IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1180/3/3/11
1181/3/3/11
1182/3/3/11
1183/3/3/11

Victoria House
Bloomsbury Place
London WC1A 2EB

4th April 2012

Before:

MARCUS SMITH QC
BRIAN LANDERS
PROFESSOR COLIN MAYER

(Sitting as a Tribunal in England and Wales)

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC
EVERYTHING EVERYWHERE LIMITED
HUTCHISON 3G (UK) LIMITED
VODAFONE LIMITED — Appellants

- and -

COMPETITION COMMISSION — Respondent

- and -

OFFICE OF COMMUNICATIONS — Interested Party

- and -

TELEFÓNICA UK LIMITED — Intervener

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HEARING – DAY 2

APPEARANCES

MR. ROBERT PALMER (instructed by the Legal Department) appeared on behalf of British Telecommunications Plc.

MR. JON TURNER QC and MR. JULIAN GREGORY (instructed by the Regulatory Department) appeared on behalf of the Everything Everywhere Limited.

MR. BRIAN KENNELLY (instructed by Baker & McKenzie) appeared on behalf of Hutchison 3G (UK) Limited.

MRS. ELIZABETH McKNIGHT and MR. ANDREW NORTH (Solicitors, Herbert Smith) appeared on behalf of Vodafone Limited.

MR. JOSH HOLMES and MR. MARK VINALL appeared on behalf of the Office of Communications.

MR. MICHAEL BOWSHER QC and MR. NICHOLAS GIBSON appeared on behalf of the Competition Commission.

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THE CHAIRMAN: Mrs. McKnight?

MRS. McKNIGHT: Thank you. I appreciate I have got very little time, so I want to get stuck in. I am going to give you a quick reminder of what I covered yesterday and then explain how it is going to feed in to what I am going to do next. I showed you yesterday some basic facts about how the Ofcom model is structured, its reliance on engineering insight to translate engineering fact into design parameters; and then the second stage of calibration against real world data for total asset deployment and total costs.

I showed you how, for any single year of the model, because it models each year of the model period separately, the fact that the model is calibrated to the data about total volumes of traffic that are carried in that year does not confer any confidence that the resulting design parameters, the post-calibration parameters, correctly reflect the underlying real world causes that drive asset deployment because matching at the total asset level does not tell you that the underlying rules are matching true causation. We looked at para.6.102 of the Final Determination where we saw that the Competition Commission accepted that fact in respect of the radio network assets which were the subject of 3's appeal.

I also argued yesterday that the fact that the model has been calibrated separately for a number of successive years does not improve the level of confidence one can have in the fact that the rules are working correctly in each year of the model.

I sensed that that possibly was not as readily comprehensible as my first point. I just want to run through why that is. Imagine that everyone in this room is given a copy of the Ofcom model, and everyone is asked to run the model for a different year, so I look after the year 2000, someone else does 2001, we each run the model with its basic design parameters, and each of us then comes up with a total set of assets that the model tells us are needed to meet the total traffic demand in the year for which we have individually taken responsibility.

Each of us also has the data about the real world asset deployment and total costs that the average MNO incurred to meet that demand in the year for which each of us is individually responsible. Each of us will note - and this is not a criticism, we accept that this is how models work – the basic design parameters will not dimension a network that matches the real world outturn. So each of us individually will then tweak the design parameters we have been given to get a better match between what the model predicts and the real world outturn.

We have all worked separately on this, and we come back together and we all say, "I did not think the model was awfully good, because what it predicted on the basic design parameters did not match the real world outturn, but I have managed to tweak it so it does". I do not

think realistically anyone could then say to anyone else in the room, "I have done the same but I have probably used different tweaks from you, but obviously the model is now working well, it is now reflecting the underlying causation drivers of asset deployment", because we have all tweaked in complete isolation from one another in different ways. The mere fact of an accumulation of years of calibration does not really add to one's confidence.

To be more benign towards what Ofcom might have been saying when Ofcom was apparently saying, "Trust us, we have been doing this for years", what they might have been saying is, "We do not approach it in isolation year on year, we bring an accumulated wisdom to the way we calibrate for extra years that are coming through, and what we are doing is, we are becoming a bit more savvy about which levers we should pull and to what extent, because clearly we are getting to know which ones seem to work best, and the combination of all the work we have done means that we are more likely to be getting it right than wrong", so calibration is moving us towards a truer reflection of the underlying causation drivers rather than just randomly moving us away from it. I do not know that that is what they are saying, but it is one possible interpretation.

If we give them the benefit of the doubt and say that is what they are saying, and if we say, "Maybe you are right, maybe your accumulated wisdom of calibration over the years is causing you to pull levers which bring the design parameters into truer approximation to what is happening in the real world" -- we say that then we face a really important question. You are coming up, by using that accumulated wisdom, with a different set of post-calibration parameters for each year of the model on some key drivers, and you are telling us that what really justifies these adjustments is the fact you are calibrating to a real world number. So in year 2010 you are making adjustments that bring your 2010 modelled year into good alignment with the outturn total traffic volume numbers 2010 for year 2000 when we have much less traffic, you are calibrating against a lesser volume, and you are telling us that we can trust those numbers, that the design parameters you are coming up with are informative as to the drivers of asset deployment for those years.

We say, "Okay, when you run the 2010 model for the full traffic volume we will trust you, we have got confidence it is working, but when you run the 2010 model for the lesser volume that reflects the 2010 traffic without the MCT component, the volume you are running through that model is much closer to a volume that occurred roughly five years before, and roughly five years before you are telling us that different rules are reflective of what drives asset deployment at that lesser volume, so what have you done to satisfy

yourself as to which choice of rules you should be applying when you do the ex-MCT run of the model in any given year?" We say you, Ofcom, have got to look at what factors might be driving the fact that we have different rules that are true world reflective in the earlier year. Is it that those rules reflect the fact that when we have a lesser traffic volume there are different factors driving asset deployment? Is it just that there is more coverage going on, which is not particularly relevant for the time shift, or is it that there are just different legal rules about assets could be deployed, or were there different technologies available? But you have got to look at it.

We just say it is a question that cannot be ducked. When we look at the CC's reasons we will see it has been ducked.

With that I want to start on my new material which is to take you, in due course, to the Final Determination. Could we go now to core bundle A2, right at the beginning, tab A which is the second part of the Final Determination. I am on Chapter 3 internal p.3-9. We see at the start of this, para.3.36. This explains the structure of this chapter. In Part 1 they are going to look at Vodafone and EE alleged certain key deficiencies in the model. "(a) Ofcom had wrongly specified the ex-MCT network" and that is the bit I am going to be looking at. Then we see the next bit: "(b) the network design parameters were incorrect" and I am going to be looking at some of that as well. But then there is a whole long tail of other alleged errors in the specification of the network, particularly its ex-MCT implementation.

If we then turn the page what we see is that when we go into Part 1 we have this heading "(a) Specification of the ex-MCT network" and the way in which this is structured the Commission sets out what Ofcom said, what the challenge was that the appellants brought, what everyone said about it, then they have their assessment.

Vodafone's challenge is summarised at paras.3.40 onwards, but I do not think it does full justice to the challenge. I want, without turning you to it, just to draw your attention to the elements of Vodafone's Notice of Appeal which found this part of the determination. At para.63 of the Notice of Appeal we said that

> "One of the most compelling reasons why Ofcom should have set, and the Tribunal should now provide for, the new price controls to be set on a LRIC+ basis is that the Ofcom model cannot with its current output produce a robust estimate for LRIC cost of the MCT service."

We then set out what the recommendation required, how the model works and we then went, in para.67 of our Notice of Appeal, to explain some of the problems. We said:

"Whilst the LRIC methodology contemplated by the EC Recommendation is therefore consistent with the application of a subtractional approach [you have a model that computes total deployment for service, then you do traffic without MCT and you deduct one from the other] it is critical that the model used to derive a LRIC measure of the cost of the MCT service should correctly categorise costs as being traffic related, or non-traffic related, and that the quantum of traffic related costs should be correctly attributed to different traffic services, so that when the 'with MCT' and 'without MCT' costings are computed, with a view to the application of the subtractional method, the two inputs to the subtraction are correctly derived."

Then we explained what Ofcom has done and we said in para.69:

"In fact, however, the Ofcom model is entirely unsuited to this exercise because: (69.1) Some costs which the Ofcom model treats as being unrelated to traffic ... are, in fact, traffic-related costs in whole or in part; (69.2) Some costs which the Ofcom model treats as being, in part, non-traffic related and, as to the remainder, traffic-related, are split incorrectly. [There are other criticisms, then we said] (69.4) Furthermore, Ofcom's subtractional method gives no consideration to the different way in which a mobile network might be designed if it were not required to provide an MCT service, which is critical to the ascertainment of the true avoidable costs of the MCT service."

So we set up a large number of objections to the design and implementation of the model. Rather than take you to the CC's summary of our challenge we would invite you to look at it as set out in the Notice of Appeal and the supporting evidence.

If we turn the pages we get to [Final Determination] para.3.66. The intervening pages contain the summary of what the CC considers to be the material points that everyone made on this part of their defence case. The core passage I want to focus on is 3.66 to 3.72. I think the first three paragraphs have to be understood together:

"Ofcom considered that the ex-MCT services network was a network that was similar to the all-services network, but smaller, because it carried less traffic. Ofcom said that the ex-MCT network should be considered as a network that was effectively built a little bit later in time. (3.67) Vodafone's view was that in respect of the network design of the network without MCT services was that this would be a completely redesigned network, optimizing network costs for providing all services excluding MCT services."

It seems that what the CC is doing is it is setting out Ofcom's position, our position, and then it is saying: we were persuaded by Ofcom's reasoning. I think the reasoning must be what they set out in 3.66 because that paragraph at 3.66 has already been said in setting out Ofcom's case. They have selected it from Ofcom's argument as being, it appears, the bit that they accepted. To the extent there is a useful precedent there is a load of reasoning. The *Number 1 Poultry* case I took you to yesterday was exactly that: the Secretary of State's planning decision drew on but did not necessarily go into the inspector's recommendation.

> "(3.68) We were persuaded by Ofcom's reasoning [clearly only para.3.66 can be said to be reasoning] that, in principle [and therefore that sounds like a bit of caveat], a network that has design parameters that provide the cost of the all-services network satisfactorily over time does also provide a sufficient approximation of the costs of the ex-MCT network at a specific point in time."

This is quite vague really. Which design parameters are referred to and why are they plural? In any single year there is a vast number of design parameters, but of course, from year to year there are different design parameters. So are they recognising here that there are different design parameters from one year to the next but suggesting that does not prevent them concluding that the model is working satisfactorily over time? When they say that the design parameters provide a sufficient approximation of the costs of the ex-MCT network at a specific point in time, which specific point in time provides the relevant design parameters: is it the later year, when the ex-MCT volume of traffic arose, or is it the earlier year when the ex-MCT traffic for the later year matched the total traffic to which the network was calibrated for the earlier year? What do they mean by that? Then there is something else:

> "(3.69) We are also persuaded by Ofcom's reasoning that the all-services network build parameters in its 2011 Model were informed by its calibration over time. Vodafone's approach would require a large number of hypothetical assumptions that could not be calibrated to what operators do in practice, whereas Ofcom's approach, at least in principle, would be informed by how operators have responded to traffic growth in the past, providing a verifiable reference point."

We entirely accept that we said if you hypothesise how an ex-MCT network would be built from scratch with no incoming call traffic in contemplation, it is a hypothesis, no calibration, no-one has built such a network, so we accept that. But the important point abut this sentence is it seems that one reason for rejecting that approach is because it does not

have a verifiable reference point in the real world. So it seems, and I can understand this, that the CC thought that calibration to a real world set of figures was critical to its choice of accepting that Ofcom's method was certainly superior (whether it was good enough is a different question).

But it is not really clear how much confidence they thought you could derive from calibration over time as ensuring that the rules worked from year to year at different traffic levels because they just said it was "informed", well that is quite a weak word. Clearly, we are not suggesting Ofcom turned its mind against evidence from previous years, they took account of it, but how powerful is that as a means of ensuring that the model works from year to year and, of course, it still does not address this point that when you have different design parameters for different volumes it is not really clear which one they think provides the best insight into the ex-MCT network.

3.70 – I think this paragraph is not so important to me. It is saying that EE, essentially agreeing with Vodafone, says there will be a greater, an infinite – I do not think we said that –

> "… an infinite number of ways that the ex-MCT network could be hypothetically re-optimised and we were persuaded by Ofcom that there would likely be considerable practical difficulties in identifying appropriate re-optimised network. Neither [of us] have provided evidence that showed that any of these hypothetical networks could be calibrated against an external benchmark."

That seems to be the same point. If it cannot be calibrated we are very nervous of it, says the CC.

> "We also agree with Ofcom that it is not appropriate to treat costs as being wholly or partly the avoidable costs of the final increment …"

(that is the MCT service)

> "… unless there was an evidential or analytical basis on which Ofcom could conclude that those costs would not be incurred by the hypothetical efficient operator in the absence of providing MCT services."

Now, what is that saying? Is that saying that we cannot have an adjustment? If we are running the model in the year N for full traffic services, and we are running it again in year N, which is what Ofcom has done, for the ex-MCT traffic level, we cannot have any adjustment to bring in one of the parameters from the earlier year in whole or in part unless we can show that those costs – now what does that mean? Does that mean all those costs in

the relevant category or all of the part that we claim are purely incremental to the MCT service?

When they say we would have to show that they would not be incurred in the absence of providing MCT services, what does that mean? Does that mean we have to show that these costs are peculiarly related to the MCT service by its character, or are they saying in the absence of the provision of the volume of services that it is in fact MCT. So are they saying that we have to prove somehow that the costs are peculiarly linked to the MCT service, or just are linked to that additional volume, which happens to be MCT? It should be the latter because they started off by saying that the MCT services are not peculiar, and the removal of MCT services is not the removal of anything of a specific character that is different from other traffic, it is just a reduction in volume. So they should not be looking for us to prove that a particular cost parameter is justified because of some peculiarity about the way in which MCT services drive costs.

> "We do not therefore consider that Vodafone has demonstrated that Ofcom erred in its specification of the ex-MCT network."

In one sense that is very strange because we came forward with a lot of individual criticisms and points of principle of the way in which the Ofcom model was not apt to deal with the LRIC calculation. As far as we were aware Ofcom never relied on this reasoning but somehow the calibration over time means that it is a bit like a time shift, it seems to read to us if there is heavy reliance on time shift that what you should be doing is saying the network is calibrated very well from year to year for different traffic volumes, and therefore you are looking to smaller volumes. We have a model that is calibrated to that traffic volume, use that one. We did not think that is what they were saying so we did not criticise that. Equally, now that the CC says they are persuaded by Ofcom's reasoning they seem to be persuaded by something that was not the basis of the original MCT decision, and I am going to take you to that, to explain why our notice of appeal was not directed at criticising precisely this reasoning.

Our rather generous reading of what they are saying now is: do not worry, the model works because you can time shift. You can model the assets deployed in the ex-MCT world for any given year by using the design parameters which have been calibrated to that verifiable reference point. But the model does not do that, so we say it is a self-contradictory set of reasons because they endorse the model and the way it is used for one reason, but it is not actually how it works.

The CC has come back to us saying: "You are over-reading this, over interpreting it. All we are saying is there is an analogy with a removal of the MCT services; it's a bit like having a lesser volume of service, that is all we are saying." We say then "What are your reasons?" This sort of "time shift lite" version of the reading does not really tell us anything about why you think the model works in its current specification and implementation. We would say if they are placing so little reliance on time shift that we cannot infer that the ex-MCT run should be by reference to the earlier years' parameters then they have got nothing here. We say that because they are upholding Ofcom's model and its implementation by reference to reasons that were not articulated in Ofcom's MCT statement we would expect to see fuller reasoning, and we say this is an Article 4 appeal, you have the task of oversight of whether they have done their job properly, and we say it is difficult to understand how you could exercise that oversight by reference to this very inadequate reasoning which is either self-contradictory or tells you nothing.

THE CHAIRMAN: Mrs. McKnight, can you help me on this? Just to take it in stages, I think you would be pushing at an open door in your submission that any model is an imperfect representation of reality.

MRS. McKNIGHT: Yes.

THE CHAIRMAN: I will be kicked by my colleagues if I go too far in any of my formulations, but I think that is common ground. It is also quite clear from your submissions that you are saying that not only was the model (as they all are) an inadequate reflection of the real world, but that it was deficient, and by deficient I mean it was capable of improvement by another different model. In other words, not only did it share the characteristic of all models in that it was an imperfect reflection of the real world, but there was another, better model which could have been deployed.

MRS. McKNIGHT: Well that was the case we advanced. We do not now advance that because that has been rejected, and we accept, on the merits.

THE CHAIRMAN: Pausing there, these deficiencies we see articulated in 3.36 of the final determination, and they were considered by the CC and rejected as you have shown us in one case, rejected on the merits.

MRS. McKNIGHT: Yes.

THE CHAIRMAN: As I understand it, what you are saying is the CC's final determination should be reviewed by us on two essential judicial review criteria, one where the reasoning is articulated by the CC on the double proportionality test so that we give it an intense European judicial review scrutiny to ensure that it stacks up. Where the reasoning is not

full, and this is the point you are making at the moment, we need to be satisfied that actually there are good reasons for the decision of the CC and if those reasons are not evident we need to be remitting the matter on that ground. Now, do correct me if I have unfairly stated your arguments, but my question is that although I can see that the wrapper is different between 'on the merits' and 'judicial review', I find it very hard to distinguish how the judicial review inquiry differs from an 'on the merits' review.

MRS. McKNIGHT: Partly because I have not finished my case, but I am not quite sure – you prefaced this by suggesting that we would all accept that models are imperfect. Yes, there are two ways, we say all models are imperfect but where a model is going to be used to set a price control on which an enormous amount of money turns, and the setting of which has implications for social welfare such as Mr. Turner elaborated yesterday, a very high degree of refinement is to be achieved. What we say is that Ofcom did the job, it is a merits appeal, the merits element is handled by the CC and they should have looked with a very profound and rigorous scrutiny whether Ofcom had done the best possible job. "Best possible job" must build in a sense of what could they have done better given they do not have infinite resources or insight. But, we are saying that the CC appears to have accepted the Ofcom model as being good enough. We say they did not apply the right standard of refinement. Even if they were setting too low a target and they were satisfied too readily, we do not see how, on their reasoning, they could properly be satisfied that this was good enough, because the reasoning which caused them to conclude that the calibration was good enough should have caused them to conclude that the subtractive approach should have been done differently within the model, as specified, that you should have used the earlier years' parameters for the ex-MCT run of the model. That would not have required any amount of additional work, it would just have been correcting what is an obvious error, if you think that it is well calibrated for the reasons the CC has given.

THE CHAIRMAN: Let me put this hypothetical to you, Mrs. McKnight. Let us suppose that we have a model and in the notice of appeal you are challenging the decision which uses the model, where the model underpins the decision, five defects are identified, and again I will use my term of deficiency meaning an instance where the model could, in some demonstrable way, be better. Let us say that actually all those points are good, but the CC gets it wrong, they look at the points and they reject all five because they think they are wrong. Let us assume, hypothetically, that, in fact, the CC's 'on the merits' decision is, on all five points, incorrect, we have got a clean sweep of errors.

MRS. McKNIGHT: We would be stuck with that, you are saying?

THE CHAIRMAN: We then enter the scene. How is it that our judicial review jurisdiction is engaged in respect of those five errors without simply revisiting them?

MRS. McKNIGHT: That could be difficult and we would have to understand why they got them wrong. I think one could speculate as to why the CC would have made five errors of a particular type, but I think it is probably not a very fruitful line of enquiry. What I would say about the case I am advancing is we are not in that situation. The situation we are in is where the CC did not apply the correct standard of profound and rigorous scrutiny. The only thing that seems to have prompted them to conclude that the model was good enough was that Ofcom said it was. The bits of Ofcom's reasoning that they picked out to say it was good enough do not even justify the way in which Ofcom then ran the model for the ex-MCT implementation.

It seems that there is a key distinction between a situation where someone evaluated evidence and said, we are not persuaded that this particular cost was incremental or was incurred, that your procurement costs are at that level. These are factual matters to some extent, and reasoning which is self-contradictory.

THE CHAIRMAN: I do not think you are saying, and again you will correct me if I am wrong, that the CC misdirected itself as to the test it should apply when conducting an 'on the merits' review. I think what you are saying is that ----

MRS. McKNIGHT: No, I am saying that. If I take you to para.3.33, and I thought if we went to it straight away we would end up debating it forever. 3.33:

> "In our view, calculating the LRIC for MCT services is effectively a theoretical exercise to establish a reasonable basis for identifying avoidable costs."

It is to identify the best available basis, because it is a merits review of whether they have done the best thing:

> "Vodafone's appeal appears to be based on a certain interpretation of how this exercise should be conducted. In the light of the nature of the exercise we do not believe that Ofcom's approach is one that might lightly be set aside in the absence of a clearly superior alternative."

When you say that we have advanced all these criticisms and they were all rejected, in large part they were rejected because we had not demonstrated a clearly superior alternative.

I come back to my point, that it would be great if we could show a clearly superior alternative. I am going to explain to you shortly, when we look at why some of these were rejected, why we could not do that and why it is unreasonable to expect us to do that. We are saying that they did misdirect themselves because they should have said, "Have you

done enough to undermine confidence for this model predicts a robust number?" We would say that if they had addressed their minds to that question they would have had to conclude that we had undermined confidence.

The reason I took you to the structure of the determination, 3.36, is that although they list (a), (b), (c), (d), these are actually slightly misleading because (a) is almost an umbrella assessment, they are saying, "You told us that the ex-MCT network should not just be a re-run of the full services network with the same design parameters for every single year, you told us there should be loads and loads of changes because an ex-MCT network will be different, both because it carries different traffic volumes and because it might have different characteristics through never carrying MCT traffic. But we, the CC, are telling you at the outset that we think the model is sound". So they have essentially addressed the whole of our case in those paragraphs 3.66 to 72. They have said that there is nothing fancy about MCT, it is just a reduction in volume, it is like going back a few years, and the model is well calibrated for all years, so what is the problem?

That is their reasoning for rejecting all of our case. They then go through, quite properly, each one and explain whether there are other reasons. We would say that the error in reasoning which we have identified, the inconsistency, infects everything they did subsequently in chapter 3. I would like to take you to examples of that.

THE CHAIRMAN: That would be helpful, because I confess that the thrust of your submissions yesterday and for part of this morning were very much focused on the detail of how the model worked and how the CC had failed to take account of really rather narrow points as to the operation of the model that Vodafone was advancing. Speaking for myself, and obviously we will have to think about this further, but that sort of detailed investigation to my mind sits rather ill with a judicial review jurisdiction.

MRS. McKNIGHT: I well understand that and I appreciate ----

THE CHAIRMAN: I quite see that if you are saying that the CC basically misdirected itself as to the standard of enquiry that it should use in order to test Ofcom's model, that is a different point, but it is not a point that requires us to be drawn into the minutiae of the individual points.

MRS. McKNIGHT: Though I think to make good that point I probably have to show you what they have done. The point I would make, and I think I explained this at the outset yesterday, is that I would be taking you to a lot of what you could call evidence, but I am not inviting you to decide whether the case we advance is better than a case Ofcom advanced. Quite clearly, that would be a merits matter. What I am doing is, or what I am

seeking to do, to draw your attention to the fact that the evidence disclosed particular issues, and one of the key issues was whether you should be using different design parameters to run the ex-MCT run of the model than the full service run of the model. I think I took you to one point where Mr. Kaltenbronn of the Commission staff expressly disclosed in the questions that he put to Ofcom that he understood that was an issue. I am saying that you would then expect to see in their reasoning something that addresses that issue adequately. Either it does not address it at all, if it is time shift lite, or the way in which it addresses it is self-contradictory. That is a pure JR point. Their reasoning is irrational or inadequate.

THE CHAIRMAN: Thank you, that has been very helpful.

MRS. McKNIGHT: Thank you. Can someone tell me how many minutes I have got left?

THE CHAIRMAN: About five minutes, I am told.

MRS. McKNIGHT: Can I then make the point that I think I do need to take you through just a couple of the reasons why the approach that the CC used in the next few paragraphs was wrong in law, and I do then need to take you to why this did not appear in the notice of appeal and how this came out of the ----

THE CHAIRMAN: Mrs. McKnight, if you run until 11 o'clock, but you will have to sit down at 11.

MRS. McKNIGHT: That is fine, thank you very much. If we go back to where we were, we were in para.3.71:

> "We also agree with Ofcom that it is not appropriate to treat costs as being wholly or partly the avoidable costs of the final increment there was an evidential or analytical basis on which Ofcom could conclude that those costs would not be incurred by the hypothetical efficient operator in the absence of providing MCT services."

The next section, the network design parameters, is then the CC's attempt to decide whether we have met that evidential and analytical burden to justify having a parameter adjusted for the ex-MCT run of the model. We say that when the CC was approaching this task of looking at each of these proposed adjustments they should have been applying profound and rigorous scrutiny to see whether Ofcom got the best answer on each of them. They should have been looking both at the evaluation of particular evidence that was put forward, but also at what threshold or what bar we had to pass in order to make good an adjustment, and whether they were setting the bar so high that it essentially skewed the outcome so that the default position was always that we would lose and that LRIC would be understated, and the burden was put so high that we could not be expected to meet it.

We say that it is not for Vodafone to prove that a different parameter would have been a better rule, but the way in which the rules have been set by Ofcom create a real risk of error so as to undermine confidence in the results.

I want to look at paras.3.129 to 3.131. This is one of the examples, and I choose this simply because I think it is the starkest example of what the CC has got wrong. The CC looked at it this way. If we look at 3.129, we are looking at whether in running the model for the ex-MCT implementation for a given year they should have applied a different design parameter for the proportion of microcells and picocells, or the proportion of traffic carried on such cells. You will recall from the evidence of Mr. Roche that I took you to yesterday, not controverted, that in earlier years with lower traffic volumes you have a lower proportion of traffic on microcells and picocells. They say half way down 3.129:

> "Ofcom said that microcell and picocell sites were used to meet a mixture of local coverage and capacity needs and that it considered that the proportion of microcells and picocells in its model reflected an efficient deployment of microcells and picocells. Ofcom also stated that it had no evidence of a clear link between the proportion of microcells and picocells and termination traffic. Three also provided evidence suggesting that there was no clear link …
> We note that Vodafone indicated that the evidence of a link between the proportion of microcells and picocells and the ex-MCT network was one of logic …"

What they mean by that was Vodafone had put in evidence saying it is expensive to employ microcells and picocells, you would only use them, relative to a microcell, where you have a special need that cannot be met. That will either be filling in a little gap of coverage, or it will be providing extra capacity in areas where you want really dense usage. I took you yesterday to the uncontroverted evidence that in sports stadia where you get very heavy traffic you put in microcells and picocells. It says:

> "However, we were persuaded by Ofcom's reasoning that, in principle, a network that has design parameters that provide the cost …"

etc, the same as we have heard before –

> "We therefore consider that evidence relating to the proportion of microcells and picocells over time could inform the appropriateness of such an adjustment."

This is an interesting point, because they say they go back to why they were satisfied with the model as a whole, and they seem here to suggest they were relying on what you might

call the heavy time shift argument, heavy reliance, because they do accept that evidence relating to the fact that you had a different design parameter in an earlier year where the volume was lower is potentially informative about whether you should make an adjustment for the later year. It goes on:

> "We agree with Vodafone that the proportion of microcell and picocell sites increased in certain periods in the 2011 Model. However, we agree with Ofcom and Three that there is insufficient evidence to suggest that the proportion microcells and picocells is related to termination traffic."

We say that is completely the wrong test. They have said that there is nothing peculiar to termination traffic; termination traffic is just a reduction in volume. They should have been asking whether the evidence was sufficient to show that some or all of the difference between the two parameters was referable to traffic volumes, not termination traffic, because that is inconsistent with their decision that there is nothing different about a network that does not carry MCT.

Then it says:

> "In particular, we were persuaded by Ofcom's explanation that a proportion of microcells and picocells are built for coverage purposes."

Yes, I do not think that is in dispute. The question is, what about the rest? Making no adjustment because we cannot prove what proportion of change there has been over time referable to traffic, means that, if that is the bar we have to cross, it is always skewed against us. This model is going to systematically reject adjustments that are going to be valid just because you cannot be precise.

What they seem to be suggesting is that we should have produced more engineering type evidence to show why you roll out a higher proportion of microcells and picocells as traffic goes up. That is absolutely inappropriate, to expect that of us. The engineering insight that underpins this model had already run out. Ofcom has done its best with everyone's input. They have resorted to calibration. Calibration amounts to saying that there is no more engineering evidence, I am just going to have to do something to make it match the real world. That is what they have done. We say, you matched it to the real world at the lower volume and came up with this parameter; you matched it to the real world at higher volume and came up with that parameter. You do not know why that was right then and this is right now. You know that the difference is attributable in part to coverage, in part to traffic, maybe something else, but unless we can prove by evidence that you know is not available how much of it is traffic, we do not get anything. That cannot be right. That is not a

proportionate way for Ofcom to fulfil its task, and the CC has erred in accepting that as a good enough approach and endorsing that approach.

We say that is not the only approach. If you look at the evidence that Ofcom put in to defend their model, they had a witness statement from Mr. Allen, who is a consultant with Analysys Mason, the consultants they used to build their model. Mr. Allen said at para.42 of his witness statement that he has advised NRAs and the Netherlands NRA as an example, not the only one, has made adjustments. I will not turn it up for you but I have it to hand myself. At para.42 he says:

> "There is a difference between the OPTA model [that is the Netherlands NRA] and Ofcom's 2011 Cost Model, which is that the OPTA model modifies the network design algorithms when the model is run without MCT traffic."

So it does exactly what we say it should do. One of them is:

> "(c) Slightly fewer GSM special sites (e.g. in tunnels) are deployed when the model is run without MCT traffic. These special sites usually cover small areas and might be deployed either to carry traffic in areas of exceptionally high demand, or to provide coverage within small but important 'holes' in the network coverage ... This change therefore makes an assumption about how many fewer GSM special sites would be required in the absence of MCT traffic and makes a fraction of the special site costs incremental to MCT."

So the default is not "you always lose", the default is "we split the difference". We say that this model is systematically skewed against us and the CC has endorsed that skewing approach because it has not recognised that there is a better way of doing it and that they simply have not had regard to that, but they have accepted Ofcom without challenge.

MR. LANDERS: Could I just ask a question. Is it not the case that they had evidence from 3 that there was no link between traffic and picocells, did you not read that out?

MRS. McKNIGHT: Yes, 3 provided evidence suggesting that there was no clear link. The clear link (going back to the engineering point) they accept that part of it is coverage, but by implication part of it is traffic, which is the other thing. The clear link, I think, means they cannot quantify how much might be traffic.

MR. LANDERS: But effectively you have argued one way; 3 has argued the other way and they have chosen the way that 3 argued. Why is that judicially reviewable?

MRS. McKNIGHT: Because it is the wrong test, because they have sought, by looking at engineering evidence, to decide whether we have proved what proportion, if any, is traffic related when they should have said the difference in the parameters from one year to the

next does not come out of engineering evidence; it comes out of calibration because we have run out of engineering insight. So we need some other approach, which we would say is a logical approach saying where you have got two different parameters and you cannot explain by engineering evidence why they are different but you accept (I think everyone accepts) that additional micro and picocells are deployed to meet traffic density. To say you cannot have any adjustment because you have not proved, wholly or partly, what it is, is just not the right test.

If I can just make the point, just so we get some sense of materiality, I will not take you to it, but Mr. Roche in his evidence in Roche 1 did point out what OPTA had done. He said that in the OPTA model, making these adjustments (there are three or four and I mentioned the GSM and sites ones) collectively they have the effect of increasing the OPTA measure of LRIC by 50 per cent. We do not read across from that, obviously, because you have to understand the totality of the OPTA model, but these are potentially material adjustments. I think that is as much as I can say about that.

Perhaps I should go on now to how this came into the pleadings. Again, I will not turn up all the documents, because I do not have time. What I would say is that Ofcom, in its submissions for today's hearing which I will refer you to, do explain how they think that this sort of time shift argument entered people's thinking. Their submissions for today make clear they downplay the reliance on time shift. The first place it seemed to arise in Annex A6, Annex 6 of the MCT statement at para.A6.154 where we see that when discussing all the pros and cons of different adjustments that were proposed to the model, Ofcom said in its MCT statement and annex at A6.14:

> "We note that H3G provided a counter argument to Vodafone's general comment that the April 2010 cost model was not suitable for pure LRIC, specifically that removing voice termination traffic was similar to a time-shift in volumes."

So that is where it is mentioned. They just said that they had noted it. They did not indicate that they agreed with it. It says: "Section 10 discusses the pure LRIC estimation approach, including the comments by Vodafone." I think that they meant Section 9 actually, because that is the chapter that deals with it. In 9.84 of their statement all they said was:

> H3G has argued that there is no difference between the network plus and network minus approaches. In H3G's view, if the network build parameters are correct there should be no difference between changing volumes over time and

changing volumes due to the removal of a service. We consider there may be some merit in this view, particularly if the increment … is small."

And they go on to say it might not always be right. So the only way in which this arose in the MCT statement was H3G put forward this time shift as a useful way of looking at it, Ofcom did not necessarily appear to endorse it but made some reference to it. So it follows that we did not then sort of raise it in our Notice of Appeal that Ofcom had erred in thinking its model was sound because of the time shift. It was not something they relied on.

The next place it arises in these proceedings is the second witness statement of Mr. Mantzos. Can I take you to this. It is volume B3 tab 21. I would like to go to para.2.20 on p.10. Mr. Mantzos is a witness for 3 and this is part of the evidence that 3 served with its Statement of Intervention opposing Vodafone's appeal. What he does is he has two graphs on p.10 where he sets out the growth in volume of 2G traffic over time represented by the black bars going up in ascending order. It is not purely over time because he has ordered them in order of volume. If it were time ordered it would go up then down and peter out. 3G is actually increasing over time. What he says is: you have got a model that is calibrated for each of these traffic volumes represented by the black bars. But of course we have discussed previously it is separately calibrated.

Then on the right hand page, p.11, he has filled in the gaps with grey bars. What he says is if the model is performing well for each of the explicitly calibrated black bars, you can also expect it to perform well for each of the grey bars because really they are just filling in gaps.

So this seems to be the origin of the notion that if the model is calibrated in this way you can just look back and say if I am at a year when the black bar represents total traffic volume I look back and there is a grey bar or an earlier black bar that represents the lower volume ex-MCT in that year, I have got something that is calibrated so I am confident it works. But we say of course you should then be applying the parameters referable to that year. So I take you to that because it seems that that was an important point for the CC to become alert to the potential of this argument which has found its way into 3.66 to 3.72 of the Final Determination.

This was the first time we really saw this was being argued. Then in our core submission (I will not take you to it) in paras.5.7, 5.10 and 5.92 answered that. 5.7 and 5.10 were our general answer to Ofcom's defence; 5.92 picked up on the point that was being made by Mr. Mantzos and answered explicitly. We relied on the reply evidence of Mr. Roche. I took you to that, Roche 2 paras.3.1/3.2 he says Mr. Mantzos presents these graphs, but of

course he is in error because the calibration is not mutually corroborative from one year to the next. So we answered it.

Then this reasoning that we see in the Final Determination appeared in the CC's provisional Determination. That was the first time we knew that the CC was minded to run with this analysis which we now say is self-contradictory. When it appeared in the provisional Determination we answered it. Mr. Turner took you to the fact that we did not have much time and we were told not to raise new arguments or evidence, but we were allowed to point out errors of reasoning. So in Section 6 of our response to the provisional Determination we set out substantially all I have been telling you in my submissions, why we think it is self-contradictory or that there is a vacuum of reasoning to support the fact that this is essentially a time shift but the implementation without time shifting is OK. We would say that as soon as it became apparent that this was a point on which the CC intended to place greater reliance than Ofcom ever had, we answered it.

We do note with some interest that the Competition Commission say in their skeleton for this hearing: you never raised it in your Notice of Appeal, and I think that is possibly why they provided such an inadequate reasoning, because they did not think they were answering a case. But our point is this was their answer to our case, and we say therefore that perhaps we can see why they gave such inadequate reasoning, because they seem to have thought they were merely upholding Ofcom's own reasoning that we had not challenged. But this was not Ofcom's reasoning, this was reasoning which they picked up from 3, elaborated and then presented in their provisional Determination, and when we responded to it they seem to have done nothing. So we say that we are certainly not debarred from raising these points by not having pleaded them in the Notice of Appeal, because they were not the issue at that stage.

I have not got time, but I had hoped to take you to later parts of Chapter 3 where the errors that I have identified, which go to how they dealt with microcells/picocells, where they endorsed this very skewed approach to whether an adjustment can be carried forward. That finds its way through the approach of rejecting our specific criticisms. But I come back to the fact that the key point is that the way in which Chapter 3 is structured, the part that I have taken you to (paras.3.66 to 3.72) is the heart of the CC's reasoning. EE proceeds on the basis that because the model is essentially apt as it stands to deal with the ex-MCT implementation, we face a very high hurdle to introduce any adjustments. We say that that is what is fundamentally wrong if you recognise that the time shift analogy or reasoning is weighty, because you have already recognised that the calibration to the real world in an

earlier year is more informative than the parameters using the later year when you are doing the ex-MCT run of the model.

One final point you may wish me to address is, if we were right, what answer should the CC have given to this Reference Question? We say that Ofcom has said the correct answer for the LRIC measure of MCT is 0.69 pence per minute in 2014. The only basis on which you can be confident that that is the correct answer, or a robust answer, is if you have confidence in the model. We say that if the CC had done their job properly they would have had no confidence in the model as it is implemented. There would, therefore, have been no reason to believe that 0.69 was the right answer. They should therefore have said that it was more likely than not that 0.69 is wrong. There is no *ex ante* reason why 0.69 is likely to be right. You can only say it is likely to be right if the model is sound. If the model is not sound 0.69 is no more likely than any other number to be right, and we say therefore that they should have said Ofcom had erred in setting it at that figure.

Mr. North reminds me that we talked a lot about cell radii yesterday. I did not get a chance to summarise that this morning. I have a short note which I would like to hand around but it does not add to what we have said before, it is just a helpful summary.

THE CHAIRMAN: That will be very helpful, we will certainly read it.

MRS. McKNIGHT: Those are my submissions, thank you.

MR. BOWSHER: There is a concern here that we are getting a lot of technical material coming in at this point elaborating a case which I thought the written submissions had been closed and I am a little concerned about how this develops. All of these matters do need to be taken back and time taken to analyse them.

THE CHAIRMAN: Yes, well we are minded to read it at least, *de bene esse*, but we hear what you say, Mr. Bowsher. Mrs. McKnight, one question which has been occurring to us both during the course of Mr. Turner's submissions yesterday and yours, is this: both of you in your own ways are emphasising the importance of getting the right answer.

MRS. McKNIGHT: By which I think I always say that is a robust answer.

THE CHAIRMAN: Yes, you used in the case of the model that it is important that the model be robust.

MRS. McKNIGHT: And produces an answer that is robust, which then becomes right because it is ----

THE CHAIRMAN: No, I quite understand your point that if you have a non-robust model then the answers which it produces are equally likely to be non-robust or unsound. What slightly concerns me is the interplay between judicial review principles and the fact that the process

that we are part of is actually very much party driven. I think it is common ground with everyone that if Ofcom had reached a decision that was fundamentally flawed, but no one appealed it, then neither the CAT nor the CC would be engaged, there would simply be a wrong decision. What engages our jurisdiction is the decision, the positive decision of a party to appeal it.

MRS. McKNIGHT: Yes.

THE CHAIRMAN: And as Mr. Turner suggested yesterday, there is certainly a good argument for saying that the CAT and the CC's jurisdiction is limited to those grounds of appeal and that were the CC for instance to find some glaring error somewhere else in Ofcom's decision that would not be a matter for it.

MRS. McKNIGHT: You are troubled by the fact that errors can be identified and be left unremedied?

THE CHAIRMAN: No, I am quite comfortable with that.

MRS. McKNIGHT: Oh good. In fact, I would like to make the point that they might not remain unremedied because we have an instance here, for example, that in the course of Vodafone's appeal it raised a point about 2G, 3G MSC servers – I do not know what they are. In evaluating the ground we have raised, Ofcom identified what they say is unrelated error, but it explained, perhaps why the result was a bit odd, so they corrected that of their own initiative. Of course, that is the proper thing for a responsible regulator to do, particularly if it is only a material matter. So, my recollection may fail me but I do believe in the previous MCT appeals something similar happened that the Competition Commission just identified off its own bat something that was wrong, and I think Ofcom of its own initiative remedied it. If it then did that in a way that we did not like I suppose that would be the subject for a separate appeal because that would be an amendment decision that would itself be appealable. But I think because we have at least one public interest party in the proceedings, Ofcom, if something happens which suggests an error arose that is not within the grounds of appeal it would be open to them on their own initiative to take action. The reason I would not say it in every case is that you could imagine a situation where the desire to do that would conflict with a direction you have given for them to dispose of a related matter. But I think talking in the abstract it is hard to take the discussion much further than that.

THE CHAIRMAN: I am always very wary of absolutely clear cut divisions, but the point I was suggesting is that the jurisdiction of the CAT, and of course the jurisdiction of the CC derives from what the CAT gives it to do, is limited – perhaps not absolutely, there may be

an exception of the sort that you, Mrs. McKnight, have helpfully articulated, but basically the jurisdiction is articulated by those grounds that the parties choose to take forward.

MRS. McKNIGHT: Yes.

THE CHAIRMAN: Of course, those are articulated in a notice of appeal which is supported by evidence, and that evidence generally has to be served at the same time as the notice of appeal.

MRS. McKNIGHT: Yes.

THE CHAIRMAN: And if parties wish to adduce something later then they are on the mercy of the Tribunal to admit it or not.

MRS. McKNIGHT: Yes, though I think it is normal to admit reply evidence, because one has to recall that it would be open to the respondent to say: "I see what you say is wrong with my decision, but I say my decision is right for the reasons I gave and the three new reasons" which buttress it, and an intervener can do the same thing ----

THE CHAIRMAN: That is also true, but my point is that the evidence accompanies the pleadings, of course the pleadings are sequential.

MRS. McKNIGHT: Yes, and of course that is not a function of the Framework Directive, that is a function of the way the CAT rules were set up under the influence of Sir Christopher Bellamy from the CFI dealing with competition cases initially.

THE CHAIRMAN: I quite see that but we are not going to re-write Sir Christopher's rules ----

MRS. McKNIGHT: I appreciate that but I just wonder what the significance is as to timing.

THE CHAIRMAN: -- we are following those. What I am groping towards is that there may be a tension between the judicial review head that you have articulated of, let us say, under the double proportionality test, assessing the robustness of the model in general terms and the fact that the CAT's jurisdiction is limited to those points of appeal that the parties choose to advance, buttressed by the evidence that the parties choose to adduce in support of those points.

MRS. McKNIGHT: Yes.

THE CHAIRMAN: And really the point I am coming towards, and this is the bit that is causing me thought, is that the CC's approach of saying – if you look at 3.132 of the FD – that Vodafone has not demonstrated that Ofcom erred, is very much conditioned upon this process whereby it is incumbent on a party to appeal and to produce the evidence to support the point that is being appealed. If the evidence is not good enough why then should the point not simply be rejected?

MRS. McKNIGHT: I understand that point and that is why, regrettably, I did rush it. It is critical to understand the nexus between our grounds of appeal and this part of the determination. We said there are various things wrong with the model generally and you could put them right, and that was reference question 3, where they made some adjustments for historic datacard market shares and things, and the model therefore just has been slightly adjusted by reference to particular corrections we made out, and that will then affect the way it runs for the total traffic volume for LRIC+ and it will affect how it runs for total traffic minus MCT for the subtraction. So that is just basic input to the model. But then we said that even if the model, with those corrections, is apt for the LRIC+ implementation you can use it for just total traffic volumes, it needs to be further adjusted to get a proper model for ex-MCT volumes, for modelling a world where there is no incoming call traffic to the modelled network, and we advanced lots of negative points, what was wrong with the model, and then we said that we cannot put it right because we do not have access to all the industry data to do a model, but we said to make good our case, or to buttress our case that the problems we have identified do really matter, we have different ways you can home in on what is likely to be a LRIC number, some of them subtractive, some completely different, just to give confidence that homing in on a higher number is more likely to be right.

We say that the way in which the CC answered that case was to take a point which Ofcom had not taken, so they did not say "We reject all your criticisms for the reasons Ofcom has given", they did not say much about why Ofcom thought the model was good enough, but they took out this little seed of a reference to time shift, and said "Looking at what Mr. Mantzos has done and Ofcom's references to time shift, we (the CC) think the model works because the calibration over time gives you verifiable reference points for lower traffic volumes, and we think that gives us confidence it is working well at all levels of traffic demand". Then by implication, though they do not actually say it because they have this rather weasel word about over time, at a specific point in time without indicating which one they are talking about, they seem to conclude that it works as the subtractive approach is implemented, that it is okay to run the model in year N for full traffic volume, to run the same model with the same parameters at the lower traffic level even though the calibration at that level suggests something different. So their reason for being confident it works was almost reached independently of our criticisms, so we then have to say: "If the reason you reject all our criticisms is because you have a different way of justifying the model we are entitled on JR grounds to say that your justification, which is your creation out of what 3

started you thinking about, is just self-contradictory. Or, if you are not really relying on time shift there are no reasons because you have not explained any reasons why you think it works, you are just asserting that it works."

So we are not suggesting that if we raise limited criticisms the CC should have gone off and done a thorough investigation of all aspects of robustness of the model. We are saying that when we said: "The model is not robust for the following 20 reasons" they came back and said: "Yes, it is" for a completely different set of reasons; "we do not need to dig into coverage and traffic, we just need to be confident that the method by which it has evolved, through calibration for successive years' traffic volumes gives us confidence it is okay and then we will not dig under the surface in the way you want us to." They reject some of our stuff just saying that it is not even right to ask the question because we are confident it is calibrated properly. So if that is their answer to our case, we must be able to challenge that on JR.

THE CHAIRMAN: Thank you very much. Miss McKnight, thank you. Mr. Turner, I noticed you have been itching to stand up.

MR. TURNER: Well I need not stand up now, it is only that in relation to the question, sir, that you have asked, which is obviously a fundamental issue, it may be efficient for me to spend literally a minute on it before everybody kicks off because it may assist them in going faster and frame the argument more quickly.

THE CHAIRMAN: That does sound sensible. I confess it is a general point that occurred to us overnight, which is why we raised it, but it would, I think, be helpful.

MR. TURNER: I am going to deal with it in very crude and general terms then. Yes, it is important to get to the right answer, because the provisions in the European Directive, and in the Statute, which I showed you at the outset, show that importance is attributed to getting to the right answer. It is not the intention with the appeal process. The appeal process is concerned with the grounds of appeal alone, it is part of my submissions, and the appeal bodies are concerned with looking into whether something has been got materially wrong, and there will be some argument about that I apprehend; that is the essential task of the appeal bodies. If something has been got materially wrong by Ofcom it should be corrected. That can be done on a remittal – it is a remedy issue. There is a difference between demonstrating error and demonstrating what the right answer should be once the error has been exposed. Demonstration of error is the right area where the CC should have been focusing on the question of the burden. We should have been demonstrating that there was a material mistake. You have seen from their intermediate conclusions that we have

done. What has happened is that it is led into an insistence that we demonstrate what the right remedy should be, which is getting ahead of themselves, demonstrating what the right remedy should be, even when from our perspective if you stand in our shoes that might be practically impossible in advance of seeing the CC's intermediate conclusions. I hope that helps, but that is how we conceptually see the map.

THE CHAIRMAN: I think we are seeing things quite similarly in terms of how I put the point to Mrs. McKnight. We will see what Mr. Bowsher says. Yes, Mr. Bowsher?

MR. BOWSHER: Sir, let me say a little about the way we tried to structure the submissions. On this side, of course, we have a number of parties who have distinctly different perspectives, and so it is not, as I think I foreshadowed at the CMC a few days ago, possible for us to share out the burden in quite the same way because on some of the questions that arise there are two parties who have different, and importantly different, perspectives. So you may find that there are two different answers on the same point, but we hope consistent.

We do rely upon the entirety of our submissions, and I will come back to the significance of those in due course. One or two little sideswipes were made as to the length of those. I would simply note that they are shorter than the combined length of the challenges we had to meet, but that actually turns into a substantive point presently. We have sought to answer the points that have been made in writing in that submission and I do not necessarily intend to refer to any particular part of the written submissions, and I know you will be not just taking those as read but reading them, if I can put it that way.

What I do propose to do, therefore, as a shorthand, and I hope sometimes to accelerate things, is to track parts of the written submissions to use it as a means of picking up references, so it may be useful to have them to one side, because I may, more or less as a throw-away line, give you a paragraph reference which would be a shorthand of saying that that is where you will get the relevant page references, and so forth. If that becomes an intolerable burden or too confusing do please tell me, but it is intended to be a way of speeding up. I am conscious that sometimes that method can actually have the opposite effect.

As with Mr. Turner's submissions, we propose to take a little time looking at the appeal structure, the context of this decision and the process overall. We will then address certain fallacies which we have already looked at in writing, but we will look at those in a little bit more detail and then we will look at certain aspects orally of the various grounds of challenge. Just so that you get a general sense of how we are dealing with matters, I will be dealing with all the grounds in one way or another except that we would anticipate that on B

and 5, the modelling issues, both I and my friend Mr. Kennelly will have things to say. I hope that is a convenient way of dealing with the matter. It may also be that Mr. Holmes on behalf of Ofcom has other matters to add. There are obviously two distinct perspectives here. There is the position of the Commission as the body that had to review the matter and, as you have already heard this morning, 3 who was more, as it were, hands-on in the detail of it.

THE CHAIRMAN: We have well in the mind the fact that you are grouped perhaps less comfortably than EE and Vodafone.

MR. BOWSHER: On Vodafone ground C, which is pursued, I will explain later what our position is on that but, broadly speaking, I leave the substantive submissions to that, if there is time, to Mr. Kennelly. I am not sure whether we will have time for that or not, but we have set out our position. I will, when we get there, explain our position in a little detail. Likewise, on issue 4, Mr. Palmer for BT, that is glide path, will be leading on that point and I do not expect that we will want to say a great deal more on that beyond what we have already said in writing. That is not to say that we are, as it were, not available to answer questions as they arise if necessary.

Let me start by just making a few very high level observations about the nature of this price control determination and this judicial review within the context of that determination before moving on to some more general structural questions. This judicial review challenge arises out of the Ofcom charge control decision which limited MTRs for all four national MCPs so that that maximum permitted for MCT reached LRIC by 1st April 2014, and the time period is important obviously. It is therefore representative of change in the previous price control set in March 2007 which was based on LRIC+, and at a very simplistic level – it may be worth just standing back for a moment thinking about what the nature of the decision is that the CC had to look at – the fundamental difference between LRIC and LRIC+ is that LRIC is intended to cover the terminating operators' direct costs of terminating a call, whereas LRIC+ is intended to make a contribution to the terminating operators' fixed and common costs – i.e. costs that are involved with running a network and so are common to termination, call origination, SMS, data, etc.

From a general economic point of view, LRIC has an appeal that it is likely to be closer to marginal cost, and in general prices that are close to marginal promote allocative efficiency and effective competition. Of course, some of that is reflected in the EU recommendation which we will touch on in due course.

Charges above LRIC+ are liable to put smaller networks at a competitive disadvantage because the cost to an operator of terminating calls on other networks will be greater than terminating calls on its own network, a difference that does not correspondence to any difference in underlying cost of termination.

Smaller networks will have a higher proportion of off-net calls. This cost disadvantage to smaller networks does not arise because the smaller networks' own costs are higher than those of larger networks or because it costs other networks to terminate calls originating on a smaller network.

It is worth just sitting back to bear in mind that there are these other factors. Almost the entirety of this hearing, of course, will be about all the reasons why LRIC is a bad thing, or LRIC might be a bad thing. There are countervailing factors. This is, as it were, ten seconds to think about the fact that there are a number of countervailing economic factors. In the given case, the appellants argue that there are particular reasons why this general proposition does not hold for MCT, and that there are factors that suggest a higher price will be closer to optimal.

The move from LRIC+ to LRIC does create winners and losers and to the extent that one must have concern for the losers, such as consumers who receive more calls than they make, and the MNOs who have more of those customers, rather than the winners, this may be a consideration in favour of LRIC+, and that factor has to be considered amongst a range of other factors.

Thus, adverse consequences that may concern or affect the challenges must be balanced against other matters. Not to take an exhaustive list, Ofcom said that LRIC+ based MTRs would have a number of consequences. Subscribers to the smaller networks could expect to pay higher average prices, as LRIC+ based MTRs would result in higher retail charges for off-net rather than for on-net calls. Such charges would raise the expected marginal cost to an MCP of making calls, and the impact of this would be greater on smaller networks, and such charges would give larger networks an advantage in competing for the valuable top-end post-pay customers who make more calls than they receive.

Enough of that, that is, as it were, the background.

The appeal structure: it has always been a principle of EU law that the enforcement of EU derived rights and obligations are to be enforced in domestic proceedings by application of national remedies and procedures. The shorthand for that has always been the principle of national procedural autonomy, and that has been set out in case law. The classic case is the *Rewe Finanz Centrale* case, which is not in the bundle but it is perhaps too classic to state it,

but there is, of course, a tension. The principle of national procedural autonomy is qualified by the need for such EU law rights to be the subject to principles of effectiveness and equivalence. These qualifying principles provide that the rules for such enforcement cannot be less favourable than those relating to similar domestic actions and cannot render it impossible in practice to exercise rights derived from EU law.

The appeal procedure here is, of course, that provided for under s.192, elaborated in s.193 and s.195, and that is as required by Article 4 of the Framework Directive. That does set out, as it were, the context for this process, but the national procedure, we say, is, itself, a full and complete implementation of EU law requirements and there is no suggestion, and has been no suggestion that it falls in any way short of those requirements, at least not any more. There have been, of course, previous discussions about how national law was to accommodate that but not in a case such as this.

It requires no supplement. The procedure is established as a national procedure and can stand on its own.

Taking Article 4.2 though – it may be worth just taking it out for a moment, authorities 1, tab 7 – it is important to have in mind – this is not in any way to downplay the importance of the Tribunal in this process as a domestic procedure, it is what it is, but when one is thinking about what is the relevance of Article 4.2 for this procedure and what is the EU content, it is important to have regard to the fact that there is a specific reason why the Tribunal is to be involved, and that is because it is necessary to ensure the UK regime remains part of a harmonised, integrated regime across Europe that there be a means of making a reference to the court in Luxembourg. At a purely technical level that is why the Tribunal has to be a link in the chain. There has to be a mechanism, as provided for by Article 4.2 that can make that reference under what is now Article 267 TFEU, it was 234.

The decision maker throughout this process is Ofcom, and one can debate, if we turn in this file to s.195, to quite what each body is intended to be. It is clear when one looks at s.195 that the decision maker is Ofcom. Although there is reference to a singular appeal body in the Directive, in this case – it may be yet again a curiosity of the UK – we have created effectively a bifurcated appeal body. To some extent, the CC and CAT are two limbs of an appeal body together. They create what has the effect of being a three level process, so that the CAT is now applying today a third level review of this same issue. It is relevant, therefore, when we look at some of the case law about the nature of review, to have that in mind. This is different from almost any other comparable regulatory regime that one can think of, in that one does have this third level Tribunal review of a regulatory judgment.

What is, of course, also important is this: contrary to what Mr. Turner said yesterday – in the transcript it is p.17, line 2 – the CC is not an investigative body. Its statutory powers and duties under this regime are different from those which it has under a number of regimes which it has to fit within. It does not have the powers to make investigations of its motion, and that is not the way in which this process works. It is an appellate body. It may be that the fact that EE have made that in that way betrays some of the errors in the case.

THE CHAIRMAN: Is there another situation where one has a single appellate function divided between two bodies?

MR. BOWSHER: I could not think of one. I was – perhaps it is a personal bias – trying to think of a regime where, as it were, for the same reason it had been necessary to split a highly technical merits review from the need to have a court that can make a reference. I simply cannot think of one anywhere in the Tribunal system.

THE CHAIRMAN: It does seem a fairly unique process, but I was simply taking slight issue with your description of it as a three-tier process. In a sense, what one has is one set of appeal documents, the notice of appeal, which go to the CAT. The CAT then has got to determine which bits are for it on the merits and which bits are for the CC on the merits, allocate those but maintain a general supervision of the CC process – for instance, admission of new evidence springs to mind as something which might crop up during the course of the CC process with then the longstop JR after the CC has reached its conclusions on the price control matters.

MR. BOWSHER: I do not want to get too bogged down as to whether or not for this purpose the CAT is the same as the Supreme Court, or whatever. The point is this: as Mr. Turner said yesterday, the Tribunal is the oversight body sitting over, but as it were connected to, the merits appeal body. So it is necessarily the third body to look at the same question, albeit in a different way. The fact that it is the third body to look at that same question is relevant, in my submission, when we come to look at the standard that is to be applied. It is unusual. I am not going to suggest it is unique; it is unusual. It is the only example where either the Commission or the Tribunal (as far as I am aware) are in that position. Therefore, one should not be surprised that both the Commission's approach to its role, and also the Tribunal's approach to reviewing the Commission, should be different in this regime from that which it is in other regimes. I will come on to make a few more detailed points about that presently, when we come on to timeliness, finality and so forth, because again that is important.

The process starts with Ofcom, and we have set out in some detail in writing the references to the way in which the process works. That really starts at para.11 of our submissions and runs on for some pages. In particular, may I take you to para.15 which highlights the fact that Ofcom has to have regard not only to s.88 (which is file 1 which we had a moment ago), s.88(1) which sets out the high level requirements and the need to ensure that the condition is appropriate to promote efficiency, sustainable competition and the greatest possible benefits for end users. That is all end users. There is a risk that one focuses sometimes too much on one particular end user, hence where I started our review of these matters.

Of course, there is also then s.47 and s.47(2) which sets out relevant matters. As my learned friend, Mr. Turner, also identified, there are ss.3 and 4 which identify other specific matters. Section 3 identifies a whole range of matters to which Ofcom must have regard and that includes, but is only one of I do not know how many factors, those on low incomes. Again, not to discount it at all, but it is only one of a large number of factors. Again, there is a danger in the context of this review that we focus a little too much, or at least lose sight of the fact when we are looking at vulnerable consumers and the importance of looking at them, that one does not take account of the tension with other duties. It is the resolution of those conflicts, or those tensions between the various matters which is, in the first instance, for Ofcom.

In our submission, the CRF does not establish any different test of review. It is the source of the substantive requirements, but having been correctly implemented in the UK it really does not add very much more, unless and until there comes a point at which the interpretation of the law ends up being contrary to EU law in some way, and there is a misunderstanding as to what, just looking at random, "encouraging investment" means or whatever, or there is some other point that arises. In looking at Ofcom's approach we have set out some of the particularities of its position in para.19, and then in para.54 of our submission. That is where we note the points that I have just made, and the various references.

May I pick up a few points while we are thinking about the high level regime. Some reference has been made to the obligation for written reasons. In our submission, the obligation for written reasons in the Directive is not particularly linked to the requirement for a review. Partly it is just a consequence of both domestic and EU law that reasons have to be given, but also it is a necessary part of the process that leads to a reference. If you

then have a reference but you do not have to have a reasoned decision, it does not really add much more to the overall --

THE CHAIRMAN: It is quite difficult to review an unreasoned decision.

MR. BOWSHER: Exactly. All I am saying, there is nothing more to be added to it, just the fact that it says there have to be reasons. There is no special magic about the fact that a decision has to be reasoned. Obviously it is. I am just concerned that some sort of weight has been put on those words, or suggested that there might be some special reason why the reasons have to be of some particular type or whatever. It is just the standard obligation to give reasons. There is nothing special about it.

When we look at the case law it is clear, in our submission, that there is no particular reason why the EU Standard of Review in cases such as this need be any significantly more onerous than a domestic standard. Again, we refer to that in para.32 of our submission, particularly where you are dealing with a complex, technical, multi-factored decision of a primary decision maker one would expect a relatively broad matter of appreciation and a light intensity of review. I will come on to make that good by reference to some of those cases.

THE CHAIRMAN: That would be helpful, but could you help us on this. Article 4.2 does say that the decision shall be subject to review, and that must mean review according to European standards rather than UK standards, so is your submission to us that we apply a European standard of judicial review, it is just that that standard is not that much different from what would be an English standard of review?

MR. BOWSHER: Exactly so. We have set that out in our skeleton at para.59.5. I will come on to the cases.

THE CHAIRMAN: So, for instance, if we were debating whether to apply a *Wednesbury* test or Mrs. McKnight's double proportionality test, we ought to be favouring double proportionality over *Wednesbury*?

MR. BOWSHER: Can I come on to double proportionality when we come to the cases? What our position is is that it is in fact a domestic review. The obligation to establish the body under 4.2 has been fulfilled. That is why I started by saying that the requirements of Article 4 have been fulfilled by establishing this process. So there is no need for any EU overlay. But if I am wrong on that, the EU component does not add anything materially to the analysis that the Tribunal has to deal with. It may be that it is not therefore a matter that the Tribunal needs to grapple with in any great detail.

THE CHAIRMAN: It may be. I just want to be clear where everyone is coming from. When one looks at s.193(7) where it says that applying the principles applicable on an application for judicial review, it is pretty clear from the cases that there is a European line and an English line. So your primary position is that we apply English principles for judicial review, but if you are wrong on that, we apply European principles and it makes no difference.

MR. BOWSHER: Yes, as modulated through the case law, and I will come on to some of those case in a moment.

We say that when one is looking at the intensity of review (and I will come on to the details of this) there are a number of factors. There is the nature of this body, the nature of the question, and the fact that this is judicial review of what is already an appellate merits review. That is my third level point, however one wants to put that. As I say, we have dealt with that in a little more detail in para.59 of our submission.

It is significant, when looking at that, to note that of course it is not just a question about the full and satisfactory way. It is not just that the CC has been established as an appeal body pursuant to the Directive and as an implementation of the Directive that I reach that conclusion, but it is also because the proportionality judgment is a judgment by Ofcom which we assess ourselves. That is the way the obligations work under the statute. So it is, as it were, a second reason why the way to look at this is us as the appellate body judging what Ofcom has done and its obligations. Again, it is a domestic standard that applies to our appeal, and therefore a domestic standard applies to the Tribunal's review.

I turn to develop that by reference to the cases. You can put file 1 to one side. Does the Tribunal want to have a break this morning? I am in your hands.

THE CHAIRMAN: Yes, why do we not run for another ten minutes and then rise.

MR. BOWSHER: Fine. There are a few authorities I want to look at in volume 4. It is EU and UK authorities together, so for this purpose I am skipping over a little bit the niceties of my UK domestic ones. I am just going to embrace the whole totality of the two regimes, as it were. It seems easier to do it that way. Can I take you to tab 64 *Fedesa*. In a sense, I do not need to pull this out because it is one of the classic cases which is referred to in all of the other cases but occasionally it is useful just to remind oneself. This was a case that was an assessment of issues arising under the implementation of agricultural law, all to do with use of various hormone substances and so forth. All these cases, of course, can be distinguished and compared with our situation. One irrelevant distinction is that this is a matter to do with animal health and it is to do with a legislative implementation. That is a material distinction, but the proposition at para.14 is generally taken as being of general

application. So para.13 states the principle of proportionality. Paragraph 14 qualifies that by saying:

> "However, with regard to judicial review of compliance with those conditions [conditions of proportionality] it must be stated that in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by Articles 40 and 43 of the Treaty. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue."

We will get there, but one can essentially say that there are other bodies with similar political policies to look at, and if there are political concerns, if there are policy concerns, Ofcom is one of those bodies that, in a sense, is applying a whole range of policy matters, of course expressed at some length in the 2003 Act. I should have made the point while we were there, but if one reads them in detail it would be hard to be more political than the content of s.3. It struck me that they are nearly all inherently political choices.

The next case to look at is *Astipesca*. This is a fisheries case, and it is about financial aid, but it develops the point at para.78, when looking at the questions of infringement of the principle of proportionality, and this is all to do with reductions in aid pursuant to various Community measures. 78:

> "… the Court recalls that it is settled case-law that the principle of proportionality enshrined in [the Treaty] requires that measures adopted by Community institutions must not exceed what is appropriate and necessary for attaining the objective pursued …"

and then a reference is given:

> "79. It should be added that, where the evaluation of a complex economic situation is involved, which is the case with respect to fisheries policy, the Community institutions enjoy a wide measure of discretion. In reviewing the legality of the exercise of such discretion, the Court must confine itself to examining whether that exercise discloses manifest error or constitutes misuse of powers or a clear disregard of the limits of its discretion on the part of that institution."

So to the extent that one is looking at an EU measure of proportionality we would say that Ofcom, and also the CC are in that position; they are exactly that body which is evaluating a

complex economic situation and taking into account a range of policy matters expressed in legislation.

If one then turns to tab 52, I am afraid that is in file 3, and this is the oft cited decision of *Mabanaft*, and two paragraphs to have regard to. First, para. 32, which I do not think was read to you, and I would ask you to have particular regard to para. 32 of *Mabanaft*.

> "However, in my judgment the obligation imposed by the first sentence …"

– you have already had this introduced to you but this is the oil stocks case. If I can start from the third line:

> "It follows under Community law that the court must allow the Secretary of State a large measure of discretion in choosing an appropriate method. In reviewing the legality of the exercise of such discretion, the court must limit itself to examining whether the decision of the Secretary of State discloses a manifest error or constitutes the misuse of powers or there has been a clear disregard of the limits of his discretion. This is because under Community law, where the decision maker in the member state is required to evaluate a complex economic situation – and the same would apply to a complex technical situation as here – the intensity of the review is low. The decision maker will enjoy a large measure of discretion and the court will limit itself to asking where the assessment is manifestly unreasonable. The Court will not substitute its judgment for that of the decision maker."

Then in para. 42, reiterating the point that in the context of proportionality, and para. 47 refers to proportionality, and then 48:

> "In any assessment of proportionality in a technical field, the court must allow a proper margin of discretion to the decision maker, because of the complexity of the assessment he is called upon to make in this field. It is a specific function of government to take decisions such as these for ensuring the supply of essential products in the situation of an emergency. The court therefore exercises restraint in reviewing any decision of this kind and requires it to be shown that the new regime was a manifestly disproportionate means of achieving the end …"

If we then look at tab 53, which is the next tab, we see one of many H3G decisions – I call it myself the 'CAT 11 decision', I know other people have different shorthand for these decisions and it can be very confusing. I will be numerical and call it the 'CAT 11 decision', simply from its number. This was in a price control case itself before this Tribunal, and therefore is useful for 'bringing us home' as it were. It is in the section: "The

relevant Judicial Review Principles" on p.8, and in para. 23 there is a reference to "various interveners" seeking to urge upon the Tribunal a more intense level of scrutiny. Mr. Turner arguing that domestic provisions derive from the CRF so a "tighter" model of JR applies. Then the Tribunal says:

> "We are not convinced either that the 'tighter' test is engaged here or that in the circumstances of this case, the European model calls for any greater degree of scrutiny than would apply under domestic law. On the same day as our hearing on 24 March, the Court of Appeal handed down its decision in *Mabanaft*. In that case it was common ground that the Secretary of State's decision was subject to judicial scrutiny in accordance with the judicial review principles laid down by Community law and that those principles were in general stricter than the domestic law. Nonetheless the court allowed the Secretary of State 'a large measure of discretion' in deciding the appropriate method for implementing the Community law obligation at issue in that appeal. In any event, having regard to our findings set out below, this is not a case where the considerations are so finely balanced that it would make any difference to the final result."

My Junior, Mr. Gibson, makes the very good point that we read the first clause that I started with as being the point I was just making that the Tribunal there is, as it were, not expressing a view either way as to whether or not EU standard applies or not, but again taking the pragmatic approach I have taken is to say: "There we are, nonetheless, assuming it does."

I am conscious you said ten minutes, is that a convenient moment?

THE CHAIRMAN: That would be, Mr. Bowsher, thank you very much. We will rise for five minutes.

(Short break)

MR. BOWSHER: Sir, while we are in the authorities bundles, can we turn to *Tesco* at tab 51. This, of course, is a case concerning the CC but it is a different regime. It is a case concerning the CC as primary decision maker and fact finder. Obviously the approach of the Tribunal in those circumstances will be different, but actually, when we look at the authorities, I would suggest not markedly different. Can we go to para.139, where the double proportionality approach is coined. There is a risk with the label, the word "double" is a misnomer in a sense. It is proportionality that may apply twice and with variable intensity, but not twice as much intensity. There is sometimes perhaps an over-glib way of trying to sell the concept of double proportionality that it is twice as much proportionality,

whatever that would mean. It is simply the self-evident point that more important issues or more intrusive issues need to be examined. There is nothing in here that departs from the fact that that has to be balanced against a margin of appreciation. In other words, even the CC in this regime has its broad margin of appreciation. It is simply that proportionality has to be looked at at a number of stages and in a different way depending on the nature of the issue. You can see that more clearly by looking at the *BAA* case at tab 63 ----

THE CHAIRMAN: And moving bundles.

MR. BOWSHER: Yes, apologies for that. Can we go to para.20 on p.10. This is looking at a similar provision:

> "Section 179(4) of the Act provides that on an application to it for review of a decision of the CC the Tribunal 'shall apply the same principles as would be applied by a court on an application for judicial review'."

It then sets out the correct approach. It summarises the position of *Fidesa* in sub.(2), (3), the position of the decision maker needing to put itself in a position to decide the relevant statutory questions, but of course, necessarily the way in which that obligation works must depend on what the function is of the decision maker, and here we are not an investigator, our approach to that information gathering process must necessarily be limited, and I will come on to that.

Then there is the reference to the domestic rationality test, and then in 25 there is the reference to Convention rights and the consideration as to whether or not there is proportionality under Convention rights, and then there is a reference also to EU law rights, whether or not that, in fact, adds anything very much. Without reading the whole paragraphs out, where one gets to, in our submission, is that the Tribunal considers that, in fact, it does not add very much in a case such as this.

THE CHAIRMAN: Where does it say that, Mr. Bowsher?

MR. BOWSHER: At the top of p.14, although one may need to run into it from the bottom of p.13:

> "One may compare, in this regard, the similar standard of review of assessments of expert bodies in proportionality analysis under EU law, where a court will only check to see than act taken by such a body 'is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion.'"

That is *Upjohn*.

> "Actually, in the present context, the standard of review appropriate under [the relevant ECHR provision and the HRA] is essentially equivalent to that given by the ordinary domestic standard of rationality. However, we also accept Mr. Beard's submission that even if the standards required … regarding its investigations and evidential basis for its decisions were more stringent than under the usual test of rationality, the CC would plainly have met those more stringent standards as well."

That is really a throw-away. The point is that the Convention obligations which are clearly being regarded by Mr. Justice Sales there, or by the Tribunal, there as equivalent, he did not regard as adding anything very much, if anything.

That is consistent with recent authority from the Court of Appeal in a case called *Sinclair Collis*, which we have at tab 61. This is a slightly more difficult authority, firstly, because it is because a public health case, and secondly, because it is a case in which the court was split two/one, and the majority themselves had a little debate amongst themselves. I am at a disadvantage, unlike some in this room, of not being involved in the case, so I probably do not understand it in sufficient depth. The short point, if I can give you some references – the headnote, paragraphs 3, 148, 153, 155 - this of course is a public health case, it concerns proportionality of measures to remove tobacco vending machines. The short summary of the proposition is in the headnote at held (3):

> "That where a measure represented a *prima facie* derogation from article 34EU, to be valid it had to be shown that the measure was proportionate, in other words that it was suitable and necessary for the purpose of achieving its legitimate aim and that, where there was a choice of measures for achieving the legitimate aim, the least intrusive means of interfering with a fundamental freedom had been employed; and that, when determining whether a decision was proportionate, the breadth of the margin of appreciation to be accorded to the decision-maker would depend on the circumstances of the case, in particular the identity of the decision-maker and the subject matter of the decision, a broad margin of appreciation being accorded where the subject matter was the protection of public health."

Reading across from the decisions we have just seen from this Tribunal, I would submit that the Tribunal is in a comparable, although obviously different, position. The complexity and policy nature of the decisions which this Tribunal is supervising is comparable and similar factors apply.

Lady Justice Arden at para.148 at p.357 analyses the correct standard in some way and the relevance of the identity of the decision maker. I do not propose to read it all. At para.153 she deals with *Mabanaft*, and the question of "manifestly inappropriate". Then 155:

> "The intensity of review of the decision TVMs should be no different from what would have been the position if the exercise had been wholly carried out by Parliament. It is not, in my judgment, an objection that decisions are being tested by a national court by a standard of review that is at the lower end of the scale, or by a standard of review that looks like *Wednesbury* unreasonableness, if that is what European Union law itself requires."

We would suggest that that indicates that when it is dealing with a decision and a decision maker like this, there is indeed appellate authority to show that there is a close comparison between domestic and EU standards.

Similar observations are made by the Master of the Rolls. If I can give you references, I think it is 200, 201 and 255 of his judgment. This case is more fully elaborated by Mr. Kennelly in his submissions at para.49. Perhaps it is useful just to take that note in order to save time here. I am asked to read para.200:

> "The breadth of the margin of appreciation in relation to any decision thus depends on the circumstances of the case and, in particular, on the identity of the decision-maker, the nature of the decision, the reasons for the decision and the effect of the decision. Further, because the extent of the breadth cannot be expressed in arithmetical terms, it is not easy to describe in words which have the same meaning to everybody, the precise test to be applied to determine whether, in a particular case, a decision is outside the margin. It is therefore unsurprising that in different judgments, the same expression is sometimes used to describe different things, and that sometimes different expressions are used to mean the same thing."

While I am here looking at cases on the correct approach can I look also at the decision of *E*, which you, sir, referred us to last night. I did have circulated copies of the QB report, simply because I was hoping to save time by looking at the headnote.

THE CHAIRMAN: We will just check whether it is in bundle 5. Yes, it is bundle 5, tab 74.

MR. BOWSHER: I was simply going to take you to the headnote, and you will be aware that this, of course, is an asylum claim, and I probably do not need to explain it in too much detail, your having drawn it to our attention. It is all to do with a case concerning the way

in which an error of fact that arisen in a procedure may give rise to a challengeable mistake of fact. The headnote says:

> "The mistake of fact giving rise to unfairness was a separate head of challenge on an appeal on a point of law, at least in statutory contexts … where the parties shared an interest in co-operating to achieve the correct result; that in order for a court to make a finding of such unfairness it would have to be shown that the Tribunal whose decision was under appeal had made a mistake as to an established fact which was uncontentious and objectively verifiable, including a mistake as to the availability of evidence on a particular matter, that the appellant or his advisers had not been responsible for the mistake, and that the mistake had made a material, although not necessarily decisive, part in the Tribunal's reasoning; and that, accordingly, if the new evidence were admitted the court would be entitled to consider whether the Tribunal had made a mistake of fact giving rise to unfairness so as to amount to an error of law."

That, albeit that it is in a very different area and gives rise to a number of matters which I will come on to about the procedure, (while we are looking at the standard of review) makes clear even where we are dealing with an issue as to an error of established fact, i.e. fact in the past, the threshold is very high, the standard of review is high. When we come on to it, a number of factors distinguish this case from a case like that.

Firstly, we are dealing, in this case almost entirely (and perhaps entirely, but I have not quite worked it out) with predictive errors, not errors about facts in the past. That may not be 100 per cent true, but it is broadly true. This is therefore errors not just about predicting primary facts but also predicting secondary facts which are inferred from the primary facts. Those are all the sorts of judgments which one gives to a regulator with a margin of appreciation to get on and try to work out for his or herself.

THE CHAIRMAN: They are also highly contentious. That is why I was intrigued by (ii) in para.63 because if those facts are established in the sense that attention has been drawn to the point if the correct position can be shown by objective and uncontentious evidence, it struck me as really quite tight, even on a judicial review of the facts basis.

MR. BOWSHER: Perhaps I am reading it differently. I read that, which reflects what is said in the head note, as meaning that the error was an error regarding a concrete fact which could be established, as it were, as opposed to an error of fact which could not be established.

THE CHAIRMAN: Yes, but one wonders what the position would be if the parties before the Tribunal are arguing different versions of fact. That is what I am intrigued by.

MR. BOWSHER: Then it is not uncontentious evidence and we are in a different area.

THE CHAIRMAN: The point I am making is if you take, for instance, the predictions here, they are all contentious.

MR. BOWSHER: Yes, and that is why you have a primary decision maker that has to resolve those contentious decisions. Whereas a reviewing court is much more likely to interfere in a decision where a primary decision maker has apparently ignored an obvious fact which really cannot be seriously contested, that must be different where Ofcom and then the CC are having to resolve matters which the parties cannot agree amongst themselves, and where the parties (and this is where the procedural matters referred to in the head note come in, the involvement of the challenges in the process) have all had their opportunity to make their cases. I will come to that in due course. This case is very important for setting the context for what I want to say about ground one and how EE is the author of its own misfortune on ground one and is really trying to blame us for its own failures properly to manage its case. I will come on to make that good probably after lunch.

Taking the first part of that, in so far as one is looking at a factual assessment, a complex factual assessment involving predictive facts - and I will just add the predictive element from EE as that goes into that assessment as to what is the type of review.

I do not propose to take up time to develop in more detail (unless time weighs heavily upon us) why I make the point about Article 4.2, as it were, relieves us of the EU obligation altogether. It will take a little while and it may not be necessary. If we get time I will come back to it, but it takes a few pages and a bit of tricky work, I think.

In our submission, it is in fact, when one looks at the authorities that we just looked at, clear that the EU standard adds little or nothing to the review that this Tribunal has to give in any event, given the nature of the CC's activity in this case, and the process by which we reached here. That may be the easy place to stop, and we saw that is, in a sense, where the Tribunal stopped in the H3G CAT 11.

Standing back, one of the problems with proportionality in any event is that it is easier conceptually to go through the hoops of proportionality when one is dealing with a more linear problem. That is probably not the correct word. By which I mean, take *Sinclair Collis*, do you ban tobacco vending machines or not? I am sure there are obviously other options, but there is a binary element to that: there is a public health element, and that people want to sell tobacco through vending machines. You can fairly readily identify the competing interests, and who and what is least intrusive for one or other group is fairly

readily balanced. There is the full operation of proportionality and at least one can understand how that test works.

In my submission, that full sort of *Fedesa* type formula really starts to rather break down and add little more than rationality and was this a rational pursuit of the objective when you get into a multi-factored dispute? Every measure is intrusive for someone and has benefits and positives and negatives for all of these various groups, a very large number of which are specifically identified in the statute as people who have to be had regard to. Even if there were only one objective, different groups would be affected differently (more or less restrictively) and there is no prescribed algorithm determining how that balance is to be effected. Even if it were, it really does not add much more than rationality. That, of course, leaves to one side the fact that we have to work in the extra level that on top of the interests of the interests of the people who are specifically identified by group or category in the statute, there is the Recommendation to which Ofcom has to pay utmost regard, and that has its own requirements directly relevant to LRIC and LRIC+.

THE CHAIRMAN: I can, of course, see that multi-faceted problems present an additional difficulty. But, in a sense, when you are reviewing that sort of problem is not a three stage process appropriate in that first of all, one lists the relevant factors and discounts the irrelevant factors; then one reaches a view as to what each of those factors entails in terms of consequences; and then, when they are pointing in different directions, at that point you have got the weighing process in order to work out what the final answer is?

MR. BOWSHER: Yes. I suppose we are agreeing. Once one gets to that point (and it may not always be the case) certainly if you have equivalent benefits and burdens they are likely to cancel each other and simply a choice has to be made. It is not really which is least intrusive; there is a burden that is going to fall somewhere. The music is going to stop and it has to lie somewhere, and someone has to decide where that falls, having regard to all of the objectives. It becomes more about the pursuit of the objectives and the regulatory judgment about that because what is least intrusive for one person is not for someone else, and you make a different choice and you just move the parcel around to someone else. I am sorry, that is a very facile way of putting it. It is definitely put more elegantly by Lightman J. (I am reminded) in the *Cellcom* case which we have at tab 27 file 2, the top of p.13. This is a telecoms case, although under the old 1984 Act. I am not sure we need to get too bogged down in the facts. Paragraph 26:

> "It is appropriate to state briefly the relevant principles on which the court is to act in judicial review proceedings when a challenge is made to a decision by a

> person on whom decision-making powers are conferred by the legislature. Where the Act has conferred the decision-making function on the Director, it is for him, and him alone, to consider the economic arguments, weigh the compelling considerations and arrive at a judgment ... The court must be astute to avoid the danger of substituting its view for the decision-maker and of contradicting (as in this case) a conscientious decision-maker acting in good faith with knowledge of all the facts."

That has a sort of echo back in *Sinclair Collis* at para.126 which is referred to in our submission.

Drawing that together, then, we say that the review here is: are we pursuing the objectives; and have we fallen foul of a manifest inappropriateness test? We say that is a low intensity test, even where the CC is the primary decision-taker (see *BAA* case), and this point is developed in more detail in H3G's submissions at para.46. *A fortiori*, while we are dealing here with CC it is not the primary decision-taker but an appellate body.

THE CHAIRMAN: Just to be clear, an appellate body tasked with an on the merits review.

MR. BOWSHER: Yes.

THE CHAIRMAN: To that extent the cases that you are citing to us on judicial review are, of course, incredibly helpful in terms of our function, which is explicitly judicial review, but they are not, perhaps by analogy of reasoning, of assistance in determining what the CC's task is when determining appeals of price control matters, or when determining questions of price control matters referred to it.

MR. BOWSHER: Sorry, we are at cross purposes. We are the body that has to conduct that appeal, but the review standard is, is its conduct manifestly inappropriate, in our submission?

THE CHAIRMAN: I am wondering whether you are not eliding the functions of the two tiers on the process to take your line. We operate on judicial review, you operate on the merits.

MR. BOWSHER: Yes, but I am looking at the standard that the Tribunal applies to us, the standard of your judgment of our factual assessments we would say once you strip it all away really comes down to: was our judgment of those factual matters manifestly inappropriate.

THE CHAIRMAN: Good, I was getting a little troubled.

MR. BOWSHER: Sorry, I think we were at cross purposes, my fault entirely. All I was saying is that is particularly true because of the nature of this process, so that is the *a fortiori* point because of the way we are working. We have conducted an appellate review, and in a sense

unless what we have done demonstrably fails in some really high level domestic JR sense, or is a manifestly inappropriate application of assessment of fact or whatever, the margin of appreciation should permit our determination to stand.

There is some material on impact assessment, that has not been developed orally but I would just note that has been dealt with I think in H3G's submissions and there are some quite useful references there which I will come back and give you if that is relevant.

The CC's approach is summarised, firstly, the approach it was planning to take is in the final determination ----

THE CHAIRMAN: It is A vol.1 tab 2, I think.

MR. BOWSHER: Yes. The approach taken by the Commission is set out in its final determination in the section on p.2-8 (internal numbering). It is explained, and again I do not think it is necessary to read it all out. 2.45 is probably the key paragraph where we set out the approach that we are taking, and I will come on to this presently with a more detailed consideration of the standard of review. The paragraph which we say has been very substantially misapplied and misunderstood by the challengers in their claim is 2.59, and we will come back to this when I deal with the real risk argument.

This is really the Commission seeking to encapsulate the Tribunal's own Judgment in the recent *Talk Talk* case, which I will come back to later, but it is convenient to look at it here.

What the Commission is saying is:

> "the CC agrees that it must determine whether Ofcom made the 'right' choice and that the appeal should succeed if the appellant can demonstrate that Ofcom applied a methodology which was so unsound …"

- and, of course, that "so" is rather important, it comes from the Judgment itself:

> "… so unsound as to create a real risk that the decision was wrong."

You want the analysis as to how we reach that conclusion and it starts at para. 1.28 of the Determination, and that is described in some detail there. We will come back to that because I have to look at the real risk issue in a little bit more detail.

The Commission's role we describe in our submissions from para. 21, and we describe in paras. 27 and 28 the approach that we are taking, or seek to take, in this appeal, and the principles are then highlighted in para.28. The decision is being appealed only by reference to the grounds of appeal set out in the notice of appeal. It is conducted on the merits, and so on and so forth. (4) - we do not duplicate or usurp the functions of the regulator, and we are not an investigative body, and that refers back to T-Mobile and the Court of Appeal, and no quotation there. We are not conducting a hearing *de novo*. Then, importantly, given the

nature of this review it is not for us to replace the judgment of the regulator, but that there may be no single right answer.

Then (8), and this refers to what we were just saying, exceptionally it may be necessary to look at the process by which the decision was taken.

What is clear, and we have seen that from the decisions we have already looked at, in particular *E*, that for any appeal to succeed, an error established must be of sufficient importance to vitiate the decision taken by Ofcom, and the whole question of materiality again is a matter which we go into in rather more detail from 77 to 87 in our submissions, and then again later on.

It must be shown to have had a material impact, and again H3G develop that in a little bit more detail.

What then is the nature of this procedure and how has that informed the way in which one should deal with this process? This is a procedure which demands a final and timely resolution of the matters before the Tribunal. There are two authorities which we can usefully look to for that. There is one authority which did not reach the bundle but I hope was circulated overnight, another H3G decision – it is one of the many H3G decisions.

THE CHAIRMAN: I think it has found its way into bundle 5. 2008 CAT 5.

MR. BOWSHER: Indeed, and this is a Ruling in the context of the previous MCT process. There is some useful discussion here about the process the Commission should undertake, and I think we discussed this at the earliest CMC in this matter. Paragraph 14:

> "The Competition Commission was understandably cautious about committing itself to producing an alternative price control given that matters have not yet been referred, and it does not have a clear idea about how complex the issues raised are going to be. Mr. Sharpe, on behalf of the Commission, resisted any formulation of the questions which would put what he described as 'undue pressure' on it to come up with substitute figures."

And so on. Then:

> "He further accepted that as part and parcel of that exercise, if it rejects the methodology used by Ofcom in any respect it will need to specify an alternative methodology which Ofcom can follow, without having to exercise more than minimal discretion. Certainly, Mr. Sharpe sought to emphasise, for the benefit of Ofcom and the appellants that the Competition Commission aspired to prescribing a methodology which would enable Ofcom to arrive at answers relatively quickly.

Then at 15:

"The Tribunal accepts the arguments put forward by BT and Ofcom, that the aim of the statutory provisions is that the disposal of the appeal, incorporating the determination of the price control matters by the Competition Commission should result in as high a degree of finality as possible having regard to the grounds of appeal and the nature of the Commission's findings. The Tribunal encourages the Commission to conduct its investigation in such a manner and to express its determination in such terms as to make clear what directions the Tribunal should give in respect of the specified price control matters when remitting the decision to Ofcom. It is desirable that those directions and the disposal of the appeal should in effect settle the question of what the price control should be for the period covered by the decision. The Competition Commission should carry out their investigation with that goal firmly in mind."

That, of course, is relevant when we are considering some of the discussions that you were having with Mr. Turner yesterday, as to how one might try and deal with errors. The point is this is a process that has to run promptly to a timely result, otherwise it becomes denuded of its own value. The price control period is of a finite length, there is an established procedure which I will come on to, and that procedure exists in a certain way so that it can reach a final result within a particular time.

There is a little more on this topic if we look at tab 43 in the authorities bundle, which I think is going to be vol.2. This is a different price control matter. The point here was that H3G were trying to put in further evidence and you can see the context of that from para.113, objections to the submission of material and so on and so forth. The relevant passage is at para. 115:

"Mr. Sharpe, appearing for the Competition Commission, set out very fairly how the Competition Commission wishes to proceed:

'… we do not want, we do not welcome or invite a ceaseless barrage of new paper at irregular intervals. The Commission is at the stage now when it has begun to isolate the issues which it thinks are important and in due course will be contacting the parties for specific targeted pieces of evidence in relation to the issues that arise, and that is how we wish to proceed. That does not mean to say, and let me emphasise this, if something of importance or relevance does emerge, and the parties are terribly keen to let us know about it, we are not going to say: 'Inadmissible, we do not want to know'. What we would like to do is for them to make us aware of that evidence and

> we will consider whether we wish to seek it, and use it. We think that is the appropriate way forward and respectfully we would wish you to endorse that'.
>
> The Tribunal does certainly endorse that as a sensible way forward. Therefore we do not grant permission to H3G to adduce the W1K Report or the other documents sought to be added after 7 March. The Competition Commission is now aware of the existence of those documents and, if it wants to, it can ask the parties for submissions on all or any of the matters discussed. From now on, if H3G or any other party comes across any further document it considers relevant to its case, it should draw the document to the Competition Commission's attention. The other parties should not respond or comment on the new document unless or until the Competition Commission asks them to do so. There is no need, therefore, for further applications to adduce evidence in order to alert the Competition Commission to such publicly available material."

The requirement for timeliness in this procedure is, of course, not just a gentle aspiration it is required by Statute, it is actually embedded in the Competition Act Appeals Regulations where the four month period is expressly provided for.

In order to give flesh to that, the CC has published its own price control appeals guidelines, which were known to all the parties, and you will be familiar with those, but they set out a series of procedures, and I perhaps do not need to turn them up, but that sets out a procedure by which parties know what is required at each stage, all the evidence, transcripts and meetings, etc are generally available and each can read the issues raised with others, but it is a procedure designed to avoid a free for all in effect, and bring each matter to a rapid conclusion. The status of the provisional determination is set out in that very clearly.

When we come on to it, what is clear is that it provides the full opportunity in the course of the whole proceeding – the appeal proceeding– for each party to bring forward the evidence for the propositions it wishes to support.

There is no reason why a party in this proceeding, any more than in any other sort of dispute, should say: "Yes, I knew that was the point, I wanted to promote it but I did not promote it in its entirety because I thought maybe we would avoid it on an interim position". You have to put forward your whole case. That is a pretty standard proposition of civil procedure, but it applies *a fortiori* in this process where the process has got a history back with the Regulator, the issues are known, the issues are canvassed and identified in the appeal, and parties should be expected to understand what it is they are seeking to achieve

and the material that they want to put forward to try and make good those propositions. Rather than deal with that in the abstract, I will come on to it when I deal with ground 1. What we say is that the flaw with EE's position is that really what it is today complaining of is a failure to put forward its whole case when it should have done.

It is not a process – and one can imagine how you could run an iterative process in a complicated situation such as this – this is evidently not that iterative process. There is one iterative machine, as it were, and that is the remedies, the process of remission back. It is not explicitly limited, of course, to remedies, but that is the point at which one would expect any remission to take place.

In terms of remitting a request for any matter to be remitted back to us, the Commission, I do not believe the statute itself makes any specific provision. I suppose one could issue a further reference question if that were thought to be necessary, and there is no particular reason why one could not do that, but if there were an issue for which that seemed to be appropriate, that would be the route, but otherwise it would be a means of referring back.

When looking, therefore, at the Tribunal's role in this overall, it sits at the top of a multi-layered process, and, as we have said in our submissions at para.36, it is the third level. The factors that we have identified from appellate authority, House of Lords and the High Court of Australia, are relevant. It is not appropriate for a challenger simply to be given a further bite of the cherry on a factual assessment simply because there is another opportunity to do so. This is a high level review and it should not be turned into a third go at the same factual assessment.

I would invite the Tribunal particularly to look at the Australian High Court decision, the judgment of Mr. Justice Dean, which we have referred to, and the paragraphs that we refer to.

It is these misunderstandings and the misstatement of the correct structures and procedures which we say certainly provide foundational fallacies on which these review challenges are built. The CC is not obliged to investigate matters of its own motion. It is axiomatic that an appeal body is required to inform itself of that which was before the decision maker appealed against. That is the limit of the, as it were, the *Tameside* obligation which was referred to when one is talking about an appeal. An appeal body does not go out and look to see what other facts there might have been. That must be clear as an axiom of an appeal process.

The *E* decision is quite useful also as illustrating the limits on bringing forward fresh factual material in the context of an ongoing regulatory process. It actually cites *Ladd v. Marshall*

as a useful principle as to the constraint on the ability to bring forward further factual material in an ongoing process. While perhaps not directly applicable to this process it is a useful analogy. The idea that one can keep coming back introducing further factual material is not normally a part of an appeal process, and the extent to which the procedures in this process permit it, that is an unusual departure from the norm.

THE CHAIRMAN: True though the Court of Appeal has recognised, not necessarily in price control cases but in the Tribunal's procedural rules, that it is not a *Ladd v. Marshall* test but a rather wide test, the admission of new evidence.

MR. BOWSHER: Absolutely, and you are quite right. It was my shorthand mistake. It is not directly applicable, but it is a shorthand for that is the right approach, and the procedures exist to specify what, in fact, is required.

This leads on to a number of the points being made by the challengers blurring some of the important distinctions, and in particular when we come on to the blurring of decision making, appeal and review, if I can take you to para.71 of our submissions. This addresses points that have been put in two ways. There was a suggestion yesterday – I think Mr. Turner suggested that there should not be any slant against the challengers. I am not quite sure what he was saying, whether he saying that was a sort of *ad hominem* we should not feel bad about the challengers because of who they are or whether there is a procedural structural slant. The fact is that this is an appeal process and an appellant must bring forward its case. These criticisms that we have been dealing with, matters on a burden of proof, that that is somehow a matter of criticism, really misunderstand both the nature of the appeal process and also, in our submission, the nature of the way in which one brings cases and the proper approach to proof. There is a distinction between deciding something because an appellant or a claimant has not come up to proof, it simply has not produced the material that is necessary to prove its case, and those cases which the Court of Appeal often gets exercised by where a judge, as it were, defaults and says, "I simply cannot work it out, I am simply going to decide this on the basis of a burden of proof evaluation". We referred to *Stephens v. Cannon* as a specific example of that which goes to a number of those examples where the Court of Appeal has had to try and unpick those limited circumstances where it is appropriate to deal with a burden of proof analysis. That is not what we are dealing with here. What has happened here is that the challenger has to bring forward its case and we, the CC, has to do its best on the basis of the material before it. That is what it has done at great length, and we will come on to some of the specifics of it.

It is not defaulting and deciding simply on the question of burden of proof by saying, "Well, I have listened to 3, Ofcom, EE, Vodafone, and I have considered all of those arguments, I do not think Vodafone's argument stacks up", that is not burden of proof, that is just making a choice as best you can of the material before you. Of course, it might be that in some circumstances the result of that debate is a synthesis of all four, and it may be that it is a rejection of some and not of others. That is what you do, but I may be labouring the point. It also mistakes the fact that it is fundamental that an appellate body will only reverse a primary decision maker on an issue of fact when it is convinced that the decision maker's view is wrong, and that is the point we make by reference to *Smith New Court* in the House of Lords at para.73 of our submissions.

There is a burden on an appellant to convince the appellate body that the primary decision maker's view was wrong. That is not an unfair burden. That is the way appeals work. An appeal is not a request to have the matter looked at again. It is an opportunity to show that it was wrong. That does put a burden on you.

Again, to put the point across, where one is dealing with predictive matters, as we were looking at in *E,* that is a further problem because one is having to rely upon not just primary findings of fact but also inferences drawn by the skilled regulator, and so forth.

It is also the case, and can I invite the Tribunal to pay particular attention to our submissions, both in paras.32(4) and 89 on this – para.32(4) is where we have set the point out – it simply is not the case that every perceived failure in fact finding or analysis by a decision making body requires or permits its finding to be quashed, a relevant failing must satisfy a materiality test. To simply assume, as sometimes the appeal seems to, that because there has been a failing there may have been an error that may upset the entire conclusion, that must be wrong. Materiality bites in at least two ways. An error may simply be insignificant. An error may also, even if significant, be only relevant to one route towards reaching the answer, but in a multi-faceted complex case such as this where we are dealing with all sorts of matters, where a particular outcome is warranted by more than one set of analyses or by a combination of factors, and the fact that one factor falls away because it turns out to be an error does not actually alter the outcome, its incremental effect is negligible or it actually is just part of a pillar which adds nothing to the final conclusion.

It is necessary to establish, if this appeal is to succeed, that the error not only is one which is appropriate for us, the CC, to overturn, but also that it is material to the outcome. For this review to succeed it is necessary for this Tribunal to decide that the Commission's

judgments of all of those complex matters was not just wrong, but was manifestly inappropriate, or in some other way fell foul of some rule of law or whatever.

Is that a convenient point? It is a minute early, but I was about to turn the page to a couple more subjects.

THE CHAIRMAN: We will rise a minute early, yes, Mr. Bowsher, and we will rise until two o'clock.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr. Bowsher.

MR. BOWSHER: Sir, I was dealing with a couple of fallacies arising out of the misstatement, we say by the chairman when he described the structure. Can I just draw your attention in the Final Determination to the section headed "Our role" on p.1-9. I do not believe it has been challenged. That summarises the standard of review that the CC was intending on applying. It goes from 1.26 to 1.33. That, of course, is the approach that had been taking in dealing with the pleadings and the Reference Questions which of course are the questions that this Tribunal asks the CC that ultimately condition the way it is dealt with. It may be that this is a convenient place (just to save time) to deal with what we have called the "real risk fallacy". We have dealt with it in our submissions from paras.77 to 87 in some detail and then a little later on 109. The short point is this. As we see set out in para.1.28 of the Final Determination, Vodafone cited your judgment in *Talk Talk* to the Commission and that was taken on board by the Commission, and it embodied that as set out there, fifth line down:

> "The Tribunal should proceed on the basis that an appeal must succeed if it showed that Ofcom reached the wrong decision or that, in reaching its decision, it applied a methodology which was so unsound as to create a real risk that the decision was wrong. "

That is the approach being applied by the Commission: if the methodology was so unsound as to create a real risk that its decision was wrong. It is what we have called an "exceptional procedural head of review". The word "so", short though it is, is significant.

We do note that there is a point to be made about what "methodology" actually means here. In *Talk Talk* it is a procedural matter rather than a question of intellectual reasoning. That may or may not be relevant. I do not place great weight on it, but there is some confusion that can sometimes arise out of the fact, in this case, that one gets that wrong. Sorry, I should just mention that the word "methodology" was introduced by Vodafone. It is not a word that you used in the *Talk Talk* judgment yourself.

The correct approach is supported in its exceptional nature by the reference to the *T Mobile* case which is in the following paragraph, and it is in the last paragraph we quoted.

> "It is also common ground that there may, in relation to any particular dispute, be a number of different approaches which Ofcom could reasonably adopt in arriving at its determination. There may well be no single 'right answer' to the dispute [a point I have already made] to the dispute. To that extent, the Tribunal may, whilst still conducting a merits review of the decision, be slow to overturn a decision which is arrived at by an appropriate methodology even if the dissatisfied party can suggest other ways of approaching the case ..."

That is where methodology comes in.

It is wrong, and a fallacy, to elevate from that exceptional procedural ground of review (which is good common sense) into some fresh substantive round of review that one looks at any process of reasoning or process and if one thinks that there is a risk that it is wrong therefore you overturn it. The precautionary principle would mean that all decisions that were judicially reviewable would be overturned on the basis of if there is a real risk that they may be wrong. One should not really indulge in *reductio ad absurdum* but this particular fallacy cries out for it. It is just self-evidently wrong. It is an exceptional and particular proposition which, in its own terms, makes sense. It is plainly not the case that we are obliged to go around looking, in our process, from *BAA*, applying the fine toothcomb, looking for the real risks. We have to deal with the matter in a common sense way.

The next fallacy before I get into the detailed grounds arises out of, we say, the error in challenges in the way they have dealt with this procedure. I have already alluded to this. This is a procedure which requires a timely conclusion. It is based on four elaborate written procedures. It is no more a trial by ambush than any other sensible procedure. In this case, you will recall that in particular we for the Commission were particularly anxious at one of the earlier CMCs a few days ago, that we had sufficient opportunity to review modelling matters with modelling experts. This is important in cases such as this because there is an information asymmetry. The MNOs know, as it were, their business; they know how these things are dealt with; they have the information. Both the regulator and the Commission have to derive their information from them, to a considerable degree.

It is a concern, therefore, that the oral submissions that we have heard in the last day or so have been so heavily recast and refocused from the broad 91 pages of written submission that we had only a couple of weeks ago, refocused and refocused to a different place in

some respects. Certainly, the emphasis has been very substantially changed and some different points made. It is for that reason that I said at the beginning the observations about the length of submissions raise a substantive matter. All the parties have spent a considerable amount of time dealing at length with a great deal of substantive material. It turns out that in oral submissions this has been refocused to a few specific and somewhat different arguments than had been originally developed, albeit that the challengers have been careful to make sure that they find, as it were, a hook to start their argument on somewhere in their documents.

This is a concern. As a matter of procedural principle parties should make clear and concise complaints in these processes and stick to them, not make 91 pages of complaint and then look to pursue whichever seems most promising after they have had a comprehensive written response. As a practical issue, in so far as there are specific issues of modelling, I do not think this need arise but certainly one can see in other cases, modelling questions in this case might put both the Commission and Ofcom into an impossible situation.

Technical questions about modelling are not questions that we are necessarily able to provide an instant answer to, however well prepared one is for a hearing. That refers back to the points I made to you, sir, at the earlier CMC. This is a compressed and accelerated procedure, and if parties shift ground in this way that creates a real problem.

Most importantly, this tells us much about the substantive answer to the matters which have now been developed orally. We are left with questions about the CC's assessment of Ofcom's approach to certain predictive matters in complex areas, matters on which the challengers have been evidently well informed for many months, stretching back before the April 2010 consultation, matters on which they have been able to bring forward whatever case they wish over a lengthy process. This is a classic matter for a broad margin of appreciation, and a matter which challengers should long since have addressed.

This engages concerns raised by the Court of Appeal in the *EE* case you cited. This is a procedure where the parties do have to co-operate, the parties do have to bring forward their various challenges at an early stage. No indulgence, in my submission, should be shown to a challenger that seeks to say: ah well, if only I had known, I might have done it differently.

THE CHAIRMAN: To be fair, Mr. Bowsher, I am not sure Mrs. McKnight was actually saying that. I think what she was saying was she could demonstrate the failure of the CC to apply the test in paras.126 and following of the Final Determination by reference to examples drawn from the modelling, but as I understood it (and I am sure I will be corrected if I am wrong) she was not inviting the Tribunal to make any kind of decision as to whether on the

merits these things were right or wrong. What she was asking us to do was to infer from those instances how wrong the CC's approach was. It is at a higher level in generality, I think, than you are putting it there. I think I have put that right, have I Mrs. McKnight?

MRS. McKNIGHT: Sir, that is correct. I think just to simply illustrate that point, I was meticulous where I could be to use Ofcom's material and technical hearings of all parties which were, I think, accepted to be a non-controversial, educational exercise for the CC as to how the model functions. I am not asking you to make any findings which might be correct; I am simply demonstrating that there are certain uncontroversial facts about the model which I think everyone in the room already knew, except possibly the Tribunal, because you have not previously engaged with this case. I am not asking you to answer, or anyone to answer, the points. Thank you.

THE CHAIRMAN: Does that help, Mr. Bowsher?

MR. BOWSHER: I made a general point which is not so particularly directed to Ground B, but it certainly relates to the EE submission and Ground A. I will come on to that. But the point remains, and it picks up a question raised this morning I cannot remember by which member of the Tribunal. When we look at it, these are all matters which have been, in one way or another, in play in these proceedings, raised in different ways at different times, and resolved. And to then try to find a new way of recasting them and saying we wish that the Commission had done something rather different because here is another point, in our submission is the wrong way forward. But I will make that good by looking at the particular material.

When we look at Reference Question 1, we deal with the written grounds from para.90 of our submission. That takes some time indeed. We say it is simply not true, for all the reasons we have set out there, that the Ofcom analysis was demolished. We, the Commission, looked at certain matters which were being raised, and reached judgments on them and preferred different parties' positions in respect of different elements of them. That is set out most clearly in paras.116 and 177, and then in the section on allocative efficiency where we set out in some detail how we have dealt with the various points which were being made about allocative efficiency. This is not a case where we were resolving matters on the burden of proof; we were taking on board a lot of material from different parties and resolving that material as best we could, taking account of the quality of it and its persuasiveness.

If one compares that with the way in which the Ground One complaint is made one can see how this is not well founded, the complaint now being made. What we are talking about is

a challenge which, it appears from the table that EE produced on Friday evening, is a claim based on the process after CC had reached its intermediate conclusions, and that is now explicitly stated in that table from Friday evening. I am not sure where it ended up in the bundle.

THE CHAIRMAN: We have it separately, Mr. Bowsher.

MRS. McKNIGHT: It is at A3, 16 if you want to use the bundles.

THE CHAIRMAN: We are all there, Mr. Bowsher.

MR. BOWSHER: Thank you. This is, of course, a topic as we explained by Mr. Turner, which was raised in the original statement in B1, tab 3, and it may be worth just pulling that out. There is a whole section, of course, in the annex 3, which is a little bit hard to find because the document keeps repaginating itself, but once one gets into the annexes it is A3.

THE CHAIRMAN: "Economic arguments"?

MR. BOWSHER: Yes, it starts on p.30, "Allocative Efficiency", and it narrates how this topic was dealt with in the April 2010 consultation, and how the parties were able to deal with it then. Then at A3.11 you can see that stakeholders had been asked to consider that in earlier consultation. A3.12:

> "EE, O2 and Vodafone submitted that we had provided limited evidence that pure LRIC led to more efficient outcomes. O2 argued that we had not provided evidence that the balance of retail and wholesale tariffs that we observe in the market was not already allocatively efficient."

And then so on and so forth. There is then discussion about various topics which come up in the pleadings. It was plain then that this was a topic at this stage of the consultation. If you then go to the bottom of p.37 there is an orphaned heading: "Impact on mobile usage and ownership", and you can see at A3.36 over the page:

> "Section 7 considered all the stakeholders' responses on these issues …"

- that is mobile usage and ownership issues, and that I am afraid is section 7 of the statement itself, so you have to jump back about 200 pages and you will find a very long discussion – p.107 of the main body of the statement, headed: "Empirical analysis of consumer effects", and again I do not need to take you through it, but you can see that all of the parties have had input into exactly these issues which are the concerns raised in Grounds 1, 2 and 3 at that early stage.

The notice of appeal produced by EE is at B2, and this, of course, is the notice of appeal against that statement, tab 6, para. 23:

"As to the remainder of the Decision, the key sections for the purpose of Ground 1 are Sections 7 and 8 and Annex 3"

- which we have just seen.

"These sections are interrelated as they all contain and reflect Ofcom's analysis of how MCPs will be likely to respond to different levels of MTR charge control, in particular in terms of their retail prices in different segments of the mobile market, and the likely effects of those pricing decisions on mobile ownership and subscriptions, and on usage …"

That is exactly the topic we are talking about here. Then at 24: "In broad summary, Ofcom concluded that", and then there is a heading "allocative efficiency" considerations that set out what they say they concluded. We then get on to more detail if we come on to 45 under a heading of LRIC+ choice, they say:

"In the Decision, however, Ofcom's reasoning fails to meet this standard as it suffers from serious theoretical and empirical flaws."

Then, 45.3:

"On a number of crucial issues, Ofcom makes heroic and flawed assumptions which are not supported by evidence and are contradicted by the evidence of past behaviour."

Then 61, and this is a list of conceptual criticisms of the decision starting at 56:

"Fifth, in any event, when assessing the likely effects on allocative efficiency of different MTR cost standards, the relevant issue is not whether two-part pricing makes an allocatively efficient pricing structure *possible*. The issue is what prices are *in fact* likely to be set by MCPs under lower MTRs. That will turn on their commercial incentives as individual operators, not on what would be most efficient. How MCPs are likely to set prices under MTRs based on pure LRIC therefore falls to be determined by an examination of the available evidence. To the extent that Ofcom thinks otherwise, it commits an error of reasoning. In places, Ofcom does suggest that a departure from the standard approach may be justified simply because two-part tariffs and the possibility for price discrimination on the retail market make an efficient form of cost recovery '*possible*'."

There is yet more, at 134, if I can draw your attention to it, is a section specifically addressing the effects on vulnerable consumers. Then in 154 we can see that EE is actually relying on additional material to support their proposition. EE is therefore putting forward a case, and it is the structure of disputes one would expect that parties put forward their best

case at that point. They say at paras. 71 and 72 that draws some of the threads together, that the adoption of pure LRIC as a cost standard will result in a material reduction in the level of mobile ownership and subscription, in particular for the following reasons, and they set out those reasons.

It is a normal consequence of a dispute that one brings forward the material to support that proposition, and if that was the argument they wanted to support with evidence they could and did have the opportunity. Of course, they have had another opportunity to deal with that which is described in a little bit more detail in the final determination itself, because there has been survey evidence, and this was survey evidence that was not conducted in some way independently of the challengers, and if you take the final determination - this is all under a section which starts on 2-153, para.2.799, it starts with the Ofcom definition of "allocative efficiency", and leads through to a discussion as to what the conclusions might be on allocative efficiency, and those are set out at 2.812, and then 2.823 where they set out their preferences, the Commission sets out its overall assessments on allocative efficiency. That is what these topics are concerned with, and the material which has fed into that discussion is survey evidence discussed in detail earlier on in the determination from 2.681, and that is where I would just like to pause for a moment and take a little longer, to look at what actually that comprised of.

This is all under the general topic of allocative efficiency and effects, specifically effects on mobile ownership and subscriptions. 2.681 on p.2-124:

> "Several surveys were carried out for the purpose of investigating the effects of lower MTRs on subscriptions and we describe each briefly below. Ofcom noted that it was sceptical of over reliance on surveys as a reliable method of estimating impact of changes …"

There is a jigsaw survey done for Ofcom, there is a GFK survey for Everything Everywhere. I am a little bit nervous about reading anything out because I think it may be confidential.

THE CHAIRMAN: No, that is fine.

MR. BOWSHER: But you can see from the figures there that a number of variables are discussed. There is a further discussion of ICM survey done for Vodafone at 2.686, and the survey evidence overall is assessed from 2.690 through to 2.695, and there is considerable discussion about what went into the surveys, were they good, bad or indifferent or whatever.

For my learned friend to say now that they did not know there was need for another survey, within the context of this procedure there has been ample opportunity both within this round of provision of survey material, but also perhaps independently in support at any point during the process to make good whatever case it was that EE wanted to make.

Now, what they say in their response document ----

THE CHAIRMAN: Mr. Bowsher, can we just nail this? Let us look at one of the paragraphs Mr. Turner placed great stress on, para.2.700 which has the overall assessment on consumer responses. You can see there that the CC is indicating what sort of survey evidence it would expect a regulator would seek to rely on – the fourth and fifth lines. Your position is that when the MNOs, when EE was appealing this it should have envisaged the need for this additional evidence and put it in place with its notice of appeal. Is that what you are saying?

MR. BOWSHER: That would be, maybe, not the last point but it would be a point towards the end of the process, yes. If there is evidence that can be brought forward they should bring it forward, but this tells us that this – it goes back to the point in *E* – is a process which goes right back to the consultation in 2009 in which the parties in this room are, to some degree at least, co-operating. The CC was not involved at that point, of course. It is for the parties to bring forward whatever material they need to make good their propositions. There are many opportunities to make good those observations. Each party has brought forward surveys to make good its observations about allocative efficiency and the impact on subscription numbers, and so forth.

THE CHAIRMAN: What happens – this may or may not be this case – if the CC's review takes a slightly unexplained course which, to be fair, is something that really one might expect when one has a factual complexity of this sort? Suppose the CC's course takes it down a route which no party, when filing its notice of appeal, could really have anticipated? What is the appropriate course then? I think Mr. Turner's line would be that at that point the CC needs to recognise that it, having no investigative powers, cannot answer the question that has been put and should recommend, to put it no higher than that, remission back to Ofcom. What is your answer to that?

MR. BOWSHER: Can I deal with it in this case before dealing with the hypothetical case?

THE CHAIRMAN: Very well.

MR. BOWSHER: That really is not this situation. Can we go to B4, tab 37. This is a document you were taken to. Paragraph 9, p.4:

> "The initial evidence and arguments of the appellants were targeted at Ofcom's position in the Statement – and were therefore not based on the CC's reasoning or tailored to identify its implications. The CC stated:
>
> '*we start from the premise that prices will change in line with our conclusions above, whereas some of the arguments start from Ofcom's position on price changes, and are thus difficult to apply.*
>
> *Part of [the appellants'] claim is based on their view that Ofcom's reasoning on the pattern of price changes is incorrect. As we discussed above, we find force in that view. However, that also means that some of the arguments made start from Ofcom's conclusions on price changes rather than the position we have taken. Therefore we apply the parties' logic and evidence as best we can'.*
>
> It has not been possible for the appellants to advance revised arguments and evidence focused on spelling out the implications of the Commission's findings, as it was only at the time of the PD that the parties became aware that the CC was minded to overturn of course's approach, and in what ways."

Let us just pause there. What we are talking about is price changes and the impact of price changes, or rather the effect on an MTR on price and the effect of a change of price on subscription numbers, and that is all. It is not actually that many more variables. It has always been, as I understand it, the challengers' proposition that the effect of going down to LRIC would be that the prices for some users would increase and that that would have an effect on the subscriptions

I do not want to bandy particular numbers around because some of them are confidential. In fact, some of the numbers that have been used in the surveys were exactly in the range of numbers which the Commission was then trying to hypothesise about in its own determination.

It was always open to the challengers to bring forward evidence which said, "We do not accept what Ofcom says, this idea that it is going to be neutral or whatever is not right, we think that Ofcom's pricing presumptions are different, we can show that the effect of changing MTRs will change prices and that will have this effect, and this is the evidence, survey evidence, or whatever, which shows that. That is the way one would expect, if this were litigation in the High Court, one would bring forward one's full case. One would not wait to see, "I wonder what the decision will be on this and then I will deal with the alternatives that arise". This is why I made the point at the beginning, this is not an iterative procedure. The problem with it being an iterative procedure is, given the complexity, if it

were right that one could always revert back on any intermediate problem, because these are multi-faceted interlinked propositions, you would end up saying, what I am going to do is, we will decide the following 12 matters and then we will go back and see what the consequences of that decision are and then we will decide a few more and then we will decide a few more. You do not reach finality. It is the essence of a process that requires timely and final resolution that all the parties bring forward their best shot. The best shot here in this case is all the evidence that shows that Ofcom was wrong, that this would not affect vulnerable consumers in the way that EE says they would. It is only three or four links. I am decrying it. I am sure the evidence is substantial. The logical links are not that numerous.

There may be a hypothetical example. Vodafone did produce some evidence. There was an opportunity to bring it forward. If the surveys that were produced assume that Ofcom were right that, to be frank, is just a weakness of the design of the survey. If one were advising an expert in High Court litigation about whatever you might want to put in the various parameters and ask an expert to comment on the various logical starting points for his or her analysis, and say, "I would like to know what you think if this finding would be if this, this or this".

It was certainly open to EE, as was done, and in our submission it was pretty clear that it was logically necessary to support the EE notice of appeal, to bring forward their case that said, "The statement is just wrong, you could have produced evidence on two hypotheses. If you take Ofcom's view of the world on prices then this is the effect, but actually we think this is the correct view of the world on prices, which is more favourable to our argument". That is, of course, crucial here. What has happened and the nature of what they are saying is, "Because we disagreed with Ofcom and took a view on prices which helps them, they are entitled not to have followed through the logical consequences of that", and it does not make sense. It leaves the CC as the appellate body in an impossible position, it simply has to do the best it can on the material it has. It cannot keep iterating on these points. It is bad enough in simple litigation to keep remitting things backwards and forwards. In a case like this, the risk is you would never get out, because you would always have some further point which the CC has varied the position on and you need now to revert back.

THE CHAIRMAN: Mr. Bowsher, I quite take your point that it is incumbent upon a party to put its best foot forward, as it were, on initiating an appeal, and no doubt it can be said that that best foot should include alternatives and hypotheses. You would accept, I think – I will ask you, do you accept that it is possible for a CC provisional determination to take a route

which, with the best will in the world, the appellant could not anticipate and therefore did not put evidence in?

MR. BOWSHER: It is possible, but it is hardly likely to be exactly the outcome which they are arguing for. They are arguing for a proposition which says, "No, Ofcom has got it wrong, this will hurt vulnerable consumers more in the ways I have just outlined", but what they do not do is put in the evidence that flows on from an intermediate finding which actually supports them, or could support them if they had capitalised on it, because they then say, "We did not have the evidence, our evidence was all assuming you would agree with Ofcom, we did not realise you were actually going to disagree with Ofcom". It is not a known unknown, it is a known possible outcome, they may not think it is very likely, but it is a known possible outcome that we will actually decide and take decisions on prices which are, broadly speaking, favouring to what they are asking for.

THE CHAIRMAN: I can see that there might be, as it were, a partial overturn where the CC takes a partially different view to the view that Ofcom took. No doubt that is capable of prediction. I am not sure I understand how it is that an appellant can foresee precisely in what respect the CC will disagree with Ofcom. I am sure anyone will say, "Yes, it is quite possible that they will 100 per cent agree, 100 per cent disagree, or fall somewhere within the range between zero and 100", but where and how the disagreement may emerge does seem to me to be rather difficult to predict.

MR. BOWSHER: Sir, I submit it is not that difficult. Paragraph 61 of their notice of appeal – I took you to various references, I did not take you to all of them – says, second sentence, "The issue is what prices are in fact likely to be set by MCPs under lower MTRs?" That they put in issue. It must have been foreseeable that one outcome is that a different conclusion was reached on that very point. Yes, of course, there can be a variety of possibilities.

If one goes to a simple valuation dispute, let us say there is diverse evidence about valuation of land which may lead to a number of consequential findings in a case. This is at the risk of trespassing into another matter. The analogy is a perfectly good one, so I am going to stick with it. Let us suppose that there is an issue about valuing some land, and if the land is worth a certain amount of money then it may have certain substantive consequences for the rest of the case, and if it is worth virtually nothing there would be some other consequence. There are two alternative and quite elaborate arguments to be made which all hinge on whether the land is worth £100,000 or £10 million or some figure in between.

It would be surprising if the Tribunal were to let the party off the hook and say, "Well, I am not going to start arguing about what the variables might be because I am note quite sure what number you are going to attribute that piece of land". Yes, it is logically essential perhaps to the argument – this is a hypothesis obviously – whether the figure is £100,000 or £10 million, but the claimant has to make a claim on either alternative and bring forward all its evidence for either number or any number in between when both stages are in issue. What is clear here is that all stages of the argument are in issue. The correct MTR rate is in issue, the consequential price is in issue, the impact on consumers is in issue, and the impact on vulnerable consumers is in issue. All of that is put in issue.

Obviously we would accept that this is a compressed, challenging procedure for all of us. It is. That is not a reason why the parties do not have to put forward their best material. To say, as they said, we have not been able to advance arguments based on the implications of the findings because we did not know what they were going to be does not really do justice to what the nature of the findings are that we are talking about. This is not the CC coming in and saying, "Actually, we have been thinking about this and we think that Ofcom have got it wrong, people are going to stop mobile phones next week" – that is a silly example – or there is going to be a new social programme to hand out free phones to certain people, or whatever, a genuine unknown unknown. What happens then is another case. It is not this case.

THE CHAIRMAN: What Mr. Turner is going to say, I anticipate, is that it was known that the CC might well find a different price that was likely to be set by the MCPs. What was unknown was what that price would be. What you seem to be suggesting is that the appellants go out and seek surveys for every price in a range and adduce that evidence, because they do not know what price the CC will find at the end of the day.

MR. BOWSHER: That illustrates exactly the point because that means this procedure must always be an iterative procedure. It must be right that you can produce evidence on a sample. I will use numbers anyway. What is the effect of 1, 2, 5, 8, 10, 20? Evidence is imperfect; that is the nature of disputes. But that is why these surveys were being judged and evaluated by the CC. There are all sorts of issues about the quality of survey evidence, far beyond these issues that we are talking about here. There was a lot more discussion about this in the Determination.

It is a question of judgment for the challenger: what evidence am I going to want to put in so that I have got the range covered? Going back to my example: how do I make sure that I have covered the argument so that the Tribunal can take away whatever it finds on that

logical point? How does it then bank that and then apply that to my following argument? That is what tribunals do all the time; they say: I do not agree with either £100,000 or £10 million I think the answer is - I am not going to fill in that blank! Then we think the consequence of that is this, this and this. That might be a consequence which is not quite what any party was arguing for. That is typical. But that is the Tribunal doing the best it can on the basis of the evidence. It is not burden of proof.

The alternative is, as you rightly say, that until the CC has chewed over all of that stuff in the statement - and not before, because there is no point in doing it until the CC has looked at it, so Ofcom does all of that, the CC does all of its, and until CC comes up and says the answer is 42 there is no point in having any survey at all because until you know the answer is 42 any survey is pointless. That is just not right. If that is right, it means that the process inevitably has month after month of iteration built in because this is a relatively simple point. In cases such as this, there will be much more complex issues with many more logical hoops to jump through.

MR. LANDERS: Could I just perhaps pick this up in a slightly different way. I think 2-700 is a key paragraph. As I understand it, the issue is that on the basis of the evidence that was available to the CC the feeling is that there was a sufficient basis on which to come to a clear conclusion. Is it then not reasonable to say at that point one should admit that there is not sufficient evidence and then seek to obtain, in some form of another, further evidence on which to come to a conclusion?

MR. BOWSHER: In short no, not if the issue is a matter within the context of the existing dispute. Again, the premise on which this procedure works is that the parties have to bring forward their case within the procedure, within the rules of that procedure, and bring forward their case in one hit. If there is something completely unexpected there may be a variant on that, but the alternative does get you into a situation where one would simply be creating the opportunity for challenges always, you want to find a point like this and loop back and say: we are not going to bring our whole case. You will end up having these determinations done effectively as a series of preliminary issues because each issue will be: let us decide this tranche and then we will deal with that and go on; let us assess the survey evidence; assess what the outcome of that is; if it is not good enough then we will go back. This will not be the only point on which there is evidence. In a case such as this, there will be engineering evidence and so on and so forth. It is not, in my submission, a proper approach to civil procedure generally for a Tribunal to simply say: I cannot deal with this; you have had your opportunity to put forward your case; this was part of the case but I

cannot answer it; I am simply going to throw it back to you. That is no more the right answer than it is in the *Sewell* case that we cited about deciding matters on the burden of proof, for a judge to say I cannot decide between these two expert reports. The court has to deal with the material it has.

THE CHAIRMAN: That was why one has rules like *Ladd v. Marshall* which, in an appellate process, served to confine very narrowly the circumstances in which an appellate body can see new evidence. We all know those particular criteria in *Ladd v. Marshall* are very tight. But the Tribunal's rules, rule 22, as construed by the Court of Appeal in *British Telecom v. Office of Communications* in the private circuits matter, accepted that there was a broader discretion in the Tribunal to admit evidence on an appeal.

MR. BOWSHER: Indeed. That is the final point that in a genuinely unexpected case - if, as we do not accept but let us suppose this was genuinely a complete novelty to the challengers (which is obviously contrary to what I say) then it is open to them to bring forward fresh evidence. This is plainly material on which they can bring forward evidence. It is not something on which they know nothing. They can bring forward evidence either to show that what we have said is manifestly wrong because it is obvious in the market that things are different (I am not sure that they could make that); or to seek to have another reference question developed, I suppose. There are many variations one might do for the directions if it was a genuinely new point, to reopen the point because we had not expected that this entirely new thing was going to happen in the market, whatever that is.

That is not this case, and it is neither consistent with sound principles of civil procedure to have this iterative process, and it is certainly not consistent with this procedure to provide for that iterative process. Unfortunately, the complexity of the issues in cases such as this mean that these are exactly the sort of cases which would lend themselves to that iterative process were one to think that that is the right way of going down. That really will snuff out their utility.

THE CHAIRMAN: Leaving on one side the facts of this case and just putting my hypothetical question which we parked a few minutes ago, as I understand your position, if there is a genuine, unexpected turn which only emerges in the CC's provisional Determination, your answer to how that should be handled would be for the parties to try to adduce new evidence and for the CC to consider that?

MR. BOWSHER: Yes, they can apply to the CC. That is one of the reasons why I have not made that cross-reference back to what I was saying this morning, but they can apply to the CC. If it becomes obvious to the CC, the CC could ask for it even. If the CC is wrong, they can

make an application to this Tribunal. These challengers are not shrinking violets, so the shrinking violet defence of: "oh, I did not think I could put this forward but the fact that it was not there means that the Determination cannot stand" in my submission is not a credible way of dealing with the matter. That is our position on the procedure. This having been a procedure in a great deal more detail, I could have taken you to many more references which make the same point. I have illustrated it. We say that EE are, in this case, the author of their own misfortune, they did produce a survey which was evaluated. It could have dealt with other things.

THE CHAIRMAN: Thank you, that is very helpful. I think Mr. Landers has a question.

MR. LANDERS: Can I just ask something about what the Competition Commission actually decided, which I am still not clear on. Ofcom postulated a pattern of price changes, the appellants disagreed with that pattern, the Competition Commission agreed with the reasoning of the appellants. Did the Competition Commission then accept the pattern of price changes that had been put forward by the appellants (from which one could argue the appellants should have been able to work out what would happen as a consequence), or did they put forward something quite different that the appellants could not have predicted?

MR. BOWSHER: What they said on this survey - and we may have to come back to it, because of what they found there are a few links to this - their finding is 2-700, so they are saying if there could have been more survey evidence that would have helped us; we think it is possible that might have helped us, but there is a limit to what the actual survey evidence does to assist us. When it comes to taking that point forward into the allocative efficiency point, they do not say they agree with any particular party; they do take their own position. There are a number of paragraphs here which I need to take you to. I am wondering whether it makes sense if I can just rattle out a quick list of the consequences on this and maybe do it after the break.

THE CHAIRMAN: That sounds sensible.

MR. BOWSHER: The point is that finding on survey evidence feeds into a series of other findings. The query I have to that is that does not mean that was not something they could not have anticipated. The range of possibilities out of this survey evidence, this was at the heart of what they were asking for, I have shown you in the Notice of Appeal. In a sense, it is not right to suppose that the parties can only expect a win/lose scenario. Indeed, the history of civil procedure is most people end up in the middle.

I am sorry to park it, but would it be quicker if I just give you a list because it does involve you going round a few different documents.

THE CHAIRMAN: That is absolutely fine, Mr. Bowsher, either after the minibreak this afternoon or tomorrow morning will be fine. I am sorry to add a further question.

MR. BOWSHER: Yes, please.

THE CHAIRMAN: I wonder if I could just ask you about one of the authorities you took us to this morning in volume 2 of the bundle tab 43. You helpfully took us to paras.115 and 116 of the decision in 2008. In para.115 Mr. Sharpe, appearing for the CC, seems to be suggesting a rather more welcoming approach to additional material, and than I get the sense applied in the case of this particular determination. I just wondered whether there had been a change of approach between 2008 and now. That may be something you want to come back on.

MR. BOWSHER: The short answer to that is the guidelines came into effect. I can come back in detail on that: what led to the guidelines and why the guidelines say what they do, but the short practical answer is - and there is a little bit of narrative in the guidelines about why they are necessary and to some extent that may be rehashing what I have already said, these need to be prompt final proceedings; let us get to the end at some point, and that was why we had these guidelines which did not then exist. I can take instructions, perhaps, as to how far I can usefully help you as to the background as to why the guidelines were put in, but I am not sure that that is going to help particularly.

THE CHAIRMAN: No, it may be just a couple of references as to when the final cut-off point is in the guidelines would be helpful.

MR. BOWSHER: I did not open that document specifically, I can come back to that.

THE CHAIRMAN: Thank you very much, Mr. Bowsher.

MR. BOWSHER: I do not know whether I should go on.

THE CHAIRMAN: Go on for another 15 minutes, Mr. Bowsher and then we will rise.

MR. BOWSHER: You have our first point. I do not need perhaps to spend a great deal of time on this because it is a point which I have already developed in some detail in writing when we dealt with Grounds 1 to 3 in some detail. But it is important, and I will just reiterate it now, to have regard to the fact that, as I have already noted, in any event we say there is no error here which can be shown to fall foul of the relevant JR standard. This survey point is not, as we put it (it is in para.88), we made the general point that in order to identify an error which is to be successfully challenged and reviewed one needs to show that the error is part of a fundamental part of the reasoning, so that it actually has a material effect on the decision. Now, this really picks up Mr. Landers' point, which is why I will come back to it, but it is relevant that I make that point now before making it good with all of the references.

We say that in itself this survey point is not decisive nor does it in itself amount to a fundamental element of the reasoning. There are a large number of parts by which the CC reaches its ultimate decision. It has had to go through all of those in its determination. It is really necessary for the challengers to show that without this the decision falls away altogether for them to make this review good. Of course, that is an important general principle because the difficulty with these complex matters, and a large determination such as this, is that challengers will always, if they wish, be able to snipe at one point or another. One needs to show not only that the point one is sniping at is a point which actually causes the decision to fall away and it seems to us that is not this case.

Ground 1, therefore, in our submission is a Ground which must fail. It is a Ground which, as now expressed, on Friday night, is a Ground only concerned with the operation of the procedure in front of the CC and that is explicitly stated, and perhaps as we have got it out we should actually look at it, that they have now made absolutely clear that – if you have that document – all Ground 1 is that:

> "The CC should not have upheld Ofcom's unsafe conclusion because the appellants had not produced the necessary further evidence, rather it should have determined that in accordance with the statutory machinery the matter ought to be remitted to Ofcom so that further evidence could be obtained."

It is possible to do it but to say it is in accordance with the statutory machinery rather implies that there is some obligation; there simply is not. On the contrary, all the indicators go the other way.

THE CHAIRMAN: Mr. Bowsher, I should just make one point with regard to this document, it is clear on the face of it but it is worth saying, this is a document that was produced in response to an invitation by the Tribunal and we perhaps rather unreasonably requested that the ground of appeal be stated in a single sentence. From our point of view it is a very helpful document, but I do not think it would be right to hold up either of the parties who produced it to it as if it were a pleading or a notice of appeal, it is a helpful working document, but for our part I do not think we should regard it as anything more than that.

MR. BOWSHER: Certainly we are not abandoning our written submissions on the basis of it, but we are taking it as an indication of the focus that we should focus our attention to, and that of course is emphasised by the way in which the matter was developed on Tuesday.

Ground 2 I think is related to this. Ground 2 is described in the sheet again – it is a useful guide – as:

"The CC erred by making findings in 2.803 and 2.806 on which the parties were given no opportunity to adduce evidence."

And it is perhaps therefore appropriate just to pull out what that is. You have seen it before but time has passed. We have dealt with Ground 2 in paras. 145 to 158 of our written submissions and I certainly do not intend to repeat all that was there. The short point is that our observation was that it had not been established that even if there would be a significant number of customers who gave up their phones that this would translate into a significant loss of allocative efficiency. As we have already seen, the allocative efficiency effects of this price control, and the price changes that would flow from any change in MTRs was at the heart of this appeal from the outset. It was necessary for the CC to consider the possible efficiency effects that would flow from a change in mobile phone ownership – it is one of the statutory requirements that this process promotes efficiency amongst other matters, it goes into the balance. It is appropriate, as we say in para.147, to consider all of those matters by reference to the statutory objectives and the Reference question and, as we have said in para. 149, which is perhaps the nub of it, we were required to determine whether Ofcom erred in adopting pure LRIC for the reasons set out in the particular paragraphs. These were all price controls and the allegations made all related to principles to be applied in setting the condition, the methods to be applied, the provisions imposing the price control. The fundamental allegation was always the same that there had been some sort of error in applying those principles. In order to do that it must have been necessary – all those points having been put in issue, and we refer to that at 152 where Ofcom put in issue the application of all three limbs of the s.88 test. It would have been nonsense for the Commission to simply determine the question of allocative efficiency without actually taking a view as to where the evidence and the arguments were on the point.

It may be that the material before it was not very satisfactory, and that rather flows from where it had got to but what it was saying was that it does not follow necessarily that diminution in subscribers necessarily leads to reduction in allocative efficiency, it was simply making its observation which, yes, it was different from what other people had observed, but that was its conclusion, it had had the opportunity to look at all the material such as it was. It is not suggested that there was anything wrong in the conclusion that was drawn, it is just that somehow or other in considering allocative efficiency the Commission should have pretended the question was not there. It just was there. If it had not asked it there might have been serious questions as to whether it actually fulfilled its statutory function. The arguments about whether there had been evidence adduced on this or not is

just not to the point. Again it comes back – I am now repeating myself – it is the same issue, it is one of the sequences parts of the efficiency analysis. I will not take you through all of the detail of our argument in this, but I would point out that there are a number of specific errors in the argument on Ground 2 and we identify those in para. 158, and some of them are really quite significant; it says what it says, I do not need to say any more.

Ground 3 we have dealt with that in writing. I am not sure there is anything I can usefully add to what I have already said in writing.

Vodafone Ground A I was proposing to deal with quite briefly, before getting into the home straight as it were. Vodafone Ground A is this question about what details were or were not provided and this is discussed – again if one takes Vodafone's Friday table it is a useful starting point for what the target now is. This is about this simulation model which it is said the CC failed to take account of, and that is put in two or three different ways, and it ends up being a real risk argument. It is said that because we did not have that in mind we have failed to have that available to inform the question of whether there was a real risk that Ofcom reached the wrong decision. So the question really is whether this material – which in fact I do not think we do not have – in itself ought to have led the CC to reach a different view either substantively or ought to have caused it to double back and think actually there is a real risk. You have heard our submissions about real risk, that just is not the test. The question is: was the conduct of the CC regarding this simulation model manifestly inappropriate? Without repeating all that we say, we say the model in writing – and again I urge you to look at that – the model's utility was limited. It was discussed and not dismissed out of hand. It was evaluated. Let me show you first how it was dealt with and then where it was evaluated.

If you go to B3 tab 29, p.49, at line 4 there is a question about information used to adjust the model, and that leads on to an exchange. At line 14 on p.50 the Chairman then picks it up:

> "Moving on to your simulation model, which is annex 3, I think of schedule 2 …"

that is what we are talking about –

> "… just so that we can – it is quite a brief document. I think we would like to understand it a bit better. But before we get to that …"

That discussion goes on from there down through to p.53, line 17, where the Chairman of the panel brings the discussion to an end.

It was considered, it was discussed, it was evaluated in the decision in the Final Determination at 2.445, 2.446 and 2.447.

"2.445 We agree with Ofcom that Vodafone had not provided sufficient documentation of the model. Vodafone provided only a brief description of the purpose of the model … as set out above …"

That is then referred to. You can see that this is a discussion about material in the pleading, which is followed up.

"Following its bilateral hearing, Vodafone provided a copy of the spreadsheet but no further documentation …. We do not have a sufficient understanding of the model to allow us to make an independent assessment of the results."

Pausing there, it is not incumbent upon us to go further and chase parties for every possible outstanding detail. They are not shrinking violets, they do know how to bring forward their case. If they do not choose to make a point, that is for them. It was clear that there was a discussion and that the panel had at least demonstrated its interest and the door was left open to bring forward more information.

Then 2.446:

"In addition, the countervailing effects require there to be …"

and then the discussion goes into the technical detail. The conclusion at the end of 2.446:

"Vodafone did not say, however, what figures it attached to an assumption that there were such differentials and what the source of these inputs.

Finally, Vodafone used this model to estimate the size of the positive competition effect identified in the economic literature … We considered the appellants' arguments in relation to this literature … We conclude that we are not persuaded by Vodafone's argument that a clear conclusion of the literature is that the competitive effects identified by Ofcom must be balanced against otherwise pro-competitive effects of higher MTRs.

For the reasons set out [above], we consider that we cannot attach much weight to the results of Vodafone's simulation model."

So there is a body of literature in which there are different contentions about what that means. There is a simulation model which may affect the conclusion of it. The CC looks at all of that material quite properly and concludes from it, "Our evaluation of the literature is that we do agree with the contended for outcomes, and we do not think that model helps much". What more is one supposed to do? Others may think it was a great model. It stops with the CC to decide whether it was or it was not, and it was open to people to bring forward more information at that time last October.

Sir, is that a convenient moment?

THE CHAIRMAN: That is a convenient moment.

MRS. McKNIGHT: Before we rise, sir, could I just make a point that Mr. Bowsher could check during the short break. He took us to p.53 of the bilateral hearing transcript where the Chairman said, "Are you able to give us an electronic model?" – i.e. the simulation model – this is obviously a quite different model to the one I am interested in. Mr. Houpis, of Frontier Economics, said yes. We did then provide the model. I would like Mr. Bowsher to confirm, after taking instructions, that his clients did receive the spreadsheet, which is the model. Then the Chairman said, having required an electronic copy of the model, said:

> "Probably we should leave it at that in that case and issue any further questions once we have that."

We received no further questions, and I would like to just confirm that it is also the Commission's understanding that they did not issue any questions. Thank you.

MR. BOWSHER: That is in our written submissions, as my learned friend knows. We have set out our answer. We got the model and we did not ask questions. In our submission, nothing flows from that. That is the answer. We asked for it, we got the material, we considered it.

THE CHAIRMAN: Thank you all, we will rise for five minutes.

(Short break)

THE CHAIRMAN: Mr. Bowsher, before you resume, I thought I would raise the vexed question of timing. By those keeping a stop clock going, their reckoning is you have had three hours of your time out or four, and we are very conscious that you have a number of people following you in those four hours. I am also conscious that Mrs. McKnight was given a little more latitude this morning, so the same courtesy will be extended to you. How are we doing?

MR. BOWSHER: Pretty well, because, if I can just tell you where I am, I want to just double back on a couple of questions which were raised. I may not be able to answer them all now. Then I am moving on to Ground C where, I am as it were, only doing part of it and then it is really over to others. I will take Ground B fairly swiftly. I was planning, I think as I have already indicated, C and 4. I have nothing to say orally and it will be on what is already in writing unless there are any questions that you wanted us to pick up. 15-20 minutes, I am guessing. Perhaps I might take a little bit longer, but if I can plough on and see where we get to.

THE CHAIRMAN: That is fine. Do we have an indication of how long those coming after you are going to be in total? Do you have a sense of that?

MR. BOWSHER: I am not quite sure now because the landscape has been shifting a little bit since we first discussed it on Friday. Mr. Kennelly has got lots of points to make, I know.

MR. KENNELLY: Sir, I shall try to finish in half an hour.

THE CHAIRMAN: Right, that is excellent. We will not finish today. That is helpful. Mr. Bowsher do proceed and we will see how we go.

MR. BOWSHER: First, you asked me some questions about references in the procedure. That is in authorities bundle 1 tab 6. Perhaps I can just call in references fairly quickly. 1.2 tells you that these guidelines were prepared following a consultation, I think, with everyone who is in this room. 2.4 tells you that the purpose of this procedure is that the CC endeavours to provide a clear and final resolution. Sorry, I am taking this very quickly but I am sure you will come back to it. 2.5 sets out the importance of the reference questions. 2.6 we do not conduct investigations. 3.7 we answer questions on the pleadings. Then it runs through the various stages up to provisional determination at 3.21 and tells you at 3.22 and 3.23 what people are going to be invited to do after the provisional determination. Then 4.9 is a qualification. Basically, there are only so many things one can read. It is about management. Please do not think there is an invitation to stick within the procedure, as it were. This does represent some shift, I am told. Mr. Sharpe may have been optimistic about being open and helpful, but there comes a point perhaps where procedure led to shifts a little bit in the wrong direction and this is an intent to clarify and set out a common basis on which everyone can have a fair crack of the whip in these procedures. One can see how Mr. Sharpe's optimism might have been exploited. But the door is not shut, that is the key point.

On Mr. Landers' question, if I can take that fairly briefly, I am not going to try to give a comprehensive answer to that because it does raise some points of detail, but the short answer is the key was what was at issue was the difference between LRIC and LRIC+. There were surveys that went out, including a Vodafone survey which was better than the EE survey, and we say that in the determination. It was foreseeable that those surveys should address that choice and the way we dealt with the consequences of our decision is in 2.823 of the Final Determination. This is not quite a full answer, but I think it is a partial answer to the question. It draws together various threads. Maybe I can just invite the Tribunal to read the entirety of 2.823. (Pause)

We are simply saying yes, we have decided certain things; we do not necessarily think they are significant, and it is then trying to balance the significance of certain conclusions which may have been made in favour of the appellants. We draw it all together with that

conclusion that despite all of those things that have been found in different ways we agree with Ofcom that our efficiency grounds do not provide a clear answer.

So the short answer to Mr. Landers is in fact it did not provide a clear answer one way or the other, which of course feeds into our significant material error point, because the reality is that this particular whole line of argument in fact did not inform the decision very much at all because it ended having a neutral effect on the overall decision. Neutral is perhaps overstating it, but it was not a strong finding on that point.

B, as I say, this is an area where we are going to share out some of the points. Again, we have dealt with this in writing in some detail from paras.199 to 214, and I do not want to go over those in detail but I know that you will be looking at those. A few general observations. Firstly, the time shift emerged, as you will have seen, in the course of the proceedings. It did not come out of the pleadings as such; it has emerged from the proceedings, but it having emerged and parties having made submissions in accordance with the procedure, it would have been absurd for the Commission not to try to make the best of the material before it and to make an appropriate decision on the basis of that evidence. It did that. It weighed the various positions put to it by the different parties. It had to have regard in doing that that the recommendation has a relevance in how you carry out this modelling and actually makes positive requirements about how these models are constructed and how the termination traffic costs are inserted into the model and the references to the last step and so forth of the model all refer back to the recommendation. That obviously has a significant effect, but not a compelling effect, on the process. The process itself involves a degree of judgment, but it is also important that it was never said and has not been said that the model was a time shift model. It has similar features and we develop that in more detail in our submissions.

When it comes on to the detailed complaints about the model, there are a couple of points which I need to draw attention to. Firstly, one line of attack is to the effect that we have failed to address the overall appropriateness of the model. This, I am afraid, involves going back on a pleading point, but I do not propose to take out all the pleadings. One of the oddities of the way in which the Reference Questions were drafted is that the model overall was considered in parts of the Notice of Appeal which ended up forming part of Reference Question 1. So that the evaluation of the model itself is to be found in the assessment of Reference Question 1 (to which I do not think you have been taken) from 2.932 to 2.939 of the Determination. That itself refers back to other matters. I have not taken you to it but if

you look at the Reference question you will see that it is within paras. 63 to 74 of Vodafone's notice of appeal which is part of Reference question 1.

So that itself, as it were, refers forwards or backwards, depending on how one looks at it, to the very substantial body of individual assessments which run from 3.34 to 3.922 on each and everyone of these individual matters raise in 3.36.

But you do need to have both bits if you are looking at the question as the overall appropriateness of the model you need to look at the first bit because that is where we dealt with it in the determination.

In terms of each individual component we did deal with each one, we say, satisfactorily. Thus, for example, we dealt with the effect of the Dutch Regulatory Authority in a section to be found at 3.572 to 3.578. I do not intend to read it all out but it is there, there is a passage headed regulatory precedent where we discuss the relevance of the fact the Dutch have taken a different view.

We have, we say, taken a sensible evaluation by reference to choices made about the merits of the different models, we have had to make those choices. We have had to make the choices as to whether it is better to look at a model that has some calibrated reference to reality or not, and that decision is not manifestly inappropriate; we would say it was right but it certainly does not fall foul of any judicial review test. There really is not anything even that we say that goes anywhere close to saying that the incorrect real risk theory is engaged, because there is nothing in our submission to suggest that there is any real likelihood that what we have done is wrong.

Vodafone has come forward with three examples of points which it says may or may not be incorrect; three elements which may involve some question about the way in which the model was dealt with. We have dealt with those individually in our written submissions. There is not, in fact, evidence, as far as I can tell that there were in fact real concerns regarding those elements. What Vodafone is saying is that there seem to be changes, those changes may be traffic related. That is not good enough, they need to go as far as showing that they are traffic related and actually make good that point in order to get anywhere near even a real risk level, otherwise it is simply a case that we have exhaustively analysed each of these components by reference to this evaluation as to what the nature of the costs are, and sought to apportion them. Mr. Kinnelly will look in a little more detail I expect to the three – cell radii, cell breathing and picocell and microcell proportion. But it seems to us, on our best assessment, even looking back at it now, those are likely to be coverage related.

The challenge as set out in Friday evening's document, we are referred to their response to the provisional determination and it ends up being a similar sort of issue that we had with other parts of the claim, and it is in s.6 of that document, it is 37A in file B3 is what they refer to. But when one looks at it in our submission this lengthy document does not reveal manifest errors, and certainly nothing developed before you, in our submission, gets anywhere near a manifest error that should upset the decision to adopt the Ofcom model.

Probably, given the time, I ought to just stop there. There are other points which I could go on in greater detail, but I suspect that others will deal with them at least as well probably no doubt better than I would have done.

So having indicated how we are going to deal with other points, probably not in great detail but I may just come back on Mr. Landers' question depending on how those submissions evolve, I do not think there is anything else I can assist with at the moment. I have said Ground C we are dealing with in writing.

THE CHAIRMAN: Indeed. Thank you very much, Mr. Bowsher. Yes, Mr. Kinnelly?

MR. KENNELLY: If you will permit me, sir, I will address very briefly the surveys point which emerged in the course of this afternoon's submissions before addressing Ground B of Vodafone's notice of appeal.

Sir, you raised two points on surveys, one a point of principle, and one a point on this case which I think Professor Mayer also addressed. On the point of principle you asked what if the CC took a completely unexpected course and produced an analysis, or answer which no party could have anticipated. Our view is that two things may arise from that situation. The first is, of course, the CC is bound by duties of procedural fairness in common with any other public authority. Therefore, if this was a completely new matter it would be obliged to put it to the parties and provide them with sufficient detail to understand the point and sufficient time to respond. In that context it will be open to the parties to apply to adduce new evidence under Rule 22 of this Tribunal's Rules, and one would expect that permission to be granted and new evidence to be adduced. That would accommodate in almost any conceivable situation the situation which you, sir, envisage.

But in the highly unlikely event that the appeal process could not accommodate that, and it was impossible to get that further evidence, and the Tribunal will recall that the issue of the sufficiency of inquiries – what is a sufficient inquiry – is a matter for the CC to be challenged only on irrationality grounds (we have that in the *BAA* case at para. 25). If the CC determines that the inquiries are necessary and sufficiently material that the CC cannot

decide if Ofcom was right or wrong then it would be likely appropriate for the CC to allow the appeals and remit in order for that material to be gathered.

But, in reality, in almost any conceivable situation the first stage would be sufficient. The appeal process is sufficiently flexible to accommodate the gathering of that evidence.

Needless to say neither EE nor Vodafone sought permission in this case to adduce the kind of survey evidence which they said they needed to have.

Now, turning to the facts of this case, they are quite different from the extreme facts which I have just outlined. In this case, as Mr. Bowsher said, the parties, in particular EE and Vodafone, had all of the necessary material to construct a robust survey. They did not need the final ultimate figure that the CC would settle upon. In the April 2010 consultation all of the parties were putting forward their own figures based on evidence that they would likely rely on before the CC on appeal, and EE had all of that material. It could have used that to construct a robust survey; it relied on more ambitious questions. I commend to the Tribunal the criticisms of the surveys at the FD para. 2.685 and FD 2.691, because of the time I do not propose to take you to every document, but if you look at those pages you will see that there are serious criticisms of the surveys which have nothing to do with the fact that they lacked the final figure, or even anything like the final figure that the CC settled upon. There were serious flaws in those surveys which EE and Vodafone could have avoided had they constructed them properly.

It is also useful for the Tribunal to look at FD 2.823 where those problems are again summarised by the CC, and the problems and flaws in the surveys have nothing to do with the fact that they lacked the final figure that the CC produced.

In terms of any question of prejudice that EE may have suffered the Tribunal has well in mind, because Mr. Turner relied on it very heavily, that the CC in fact adopted EE's submissions as to the form and targeted price increases.

Turning to Professor Mayer's point, the reference to para.2.700, where the CC bemoaned the lack of robust survey evidence. In that paragraph the CC was not saying, in our submission, that "Without adequate surveys we cannot decide if Ofcom's decision is right or wrong on this question of allocative efficiency." If the Tribunal read the entirety of the CC's overall assessment at paragraphs 2.813 to 2.823 you will see that the CC was able to make its decision properly without having that robust survey evidence. The Tribunal will also recall that the question of a survey was but one factor in this assessment of the impact of the LRIC figure of price increases on mobile ownership and subscriptions, and that

impact was itself but one factor in the overall question of allocative efficiency. So it is very important to see it in its proper context.

Turning then, if I may, to Vodafone Ground B. Although Ground B in its present form was not raised in Vodafone's notice of appeal it rests on, and in my submission is effectively a reformulation of a central argument in the notice of appeal. This is the firm design parameters in the model are a function of i.e. determined by the level of network traffic, and therefore the parameters in the ex-MCT scenario need to be adjusted relative to those, and the with MCT scenario to reflect track differences between the scenarios. This focus on traffic is the key to Vodafone's complaint under Ground B. Of course, this argument was considered at length on the merits and rejected by the CC and those conclusions are in the FD at 3.39 to 3.144.

Vodafone now makes four points in its pleading: first an error of law, referring to this real risk of error in the assessment of LRIC, which Mrs. McKnight, in fairness to her, did not pursue before you with any vigour, she relied on a quite different test. Secondly, that the CC's conclusions that the model was fit for the purpose of ascertaining the LRIC cost of the MCT service, and that no amendments needed to be made to the network design parameters used in modelling the ex-MCT-network was irrational; and thirdly, that it was also irrational for failing to have regard to relevant considerations relating to design implementation and quality of Ofcom's network, the network model and approach of other NRAs; and finally the lack of reasons.

Turning to the legal test, and here if you will indulge me at this late hour on maybe not the most interesting of the Grounds – well I find it interesting at least, myself and Mr. Mantzos – allow me to recap very briefly a legal background, because this is very important to the particular Ground B. We say this is classically the kind of ground which is not amenable to judicial scrutiny and a judicial review. I say "amenable", of course you can look at it but you will hear my submissions as to the intensity of your review. In addressing these questions I will also, I hope, address the Chairman's point regarding the potential tension between the JR ground of proportionality and the fact that the CAT is constrained by the grounds of appeal. I shall do it by addressing the role of each of the institutions in this proceeding.

First, Ofcom, the primary decision maker, which has a wide discretion and investigatory powers, and questions of proportionality are primarily for Ofcom and that is enshrined in the Statute.

The CC, as the appellate body, applies profound and rigorous scrutiny to the question whether the appellant has shown a material error in Ofcom's decision. That is the CC's statutory question. The CC looks to see if Ofcom has reached the right answer, not the perfect answer. Mrs. McKnight, on a number of occasions, referred to "perfection". She said she was not a counsel of perfection, but on two occasions in particular she criticised Ofcom for not achieving "perfection" in the model. She said it was a real concern that the design rules are imperfect based on engineering insight. That is p.69 of the transcript, line 19. She also said that it comes back to this point, Ofcom did not have to set a LRIC based charge control, if this model is not good enough, then it should not be doing that, it should be setting a LRIC+ charge control until it can perfect this (p.69, line 23). That, of course, is not the test.

In fact, as the Tribunal held in the *T-Mobile* case, the authorities bundle 3, tab 45, paragraph 82, there may be no single right answer. We say, especially in an imprecise and uncertain area such as modelling inputs, there may be no single right answer. In that situation the CC, on a merits approach, will be slow to disturb Ofcom's reasoning.

Also, separately, the CC and the Tribunal have been reluctant to find material errors in Ofcom's assessment in areas where there is inherent imprecision or a significant margin of error. That is the *Carphone Warehouse* case, the CC determination, authorities bundle 4, tab 59, paragraph 2.406.

Further, crucially, the question of materiality. In Mr. Turner's typically eloquent summary this morning, he suggested that all an appellant must show is an error. I may be unfair to him, but he may have suggested that questions of practical implications and alternatives are for the remedies stage only. This, in my submission, risks ignoring the question of materiality. It is only material errors that serve to vitiate Ofcom's decisions. Questions of materiality are crucial in appeals such as this. You have the authorities, and I refer to two, the *H3G* determination of the CC of 16th January 2009 at paragraph 1.32. There the CC held that the error in reasoning must have been sufficiently important to vitiate Ofcom's decision on the point in whole or in part; and also in the *Carphone Warehouse* case the CC took as its starting point the position that an error will not be a material error where there is only an insignificant or negligible impact in relative terms, importantly, on the overall level of the price control that has been set by Ofcom.

You will also see in that same case the fact that the CC deprecated the practice of parties of aggregating immaterial errors and then submitting that cumulatively they amounted to a material error. That is not an appropriate approach.

Finally, sir, you raised the issue of the EU proportionality test and extent to which there is any material difference between it and the domestic standard. We do not disagree with anything Mr. Bowsher said, but it is important to draw attention to a further authority which serves to link *Mabanaft* and *Sinclair Collis* in our submissions. That is the *BT v. Secretary of State for BIS* authority. Because you have not been taken to that yet I would ask you to turn it up. It is in authorities bundle 4, tab 60, paragraph 214. Here Mr. Justice Kenneth Parker was addressed on the Digital Economy Act. I appreciate that in this case it was a judicial review of an Act of Parliament, and obviously there were various considerations as to why the court should be slow to disturb an Act of the primary legislature. This is a question that does not depend on the fact that is not an instrument of primary legislation that is being challenged – it is paragraphs 213 and 214 – because the Judge describes how, quite apart from all the issues about it being a matter for Parliament, it was, of necessity, an extremely difficult polycentric matter to resolve. He says at the end of paragraph 213:

> "… [there are] a range of policy choices that are theoretically open, but is well nigh impossible for a judge."

He refers to the *Eastside Cheese* case where Lord Bingham accorded a margin of appreciation (under EU law) because the challenged decision called for:

> 'the evaluation of scientific evidence and advice as to public health risks, and which have serious implications both for the general public and for the manufacturers, processors and retailers of the suspect cheese'."

A public health case.

In the passage upon which I rely, paragraph 214, the learned Judge said:

> "Here, the evaluation is not of scientific evidence but of competing economic arguments, when a similar margin of appreciation is justified."

Of course, we have seen the *Sinclair Collis* case where the Court of Appeal, at least the majority, Lady Justice Arden and Lord Neuberger agreed – I will refer to Lady Justice Arden at 155 first, that where there is a wide margin of appreciation, and of course that varies depending on the circumstances, as in a public health case or, I say, based on the *BIS* case, a complex assessment by an economic regulator, the standard of review which EU law requires in this context looks like a *Wednesbury* review.

Even Lord Justice Laws, who dissented and agreed with the submissions which myself and Miss Rose made in that case, said that he rejected our, what he called "close range criticisms of the economic assessment made by the Secretary of State". I can assure the

Tribunal that our case was stronger there for lack of evidence than the appellants in this case. Even in his dissent Lord Justice Laws gave us short shrift.

THE CHAIRMAN: We are not going to take issue with you on that, I can assure you.

MR. KENNELLY: Indeed not.

Turning to the question itself and the factual background, bearing in mind the standard of review, I do not think it is in dispute, but it is important to recall the extreme complexity of this modelling exercise, and I rely on Ofcom's skeleton at paragraph 27 where, and again because this point has not been made, it is appropriate to make it now:

> "The primary part of the model is made up of 6 Excel workbooks containing over 150 Excel worksheets and almost 2.5 million cells. It is over 100 Mbs in size;
>
> From the consultation responses, Ofcom logged 68 separate cost modelling issues to be addressed (both implementation and conceptual), in addition to the general update to the model which was required to reflect updated operator information in about 100 fields."

Ofcom makes the point that its resources and time are not unlimited in addressing all of that material. Therefore, Ofcom could not exhaustively model every single effect pertaining to national mobile networks but had to make judgments as to what was proportionate in the light of other necessary possible avenues of work and the time and resources available. This is a matter of judgment based largely on the likely materiality of a particular costs modelling point and the likely time required to investigate it further. As the CC found at 3.125 of the FD, the cost model is an abstraction of reality and will necessarily need to include approximations. This Vodafone accepted Mr Roche at the technical hearing, p.31, line 20. He said at that technical hearing that the "Ofcom MTR model is a mind boggling 100 Mb Excel spreadsheet". Even then it is obviously a massive simplification of reality, and crucially, he said, it has to be.

With that in mind we turn to the particular time shift point which is the first of the points raised in Vodafone's ground B. Our submission is that Vodafone's grounds misrepresent Ofcom's model and the CC's analysis of it. Ofcom never said that it adopted a time shifted approach. The Tribunal has well in mind what Ofcom's approach actually was. It was a subtractional approach, as recommended by the EC Recommendation. In Ofcom's approach the network design parameters at a given point in time are unchanged between the network with MCT and the ex-MCT network.

True it is, as Mrs McKnight pointed out, the time shift analogy was first raised by Three, and Ofcom used it as an analogy to explain why it considered the removal of MCT traffic could not and has not lead to a fundamentally different network design. Mrs McKnight, herself, acknowledges, and this is important, that Ofcom do not rely in the decision on any time shift approach.

Similarly, the CC did not find that Ofcom had adopted a time shifted approach, or that one was appropriate. All the CC found was at FD 3.68. What the Commission said there is important, it said "in principle", and Mrs. McKnight said that was a caveat. Yes, it was, the CC said:

> "… in principle, a network that has design parameters that provide the cost of all the all-services network satisfactorily over time also provide a sufficient approximation of the cost the ex-MCT network at a specific point in time."

That was not, as Mrs. McKnight said, the sole basis for rejecting Vodafone's challenge to the model, because the CC's reasoning was not confined to 3.68.

At 3.124 crucially the CC recognised Vodafone's point that it is appropriate in principle to use different network design parameters in the ex-MCT network where parameters for a particular network asset, one, vary with time, and two, as a result of changing traffic. The CC said that it would consider any potential adjustments on a case by case basis. I will come to those adjustments later. That was the CC's approach.

The first question: to what extent do parameters vary over time before we get to traffic? This morning Mrs. McKnight appeared to suggest that each parameter was tweaked differently in each year. That was the example where everyone in the room was given a parameter which we tweaked on an annual basis.

Vodafone accepts that in general the network design parameters in the model remain constant over time. That is not challenged. If you look at para.4 of Mr. Roche's third statement that is confirmed. Vodafone accepts that not all design parameters need to change with time, and that is implicit in para.60.3(b) of their grounds. This is important because Mrs. McKnight accepted yesterday (p.65, line 12 of the transcript), and you will forgive me if I just quote from what she said. She said:

> "…if you made a common set of calibration adjustments and the result was that the model for the same post-calibration adjustment rules predicted the correct, or close to correct, outturn at every level of demand that has been observed from year to year, one could be pretty confident that the rules were correctly reflective of the underlying asset causation drivers."

Here comes her criticism –

> "But if you are making different calibration adjustments from year to year there really is no reason to be more confident that the post-calibration rules are right than if you just had one year."

She is accepting there that where the parameters do not change over time there is cause for confidence. That, as I say, is what happens in general in the model. I can give you examples of parameters that do not change over time, but I am sure that you do not need to have those now.

Therefore, the CC's conclusion that overall a costs model is necessarily an abstraction of reality, and network design parameters generally remain constant over time, it is not irrational to conclude that in principle if the model is satisfactorily tracking the evolution of costs due to increasing traffic over time then it should also provide a sufficient approximation of the changing costs due to the removal of MCT traffic.

PROFESSOR MAYER: May I just ask, I thought we were hearing yesterday and today that there was a table where parameters seemed to change. I do not know whether you want to refer to that, Mr Kennelly.

MR. KENNELLY: Vodafone put in appeal parameters which it said varied over time and varied with traffic, and those are the ones which are in Vodafone's skeleton argument, microcells and picocells, 2G cell radii. Those are the two main ones. Then there is the cell breathing point where they said there should have been an adjustment.

Mrs McKnight again – I make no criticism of her – could only deal with microcells and picocells, even with her extension of time. They have dealt with it in writing, and we have dealt with it at length in writing, as has the CC. I propose only to address orally, because it is now 4.15, the part that Mrs McKnight addressed orally, and I rest on my written submissions and on the extensive evidence before you for the other points. That was the point of microcells and picocells. I am assuming, if Mrs McKnight showed it to you, that that is her best point on these parameters.

Of course, Vodafone argues that its evidence shows there is a real possibility that the proportion of microcells and picocells is driven by traffic, and this contributes to a real risk that Ofcom has erred by not adjusting this parameter. First of all, that is not the test and you have all our submissions on that.

We submit that the Commission considered the issue fully and reached a rational conclusion that there was no clear link between traffic and microcells and picocells, and the reference is in the FD, 3.73, 3.101 to 3.103. Critically, this was an instance where Three put forward

hard evidence as to the lack of a clear link between microcells and picocells and traffic, not termination traffic, but traffic overall, which of course includes the termination traffic but we made the broader point. That is in Mantzos 2, para.3.31, B3, tab 21. This is important because, and Mr Landers made the point, I think, this was a situation where the CC had conflicting evidence, and it preferred, we say correctly, the evidence of 3. Mrs McKnight in response said no clear link meant that it could not be properly quantified. That was not our evidence. Our evidence was that the facts showed that as traffic went out microcells and picocells were not going up, in fact they seemed to be going down; the numbers were reducing. That was the evidence we put forward in Mantzos 2 and that was the evidence which was adopted by the CC at 3.131 of the Final Determination. This comes nowhere near irrationality in our submission.

As I said, in relation to 2G cell radii, you have our references similarly for self-reading. In our submission, this is a ground which, bearing in mind the test is one of rationality and not a merits appeal, must fail for the reasons I have given. I am grateful.

MR. LANDERS: Can I ask a question briefly on the shift back and shift forward. The argument was put forward that since one is looking at a lower volume you should simply shift back to earlier parameters.

MR. KENNELLY: I think there are two points. The first was when we suggested it, as we did, it was an analogy; it was not fully developed. Clearly, where all things remain equal and there are no other reasons for network assets to increase, there might be some scope for that, but that is plainly not the case. There are other reasons for network assets to increase such as coverage and technological reasons. For example, in their table at 3.1 of Mr Roche's second statement there is reference to the HSPA efficiency changing. That has nothing to do with traffic. The hardware and software came on-stream and therefore the parameter changed.

So we say that it is a useful analogy; it is no more than that. Ofcom treated it as no more than that; the CC endorsed that. There are good reasons why Vodafone's mechanistic attempts to go back in time for the ex-MCT network is wrong because they have failed to show that even for these two parameters the changes are due to traffic.

MR. LANDERS: Can I just clarify something. I think you are saying that Mrs. McKnight chose five parameters, the changing over time, but most of the parameters do not get adjusted. Are you saying that the ones that do not get adjusted are equally important?

MR. KENNELLY: Yes, the ones that do not change at the time are important because in general - I have to ask about the exact degree of importance. I cannot say how important individual ones are, but in general the parameters of the model do not vary over time.

MR. LANDERS: But there would be no argument that the five that were selected by Mrs. McKnight are particularly important?

MR. KENNELLY: That was not an argument that she made today. She said they were key parameters, but one accepts that the general practice is that the parameters in the model do not vary over time. Certainly no-one has suggested that these are the most important parameters.

MR. LANDERS: Key might be a suggestion, but you would dispute that they are key?

MR. KENNELLY: I certainly would dispute that, yes. Yes, that is confirmed by someone who knows far more about this than I do, to whom I am grateful for the submission I have just given. Thank you very much.

THE CHAIRMAN: Thank you very much, Mr Kennelly.

MRS. McKNIGHT: I would be happy to clarify that we do maintain that the parameters we have identified make a material difference to the result. I will, in reply, show you the quantum of the difference. But we are not suggesting that the ones that do not change are immaterial. Clearly there are lots of inputs into the final answer, but our point is the ones that we are relying on make a big difference.

MR. KENNELLY: Mrs McKnight, very helpfully, has triggered my last point which is of course on materiality you have our submission that in any event the adjustments are not material. You see what we say about materiality in our written submission. I can take you to that now.

THE CHAIRMAN: Yes, we have that. I think it is now clear that Mrs McKnight is suggesting that the ones she has picked are material but she is not going further and saying that the ones you have referenced are not material.

MR. KENNELLY: Correct.

THE CHAIRMAN: Thank you very much. Who is next?

MR. PALMER: Sir, I will be about 20 possibly 25 minutes. I am in your hands as to whether you would like me to embark on that now or not.

THE CHAIRMAN: I think it would be helpful, Mr. Palmer, if we could begin, and even better, finish today!

MR. PALMER: I will do my best to oblige. I am very grateful, sir. Sir, I am going to address the Tribunal, if I may, on EE's Ground One and briefly on Four. Yesterday, the Tribunal had

the benefit of Mr. Turner's oral submissions which, as he explained, made the essential points he needed to establish EE's case. In my submission, those essential points are based on at least two false factual premises and do not generate a legally coherent ground for judicial review.

I will start with the first factual false premise which I say is on the facts Mr. Turner has overstated the significance of the criticism that the CC made of the appellants' survey evidence, and therefore he overstates the extent to which those criticisms imposed limitations on the CC's ability to determine the effect of price changes on mobile ownership.

On Mr. Turner's account the absence of fully reliable survey evidence was critical to the Commission's conclusion that allocative efficiency grounds do not provide a clear answer to Reference Question 1, namely the difference between LRIC and LRIC+. Those conclusions, those overall final conclusions of course, appear at 2.929(b) of the Commission's Final Determination at p.2-178. That is the headline news, the overall assessment where the Commission pulled together all of its conclusions in support of its ultimate conclusion that Ofcom did not err in going with the Recommendation of the European Commission and choosing pure LRIC as the appropriate cost standard. It is (b) in that paragraph which deals with allocative efficiency. In the third line it is:

> "... we agree with Ofcom that allocative efficiency grounds alone do not provide a clear answer as to [which] should be preferred."

But Mr. Turner's case is that part of that ultimate conclusion was fundamentally affected by the absence of fully reliable survey evidence. That is a premise which I seek to persuade you is false.

May we go to the conclusions on allocative efficiency, which the Tribunal has seen already several times, at 2.823. Because the Tribunal has seen it before I will not spend time on it other than to say it cannot, on any view, be reduced to the simple proposition that but for fully reliable survey evidence we cannot uphold this appeal. The reasoning of the CC there in pulling together all the strands of its consideration of overall efficiency is much more nuanced and subtle than that.

The high point for Mr. Turner is para.2.819 on the opposite page. Again, still forming part, at this point of the overall assessment on allocative efficiency specifically which began at 2.813. The high point, 2.819:

> "We have also considered evidence on the responsiveness of consumers to price increases. We would normally expect this question to be addressed using

empirical evidence, but Ofcom relied on little relevant evidence in its decision and we found that the evidence of the appellants did not allow us to make a reliable assessment on the scale of reactions to price increases. This is further complicated by the fact that most evidence refers to the number of subscriptions rather than the number of subscribers. We did not think that any of the evidence demonstrated that moving from LRIC+ to LRIC would lead to significant reductions in subscriber numbers, relative to the level of subscribers in the UK today."

But the CC did not stop there, it continued in the following paragraph which Mr. Turner did not find time to read, and in particular at 2.820 second sentence:

"We consider that the most likely effect on pre-pay users would be call price increases (possibly mitigated for higher users by some form of reward or add-on) as we have already witnessed since the new charge control came into effect. We expect an increase in call prices to have a relatively small effect on subscribers numbers."

That is a positive conclusion stated there at this point in the Determination in headline form in overall conclusions. We are going to drill back, going backwards through the Determination, rather like Mr. Turner's grounds, going backwards, unpacking these overall conclusions into some of the detail.

I also draw attention to 2.821 where the CC concluded that price changes of other possible types were not likely.

"We note that the MCPs' response to the first - and largest - cut in MTRs, from the previous charge control to the first year of this control, has mainly taken the form of call price increases. It is not clear to us that the smaller difference between LRIC+ and LRIC would prompt a different type of response."

It is important to remember in terms of empirical evidence that the CC did have the benefit already of the first and biggest price drop in the new charge control period and what effect that was having.

Just working a little bit earlier, still in these overall assessment paragraphs, we can see in particular at 2.816 and 2.818 it found that it was the marginal customers which were more likely to be affected, but at 2.818:

"However, the available evidence suggests that price increases for low-usage customers are still likely to be modest. [That point has nothing to do with the survey evidence.] A reasonable assumption would be that the average price

> increase for pre-pay users is in the range of £5 to £8 per year. [again, when we go back to para.2.738 you will recall that once you take into account the waterbed effect it is only 80 per cent of that level, which brings it down still further to £4 to £6.40 or so.] Since this is the average, there is a possibility that some customers would see increases well above this level. In particular, if we believed that there is a sizeable category of pre-pay users who make a low number of outgoing calls, but receive a large volume of incoming calls, and that price increases could be targeted at that category, we might expect that it would receive above-average price increases leading to reduced ownership However, data on calling patterns does not suggest that a sizeable category of this type exists."

These are all matters which informed the conclusion to which we have already gone at 8.20 that an increase in call prices would have a relatively small effect on subscriber numbers. Drilling back into the consideration in more detail of some of those points, we can go back to 2.736 and look at the conclusions that the CC was able to draw. 736 you were taken to by Mr. Turner:

> "... we consider it likely that certain groups will be most at risk of giving up their subscriptions, and that in general those groups will be relatively low users."

This was consistent with Vodafone's survey evidence. We do see Vodafone's survey evidence, and EE's survey evidence for that matter, being referred to at various points with the lessons that could reliably be drawn from it being drawn, but only the absolute levels, as you will see in due course, could not be extrapolated from them.

At 2.737 we have those figures with the footnote. Then at 2.738 we expect this effect to be larger than this for some groups and smaller for others. Then there follows the point to which I adverted earlier on, leading to the conclusion to which I attach significance at 2.742:

> "Taking into account all the evidence we considered above on calling patterns, we did not find convincing evidence that there are groups of customers – and especially low usage customers – whose net income from mobile termination charges forms a large proportion of the revenue that MCPs earn from having them as subscribers. This suggests that price increases for these customers would be modest relative to the level of charges they were already paying and, in turn, that if prices take the form of increases in usage charges …"

which they do expect later on: "then the effect on number of subscribers will be relatively small".

That is a positive finding and an important one bringing together the scale of expected changes in prices – modest, especially for low usage customers who are the most likely to be affected – and the number of subscribers that will be affected, that will be relatively small.

2.700, to which the Tribunal referred earlier and working backwards through it, which is the conclusion on the survey section, the CC accepted that

> "care must be taken when assessing survey results – [that is a point I will come back to under my second point later] - we do not accept that a well-designed survey provides no relevant information.
>
> Since the question of consumer responses to price increases is a key issue in this determination, we would normally expect a robust survey to be important evidence that a regulator would seek to rely on. In this case there does not appear to be any reliable survey evidence that directly addresses the magnitude of customer loss that would flow from the type of price changes we expect to observe. Vodafone and EE's surveys tell us something about the relative effects of different types of price changes, and about the relative impact on low income customers compared with other customers, although we have been careful in how much weight to place on them."

From that conclusion that indirect information is applied in the subsequent analysis which I will not take you all the way through, but leading to those ultimate conclusions as part of the general picture, part of the general assessment about the likely scale of price changes, and hence the likely effect on numbers. Taking into account what could be drawn from the surveys, but at no point finding that the absence of surveys meant that no sustainable conclusion could be drawn, and that is the critical point for this ground of appeal, and their conclusions on this point are not irrational, they are not even argued to be irrational by Mr. Turner, and they are not unsustainable in the absence of direct survey evidence of the kind that is being referred to here at 2.700.

But it is still possible to cross check the CC's ultimate conclusions on this with what they could actually draw from the surveys, and here we now turn to the actual assessment of survey evidence at the beginning of this journey from 2.690 onwards. The most reliable survey is identified as the second Vodafone survey, and the critical point about that is at 2.694, which is self-evidently and quite clearly directed at the wrong target which was the

effect of the drop from existing prices to pure LRIC prices and not directed at the effect of the change from LRIC+ to LRIC. That is a stare in your face, an obvious point. I say that not to detract from the expertise of Dr. Maldoom, who expressly drew attention to that point in his report attached to BT's statement of intervention and in particular it is para. 160 of his report, and that is referred to by the CC at their paragraph 2.689.

Vodafone did respond to the criticisms of its surveys in its core submission in annex 1 – I do not need to turn it up, the document is at B3, tab 23 – but it took no steps to correct this central point, and it is that central point that led to the strong criticism of even the second attempt survey from the CC. There was another criticism as well in the paragraph preceding but that is less central, it was about the difficulty that gave to interpretation of the results rather than the whole exercise had been misdirected.

What led to the accusation of a misdirection is at 2.694. But nonetheless doing the best that it could and in effect being generous to Vodafone, what the CC did at 2.695 in a heavily caveated fashion understandably, is extrapolate from that information based on the proportion of the drop, 32 per cent, which could be attributed to the change from LRIC+ to LRIC and even on that basis found only 0.5 per cent of mobile users, or 0.3 per cent of subscriptions would be affected. That is assuming a linear demand curve, and if one drops down to footnote 599, a reasonable alternative assumption would be that small changes have very little effect on ownership, whereas larger changes have an effect orders of magnitude higher. In that case the estimate we provide in this paragraph would be too high, so this is a worst case based on a misconceived survey which has not been corrected even though the central criticism of it has been directly drawn to Vodafone's attention and so there frankly is no procedural unfairness point to be taken here. Vodafone declined to correct that error and offer an alternative.

That is consistent with what I say is the key conclusion at 2.742 to which I took you earlier. The effect on the number of subscribers will be relatively small, that is 0.5 per cent on that worst case linear demand curve basis, it may well be reasonable to say it is likely to be less than that.

What could be drawn from the Vodafone survey was consistent with the conclusions which the CC drew from bringing together the other elements to which I have referred. At no point does it conclude: "but because we do not have that direct survey evidence we cannot place faith in our general expectation." That does not appear and it is an overstatement on Mr. Turner's behalf to suggest that that is how the CC's determination should be read. In particular it has to be borne in mind that the ultimate use of determining what proportion of

subscribers is likely to drop off has then to be assessed in allocative efficiency terms and then you have the discussion at 2.808 and 2.809 about whether or not it is safe, even from that information to conclude that there would be a drop off in allocative efficiency and, indeed, without going through that discussion I just draw the Tribunal's attention to 2.812 again which, by way of conclusion to that discussion in the preceding paragraphs, concludes: "We believe that the above discussion illustrates the difficulty of drawing strong and robust conclusions on allocative efficiency in a complex market." Again, that does not hinge on the absence of direct survey evidence, and it is impossible to conclude that the CC thought: "If only we had direct survey evidence we would be likely to be able to draw a different overall conclusion on the ultimate relevance of allocative efficiency."

THE CHAIRMAN: Mr. Palmer, the CC's para.2.694 deals with the Vodafone survey, is the only relevant part of the final determination on EE's survey, para. 2.691?

MR. PALMER: I think it may be. That has to be viewed in this context: the EE survey was submitted as part of a consultation response to Ofcom. Ofcom made criticisms of it. EE decided not to go the Vodafone route and tried to correct those and indeed the CC were more generous to it than Ofcom had been, nonetheless they were cautious of the demonstrably small sample, only 434 respondents with subcategories again being necessarily smaller. So EE's reasons for not producing a second version or a better survey, even in the light of Ofcom's criticisms are saying effectively we did not have time in the two months from the publication of the statement before the appeal but obviously Vodafone managed it, and we know EE and Vodafone have closely co-ordinated their appeal so as not to duplicate and overlap and so forth. I do not know whether there was co-ordination on that point or not, they will have to tell you but for whatever reason EE decided not to seek to produce a better survey at that point, so that has to be seen in that context.

Sir, I said 20 minutes, I am slightly behind, I think I have about 10 minutes more. I am very happy to keep going, equally I do not want to try your patience today.

THE CHAIRMAN: You are certainly not trying our patience in any way but I am very conscious that there are transcribers who have to transcribe, and so I think we will rise now. How are we doing? You have another 10 minutes or so. We then have, I think, Mr. Holmes?

MR. HOLMES: Yes, I expect to be no more than 15 minutes.

THE CHAIRMAN: And then we are into replies, is that right?

MR. TURNER: Yes.

THE CHAIRMAN: Well we should comfortably finish tomorrow?

MR. TURNER: Yes.

THE CHAIRMAN: It may be before or after lunch, but it ought to be early afternoon at the latest I would have thought.

MR. TURNER: It is the neutral goal of everyone in this room to finish by …. (Laughter)

THE CHAIRMAN: There is co-operation on a large scale, Mr. Turner. In that case we will say 10.30 tomorrow morning.

(Adjourned until 10.30 am on Thursday, 5th April 2012)