Neutral citation [2015] CAT 6

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1211/3/3/13

Victoria House
Bloomsbury Place
London WC1A 2 EB

17 March 2015

Before:

MARCUS SMITH QC
(Chairman)
STEPHEN HARRISON
PROFESSOR GAVIN REID

Sitting as a Tribunal in England and Wales

B E T W E E N:

BRITISH TELECOMMUNICATIONS PLC

Appellant

- and-

GAMMA TELECOM HOLDINGS LIMITED
TALKTALK TELECOM GROUP PLC

Interveners

- v -

OFFICE OF COMMUNICATIONS

Respondent

-and-

HUTCHISON 3G UK LIMITED
TELEFÓNICA UK LIMITED

Interveners

Heard at Victoria House on 26 and 27 February 2015

RULING

APPEARANCES

Mr Daniel Beard QC, Ms Sarah Lee and Ms Ligia Osepciu (instructed by BT Legal) appeared for British Telecommunications plc.

Ms Sarah Love (instructed by Charles Russell Speechlys LLP) appeared for Gamma Telecom Holdings Limited, intervening in support of British Telecommunications plc.

Mr Ben Lask (instructed by TalkTalk Legal Shared Services) appeared for TalkTalk Telecom Group plc, intervening in support of British Telecommunications plc.

Mr Javan Herberg QC and Mr Tristan Jones (instructed by the Office of Communications) appeared for the Office of Communications.

Mr Jon Turner QC and Mr Philip Woolfe (instructed by Constantine Cannon LLP) appeared for Hutchison 3G UK Limited, intervening in support of the Office of Communications.

Mr Tim Ward QC and Mr Robert O'Donoghue (instructed by King & Wood Mallesons LLP) appeared for Telefónica UK Limited, intervening in support of the Office of Communications.

I. INTRODUCTION

(a) OFCOM's Decision

1. By a decision dated 4 April 2013 (the "Decision"), the Office of Communications ("OFCOM") resolved certain disputes between British Telecommunications plc ("BT") on the one hand and each of Everything Everywhere ("EE"), Telefónica UK Limited ("Telefónica"), Hutchison 3G UK Limited ("Three") and Vodafone Group Services Limited ("Vodafone"). Collectively, we shall refer to EE, Telefónica, Three and Vodafone as the "mobile network operators" or "MNOs".[1]

2. The dispute between BT and the MNOs was essentially as to whether BT was permitted to introduce new wholesale termination charges for calls to certain numbers on BT's network. These changes were set out in various Network Charge Change Notices ("NCCNs"), namely NCCNs 1101, 1107 and 1046. All of these NCCNs had a common form of charging structure, although the details varied. Essentially, BT was seeking to charge different prices for the same service (that service being the termination of a call to a specific class of number). The price payable depended upon what the originating communications provider was charging its own retail customers. For the purposes of this Ruling, we shall refer to pricing structures of this sort as "ladder pricing".

3. Pursuant to its dispute resolution powers contained in sections 185 to 191 of the Communications Act 2003 (the "2003 Act"), and for the reasons set out in the Decision, OFCOM resolved these various disputes against BT and in favour of the MNOs.

4. In resolving these disputes, OFCOM's approach was to find that BT's charges, as set out in the NCCNs, could only be introduced if they were "fair and

[1] Shortly before the hearing, EE and Vodafone withdrew their interventions. They played no part in the hearing before us on 26 and 27 February 2015. The remaining MNOs were thus individually represented by separate legal teams. Nevertheless, it is appropriate to continue to use the term "MNOs" not merely to embrace Telefónica and Three, but also (to the extent that their historical participation in these proceedings is relevant) EE and Vodafone.

reasonable". A new charge would be fair and reasonable in the following circumstances (quoting from paragraph 1.8 of the Decision):

"Ofcom considers that it could be fair and reasonable for BT to introduce tiered [wholesale termination charges]. In order to assess whether the charges in the Disputes are fair and reasonable we have used an analytical framework which is substantively the same as that which we used in the 08x cases and which sets out an approach that was considered appropriate by the Competition Appeal Tribunal ("CAT") and by the Court of Appeal ("CoA") in the subsequent appeal of the CAT's Judgment. Broadly, the framework comprises three principles:

- to satisfy the first principle, the [wholesale termination charges] should not deny MNOs the opportunity to recover their efficient costs of originating calls;
- to satisfy the second principle, the [wholesale termination charges] should be beneficial to consumers; and
- to satisfy the third principle, the [wholesale termination charges] should be practical to implement."

5. In the case of these NCCNs, OFCOM concluded as follows:

"1.12 …Our overall conclusions in relation to each of the three principles are as follows:

Principle 1

1.13 Our analysis in this investigation has led us to conclude that, in relation to each of NCCNs 1101, 1107 and 1046, the introduction of those NCCNs should not prevent the MNOs from recovering their efficiently incurred costs of call origination. We therefore conclude that Principle 1 is satisfied in relation to each of the three NCCNs.

Principle 2

1.14 We have identified that there are two distinct groups of consumers that may be affected by the NCCNs: callers and service providers. Having considered the Direct effect, [mobile tariff package effect] and Indirect effects of the three NCCNs, and taking account of any effects on competition arising from the introduction of the NCCNs, we have concluded that Principle 2 is not satisfied in relation to any of the three NCCNs.

Principle 3

1.15 We consider that there is some uncertainty as to whether it is practical to implement the relevant [wholesale termination charges]. In light of our conclusions in relation to Principle 2, we do not consider that it is necessary for us to reach a definitive conclusion in relation to whether NCCNs 1101, 1107 or 1046 satisfy Principle 3 and therefore do not do so."

6. Thus, by its Decision, OFCOM determined that BT's proposed charges were not "fair and reasonable", and so could not be implemented. This is BT's appeal against that Decision, made pursuant to section 192 of the 2003 Act, which BT commenced by a "Protective Notice of Appeal" dated 24 May 2013. The reason why BT took this course, instead of filing an ordinary Notice of Appeal, is the *08x Case*, which we consider below.

(b) The *08x Case*

7. Although all appeals to the Tribunal under section 192 fall to be determined "on the merits and by reference to the grounds of appeal set out in the notice of appeal" (section 195(2) of the 2003 Act), the issues considered by OFCOM in the Decision have already received significant consideration by OFCOM, this Tribunal, the Court of Appeal and the Supreme Court. BT contends that the decision of the Supreme Court, in particular, means that this appeal can be determined very quickly. It is therefore necessary to set out this earlier consideration of the issues by way of background to this appeal.

8. *British Telecommunications plc v Office of Communications* [2011] CAT 24 (the "*08x Case*") was an appeal of two decisions of OFCOM (dated 5 February 2010 and 10 August 2010) in which OFCOM declined to find certain NCCNs (in this case, NCCNs 956, 985 and 986) "fair and reasonable". Like the NCCNs in this case, NCCNs 956, 985 and 986 all had a ladder pricing structure, and OFCOM – applying similar principles to those set out in paragraph 4 above – was (as in the case of the Decision) not satisfied that these were fair or reasonable.

9. Although the Tribunal in the *08x Case* broadly agreed with OFCOM's approach as articulated in its three principles ("a good analytical framework": paragraph 439 of the *08x Case*), the Tribunal's approach in the application of these principles was different from that of OFCOM, and resulted in the Tribunal finding that NCCNs 956, 985 and 986 should stand (paragraphs 450 and 451 of the *08x Case*) and that BT's appeals of OFCOM's decisions of 5 February 2010 and 10 August 2010 should be allowed (see paragraph 3 of the Tribunal's order of 12 August 2011).

10. The Tribunal's decision in the *08x Case* was appealed to the Court of Appeal. The Court of Appeal essentially disagreed with the Tribunal's approach and, in a judgment dated 25 July 2012, overruled the Tribunal's decision, and ordered that NCCNs 956, 985 and 986 should not be permitted ([2012] EWCA Civ 1002).

11. On 12 February 2013, the Supreme Court granted BT permission to appeal. The judgment of the Supreme Court was handed down on 9 July 2014 ([2014] UKSC 42), and BT's appeal was successful.

(c) BT's appeal

12. The Decision came to be made, and the appeal against that Decision progressed, against the background of the *08x Case*. The chronology was as follows:

Date	Event in the *08x Case*	Event in these proceedings
5 Feb 2010	OFCOM decision regarding BT's termination charges for 080 calls (NCCN 956).	
10 Aug 2010	OFCOM decision regarding BT's termination charges for 0845 and 0870 calls (NCCN 985 and 986).	
1 Aug 2011	Decision of the CAT in the *08x Case* [2011] CAT 24.	
25 Jul 2012	Decision of the Court of Appeal in the *08x Case* [2012] EWCA 1002.	
4 Dec 2012		OFCOM's provisional decision.
12 Feb 2013	The Supreme Court grants permission to appeal.	
4 Apr 2013		OFCOM's Decision.
24 May 2013		BT's Protective Notice of Appeal.
25 Jun 2013		Order of the CAT staying the appeal until the decision of the Supreme Court in the *08x Case*.
9 Jul 2014	Decision of the Supreme Court in the *08x Case* [2014] UKSC 42.	
8 Aug 2014		Order of the CAT that BT serve a Draft Notice of Appeal in place of the Protective Notice of Appeal.
12 Sep 2014		BT files a draft Amended Notice of Appeal.

13. The Decision was not made within the four months generally required by section 188(5) of the 2003 Act. There was good reason for this. The making of the Decision was put off, first to await the outcome of the appeal to the Tribunal in the *08x Case*, and then to await the outcome of the appeal from the Tribunal's decision to the Court of Appeal. Following the decision of the Court of Appeal (which itself refused permission to appeal to the Supreme Court), work on the Decision re-started. A provisional decision was circulated to the parties on 4 December 2012. When it became clear that the case would progress to the Supreme Court, OFCOM considered whether, once-again, to put the process on hold, but it decided not to.[2]

14. Instead OFCOM decided to press on, and it published the Decision in April 2013. As we have noted, the Decision went against BT.

15. As a result, BT was obliged – if it wanted to contest the Decision – to appeal. It did so by way of a "protective" Notice of Appeal. The relevant paragraphs of the Notice of Appeal read as follows:

> "6. …the [Decision] adopts essentially the same approach to dispute resolution and the same analytical framework as that adopted by Ofcom in the 08x Determinations, and arrives at a similar overall conclusion. It is, therefore, plain that the outcome of that Supreme Court 08x appeal will have an important impact on the merits and course of the present appeal…
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> 7. In light of the above, BT has prepared this Protective Notice of Appeal, which only sets out the factual background and grounds of appeal in outline and is not accompanied by evidence. This is a pragmatic approach to ensure that the appeal is lodged within time but without incurring costs which might prove to be entirely unnecessary and wasted.
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> 8. BT invites the Tribunal to stay its appeal against the [Decision] following service of this Notice until such time as judgment is handed down in the Supreme Court 08x appeal, whereupon BT shall have a period of 2 months (or such time as the Tribunal may direct) in which to file a fuller, amended Notice of Appeal and supporting evidence (if so advised)…"

16. By an order dated 25 June 2013, the President ordered that BT's appeal be stayed until the handing down of the Supreme Court's judgment, and that BT indicate within 14 days of the date of that judgment whether it intended to pursue the appeal.

[2] OFCOM consulted the parties on this. As we understand it, BT urged OFCOM to await the outcome of its appeal to the Supreme Court, whereas the MNOs appear to have urged OFCOM to make a decision. For the reasons given in paragraph 2.64 of the Decision, OFCOM decided to proceed.

17. As we have noted, BT's appeal in the *08x Case* was successful, with the result that the NCCNs in that case were upheld. In these circumstances, BT unsurprisingly indicated that it intended to pursue its appeal.

18. We consider BT's grounds of appeal in greater detail at paragraph 24 below. Broadly speaking, BT's position was that the decision of the Supreme Court in the *08x Case* effectively determined the outcome of its appeal in this case, and that the Decision could be reversed in BT's favour without much substantive hearing before this Tribunal in this appeal. BT's position, taken at its highest, is that the Supreme Court's decision in the *08x Case* rendered the outcome of this case a foregone conclusion.

19. It will be recalled (see paragraph 5 above) that OFCOM decided Principle 1 in BT's favour; Principle 2 against BT; and reached no conclusion on Principle 3. OFCOM accepts – not completely without qualification – that, without the admission of more evidence which might change the outcome, its conclusion on Principle 2 was wrong, and should have been in BT's favour and not against it.[3]

20. Up to a point, OFCOM's stance lends support to BT's contention that the Decision should be reversed in its (BT's) favour without any further substantive hearing, particularly since OFCOM itself has not sought (and does not seek) to adduce either new grounds or new evidence in support of its Decision. However, there are two difficulties with the course suggested by BT:

    (1) First, OFCOM did not decide Principle 3 either way, but left that matter open. Given that Principle 3 was not before the Supreme Court in the *08x Case* (the issue having been decided in BT's favour by the Tribunal and not appealed), it is at first blush difficult to see how the point can now be decided in BT's favour without any further substantive hearing.

[3] Paragraph 5 of OFCOM's skeleton argument puts the matter very fairly: "…in light of the judgment of the Supreme Court…Ofcom accepts that it erred in its conclusion on Principle 2 on the material before it…Given Ofcom's uncertainty as regards the consumer impact, it should have decided that Principle 2 considerations did not lead to the conclusion that BT should be prevented from introducing the proposed prices. Ofcom therefore concedes that the [Decision] was based on an error of law and should be quashed, subject to any application by the [MNOs] to seek to advance fresh grounds or evidence…".

(2) Secondly, the MNOs are themselves seeking to adduce both additional grounds and additional evidence by way of which the Decision might – as they contend – be supported. The MNOs say that fairness requires these new grounds and this new evidence to be heard, and the Decision in effect re-made (whether by OFCOM or this Tribunal) in light of these grounds and this evidence.

21. BT's answer to these points is as follows:

(1) First, as regards the undecided Principle 3, BT contends that it is perfectly possible for the Tribunal to decide that the charges contained in NCCNs 1101, 1107 and 1046 are practical to implement without any further substantive hearing. This is because:

(i) In its decision of 5 February 2010, OFCOM decided that the charges in NCCN 956 were practical to implement and that (as regards that NCCN) Principle 3 was satisfied (see paragraphs 165 to 166 of the Tribunal's decision in the *08x Case*).

(ii) In its decision of 10 August 2010, OFCOM decided that the charges in NCCNs 985 and 986 were not practical to implement and that (as regards these NCCNs) Principle 3 was not satisfied (see paragraphs 168 to 169 of the Tribunal's decision in the *08x Case*). That conclusion was overturned by the Tribunal in paragraphs 401 to 408 of the Tribunal's decision in the *08x Case*. Essentially, the Tribunal concluded that OFCOM's approach, in its earlier decision of 5 February 2010, was the correct one (see paragraph 408 of the Tribunal's decision in the *08x Case*).

The conclusion that the charges in NCCNs 956, 985 and 986 were practical to implement and that Principle 3 was satisfied was not appealed beyond the Tribunal, and was never considered by either the Court of Appeal or the Supreme Court. BT contended that there was no reason why the same conclusion should not pertain in respect of NCCNs 1101, 1107 and 1046.

(2) Secondly, as regards the new grounds and the new evidence that the MNOs sought to import, BT's position was short and straightforward: these grounds and this evidence should not be admitted.

(d) The structure of this Ruling

22. Plainly, questions of admissibility – both of new grounds and of new evidence – lie at the heart of what we have to determine. Those questions are of particular importance because – decided one way – they might result in what could be called a summary judgment in BT's favour. Decided the other way, they further protract an already long-running process, in circumstances where a similar dispute, concerning similar NCCNs, has been decided in BT's favour by the Supreme Court.

23. This Ruling is structured as follows:

(1) Section II below identifies the points in issue on the pleadings, and the points which the MNOs seek to put in issue, and the evidence they seek to adduce.

(2) Section III articulates the principles that we consider should be applied when deciding such questions of admissiblity.

(3) Section IV applies these principles to the new points and new evidence that the MNOs seek to adduce.

(4) Our conclusions are stated in Section V, where we also consider the future course of these proceedings.

II. THE POINTS IN ISSUE

(a) BT's grounds of appeal

24. BT's grounds of appeal are pleaded in an Amended Notice of Appeal filed in place of the Protective Notice of Appeal originally filed by BT on 24 May 2013.[4] There are four grounds of appeal:

(1) Ground 1 (Limb I). By this ground,[5] BT contends that OFCOM has no power to prohibit ladder pricing unless this is necessary to ensure end-to-end connectivity. This was a point which had been argued by BT before the Supreme Court. The Supreme Court declined to decide the appeal on this ground, recognising that the issues raised would necessitate a reference to the Court of Justice of the European Union.[6] By its order dated 5 November 2014, the Tribunal stayed this ground of appeal until further direction.

(2) Ground 1 (Limb II). By this ground,[7] BT contends that even if OFCOM had a broader power than argued for under Ground 1 (Limb I), it was impermissible for OFCOM to prohibit price ladders where there was merely uncertainty as to the possibility of consumer benefit or detriment. This was the ground on which BT's appeal succeeded before the Supreme Court. In essence – and putting the matter very broadly – whereas OFCOM and the Court of Appeal held that unless the consumer benefit of the NCCNs could be positively demonstrated they should not be allowed, the Tribunal and the Supreme Court held that OFCOM could not reject charges "simply because they might have adverse consequences for consumers, in the absence of any reason to think that they would".[8] Absent the admission of any further evidence on this point, OFCOM and

[4] BT was given permission to amend pursuant to paragraph 2 of the Tribunal's order dated 5 November 2014.
[5] See paragraph 55.1 of BT's Amended Notice of Appeal.
[6] See paragraphs 49 and 50 of the decision of the Supreme Court in the *08x Case*.
[7] See paragraph 55.2 of BT's Amended Notice of Appeal.
[8] See paragraph 43 of the decision of the Supreme Court in the *08x Case*.

MNOs accept that – by reason of the decision of the Supreme Court – Principle 2 should have been decided in favour of BT and not against it.[9]

(3) Ground 2. By this ground,[10] BT contends that even if (contrary to the holding of the Supreme Court) it was necessary to demonstrate that the NCCNs were beneficial to consumers, OFCOM erred in concluding that there was any material risk of consumer detriment. By its order dated 5 November 2014, the Tribunal stayed this ground of appeal until further direction.

(4) Ground 3. By this ground,[11] BT contends that OFCOM erred in fact and law in its analysis of Principle 3 and erred in failing to recognise that this principle was met in any event.

(b) Interventions in support of BT

25. Both Gamma Telecoms Holdings Limited ("Gamma") and TalkTalk Telecom Group plc ("TalkTalk") were permitted to intervene in support of BT.[12] Both support BT on all grounds, although it is fair to say that the principal focus of their Statements of Intervention is in relation to Ground 3. In relation to this Ground, both seek to adduce new evidence regarding the practicality of implementing ladder pricing. (The new evidence sought to be adduced by all the parties is set out in Annex 1 hereto.)

(c) The position of OFCOM

26. Although nominally the respondent in this appeal, OFCOM has adopted a neutral stance in relation to the principal issues. OFCOM does not seek to adduce any new grounds nor any new evidence by which its Decision might be defended.

[9] See, for example, paragraph 5(a) of OFCOM's skeleton argument, paragraph 13(2) of Telefónica's skeleton and paragraph 3 of Three's skeleton.
[10] See paragraphs 71*ff* of BT's Amended Notice of Appeal.
[11] See paragraphs 79*ff* of BT's Amended Notice of Appeal.
[12] As regards Gamma, see paragraph 5 of the Tribunal's order dated 5 November 2014 and as regards TalkTalk, see the Tribunal's order dated 11 December 2014.

27. In adopting this stance, OFCOM is doing no more than acting upon a point made by Toulson LJ in *British Telecommunications plc v Office of Communications* [2011] EWCA Civ 245 at paragraphs 85 to 87:

> "85. During the argument, Ms Rose [counsel for OFCOM] said that Ofcom is in a difficult position if the [Tribunal] admits evidence which Ofcom has not considered, particularly if the result of the appeal may be a remission of the matter to Ofcom. The awkwardness of its position at the appeal stage arises from a combination of the fact that it has not had an opportunity of considering the additional material and the possibility that it may have to do so on a remission. It must therefore be careful not to say anything on the hearing of the appeal which might appear to compromise its independence or impartiality.
>
> 86. The Chancellor asked Ms Rose why in such circumstances Ofcom should feel a need to take part on the hearing of the appeal, instead of leaving the interested parties to battle it out. Ms Rose took instructions and it seems to be simply a matter of practice.
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> 87. Section 192(2) of the [2003 Act] gives a right of appeal to a person affected by a decision of Ofcom. It is the practice for Ofcom to be named as the respondent, but it does not follow that it needs to take an active part in the appeal. There may be cases in which Ofcom wishes to appear, for example, because the appeal gives rise to questions of wider importance which may affect Ofcom's approach in other cases or because it is the subject of criticism to which it wishes to respond. But Ofcom should not feel under any obligation to use public resources in being represented on each and every appeal from a decision made by it, merely because as a matter of form it is a respondent to the appeal."

28. In this case, as we have noted, OFCOM has elected to take a neutral stance, as it was entitled to do.

(d) Interventions in support of OFCOM

29. Given OFCOM's neutral stance, it is perhaps something of a misnomer to describe the MNOs as interveners in support of OFCOM. Nevertheless, formally speaking, that is what they are.

30. All of the MNOs were given permission to intervene, albeit that in the end only Telefónica and Three in fact appeared before us. Paragraph 6 of the Tribunal's order dated 5 November 2014 placed important restrictions on the extent to which the MNOs were permitted to intervene:

> "6. Without prejudice to any application that may be made:
>
> (1) under Rule 22 of the Tribunal's Rules; and/or

(2) to introduce into this appeal a new ground justifying the Decision, not advanced by the MNO Interveners before OFCOM

the MNO Interveners be permitted to intervene and defend the appeal on any grounds that OFCOM could have advanced (had it been so advised)"

31. The purpose of these restrictions was to ensure that the Tribunal retained control over the ambit of the MNOs' interventions: the MNOs were not given the unfettered right to introduce new grounds or new evidence by which the Decision might be defended, although of course they were entitled to apply to introduce such grounds and/or such evidence.

32. Strictly without prejudice to the ambit of OFCOM's ability to introduce new grounds and/or new evidence in an appeal of one of its decisions, the MNOs advanced four bases by which they contended that OFCOM's Decision could be supported. These bases were as follows:[13]

(1) Basis 1.[14] The NCCNs were too uncertain to meet the requirements of paragraphs 12.1 and 12.2 of the Standard Interconnect Agreement. It is the Standard Interconnect Agreement that provides the contractual basis enabling BT to introduce new charges. Basis 1, all parties accepted, constituted a new basis by which the Decision could be defended: that is, it was a new point, not made by the MNOs before OFCOM, and so not addressed in the Decision. It was, however, a purely legal point, requiring the adduction of no evidence.

(2) Basis 2. That NCCN 1046 was issued contrary to the provisions of the Standard Interconnect Agreement. There was some debate as to whether this constituted a new point or not. Telefónica pointed out that the matter had been raised in correspondence with OFCOM,[15] but that OFCOM had not determined the matter. Again, this was a purely legal point, requiring

[13] The term "grounds" was used by the parties, but they recognised that this was a term that was apt to mislead. This is because "grounds" suggests "grounds of appeal". Given that the Decision was in favour of the MNOs and against BT, it seems clear that the MNOs could not themselves appeal the Decision. How a successful party can defend a decision in its favour on additional or different grounds is a point to which we return further below. In the meantime we use the more neutral term "basis" or "bases".

[14] Basis 1 was advanced by Three alone. The other bases were advanced both by Three and Telefónica.

[15] Specifically, in Telefónica's letter dated 30 August 2011. The point was not taken in initial submissions, nor in response to OFCOM's provisional decision. OFCOM accepted that the point had been raised during the span of the dispute resolution process: Transcript Day 2, page 25.

the adduction of no evidence. Furthermore, it was also a point arising as a matter to be determined between BT and the MNOs, as a result of the decision of the Supreme Court and the Supreme Court's order arising out of its decision in the *08x Case* directing the Tribunal to deal with matters consequential to its decision. For this reason, BT did not oppose Basis 2 being disposed of in this appeal (albeit that there is also a hearing, before a differently constituted Tribunal, dealing with matters consequential to the Supreme Court's order of 3 December 2014).

(3) Basis 3. That NCCN 1101 was detrimental to consumer welfare and that OFCOM was therefore right to find that Principle 2 was not satisfied in respect of this particular NCCN. It is to be noted that Basis 3 goes beyond simply contending that the effects of NCCN 1101 were uncertain: Basis 3 amounts to a positive case that the effects of NCCN 1101 were consumer detrimental. Basis 3 was advanced by both Three and Telefónica, although the stance of these MNOs differed as to whether Basis 3 constituted a new point, not made by the MNOs before OFCOM, or whether it was merely a "re-packaging" of a point that had been made earlier. We consider further below whether or not Basis 3 is "new": whatever the case, both MNOs sought to adduce new evidence on the point.

(4) Basis 4. That the NCCNs would not be reasonably practical to implement. This issue was squarely before OFCOM in the form of Principle 3 and – as we have noted – whether the NCCNs satisfied that principle or not was not determined by OFCOM. However, both MNOs sought to adduce further evidence on the point.

III. THE APPROACH TO ADMISSIBILITY

(a) Reference of disputes to OFCOM

33. The 2003 Act makes provision for the reference of certain disputes (defined in section 185(1) and (2)) to OFCOM: section 185(3). References are to be made in such manner as OFCOM may require (section 185(4)), and we were referred to OFCOM's "Dispute Resolution Guidelines" dated 7 June 2011. These set out various "submission requirements" as follows:

"3.14 We expect stakeholders to make adequate, well-reasoned submissions supported by evidence.

3.15 Ofcom will only open an Enquiry Phase where the information provided by the party referring the dispute is sufficient to enable Ofcom at the outset to determine whether the dispute satisfies the statutory conditions for a referral and whether or not it is appropriate for Ofcom to decide to handle it.

3.16 We expect dispute submissions to meet minimum requirements before we take any further action. These include having the facts of the case, details of the issues in dispute and the remedies sought. We would also like to see evidence of the submitting Party having made genuine efforts to enter into good faith negotiations."

34. Thus, unsurprisingly, OFCOM requires the issues in dispute to be clearly articulated. In the present case, OFCOM formulated the disputes it was resolving as follows in paragraph 1.7 of its provisional decision dated 4 December 2012:

"Ofcom accepted the Disputes for resolution with scopes of determining whether it is fair and reasonable for BT to apply the [wholesale termination charges] for calls to 080, 0843/4, 0871/2/3 and 09 numbers hosted on its network, specifically set out in NCCNs 1101, 1107 and 1007 (as amended by NCCN 1046), which are based on the level of the retail charge imposed by [originating communication providers] for calls to these numbers."

35. The framework by way of which OFCOM was proposing to assess whether the charges being imposed by BT were "fair and reasonable" was clearly set out in the next paragraph (at paragraph 1.8 of the provisional decision dated 4 December 2012) and is set out in paragraph 4 above. No-one can have been under any illusions as to what OFCOM was, and what it was not, considering. So far as we are aware, none of the parties told OFCOM in the time available for responses to the provisional decision that it had, in some way, misstated the nature or ambit of the disputes that it was proposing to resolve.

36. Where OFCOM accepts a dispute referred to it, it must resolve the dispute in accordance with the procedure laid down in section 188 of the 2003 Act, using the powers conferred on it by section 190.

(b) Appeals to the Tribunal

37. A determination by OFCOM is a decision that is appealable under section 192(1) of the 2003 Act. Any person "affected by a decision to which this section applies may appeal against it to the Tribunal". In *British Telecommunications*

plc v Office of Communications [2010] CAT 17, the Tribunal described (in paragraphs 51 to 68) the manner in which appeals under section 192 of the 2003 Act are made to the Tribunal and dealt with by the Tribunal. We adopt that description, and would only make the following points by way of addition or emphasis:[16]

(1) Any appeal is against OFCOM's decision, as opposed to the reasoning by which that decision was reached: sections 192(2) and 192(6) of the 2003 Act. This is consistent with appeals generally in the United Kingdom: *Lake v Lake* [1955] P 336 at 342; *British Telecommunications plc v Office of Communications* [2011] CAT 20 at paragraph 7(1).

(2) The Tribunal decides an appeal:

(i) on the merits; and

(ii) by reference to the grounds of appeal set out in the notice of appeal: section 195(2) of the 2003 Act.

It is to be stressed that an appeal before the Tribunal is not a *de novo* hearing. As the Tribunal stated in *British Telecommunications plc v Office of Communications* [2010] CAT 17 at paragraph 76:

> "By section 192(6) of the 2003 Act and rule 8(4)(b) of the [Competition Appeal Tribunal Rules 2003, SI 2003 No 1372, the "2003 Tribunal Rules"], the notice of appeal must set out specifically where it is contended OFCOM went wrong, identifying errors of fact, errors of law and/or the wrong exercise of discretion. The evidence adduced will, obviously, go to support these contentions. What is intended is the very reverse of a *de novo* hearing. OFCOM's decision is reviewed through the prism of the specific errors that are alleged by the appellant. Where no errors are pleaded, the decision to that extent will not be the subject of specific review. What is intended is an appeal on specific points."

(c) Admission of new evidence by an appellant

38. It is, of course, for the appellant to formulate its grounds of appeal. On the face of it, there is no reason why the notice of appeal cannot include, in its grounds, any point by way of which the appellant seeks to contend that OFCOM's

[16] The decision of the Tribunal at [2010] CAT 17 was appealed to the Court of Appeal (on the question of admissibility of evidence) and affirmed. We shall refer, in due course, to the decision of the Court of Appeal [2011] EWCA Civ 245 on this question: however, the description of the appeals process in the Tribunal's decision continues to stand, and we adopt it.

decision is wrong, subject always to the Tribunal's ability to control its own proceedings.[17] That is, perhaps, unsurprising, given that the precise route by way of which OFCOM ultimately decides a dispute that has been referred to it may be unknown to an appellant until a relatively late stage.

39. In terms of the evidence that an appellant may adduce, an appellant is obliged by Rule 8(6)(b) of the 2003 Tribunal Rules to annex to its notice of appeal "as far as practicable a copy of every document on which the appellant relies including the written statements of all witnesses of fact, or expert witnesses, if any".

40. However, the Tribunal retains general control over the evidence being adduced before it. Rule 22 of the 2003 Tribunal Rules provides:

> "(1) The Tribunal may control the evidence by giving directions as to -
>
> (a) the issues on which it requires evidence;
>
> (b) the nature of the evidence which it requires to decide those issues; and
>
> (c) the way in which the evidence is to be placed before the Tribunal.
>
> (2) The Tribunal may admit or exclude evidence, whether or not the evidence was available to the respondent when the disputed decision was taken."

41. As the Court of Appeal noted in paragraph 21 of its decision in *British Telecommunications plc v Office of Communications* [2011] EWCA Civ 245, "[i]t is unusual for an appellate body to be given express power to dictate what evidence it requires to decide the issues. On its natural reading, this rule entitles the CAT to require the provision of evidence which was not before Ofcom, if it considers that it needs such evidence in order properly to decide the issues".

42. The Court of Appeal provided helpful and clear guidance as to how this discretion should be exercised by the Tribunal in *British Telecommunications plc v Office of Communications* [2011] EWCA Civ 245, and it is worth setting out this guidance in full:

> "68. Ms Rose submitted that the rule in *Ladd v Marshall* is of general application in civil appeals and that the reasons for it apply with equal validity to appeals to the CAT. She also relied on the factors advanced in support of her argument on

[17] In particular by Rules 9 and 10 of the 2003 Tribunal Rules.

the construction of section 192(6)(a) as reasons why the CAT should admit fresh evidence only in exceptional cases.

69. There are significant differences between the procedure for determining a dispute under the [2003 Act] and an ordinary civil claim. A civil claim is ordinarily determined after a trial at which witnesses give evidence and can be cross-examined. A dispute under the relevant part of the [2003 Act] is determined by Ofcom on paper. Whereas oral examination of witnesses on a civil appeal is highly exceptional, because there should have been a proper opportunity for it at the trial, any oral examination of witnesses in a dispute of the present kind will necessarily be at the appeal stage.

70. Under Article 4 of the Framework Directive, the appeal body is concerned not merely with Ofcom's process of determination but with the merits. Ofcom is not only an adjudicative but an investigative body, and the appellant may wish to produce material, or further material, to rebut Ofcom's conclusions from its investigation. It is unsurprising that the CAT should adopt a more permissive approach towards the reception of fresh evidence than a court hearing an appeal from a judgment following the trial of a civil action. Indeed, as Sullivan LJ observed, the appeal body might in some cases expect an appellant to produce further material to address criticisms or weaknesses identified by Ofcom.

71. Ofcom submitted in its skeleton argument that an unfettered right to adduce fresh evidence on appeal might cause parties to avoid proper engagement with Ofcom during the dispute resolution process. No party has an unfettered right to adduce fresh evidence on an appeal to the CAT, and there is force in Ms Rose's argument that parties ought to be encouraged to present their case to Ofcom as fully as the circumstances permit. That is a factor, among others, to be borne in mind by the CAT when considering the discretionary question whether to admit fresh evidence. Other relevant factors would include the potential prejudice (in costs, delay or otherwise) which other parties may suffer if an appellant is permitted to introduce material that it could reasonably have been expected to place before Ofcom. These are not necessarily the only relevant factors.

72. The court was asked by Ofcom to give clear guidance to the CAT about the exercise of its power to admit fresh evidence. Before the CAT there was argument whether it was for the party seeking to adduce fresh evidence to show why it should be given permission to do so, or was for the opposing party to show why permission should not be granted. Since the introduction of fresh evidence is not a matter of right, in the event of a dispute about its admission I would regard it as the responsibility of the party who wants to introduce it to show a good reason why the CAT should admit it. The question for the CAT would be whether in all the circumstances it considers that it is in the interests of justice for the evidence to be admitted. I would not attempt to lay down any more precise test, nor would I attempt to lay down a comprehensive list of relevant factors or suggest how they should be balanced in a particular case. There are several reasons why I consider that it would be inappropriate, and is unnecessary, for this court to do so.

73. First, the potential circumstances are infinitely variable. During the argument Sullivan LJ asked Ms Rose what bright line test could be applied for drawing a line between acceptable and unacceptable fresh evidence. The discussion which followed persuaded me that the quest is elusive and that any formula which this court sought to lay down would be counterproductive, in that it would be more

likely to lead to further procedural arguments than to avoid or resolve them. Secondly, the CAT is a specialist tribunal. It has far more knowledge and a much surer feel for case management in its field than this court. Thirdly, the CAT's approach to the application of the CAT rules is set out in the CAT guide. Its overall approach is to exercise its powers in such a way "that expense is saved, and that appeals are dealt with expeditiously and fairly". This court should be wary of trying to tell the CAT how it should do so.

74. These points can be illustrated by reference to the comment of the economist member of the panel, to which I have referred, that much of the case turns on economic theory supported by algebraic and mathematical calculations. Introduction of further calculations of that kind before a specialist appeal tribunal is different, for example, from trying to introduce fresh evidence from a bystander on appeal from a trial of a personal injury claim. The CAT may or may not consider that it would be proportionate and just to allow further algebraic calculations to be introduced in support of one economic theory or another, but that is quintessentially a matter for the tribunal to decide."

43. In *British Telecommunications plc v Office of Communications* [2014] CAT 14 at paragraphs 68 to 70 and 208 to 212, the Tribunal considered this further, and noted that a distinction was to be drawn between "evidence in verification or amplification of matters and arguments placed before OFCOM in the dispute resolution process" on the one hand, and "new evidence that brings in matters that were not placed before OFCOM at all" (paragraph 68).

44. In the Tribunal's draft rules – the Competition Appeal Tribunal Rules 2015, which are presently being consulted upon by the Government – Rule 21 seeks to articulate a non-exclusive list as to what factors might be relevant when seeking to admit or exclude evidence:

"(2) In deciding whether to admit or exclude evidence, the Tribunal will have regard to whether it would be just and proportionate to admit or exclude the evidence, including by reference to the following criteria:

(a) the statutory provision pursuant to which the appeal is brought and the applicable standard of review being applied by the Tribunal;

(b) whether or not the evidence was available to the respondent before the disputed decision was taken;

(c) whether or not the evidence was capable of being made available to the respondent before the disputed decision was taken;

(d) the prejudice that may be suffered by one or more parties if the evidence is admitted or excluded; and

(e) whether the evidence is necessary for the Tribunal to determine the case."

When addressing the Tribunal on whether specific evidence should or should not be admitted, the parties helpfully made reference to these provisions, and we take them into account in so far as they are relevant in this case. However, we stress that these are no more than draft rules and we have treated them as a helpful expansion of the guidance given by the Court of Appeal, to which we have had primary regard.

(d) The position of OFCOM

45. OFCOM did not seek to adduce new grounds or new evidence, and the MNOs did not (before us, although they reserved their position, should this issue go any further) seek to contend that OFCOM's ability to introduce new points by which its decision might be supported[18] or new evidence supporting that decision was particularly wide.

46. BT's position was that, in general terms, OFCOM could not and should not be permitted to introduce new points. BT put the argument both as a jurisdictional one (i.e., that the Tribunal lacked jurisdiction to permit the adduction of new points and/or new evidence) and as one going to discretion (i.e., that the Tribunal should not, generally speaking, permit OFCOM to adduce new points and/or new evidence).

47. We unhesitatingly decline to accept BT's primary contention, that the Tribunal lacks jurisdiction to admit new points and/or evidence. That, as it seems to us, would be inconsistent with the breadth of Rules 14(3) and 22 of the 2003 Tribunal Rules, as well as the decision of the Tribunal in *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2001] CAT 3 and that of the Court of Appeal in *British Telecommunications plc v Office of Communications* [2011] EWCA Civ 245. We have considered the relevant part of the latter case above; in *Napp*, the Tribunal said in terms (at paragraph 64) that "it is impossible to deduce from the [Competition Act 1998] and the [2003 Tribunal Rules] that there is an absolute bar on the admission of new evidence

[18] Again, for the reasons given in footnote 13, we avoid use of the term "grounds". In the context the dispute resolution procedure, of course, OFCOM will never be the appellant, and will always be the respondent.

before this Tribunal, whether submitted by the appellant or the respondent", and we respectfully agree.

48. So far as the question of discretion is concerned, as we have noted, OFCOM was not seeking to adduce either new points or new evidence, and we do not consider it appropriate to make general statements as to how, in the future and in an unknown case, the Tribunal ought to exercise its discretion.

49. BT, of course, was contending that any evidential discretion limiting OFCOM's ability to adduce new points and/or new evidence ought also, and to the same extent, to apply to the MNOs as interveners. It is to the position of interveners that we now turn.

(e) The position of interveners (intervening in support of OFCOM)

50. We entirely accept that interventions are in support of one or other of the two parties to an appeal (either the appellant or the respondent) and that, in general terms, an intervener's role will be just that: supportive. However, rule 16(6) of the 2003 Tribunal Rules makes clear that <u>if</u> the Tribunal is satisfied that an intervener has sufficient interest, "it may permit the intervention on such terms and conditions as it thinks fit". In short, there is a broad discretion as to what points may be raised on an intervention.

51. In terms of <u>how</u> that discretion should be exercised, just as in the case of OFCOM, we consider that it would be invidious to lay down any general rules as to how the discretion should be exercised in unknown future cases. We specifically consider the admissibility of the points and evidence that the MNOs wish to adduce in this case in Section IV below. However, the following points are relevant where an intervener, supporting OFCOM and who was a party to the dispute resolution process, seeks to adduce new evidence before the Tribunal in the context of the 2003 Act's dispute resolution procedure:[19]

[19] As this appeal demonstrates, in dispute resolution cases, there can be two kinds of intervener:
(1) An intervener who is really an outsider to the dispute and not a party to the dispute resolution process, but who considers itself affected by the decision being appealed. Gamma and TalkTalk are both examples of such an intervener.
(2) An intervener who was a party to the dispute resolution process, and who was successful, and who is seeking to support OFCOM's decision.

(1) The dispute resolution procedure contained in the 2003 Act is a procedure intended to facilitate the swift resolution of disputes between communications providers. Although OFCOM undoubtedly has a regulatory function in resolving such disputes, OFCOM also functions simply as an adjudicator. As Lord Sumption noted in paragraph 32 of the Supreme Court's decision in the *08x Case*, OFCOM "may perform an adjudicatory or regulatory role or a combination of the two".

(2) That adjudicatory role is particularly underlined by the fact that a communications provider elects to refer a dispute to OFCOM and, as a consequence, must shoulder the burden of articulating precisely what the nature and scope of the dispute actually is: see paragraphs 33-34 above. It seems to us that any party before the Tribunal – whether that party be appellant or intervener – that seeks to raise points or evidence going beyond the scope of the original referral to OFCOM will have to be prepared to justify the inclusion of such points or such evidence on an appeal.[20] That is exactly what the Tribunal said – in relation to new evidence – in paragraph 68 of *British Telecommunications plc v Office of Communications* [2014] CAT 14.

(3) Whether a party referring a dispute to OFCOM ends up – on an appeal to the Tribunal – as the appellant or an intervener is entirely a function of OFCOM's decision. As we have noted (see footnote 18 above), OFCOM will <u>always</u> be the respondent, defending its decision. Whether the party referring the dispute ends up as the appellant or the intervener depends on whether that decision went in its favour or not.

(4) The fact that dispute resolution may in some cases amount to little more than a swift <u>adjudicative</u> process was recognised by the Court of Appeal in *British Telecommunications plc v Office of Communications* [2011] EWCA Civ 245: see the passage cited in paragraph 27 above. Clearly,

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This paragraph considers the second case.

[20] Subject, of course, to the extent of the dispute expanding or contracted during the course of OFCOM's dispute resolution process.

there will be case where the interested parties (that is, the appellant and the intervener) should be left "to battle it out".

(5) The concept of a "respondent's notice" is a familiar one in the Senior Courts (see Civil Procedure Rules ("CPR") Part 52.5). One of the functions of such a notice is to enable a respondent to contend that the appeal court should "uphold the order of the lower court for reasons different from or additional to those given by the lower court": CPR Part 52.5(2)(b). In appeals from a decision of OFCOM to the Tribunal, a party can only appeal if the decision has been adverse: see footnote 13 above. Otherwise a party (other than OFCOM) can only intervene. It seems to us that there will be cases where a statement of intervention may be an appropriate place for the winning party before OFCOM to be able to contend that OFCOM's decision is correct, but for reasons different from or additional to those given by OFCOM in its decision.

(f) Conclusions

52. As we have noted in the preceding paragraph, in a dispute between two (or more) communications providers, which communications provider ends up as the appellant and which as intervener is essentially a function of how OFCOM resolves the dispute.

53. In this case, BT happens to be the appellant. However, BT is only in this position because OFCOM – for reasons which we have set out in paragraph 13 above – elected to publish the Decision between the decisions of the Court of Appeal and the Supreme Court in the *08x Case*. Had OFCOM awaited the Supreme Court's decision (and we stress that we do not criticise OFCOM for not doing so), then:

(1) As regards Principle 2:

(i) It would have been clear (from OFCOM's provisional decision dated 4 December 2012) that OFCOM had decided Principle 2 wrongly and that OFCOM would have had to re-visit this aspect of its decision.

(ii) OFCOM would either have decided Principle 2 in BT's favour on the basis of the evidence then before it or it would have permitted the adduction of further evidence (in which case the outcome of Principle 2 would have depended on the effect of that further evidence). In submissions before us (Transcript Day 1, page 50), OFCOM made clear that the latter (permission to adduce more evidence) was more likely to have been the case in the counter-factual scenario.

(iii) Had OFCOM decided Principle 2 on the basis of the evidence before it, then (subject to what we say about Principle 3 below) the MNOs, and not BT, would have been the appellants.

(2) As regards Principle 3:

(i) OFCOM would have been obliged to decide Principle 3, instead of leaving the point undecided, given the Supreme Court's conclusion in the *08x Case*.

(ii) In its provisional decision, OFCOM decided Principle 3 in BT's favour.[21] Obviously, had OFCOM carried this provisional decision through into the Decision, then (subject to OFCOM's conclusion on Principle 2) the MNOs, and not BT, would have been the appellants.

54. Considered in this light, it is clear that the labels "appellant" and "intervener" are particularly unhelpful in this case. Given the timing of OFCOM's Decision and outcome of the *08x Case* in the Supreme Court, it is our firm conclusion that we should consider the MNOs in the position of appellants, and apply our discretion in relation to Bases 1 to 4 in this way.

55. We therefore consider that the approach we should adopt to new evidence in this case is as stated by the Court of Appeal in *British Telecommunications plc v Office of Communications* [2011] EWCA Civ 245 (see paragraph 42 above).

[21] See paragraph 4.152 (in relation to NCCN 1101), paragraph 5.92 (in relation to NCCN 1107), paragraph 5.93 (in relation to NCCN 1102) and paragraph 6.93 (in relation to NCCN 1046).

The question for the Tribunal is whether, in all the circumstances, it considers that it is in the interests of justice for the evidence to be admitted. That accords with the weight placed by the MNOs on the importance of "fairness" and "appropriateness", as well as the use (in the draft Tribunal Rules 2015) of the phrase "just and proportionate".

56. As regards the criteria that we should apply to the admission of new points, we are very conscious that the decision of the Court of Appeal was confined to evidence. Nevertheless, it is our view that substantially the same test is appropriate, when considering our discretion to admit new points in this appeal.

57. With that, we turn to the question of whether the four bases advanced by the MNOs should be admitted in this appeal.

IV. ADMISSION OF BASES 1 TO 4

(a) Basis 1

58. The nature of Basis 1 was described in paragraph 32(1) above. All of the parties agreed that this constituted a new basis by which the Decision could be defended. As such it was a new point, not made by the MNOs before OFCOM, and so not addressed by OFCOM in the Decision.

59. It is our unanimous conclusion that we should not give permission to the MNOs to introduce Basis 1 into this appeal:

    (1) The argument that the NCCNs were too uncertain to meet the requirements of the Standard Interconnect Agreement was one that was always open to the MNOs to make, but which formed no part of the dispute referred by them to OFCOM. As we have noted (see paragraphs 34-35 above), the scope of the dispute before OFCOM was whether the relevant NCCNs were "fair and reasonable" (paragraph 1.7 of the provisional decision), the meaning of this concept being defined in the next paragraph (paragraph 1.8 of the provisional decision). Had the MNOs wanted to take a contractual point, they could easily have done so.

(2) Both Mr Ward QC, leading counsel for Telefónica, and Mr Turner QC, leading counsel for Three, suggested that the legal landscape had, in some way, been altered by the Supreme Court's decision in the *08x Case* and that this constituted a powerful reason for permitting the MNOs to take new points. In particular, it was suggested that the importance of the contract – the Standard Interconnect Agreement – only became clear after the decision of the Supreme Court. As to this:

(i) Whilst we accept that the decision of the Supreme Court – like that of the Tribunal – attached a greater importance to BT's rights under the Standard Interconnect Agreement than did either OFCOM or the Court of Appeal in the *08x Case*, the fact is that at the latest by the time of the Tribunal's decision in the *08x Case* (1 August 2011) it was clear that the contract could be regarded as significant – the point was in play, and it would have been open for the MNOs to take the point in this dispute from an early stage. They chose not to do so.

(ii) Moreover, the *08x Case* was principally concerned with the question of what was "fair and reasonable", the factors that were relevant to such an assessment, and the weight to be attached to such factors. On this, it is true that the Supreme Court differed from the Court of Appeal. But that was in a context where everyone was proceeding on the basis that BT had the contractual right to impose new charges: the "live" issue was the extent to which that was a relevant factor for purposes of the "fair and reasonable" test. Basis 1, however, goes to the exactly converse point. It asserts straightforwardly that BT's NCCNs are invalid as a matter of contract law. That is a point entirely independent of the issue of "fairness and reasonableness" considered in the *08x Case* and, as we have said, was a point open to the MNOs in this dispute from an early stage.

(3) We are very conscious that the dispute resolution process before OFCOM is intended to be a quick one. We consider that it would be invidious for

that process to be extended by the taking of late points that could have been taken earlier, to the prejudice of the party or parties having to respond to such points (here: BT).

60. There was some suggestion before us that BT had been given permission by the Tribunal to introduce a new contractual point and that, for this reason, Basis 1 should be admitted also. As to this:

(1) We do not consider that a "tit-for-tat" approach should be adopted to new points or new evidence. In each case, the new point or new evidence must be considered on its merits. Here, there is no suggestion that Basis 1 is in any way responsive or consequential to amendments that the Tribunal permitted BT to make to its Protective Notice of Appeal.

(2) Nor is it right to say that the permission given to BT to amend its Protective Notice of Appeal gave BT permission to run "new" points. It was suggested that paragraph 69.7 of the Amended Notice of Appeal did constitute such a new point. This paragraph – which was indeed introduced by way of amendment – reads as follows:

> "BT had a contractual discretion, under Clause 12 of the [Standard Interconnect Agreement], to alter its prices for BT services provided that the revised prices did not conflict with the regulatory objectives set out in Article 8 of the Framework Directive."

Read in context, this is no more than an elucidation of the point made by BT in its Protective Notice of Appeal (for instance, paragraph 35 of the Protective Notice of Appeal and paragraph 58 of the Amended Notice of Appeal) that regulatory powers should be exercised having due regard to the principle of minimum intervention into the private law rights of a communications provider such as BT.

(b) Basis 2

61. The nature of Basis 2 was described in paragraph 32(2) above. Telefónica contended that Basis 2 had been aired before OFCOM (specifically in its letter dated 30 August 2011), but that OFCOM had failed to determine the matter.[22]

62. Whilst it can be said that the point was raised by Telefónica in correspondence with OFCOM, the fact is that the point is nowhere articulated in OFCOM's definition of the scope of the dispute between the MNOs and BT. Equally, the point does not feature either in the provisional decision or in the Decision itself.

63. The significance of OFCOM's failure to advert to the point in the provisional decision is that had Telefónica (or any of the other MNOs) been putting this point forward as a part of the dispute to be resolved by OFCOM, then they could and should have made this clear to OFCOM before 28 December 2012 (which was the closing date for responses to the provisional decision). None of the MNOs did so. Whilst OFCOM will always do its best to ensure that it has properly understood the nature and scope of the dispute it must resolve, we fail to see why OFCOM should be obliged to trawl through correspondence between it and the disputing parties in order for it to determine those points that are in issue for the purposes of the dispute resolution process. Indeed, as we have noted (paragraphs 33-34 above), paragraph 3.16 of OFCOM's Dispute Resolution Guidelines requires the "issues in dispute" to be defined.

64. Accordingly, for the reasons given in the preceding paragraphs, it is our unanimous conclusion that we should not give permission to the MNOs to introduce Basis 2 into this appeal.

65. In the event, this conclusion is unlikely to trouble the MNOs unduly, since we are given to understand that Basis 2 is also a live issue between BT, Three and Telefónica in other proceedings before the Tribunal, to be heard as part of those proceedings.

[22] See paragraph 28 of Three's skeleton and footnote 15 above.

(c) Basis 3

66. The nature of Basis 3 was described in paragraph 32(3) above. There was some divergence between Three and Telefónica as to how "new" this point actually was. Thus:

    (1) Three's position was that "[t]he essence of this point was advanced before Ofcom, although the focus after the Court of Appeal's judgment in July 2012 was on satisfying a different, and lower, legal test ("uncertainty"): paragraph 25.2 of Three's skeleton.

    (2) Telefónica, by contrast, submitted that the decision of the Supreme Court in the *08x Case* "involves a fundamentally different approach to the Court of Appeal…in relation to consumer detriment under Principle 2. It would be unfair therefore to effectively penalise Telefónica for approaching its submissions to Ofcom on the basis of the law as it then stood."

67. It is important to be clear precisely what OFCOM was deciding in the *08x Case*, and what the precise debate was in the appellate courts that were considering OFCOM's decision. Both OFCOM and the Tribunal, when OFCOM's decision was appealed to it, were seeking to ascertain the effect of the NCCNs in the *08x Case*. The issue was whether the NCCNs at issue provided benefits to consumers.[23] Certainly, it is true, that both OFCOM and, on appeal, the Tribunal, concluded that it was unclear what these effects might be. The effect of this conclusion was that before OFCOM, BT failed, and before the Tribunal, BT succeeded. That pattern was repeated before the Court of Appeal and Supreme Court. The Court of Appeal and Supreme Court concerned themselves only with the legal consequences of OFCOM's and the Tribunal's common finding that the outcome of the NCCNs was uncertain in terms of consumer benefit, but that does not alter the essence of Principle 2, which is whether the NCCN in question provides a consumer benefit. The argument before the Court of Appeal and the Supreme Court did not affect this basic question.

[23] See, for example, the articulation of OFCOM's principles at paragraph 163 of the Tribunal's decision in the *08x Case*.

68. At all times, the issue was whether there was, or was not, a consumer benefit: the Supreme Court finally resolved what the correct position was where the evidence was equivocal.

69. Accordingly, we consider that Three, and not Telefónica, has more accurately described the essence of Basis 3. Having reached that conclusion, we turn to the question of whether Basis 3 should be admitted into this appeal. It is our unanimous conclusion that it should not be, for the following reasons:

    (1) Given that the essential issue arising out of Principle 2 was always clear, there is no good reason why the evidence that the MNOs seek to adduce in support of Basis 3 could not have been adduced earlier, before OFCOM.

    (2) It may well be that the expert evidence of Mr Hunt takes the analysis of Professor Dobbs (on which BT relied, and whose model was extensively considered by the Tribunal in its decision in the *08x Case*) further. Certainly, for the purposes of these applications, we will assume that to be the case. But further analysis, in the form of Mr Hunt's evidence, could have been made available to OFCOM and should have been done sooner by the MNOs if they wanted to adduce it. In this regard, it is worth noting the limited nature of the exercise carried out by Mr Hunt: his conclusions as regards detriment only relate to the specific case of NCCN 1101. They do not extend to NCCNs 1046 and 1107, where he concurs that the outcome is uncertain.

    (3) We are prepared to accept that the data used by Mr Hunt contains more extensive data – deriving from all MNOs, rather than just EE – than previously. We are also prepared to accept that Mr Hunt relies upon data that post-dates OFCOM's Decision, and so is "new". The material that we were referred to was in particular an article by Professors Genakos and Valetti entitled "Evaluating a decade of mobile termination rate regulation", which was published in 2013. The article is neither confined to a specific NCCN, nor even to the UK. The abstract states that "[u]sing a large panel covering 27 countries, we find that the "waterbed" phenomenon, initially observed until early 2006, becomes insignificant on

average over the 10-year period, 2002-2011". The problem is that, when considering the potential economic benefit or detriment of new charging structures, the story never ends. However, dispute resolution must have finality and, as we have noted, the dispute resolution process under the 2003 Act is intended to be, and should be, extremely quick. In short, so far as Principle 2 is concerned, the introduction of evidence in this dispute should have ended probably by the time of OFCOM's provisional decision, and certainly by the date of the Decision itself. It is common ground that OFCOM was, on the basis of the evidence before it at the time of the Decision, able to reach a conclusion in relation to Principle 2. In reaching that conclusion, OFCOM applied the wrong test as promulgated by the Court of Appeal. OFCOM is perfectly capable of applying the right test, as pronounced by the Supreme Court, and that is how we consider Principle 2 should be determined.

70. In considering Mr Hunt's evidence, we raised the question with Mr Beard QC, leading counsel for BT, as to whether it would be appropriate for us to seek to assess the weight to be given to the new evidence that the MNOs were seeking to adduce, and to take this into account in the exercise of our discretion whether or not to admit this new evidence.[24] Mr Beard did not encourage us to do so,[25] and Mr Turner positively discouraged us from doing so.[26] We consider both counsel to have been right, and we have not sought to consider the substantive weight of the new evidence that the MNOs seek to adduce.

71. At times in his submissions, Mr Turner suggested that there was a "public interest" element in permitting the adduction of the MNO's new evidence, in that it was in the public interest to get to the "right" answer. Whilst, obviously, it is always desirable to seek the right answer, finality of process is also a very important factor. Significantly, OFCOM – the regulator – did not press for further evidence to be adduced.

[24] Transcript Day 2, page 5.
[25] Transcript Day 2, page 5.
[26] Transcript Day 1, page 20.

(d) Basis 4

72. The nature of Basis 4 was described in paragraph 32(4) above. As we have noted, this issue was squarely before OFCOM in the form of Principle 3, but OFCOM elected (given its conclusion on Principle 2) not to decide the point. With hindsight, given the timing of the Decision and the substance of the decision of the Supreme Court in the *08x Case*, this was an error.

73. It means that on this appeal, the Tribunal is not presented with a resolved, but an open, issue: the question for the Tribunal is not whether OFCOM was wrong, but how an open issue should be determined and – in particular – on the basis of what evidence.

74. Given that the issue is an open one, it is our unanimous conclusion that the new evidence going to Basis 4 should be admitted. We stress that we reach this conclusion mainly because the issue is an open one, and that it seems preferable that it be determined on the basis of the best evidence – which includes the new evidence that the MNOs seek to adduce. Had OFCOM itself determined Principle 3, then we would not have decided the question of admissibility in the way that we have.

V. CONCLUSION

75. For the reasons we have given, we are only prepared to give permission to the MNOs to adduce the new evidence they have produced in relation to Principle 3.

76. There remains the question of how Principle 3 is to be resolved. In its skeleton, OFCOM said:

> "14. …in deciding whether to remit particular issues to Ofcom or to decide them for itself, a significant consideration will clearly be the nature of the issues in question. The Tribunal cannot sensibly decide whether it, or Ofcom, is best placed to resolve particular arguments or evidential disputes until it has first decided which arguments and evidence are in issue.
>
> 15. Accordingly, the appropriate approach in the circumstances of this case is, in Ofcom's submission, for the Tribunal to decide firstly whether, in principle, it would (if it were hearing the matter) permit the parties to rely on the grounds and evidence upon which they seek to rely, and secondly whether resolution of

> the substantive issues should be undertaken by this Tribunal or by Ofcom on remittal."

77. It is evident that we agree that this is the correct approach to take. The points in issue, and the evidence to be relied upon, need to be established first, before the issue of "forum" arises. Indeed, we consider this to be the only approach that is consistent with the Tribunal's statutory duty to dispose of an appeal in accordance with section 195 of the 2003 Act. The Tribunal must, pursuant to section 195(2), decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal. Only after a decision on the merits has been made, can the Tribunal remit. That, as it seems to us, implies taking a view on the points in issue and the evidence going to those points.

78. The effect of our conclusions in relation to Bases 1 to 4 is that only Principle 3 remains in issue:

    (1) We have not admitted Bases 1 and 2, with the result that these cannot be pursued by the MNOs.

    (2) We have not admitted Basis 3, with the result that Principle 2 must be decided in BT's favour.

    Principle 3 was always in issue, and we have decided that the MNOs may rely on the evidence that they seek to adduce.

79. Ordinarily, this Tribunal would be pre-disposed to remit Principle 3 to OFCOM for it to decide, pursuant to section 195(4). That, essentially, is because OFCOM is the sectoral regulator and ought to be the primary decision-maker in matters falling within its competence. However, in this instance, we unanimously consider that Principle 3 should be decided by the Tribunal. We have reached this conclusion for the following reasons:

    (1) The issue is a relatively narrow one, perfectly capable of being decided by the Tribunal, rather than OFCOM.

    (2) The proceedings before the Tribunal are well-advanced: statements of intervention and the MNOs' evidence have already been served: all that

really remains is for the Tribunal to make (limited) directions for evidence in response.

(3) OFCOM has made very clear that it is "sitting on the fence" as regards the question of remission, and is emphatically leaving this matter to the Tribunal. OFCOM is certainly not advocating remission – indeed, there were times when Mr Herberg QC, leading counsel for OFCOM, appeared to be actively advocating that the Tribunal keep the matter before it.[27] Certainly, OFCOM has not suggested an aspect of regulatory policy that might render it more appropriate to remit: Principle 3 seems to turn very much on the facts.

80. In these circumstances, we will give directions for the determination, by the Tribunal, of Principle 3 as soon as possible, including in relation to evidence responsive to that which the MNOs will be adducing.

Marcus Smith QC Stephen Harrison Professor Gavin Reid

Charles Dhanowa OBE, QC
(Hon)
Registrar

Date: 17 March 2015

[27] Transcript Day 2, pages 46 to 47.

ANNEX 1

Party seeking to adduce new evidence	Evidence sought to be adduced	Issue
Gamma	Witness statement of Peter Farmer	OFCOM's Principle 3
TalkTalk	Witness statement of Damon Harding	OFCOM's Principle 3
Three (also relied upon by Telefónica)	Expert evidence of Matthew Hunt	OFCOM's Principle 2
Three	Witness statement of Kushal Sareen	OFCOM's Principles 2/3
Three	Witness statement of Lucie Taylor	OFCOM's Principle 2
Telefónica	Witness statement of Usman Choudry	OFCOM's Principle 2
Telefónica	Witness statement of Diane Gregson	OFCOM's Principle 3