.

MR. SCOTT: I suppose the question that arises is just "How far can this go?" and that is the concern that, as a matter of disciplined case management you have seen what decision we took in relation to on-net/off-net and the reasoning that we had behind that, and we may or may not be proved right in relation to that reasoning.

MR. TURNER: I am sure you will be proved right!

MR. SCOTT: But you can see the nature of our concern that we do not want read in tooth and claw with horns and tails interveners running roughshod across either us or the Competition Commission with issues, so there has to be some boundary here.

MR. TURNER: Absolutely and, with respect, sir, the on-net/off-net issue was an issue being introduced from the side; that was the defining feature, that was the finding of the Tribunal and the appeal which is now indicated by H3G relates to whether it was practicable as a matter of discretion to bring it in, but it was still an issue being brought in by the side and even in H3G's notice of appeal they take the position that it was a new issue that they could not have anticipated which, as a matter of your discretion, you should have allowed in. We are saying that where an appellant has raised an issue, so it is already there, then there should be a proper process of deliberation in which the parties to an appeal can bring forward their arguments and evidence on those issues.

THE CHAIRMAN: But they can bring forward their arguments and evidence to negate the point that is made, the question is rather: can they then bring in other points in evidence on that point, say externality costs, which not only counter the argument that the amount should be lower, or higher but that it should go in the opposite direction, such that the Commission can ultimately, and this Tribunal can ultimately reflect that in a higher price. So I am not sure that the limitation that we are considering imposing precludes you from raising arguments in addition to those relied on by Ofcom to justify the stance that they took, but merely adding to those arguments that point in the opposite direction.

MR. TURNER: Yes, it plainly cannot be correct if issue A – say, spectrum costs and whether they should be allowed for or not – is raised on an appeal, and an intervener or anybody else comes along and says: "Here is another part of the decision which nobody has yet mentioned, but which points in the other direction and, while you are at it in the appeal process, that should be looked at as well." That is nobody's position.

Where a particular issue has been opened in the sense that it forms a ground of appeal that the decision maker got it wrong on that point, then the Tribunal and in our submission the Competition Commission as well, needs to be very wary about trying to draw a fine line between points where you are simply saying: "No, your argument on that is wrong because

it is based on an incorrect view of the economic theory" or something like that, and leaving it there, and the position which we say is also fully legitimate where, taking the example of spectrum costs, one says: "You say that the auction fees paid in the year 2000 are an irrelevant consideration". We say that they are not only relevant but deserve to be treated as a weighty consideration for the following reason: to have to stop short and say "Well it is relevant but we cannot develop that and say why …", which would lead the decision maker to the view that it should also be considered to be a weighty consideration "… cannot be right, and therefore to try to draw a fine line down the middle, in our submission, will not work. The right decision, therefore, is for this Tribunal to recognise where a particular issue has been raised – it is not possible now to go into, at least on the hypothetical basis – all of the possibilities, but where an issue has been fairly raised, and if you take Spectrum costs for example, BT's case is in part Ofcom got spectrum costs wrong by reference to the host of statutory duties which are set out in the notice of appeal. If it puts the matter in a fairly broad way, then other parties are entitled to come back and say "No, if you look at this policy consideration efficiency, or the interests of end users then you need to take into account this. You have put that in issue and this is the right way to look at it." Otherwise, the decision maker in the public interest will make a blinkered and incomplete decision and that is not conducive to the public good.

Madam, subject to any questions from the Tribunal.

PROFESSOR BAIN: Perhaps I could raise with you the difficulty I see with this and that is really that you are talking as if the concept of an issue was readily identifiable and was quite distinct from the concept of the argument. Casting my mind back to on-net/off-net, it surely could be described as an argument. I think it was being put forward as an argument in support of a more general issue?

MR. TURNER: Yes.

PROFESSOR BAIN: And we took the view on that that it was not admissible in these proceedings for the reasons that we set out.

MR. TURNER: Yes.

PROFESSOR BAIN: You seem to be suggesting that whenever you want to advance an argument as an intervener to deal with a broader issue you should be allowed to do so, and it seems to me to raise the same kind of difficulties as one is in there. It may be in the end one simply has to rely on the Competition Commission taking a robust view of how widely it is prepared to allow your arguments to range, but I do feel a considerable difficulty with the way you are putting it in that I personally cannot make up my mind without looking at

particular individual cases what is to be regarded as an argument, what is to be regarded as an issue; and whether or not a particular argument goes beyond the bounds of what was in the notice of appeal?

MR. TURNER: Well if one takes on-net/off-net, had that been included in the original notice of appeal there would not have been any issue at all. We will come in due course to the question of the pleadings and the extent to which they can be allowed to develop yet further, but we have pleaded cases, and the extent to which it is there on the documents tells you, it gives you your answer as to what is in issue in this case.

PROFESSOR BAIN: Well I cannot take this any farther but I think you understand that there is some difficulty in my mind still about this particular distinction.

MR. TURNER: Sir, I appreciate that. All I would say is that as the Tribunal recognises it may be something which can only be addressed on a point by point basis, or by reference to specific examples, but that the general approach, however, has to be that first the Tribunal must not adopt an unduly narrow or technical approach, because the dangers of doing that are equally if not worse than the reverse, than allowing perhaps a little bit more in than should be there. The fact is that what is there on the pleadings at the moment is accepted, there has been no complaint that anyone has run riot with horns and a tail through the Tribunal's procedure, and it defines the procedure now coming before the Competition Commission.

Finally, madam, with an eye on the clock, question D. All that it remains for us to say is that we also accept the Tribunal's proposal in relation to how this question should be formulated. We would say that it is necessary to ask whether Ofcom erred in a particular way, whether the decision was incorrect for the reasons set out, let us say, in paras X to Y of the notice of appeal or, as a proposal we circulated to the parties yesterday, in those parts of the interveners' statements of intervention relating to the matter. But whether you put that in the questions or in a recital seems to us to make no odds.

Madam, subject to anything the Tribunal has, those are our submissions.

THE CHAIRMAN: Thank you very much, Mr. Turner. We will break for the short adjournment now. Can I just have an indication from Orange, Vodafone and 02 how long they think they are going to need after the lunch break. Mr. Flynn?

MR. FLYNN: Madam, I have had a quick word with the others in the "cheap seats" and we will certainly be under half an hour between the three of us and possibly less than that.

THE CHAIRMAN: Thank you, that is helpful. We will meet then at five past two.

(Adjourned for a short time)

THE CHAIRMAN: Mr. Flynn?

MR. FLYNN: Thank you, Madam. A few brief remarks on behalf of Orange. I will only be addressing you on Question B, to keep things short. Since nobody is now saying that the CC should be required, or is by the statutory provisions required, to determine the price, I think it takes the heat out of it somewhat, but I did just want to reply to one or two of Mr. Anderson's points, and to explain the position that we set out in our letter and previously in our intervention statement. Just in terms of the statutory provisions - or, more particularly, the 2004 rules of the Tribunal - which both Mr. Anderson and Miss Dinah Rose referred to in this connection - could I just explain my interpretation of Rule 3(1)(c) which, I think in both cases, was said to indicate that it was specifically provided that the Competition Commission should, or could, make a determination of what level the price control should be set. In my submission, if construes that provision, what is actually being said is that certain matters are specified as price control matters, provided they are dispute between the parties, and those price control matters relate to the things listed in A, B, and C, and in relation to C, what is listed is what the provisions in imposing the control contained in that condition should be, including the provisions as to what level the price control should be set at. In other words, in my submission, that is what is referred to the CC; that is what it should be thinking about - rather than the form of the answer that it gives. It just seems to me that this does not specify the outcome of the CC process.

More generally, in our submission, the outcome of the appeal process should be perhaps a determination if the CC is with one or other of the appellants, that a particular element in the calculation is wrong. So, Element X was wrong. They may even be able to say that the number X should have been Y. But, in our submission what then should happen is that that, of course, is the CC's determination. It comes before the Tribunal. The Tribunal must reflect that determination in its order. But, in my submission, what it should be doing is then ordering Ofcom to reconsider its statement to that effect. I think what has been ascribed to us - and I do not know if we are the ones with the horns and tails or the mischievous fancies - is a view that then everything is up for grabs once again in front of Ofcom because of the result of the appeal. That is not our submission. In my submission that happens in any case. It is always open to the decision-maker. It is open to them today to reconsider that decision to accept, if they wish to, representations from parties to that effect. What it seems to me is that it is no part of the statutory schemes for these appeals that the Tribunal is to direct off that it must reconsider the statement to that extent, and only to that extent. There is no authority, in my submission, for that proposition. As Mr.

Roth explained this morning, the decision is for Ofcom. The Tribunal actually does not have the jurisdiction to quosh the decision. It has the decision to remit the matter and direct Ofcom how to reconsider it. But, in my submission Ofcom cannot be precluded just because certain points have been raised in an appeal from considering other matters which might lead to a different price being reached really at any point. It does not make any difference - the fact that certain points are going put in issue in the appeal. In my submission, the Tribunal decides the appeal, but the ultimate decision is for Ofcom. If it takes the view that one element of the price has to be lowered because that is what the Tribunal has told it based on the Competition Commission's determination, that will not preclude Ofcom, as the decision-maker, should it so wish - and we may be in entirely hypothetical territory here - from reconsidering other elements of its price control at the same time, and on the same occasion. If it were to do so, it is those matters that would, if necessary - and I make no developed submission about that - be put out for consultation with the Commission. In my submission, the Tribunal's judgment on the appeal and the Commission's role in any consultation on a new decision just do not meet up - so, there is no risk in hierarchical terms of conflict between the two. Ofcom will, of course, comply with the Tribunal's decision that what Ofcom does in relation to the price controls is a matter for it under its statutory powers.

So, we are not saying that the result of the appeal, should part of it succeed, is that the entire statement must be reconsidered. It is simply that the result of the appeal is not to preclude Ofcom from reconsidering, should it so wish, and should it accept submissions to that effect from the interveners, from the appellants or from members of the public -- I mean, in its statutory role. That is the explanation we were seeking to give in our written submissions at the place of these appeal proceedings and the role of the CC within that in the statutory scheme for regulation where Ofcom is the decision-maker.

I think those were the only points I wished to make to the Tribunal this afternoon.

THE CHAIRMAN: Thank you very much. Miss Bacon?

MISS BACON: Again, just a few points, because I gratefully adopt the submissions of Mr. Flynn and Mr. Turner. As Mr. Anderson identified, we all fall in the same camp. Just a few points on Questions B and C - because we are content with the Tribunal's formulation regarding Question D -- Madam, you asked Mr. Anderson whether the directive requires the decision to be remitted. Madam, I did not quite catch his response. I am not sure if he did respond to that. But, our understanding is that Article 4 of the Framework Directive does not require any particular form of appeal mechanism. It simply requires there to be a

merits-based appeal. It is one of these areas where, of course, the directive leaves it to the national authorities to decide precisely how it is going to implement that requirement. So, in our submission, you look at what the national authorities have decided to do -- what the legislator did decide to do. As we said in our written submissions, there is a very clear distinction drawn here between the provisions of the Competition Act in Schedule 8, para. 3, and the kind of appeal mechanism we have in s. 195. S.195 provides that "there shall be remitted to Ofcom the matters once the Competition Appeal Tribunal has reached its decision". So, the Tribunal shall remit the decision under appeal to the decision-maker. By comparison, in Schedule 3 you have a number of alternative conditions. So the Tribunal may remit the matter to the OFT or it may impose, or revoke, or vary the penalty, or -- and so on. Then we get to s.3(b): "-- or make any other decision which the OFT could itself have made". So, when Mr. Anderson said this morning that s.195 is the functional equivalent - and that is the word he used - functional equivalent of s.3(2)(e), with respect we would beg to differ. The two provisions are entirely different. S.3(2)(e) is a possible outcome of an appeal process under the Competition Act. S.195 prescribes remittal as the only possible outcome.

So, that is what we have to say about the distinction between the two sets. One, we say, is not a functional equivalent of the other.

The question is then how to make sense of this appeal mechanism. It seems to us that the submissions of Ofcom and BT, and Hutchison cause a great deal of confusion because they are led to the position in which they say, "Well, some issues must be remitted". I understand that to be the provision of Miss Rose and Ofcom, such as the issue about the traffic imbalance. That issue, they say, would have to be remitted, but other issues could be decided by the CC. That gives rise, we say, to a real difficulty, which is: how do you draw the line between those issues which (as Mr. Roth said) fall within the appellate jurisdiction of the CC and those issues which fall to be determined as a primary decision-maker. It seems to us that we have not really heard any clear principle this morning as to how you do draw the line between those issues which the CC should decide and those which it should not.

THE CHAIRMAN: The line is drawn by the grounds of appeal. I think the point being made with the on-net/off-net is that that is not within the grounds of appeal, and therefore cannot form part of the Competition Commission's deliberations. What we are debating is whether within the grounds of appeal there are arguments that can be brought to bear not only rebutting a potential lowering of the price, but in support of raising the price.

MISS BACON: Madam, if I may say so, that really goes to Question C - not Question B. I was not talking about arguments which might be raised in support of the remedy which may lead to a higher result. I was simply saying that if the CC is responding, and determining the appeal full square within the grounds of appeal as set out by the appellants, does it come to a point where it says, "We cannot go further and decide a matter because it would be deciding de novo". As I understood Miss Rose's submission, she said that on the traffic imbalance point, the Commission would get to a point where it said, "This is an issue which has not been investigated by Ofcom and we have to remit that". However, on other issues she and BT, and Ofcom seem to be saying, "The CC could say, yes, there has been an error. We will go on to determine what the correct result would have been if that error had not been committed". Mr. Roth gave the example of para. 115 in BT's notice of appeal, p.41 in Bundle A, Tab 3. If I could just ask you to turn that up -- It seems to me that this was actually a clear example of an issue in which it would be very difficult for the CC to determine the matter without embarking in this kind of de novo consideration which is not appropriate in an appeal body. I only refer to this by way of example, because it is the example that Mr. Roth himself gave. He said,

> "Further, Ofcom should have investigated achieved spectrum prices across countries ----"

In this case the CC has to do two things. First of all, it has to reach the conclusion as to whether or not that is correct, did Ofcom make that error. If the CC concludes that Ofcom should have done that what he says, "We do not want to go off and do that ourselves, we want the CC to go off and do the extra work". I understand that there is an issue here of resource allocation, but at the end of the day we submit that the issue of resources should not determine what is a legal question as to the appellate function of the CC. This, we suggest, is exactly an example of where if the CC were to go on and determine that it would be going into the kind of *de novo* investigation that is outside its function as an appeal body. That is the precisely the reason why, in this kind of appeal, the decision is remitted to Ofcom.

So we would submit that it is simply not open to the CC to say, "Ofcom has made this kind of error, let us see if we can do a better having rectified that error and come to our own conclusion as to what the result should be".

MR. SCOTT: You are drawing a distinction which is partly based on what happens in the case of one Act "decision" or in the case of the other Act "determination" has been made, but you are seeking to apply that distinction to the process by which that decision or

determination is reached. The words in 195(1) and Schedule 8, 3.1 are, with the exception of the words "decision" and "determine" – one says "shall decide" and the other says "must determine" – the same words, as I recall. What that suggests is that the process is likely to be very similar even though the outcome is distinguished by the fact that in the one case the European framework permits us to act as a competition authority and in the other case the framework envisages three different sorts of body. It envisages a national regulatory authority, something which is not that and is not a court – in our case the Competition Commission – and then a court-like body which is us. It distinguishes the functions in the regulatory framework of communications in a way that does not happen in the competition framework. What is not clear to me is why what is going to happen necessarily changes the way in which we interpret those words in relation to the grounds of appeal set out in the notice of appeal.

MISS BACON: It is an interesting question because the language "decision" and "determination" itself does not tell you very much about what kind of decision or determination is taken. Our submission is that one has to read the legislation as a whole to construe those terms. We would say that there is a two-stage process because this is an appellate function and because the legislators' decision has been to frame this in terms of the remittal to Ofcom, not merely an option to remit but in every case it shall be remitted to Ofcom to take the decision. We would go on to say that that is actually consistent with the consultation objectives, and so on. That is the only way to make sense of the requirement to consult.

In answer to your question, we would say that there is a two-stage determination process. The first is that there is a determination that there is an error. The second is what do you do once you have found there to be an error. We would say, at the first stage you then remit it back to Ofcom and then Ofcom takes it forward to decide what to do about the error. In other words, you have a determination by the tribunal and that is a determination, a determination that Ofcom have erred in failing to do X, Y and Z. Then it is for Ofcom to take that and rectify it.

So we say it is a two stage process and that is how the scheme of the legislation was specifically designed. I do not want to take any time over that point because I only have a short time.

I think that is all I wanted to say on question B.

Turning briefly to question C, I should just respond to Mr. Anderson's point about the *BASF* case to clarify what we were intending in our submissions. Of course we were not

saying that as per the CFI the tribunal or the CC has the jurisdiction itself to raise the level of the price control. Indeed, that would be completely inconsistent with what I have just said about question B. The reason for referring it was just to illustrate the fact that there may be cases in which issues squarely within the appeal lead inexorably to the conclusion opposite to that sought by the appellant. In that case it was a submission made by the appellant *BASF*. That did not lead to the conclusion, as it thought, that its fine should be reduced. Quite the opposite, the CFI thought that that led to the conclusion that its fine should be increased. The CFI, of course, had the power itself to increase the fine, whereas the tribunal does not have a similar power here. The same may be true, we say, of submissions either made by the appellants or more likely the response is made by the interveners. It may simply be the result inexorably from one of the submissions of the interveners which are four-square within the grounds of appeal as set out by the appellant. The result of that leads to the conclusion that price control is higher.

We are not saying that the interveners should suddenly be able to raise grounds of appeal which are not set out in their own pleaded notice of appeal. I understand the tribunal's concern there that we are going to somehow be running amok and raising all kinds of new grounds right, left and centre. The point is rather, as Mr. Turner and Mr. Flynn have explained, we are simply responding to the grounds of appeal. For example, Hutchison may say that this particular aspect of the decision is wrong. We respond and say, no, it is right because. The CC may – I am not saying it will – come to the conclusion not only that we are right but that inevitably leads in the opposite direction. We say simply that the CC should not be precluded from reaching that result.

If I might make one further point. In fact, with respect to this question as to whether we are going to be raising new grounds of appeal which are not framed within the terms of the appeal, the CC is going to have to deal with this in any event whatever the tribunal determines is the correct framing of this question. The CC is going to have to ask itself whether our statement of intervention is within the grounds of appeal or whether we are raising completely new points. So it is not as if the tribunal's framing of this question is going to alter in any way what the CC ultimately has to do. What we are saying is that the CC will have to make that decision in any event. The question is simply when it has made that decision and it has decided that our argument is within the grounds of appeal and it can determine it, should it then be precluded from actually drawing the necessary consequence from that. So it is not in any way saving the CC time or preventing the CC from having to deal with this difficulty. It is always going to have to deal with it.

MR. SCOTT: Pausing on that, both in the Competition Act and in the Treaty there are specific provisions that relate to penalties. If my memory serves me right Article 229 and Schedule 8, 3(2)(b) do not occur in relation to price control matters. Do you think that makes any difference?

MISS BACON: I think that is placing too much weight on the exactness of the analogy I was drawing. As I said, the only reason I relied on this was to show that there may be a situation when an argument that is put forward, in that case even by an appellant, might actually lead to the opposite conclusion, and that if that is the case one should not preclude the CC from actually setting out that conclusion. That is the scope of it. I was not intending to make a more extensive argument than that.

The final point to make is that Mr. Anderson generously in the alternative on question C suggested that he would be happy with the formulation of Vodafone. We would be happy with that formulation too.

THE CHAIRMAN: Thank you. I think that is your cue, Miss McKnight.

MISS McKNIGHT: Thank you. Whilst we share a lot of common ground with what T-Mobile have said this morning we would wish to emphasise to the tribunal that Vodafone's position is somewhat different, given the contents of Vodafone's statement of intervention in the two cases before you. Just to remind you, I think BT's position appears to be that there is something objectionable if an intervener seeks to raise through intervention something which it should properly have raised by its own notice of appeal, so if it seeks to improve upon the decision which is under appeal, and that be if it raised new arguments suggesting in this case that the Vodafone price control should go up or if it seeks other relief which it should have sought by its own notice of appeal.

In the present case it is useful to recollect what it is that Vodafone is arguing in each of the appeals. First, as regards BT's appeal, BT has identified that there are various building blocks in the price controls that Ofcom determined and it argues that certain of those building blocks, the 3G spectrum costs block, the externality surcharge, for example, were set too generously and that in consequence since the end price control is the sum of all those individual building blocks the end result came out too high.

The decision which is the subject of the appeal is a decision as to the level at which the charge control should be set. Ofcom's reasons in support of that decision are not technically something which is appealed. The grounds of appeal address alleged deficiencies in those reasons.

Vodafone did not appeal against Ofcom's decision because it is content that the charge control was set at an appropriate level. However, Vodafone does consider that some of Ofcom's reasons in support of the charge control were deficient and therefore if BT now criticises the level at which the charge control is set and identifies deficiencies relating to the reasons in support of particular building blocks, we say it is open to Vodafone to say, no, the size of that building block is correct but the reasons for the adoption of that building block can be supplemented and that is what Vodafone seeks to do. We seek to do that particularly in respect of the 3G spectrum costs and the externality surcharge, but we are not seeking to say that the charge control should be set at a more generous level. We accept that if we had wanted to do that we should have done it by way of appeal.

As regards the Hutchison 3G appeal, of course that raises far more issues, including the NPZ, but I want to focus on the particular reason why Vodafone says that it should be open to the Competition Commission to set a more generous charge control for Vodafone as a result of the grounds raised by Hutchison. What we say is that where Hutchison says that its own charge control should have factored in a specific building block to deal with CARS costs, the customer, acquisition and retention costs, we think that is incorrect. If the Competition Commission and hence the tribunal were to conclude that CARS costs should have been allowed for Hutchison 3G, we think that by parity of reasoning, because we think the only reasons which could support such a conclusion would apply also to Vodafone, that should lead to a consequential amendment to the charge control applicable to the 2G/3G MNOs, so that we would also end up with a higher charge control limit.

Again, that is a point which we could not properly have raised by independent appeal, because our primary position is that there is no need to allow for CARS costs. We are saying that if we are wrong on that then the overriding principle of fairness and parity of treatment for persons in like position must mean that it would be proper to have a consequential reconsideration of the level of the Vodafone charge control.

So we consider that the points which Vodafone is raising in its statement of intervention are ones which cannot be impugned as an indirect attempt to apply out of time for what should have been applied for by way of appeal.

THE CHAIRMAN: But at what point in the process do you say that the question of whether there is any read-across from a successful challenge to one point in one person's price control is it to be considered whether there is a read-across to the other price controls?

MISS McKNIGHT: You mean is it by the tribunal or the Competition Commission?

THE CHAIRMAN: Or by Ofcom, which is the result that one of your colleagues was saying.

MISS McKNIGHT: We say it should be done by the Competition Commission because in referring these questions to the Competition Commission you can already see from our pleadings and our request for relief in our H3G statement of intervention that we have raised this point. We have said that if the CARS costs are allowable for Hutchison they are also allowable for us and we seek relief that takes account of that. We say that the question as to whether the charge control applicable to the 2G/3G MNOs should be raised is itself a price control matter, so it must be referred to and considered by the CC. (After a pause) Should I continue?

THE CHAIRMAN: Yes.

MISS McKNIGHT: I was not sure whether you were going to ask me a question. I think that to the extent that we seek to introduce arguments in support of Ofcom's computation of the externality surcharge and the 3G spectrum costs which go beyond the reasons that Ofcom itself relied on, we say that we can do that by virtue of the Tribunal Rules and we take you to Rule 16 of the Tribunal's principal rules. Mr. Turner made the point that Rule 16(9) specifically contemplates that the statement of intervention should set out the relief sought by the intervener, and this suggests it maybe separate relief from the relief sought by one of the principal parties, which itself suggests that the intervention may go beyond the scope of an appeal or defence.

We would also point out that in Rule 16(5) where the rule requires the intervener to state the name of any party whose position the person making the request intends to support. It has to be noticed that it does say "the name of any party whose position he intends to support", making clear we would suggest that he may not support the position of either the appellant or the respondent and, as Mr. Scott has noted, that is a particular concern in this case where interveners appear to support more than one party, or to differ from parties on different issues. We say the rule specifically contemplates that the intervention may go beyond the arguments raised in the notice of appeal or the defence.

I mentioned at the outset that we draw a key distinction between the decision, which is the subject of the appeal and the reasons for the decision, those reasons being challenged through the grounds of appeal. In case that were in any way controversial I would take you to the *Coca-Cola* decision of the Court of First Instance, which I have handed up. I apologise that I do not have the official report at this stage, but we will certainly send it in to the Tribunal for citation.

This is not a perfect analogy for the case now before the Tribunal but I think it does illustrate the essential points that I wished to draw to your attention. In this case the Court

of First Instance faced an appeal from Coca-Cola. Coca-Cola had notified a merger to the European Commission under the older version of the EC Merger Regulation. The EC Commission had concluded that whilst Coca-Cola occupied a dominant market position, nonetheless the merger was permissible and did not tend to create or further strengthen a dominant market position.

Coca-Cola appealed against the decision of the Commission on the basis it did not wish to be fixed with a finding that it already occupied a dominant market position and in para.26 of the Judgment of the Court of First Instance which you have you will see that in the application TCCC (one of the Coca-Cola entities that appealed) asked the court should:

> " – declare the decision [of the European Commission] void in so far as the Commission finds that the decision that the sup ply of cola-flavoured carbonated soft drinks in Great Britain comprises a relevant market …"

And that one of the entities held a dominant position on that market, and that there was a relationship of control between two of the other entities.

One question which arose was whether this was an admissible appeal at all, because the decision had not been adverse to the interests of the notifying parties, they just objected to one element of the reasoning.

This was a point which the European Commission picked up in defending the appeal. At para 50 the Judgment notes that because the appeal did not relate to the operative part of the decision but only some of its grounds, the application had to be dismissed as manifestly inadmissible. The court went on to consider that argument, and in paras.77 to 79 it says it is settled case law that any measure which produces binding legal effects, such as to affect the interests of an applicant by bringing about a distinct change in his legal position is an act which may be appealable, or may be appealed. Then it said:

> "To determine whether an act or decision produces such effects, it is necessary to look to its substance.

Then at para.79:

> "In the present case it follows that the mere fact that the contested decision declares the notified operation …"

- that was the merger:

> "… compatible with the common market and thus, in principle, doe not have an adverse effect on the applicants does not dispense the court from examining whether the contested findings …"

- that is to market definition and dominance –

"… have binding legal effects such as to affect the applicants' interests."

The court went on then to consider whether a finding of dominance would essentially be binding in any subsequent proceedings brought under Article 82. From its reasoning it concluded in para.92 that:

"… that the mere finding in a contested decision that [this entity] held a dominant position has no binding legal effects so that the applicants' challenge to its merit is not admissible."

Now, this I would say is a clear example of a case where the court, and indeed an English court I think would have done the same thing, recognises a difference between the operative part of the decision, which may be appealed if it is adverse to the would-be appellant and the reasoning which maybe the subject of grounds of challenge, if there is an admissible appeal but is not itself appealable. There is no question that Vodafone should have appealed the Ofcom determination saying: "We do not agree with your reasoning, we are very happy with the outcome", and therefore we are in a very proper position of seeking to add additional reasons in support of Ofcom's determination whilst not having appealed ourselves. That deals with my principal point, that is that the arguments which Vodafone has put into its statement of intervention are properly included and should therefore go to the Competition Commission.

We are troubled though by some of the additional points which have been aired this morning, because it seems to us that once the pleadings in this case are settled, the task of the Tribunal and the Competition Commission is to determine the relevant parts of the appeal that fall to them respectively, in accordance with the grounds and arguments raised in those pleadings. It seemed to us for example that where the Tribunal has decided it is not open to H3G to introduce arguments that their traffic imbalance is caused by on-net/off-net pricing differentials used by larger networks, that means that that is not a matter which the Tribunal or the Competition Commission needs to have regard to. They will hear no evidence as to on-net/off-net pricing and the only task for, in this case, the Competition Commission is to decide whether the charge controls have, in the relevant respects raised in the pleadings, been set at the wrong level by reference to the evidence adduced pursuant to the pleadings. We do not therefore think it is open to H3G to say to the Commission "Of course, we are not allowed to put a positive case to you about on-net/off-net pricing, but we invite you to conclude that Ofcom should examine this and that no proper decision can be made until it has been examined. It seemed to us that that is simply not an issue that is raised in these proceedings at all. The only sense in which the

Competition Commission will look at traffic imbalance will be to determine whether H3G has adequately demonstrated that mobile number portability has caused a traffic imbalance and that is legally relevant to the level at which price control should be set. Those are the outer bounds of the issue about traffic imbalance.

We would buttress that position by pointing out ----

THE CHAIRMAN: These submissions seem to be rather straying from the point about what are the questions that should be referred to the Competition Commission.

MISS McKNIGHT: In that case I will not pursue them. I mention the reason I raised it was because it was suggested I think today that the Tribunal may be troubled by referring questions that embrace everything within the scope of the pleadings if that allows too wide-ranging an investigation at the Commission stage and has adverse impacts on the timetable. If that is not a concern then I need not pursue this.

THE CHAIRMAN: Well what I am saying is I do not think we want to hear submissions about how the Competition Commission ought to respond to points which are raised by a party which other parties think go outside the ambit of the appeal.

MISS McKNIGHT: Thank you, in that case I will not pursue it. I was intending to mention what we understand to be the scope of the Competition Commission's information gathering powers, because again that appeared to be pertinent to other parties' submissions as to the manner in which the Competition Commission would address questions posed to it and the kind of answer it could be expected to reach. I am reluctant to embark on that if ----

THE CHAIRMAN: I do not think anyone has said that there is any limitation on their powers from which we can derive any indication as to what the legislature thought that their role ought to be.

MISS McKNIGHT: In that case I think I do have something to say, because I think we think there are limitations on their powers, that as we understand it other parties have suggested that where the Enterprise Act confers on the Competition Commission powers to gather information by the issuing of statutory demands, that those same powers apply in the context of the proposed price control reference. We do not consider that to be correct. Our reading of the legislation is that the Enterprise Act confers specific information gathering powers for use only in Enterprise Act investigations, merger investigations or market investigations. That the Competition Act confers on the Competition Commission a power to adopt procedural rules to govern its procedures - but clearly a rule making power cannot be used to extend the scope of the substantive powers available to the Commission.

That the Competition Act Schedule 7 rule making powers were specifically extended by the Communications Act to allow rules to be made to govern price control references – but again that does not itself confer additional information gathering powers. Therefore, the Competition Commission only has such powers as are conferred on it by the Communications Act in respect of price control references, and there are no, as it appears to us, specific information gathering powers available to the Competition Commission.

We addressed in our written submissions the fact that this is not in itself a problem because the Competition Appeal Tribunal has extensive powers to gather evidence, and since the Competition Commission element of this case forms part of the overall appeal to the Tribunal we see no objection to the Tribunal gathering such evidence as it requires and passing it across to the Competition Commission for use in the determination of the price control questions.

We consider that this is clearly the import of the statute since s.193(8) of the Communications Act, which deals with various offences which private parties may commit if they fail to provide appropriate information to the Competition Commission, specifically import the offences of supplying false or misleading information from the Enterprise Act, but do not import the other offence of failing to respond to a statutory demand, and that of course is consistent with our position ----

THE CHAIRMAN: Miss McKnight, are you saying then that there has been no rule actually made ext ending the Competition Commission's general information gathering powers to enable it to use those powers in the context of this kind of inquiry?

MISS McKNIGHT: That is my position. I am conscious it is very easy to miss one of these provisions, but I understand the Competition Commission agrees with me. If I could point out also that the Competition Commission's functions in other cases ----

THE CHAIRMAN: Does it not somehow define this as a 'special inquiry' at some point and then those rules do apply to special inquiries. I do seem to recall having gone round this loop myself at a very early stage of this whole process.

MISS McKNIGHT: Yes, the Competition Commission's rules do indeed envisage that certain rules should apply to special inquiries, but the point we make is that those rules explain just how certain procedural matters will be handled, but do not – and I would submit cannot – confer a power together information which is not available by statute.

If I could complete my submission, I am sure it will be necessary to revert to his point, but I appreciate it is potentially significant.

MR. SCOTT: Just pausing there, what is envisaged is our Rules in accordance with directions given to them by the Tribunal in exercise of powers conferred by the Rules which presumably are our rules.

MISS McKNIGHT: Sir, where are you reading from?

MR. SCOTT: 193(2): "Where a price control matter is referred in accordance with Tribunal Rules to the Competition Commission for determination, the Commission is to determine that matter in accordance with the provision made by the Rules …"

which is presumably our rules – yes?

> "… in accordance with directions given to them by the Tribunal in exercise of powers conferred by the Rules and subject to the Rules and any such directions using such procedure as the Commission consider appropriate."

MISS McKNIGHT: Yes, so that would be to appoint a Panel of a number of members ----

MR. SCOTT: Absolutely, but are you suggesting that if they need to compel evidence they have to come back to us -----

MISS McKNIGHT: From third parties, but if I could make a point, the Competition Commission of course is most familiar to all of us from its conduct of market investigation and merger references, but they are not its only functions. Under utilities provisions now, they do conduct code modification appeals from energy codes which are much more akin to an adversarial appeal procedure inter partes, looking only at limited issues raised on appeal. We say that that is a much closer analogy to what is happening here than the broad-ranging market investigation and merger inquiries. However, the reason this statute calls for price control matters to be referred to the Competition Commission is not to allow a wide-ranging investigation to be conducted. It is to take advantage of the Competition Commission's experience and expertise in dealing with quantitative questions relating to price controls. There is absolutely no reason why the Competition Commission should be going off asking questions of lots of third parties unless it comes back to you, explaining why it needs to do that and you exercise your powers to enable it to do so.

I wanted to introduce this submission to assist you in concluding that by allowing all the pleaded points to go off to the Competition Commission you are not opening up all sorts of issues that interveners may wish to raise, but it is all bounded by the terms of the pleadings and is then an adversarial process before the Competition Commission.

MR. SCOTT: Just pausing there, is it an adversarial process, or is it in fact an administrative, but not national regulatory level process.

MISS McKNIGHT: Perhaps 'adversarial' is not the right word, but the Commission can choose its own procedures. It may adopt an inquisitorial procedure vis-à-vis each party rather than having an inter partes hearing, for example. But, the point I am making is that it is not an investigation where the Commission can say, "We think it will be interesting, or useful, or relevant to go and look at another issue and gather information from third parties on that". Their task is to decide issues raised by one party to which other parties respond with finite responses, and to decide among those positions. That

THE CHAIRMAN: Has the Competition Commission made rules for special reference groups?

MISS McKNIGHT: They form part of its 2006 General Rules of Procedure, as I understand it. However, I am conscious that the Competition Commission are here ----

THE CHAIRMAN: Certainly 'special reference group' is defined as meaning a group constituted in connection with an investigation under s.193 of the Communications Act.

MR. SHARPE: May I assist? Insofar as this is relevant to our concerns today, the rules to which you have been directed have no statutory significance. So, if we are addressing the question: will the Commission in the course of the determination have the power to compel people to come along and give evidence or to supply documentation?, the answer, as my learned friend, Miss McKnight, explained to you, is that we do not have that power. There may be certain circumstances which I have to say to you we do not envisage. But, if there is a situation where we do want somebody to give evidence, or to supply documents in data, we will come back to you and we will seek directions, and request that you make the appropriate direction. Then the party will be bound. I think that is the way in which the statutory scheme is designed to work.

THE CHAIRMAN: Does that say anything about whether or not you can, for example, take evidence from third parties? It is a point which Mr. Anderson seemed to be relying on your ability to do that in support of his submissions that you ought to come up with as close a thing to the final answer as you possibly can.

MR. SHARPE: Mr. Anderson, with characteristic under-statement, said that the Commission had all the powers it normally has, from memory. That is not right. I am most grateful to Miss McKnight for anticipating and saving me the bother of making these submissions myself. To the extent that it is relevant, the Commission does not have those powers in the precise form that it adopts in the form of a market investigation power. What can we deduce from that? We can perhaps deduce what I will be submitting - but I think I am in exceptionally good company - that you are not required to order us to seek a unique

number in discharge of our duties under the Act. That is where I was going to come in in a few moments' time.

THE CHAIRMAN: Miss McKnight, is there anything further you want to say?

MISS McKNIGHT: My substantive submissions are complete. I wish only to explain the relationship of these submissions with what Mr. Turner was saying for T-Mobile. Clearly, Mr. Turner's submissions went further and suggested that it is only to the Competition Commission not merely to decide whether to dismiss the appeal or to allow it so as to reduce 3G spectrum costs allowed in the price control, or whatever, but also if they decide, having heard all the evidence, to set a higher figure. We do not contend that they should do that. But, we have no problem with agreeing that that is an interpretation of the Competition Commission's powers, which it is open to the Tribunal to adopt, and it is perfectly consistent with its public law function where it might be regarded as intolerable for it to have to turn its back on adopting what it thinks is the right answer.

We would merely complete our submissions by saying that in light of what I have said as to the somewhat narrower ambit of the Commission's role, we see no reason why they should not be able to adopt particular figures in response to the points raised in these appeals since these are not cases where we think they should be, or need to be, going out seeking such enormous amounts of evidence on new points as to render that impracticable. That would complete my submissions.

THE CHAIRMAN: Thank you. Mr. Sharpe?

MR. SHARPE: Madam, gentlemen, the Competition Commission is not a party to these proceedings as you are aware. We have the status, I suppose, of visitors - but I hope welcome visitors. But, like all visitors we are not going to outstay our welcome. We feel we are intruding into a domestic industrial dispute and that the sensible thing to do is to err on the side of caution.

I am going to address you essentially on Question B. So much of what I was about to say has been taken already in submissions from, particularly Mr. Flynn in relation to Rule 3, and Miss Bacon in relation to the nature of what we are doing, and, lastly, of course, Miss McKnight. So, I am not going to repeat those submissions at any length.

What I want to do is simply say this: respectfully, however attractively Mr. Anderson deployed his argument, there is no compulsion on you to require a number. I think that is now common ground, although it was not until today, I think.

I think we would also wish to submit that in relation to the other side of the coin - the exercise of your discretion - if a discretion exists, it should be exercised very, very

carefully indeed. I am going to submit that (1) you may not have that discretion; and (2) if you do, you should not exercise it in favour of seeking a unique number, or putting undue pressure upon the competition at this stage in the proceedings when we are not even at the threshold of a reference, with respect, judging by the timetables that have been proposed, and where we have not full visibility if not of the arguments of the parties, then of the evidence of the parties.

Rule 3(1) refers to matters in dispute related to - and we have seen the litany- the price control mechanism. Mr. Flynn's submissions we respectfully endorse. It does not require - and, indeed, possibly not even envisage - a reference on the basis of the level. It just simply says, as Mrs. McKnight put it, and as I would have put it, that the building blocks which relate to the price control mechanism - namely, the issues that you have identified from the pleadings themselves - should form the subject of our investigation by the Commission. Of course, in undertaking that investigation we will clearly come to a view whether Ofcom was right, and if it was wrong, the nature of the error and the extent of the error, and we will probably come to a view as to how that error can be corrected.

Probably. In doing that, we may, in succession on each of the matters consisting of the building blocks, come to a composite picture of where the price control ultimately may lie and where it should be put.

What we wish to resist today is a requirement - however it is expressed in the imperative language of the draft that Mr. Roth approved of, and which was submitted by Mr. Anderson as amended - to go forward with a presumption that we will provide such a number unless we can think of some good practical reasons why we should not.

We were much attracted by your own formulation in Question 7. We interpreted Question 7 to provide the Commission with latitude, to say, "Well, look, having determined the answers to the building block questions, what assistance can you, the Commission, give us, the Tribunal, as to how we should exercise our functions, taking it forward?" Under that heading, we anticipated that we would be able, if we thought it appropriate - and I have to emphasise when I use that formulation as you do, not on a whim, but whether we think it is possible and practical for us to provide you with the assistance which would then enable you to provide the necessary order to Ofcom ----

THE CHAIRMAN: Looking at the wording that Ofcom put forward - that BT supported, subject to the words in brackets being left out -- That was para. 11 of Ofcom's submissions -- Do you say that that wording does impose inappropriate pressure on the Commission to come up with a figure?

MR. SHARPE: Where we are starting from on this, as was correctly pointed out by Miss Bacon, is that we are not going into this as if it were a water reference to find a K factor, or gas transmission, or whatever. It is perhaps useful to remember that water is the only example where the Commission is mandated to come up with a number. For all the others, it is a recommendation to the sectoral regulator. We are not doing that. We are not starting off de novo. What we are looking at is how Ofcom has reasoned its case and arrived at a conclusion. We are being asked highly specific questions drawn from the notices of appeal - not from thin air, but from the notices of appeal. It is our task to react to those questions. We hope those questions will, if answered, provide a comprehensive basis on which a settlement could finally be reached. If they do, they do. If they do not, it will not be the Commission's fault. We will have answered those questions.

It is one thing in the context of an appeal -- Parliament has essentially sub-contracted this procedure from the CAT to the Commission for good reasons - and reasons I will not develop any further. The question then becomes: if we have answered the questions that you have posed us in relation to the building blocks, should there be a further obligation to take the fruits of that knowledge and expertise, and offer something else which is a positive affirmation as to what the number should actually be?

We are in some doubt as to whether we should be obliged to do that. Even if we were, what status would it have? Would it bind you - unless we are Wednesbury mad - as any other finding in relation to the building blocks would bind you?

THE CHAIRMAN: The answer is: yes, it would -- or, BT say, "Yes, it would" - because it is a specified price control matter because in their relief they have asked for a decision lowering the price.

MR. SHARPE: Respectfully, they are wrong. That is not the statutory scheme. The statutory scheme is that we come to determinations on matters raised in the notice of appeal; we provide you with the fruits of our labours in the context of a determination. You then pass that to Ofcom and Ofcom must then consider those directions in the light of its other knowledge and sectoral expertise, and whatever expertise the Commission may possess - and it does possess considerable expertise, it is not that specific sectoral expertise that Ofcom enjoys in much the same way as any other regulator, given a recommendation in the more orthodox *de novo* enquiries. We say that the role of Ofcom is more than a cipher in these proceedings.

Secondly, the point that my friend Mr. Anderson developed, with, respectfully, some difficulty, about consultation at the end of the procedure, you have been taken to the

Framework Directive, you have been taken to 7(3), but perhaps you could refresh your knowledge of that, perhaps not now, and look and see what is actually required there. What is required is the regulatory authority, Ofcom, taking the determination, putting it out to consultation with other Member States, their regulatory bodies and the Commission, and then, as the Framework Directive actually says in terms, it must take (7(5)) the utmost account of the fruits of that consultation. Unless that is just meaningless verbiage it actually means that it puts out something which is capable of change, which is capable of amendment in the light of the comments from the Commission and other Member States. It is our line that it does not make sense, in my submission, to say that only applied to the first round, because that decision, by definition, has been superseded by the findings of the Competition Commission and your own order, your own decision, in relation to Ofcom. So what possible benefit can there be in furnishing other Member States or the Commission with something which is out of date and regarding that as a conclusive expression of how the United Kingdom must handle this particular matter.

Then 7(5) states in terms that there must be the utmost account before it is adopted – and "adopt" I think means have normative significance. That is not the case in the discarded Ofcom decision. Then you have the resulting draft measure coming into force.

That simply cannot apply to an earlier discarded decision. It must apply to the final decision which, under 7(5), must be notified to the Commission and regarded and put in some sort of record as the definitive and final statement of the United Kingdom's settlement in relation to this matter. Respectfully, any argument to the contrary cannot give full weight to this provision of Community law which is designed plainly to ensure harmony across Member States and to inform the Commission of an accurate and final settlement as opposed to something which is inaccurate and has been discarded.

I am sorry if I have laboured that, but I submit it now because I would work back to say, is it appropriate to have a final number? The answer, in my respectful submission, is no, the only final number is the number which has been out for consultation to which the utmost attention must be given and then finally determined and adopted.

THE CHAIRMAN: I do not see that that necessarily follows, Mr. Sharpe, because, as Mr. Roth pointed out, the consultation required need only take a month. So that month could be spent by the Commission looking at a final figure produced by the Competition Commission and incorporated in the tribunal's determination. The kind of process that you are considering, which is where the Competition Commission simply says, "Well, Ofcom,

you erred in how you did this, go back and have a further think", but then you are envisaging a much longer consultation period than simply the Article 7 process.

MR. SHARPE: My submissions are directed exclusively to Article 7. What Ofcom feels it needs to do is entirely up to them. Article 7 requires the national regulatory authority, and I am taking that to be Ofcom, to supply this information to the other Member States and to the Commission.

THE CHAIRMAN: I thought you were arguing from your position that the ultimate decision by Ofcom following the 195 process has to be put out to consultation. You were inferring from that something about whether it is appropriate for the Competition Commission to be asked to arrive at a specific figure or not.

MR. SHARPE: In answer to your answer, madam, that it would bind the tribunal, if it binds the tribunal then it binds Ofcom. If it binds Ofcom, what is there to put out to consultation and take into account the utmost concern, it is just a sham. We cannot countenance that. It is a simple point, with respect.

Whatever we are ordered to do, it cannot be establishing a binding and unique number. What we can do and what we undertake to do in the clearest possible terms, and what I submit would should be required to do, is to provide you with clear and comprehensive answers to the questions put to us and, as far we can, to ensure that the determinations of the appeals provide as much finality as we can under the circumstances.

Whatever we do, Ofcom will not be relieved of a responsibility to engage the Commission's findings and to give it its final expression. That is the statutory scheme and we are supported in that by the role of the Commission and the other Member States in accordance with the Framework Directive.

PROFESSOR BAIN: Mr. Sharpe, you seem to be saying, if I can just take a concrete example, that if, for example, Ofcom felt that the network externality charge should be reduced from 0.3 to 0.2, it would not be able to say so. It would only be able to say it could be reduced, but without being able to give a precise figure, because if it gave a precise figure it would be binding on us and that would be binding on Ofcom, and that would not be possible. Is that what you are saying?

MR. SHARPE: No, it is not. We will be able to offer a view in the course of our determination on some things, and it could easily be the example you have chosen – in other words, we will not rest upon a statement that simply states it is too high, or even too low, and we will come forward with numbers. I want to enter a caveat here which actually I think is the watermark, if I may put it that way, of my submissions. From our standpoint, we cannot

say with any precision precisely what we can do. That is not to say that the Commission has not worked hard in the interim when this has become a live issue, but it is a long way from reaching any conclusions about any matter, the parties will be relieved to hear.

That being the case, I cannot come before this tribunal and say, "We are going to provide exact and precise numbers on each and every question", what I can say is what I have just said, that we will do our best to provide as clear and as comprehensive answers up to and including, as I put it earlier, the existence of error, if there be such, its magnitude and the consequences of it.

I hope that answers your point, Professor.

PROFESSOR BAIN: Can you provide a precise methodology for dealing with each of the components so that is not left afterwards for Ofcom to take some broad balance decision? You can come to precise methodology and then somebody else can get hold of the data and work out the numbers. If you cannot do that then I think one is leaving a substantial area of discretion to Ofcom which will inevitably extend the process by months or conceivably years.

MR. SHARPE: Professor, if I may, I would not have wished to give any indication that we would not do other than, one, as I said, identify the error, ascribe some magnitude to it, and I think as part and parcel of that exercise we will have to create some sort of methodology by which it can be appropriately reasoned. So we will have to explain how we arrived at those conclusions in a form which we hope – please forgive me, it can only be a speculation at the moment – and this is certainly the aspiration of those behind me, to arrive at a methodology which will then enable Ofcom to, as it were, plug everything in and arrive at answers relatively quickly. Whether we can achieve that will be a matter for experience to determine, but that is the aspiration. Respectfully, I do not think the tribunal can insist on anything more at this stage. We are just simply at the threshold, or not even at the threshold, of the reference – I do not quite know what your timetable is – or indeed what is to be referred. I cannot answer questions firmly, I can just give you in good faith what is the statement of our aspiration. If your question focuses on the methodology which will enable Ofcom to determine the issue, the answer is that is our intention.

PROFESSOR BAIN: There would be no objection to us building into the questions to the CC that that aspiration existed in as precise terms as we could?

MR. SHARPE: If, sir, you are saying that the Commission must provide reasons for its view then there can be no possible objection to that. That is really saying what our intention is.

PROFESSOR BAIN: I think I am really saying that if it is practicable the Commission should give a defined concrete methodology which Ofcom can follow with the minimum of discretion.

MR. SHARPE: I think there would be enormous sympathy for that from those behind me, but lest I am misjudging the position allow me to confer, because I think the form of words is acceptable. (After a pause) As I expected, what Professor Bain is proposing is absolutely right. In order to determine that something is wrong, that Ofcom have erred, we will pretty early on have to come to a view as to what would be right, and if you are saying that then we are at one.

Where we may differ, and I hesitate to push this further, is to try and insist upon a degree of precision at this stage that we cannot promise that we can meet. We do not want to be put into a position in a form of words where we are required to promise more than we can deliver.

I have said fairly solemnly and carefully what it is we aspire to and respectfully we think that should be sufficient for all the parties' purposes, even BT's. It is in our interests in this first reference of this nature to conclude in a manner which is as helpful as possible to Ofcom and that is our intention.

THE CHAIRMAN: Thank you, Mr. Sharpe.

MR. SHARPE: There is so much more I was going to say, but you will be relieved to hear that it has been said so much better by the other parties before me. I do have an observation and I will be very brief, and that is in relation to question C, the question of can we go up or down. It is a very general one. As a public body charged with examining the questions, we think it is a very unattractive way forward to say that if in the course of our analysis of the issues, the fact gathering analysis and testing, we come to a provisional conclusion that actually the rates should be up, we do not want to be put into a position where we are obliged essentially to ignore that and not give effect to it. We do not think that is what Parliament could have intended. We think that if we come to a view that the rates should be different from what they are but upwards rather than down we want to have the freedom to be able to report that to you and assist you in that way. It is a very simple point, and I have abbreviated by planned submissions, but that is essentially to supplement the submissions that have already been made so well.

THE CHAIRMAN: Thank you, Mr. Sharpe.

MR. SHARPE: Thank you, madam.

THE CHAIRMAN: We do have, on the timetable, which we sit behind a little bit but I am hoping we can catch up on on the next few questions, but, Mr. Anderson, is there anything that you wish to say in reply briefly?

MR. ANDERSON: I did have a little bit to reply to. I will do it as quickly as I can. It is an interesting feature of this aspect of the case that the first four speakers representing interests as diverse as BT, H3G, Ofcom and T-Mobile, all associated themselves with Ofcom's draft of question 7, a rather balanced draft, if I may say so, which requires the Commission to indicate a specific price only when that is practicable, and to do so whenever it is practicable, and to provide clear and precise guidance when it is not. The only difference between us was the reference to consultation. That is simply a better worded version of what BT propose both in its notice of appeal, as Mr. Turner pointed out, and in its letter of 2nd January and in its written submissions of last week. Consistency may well be an overrated virtue but, despite what has been said, it has been displayed on this occasion by BT.

T-Mobile also accepted at the start that the Commission can arrive at a particular number, as he put it, albeit that he said it would be indicative rather than binding. That submission has to be measured against 193(6), which requires the tribunal to decide a price control matter in accordance with the determination of the Commission; and 195(4) which envisages that Ofcom will give effect to the decision. Some of Mr. Sharpe's later submissions perhaps have to be viewed in the light of that as well.

Finally, of course, 195(6) requiring Ofcom to comply with every direction given up to 195(4). So any number that the Commission comes up with is certainly capable of being made binding and we can imagine no good reason why it should not be.

Turning to consultation, the practical point is whether any reference to it needs to be included in Ofcom's question 7. We submitted, you will remember, with H3G that the three words in brackets could safely be omitted from the question without prejudicing anyone's position.

The only argument I think we heard against that was from Mr. Roth. He appeared to have some sympathy for the view that they could be omitted, but he thought the words were necessary – if I read him right – in order to supplement the statutory provisions, 193(6) and 195(4) to which I have just referred, must decide that matter in accordance with the determination of the Commission and directions to the Tribunal for giving effect to the decision. Those provisions, he said, make no mention of consultation; it would be very

unfortunate if the feeling were given by a question from this Tribunal to the Commission that no consultation was to take place.

We disagree. If the statute is deficient in some way then with the best will in the world the deficiency cannot be made good by a question posed by this Tribunal to the Competition Commission. What one does get from those subsections, which indeed make no reference to consultation, is support for our way of reading the Directives, as not imposing an obligation to re-consult after the determination of any appeal.

THE CHAIRMAN: Do you say that the domestic legislation does not either, so are you saying that s.48 would not require you to go through that process if you were carrying out the modification of the decision pursuant to an order of this Tribunal.

MR. ANDERSON: We would apply exactly the same answer to that as I gave you madam in relation to the point raised on the Access Directive – was it Article 8 of the Access Directive – the provision on amendments and withdrawals, and so on. If you actually look at the part of the Directive (Article 4, Framework Directive) or the part of the Act, 195, 193, it is concerned with appeals, it is noticeable that neither of them contains any reference to consultations. We rely on the Act indirectly as support for our reading of the Directive, indeed, it is quite striking for the reasons Mr. Roth gave really, reading 193 and 195, that there is no reference to consultation there. But if, as he says, the Act is defective or inadequate in some ways, then it is certainly not something that is capable of being remedied by the wording of a question. So really the only reason advanced for including the three words in brackets we say is not a good one.

MR. SCOTT: Is what you are saying that Article 6 of the Framework Directive has already been exhausted.

MR. ANDERSON: Exactly, and that the policy argument effectively has been had, the Commission has given its views on the policy, there is now a question of law, which is before this Tribunal. The correct solution, as both we and H3G suggested in opening, is that there may be cases in which a consultation is required as a matter of English public law, and that will also take care of the Tele 2 case that the Tribunal put to I think Mr. Roth – or perhaps Miss Rose – with its insistence that the equivalence be respected, in other words, the need to treat those with rights under the Directive no less favourably than those with rights under domestic law. If one applies normal principles of domestic law then that principle is respected and that is what we propose.

Mr. Flynn referred to Rule 3(1)(c) and submitted that this represented the question rather than the answer. This was the provision which we relied on in opening about price control

matters, including at what level the price control should be set. He said that is the question but it does not say anything about the answer.

We have admitted the possibility consistently that there may be cases to which the Competition Commission is unable to decide at what level the price control should be set. If the Competition Commission does so decide 193(6) says that the Tribunal must decide in accordance with that and then it is for Ofcom to give effect to that decision subject to any directions to be made by the Tribunal. So yes, the question does not guarantee that there will be an answer, but if there is an answer, again it can be translated into a binding decision, and the idea t hat Ofcom is entitled, or even obliged to reopen other elements of its initial decision is one that we resist for the same reasons as Mr. Roth gave.

I go on to question C. Mr. Turner's first point here was that the wording of s.195(2), which requires the Tribunal to decide the appeal by reference to the grounds of appeal set out in the notice of appeal was identical to the wording of Schedule 8 to the Competition Act, para.3(1), as indeed it is. He showed you the *JJB* case in which it was held that there was power under that schedule to put fines up as well as down. This identity of wording, said Mr. Roth, was the factor, I think, or the main factor which caused Ofcom to change its mind and submit this morning that the movement could be upwards as well as downwards. The flaw in that argument is apparent from paras. 214 to 215 of the judgment in JJB as I hope appeared from that passage when Mr. Turner took you to it. The Tribunal was basing its conclusion not on para.3(1) of the schedule, but on para.3(2) which provided in terms that there should be a power to impose a penalty and to vary the amount – formulations which are conspicuous by their absence from the relevant provisions of the 2003 Act. Paragraph 3.1 was relied upon only in an unsuccessful attempt to limit the principle that was aid to emerge from the wide scope of para.3(2). So we invite you to conclude that that case and that analogy does not assist. We invite Mr. Roth, if that argument really was instrumental in him changing his mind to think about perhaps changing it back again. *Allsports*, a completely different case from this one. Of course we accept that matters ----

THE CHAIRMAN: I do not think we took the view that *Allsports* helped Mr. Turner particularly.

MR. ANDERSON: Well I will say no more about that. The difficulty in drawing a line, as to that we would say it is now we who have difficulty in drawing a convincing line, but those on the other side from us. Mr. Turner, in suggesting that a dynamic approach should be taken rather gave the game away when he indicated – I thought he indicated – that concepts as broad as efficiency, or even I think he said the "public interest" were put in issue by

appellants it could be open to interveners to come back with their own submissions on what those very laudable concepts required. In that respect it is not good enough, in our submission, to leave the thin line to the good sense of the Commission, not of course that the Competition Commission does not have good sense, it is simply that s.193 envisages the Commission taking its direction from you even on matters of procedure, and most certainly on matters of substantive law.

Mr. Turner said he did not have hooves and horns, and I am sure that none of the interveners would do anything other than act quite properly in the interests of their clients. But if you want to test his submission against T-Mobile's own statement of intervention, to see the sort of argument he has in mind I can perhaps take you just to one page of that, it is in bundle A ----

THE CHAIRMAN: I think we did stop somebody else from taking us to that, so I do not think it would be fair ----

MR. ANDERSON: Am I allowed to give you the reference.

THE CHAIRMAN: I think that everybody who has made submissions have promised faithfully that if we did go down that route they would not use it as a way of opening up the debate before the Competition Commission and it is up to us to weigh how we wish to respond to that and how we choose to draft the question in consequence, but I think we have probably heard enough ----

MR. ANDERSON: Yes, well it would have made the Tribunal's flesh creep in any event, so I will spare you that reference. (Laughter) Public policy is relied upon – well, there is no such thing as a general public policy in this area. There is a public policy that criminals should go to prison for an appropriate length of time. That does not mean that the Court of Appeal has the power to increase their sentences, even though there is a separate procedure, the Attorney General's Reference, by which that aim could be achieved.

Proliferation of appeals, well if there is some marginal extra tendency appeal associated with our submission that is, in our submission, a lesser even than the dynamic approach urged by Mr. Turner in which one never quite knows what the scope of the appeal is. What is so wrong with saying: "If you do not like the price that was set, appeal it"? The right to achieve the result that you could have achieved by appealing, by the expedient of intervening in someone else's appeal is not one that is recognised in any of the legal systems to which you have been referred. Rather , the rule for interveners is generally that they must take the case as they find it.

My alternative – Miss Bacon generously said that I generously indicated that I was happy with Vodafone's formulation. If I did say that I was being too generous, it was an alternative submission. What we liked about Vodafone's formulation is that it sounded very similar to our primary submission. Having heard Miss McKnight and her rather broad interpretation of consequential in the formulation we became rather less fond of it. *Coca-Cola* Miss McKnight also referred to. We say that is not a useful analogy at all. What *Coca-Cola* is in Euro law is the equivalent of a judgment on the interpretation of s.192(2) of the 2003 Act, that is a section that says that a person affected by a decision to which this section applies may appeal against it to the Tribunal, and it held that when it had been decided that somebody was dominant they were affected, and they could appeal, notwithstanding the fact that the merger had been let through.

THE CHAIRMAN: The point she was making was that in arguing a case you may make five points, and you may lose on three and win on two, and if overall that means that you have won then you cannot appeal against the fact that they found against you on the other points. But that if somebody else then appeals and says: The ones you won on are actually wrong, you can then appeal the ones that you lost on, even though the loss on those issues did not affect the final result to you adversely. That is the point that she was making, that hey were happy with the result – or not unhappy with the result – and therefore however egregious had been Ofcom's errors in coming to that result it is not open to them to appeal against that because if they had come to us saying: "Tribunal, we are very happy actually with the price control, but we were very sorry that the building block that they used was **this** and it should have been **that**", we would have said "If you are not dissatisfied with the result then there is no ground, there is no appeal.

MR. ANDERSON: It is one of the factors that discourages the proliferation of appeals that people do not always appeal when they are unhappy with some aspect of a judgment with which broadly they can live. In determining not to appeal they must contemplate that it is possible that other people will appeal, and certainly in the absence of any clear decision of the point that is currently before this Tribunal Vodafone could have had no assurance that others might not appeal in an attempt to get the price down, and that they would not be in position to seek to have it raised. That was the commercial judgment that they took, we say perfectly reasonably, and the fact that they did not appeal in a sense, and that others did not appeal rather goes against the idea that everyone is going to start appeals the whole time. In a sense if that proliferation, if that floodgates' argument were a good one, then why did it not apply in this case.

The powers of the Competition Commission, I think I do not need to go into in any detail, but can I simply refer for the record to our written submission at tab 46, paras.39 to 40 where we set out our position on that, and to the Rules of Procedure at bundle B, tab 9, pages 9 and 14 where those points are made good. We refer in particular to Rule 17.1 of the Competition Commission and Rule 9.1 of the Competition Commission. In our submission they have ample powers.

Mr. Sharpe said that the Commission did not have the power to compel witnesses or require the production of documents, but he himself pointed to the remedy, despite the situation it is open to the Commission to come to the CAT and to get a direction which would then be enforceable, so no practical difficulty with that in our submission.

In relation to Mr. Sharpe's submission, he said that the Commission would probably come to a view as to how any error could be corrected. We welcomed that as we welcome the statement that the Commission may come up with a figure. What concerns us is to know why it is that the commission is rejecting Ofcom's thoroughly reasonable version of this Question 7 - after all, Ofcom are only suggesting that they be required to come up with a figure in circumstances where it would be practicable to do so. So, are the Commission saying that there may be circumstances in which it is perfectly practicable for them to come up with a figure, but they determine not to do so, in which case that seems curious.

It seems that what they do not object to is the fall-back position in Ofcom's draft question, which is that if it is not practicable to produce a figure, they produce clear and precise guidance. Indeed, we were delighted to hear Mr. Sharpe go one better than that. He accepted, I believe, that the Commission would give clear and comprehensive guidance - at least he accepted that at one point. In those circumstances, albeit we appreciate the apprehension on the part of the Commission - it is, after all, a new procedure, - in our submission Ofcom's question is perfectly flexible enough to produce a sensible result.

As a final fall-back, as we mention in our written submission, if even that moderate question proves impossible for the Commission to comply with, well, it can always come back and have its terms of reference amended.

I think, unless I can help you any further, those are my submissions.

THE CHAIRMAN: Miss Rose and Mr. Roth, you are down on the timetable has having time set aside. Given the hour, please do limit yourself to things which are absolutely essential.

Miss Rose?

MISS ROSE: Madam, on Question B, again, we adopt the submissions of Mr. Anderson. We do respectfully point out that it is striking that both the appellants and the respondent are

agreed about the form of Question 7, subject only to the matter of the parenthesis, which does not appear to be of great significance. We respectfully agree with Mr. Anderson that it is difficult to see in substance what the Competition Commission's objection is. We would submit that that is the right approach.

Before I leave Question B, the issue about Rule 3, which has been raised particularly by O2 and Orange -- It is right that what Rule 3 does is to identify what are specified price control matters. In other words, what are the matters which must be referred to the Competition Commission. It does not dictate the answer. But, it would, with respect, be incomprehensible to have a statutory scheme which defines the questions which must be referred to the Competition Commission, but which does not envisage that the Competition Commission would have the power to answer those questions. In my submission, that would be futile, and the submissions of O2 and Orange do, with respect, appear to render this whole business of referring price control matters to the Competition Commission completely otiose.

Turning then to Question C -- Ofcom, after their Damascene conversion, gave an example of what they said was the sort of issue that T-Mobile could legitimately raise. It related to the externality charge. In fact, madam, in my submission, that is a classic example of something that is not open to T-Mobile to raise. If I can just ask the Tribunal very quickly to turn it up at Tab 27 in Bundle A. You will recall, madam, that the point made by Ofcom was that BT had put in issue the question of whether Ofcom's approach to the externality charge was correct, and they said, "Oh, well, in that situation T-Mobile is entitled to raise it". But, if you go to para. 29 and see what is said here, it is said,

> "As to BT's challenge to the level of the externality charge, T-Mobile contends, that, in fact, the amount that has been allowed by Ofcom is too low ----"

It then sets out three arguments in support of that proposition. Now, that proposition, of course, does not appear anywhere in BT's notice of appeal. Neither do the arguments advanced by T-Mobile in support of it. These are wholly new issues. It is true that they fall under the head of 'Externality Charge', but they are not issues in the appeal, and neither are they arguments in the appeal. We submit that this is a good example of precisely why it is illegitimate for such matters to be raised.

Vodafone distinguish between two different situations. First of all, Miss McKnight referred to what you might refer to as 'the respondent's notice situation', where Vodafone agree with the result, but wish to argue that there were different errors in reaching it. Now, we do not have an objection to that in principle, but the second part of Vodafone's suggestion

was, "Well, if the implication of the errors is that the price should actually be higher, we should be able to argue that". That is the point at which it is no longer a respondent's notice - it is a cross-appeal. No cross-appeal was lodged. So, that is the vice.

The other thing that Vodafone sought to rely on was the CARS costs, where Miss McKnight said, "Well, if H3G are successful in arguing that the CARS costs ought to have been taken into account, it would be inequitable and discriminatory for the same reasoning not to apply to the other MNOs". With respect, that is not a matter for the Competition Commission. It might be a matter for Ofcom, because if the position was that the price had to be raised in relation to H3G because of the CARS costs, then that is something that the other MNOs could take up with Ofcom and say, "We want a similar methodology applied to us". But, that is not a matter for this appeal, and it is not a matter for the Competition Commission.

You will be very happy, madam, to hear that those are the points we wish to make.

THE CHAIRMAN: Thank you. Mr. Roth?

MR. ROTH: Madam, just five minutes, if even that, on just two points - one that was raised by Miss McKnight and to which Miss Dinah rose has just referred - namely, this question of the read-across, and you asked, "At what point does the read-across take place?" We absolutely agree with what Miss Dinah Rose has just said. The question for the Commission to answer is, to take the example of the CARS cost raised by H3G, to answer H3G's question in its notice of appeal- namely, whether for H3G the CARS costs should have been factored in. If the Commission says, "Yes", and you direct us that the answer is, "Yes", what then happens is that we say s.47 does apply - that is, we have to make the modification to the charge control, and under s.47 we have to make any modification in a manner that is not discriminatory. As it is expressly set out, we are precluded from making any modification in a manner that does discriminate. So, we would then have to make a consequential modification, if that were the case, to the others. But, it is not a matter for the Tribunal because it does not arise in the appeal.

The second point was just picking up something that Mr. Sharpe said, again in answer to your question, madam, when you said, "Well, if Ofcom is left a lot of discretion by the Commission and has to do a lot of re-evaluation, then it would need much more than one month's consultation". I think his answer was that he was addressing the framework, and what Ofcom does beyond that is a matter for Ofcom. With respect, that is not right. Under the framework what we have to do under Article 6 is to consult and allow domestically a reasonable period for comment. That is the expression used. What is a

reasonable period depends on the extent of the discretion Ofcom exercises. If it is very minor, then the reasonable period may be very short. But, if it becomes much more extensive in terms of discretionary exercise of judgment, involving a lot of new matters, then the reasonable period becomes longer. All that is said in the framework is that the period in which we separately notify the draft measure to the Commission and other regulatory authorities must be of the same length as the period for domestic consultation, and, in any event, no less than one month. In other words, if it is one month domestically, it can be one month to the Commission. But, if it is two months domestically, then two months for the Commission.

THE CHAIRMAN: You are talking, in the situation we were discussing with Mr. Sharpe, not only about your consultation with the Commission, which can only occur after it has been decided what the result is going to be, but also the period in which Ofcom decides what the repercussions of the order that the Tribunal makes is. So, one is dealing then with a two-stage process, unless the Competition Commission (and therefore the Tribunal) comes up with actual figures.

MR. ROTH: What we do is we consult with the Commission at the same time as we consult domestically. Then, when we finally have taken a conclusion, we notify the Commission.

THE CHAIRMAN: Thank you.

MR. ROTH: Thank you very much.

THE CHAIRMAN: Now we move, rather late in the day, to Question A where it may be, now that there is not a huge amount of distance between the parties ---- Miss Rose, am I right in thinking that your position is that there should be, in order for the questions to reflect your pleaded case, a question asking whether the rates for 2G and 3G should have been separated out so as not to create, in your submission, this disincentive to migrate the traffic, and that that should be the same for fixed to mobile and mobile to mobile? You clarified, I think earlier, that you would appreciate then that it may be that once they are split out, that the 3G rate is higher than the blended rate ----

MISS ROSE: Yes.

THE CHAIRMAN: -- and that in your opposition to the point that we have just been discussing - that the rates should not be allowed to be set higher - one would carve out from that the caveat that in the event that you succeed on that, then of course the 3G rate is higher than the blended rate.

MISS ROSE: Yes, that is right.

THE CHAIRMAN: But the 2G rate would only be lower.

MISS ROSE: That is correct, madam. It is ss.11 and 12 of the notice of appeal where, in fact, we deal separately with the rate being too high and with the blended rate point.

THE CHAIRMAN: Now, is there any person who wants to submit that it is not appropriate to split out a separate question, whether separate potentially different rates for termination on 2G and termination on 3G should be asked of the Competition Commission? (After a pause): That should include both fixed to mobile and mobile to mobile. (After a pause): Okay. Good. So, I think that we will do that then.

That then takes us to Questions E and F. As far as Question E is concerned, the Competition Commission has said that regardless of the order in which we pose the questions, they will answer them in the way that appears to them to be most logical. We can see some force in that. Perhaps, Miss Rose, if you could just tell us what H3G's current view in relation to this is?

MISS ROSE: Yes. Madam, we are content with the position that the Competition Commission has indicated on that. The only point we do want to stress, having regard to para. 31 of the Tribunal's letter is that it is not correct that we are only putting forward the NPZ remedy on the basis that it is a remedy to correct our position in the market. It is our position that NPZ is the best solution. That is our primary case - not simply because of our disadvantages in the market.

THE CHAIRMAN: That may be a misunderstanding as to the use of the word 'remedy', I think, in that respect. But, are you content to leave it to us to determine what order the questions should be raised broadly?

MISS ROSE: Yes.

THE CHAIRMAN: Does anybody else want to say anything about Question E? (After a pause): Question F. This was the suggestion from Vodafone that the NPZ issue should be limited to the rates charged as between the 2G/3G MNO, on the one hand, and H3G, on the other hand, rather than as between all of them. H3G has clarified that they intended that the remedy in the loose sense should be more generally applicable than that, and that it is important for their case that the Commission be able to consider the position more broadly than just the charges as between the MNO and H3G. In the light of that, since it is a matter of their pleading, as I indicated at the beginning of the hearing today, our provisional view is that the question should remain as it is, i.e. not limited to the charges to H3G. Is there anybody who wishes to be heard on that? Miss McKnight?

MISS McKNIGHT: We are content with that. We raised the point simply because we wanted to ensure that the question reflected H3G's pleading. If they have now clarified that they prefer it that way we have no problem.

THE CHAIRMAN: Miss Rose, do you wish to say anything on that?

MR. ROTH: No, madam, that is our position.

THE CHAIRMAN: Excellent. We have now caught up and, in fact, have ten minutes in hand. Sorry, Mr. Turner?

MR. TURNER: Madam Chairman, I do not want to rain on your parade, but I have only one point to make lest it should be lost, which was Miss Rose came back on an aspect of our pleading that I have had nothing to say about which was the responsive nature of otherwise part of the statement of intervention on the network externality surcharge. For the record, what she said is completely wrong about the lack of responsiveness of that. If the tribunal wants, I can take you to it, but I did not want to leave the matter as though we had not said anything on that point.

THE CHAIRMAN: Perhaps you had better take us to it.

MR. TURNER: I will take you to it very briefly and this is only on a rapid look. If you go to tab 27, which is the statement of intervention, para.29, p.15, what it says is:

> "AS to BT's challenge to the *level* of the externality charge, **T-Mobile contends, that, in fact, the amount that has been allowed by Ofcom is *too low* …**"

The point, as I understand it, that is sought to be made is, if they wanted to come along and say Ofcom's allowance was too low then they should have appealed on that point. These points that are made are completely new, words that were used. In fact, if you go to BT's notice of appeal, para.175, pp.56 and 57, it is quite a good example of the point that was canvassed with Professor Bain, but not one I came prepared to deal with. The allegation being made by BT is that Ofcom erred by making some implausible assumptions. If you look at 175.1 they say that Ofcom got it wrong because you need this sort of subsidy. The MNOs would be likely to target the customers in question even in the absence of a subsidy because it is in their commercial interests to do so. So BT is saying, "We say you do not need this, they would target these customers anyway, so no need to have this extra allowance".

If you look at what we are saying, we do push back on that 29.1, that actually Ofcom assumes an implausibly high degree of price discrimination and the targeting by MNOs which they are unable, in practice, to achieve.

If you stand back and think about it for a moment, the issue which has been raised in the notice of appeal is that the level of targeting which has been assumed by Ofcom for the purpose of its original decision was implausible. Now that is the issue which is going to be looked at by the Competition Commission. On that parties come in and they give their evidence on the targeting. So we are giving our evidence, and our evidence is going to be, in fact, that, if anything, it goes the other way. It is a good example of a case where the issue has been opened, introduced by the appeal, and where it is natural for the parties in the appeal process to say, "Here is our evidence on that issue". In other words, instead of this being completely new it ----

THE CHAIRMAN: Yes, it is not completely new, but there is still the question as to whether it ought to be put forward only on the basis that it operates against the Commission saying that the externality charge should be lower or whether you can go on to say, "and moreover, on a proper analysis, it means the externality charge should be higher".

MR. TURNER: I understand that, but our point on that is really a practical one, that at the end of the day the Commission is going to have to reach a view on the merits and it is going to want to get to the bottom of the issue. That means that parties such as my clients or otherwise, where the issue is there before the Commission, are going to say what their position is rather than come up against a wall and stop there. It is a matter of introducing the evidence and then responding to it on the part of the interveners.

I actually came prepared to develop it much more cleanly in relation to a number of other points, but as it has been raised and it was said that here are a series of new matters I thought I would show the tribunal what this was about.

THE CHAIRMAN: Yes, thank you. Moving to the timetable for directions, Mr. Sharpe, you are down as kicking off on that point. What directions would you be seeking for the tribunal to make at the same time as it refers these questions to you?

MR. SHARPE: Madam, I think going first was actually not my preferred alternative, and since we received last night BT's proposed timetable for matters up to and preceding the reference, it seems to me that it might be more appropriate, with respect, to deal with the timetable in relation to the evidence which apparently is still needed to be furnished before I come along and deal with the reference itself, if that assists you, which I think it might.

May I also just flag this: how long the Commission will need will depend on what it is expected to do.

THE CHAIRMAN: And also what it is expected to do depends on some early decision that it takes as to whether the methodology used is correct, because if it decides the methodology

used is correct and that box gets a tick then it moves on to the next thing. If it decides it was no correct then it is going to have to spend time working out what they methodology should have been and, if possible, what the outcome of that is. At the moment we see the virtue – perhaps I should put it this way – whilst not trying to prejudge or foresee how much work is going to be involved in response to these grounds of appeal there seems some merit in setting a short time which can then be extended on the basis that one knows that if one sets a long time then it takes at least that time, whatever the scale of the work that has to be undertaken. I do not mean any criticism of that.

MR. SHARPE: With respect, in our submission, that is wrong. The Commission is used to dealing with reference type activities. It has a *corpus* of experience it can draw upon. It knows how long things are going to take. When I said earlier that it depends what we are asked to do, I was referring specifically to your determination on question B. Any formulation requires, as long as it is practicable, that we have got to come forward with a number. The question was put rhetorically, "If it is not practical, does it mean the Commission may not wish to give an answer?" The answer to that is actually yes. May I give an example. If in the course of our deliberations we have no knowledge of where we are going to go – and I hope everyone understands that – just take an example at random, in relation to externalities we come to the conclusion that Ofcom made an error and we require further survey data to test the propositions there. Embarking upon a survey is something the Commission does and it knows pretty well how long it takes. It takes weeks to establish whether or not a survey is needed. It will take time to formulate the precise questions, probably in conjunction with the parties, and that would be normal. It is a big matter and it would have to be put out to procurement, so there is an issue there. Then the chosen independent company we have to establish what it can do and how quickly it could do it. Then it has got to be done and then it has got to come back and it has got to be assessed. To be worthwhile it cannot be rushed. We are talking two, three, four months, or something like that.

An alternative scenario would be that we have detected an error in Ofcom's methodology, we think it can be corrected in the following way, and it is for Ofcom. We can report quickly, and it is for Ofcom to conduct the survey but this time to do it properly.

Those are open questions. I do not think any of us can resolve them today, or should even attempt to do so. How long we need will depend upon answers to those questions. If we establish a very tight timetable which everybody here knows is unrealistic, we are going to come back to you. The Commission does not need prodding, it is used to working to

internally established timetables, and working very well. What we need, with respect, is a realistic assessment of how long we need in the light of your answer to question B and in the light of experience.

We have come up with a number of which was predicated on your original formulation. We will answer questions dealing with the building blocks and we will, as I described earlier, come forward with as comprehensive an answer to assist you and Ofcom as we can, and we think that is going to take about six months. In doing that we can set out an inquiry timetable, we can lay down the milestones for meetings and when documents should be made, and those behind me can prepare the team. Roughly 20 people are going to be engaged in this.

I would counsel very strongly against setting an artificial and unrealistic time horizon when trying to co-ordinate that team. This is quite apart from the parties themselves. This is a large inquiry, it a multi-party inquiry, everybody is going to play an active role. We have actually decided, first of all, what we are going to do in relation to question B, and then established how long we need in the light of that answer and in the light of what is realistic. I am sorry to attempt to be prescriptive on that.

THE CHAIRMAN: If we answered question B against you or if we decided to adopt Mr. Roth's formulation in the Ofcom document, are you saying that we should start off with giving you more than six months?

MR. SHARPE: Yes, emphatically. There is a suggestion that somehow or other being told to do something in so far as it is practicable is a sort of easy standard. It is really quite a high standard. All the parties are going to be breathing down the Commission's neck saying, "It is practical, go away and do it". That prejudges issues about who should do things. If things are properly done and remitted back, having answered the building block question to Ofcom, then Ofcom should do it, but it seems to be saying that whatever Ofcom could do and do well must actually be done by the Commission in seeking to determine what is practicable, namely a number. All we want at this stage is the flexibility to run our own inquiry subject to all reasonable timetables with the discipline that the Commission has generated over the years and be able to plan it properly in accordance with proper and realistic timetables. If you say, contrary to BT and Ofcom's views but actually something less than what is practicable, we were allowed to exercise our own judgment as to what we can do as opposed to what Ofcom should do, subject to our guidance, then obviously it would be quicker, but we have not got a clue at the moment as to how that balance is likely to be struck.

THE CHAIRMAN: Apart from the length of the inquiry, Mr. Sharpe, are there any other matters that need to be canvassed?

MR. SHARPE: Briefly. I think Miss Lee's email, which you have seen, rests upon – has the tribunal seen Miss Lee's email?

MR. SCOTT: Just to make sure we are all looking at the same one. This is the one which has paras. 1, 2, 3, 4, starting "10 days, 10 days, 11 days, 14 days".

MR. SHARPE: Dated 24th February, which I think was yesterday at, I think, 10.36 pm.

THE CHAIRMAN: Do these days run from today, or do they run from the date of the Reference.

MR. SHARPE: That is a point that I was going to address you on, but Mr. Anderson, I think, is keen to tell you what it did mean.

THE CHAIRMAN: Yes, Mr. Anderson?

MR. ANDERSON: I can address it very briefly if you like, madam. We envisaged, why not get o with it and make these deadlines run from today. In fact, we have even put the dates by which I think all these things should be done, so the first one will be done by Thursday, 6th March, the next by Monday 17th March, and so on.

THE CHAIRMAN: So the content of these things does not necessarily depend on the outcome of any of the decisions that we are taking today?

MR. ANDERSON: No, no, I do not think it does.

THE CHAIRMAN: Is that the general view of the parties.

MR. TURNER: One point that arose from this which, because of the hour I have not had time to canvas with people generally, is we did not understand in the first step what it is proposed that BT is going to be introducing. We thought that was over, but they are apparently proposing to put some new material in and then we, without knowing what that is are signing up to a timetable based on that.

THE CHAIRMAN: Well I did not understand this as entirely precluding any later material in response to what is put in, generally it is open to parties, though Mr. Sharpe may correct me. Is the idea that once this evidence has been provided that that is then it as far as submissions from the parties to the Commission process is concerned.

MR. ANDERSON: Well the Commission retains the power to ask us questions, to invite submissions. Can I just respond directly to what Mr. Turner said. We had in mind the Commission's letter of 10th January which is at tab 40. On the second page of that letter the Commission said:

> "Fourthly, and as foreshadowed in our earlier correspondence, we expect the parties to supplement their outline notices of appeal concerning price control

matters with such further material as would have been included in a full notice of appeal, together with any further evidence in support."

I am not sure we would accept the description of our notice of appeal as simply an outline notice of appeal, we hope it was succinct, but we hope it was little more than an outline notice of appeal. Nonetheless to the extent that there are discrete matters of evidence, in some cases actually flagged in the notice of appeal – I think there was something about the cost of handsets which promised to be the subject of evidence, and one can hold all that back to reply. It seemed to us sensible to put the cards on the table to the greatest extent possible and to that very short deadline produce any further material – obviously strictly confined to the scope of the grounds of appeal and any further evidence in support so that the interveners know exactly what they are shooting at.

MR. SCOTT: In the Competition Commission submissions for today at para.17, they say:

"Given the materials we have now received the Competition Commission anticipates that pleadings of the appellants and of the defendant are substantially complete".

MR. ANDERSON: Yes, we were very troubled by that, sir, particularly in relation to the fact that there did not seem to be any acknowledgement of the entitlement to reply and we did hope that as appellants at the very least we would have some guaranteed opportunity, rather than simply hoping that the Commission would ask us, to reply to what was said against us both by Ofcom and the interveners, so that was of some concern. We do accept there is a difference in approach between the two letters of the Competition Commission and we put this forward by way of precaution than anything else.

THE CHAIRMAN: Is this the position that if we set a timetable for this exchange of "pleadings" that thereafter it is the Commission that takes the initiative. If it comes across something in somebody's submission which it does not think has been adequately explored in somebody else's submission and could be then they can ask them, but the ability of the parties to proffer more information regardless of whether the Commission wants it or not is thereafter limited.

MR. ANDERSON: That is precisely right. I hope I can reassure Mr. Sharpe to some extent. It certainly was not our suggestion that the Tribunal seek to micro-manage the whole process of the reference. As the Commission itself has said, making sure the pleadings are complete, and the evidence accompanying them, it did make sense just to get us going, particularly in view of the fact we can sensibly get going before the reference has strictly been made. The only rider to that, and it is an important point – I forget whether Miss Lee

made it in her email, I suspect she did – experience would suggest that the very earliest opportunity at which it might be possible for the Commission to indicate the date or dates on which it proposes to have an oral hearing would really be terribly useful, people's diaries are inevitably filling up and really the sooner we know about that the better even if, to some extent, it is taking a stab in the dark as to what the appropriate date would be.

MR. SHARPE: I am much obliged to Mr. Anderson for giving the Commission's view on this.

THE CHAIRMAN: Yes, Mr. Sharpe?

MR. SHARPE: I do not want to rake over past correspondence because I think it is fair to say that everybody has moved substantially on from even the last set of letters. It is true that we envisaged that the pleadings so-called, save for the fuller statements of intervention are all but complete, now it appears we were wrong on that but it is not something over which we have any control. You, madam, of course do have some control over how long it is going to take for these parties to get their pleadings in order.

From the Commission's standpoint, it can hardly be said it is a matter of indifference as to when the Reference should start, because it is a case of everyone being all dressed up and ready to go pretty well, so the quicker the better. But what we do not want is a situation where the Reference is made on anything other than a less than complete statement of the parties' final views.

The way you expressed it earlier is exactly how the Commission anticipates proceeding. It might be helpful if I were to describe in broad terms our provisional view as to how the Reference might proceed. Would that assist?

THE CHAIRMAN: Well at the moment I am just looking at the beginning of the reference, and it seems to be accepted that there can be these steps taken as outlined in the BT email ----

MR. SHARPE: Madam, not on our part.

THE CHAIRMAN: Well just let me finish my sentence. It seems to be accepted that these steps can be taken, whatever values are put on the days, before the actual Reference is made. There are some nods and some head shaking.

MR. SHARPE: Madam, in the strongest possible terms this reference cannot commence until we have total visibility of the parties' cases. These cases have evolved already, otherwise we are just to waste time and money on dealing with issues which have been superseded by changes in the submissions and evidence. We want a whistle to be blown and for you, madam, to blow that whistle, and at that point the Commission can start its business.

THE CHAIRMAN: But you already have, as I gather, substantial volumes of evidence and submissions from the parties.

MR. SHARPE: If that is right, then why are we contemplating introducing new matters at this stage; it is either relevant or it is not. If it is relevant we have to consider it, and if we have to consider it why can we not consider it all at once. I do not know whether anything ----

THE CHAIRMAN: There are two separate issues, there is when the time should run for the Reference, so we could say that we can refer it as soon as the questions are decided, as soon as we have settled we can refer the matter to the Competition Commission and we can set a deadline which is a certain number of months from the date on which exchange of pleadings is completed. Now, that is one way of approaching it.

Another way of approaching it would be to say: "We get on with resolving what the questions are, we then have this exchange of pleadings, and once that exercise is complete, then we have the reference to the Competition Commission. I thought that the Competition Commission's view was that because it cannot constitute the Panel before it gets to the actual Reference, you would prefer to have the Reference sooner rather than later, even if that meant that it is made before the pleadings are finally finished, provided that that pleading stage does not eat into the time that you have for determining the investigation.

MR. SHARPE: In terms of time, I am not saying it does not make any difference, and I would not wish to respond on the question of inadequacy of time, that is true. It is a purity point. You are in control of the Tribunal and the pleadings. You then refer the matter to the Commission, we are expecting to have some sort of hybrid period where you are controlling the pleadings in the appeal while the Commission is attempting to be master of its own procedure in relation to other matters.

I think it is a real point, and we are all struggling to find a way through this new procedure, but the cleanest way is to say that the parties must get their acts together, must submit the evidence that they are promising and to give them an incentive to do so as quickly as possible there will be no reference if the bell does not go. In the interim I would not pretend to you that the Commission will be inactive. It can and is indeed considering matters, and you would be surprised if it were otherwise. It could be six of one and half a dozen of the other, but I think the pure legal approach, if I may put it at its lowest is that we should await closure of pleadings in the appeal case and then remit the matter. It is indeed conceivable that matters might arise in the context of what is following here which may influence the terms of the Reference itself. I put no great weight on that but it is at least possible.

It may not matter, but I have offered you a pure solution and in my submission you should take it.

(The Tribunal confer)

THE CHAIRMAN: So once these pleadings are exchanged in whatever days are set aside, how t hen do you see the investigation being carried on in respect of further submissions from the parties, only in response to what questions you ask.

MR. SHARPE: Yes, what we do not want are spontaneous contributions to the inquiry which are unsolicited. The Commission would like to sit back and look at the pile of papers representing the final statement, expression of the parties' cases, analyse them on reflection and then consider them in its own way. If it has queries it will see elucidation in writing, and there may well be oral hearings as we go along on a bilateral basis. I should caution the current thinking is that this will not be an inquiry conducted from one hearing to another. The Commission wishes to be sparing in its use of oral hearings and wants the parties to be reactive to its requests in writing. That said, it is anticipated that as early as practicable there will be a plenary hearing of all the parties at which time the members of the Panel will have an opportunity to hear directly from the management of the companies precisely what the issues are. We think that is an economic way of transferring information, and I give warning of that because I think the parties will wish to prepare a little bit for that. Once we get going that will be an opportunity for everyone to see and hear in plenary session. Now, thereafter it will be a matter for the Commission Panel and its staff to determine each of the issues up to a point.

There will come a point where it will have reached what, in other contexts would be called provisional findings. Obviously we are reluctant to call them provisional findings because it has no statutory significance. But there will be indicative views, statements of where the Commission is and where it is likely to go. These will be expressed in writing. These will be communicated to the parties, and then we anticipate another plenary hearing which will give all the parties an opportunity to state their views having preceded those views by more detailed submissions in writing.

Then we envisage a period, possibly up to as much as a month where the Commission will distil what it has heard and what it has read and come to conclusions, as we are required to do, to assist you in the nature of your decision. We think it will take about a month for that latter stage.

MR. SCOTT: Mr. Sharpe, you have mentioned a second plenary hearing after the provision of indicative views communicated in writing to the parties. When we were addressed by Mr. Anderson, he was mentioning a rather wider group - notably others who would be covered in a national consultation. Are you envisaging placing these indicative views on your

website, and would you then envisage the plenary session being open to a group of those who are interested parties, but who have not intervened in these proceedings?

MR. SHARPE: May I take final instructions on that? It is something we have considered. (After a pause): Our view is that this is a statutory appeal - part of it. We are actually reluctant to extend the process beyond the parties themselves. We do not want to declare a firm view on that because if somebody has something important to say, then it is in our interests that we should hear it. But, it is not anticipated, for example, that we would put an advertisement in the paper or on the web, inviting people to make submissions. We think this is an appeal function. So we are disciplined a little bit by analogy by the procedures of the Tribunal - but only by analogy.

So, in answer to your question, we are not currently envisaging holding hearings with third parties. Our current thinking is that we would wish to confine that second plenary session to the parties represented in this room. I have to say, we may change, but I think it is probably unlikely.

THE CHAIRMAN: Clearly, one would need to take into account at that stage, having kept these parties very closely to the grounds of appeal that it would not be appropriate then to allow submissions from people who are not so familiar with what those grounds of appeal are to start raising all sorts of points that these parties have not been allowed to raise.

MR. SHARPE: Indeed so, madam. I am sure all the parties will be anchored to their notices of appeal and statements of intervention.

THE CHAIRMAN: I am keen to remind you of that point.

MR. SHARPE: Yes, you raise an important point, if I may say so respectfully. It just adds to the difficulty of an already complex and difficult process.

So, that is how we envisage things going. May I come back to the question of duration, which looms large in our minds? It is fair to report that there is a shadow panel in place, as you would expect. It is fair to report that the staff have been working pretty hard on trying to understand what is at issue here. I think we have put that under the general heading of 'Familiarisation'. Has there been any further detailed assessment, economic assessment, statistical assessment? I think the answer to that is, "Not much". That is what we propose to do once we have full visibility of the parties' cases.

THE CHAIRMAN: But, as far as you are concerned, you would prefer, for both practical and purist reasons, that the questions only be referred to you, and therefore the reference get going officially once this exchange of pleadings has taken place.

MR. SHARPE: We think that is the right way forward, madam.

THE CHAIRMAN: That, you say, will not extend things because you are getting on with it in the meantime.

MR. SHARPE: It depends, of course, on what we see when the pleadings come in. If they are totally predictable and add nothing, we query why they are being made at all. But, if they are adding things which are material, plainly it will add a little bit of time because we have to consider them. But, how much time we do not know.

THE CHAIRMAN: Thank you, Mr. Sharpe. Mr. Anderson, do you wish to say anything?

MR. ANDERSON: Madam, very briefly. I hope, once again, I can offer Mr. Sharpe some comfort. We are not seeking to compress the Commission in any way. Indeed, if you look at the last of Miss Leigh's points, we would propose that the six months only begins once the replies have been served, which we envisage will be in April.

As regards the timing of the reference, I make only one point: if the Commission's ability to tell us all when it proposes to have these plenary sessions is dependent upon the reference having been made, then, in our submission, the earlier the reference can be made, the better because when those dates go in the diary, we all know where we are. Until they have, unfortunately, we do not.

MR. SHARPE: Of course, I understand the practical force of my friend's point. He is absolutely right. It may be possible, if the Tribunal establishes a timetable and directs the timetable so that we know when the reference is going to start - and it could be 11th April, or whenever - I think we can undertake to come back to the parties pretty quickly in anticipation of a reference as to the likely days to suit everyone's convenience. It is in everybody's interest to do that as early as possible. I give my friend an undertaking that we will do that. I have an interest as well. It is the same interest, I guess.

THE CHAIRMAN: Thank you, Mr. Sharpe. Now, are there any parties who want to argue that we should do things in a different order? Is there any party who wants to suggest that there is a reason which we have not yet canvassed as to why the reference should be made as soon as we have decided what the questions are rather than waiting until this exchange of pleadings, whatever the values for the number of days are? (After a pause): Mr. Roth, do you want to say something?

MR. ROTH: It is like a Catch 22 situation. We do not have a particular view of when the reference should be made, but I would just flag up that on one particular aspect we do have considerable difficulties -- on one aspect of the timetable. If that might delay the making of the reference, we would see no particular reason why the reference cannot go earlier

THE CHAIRMAN: Perhaps you could explain.

MR. ROTH: I did not want to jump ahead of myself. We were slightly puzzled by certain aspects of the timetable set out, the first one being 'the appellants to serve supplementary material as part of pleadings' if that is what is envisaged. As we understand it, the two notices of appeal are now served and finalised. Both H3G's notice of appeal and BT's notice of appeal have been amended after rulings by you permitting amendments. No further amendments can be made unless, upon application to you, and subject only to whether H3G chooses to pursue its question of on-net/off-net in the Court of Appeal following today's ruling from the Court of Appeal -- Subject to that, those are done.

Ofcom has served, as you know, a very full and detailed price control defence. All that remains on the defence is that we have not amended the defence to take account of, and respond to, the one aspect of BT's notice of appeal - namely, the holding charge. That is a very small self-contained aspect. We can serve our amended defence in two weeks. That will close primary pleadings - that is to say, notice of appeal defences. The interveners have only served outline statements of intervention in accordance with your direction. So, presumably they may wish to serve full statements of intervention. We have no idea - and you have not yet heard from them - how long that might take -- whether they can meet this timetable, or not. We fully understand the appellants wish to have permission to serve a reply, that reply to cover not only the defence, but also no doubt the statements of intervention. Ofcom may also wish to serve a reply to the statements of intervention insofar as they do not support Ofcom, but obviously only in that regard.

That deals with pleadings. It really depends how long particularly the full statements of intervention, and therefore the replies, will involve. If that does take things forward to a significant extent, we do feel that there is no reason, once you have given your ruling on the argument you have heard today, why the questions cannot be formulated and the reference made.

Separately, there is the evidence -- BT, in particular, served some detailed evidence from Messrs. Budd, Muldoon and Professor Yarrow. I think several parties may wish to respond to some of that. Again, you have not heard yet how long people might take. Ofcom will be responding not by way of witness statement, but by way of, as it were, written submission, explaining why Ofcom considers the criticism is wrong, or the argument is unfounded - just by way of rebuttal, and not making any new positive case. Again, I can tell you how we need to do that for Mr. Budd and Dr. Muldoon. We can do that relatively quickly. For Professor Yarrow we had reserved a challenged part of his evidence as being beyond the notice of appeal. I do not think we need to pursue that

challenge, but we do need rather more time to respond to Professor Yarrow, given the extraordinary strain that Ofcom is now under in terms of not just this matter, but also we are under an order to respond to the MNP notice of appeal by 12th March. There are other major projects underway. We do not have anything like the twenty people that the CC apparently is able to devote to this matter. We wish we did.

So, that will take us well into April. But we do not wish to delay the reference going forward just because we are serving responsive and rebuttal points. That is why I mention there is inter-relationship between them. We think that certainly once the full statements of intervention have been served, the Competition Commission will see the full scope of the arguments even if some supporting evidence is still to come.

THE CHAIRMAN: So, you would envisage it to be appropriate to make the reference after the full statements of intervention are served, even if that is before replies are served and ----

MR. ROTH: Yes. We do not see it should really cause the Competition Commission any difficulties, and it will avoid delay which nobody wants. Our concern is that if it is said, "Well, the reference cannot go until everything is done", then there is great pressure to squeeze that timetable in a way that I have to say that in one or two respects we cannot meet.

THE CHAIRMAN: So, Mr. Anderson, Miss Rose, I think before we ask the parties - Ofcom and the interveners - to say whether they are prepared to accept the ten days and eleven days in paras. 2 and 3 -- They may well say that they cannot really indicate whether those are adequate unless they have some idea about how extensive your supplemental material statements and/or submissions that you refer to in para. 1 are. Miss Rose?

MISS ROSE: Madam, just to explain H3G's position -- We have not yet put in any evidence or supporting material for our notice of appeal because, as we have made clear from the outset, we always regarded the appendix as an outline of our position. We do not seek to expand on the grounds of appeal, but we will wish to put in evidence and supporting material to the notice of appeal.

THE CHAIRMAN: You have not done that yet.

MISS ROSE: No, madam. Our price control appendix was always just put in in an outline form.

THE CHAIRMAN: Yes, I know it was as far as we were concerned, but our understanding was that pleadings were generally complete now.

MISS ROSE: No, madam. We are not seeking to put in more pleadings. We are seeking to submit evidence -----

THE CHAIRMAN: Well, the pleading, including the accompanying evidence and --

MISS ROSE: We were never directed to do that.

MR. ANDERSON: The rules of the Tribunal require the evidence to accompany the notice of appeal. That is, indeed, what BT did. We understood that is what H3G did. The rules are there.

MISS ROSE: With all due respect, from the very beginning, right back in July, it was made clear that our appendix was in an outline form. It is hardly a surprise to anybody who is here today. I would be delighted if people now tell me that we cannot put any evidence in as well as not being able to run arguments. I am sure that the Competition Commission will find that extremely helpful as well, as a way of dealing with the appeal.

THE CHAIRMAN: How long then do you need from today to put in your evidence?

MISS ROSE: We would like fourteen days.

THE CHAIRMAN: If this is going to be very substantial (The Tribunal conferred) The Tribunal is somewhat concerned about this timetable, given that we have made it clear all along, and in particular of the last paragraph of the letter that we sent out on 22nd January, that we had expected that by the time of this hearing pleadings would generally have been completed informally, even if not formally. So, it does rather come as a surprise that the parties have not yet had sight of a substantial amount of the additional evidence which the parties wish to submit. However, that is the position. What we propose to do then is that H3G and BT should have until 7th March to serve their supplemental material - statements and/or submissions - related to the paragraphs of the existing notice of appeal. Ofcom should then have until 28th March to respond to that. The interveners will, of course, by then have had sight also of jurisdiction's material. So, we will give them until 4th April to produce their response. Then replies by 18th April. But, we are not prepared to delay the reference of the questions to the Competition Commission until then. We will therefore make the reference as soon as we have decided what the questions should be. We will set a date of 31st October for the Competition Commission to report back its determinations - of course, subject to anything that crops up during that period.

Are there any other matters that we need to consider?

MR. ANDERSON: There was one thing that somebody raised - I forget whether it was the Tribunal, or I think it may have been the Commission, but it was the status of the evidence in the existing proceedings -- what its status should be before -- the SMP and remedy proceedings, and the status of that evidence in the reference to the Competition Commission. I think it was in the Competition Commission's latest letter.

MR. SHARPE: Can I assist my friend? We certainly made a reference to the litigation that is ongoing between H3G ---- and, of course, your own judgment in the earlier appeal which I think is pending. We plainly need to take that into account into account insofar as it is relevant. The timetable that the Tribunal is proposing, I would have thought would have been quite sufficient unless you are uncharacteristically slow in producing a judgment - which, of course, you will not be - to take that into account. I think originally we thought of having two months at least. My guess is that we would expect to see a judgment certainly within the next two months? Would that be reasonable?

THE CHAIRMAN: Yes - I think within the next two months.

MR. SHARPE: That gives us a fairly lengthy period in which to assess its significance for our purposes. So, I am very grateful to my friend for raising the point, but I think we have been overtaken by events.

THE CHAIRMAN: As far as the evidence that has already been served in relation to the non-price control matters, that is evidence in the appeal which is relevant to all aspects of the appeal to which anybody wants to argue that it is relevant. So, that would be evidence before the Commission as much as it is evidence before us.

MR. SHARPE: Yes.

THE CHAIRMAN: Mr. Flynn, you wanted to say something?

MR. FLYNN: Madam, on this timetable, the BT proposal, which came in last night -- I hope the Tribunal is not under any impression that that this is in any way an agreed timetable as between the parties. When it came in last night we assumed there would be a discussion in the usual way. The procedure before this Tribunal, as has been said, is that notices of application have to be filed, in full, with accompanying evidence. No different rule is provided for appeals in the present context. It really is extraordinary for Hutchison to come today and say that they still have not served their evidence and that they wish to supplement yet further their amended notice of appeal. Nor have we had any indication from BT what the statements and/or submissions that they propose to serve might be. So, we have no idea what the volume of material - either legal submission or economic evidence, or any other matter - that they may wish to serve by 7th March is. Firstly, I find this, if I may say so, strange in terms of the Tribunal's procedure because if they wish to amend their applications they should apply for that in the usual way. If they wish to serve additional evidence, likewise that should be applied for. We should really know what the scope of this is. Before that happens, we cannot possibly, fairly, say that it will be quite all right for my clients - and I dare say my learned friends in the back row are feeling

similarly, and possibly also Mr. turner - to reply by 4th April, both as to legal submissions and by evidence. That is a period of four weeks at best, which includes Easter, obviously, and it may be difficult to get hold of our experts. In the middle of that period we will receive not only Ofcom's reaction - if Ofcom is able to react to this new material from BT and H3G -- not only that, but presumably the other material that Mr. Roth was mentioning - namely, their defence in relation to the holding charge and further material of some kind in response to the statements of Professor Yarrow and others on behalf of BT. It looks as though we will be faced with a mass of material at a not especially convenient time. In my submission, this timetable -- Firstly, we don't really know what it relates to, and, secondly, it is almost certainly going to be unreasonably tight for us. In my submission, we should see what it is that the appellants wish to adduce, and then we should get the scope of it -- Ofcom should also be able to say how long they need to reply to it - as should we - and we should be given a realistic date for completing our outline intervention statements to take account of all this material and serve the necessary evidence to assist the Tribunal and the Commission.

Those are my short points on this timetable.

THE CHAIRMAN: Thank you, Mr. Flynn. Miss Bacon?

MISS BACON: Could I endorse what Mr. Flynn has said, but just raise one further concern, which is that the timetable that you have set does not take account of the time taken to prepare non-confidential versions of all the documents. Just by way of illustration, we received a confidential copy of the defence on 28th January. We are still, today, waiting for a finalised non-conversion. We got the interim non-conversion on 15th February - so, that is two weeks after we got the confidential version of the defence. That is a real problem for my clients because we do not have a huge number of in-house people in the confidentiality ring. We do not have any in-house people in the confidentiality ring. I take instructions from O2 as well as external solicitors. O2 did not even have sight of even a preliminary version of the non-conversion of Ofcom's enormous defence until two weeks after it was served on us. So, for us to be expected within a period of seven days to produce our statement of intervention - seven days after Ofcom's submissions - is completely unrealistic We would not even expect to have a non-conversion by that time.

THE CHAIRMAN: The pleadings that are going to be served -- Everybody has already served their outline pleadings. That should give everybody a fairly clear indication of what the case is. The supplemental material should not be raising any new issues. We have made it very clear, even in relation to outline pleadings that the fact that they may, or may not,

have been in outline does not mean that new issues can be raised in the elaboration of those, or in the supplemental evidence. So, there should not be that much which will come as a surprise, and if there is something that comes as a surprise, no doubt you will draw that to our attention and ask us to deal with it. But, your counsels are really counsels of despair in a way in that what you envisage is this then going on for months really until the pleadings are closed without making much progress. I think we will stick with what we have proposed. If you are in very serious difficulties you can always, of course, come back and ask for some relaxation of the timetable. but, as we have made clear, we expected things to move pretty quickly from this date onwards, having got the combined hearing out of the way, and now we are focusing on these matters.

MISS BACON: If I could just respond to that, I am afraid that we will not be able to serve a statement of intervention until we have received at least the non-confidential versions of the documents that Ofcom wishes to put in. If that takes the same amount of time as it has taken to finalise the non-con version of the defence, we will not even be able to start looking at those with our clients until a period of some weeks, and possibly a month in the case of some of the information, after we receive it. So we are really in the hands of Ofcom and the appellants as to how quickly they are to sort out confidential versions. On current history there is absolutely no way we would be able to put in our statement of intervention within the seven day timetable as envisaged. I just put that as a marker.

THE CHAIRMAN: Thank you. Mr. Roth, can you give any reassurance to people as to when they can expect to receive the non-confidential versions of these?

MR. ROTH: Our problem is we are entirely in the hands of the parties. The reason there was this delay, which was not of our making, is that we have had great trouble getting responses on certain points. Once we issued our defence and the confidential version on the 28th January, as soon as we got responses we would have been ready, and were ready, to serve a non-confidential version. I can only urge that, please, people should respond quickly to requests.

THE CHAIRMAN: Would it help if we made an order as to how quickly people should respond?

MR. ROTH: Absolutely, madam. We are still waiting on one point, I am told, a very small point from H3G on which we are still waiting for a response on the defence.

THE CHAIRMAN: Should we make it clear that the dates that we have set are for both the confidential and the non-confidential versions of the pleadings. (After a pause) I understand there does have to be a period of time, but we would like to indicate that if

people have not responded to you by a certain number of days then you are entitled to assume that the material is not confidential to them so that puts the burden on them to alert you to anything that is confidential.

MR. ROTH: Madam, we are still waiting for a response on a couple of matters from Hutchison to the confidential version of our price control defence that was served on 28th January, and we would like that answer so it can be served outside the confidentiality ring. I think everyone would appreciate any indication we can get of when we will get that response.

THE CHAIRMAN: What is the hold up then?

MR. ROTH: Just to add, madam, we would need an order from you to enable us to serve it to protect Ofcom under s.393 of the Act. We are then happy to serve it.

THE CHAIRMAN: Which pleading is this?

MR. ROTH: This is the full price control defence, the 200 page defence, of which the confidential version was served on 28th January, although a non-confidential version was prepared on 15th February. It has not been served outside the confidentiality ring because we are still waiting for a response on a couple of points.

THE CHAIRMAN: Yes, Miss Rose?

MISS ROSE: My understanding is that we first had a difficulty in that Ofcom said we should consult our clients about what was confidential which put us in a "Catch 22" situation because we could not show our clients the confidential version of the defence in order to consult about what was not confidential. I am also told that we asked Ofcom ----

THE CHAIRMAN: Yes, Mr. Jones?

MR. JONES: As I understand it, we asked Ofcom some days ago for permission to show particular extracts to H3G because we needed to show the context to obtain instructions on particular outstanding bits of potential confidentiality and we received a response from Ofcom, I believe it was yesterday.

MR. ROTH: Sorry, madam, we cannot give that permission, it is not in our gift. If H3G wish to apply that anyone should be admitted by order to the confidentiality ring, either generally or for any particular purposes, they may do so. We have not got the power to do that, other than by direction of the Tribunal.

THE CHAIRMAN: You must all have worked out a way in which you deal with this, because it has previously been dealt with. Just looking at what we had proposed, we have said H3G and BT should serve their additional submissions, etc, by 7th March. Is it possible for you to serve with those non-confidential versions?

MR. SHARPE: Yes, madam.

THE CHAIRMAN: So you serve both confidential and non-confidential versions. Then Ofcom, you have until 28th March to serve your defence. It is more difficult for you because there has to be an iterative process, but if we say that you serve that and give the parties – how long would be reasonable to give the parties to come back to you with indications as to what is confidential?

MR. ROTH: We would have thought seven days should be more than adequate. Madam, may I say we are in the same position as Mr. Flynn outlined, we do not know what is coming and we are very concerned, particularly given that that is the Easter week where several of our staff who are involved in this are in holiday, about being tied to a date to respond to something which we have not seen and it appears to be all of H3G's evidence on this. We would at least ask for 4th April. We could be responding at the same time as the interveners are responding or serving their full statement of intervention.

THE CHAIRMAN: But they need to include in their statements of intervention a response to your defence.

MR. ROTH: This is not our defence. We have served our defence in great detail, a very full defence.

THE CHAIRMAN: I see, it is only your response.

MR. ROTH: To what is coming on 7th March, and our evidence in response to BT's evidence and further evidence, if there is any.

THE CHAIRMAN: We can only set a timetable in the hope that the parties will have regard to that timetable.

MR. ROTH: I think 4th April should work, subject to the unknown of what comes, but at least that may be doable.

THE CHAIRMAN: The 4th April for the confidential version?

MR. ROTH: For the confidential version, and the parties to notify us in seven days.

THE CHAIRMAN: Then the interveners are going to ask for more time after 4th April, but perhaps it cannot be helped.

MR. SCOTT: Presumably if you feel that something exceptional has happened that exceptional happening is either going to be that you feel that they have gone outwith the notice of appeal or that there is something that has taken you by surprise. In either event you can apply.

MR. ROTH: It is just the scale of the evidence we might receive and what it takes to rebut it. We just do not know. What we can do is that we can say by 7th March – I do not know if we have formally been given permission to amend our defence – just to deal with the

holding charge, in other words, the amendment that you allowed for BT, we can amend our price control in a few paragraphs to deal with that. That we can do by 7th March.

On the confidentiality, the point that has just made, as I say, we cannot waive confidentiality that has been claimed by other parties. If you order us to serve the 15th February version on all parties we are happy to do so, or if H3G apply for someone to be admitted to the confidentiality ring so that they can show the confidential version to them, we do not object to that and you can make an order and then it can be shown and this apparent blockage can be cured.

THE CHAIRMAN: This is dealing with a different point. We have got to deal with the timetable for the pleadings and then an additional point for the service of the non-confidential ----

MR. ROTH: If they have seven days to respond to 11th April, that is a Friday, and then subject to their responses, by the end of 14th April, or the Monday, we could serve the non-confidential version.

THE CHAIRMAN: When do the interveners have their ability to serve their response? Should that run from 7th April or 14th April? Mr. Turner?

MR. TURNER: Thank you, madam, we would say it ought to be 14th April, so that we full visibility of what is coming. The extra week will not make a difference.

THE CHAIRMAN: So you want 14 days from ----

MR. TURNER: I understand the time would run from 18th April, I am being told, and therefore a week after that?

THE CHAIRMAN: No.

MR. SCOTT: The 14th you get the non-confidential version.

MR. TURNER: So then it is a week after that.

MR. SCOTT: So it is a week after that, so it is the 21st. I think both versions on the 21st.

THE CHAIRMAN: So are we here then, that the H3G and BT by 10th March serve confidential and non-confidential versions.

MR. ANDERSON: 7th March.

THE CHAIRMAN: 7th March, serve confidential and non-confidential versions of their supplementary material. Ofcom serve its response to that by 7th April, the confidential version, and by 14th April they serve another version removing such material as the parties have notified in time is confidential.

(The Tribunal confer)

THE CHAIRMAN: This is our understanding of where we have got to. By 7th March H3G and BT serve confidential and non-confidential versions of their supplemental material. By 4th April Ofcom serve their confidential response to that. By 11th April the parties are to notify Ofcom of any material they want redacted from that confidential response. By 14th April Ofcom then serve the non-confidential version of their response. The interveners by 21st April serve a confidential and non-confidential version of their response to the supplemental material and Ofcom's response to that material, and then replies by 6th May – confidential and non-confidential versions to be served by the parties other than Ofcom at the same time. Ofcom will liaise with the parties at that stage concerning any redactions to be made as soon as possible.

We will also give Ofcom permission to amend their defence in relation to the matter that was raised by BT's amendment of its notice of appeal and serve that by 7th March. As I said, we will make the reference to the Competition Commission, and I think we must disengage that from this exchange of pleadings and make that once we have determined what the questions are, noting that there will be enough time left for them following our handing down judgment in the non-price control matters in the H3G appeal.

MR. ANDERSON: Just to clarify, madam, you mentioned responses and replies and so on. Is it my understanding that those deadlines apply to evidence just as they do to submissions?

THE CHAIRMAN: Yes, it is. Miss McKnight?

MISS McKNIGHT: Madam, I think in the ordinary course we would have expected the Tribunal to see the evidence and submissions first and then decide whether to allow them to be admitted having regard to Rules 8, 11 and 19 of the Tribunal's Rules. Indeed, it is our recollection, I believe others agree with this, that when BT first sought to adduce the evidence of Professors Yarrow, Maldoon and Mr. Bard, the Tribunal decided not to decide at that stage whether to give permission for that evidence to be adduced. That was to be stood over until we were ready for the price control matters. I think you suggested that it is open to us when we see the evidence and submissions to come forward suggesting that we can challenge them on the basis they are outside the four corners of the notice of appeal, but that does seem to be a reversal of the normal order. Could you perhaps clarify what is intended in that regard? The point being that whilst the Interveners and Ofcom originally did outline pleadings there was no reason for H3G or BT to consider their pleadings to be outline only because they were governed by Rule 8 of the Tribunal's Rules.

THE CHAIRMAN: Well nonetheless, they do appear to have considered their pleadings to be outline pleadings and to an extent the Tribunal has gone along with that, whether we would

do the same again we would have to consider, but this is the first time that this procedure has been operated and to an extent we have been trying to work out the best way of handling it as we have gone along. We do not feel at present that we can shut BT or H3G out from serving supplemental evidence at this point and therefore the parties will have to respond to it in the normal way.

MISS McKNIGHT: In that case, we would wish to say that we think that part of Professor Yarrow's statement goes beyond anything raised in BT's notice of appeal. It is not a point which we came prepared to argue today because we had not expected it to form part of today's agenda. But Professor Yarrow makes many points which are ----

THE CHAIRMAN: I do not think we can deal with it today. My suggestion is that we wait until the pleadings have been exchanged and if there are issues that people wish to raise as to whether or not the Competition Commission should be able to consider any particular point that is sought to be made then those can be raised, but I do not think it would be a good use of our time to deal with those in a piecemeal fashion, certainly not today.

MISS McKNIGHT: Thank you, and would you envisage those points being raised before the Tribunal or the Competition Commission?

THE CHAIRMAN: Well if they are matters which effectively state that the party has amended their notice of appeal in a way which is not permissible, then that would be a matter to raise with the Tribunal.

MISS McKNIGHT: Thank you, that is very helpful.

THE CHAIRMAN: Yes, Mr. Roth?

MR. ROTH: Madam, would you be minded to supplement the last part of that order in the same way you have earlier, that is to say you say 6th May replies, that will be confidential and non-confidential versions from BT and H3G, there will obviously only be a confidential version from Ofcom if you would consider adding that by 12th May H3G and BT will notify Ofcom what is confidential in its reply and then by 15th May, Ofcom will serve a non-confidential version of its reply, so that we have the limit set dealing with the confidentiality point.

THE CHAIRMAN: Yes, it is not just necessarily just H3G and BT is it, it might ----

MR. ROTH: No, it would be everyone, because it is all the interveners, yes. All parties to notify Ofcom what is confidential in its reply by 12th May, 15th May Ofcom to serve non-confidential version.

THE CHAIRMAN: Anything else? Thank you very much.