**IN THE COMPETITION APPEAL TRIBUNAL**

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

Victoria House
Bloomsbury Place
London WC1A.2EB

24 March 2009

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

Sitting as a Tribunal in England and Wales

BETWEEN:

**HUTCHISON 3G UK LIMITED**

**BRITISH TELECOMMUNICATIONS PLC**

Appellants

- and -

**OFFICE OF COMMUNICATIONS**

Respondent

- supported by -

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

Interveners

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# HEARING

# APPEARANCES

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

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

Mr. Josh Holmes and Mr. Jorren Knibbe instructed by and appearing on behalf of the Office of Communications.

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

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

Mr. Jon Turner QC and Mr. Meredith Pickford (instructed T-Mobile Regulatory Counsel) appeared on behalf of the Intervener T. Mobile (UK) Limited.

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

Mr. Tom Sharpe QC and Mr. David Caplan (instructed by the Competition Commission) appeared on behalf of the Competition Commission.

THE CHAIRMAN: Good morning ladies and gentlemen. It might be helpful if I summarise before we start where we are on the various issues that have arisen since the Competition Commission issued its determination back in January. I will divide the issues into two categories: judicial review issues and final disposal points.

As regards judicial review issues, we are going to hear argument today on the issue which is Vodafone's first ground of challenge and which is also a ground of challenge relied on by T-Mobile and Orange. That is, put simply, whether the Competition Commission acted irrationally in setting a higher final year TAC for H3G or whether the Competition Commission's reasoning for doing so was inadequate.

There are various other grounds of challenge about which we have received the parties' submissions and which we will determine on the papers. Those are:

a. The challenge to the Competition Commission's conclusion that there was no need to adjust the 2G price cap to reflect the opportunity cost of using 3G spectrum for voice traffic rather than data traffic.

b. The challenge to the Competition Commission's conclusion that it was appropriate to use the AIP fees which comprise the payment that the MNOs make for 2G spectrum as a proper reflection of the opportunity cost of 2G spectrum.

c. The procedural aspect of the substantive point we are hearing today namely the allegation that the Competition Commission failed properly to consult the parties about whether to allow H3G the higher final year TAC.

d. The challenge to the inclusion in the Competition Commission's determination of a provision directing Ofcom to make such changes as are necessary to the price control condition to generate TACS for each year of the price control period that are consistent with the Competition Commission's views on the glide path. The challenge on this point is both a substantive one and a procedural one.

We can add to this list the point which has arisen in the correspondence over the past couple of days between Ofcom and the Competition Commission about an error in the way that the Competition Commission calculated the value of 3G spectrum for H3G, the intention being to identify the value of that spectrum for the 2G/3G MNOs and then feed that value into the Ofcom's MCT costs model for the 3G-only operator. This was set out in Ofcom's letter to the Competition Commission copied to the Tribunal and the parties on 18th March. The error was, as we understand it, to leave out of account the fact that in Ofcom's MCT costs

model the 3G operator incurs its 3G spectrum cost one year earlier than the 2G/3G MNOs that is in 2003/04 rather than in 2004/05. The effect of correcting the error is to reduce the final year TAC for H3G from 4.4 ppm to 4.3 ppm. On 20th March the Competition Commission wrote back to Ofcom acknowledging the error and confirming that they agree with Ofcom that the correct figure for H3G's TAC in 2010/11 is 4.3 ppm. I gather that H3G now accept that using the reverse out method with Ofcom's correction does indeed lead to 4.3 rather than 4.4 ppm. Provisionally the Tribunal will treat this as an additional ground of judicial review challenge which the Competition Commission has accepted as valid and we will make the change ourselves in disposing of the appeal.

Turning to the final disposal points, a number of other points about how the Tribunal should finally dispose of these appeals have arisen. In no particular order, they are these.

First, should there be a further "tweaks", using "tweak" in the way it has come to be understood here, namely an adjustment to the TAC which applies in a given year where that adjustment has the same effect on the price cap as would be achieved if a TAC was introduced part way through a year.

There are two types of tweak that have been discussed. The first is a new 60 day tweak like the tweak that was made to the 2006/07 TAC by Ofcom. As we understand it, no one is now arguing that if the modified year 3 price control comes into force on 1 April 2009 there should be a new 60 day tweak to that third year TAC because of a lack of notice to the MNOs of what the new rate should be.

The second type of tweak is tweak to the third year TAC if Ofcom does not manage to issue a modified price control condition by 1st April 2009 but only after some part, however small, of the third year has elapsed. This point was raised by O2 in their letter to the Tribunal of 16th March. In response the Tribunal asked Ofcom to set out its intended approach to this issue.

Ofcom replied to the Tribunal's request by letter dated 19th March. Ofcom has made clear that in considering whether the MNOs have complied with the third year TAC, Ofcom would expect to assess compliance for Year 3 against a weighted average of the original third year TAC (for the period before the modified price control is adopted) and the re-determined TAC for the remainder of year 3). This, in Ofcom's view is not a matter that needs to be dealt with in the appeal and I will ask the parties shortly to indicate whether they are content with leaving it at that.

The second point is the use of actual inflation figures rather than HM Treasury estimates in relation to the glide path of the expired years of the price control for which actual figures

are now available. This was a point raised by O2 in its letter to the Tribunal of 29th January. In its submissions served on 3rd March, Ofcom rejected the suggestion that forecasts should be replaced with actual figures in the calculation of the new TACs. Vodafone has also made this point in its letter to Ofcom dated 16th March setting out a revised methodology for arriving at the intervening year TACs. As we understand it the point of principle is the same as between Vodafone and O2, but what they suggest should be done about it is slightly different.

BT has disputed the issue of principle as to whether actual figures rather than forecasts should be used and also disputes the way that Vodafone has calculated the alleged effect of this. Ofcom also argues in its letter of 19th March that it would be wrong to adjust year 1 taking into account subsequent knowledge when no one challenged the use of Treasury forecasts in the appeals and there are a range of other actual data available now which could be used to replace other forecasts used in the Competition Commission's calculations. We need to establish whether there is still an issue here between the parties and, if so, how the Tribunal should resolve it.

The third point is the alleged use of rounding in the Competition Commission's calculations. This was raised by T-Mobile in its letter of 6th March. As we understand Ofcom's letter of 19th March, one rounding point has now been resolved to T-Mobile's satisfaction. The other rounding point refers to a rounding off that was part of the calculations in the original March 2007 statement and was not challenged by anyone in the course of these appeals. The Tribunal need to know if there is still a rounding point that we need to be concerned with.

Finally, there is the point about whether, as and when the Tribunal remits the decision to Ofcom, Ofcom will need to consult interested parties domestically and/or to notify the European Commission under the Framework Directive before adopting the modified decision in compliance with the Tribunal's directions.

On the substantive issue about whether there is any such duty the parties disagree. Ofcom takes the view set out in its submissions of 3rd March that if the Tribunal at the end of the day is able to direct Ofcom very clearly as to what TACs should apply in each year of the price control then there is no need to consult either domestically or in Europe.

The interveners, or some of them, take the view that not only is there an obligation to consult both domestically and in Europe, but the existence of that obligation means that the Tribunal should not remit the decision with clear directions as to what TAC should apply because to do so would be to pre-judge the outcome of that consultation.

The parties are also not agreed as to whether the Tribunal can or should rule on the question of whether Ofcom must consult - beyond whatever ruling is necessary in order to dispose of the point about drafting the final order so as not to prejudge the outcome of any consultation. The Tribunal wrote to the parties on 13 March saying that our preliminary view is that it is not for the Tribunal to decide this since it is not an issue raised in the appeals and it is not clear that we have jurisdiction to rule on it. However, in its letter of 19th March Ofcom submits that it is necessary for the Tribunal to rule on this issue because if there is an obligation to consult, the directions that the Tribunal gives at the end of the day must reflect the possibility that things might change as a result of the consultation.

As a practical matter Ofcom flags up the desirability of the Tribunal ruling on this so hat the issue can join the myriad other issues which the parties may or may not seek in due course to overturn in the court of appeal. If we do not rule on it then it will have to be raised at some subsequent point after Ofcom has, if it sticks to its current view, decided not to consult before adopting a modified price control condition.

Undoubtedly it would be much neater to have a ruling on this included in the final disposal of the appeal. But the Tribunal's view at this moment is that our jurisdiction to decide the consultation point only arises if the parties are right in saying that the existence of the duty to consult affects the way in which the Tribunal should draft the final directions. At present therefore we propose to decide that issue first and then, if necessary, seek further submissions on the existence or otherwise of a duty to consult.

Finally, some of the parties made submissions discouraging the Tribunal from **setting any deadline** within which Ofcom must comply with the Tribunal's directions on disposal of the appeal. We can state now that it is not our intention to include any such provision in our directions.

So, a number of questions arise from those comments:

(1) Are there any other disposal points raised by the parties which I have not covered in these remarks?

(After a pause): No.

(2) What is H3G's position on the alleged error in calculating the final year TAC because of the earlier start date for the use of spectrum?

Are all the parties content with us making that adjustment on the disposal of this appeal?

Miss Rose?

MISS ROSE: Madam, as we indicated in our letter yesterday, we accept that the correct figure is 4.3. The second part of your question is slightly more complicated, and it is something I am

going to return to in my submissions, on the general question of the extent of the jurisdiction of the CAT if it finds that there have been any errors by the Competition Commission because our position is going to be that in the event that you conclude that there are any judicially reviewable errors in the Competition Commission's determination, the appropriate course is for those matters to be remitted for the Competition Commission and for it to re-determine the questions. Now, on this particular issue that, of course, will be a pure formality because, as I understand it, everybody accepts that the right figure is 4.3 and therefore it would simply be a matter of a letter and another letter. But, of course, that matter becomes of very much greater significance when we come to the main issue that you need to determine today because our position is very clearly that this Tribunal does not have jurisdiction to answer the question: What is the right year for TAC for H3G in the event that you were to conclude, contrary to our submissions, that the Competition Commission either had not reasoned it adequately or had reached an irrational conclusion?

THE CHAIRMAN: Thank you. Does anybody else want to make any comment on that point? Mr. Holmes?

MR. HOLMES: Madam, Ofcom canvassed the position of the other parties on the inadvertent error in the Competition Commission's calculations as regards H3G's final year TAC. I can confirm to the Tribunal that all of the parties agree as to the existence and extent of the error. My understanding is that the other parties, besides H3G, would be content for the matter to be dealt with by the Tribunal without the need for remittal. I think the Competition Commission is agnostic on the question of whether the Tribunal should address the point in the terms of its direction to Ofcom at the conclusion of these proceedings or as to whether the matter should be remitted.

THE CHAIRMAN: Thank you.

(3) Is anybody still asking the Tribunal to make a sixty day tweak to the Year 3 TAC even if the modified price control is adopted on or before 1st April, 2009?

(After a pause): I will move swiftly on and take that as a 'No'.

(4) Is everyone content with Ofcom's response as regards the possible tweak to the Year 3 TAC if the modified price control is adopted only after 1st April, 2009? Miss Bacon?

MISS BACON: Madam, we agree in principle that there should be an adjustment, but we are not in agreement with the way that Ofcom proposes to make the adjustment. I should say that our submissions have been filed with the Competition Appeal Tribunal this morning, and

should be circulated to everyone else within the next hour. We have addressed all four of the disposal points that you raised in your introductory remarks, madam. We disagree with Ofcom on all of them, save for one point, which is whether the Tribunal should rule on the matter. We are in agreement with Ofcom that the Tribunal should rule on the consultation question. As to the other three, our position is that it is not for the Tribunal -- that is, the tweak point, the inflation point, and the rounding point. We think that that is a matter for Ofcom, to be decided during the consultation process which we say ought to take place. But, we do say that the Tribunal should rule on consultation for the reasons given by Ofcom - in particular, avoiding a further appeal to the Tribunal after Ofcom has taken its decision.

MISS DEMETRIOU: Likewise, we also disagree with Ofcom's proposal for dealing with the tweak issue. We will address that in our written submissions which are due to be filed today.

THE CHAIRMAN: Thank you. Is there still a live issue as to the use of actual inflation figures or figures in the calculations rather than Treasury forecasts? (After a pause): Miss Bacon, that is a 'Yes' from you?

MISS BACON: I have just indicated 'Yes'.

MISS DEMETRIOU: And 'Yes' from us.

THE CHAIRMAN: And from Orange. But you have covered those, or intend to cover those, in your written submissions.

MISS DEMETRIOU: We have. Like O2 we have covered all the three remaining issues and the issue of consultation in our written submissions. Mr. Turner?

MR. TURNER: We have not addressed that in submissions, but in principle we do support O2 and Orange on that.

THE CHAIRMAN: Vodafone's position is the same.

MISS McKNIGHT: Yes.

THE CHAIRMAN: Have you dealt with that in your written submissions?

MISS McKNIGHT: We have not in fact.

THE CHAIRMAN: You are content to adopt O2 and Orange's?

MISS McKNIGHT: Yes, on that point.

MR. HOLMES: Madam, I am slightly concerned to learn that points are being taken in the written submissions which Ofcom has not I think previously seen. We would respectfully request the opportunity to make responsive written submissions to any points that have not previously been canvassed in correspondence in short order after having reviewed them today, perhaps within the next two days.

THE CHAIRMAN: We will think about that in due course.
MR. HOLMES: I am grateful, madam.
THE CHAIRMAN: Is there a live issue as to the rounding of numbers used in the calculations? Miss Bacon is a yes.
MISS BACON: Yes.
THE CHAIRMAN: And Miss Demetriou?
MISS DEMETRIOU: Yes.
MR. TURNER: And T-Mobile.
THE CHAIRMAN: And T-Mobile. My seventh question, which is, is there anything anyone wants to say about the way in which the Tribunal proposes to deal with the consultation point? That is a yes, presumably, from H3G? No, that is not necessarily the case, which is to remind everyone that we will decide first whether we think that the existence or otherwise of a duty to consult affects the way in which we draft the directions, and only then, if necessary, decide whether there is such a duty to consult. Mr. Holmes?
MR. HOLMES: Madam, for our part we agree with the Tribunal's analysis.
THE CHAIRMAN: Anyone else want to say anything on that? No. Yes, Miss Lee?
MISS LEE: Madam, we agree with the analysis but we would be very concerned obviously about the timing and would hope it could all be dealt with on the papers and in short order. The Tribunal has, and will have by the end of today, all of the submissions it needs. Thank you.
THE CHAIRMAN: Thank you. With that all sorted out as far as it can be, we then turn to the business of the day, which is Miss McKnight.
MISS McKNIGHT: Yes, thank you. We have handed up both a speaking note as to the points I will cover this morning and a one page proposed timetable of how we will split up the time today, which I think you have. We also handed up a clip of papers which we suggested should be added at the back of bundle B. It comprises the correspondence which you, yourself, have described, madam, dealing with computational error and an additional authority. I do not know whether the solicitors have actually added those papers to bundle B already. Yes, I believe that has already happened.
MR. SCOTT: I have the submissions but not the timing. We appear not to have the timing.
MISS McKNIGHT: The timetable I can simply read out if you wish. There are some timetables here. (Same handed) It is envisaged that I would make opening submissions for approximately one hour. T-Mobile will follow for an hour. Orange have requested a short slot of approximately ten minutes to make short comments. It is then envisaged that Competition Commission will have one hour, H3G one hour. Ofcom have reserved 15

minutes, but I understand may not need to address the Tribunal. Then we have provided short periods for reply for Vodafone, T-Mobile and Orange.

The way in which I intend to set out my submissions is to identify the key issues between Vodafone and the Competition Commission based on our reading of Mr. Sharpe's written submissions of 3rd March. We identify that the key issues are as follows: first, does Vodafone's first ground of challenge amount to a claim that the Commission has acted irrationally, or is it really a disguised attack on the merits of the Competition Commission's decision? The second is a question as to what amounts to adequate reasoning in a determination such as the Competition Commission has made. Accordingly, by reference to the appropriate test, has the Competition Commission given adequate reasons for its determination?

We then move on to an issue as to whether the Competition Commission acted inconsistently with the 2G cap methodology in relying on Ofcom's network and spectrum costing model to reverse out this value of 3G spectrum. I will comment in a moment on the extent to which that remains a live issue.

Another point is, is it now too late for Vodafone to challenge the degree of asymmetry provided for in the determination, given that it did not make its own appeal or challenge to asymmetry in principle.

Finally, does the 2G cap methodology necessarily imply asymmetry of treatment? That really takes us straight back to the alleged inconsistency point.

In my note I had next set out a short summary of the grounds of challenge which I think I need not go through. The purpose of my setting that out was to draw attendance note to the extent to which some of these matters have now been resolved through the recent correspondence. Of course, one of our objections to the Competition Commission's determination was that by using the so-called reversing out methodology the Competition Commission had arrived at a pence per minute spectrum allowance for H3G of 1.1p per minute instead of the 1p per minute which is allowed to the 2G/3G MNOs under the simple application of the 2G cap methodology.

Given that once the Competition Commission's inadvertent computational error is corrected, we come out at 1p per minute for H3G. I think it is agreed that through some mechanism or another that can be corrected.

There is a question as to whether we should simply cease to address this point as to which methodology the Competition Commission should have used to compute H3G's spectrum allowance. Should it have gone for an equivalent pence per minute allowance *simpliciter*,

or should it have used a reversing out methodology, albeit we now know it comes out at the same figure?

I am obviously reluctant to address points which are of no continuing significance as to the actual numbers, but I think Vodafone's position is that we would be somewhat reluctant to see the computational error corrected, but the final judgment on this appeal to give the impression that there was no objection to the methodology by which the Competition Commission had reached that corrected figure.

I am in the Tribunal's hands to some extent as to how you would wish me to address this point. We could either run our case as we would have done if no error had been identified and this remained an important point of some monetary value, or we would be content for it perhaps to be noted that a challenge had been mounted on this point which it had not been necessary to decide. I think we would not be content for the Competition Commission's judgment just to lie without some note to that effect.

THE CHAIRMAN: You could consult them.

(The Tribunal conferred)

THE CHAIRMAN: Yes, Miss McKnight, I do not think we need to take up time today in dealing with the point unless there is anything which is significantly different or additional that you would be saying now from what you have put in your written submissions, but we certainly accept that in our final judgment we will refer to the two methods and that there was a challenge as to which one was the correct one.

MISS McKNIGHT: Thank you, that is extremely helpful by way of clarification. Obviously we did not want to run a new case or an additional case now on that point, but I will perhaps, when we reach the point in my note, point you to what I was going to say simply because it was only when we saw Mr. Sharpe's written submissions of 3rd March that we saw an elaboration of his explanation as to why the Competition Commission considered that it was appropriate to use Ofcom's model, and pointed out that during the course of the Competition Commission enquiry Ofcom, itself, had used its model to model the 2G cap, and had by implication endorsed this method. We have replied to that in my note. I would like that to form part of the record, but I will not elaborate orally unless you ask me to do so when we reach that point.

There is also, of course, an inter-relationship between that particular point of challenge and the wider challenge to the inclusion of the additional network costs, because when one looks at adequacy of reasoning I think it is necessary to look at the totality of the text to see

whether, looking at all the alleged errors that we have identified, it is simply too superficial and too simplistic.

Moving on then to the points that remain a matter of monetary value to Vodafone, we can move on to what is para. 9 of my note. This is the first issue I have identified as to whether this is really a case of irrationality or of an attack on the merits. What we say is that the Competition Commission's submissions give great prominence to various citations from well known case law to the effect that when this Tribunal is exercising judicial review-type jurisdiction it should apply exactly the same test as the Administrative Court would apply, and it should refrain from a more intrusive examination of the decision under review and it should not be tempted simply because this Tribunal itself is a specialist body to reconsider what the Competition Commission itself decided.

Hutchison also makes similar points but it draws particular attention to the distinction between questions of judgment, forecasting based on expert experience, and policy questions where it is generally for the specialist decision maker who is entrusted with making a decision to make those judgments and where a court exercising judicial review jurisdiction would be most loathe to intervene, it contrasts those sorts of questions with matters of procedural fairness, points of statutory interpretation, errors of law, where of course it would be quite proper for a court to intervene to correct errors. The clear implication, and at some points it is said expressly that both the Competition Commission and Hutchison seek to advance is that Vodafone's case could only succeed if you essentially disregard that case law, and that we are asking you to go way beyond what those cases suggest is proper.

We say that is quite incorrect, that even on the most conservative assessment of judicial review jurisdiction, our case falls squarely within the kind of error that is amenable to correction through judicial review, because we say that if one looks at the law which the Competition Commission and Hutchison cite. Even that case law, which emphasises the court's reluctance to intervene in review of a specialist body's decision, even that recognises that where there is an error of law or irrationality amounting to self-contradictory reasoning, it is always proper for the court to intervene in such a case, and we would take you first, in the bundle of authorities – bundle A is the correspondence, bundle B is the authorities – to bundle B tab 28, which I think is your volume 2 of B. This is the case of *Edwards v Bairstow* which I suspect will be familiar. In this case the courts have been asked to review a decision of Tax Commissioners who had made a finding of fact that a particular series of transactions carried out by the taxpayer did not amount to an adventure

in the nature of trade so as to be amenable to tax on trading income. A question arose as to whether that was a finding of fact which could not be impugned through judicial review-type review, or whether it was a finding of mixed fact and law, or whether there had been some error of law in understanding what amounted to a trade. If we look at p.38 we have here from Lord Radcliffe a useful general explanation of the role of the courts in reviewing what seems, prima facie, to be a finding of fact. In the final paragraph he says:

> "As I see it, the reason why the courts do not interfere with commissioners' findings or determinations when they really do involve nothing but questions of fact is not only supposed advantage in the commissioners of greater experience in matters of business or any other matters. The reason is simply that by the system t hat has been set up the commissioners are the first Tribunal to try and appeal, and in the interests of the efficient administration of justice their decisions can only be upset on appeal if they have been positively wrong in law. The court is not a second opinion, where there is reasonable ground for the first. But there is no reason to make a mystery about the subjects that commissioners deal with or to invite the courts to impose any exceptional restraints upon themselves…"

Of course they are dealing with cases that arise out of facts found by commissioners.

> "Their duty is no more than to examine those facts with a decent respect for the Tribunal appealed from and if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado."

So here we have a clear expression of the principle that even when one is looking at a simple finding of fact, if the finding is one that no reasonable decision maker could have reached on the basis of the primary evidence, it is open to a court applying a judicial review jurisdiction, or looking only for errors of law to say that it amounts to an error of law that is capable of being addressed through judicial review.

In that case his Lordship emphasised the fact that the tax commissioners in question did not have specialist expertise or experience, it is just that the statutory regime entrusted to them the task of making findings of fact.

But we do see exactly the same approach taken where we have a judicial review of a decision taken by a specialist body which is recognised as having expertise, and I would like to take you next to the very recent decision of the Competition Appeal Tribunal in the Tesco case which we have at bundle B, vol.1 at tab 17. Again, I think the Tribunal may be familiar with this case, it arises of course out of the Competition Commission's market

investigation of the supermarket sector where the Competition Commission found that there were numerous local markets in which large supermarket operators enjoyed a high degree of concentration, but impaired competition. The Competition Commission was therefore looking for remedies which would prevent further local concentrations arising, or existing concentrations getting worse and would open up the possibility of competitive market entry in local markets that were already highly concentrated. They adopted a remedy that required supermarket operators owning land banks, warehousing land, to make land available in certain circumstances to third parties. They also recommended a remedy which it was not within their own power to implement, a planning remedy that would have recommended that planning law should be amended so as to provide that if a supermarket applied for permission to extend or build a new store in a local market which was already highly concentrated, or would become so by virtue of that new project, the planning permission should be refused save in exceptional circumstances.

Tesco challenged that recommendation on the basis that whilst it might be effective to prevent the worsening of local concentrations it carried with it potentially adverse welfare consequences because there were numerous local markets in which planning permission would be refused by virtue of the test but there was no certainty or prospect of a rival supermarket owner entering the market so as to meet the unmet demand which that planning application was designed to address, and Tesco's case was, in principle, that that was a welfare loss that should have been weighed in the balance in deciding whether the remedy was appropriate.

I would like to take you some of the key parts of this judgment to show how the Competition Appeal Tribunal set about evaluating that and the degree of review to which they were willing to subject the Commission's recommendation. First, if we could look at para. 81, here the Tribunal says:

> "In considering Tesco's challenge the Tribunal also has well in mind that in fulfilling its statutory functions of investigating and, if appropriate, making findings and recommendations under the Act, the Commission makes many assessments and decisions which require a significant element of judgment. To this end the Commission must be afforded an appropriate margin of appreciation, such that a Tribunal will not intervene in those assessments or judgments without good reason."

So perfectly consistent with the case law that the Competition Commission and Hutchison advance, but of course it is subject to this caveat "without good reason". If we then turn the page, ground one is the ground I described of Tesco's challenge, and in para. 85 it said that:

> "Tesco points first to the Commission's finding that the test would prevent 24 per cent of existing larger grocery stores in the UK from extending."

So that is a recognition of the number of concentrated markets in which this planning test would bite. If we then move on to para. 88 we see that Tesco quotes part of the Competition Commission report which explains how the Competition Commission had sought to take account of that problem, the problem that there would be markets where there was potentially a welfare loss. It was just the same four of us - because this was a majority decision of the Commission - who also thought it more appropriate on balance to adopt a conservative market share threshold for what would be a mechanistic test to reduce the risk that welfare enhancing store developments were prohibited by the test.

So, this was a case where the Competition Commission had recognised there would be markets where this remedy could create welfare losses, but the way of dealing with that was to ensure that the test only applied where there was a high degree of local concentration so as to reduce the number of locations in which this problem would arise.

At para. 92 we see that the Competition Commission's response to Tesco's challenge was (reading from line 3) that,

> "The Commission accepts that the test will block certain incumbent retailers from expanding their stores to meet demand, or place a limit on possible expansion, but where the test has that effect, it should be expected that another will come forward to develop a replacement".

So, what the Competition Commission was saying here in the Tribunal proceedings was, "Well, we took account of the potential welfare loss, but we thought it would be self-correcting because it should be expected that a competitor would come forward".

If we move then to para. 111 we see the Tribunal's assessment of these arguments. The Tribunal starts, "Bearing in mind the cautionary words of Mr. Justice Auld --" The point they are referring back to is his comment in another case that you should read a Competition Commission report generously, and not as a statute.

> "-- it is nevertheless our view that Tesco is correct in submitting that there is a significant gap in the Commission's analysis in relation to the 'costs' of the competition test. The report does not fully and properly assess and take account of the risk that the application of the test might have adverse effects for consumers as

a result of their being denied the benefit of developments which would enhance their welfare, including by leaving demand 'unmet'".

In para. 112, on the facing page, reading from line 3,

"As can be seen from the passages quoted [above], the Commission's approach to this risk was that it should be dealt with in the design of the test, and in particular that the risk would be 'reduced' if a 'conservative' market share threshold were adopted, namely 60 percent".

So you reduce the scope of application of the test to fewer local markets. There appears to be no other reference in the report, or in its appendices, to these possible adverse effects of the competition test.

"There is no attempt to assess the degree of risk either generally or in any particular local market or markets. Nor does the report explain by how much the risk is to be reduced by reference to the market share criteria and selected".

Moving on to para. 119, this paragraph addresses the other limb of the Commission's case that even if incumbents were precluded from making beneficial store developments, someone else would come forward to fill the gap. Here the Tribunal says,

"Thus, although a 'facilitating role' for the test [that is, the idea of facilitating new market entry] was not clearly identified in the report, the Commission may well have envisaged that it would serve this purpose as well as fulfilling its primary preventative role [preventing further concentrations]. Nor would it be implausible to suggest that the test, in combination with the Commission's other proposed remedies, could have some effect in encouraging the breakdown of existing highly-concentrated local markets. On the other hand in our view it cannot be derived from the report the developments blocked by the test would in all likelihood be replaced in a timely way by corresponding competitive developments so as to protect customers from welfare losses which might otherwise occur. Nowhere is this stated, and the report does not claim that more has been done to 'reduce' the risks that such losses would be caused by the test".

Then, in para. 124, the Tribunal has discussed the fact that there is evidence either way as to how much of a facilitative role this remedy would have. But, it says that in the context of a judicial review it is not for the Tribunal to decide those questions.

It goes on to say,

"The important point is that an assumption, which the Commission now says underpinned its recommendation of the competition test [that is, the assumption

that if the incumbent was blocked from developing, someone else would come forward], but which is by no means self-evidently correct, has not been articulated let alone properly analysed and considered in the report".

It is in the light of that reasoning that the Tribunal then goes on to say that this part of the report is defective and there is to be a separate hearing as to the relief to be given. That is summarised in para. 127: the upshot is that the risk of welfare losses which is admittedly a relevant consideration for the Commission in fulfilling its statutory role has not been properly addressed.

Now, I think this is a particularly interesting case because it is clearly a case where the Commission was a body having expertise which had reviewed all the evidence and had thought long and hard about what was the right thing to do. It was a case where the Commission had recognised that its remedy would generate welfare losses of the sort of which Tesco complained. So, this was not a case of failure to have regard to a relevant consideration. They had also come up with a reason why they thought that their test was properly balanced so as to achieve its desired beneficial effects of preventing further local concentration whilst reducing the risk of welfare losses by curtailing the number of markets to which the test would apply - only those with a high 60 percent degree of local market concentration. So, they had given a reason as to why they thought, on balance, they should pursue this remedy. But, the Tribunal, in my submission correctly, recognised that once they had recognised the welfare losses and recognised the potential benefits of the remedy, they had not explained in any sense why merely reducing the risk of welfare losses by limiting the number of markets affected was a proper balancing, and they had not articulated proper reasons. Now 'proper' clearly means good enough to explain not only which factors they were weighing, but how the weighing resulted in a particular outcome.

We say that demonstrates two points: first, that the Tribunal is willing, in exercising judicial review jurisdiction, genuinely to scrutinise what the Commission has said. It does not hold back and say, "Well, this is all a matter of their judgment. It would be improper even to embark on an examination of this". The reason they conduct that examination is because the decision is liable to be set aside if the reasoning is not proper - that is, it does not adequately address all the issues that need to be weighed in deciding which way to fall on a particular question where there is evidence pointing both ways. It is not enough just to recognise there are countervailing factors. You have to explain how you have dealt with them.

If you are content, I will move on.

So, we say that it is clear that the Tribunal should not shirk from looking at this case. We also say that it is quite clear that one of the proper grounds for setting aside a Competition Commission decision is pure irrationality in the sense of the adoption of self-contradictory reasoning. There are surprisingly few cases which discuss this directly. It is, of course, perhaps because it is quite unusual for a decision-maker to say something, "Proposition X is true. Proposition X is also untrue" in the same document. But, we say that it is self-evident that this is a proper ground for setting aside a decision because giving reasons which are genuinely self-contradictory is tantamount to not giving reasons at all. In this case the form of contradiction which we argue has occurred has resulted in one TAC being awarded to the 2G/3G MNOs and a higher TAC to H3G, which we say is self-contradictory, which also tends towards unfairness between competitors. So, it is not merely a sort of point about pure reasoning - there is a fairness element to it as well.

So far as there is authority we have referred you to the case of *Mahon -v- Air New Zealand Ltd.* which you will find at Bundle B, Tab 1 (the same volume as *Tesco*) , p.832 of the internal numbering. The facts of this case are extremely complex, but the gist of it is that a judge of the New Zealand court had been appointed to conduct an investigation under statutory powers of an air crash which had occurred in a sight-seeing flight run by Air New Zealand. The judge had concluded in his report that Air New Zealand's senior personnel had deliberately concealed key evidence with a view to protecting their own position, and that this had resulted in severe problems in investigation, and he made a costs order against Air New Zealand in consequence. An appeal on judicial review grounds was launched against that costs order on the basis that there was no proper foundation for the finding of deliberate concealment. The case ultimately found its way to the Privy Council but it was a case on judicial review principles. At the bottom of p.832, section H, the Privy Council says:

> "As courts whose functions in the instant case have been restricted to those of judicial review, both the Court of Appeal and this Board are disentitled to disturb findings of fact by the decision-maker whose decision is the subject of review, unless (1) the procedure by which such findings were reached was unlawful ... (2) primary facts were found that were not supported by any probative evidence or (3) the reasoning by which the decision-maker justified inferences of fact that he had drawn is self-contradictory or otherwise based upon an evident logical fallacy."

The Privy Council went on to find that the judge had adopted contradictory reasoning when he found that Air New Zealand had deliberately concealed evidence of how they had come

to alter the route that the flight took which led to its flying straight into a mountain. He found that they had concealed the change in route because they feared they would not get approval from the relevant regulatory authority, even though he had also found elsewhere that such approval would have been automatic. So that was a clear form of self-contradiction. That was contradictory findings of fact.

We would say that the ratio of this case must apply equally to self-contradictory reasoning as to proper principles to apply.

We say that this Tribunal should not shrink from examining the Competition Commission's determination thoroughly with a view to identifying the forms of contradiction at the inadequacy of the reasoning, which we allege is the problem.

I would then like to go on to examine what is an adequate standard of reasoning in a determination of this kind. What the Competition Commission has said is that all that is required of it is that its reasons should not be impossible to understand. That is the standard they set themselves and their submissions cite case law to that effect. They say they comfortably pass that test, that their determination is not impossible to understand, it is not even difficult to understand.

We would take issue with the way in which that test is formulated, and we would say that, by reference to a proper test, they simply have not given adequate reasons. We would make the following points. The first is that the Commission does not really dispute that it should give reasons. Of course, this is in keeping with its normal practice under Enterprise Act cases. Of course, in this case on many issues that arose in the appeal the Commission has given very detailed reasons.

We say that it is well established that where a decision maker gives or is required to give reasons for his decision, those reasons must be proper, intelligible and adequate, and that phraseology comes out of the *Westminster City Council* case, which I have cited, and is derived from an earlier case of *In re Poyser and Mills' Arbitration*, which looked at the form of reasoning which an arbitrator was required to give. I do not think I need to take you to those cases.

We say that what amounts to adequate reasons will depend on the subject matter and character of the decision. The courts have recognised that one key question is whether the reasons that are given are adequate to enable an affected party to work out whether he has a proper ground of legal challenge. That comes out of the case of *R v. Secretary of Sate for the Home Department, ex parte Doody*. I will take you to that, if I may. That was the case that was handed up to be added to the end of your bundle B.

THE CHAIRMAN: Is that volume 2 then?

MISS McKNIGHT: I believe you will have added it to volume 2, yes. The question before the House of Lords was what form of reasons should be given to a prisoner who has been subjected to a life sentence for murder to enable him to understand the basis on which the tariff and the recommended release date had been set. Over the course of years the practice of the Home Office had been to regard the life sentence as falling into two distinct parts, a fixed term tariff that reflected the penal retribution element of the case reflecting the seriousness of the offence; and then a risk element, how long the prisoner should be detained to reflect the risk of his release. Informing its view on those matters, the Home Office would take account of the comments of the trial judge who had heard the case. A question arose as to what extent the judge's recommendations and the Home Office's own reasoning should be disclosed to the prisoner. Looking at p.168, just under half way down the page, Lord Mustill says:

> "What does fairness require in the present case?"

He goes on to give a list of considerations that go to the fairness element of reasoning, and he says in item (2):

> "The standards of fairness are not immutable. They may change with the passage of time ..."

Then he goes on to say:

> "The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects."

If we then go on to p.173, by this stage his Lordship has decided that in this particular context fairness requires that the prisoner should be informed of the reasons that underlay the judicial recommendation, but also the Home Secretary own further consideration as to factors he should take into account in reaching his view on the tariff and the risk factor. Half way down he says:

> "It is not, as I understand it, questioned that the decision of the Home Secretary on the penal element is susceptible to judicial review. To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the penal element, the prisoner has virtually no means of ascertaining whether this is an instance where the decision-making process has gone astray; I think it is important that there should be an effective means of detecting the kind of error

> which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the Home Secretary should be disclosed."

This was a case where the court concluded that a fair degree of detailed reasoning should be disclosed in order to enable the affected party to know whether he had proper grounds to attack the decision on judicial review.

Moving on, the case law also recognises other criteria by which the adequacy of reasoning must be detested. The courts have suggested that it is a good discipline for the decision maker to be required to set out his reasoning because it is only by writing out reasoning that the decision maker can ascertain whether there are gaps in his reasoning. So it actually leads to better decision making. The authority I quote for that is the *Ashworth* case, which is mentioned on p.6 of the note.

We would say that the Competition Commission itself recognises the benefits of this kind of transparency. Could I ask you to take up bundle A, the first volume, tab 1, at para.2.7.40, p.2-67 of the numbering. Here the Competition Commission is considering the way in which Ofcom's own MCT statement explained the reasons for its decision. We say:

> "Whilst we accept Ofcom's first point that the transparency or otherwise of its decision does not necessarily imply that the price controls have been set at an inappropriate level. In our view Ofcom takes this point too far in divorcing the issue of transparency from our task. We do not think it would be appropriate, in an appeal of this sort, for issues of transparency to be passed over without comment. If an approach is not transparent it may be difficult to determine whether the charge controls have been set at an inappropriate level, and a regulator could always respond to a challenge by commenting that it took everything into account in taking a decision. Furthermore, a lack of transparency may mask the fact that certain factors or inputs had not been subject to sufficient consideration and may therefore indicate areas where further investigation would lead to the conclusion that the price controls have been set at an inappropriate level."

We think that that is spot on, that one wants to see adequate reasoning to be sure that key points along the way have been adequately probed and considered.

THE CHAIRMAN: Was the point that Ofcom was making that transparency is not really relevant here because it was in relation to the points raised in appeal it was an on the merits re-examination so what did it matter in a way how transparent Ofcom's reasoning was on the relevant points, because the Competition Commission was going to look at it again any way?

MISS McKNIGHT: Yes, that is a point that Ofcom made. I think Ofcom defended the transparency of their decision.

THE CHAIRMAN: Yes, of course.

MISS McKNIGHT: But also made the point there was no appeal on grounds of lack of transparency, and therefore there was no need for the CAT to trouble about it or comment. The point we take out of it is that the Competition Commission correctly recognises that a decision should be adequately reasoned to be transparent, and indeed this point was not an idle point, you will recall that in the determination the Competition Commission did find that Ofcom's scenario based approach actually disguised the fact that it had not properly articulated a decision on key considerations. For example, the way in which it just weighed different scenarios, some of which gave a renewal term to the 3G licence and therefore looked at it over a longer term, scenario 7 purported to implement the 2G cap methodology but did not recognise that that was intended not to be just one scenario, but intended to be an alternative approach. Elsewhere in the determination I have actually cited it here actually, it is 2.7.13 and 14. You need not turn them up, I think. That is where the Competition Commission says the scenario should not be used as an alternative to deciding points of principle, because it is not transparent, and also it does not disclose the reasons adequately. A final point I wish to make referring back to the *Ashworth* case to which I have referred you previously – I need not take you to it, because it is a clear point from the case. In that case the question was whether the Mental Health Review Tribunal had reached an impugnable decision in deciding to discharge a mental patient, and the ground on which the court here found the decision was flawed in judicial review terms was that it was inadequately reasoned because – one factor was – there was weighty evidence from the mental health professionals as to the risks of discharging this patient, and there was an inadequate giving of reasons to explain why that evidence had been rejected. So I think a key point here is that what amounts to adequate reasons for reaching a particular decision will depend on how weighty are the factors that point towards a different decision. So we will go on to say that when the Competition Commission had decided formally to adopt the 2G cap methodology and it said in terms that that applied equally to the 3G only operator, it required a very clear and cogent explanation of why they then decided to depart from that methodology to give H3G an asymmetric price control. But what amounts to adequate reasoning depends on the context in which the decision is to be assessed. If all the previous considerations pointed in the other direction something cogent that really weighs up the issues has to be explained to justify an alternative decision.

So applying the principles coming out of the case law to this case, we say that the Competition Commission clearly had an obligation to provide a clear intelligible, proper explanation of its decision on all the key issues raised in the appeal. It should certainly have provided sufficient reasoning to enable the Tribunal to ascertain whether there are any parts of the decision that fall to be set aside on judicial review grounds. The very fact that the 2003 Act contemplates, within s.193 that you might reject the determination on judicial review grounds means there must be adequate reasoning for you to perform that task. Of course, your own decision will embody the Competition Commission's determination to the extent that you do not reject it on judicial review grounds, so it is clear that the Competition Commission's determination must have the sort of reasoning that would be adequate in a judgment such as the Tribunal will ultimately give.

We say that it was clear from the outset of these proceedings that one of the key areas of dispute was whether H3G should be treated asymmetrically and, if so, to what extent, but BT's notice of appeal expressly raised the issue that Ofcom had erred by not applying the 2G cap methodology which would have set the recoverable 3G spectrum and network costs at the 2G cap level and by implication for everyone. When BT later exercised its right to elaborate on its notice of appeal by submissions to the Competition Commission it put forward what it called its submission on the appropriate figure for the MCT charge. I could perhaps take you to that, it is one of the documents you have added at the end of bundle B, I believe.

It is five page document headed with the case heading: "BT's submission on appropriate figure for the MCT charge."

THE CHAIRMAN: This document I think goes back to March 2008.

MISS McKNIGHT: Yes, it is not actually dated and I must admit I have not checked when it was submitted.

THE CHAIRMAN: I think it was quite soon after the ----

MISS LEE: It was served on 7th March 2008.

MISS McKNIGHT: In this document BT summarise the case in favour of the 2G cap methodology and then conclude in the final paragraphs: "The effect of the points made above may be summarised in tabular form as follows:" the allowable pence per minute should be network costs including spectrum allowance of 3.7 and that is indifferent ----

FEMALE SPEAKER: I am sorry, I am completely lost. Which document are you referring to.

THE CHAIRMAN: It is called "BT's submission on appropriate figure for the MCT charge", it should be part of tab 35 at the end of bundle B2. There is a little table right on the last page

that sets out what BT's submission was as to the actual amounts that should be included in the final year TAC, and I think the point being made is that they do not differentiate between the 3G only operator and the 2G/3G MNOs.

MISS McKNIGHT: Yes, I would also point out they do not make any distinction with administration cost so that is not how the appeal turned out in the Competition Commission. But the point here is that the 3.7 cap was regarded as applying without difference to all the MNOs.

MR. SCOTT: Is it helpful to call that a pure 2G cap approach?

MISS McKNIGHT: Well I will be coming on shortly to what it is appropriate, but I am happy for the purposes of discussion if you find that to be of assistance, to call it "pure 2G cap approach", yes. We need not turn it up but I would remind you that when the Tribunal disposed of the non-price control issues in this appeal it drew a distinction between H3G's case for asymmetric regulation, i.e. not being subjected to a charge control at all, which the t b rejected and the possibility of asymmetric price control which it said would be a question to arise in the price control questions to be referred to the Competition Commission, where of course there might have been a case for that. But, it was clear that whether there was a case for asymmetric price regulation was going to be a key question before the Competition Commission. So, one would have expected some proper reasoning to address it in the ultimate determination.

We would say that the Competition Commission was also aware, as the investigation progressed before the Competition Commission, that several parties (and that included BT, Orange, T-Mobile and Vodafone) considered that the pure 2G cap methodology logically implied that H3G should be subject to the same 3.7 cap as everyone else. I can take you perhaps to the written submissions which Vodafone made on this point in November 2008, which are at Bundle A, Tab 21B. At para. 7, Vodafone, by this time aware that the Competition Commission might have been contemplating that the 2G cap did not lead automatically to symmetry for H3G, said,

> "The logic underlying the adoption of the 2G cap implies that the network/spectrum element of all MNOs' MCT charges should be capped at the 2G cap".

We went on to address how that would then pan out, but it is clear that that was a key part of Vodafone's submissions, and very similar points were made by other parties.

So, we say that it was very clear that the Competition Commission's final determination had to address that question clearly and cogently.

A final point as to what would have had to have been included for the Competition Commission's reason to be adequate: We say that the precise way in which the tax should be computed was clearly something that was of substantial concern to the parties. We do now see that the very fact that there was no laying out of the Competition Commission's workings did enable the Competition Commission to adopt a figure which embodied an error which was not clear from the reasons. We say that that in itself is indicative of the rather sort of shorthand way that the Competition Commission ultimately disposed of the question of how H3G's TAC should be set.

I now feel that I have outlined what particular points we would have expected the Competition Commission to address in its reasoning so far as relates to this asymmetry. I have indicated that if there is a contradiction in the reasoning then it is something which can be addressed by this Tribunal by rejecting the treatment of H3G on judicial review grounds. However, I want to explain what I see to be the relationship between the two limbs of this challenge - the irrationality self-contradiction and the inadequacy of reasoning. I think there are two ways of looking at it. Mr. Scott's helpful suggestion of the pure 2G cap probably comes into play here. But, we would say that the 2G cap methodology implies that H3G should be given the same treatment - 3.7. So, if H3G is going to be given a different treatment there are two possibilities. One is that the Competition Commission is saying that, "The 2G cap is the totality of our reasoning, but for H3G it leads to a different outcome". Now, we say that is self-contradictory because the 2G cap does not lead to a different outcome. So, if that is what the Competition Commission is saying, then they fail on contradiction grounds. If, on the other hand, the Competition Commission is saying, "We accept that the 2G cap logically implies 3.7 for H3G, but there are other countervailing considerations which apply", then the countervailing considerations could justify, in theory, a departure from the 2G cap in the case of H3G. But, of course, then you are brought into the sort of questions raised in the Tesco case. In order for the Competition Commission to justify a different outcome for H3G - a departure from the 2G cap - it would have to explain what are those countervailing considerations. Of course, they would have to be countervailing. It would also have to explain why those countervailing considerations trump the application of the 2G cap pure in the case of H3G. In explaining why the countervailing considerations trumped the 2G cap it would have to explain how serious they were, what the pros and cons were of going the different routes, applying 2G cap or applying something that was asymmetrically generous.

We say that even if one is extremely generous in reading this report, one could find things which are portrayed as being countervailing considerations, and so possibly, at the most, countervailing considerations have been identified. But, they certainly have not been fully explained or weighed. We are just told, "There is a 2G cap, there are these other considerations". They are sometimes described as 'competing considerations' which I take to be countervailing in my terminology. Then we are told the answer. We are not told why they trump the 2G cap.

We say, therefore, that if this portrays a departure from the 2G cap by virtue of countervailing considerations, it fails for want of adequate reasoning. So, it seems to us that either it is an implementation of the 2G cap which is self-contradictory, or it is an unjustified departure.

It is probably worth at this stage taking you to our analysis of why the reasons are contradictory or inadequate. So, perhaps I could ask you to turn up s.2.9 of the determination at Bundle A, Tab 1? At p.2-75. What we say here is that when the Competition Commission first sets out its decision that Ofcom erred by not adopting the 2G cap, it describes the 2G cap methodology in a way that clearly signifies that it logically implies the same outcome for H3G as for the other MNOs.

THE CHAIRMAN: Is that limited to an outcome as regards the spectrum allowance or is it the outcome for the whole of the ultimate TAC?

MISS McKNIGHT: We say it could be the whole of the ultimate TAC, but it is certainly the network and spectrum costs. As we go through the paragraphs that I am going to take you to, I hope that will become apparent. So, at 2.9.1, this is the simple description of what the 2G cap argument is.

> "BT argue that customers receive no benefit from calling a 3G phone rather than a 2G phone and that in a competitive market it would not be possible to charge a higher price for what is essentially the same service. BT argued that the cost of termination on 3G networks exceeds the cost of termination of 2G networks in Ofcom's modelling only because Ofcom overvalued 3G spectrum by placing too much weight on the 3G auction held in 2000".

So, the key point here is the first sentence - that this implies the whole price of 3G MCT should not exceed the whole price of 2G MCT.

Paragraph 2.9.10. This is where the Competition Commission expresses its agreement with that principle.

"As a general principle, we agree with BT's basic point that in a competitive market the introduction of a new and more efficient technology should not led to an increase in price for an existing service".

If I could take you to 2.9.156? All the intervening sections address the possibility that even if the 2G cap is right in theory, the facts do not allow it to be applied here. But, by this stage the Competition Commission has decided that the 2G cap is right in principle and can be applied in this case. The question is: Does it apply to H3G at all, given that H3G does not have a 2G network from which a cap can be inferred? What we see here is that first of all the Competition Commission addresses a point that 3G made about different kinds of spectrum cost. At (a) it says:

"It appears to us that H3G's efficiency comparison is based on historic auction fees ... rather than on its forward looking value [of spectrum] which, in our view, is the relevant concept. H3G's argument could be interpreted as a cost recovery point."

Their point is that they had to buy 3G spectrum because they did not have anything else.

"If so, all the MNOs incurred costs in the 2000 auction (indeed H3G paid approximately £1.6 billion less for a large licence than Vodafone). Treating the forward looking value of 3G spectrum in the same way for all operators is therefore an approach that we think is appropriate."

THE CHAIRMAN: Yes, Miss McKnight, I do not have any markings in my copy of the determination as to what is confidential or not, so I am not sure whether figures such as that are confidential or whether you are going to read out anything that should not be read out.

MISS McKNIGHT: That is not confidential. This is marked actually. If, for example, just at random you turn up p.5-37, that does have markings.

THE CHAIRMAN: I see, yes.

MISS McKNIGHT: I think you can safely assume that that is no confidential, but thank you for reminding me.

Then para.(c) of this paragraph:

"We remain of the view that the benchmark of a competitive market is a useful construct when thinking about the value of 3G spectrum to a 3G-only MNO ..."

Going to the second sentence of (I):

"A potential entrant, when deciding how much to pay for 3G spectrum in respect of its (future) termination business, would know that it would not be rational to pay more than the difference between the physical network cost of termination on 3G

and the cost of termination on 2G, because if it did so it would only be able to match the prices of competitors with 2G networks by making a loss."

This, I think, is key to the point you raised, madam, as to whether the 2G cap tells us only what should be the recoverable spectrum cost, or whether it deals with network costs. What this is saying is that the 2G cap of 3.7p per minute sets the limit as to how much anyone - for example, Hutchison - is going to be allowed to charge for the network and spectrum elements of 3G termination. So if its network costs are known to be 2.9p per minute that tells us that the residue between 3.7 and 2.9 is what the 3G spectrum is worth to H3G for use in providing call termination. If the network costs were lower because it was more cost efficient then it would still be able to charge 3.7p per minute and the spectrum would have more value to it in use in providing MCT. So we say the 3.7 sets the limit for the sum of network and spectrum costs, and if one changes the other automatically changes.

This is a key to our argument. The fact that Hutchison is recognised in Ofcom's modelling to have higher pence per minute network costs does not justify any increase in the 2G cap, it merely tells us that 3G's spectrum is not worth as much for use by Hutchison in providing call termination as it is to those with lower network costs. Of course, that is not implausible because Hutchison did not pay as much, in recognition no doubt of that sort of factor.

Then in para.(ii) the Competition Commission goes on to talk not about termination but the fact that this reasoning would also apply to call origination:

"Alternatively, one can consider the situation in the origination market. A 3G-only potential entrant would similarly not find it rational to pay more than the above mentioned cost difference for the same reason."

That is a voice call originated on 3G is not superior to a voice call on 2G. So the same equation has to be borne in mind.

"(iii) Both these examples apply equally to a 3G-only potential entrant as they would to a potential entrant into the 3G business that already has a 2G network."

Then finally:

"(iv), the Competition Commission recognises that does not tell us anything about how much 3G spectrum is worth for data services, which simply cannot be provided on 2G spectrum."

So we say that when the Competition Commission first explained why it was going to apply ----

THE CHAIRMAN: Where are you reading from?

MISS McKNIGHT: 158.

"It was noted above that the application of the 2G cap methodology to the 3G only operator does not necessarily lead to the same ppm rate as for the 2G/3G MNOs."

So we recognise that at the same time the Competition Commission was - I have been asked to read to the end:

"We have received a number of submissions on this point. BT and some of the interveners have argued that the principle underpinning the 2G cap implies that no modelled cost difference should impact upon the 3G only MNOs' MCT rate, because higher prices due to higher costs would not be sustainable in a competitive market. This issue is dealt with in Section 16 on Reference question 8."

So the point we would make is that the way in which the 2G cap was explained when the Competition Commission decided to adopt it does imply that the 3.7 cap is a cap for everyone through which they can recover in various combinations their network and appropriate spectrum values.

Although the Competition Commission here, as Miss Rose points out to me, did say, "We will think about how it applies to H3G in s.16", we say in fact the logic tells you how it is going to apply. It is going to apply to give them 3.7.

So we say that in a case where the Competition Commission has set up quite firmly the 2G cap as the methodology to be applied, that creates a great onus on them to give very good reasons, if they are going to depart from that, to H3G.

We would also like to draw your attention to Chapter 5 of the determination where, as you are aware, the Commission looked at H3G's appeal case for asymmetries going beyond cost based asymmetries. As I think the Tribunal, itself, pointed out in some of its correspondence with the parties, in Chapter 5 the Competition Commission recognised that asymmetry can in principle create efficiency detriments. Can I refer you to para.5.4.53, which I think may be one the Tribunal drew to our attention. It says:

"However, we also consider that asymmetric MCT regulation has a number of potentially negative effects:

(a) If it is not based on differences in efficient costs ..."

so this is look at non-cost based asymmetry -

"... the beneficiary MNO will be able to make excess profits ..."

It also points out in (b) that:

"The asymmetric MCT rate will raise the wholesale costs for other MNOs and FNOs. This may put upward pressure on the operators' retail prices, making it harder for them to compete ..."

and adding to the distortions by potentially depressing demand. That applies regardless of the alleged rationale for the asymmetry.

We would point out that Chapter 5 does on the whole reach negative conclusions about asymmetry, but it is focused very heavily on non-cost based asymmetries. I think you need not turn it up but para.5.3.2(a), which I cited in my note, does point out that this is not dealing with cost based arguments, it is dealing with the case that there should be non-cost based asymmetries.

Chapter 5 also emphasises that if there is going to be an asymmetry awarded in a particular case it has to be awarded by reference to a detailed examination of a particular circumstance of the national market. That is at para.5.4.50 of the determination, which is on the same page as we have just looked at. It is talking about the European Regulators' Groups literature and it says:

> "We consider that the ERG's position is consistent with that of the European Commission: that is, that any asymmetries should be temporary, based on certain cost differences (with the exception identified above), have a number of potentially negative effects associated with them, and need to be considered in the light of the particular market circumstances that an NRA is dealing with."

So this clearly creates an expectation that if there is going to be a final decision that H3G should have an asymmetric tack there will be a justification for that by reference to these sort of considerations, which we simply do not see.

The only explanation which the Commission offers of its decision to grant a higher MCT charge or network spectrum allowance to H3G is in para.16.19 of the determination. That is at p.16-4. Both we and T-Mobile have addressed this in our written submissions. If we look at the opening wording:

> "We recognise that a strict application of the analogy with a competitive market on which the 2G cap is based to an extent, could imply a single TAC for all MNOs."

We say that that is very difficult to understand. Is that saying the pure 2G cap does imply the same allowance for all MNOs so that what follows is a justification from departing from that implication. Or is it saying that the 2G cap is, in a sense, incomplete as a methodology. It takes you a certain way along the path and then there are divergent routes, all of which hare equally compatible with the 2G cap. We say that the 2G cap methodology does imply the same allowance for all MNOs, so that this decision to grant a higher TAC to Hutchison can only stand if it is justified as a departure from that cap. If we now look at the supposed

justification, para. As we see there is a reference to fact that the Competition Commission has not dismissed cost recovery as an objective or placed no weight on it. This is leading up to saying Hutchison has higher costs. But of course, when it says it is not the case as argued by T-Mobile, that we have dismissed cost recovery, T-Mobile had argued, and indeed Vodafone had argued, that in deciding how to value 3G spectrum generally and to allocate some path of recovery through MCT much m ore weight should be attached to the regulatory objective of looking at what was historically paid for spectrum. But the Competition Commission roundly rejected that and decided instead that the 2G cap methodology was the appropriate one.

So I took you to the section 2.9.156 where there was a discussion of how this cap would apply to Hutchison, and there of course the Competition Commission also looked at how the 2G cap in its application to Hutchison 3G would tally with cost recovery. It said there in 2.9.156A:

> "Recovery of historic costs is really not relevant. The only costs we are interested in allowing you to recover by way of spectrum costs are the efficient forward looking costs. What is spectrum worth when used in providing MCT that can be provided for 3.7 ppm on a 2G network."

So this sets up cost recovery as a potentially competing consideration with the 2G cap, but the 2G cap tells us that the appropriate test of cost recovery is that the 2G cap allows one to recover costs to the extent that it is efficient to do so, not the historic costs which may be much higher, but the efficient costs of using 3G spectrum for call termination. So query whether that is a competing consideration at all, and if it is there is certainly no weighing of it. Then we see that it says:

> "We think a valid distinction can be drawn between the regulatory treatment of new technology and the regulatory treatment of a new entrant."

The implication is that new technology does not justify a higher price, but a new entrant may. Again, this simply states:

> "However, the 2G cap would not necessarily imply that, for example, a later 2G operator, smaller initial scale and lower lifetime traffic should not be recognised."

To say it "would not necessarily imply" tells us there is a question there, the 2G cap may be adjusted to reflect a later entrant's circumstances, but it does not weigh up how that will be done or whether, in this case, the 2G cap should nonetheless be allowed to prevail.

THE CHAIRMAN: But was it not accepted by everybody that the 3G only operators efficiently incurred network costs were 0.2 ppm higher than the network costs of the 2G/3G?

MISS McKNIGHT: Yes, that is not in dispute, but of course that begs the question once one has decided the 2G cap methodology is the right one, which the Competition Commission decided in Chapter II, then the 3.7 ppm allows 2G/3G MNOs to recover their network costs, plus approximately 1p per spectrum, and it would allow H3G to recover its network costs of 2.9 and lesser amount for spectrum because ----

THE CHAIRMAN: Well that was the issue, was it not, whether the spectrum allowance should be held constant across them all ----

MISS McKNIGHT: Yes.

THE CHAIRMAN: -- or whether the network costs should be held constant across them all.

MISS McKNIGHT: We say maybe that is a valid question, but the point is there is no explanation of why the network cost has been allowed to trump the cap here. It sets up the issue and says: "We have a 2G cap methodology but in itself it does not address whether there are countervailing considerations for a later entrant which should be allowed to trump that. But it does not actually say why in this case they have been allowed to trump the 2G cap.

MR. SCOTT: Clearly the bit that you did agree at the start of 16, 19 which implies that the Competition Commission feel uncomfortable about the pure 2G cap logic, just running right the way across all five operators?

MISS McKNIGHT: To be honest I do not think we know what the Competition Commission thinks, because my final criticism of this is going to be that this whole section is ambiguous as to whether the Competition Commission think they have treated H3G in a way that is inconsistent with the 2G cap methodology but is justified by countervailing considerations or whether they think the 2G cap methodology is not sufficiently complete to preclude this treatment consistently with it. We say that is a further deficiency in the reasoning but it is not clear whether the Competition Commission recognises that this is a departure from the cap.

THE CHAIRMAN: Well they have just made a departure in relation to administration costs which you had, after some initial objection, accepted was legitimate. What is the difference between allowing the higher amount for administration costs and allowing a higher amount for network costs?

MISS McKNIGHT: We did not accept that the administration costs were legitimate. We accepted that the way the appeal had been argued, the question as to whether Ofcom erred in finding the administration costs at different levels had been answered "no, it did not err", and therefore "question 8: what should be done?" did not arise on the drafting. We were

clear about that, but we do think, and we have made this point in our written submissions, that the logic of the 2G cap does apply to the totality of the MCT charge, which is this 3.7 plus the admin cost, given the externality surcharge is removed. So we do not see any inconsistency in our position on that front. We would say that para. 16.19 which is the only reasons that deal with this point, is ambiguous as to whether the Competition Commission thinks it is departing from the 2G cap, or applying it in one of its permitted modes, and at most merely identifies potentially countervailing considerations without explaining how they have been weighed and why the desire to create asymmetry has trumped the desire to apply the pure 2G cap, have a regard to the detriments of asymmetry which were recognised in Chapter V. There is no analysis of that.

THE CHAIRMAN: Well only some of the detriments apply. The detriment about allowing them more money to compete in the retail market would not be relevant here because this is a cost based ----

MISS McKNIGHT: Yes, I pointed out that of the detriments listed the second one certainly applied, and the general comment that you only allow asymmetry by reference to a proper examination of market circumstances appears to apply generally. I am conscious I am running over, I will be very quick.

MR. SHARPE: Would my friend take you to subparagraph C just to ensure you see …

THE CHAIRMAN: We will read that to ourselves, yes, we have read this paragraph of the determination already. Well no doubt that is a point you will come to with Mr. Sharpe in due course.

MISS McKNIGHT: On that basis our next comments were going to relate to 16.20 which of course is 4.3, 4.4 and I will pass over those, as to whether the 2G cap is consistent with Ofcom's network and spectrum costing model and whether the reversing out methodology was appropriate at all.

I would like to come on to what I think is probably my final point as to whether it is essentially too late for Vodafone to challenge the fact of asymmetric treatment, given that it did not appeal against the MCT statement on that basis and that takes me to para. 24 of my note.

We say there is absolutely no merit in the argument that because we did not appeal against asymmetry we cannot now make these arguments, because to say that is to say that the Competition Commission, having decided to adopt a methodology which logically leads to the same cap for everyone, should be allowed to rely on inconsistent reasoning simply because no-one raised that point earlier. Once the Competition Commission had adopted

wholly different reasoning for Ofcom, we must be entitled to test whether that reasoning is coherent. That is the point we are making.

We would remind you also of our point that it would actually be unfair as between the MNOs to allow this inconsistent reasoning to result unjustifiably in different charges for H3G, on the one hand, and the 2G/3G MNOs, on the other.

The final point that I had raised in my note also relates to the reversing-out methodology. I leave it there, but will not address it orally.

That completes my submissions unless there is anything else ----

THE CHAIRMAN: On the procedural point which we are going to determine on the papers perhaps you could give some thought to whether that is affected by the congruence now between the two methodologies put forward by H3G because I think in your paper submissions you do draw a distinction between the time at which the principle of potential asymmetry for H3G was raised and how long you had to deal with that, and the time at which it became clear how that was going to be done, if I can put it like that.

MISS McKNIGHT: Yes. I think we did not know how it was going to be done in two senses: we did not know whether it would be this reversing-out methodology, but we also did not know on what basis, if at all, a justification could be adduced, given the extra network costs, given that we say the 2G cap is the sum of two parts and is always the sum of two parts regardless of the components. So, I think our procedural part applies to both. So, given the reversing-out methodology was particularly obscure, more clarity might have been required on it.

But, we have put in our written submissions today on the procedural point, and I think that will cover those points.

THE CHAIRMAN: Thank you very much.

PROFESSOR BAIN: You took us to the *Tesco* case where this was being looked at by the Competition Commission at first instance. The Tribunal found that it was inadequately argued. In this case the first instance body was Ofcom. The Commission was looking at it at second instance. So, one of the things the Competition Commission says in 16.19(c) is, "We do not think it could be said that Ofcom's decision to recognise those costs differentials was wrong". In other words, they are coming at it at a sort of review stage. Does that have any bearing on the extent to which they ought to be offering their own positive reasons for deciding in the way that they did decide.

MISS McKNIGHT: I think certainly that where the Competition Commission simply agrees with what Ofcom has done, there is no need for them to recite everything. They simply say, "Ofcom made no error in this respect". But, with respect, I do not think this is an instance

where they can do that because Ofcom's decision to recognise the network cost differentials and can build that in, penny for penny, into the charge control was part and parcel of a particular methodology that used the network and spectrum costing models to say, "First of all we allow you your efficient network costs. Then we add on a separate amount for 3G spectrum which we have computed independently of what your network costs are". Now, it is not entirely independent because they calculated the capital value of the 3G license, and then apportioned it, and the apportionment formula took account of network costs to some extent as to the mode of apportionment. But, it was a methodology that said, "We allow you your network costs. We allow you your spectrum costs separately". The 2G cap methodology is completely inconsistent with that. It says, "The totality of network and spectrum costs which you may recover is collectively capped at 3.7". So, having abandoned that key element of Ofcom's methodology it is not appropriate simply to pick up one part of it and say, "Well that does not seem to us to be wrong". It is also a strange form of wording. They do not actually say it is right. Maybe they say it is not wrong, meaning, "You have not challenged it". I do not know. But, we would say that one cannot simply pick out isolated parts of Ofcom's conclusions in isolation from the methodology which supported them, when the Competition Commission has itself chosen a different methodology.

PROFESSOR BAIN: If I could just come to this issue of the methodology, it seems to me there are many places in this document where the Competition Commission endorse the approach of efficient pricing, meaning by that efficient cost-based pricing. Now, in this particular case it is very difficult to say what the opportunity cost of 3G spectrum is going to be. One could suggest that what they have found is a sort of pragmatic workable model with a theoretical basis, and that that is what the 2G cap one is. It gives them an upper bound. They looked rather carefully at what spectrum opportunity costs might be, and they came to the conclusion they would be almost certainly less than this upper bound. BT had suggested the 2G cap as a remedy. So, far from saying, "Really, we are nailing ourselves to the flat for this particular mast", they are saying, "This is a practical, workable solution in a case where ideally we would love to know what we could put in as the opportunity cost for 3G spectrum. We cannot do that, but we have got something that we can use. We have satisfied ourselves that it will allow the MNOs to recover their efficiently incurred costs. We have looked at that. It is an upper bound. It will probably be a bit more than that. But, it is certainly less than they were getting under the previous determination, and so that is what

we are doing". So, really, what you are putting to us is that they adopted the 2G cap methodology regardless, and the rest was abandoned.

There is an alternative interpretation, I think, of this, which does not put quite the same stress on the 2G cap methodology and might lead to a different view about how H3G should be treated in this case. Have you any comment on that?

MISS McKNIGHT: Well, in a sense, one needs to read the determination as a whole to see how the 2G cap is portrayed. It is our submission that it is portrayed as the theoretically sound basis for regulating. Most of the discussion about the pragmatics of it are really about -- I think it is only the theoretically sound basis for regulating 3G MCT if you accept that there is not a more valuable 3G service - it is being ousted by using 3G spectrum. So, most of the debate is about whether there is such a demand for high value data services which over the life of the licence would consume all the capacity, and also about what is the true 2G cap? The 2G cap as adopted here is, in a sense, pragmatic, because it uses the administrative incentive pricing for 2G spectrum, which is probably not a perfect reflection of the value of 2G spectrum. Most of the debate is about those considerations.

So, there seems to me to be no hesitation in saying that if there is no shortage of 3G spectrum such that 3G MCT is ousting a more valuable service, and if the AIP basis of valuing 2G spectrum is appropriate, and both those conditions were met, then the 2G cap is theoretically, and on the facts, the correct method for setting 3G MCT charges as an upper bound. Now, you are quite right that if there is competition amount the MNOs, they might actually price lower. That is the only element of pragmatism, saying that, "It's not worthwhile to probe further whether it should be lower". But, of course, that suggests that there was less reason to treat Hutchison asymmetrically because there was already an element of generosity to everyone in applying the 2G cap rather than going below it.

Could I also make one point about your initial question, as to whether there is a greater or lesser onus on the Competition Commission to give reasons where it is itself an appeal body of a sort? I think we would say that where all the parties - and indeed this Tribunal - have gone to the great trouble of proceeding with this case, we are entitled to expect a robust determination at the end of the day. I adverted earlier to the significance which had been recognised right from the outset as to the question of asymmetry. So, to end up with something which we say is an inadequate assessment of the pros and cons of asymmetry, just cannot be appropriate in the context of these appeal proceedings. A related point is, of course, that although we did interest challenge asymmetry by way of an appeal, it is not appropriate for the Competition Commission to say that everyone was happy with what

Ofcom did with asymmetry, because of course the Competition Commission had, itself, departed from what Ofcom did. They just adopted a little bit of Ofcom's asymmetry. So if they are going to pick and choose which bits of the asymmetry to allow we say they must do the job properly.

PROFESSOR BAIN:

MR. SCOTT: I suppose the one question that is in my mind, and it comes up for me when I re-read this yesterday, is this: what you are effectively saying is that in relation to this issue the Competition Commission were accepting the suggestion from BT. The Competition Commission then come to question 8, and they have to decide what the implications are for the eventual price control for each party. You have talked about fairness in relation to fairness as between the five parties and the Competition Commission have got to decide what is fair in the context of Hutchison's particular circumstances which are not the same as the circumstances of the other four operators, and that they are explaining in here. In so far as the Competition Commission is inevitably going to have to make a judgment on what they are seeing as a difficult question, are you suggesting that there are criteria that they should have been applying which are not actually mentioned at all in 16?

MISS McKNIGHT: Yes. I am saying that the correct reading of s.16 is that whilst the 2G implied asymmetry the Competition Commission appear to have identified potentially countervailing considerations which had to be brought to bear to decide whether to depart from the symmetric figure for H3G. Having identified them, and query whether all of them are relevant or appropriate or properly described, it then needed to say how weighty are they, and it had to say, "We identified in Chapter 5 that asymmetry has certain detriments, it increases the cost to users of phoning H3G", and we have to bearing in mind that the ERG and the European Commission said asymmetry should be temporary. H3G has been unregulated for a long period of time, so is it appropriate to extend the asymmetry. It had to look at the particular market conditions, and of course one of the relevant factors that emerges from Chapter 5 is that one tends to be more sympathetic to asymmetry where a new entrant does not just need asymmetry for his own benefit, but that his flourishing in the market will contribute to more effective to competition because there are otherwise insufficient operators creating effective competition. So one would have expected to see an examination of the extent to which treat Hutchison asymmetrically would benefit the market at large.

One would have expected some discussion of the timeframe. It did not have to be for the whole four years. The temporary nature could have disappeared after year 2, so we would now be entering a period of symmetry.

One would have expected a discussion of all those factors. It is very like the *Tesco* case. In *Tesco* the Competition Commission said the remedy has the benefits of preventing further market concentration from occurring through new store development by incumbents. It has the detriment that it could stifle beneficial store development and we decide the answer is, have the remedy but it only bites at 60 per cent market share.

That was a bit like the recognition of the countervailing factors, and the Tribunal said, "That is not good enough, you have explained why it has to weigh, but you have not actually evaluated how big that risk was, you have not gone into it sufficiently to justify that particular striking of the balance".

We say that this is a very similar case. You have identified potentially countervailing factors, but you have not said whether symmetry justified for four years at this level in these market conditions.

MR. SCOTT: Thank you.

THE CHAIRMAN: Thank you very much, Miss McKnight. That is very helpful. Mr. Turner?

MR. TURNER: Madam, I am likely to run over the short adjournment. First off, I adopt much of Vodafone's submissions. T-Mobile's case, I should say at the outset, reaches the same conclusions as Miss McKnight, but sometimes by a different route. I think we have somewhat less emphasis on the 2G cap being an all or nothing issue, the question of logical contradiction; and more emphasis on the need to justify a departure from the principle which has been applied to everyone else and thereby to favour H3G.

We also lay emphasis in that connection on the statutory framework and its implications for a decision to give asymmetric treatment in relation to this one operator.

The way I propose to deal with these submissions is, first, a brief overview to set out what we see as the essential issues; secondly, to deal with the legal question, the degree of scrutiny that this Tribunal should engage in when reviewing the Competition Commission's determination in this case; and thirdly, a number of brief specific observations on the grounds of challenge and the Competition Commission's reactions to those, to the extent that those have not already been dealt with by Miss McKnight.

Miss McKnight in her speaking note set out at para.3 that Vodafone's first ground of challenge relies on a sequence of propositions, and she sets out at five, at (i) to (v). For

clarity, I will do the same for T-Mobile, but I will have to spell these out orally because you will see that differences emerge.

The first proposition is that the context in which the Competition Commission's decision to impose asymmetric treatment falls to be reviewed is the legislative scheme of the CRF, the Common Regulatory Framework, and the underlying principles. We touched on that in para.7 of our submissions.

The second point: in view of that context a decision to give asymmetric treatment to one operator requires specific justification and reasoning if it is to be lawful.

The third proposition is that here in this case that is particularly so, the need is particularly acute, because the Competition Commission has reasoned that the appropriate costs for MNOs to recover through the charge controls - that is its words, the appropriate costs" - are forward looking, efficient costs with the 2G cap setting an upper bound.

If I may, I will pause there and just ask the Tribunal to pick up the determination and look at three key paragraphs, one of which I believe may have been touched on already. First, 2.9.80 on p.2-88. That is a very important paragraph. It is the Competition Commission's conclusion in which they say:

> "... we think that the 2G cap gives, in principle, an upper bound on the forward looking opportunity cost of 3G spectrum that it is appropriate to allow the recovery of through MCT charges."

It is a matter of principle.

Then at 2.9.12, the last sentence, they say:

> "Put another way, to the extent that 3G spectrum could be said to have been acquired to save costs in the provision of voice services, efficiently incurred costs could be reimbursed by adopting the principle of the 2G cap."

At 2.9.15, a few paragraphs below that, they say:

> "... the 2G cap which is based on determining the value of 3G spectrum that should be factored into the MCT charge controls in terms of network cost savings it provides for voice termination relative to 2G ..."

That is the mechanism. It is essentially a balancing item within the overall 2G cap.

It follows from that that the higher level of 3G spectrum costs being allowed to H3G in its charge control, which would take it above the overall cap of the 2G level, are not appropriate costs for achieving the objective which the Competition Commission found was the main priority, and that is 16.19 of the determination. The main priority being to give appropriate price signals for efficient consumption. My third proposition is that given the

way in which the Competition Commission has elaborated the principle it will follow, a departure from that principle in this case particularly ought to be justified.

The fourth proposition, there is no reasoning given in the determination to support the asymmetric treatment of H3G by reference to the specific conditions of the UK market, even though the Competition Commission itself specifically reasons that that is what is needed if you are going to justify asymmetric treatment based on the position of the European Commission and the ERG, because it says so.

My fifth and final proposition is that the claim that asymmetry of treatment is needed to avoid inconsistency which appears to be a discrete point in 16.19(d) of the determination, inconsistency by reflecting the fact that there is only a single opportunity cost for 3G spectrum appears to us to be subject to challenge because it is based on a confusion, a confusion between the value of spectrum in use to a particular operator, H3G which can vary depending on the circumstances and the 2G cap principle, and the market value which one would expect not to vary, as we have set out in our written submissions.

So those are, in our submission, the essential propositions that should lead this Tribunal to quash the determination in the relevant part.

In summary, the central point in this challenge relates to the Competition Commission's basis for treating H3G more favourably than all the other MNOs in the charge control structure. This is not a disguised appeal in which we are asking you, the Tribunal, to reject the Competition Commission's economic judgment about this matter and to substitute your own view. It is properly an invocation of the Tribunal's supervisory jurisdiction because you are being asked to review whether the Competition Commission's decision to treat H3G more favourably than competing operators has been properly thought through and justified against the background of the task which the Competition Commission was charged with performing and the context, the CRF. The problem is that there is very little in the way of reasoning in the determination itself to either support or explain what the Competition Commission did. As Miss McKnight has pointed out there are two main paragraphs which deal with the asymmetry issues, 16.19 and 16.20 and we have focused on those in the written submissions.

How does the Competition Commission respond to that, to our challenge in its written submissions? If you turn to tab 5 in the first bundle, I shall not go through this at length but I will make a number of short points.

The first point is that the Competition Commission with respect to the law argues that it is simply obvious that we are expressing our disagreement with the merits of the Competition

Commission's judgment and that we are not genuinely challenging the coherence or adequacy of the underlying reasoning. It says that, for example, in para. 6.

Secondly, the vast majority of the Competition Commission's written response, which you will have read, appears to us to be concerned with trying to prove that the approach to asymmetry in its determination was consistent with what Ofcom had itself originally done. For example, there is a long section leading up to para. 36 dedicated to that proposition. That is so despite two features which we say invalidate that for a start. First, that the validity of Ofcom's original approach had itself been directly put in issue in the appeal by BT. I will take you to a paragraph on that in a moment. Secondly, and I support Miss McKnight vigorously in this, that the Competition Commission took Ofcom to task for not sticking to the principle of the 2G cap methodology, the pure 2G cap methodology, but simply treating it as the basis for a scenario to arrive at a value of 3G spectrum which would then be added on to the value of other elements of cost.

If you would go back to the Competition Commission's determination, on the issue of whether this was a pragmatic or a principled approach by the Competition Commission two paragraphs are particularly relevant, and those are 2.7.20 and 2.7.25. 2.7.20 after the first two sentences states, as you can see, that the Commission considered that the 2G cap proposal was fundamentally different to the other scenarios, that it was not simply another possible valuation of spectrum, but was something that Ofcom should have agreed with or disagreed with as a matter of principle. In its conclusion in that section at 2.7.25 over the page they said:

> "We therefore remain of the view that it was not appropriate to treat the 2G cap in the same way as the other valuation scenarios, and also of the view that **mixing questions** of principle with issues of external uncertainty in scenario analysis in the way Ofcom has done lacks transparency and is unlikely to lead to an outcome that is consistent with a properly assessed MCT charge." [emphasis added]

So we support Miss McKnight on this, certainly the Competition Commission appeared to be saying that we approached this issue as a matter of principle, but my primary point is that for a large part of the Competition Commission's written response, what it is doing is tilting at what we consider to be an Aunt Sally because we were not primarily concerned with consistency or otherwise of Ofcom's original approach. Our challenge involved the points that I outlined at the outset, and what is important, thirdly, is that once you strip away all the text dealing with the Aunt Sallys and peripheral matters, it becomes very clear that the

Competition Commission's response to our points in this written submission can be isolated in a very few paragraphs indeed, and their poverty becomes evident.

Take the first point, the detriments of asymmetry. Our claim that the Competition Commission had failed properly to weigh up the benefits of giving the additional allowance against the detriments of asymmetry. That is dealt with at paras. 55 and 56 on p.24. At para. 56 they say this:

> "Non-cost based asymmetry was dealt with extensively in s.5 of the determination. As is clear from that section asymmetry is a complex topic, however the simple answer to T-Mobile's point is that Ofcom had allowed for cost based asymmetry (see para. 33e above) and that decision had not been appealed against."

That is it. We say as follows: First, that is wrong, BT's appeal did involve arguing that the 2G cap should lead to the same 3G spectrum and network cost allowance for all the MNOs in addition to the part of the BT document that Miss McKnight took you to, may I ask you to look at para. 16.14 in the determination itself. This is part of the discussion on reference question 8. In it, at 16.14, the Commission refers to BT's argument that the 2G cap should lead to the same 3G spectrum and network cost allowance for everybody, although it accepted that there should be a high administration costs allowance. Now, that is, of course, part of the section that leads to the run up ending in 16.19 where you get the conclusions. So, it is part of the series of argumentations that have led to the decision on what they should do. There is precise recognition that the argument is part of the appeal. I would also point out at 16.16, while you are on that page, that T-Mobile's submission, which we still adhere to, that in fact the 2G cap methodology does embrace all aspects of the TAC, and therefore an increased allowance for administration costs cannot be justified - and you will see that although Vodafone peeled off from that, T-Mobile, O2, and Orange persisted with that position. That is the pure position which we consider to be correct.

The first point is, well, if the Competition Commission is saying, 'Well, Ofcom have allowed for costs based asymmetry and that has not been appealed against', there was an issue in the appeal - very clearly so. But, more importantly, far more importantly, the Commission's answer here is barren. It is nothing to the point. There is nothing that reveals that it, the Competition Commission, have thought about, and have addressed, the detriment of asymmetrical treatment of H3G in the conditions of the UK market at all. It may be because of this sort of point that the Tribunal's letter of 10th March raised the question that at this hearing the Tribunal would be interested in hearing -- would want to hear from the Competition Commission about whether, and to what extent, the conditions of the UK

market were taken into account, because it is not clear from the determination and because it is not answered in their written submissions.

So, that is the first point that they address on our main challenge - the detriments of asymmetry.

What about adequacy of reasoning? That is dealt with at paras. 64 to 66 on the next page. That is all that they say about the adequacy of reasoning point. At para. 65 the Competition Commission say that these challenges are based largely on the premise that,

> "(a) the principle of the 2G cap was inconsistent with Ofcom's modelling approach".

Leave that aside. It is (b) that we are concentrating on.

> "(b) The application of the 2G cap in a way which resulted in a higher MCT rate for the 3G-only operator needed to be justified".

That is our case. They answer. Leave aside the answer in relation to the first part of the premise. They say,

> "As to the second part, the Commission accepts that its decision needed to be reasoned, but submits that it is perfectly plain why it took the decision it did, and that its reasoning is adequate".

So, again, what one has in my submission is, ultimately, bare assertion. This does not refer to a relevant part of the determination itself which can be consulted by a reader, by the Tribunal, by the parties, or by third parties which explains why asymmetry is justified in this case, and, as Miss McKnight has pointed out, to this extent -- asymmetry to this extent. As I say, that is presumably what prompted the Tribunal's letter of 10th March. We note that the Competition Commission has not given any written response to the Tribunal's letter which was sent two weeks ago, which might supplement paras. 55 and 56, or 65 and 66.

The last point, which corresponds to my final proposition - the fifth proposition - the single opportunity cost issue, that is dealt with only at para. 45 of the Competition Commission's written submissions. They recite the argument that despite the spectrum having a single market value, because it is worth less in use to an efficient 3G-only operator due to the higher network costs, there is no reason for it not to recover less than the other MNOs in respect of 3G spectrum. All it says about this is, in the penultimate sentence, that it assumes,

> "The second consideration taken into account by the Competition Commission should be disregarded".

The second consideration, if you look up the page at para. 43, is the consideration that a later entrant operators, smaller initial scale and lower lifetime traffic might be recognised. That was one of the two considerations at play.

Our point here was that we had apprehended that an analytical point was being made about inconsistency. We pointed out that that was wrong. For them to go back and say, "Ah! But, there is a smaller initial scale that needs to be thrown into the balance" is not an answer to this particular point. We do not deny that there may be benefits of asymmetry which might justify a different treatment in this case, but that is not to say that this inconsistency point is valid at all. It was wrong, and the Competition Commission should admit that that is the case.

MR. SHARPE: I wonder if it would assist my friend -- He is wrong to revert back to para. 43. He might find some assistance as far back as para. 30 where the two issues are laid out. If he were to read the two in the context of para. 30 I suspect he might be assisted.

MR. TURNER: Madam, if I may, I will press on. Now, H3G's responsive submissions are at Tab 6. There is an initial section dealing with the law. Then there is a shorter section - paras. 3.16 to 3.20 on pp.6 and 7 - which deal with the substance. Within that H3G does what the Commission did not do by seeking to say, "You complain that the Competition Commission did not deal with the basis for giving asymmetric treatment". It did do so. At para. 3.17 you will see, just above the quote at the end, they say that – let me make sure I have the right reference; it is half-way down. What the Competition Commission has done is 'entirely consistent with its findings concerning asymmetric regulation at s.5 of the determination and is soundly based on the materials referred to in that section'. Then they refer specifically to 5.4.54 and 5.4.61. Then they refer also to the position of the ERG and the European Commission as supportive. Over the page, at 3.20, again in relation to the question of whether there are potential detriments that need to be weighed, they say, well, that was dealt with and they refer the Tribunal to 5.4.9 to 5.4.62 of the Competition Commission's determination. Due consideration of the potential detriments for asymmetric regulation were clearly at the forefront of the Competition Commission's consideration.

I will turn to look at those paragraphs in a moment, but the short point is that we agree with H3G that they are right to refer to those paragraphs in section 5 of the determination as containing the only discussion on the conditions for giving asymmetric treatment to one particular operator. But, H3G are wrong to say that those paragraphs, when you look at them, lend support to the notion that H3G does merit more favourable treatment than the other MNOs. In fact, the reverse is the case.

Madam, with that, I turn to look at the question of law, because this case has been characterised as involving a challenge based on irrationality. There are suggestions made that irrationality has its common-sense flavour of something so outrageous in its defiance of logic as to be perverse. We say that that is not the test that the Tribunal should adopt in its raw form in this case.

At para. 3.1 of H3G's submissions, which you may still have open in front of you, H3G correctly refers to the important statement of the Court of Appeal in *IBA Health* - that the concept of reasonableness, which is a term we prefer to use instead of 'rationality', is a flexible one, and that the intensity of the review varies with the statutory context. So, in any particular judicial review case you must start by considering what the statutory context is within which you are assessing the decision of a body. For that reason, the series of quotations which H3G then plucks out on the next two pages are, in our view, of very little assistance. If I may give just two illustrations of that -- At para. 3.4 of Hutchison's submissions they refer to a case called *Puhlhofer*. You will see there a quotation from Lord Brightman. That refers to what you should do where the existence or non-existence of a fact is left to a public body and that the court should leave the public body to decide it except where it is obvious that the body is acting perversely. So, standing back, perhaps H3G is saying that the fact here, which would fit into this quotation is that sustainable competition in the UK market requires giving H3G more favourable treatment, and that it is not clear on the face of the Competition Commission's determination that that is perverse, and so the Tribunal should exercise restraint.

Now, in fact, this particular case and the context of that quote were addressed in the IBA decision itself by Lord Justice Carnwath. If you pick up *IBA* which is in the first authorities bundle at Tab 12 and go to para. 97 you will see that Lord Justice Carnwath explains that case. He refers to it as,

> "-- another case which is often cited without sufficient regard to its special context. The subject-matter was the duty of a local housing authority towards the homeless, the imposition of which depended on the authority's conclusion on various factual questions defined by the statute. Lord Brightman, giving the leading speech, was concerned by the 'mass of litigation' affecting authorities who were 'endeavouring to cope with intractable housing problems and to balance competing claims to limited housing resources'. It was against that background that he referred to the limited role of the judicial review, which he defined by reference to the narrowest version of the *Wednesbury* test ('unreasonableness

verging on absurdity') as applied in cases such as the Nottinghamshire County Council case. It is clear that this was a response to the particular context, and there is no reason to see it as intended as a statement of more general application".

I take that to make a specific comment about *Puhlhofer*, but also a specific comment relating to how context is important in assessing the intensity of review that will be engaged in.

Another case that H3G refer to ----

THE CHAIRMAN: What are the factors that you say determine the intensity of the review that we should be imposing in relation to the Competition Commission's determination?

MR. TURNER: Shall I move straight to that then? I will not press that point any further. My point here is that the specific context of the Competition Commission's determination is this: it is a decision made within the over-arching framework of the CRF, the European CRF, and the implementing legislation, and that that legal framework gives a very clear prescription of the matters which the decision-maker (which now is the Competition Commission) has to satisfy itself about and to address before it imposes a measure such as asymmetric regulation. These include, in particular, the following three matters, which are referred to in our written submissions: first, that what they do will promote sustainable competition; second, that it will be proportionate to what it is intended to achieve (I go no further than that); third, not discriminate unduly against other persons - the principle of equal treatment. That brings in the position of the other MNOs.

The crucial importance of the context in this case can be seen from the Competition Commission's own determination. If you would open Section 1 - a part of it perhaps too easily glossed over -- What the Competition Commission does here is that it explains first the relevant legal provisions to its processes. It explains what the principles are which it is necessary to apply and to observe. It explains how it perceives its own role in what it is doing. So, at 1.12, under the heading, 'The Legal Framework' - and I can take this quite smartly because you will be well aware of these provisions - Article 13(2) of the Access Directive is at the bottom of that page. You will see from the first sentence that,

"Any costs recovery mechanism or pricing methodology [which covers what has been happening here] must promote efficiency and sustainable competition and maximise consumer benefits".

Over the page, at 1.14, we move to the 2003 Act. You will be aware that an SMP condition - again, what we are concerned with now - can only be implemented if Ofcom is satisfied that the following tests are met -- 1.14(b) and (c) are important: (b) that the condition is not

such as to discriminate unduly; and (c) that the condition is proportionate. Then at 1.15 the same considerations appear in s.88 of the Act . 1.16 - the Competition Commission rightly is now referring to the general duties in s.3 and s.4 - again, promotion of competition, and not favouring one form of electronic communications network over another. Then, at 1.17, finally, just above the heading 'Our Role' the Competition Commission says that, "We have had regard in relation to each of the questions that have been referred, as well as in relation to our overall conclusions, to the CRF and the domestic provisions implementing it, we consider our conclusions to be consistent with the legal framework".

At 1.20, on the same page, under the heading 'Our Role', the Competition Commission refers to your judgment in which you made the reference and points out the intention - your intention - that the Competition Commission's price determinations should, if possible, settle the question of what the price control should be. That would be done by taking into account the statutory objectives.

Finally, at 16.34, at the end of the determination, under the heading 'Wider Considerations', the Competition Commission says, "We accept it is necessary for us to be satisfied that any adjustments to the price control levels that we determine should be made correct for the specific errors that have been identified, do not lead to the imposition of price controls that offend s.88 of the 2003 Act and the other relevant provisions that bind Ofcom when it is setting charge controls. We are so satisfied in this case".

So, to draw those strands together, the context here involves an EC-based legislative framework in which EC-based principles of proportionality, non-discrimination, the aim of promoting competition are engaged and they are relevant to any decision by the Competition Commission to give more favourable treatment to one operator than the others.

MR. SHARPE: Madam, I am sure my friend will want to finish by drawing your attention to 16.35 which relates to his client?

MR. TURNER: Madam, perhaps that can be read over the short adjournment, but I am happy to take it now if you are content. That is merely, in my view, an entirely immaterial, separate point about not starting afresh on a new exercise.

MR. SHARPE: We accept that.

THE CHAIRMAN: That is a point that we also dealt with in the disposals judgment - limitations on the applications of the s.88 criteria, given the scope of the appeals?

MR. TURNER: Yes, absolutely, and this is not saying that everything is opened up again, what it is saying is that if you are going to make the particular decision, which is now the focus of this hearing, you have to guide yourself by the lights of: is it going to promote competition?

Is it going to lead end users to be better off and so forth? That requires some discussion, some thought which is absent from the determination.

THE CHAIRMAN: Miss McKnight described her view of the relationship between the question whether the decision to allow asymmetric TACs for H3G was an irrational one or an unreasonable one, with the arguments about whether there was adequate reasoning. You so far have concentrated on the lack of reasoning as you see it, but do you also accept as she did that there are those two elements? Is it just a lack of reasoning case, or is it also the case that you say there could have been no justification for a different final year TAC given the option of the 2G price cap as a matter of principle?

MR. TURNER: As I sought to say at the outset ----

THE CHAIRMAN: You probably did, but I have forgotten.

MR. TURNER: No, no – our position is not quite that, it does not quite go that far. The Competition Commission says "we are applying a particular principle to determine the right level of charge control for these operators. It says this is a question of principle, and Ofcom should have treated it in that spirit. It then goes on to treat one of the operators differently, give it more favourable treatment, and our central case is that if it is going to do that there may be reasons, there could be reasons which justify a departure, but because of the way that it has approached the matter for everybody and because of this overall statutory context and the need to look after the interests of the public and so forth it needs to be properly examined, it is a departure which would need to be properly justified. So no, we do not rule it out as a possibility at all, our case is that it has to be justified.

THE CHAIRMAN: Just remind me very briefly, in one sentence, is it T-Mobile's case that this is something that should then – if we accepted that, should be remitted to the Competition Commission or that we should decide ourselves and just determine that there should be one TAC for everyone or some other permutation.

MR. TURNER: The position is set out near the start of our written submissions. We consider that first, nothing should hold up the implementation of the Competition Commission's determination as it stands, but that can go forward and we have suggested the form of order, but that this issue, because it involves some discretion on a price control matter would need to go back to the Competition Commission and it would not be appropriate for you, the Tribunal to decide it because it involves discretion on a price control issue.

THE CHAIRMAN: Thank you very much. We will resume at five past two.

MR. TURNER: I am obliged.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr. Turner?

MR. TURNER: Madam, I was saying before the short adjournment that this is a case in which the EC based principles of proportionality and non-discrimination are engaged and they hedge guide the way in which the decision maker (here the Competition Commission) needed to decide the question of symmetric or asymmetric treatment. How does that translate into the level of scrutiny which you the Tribunal should give to the Competition Commission's actions in this context of what is effectively judicial review?

Dealing first with Professor Bain's point directed to Miss McKnight, and taking this on board as well, you asked: "what impact is there on the extent of the reasoning that is appropriate when the decision maker is itself an appellate body as opposed to the original decision maker. My answer to that is that there must be at least – at least – sufficient material there to allow the Tribunal and the parties to see that the Competition Commission has really done its job properly, and in relation to these matters, proportionality, promotion of competition, as opposed to distorting competition and the even handed treatment of one operator as against the others that those have been thought about and those have been digested. That is of the essence of decision making in this context, and the Competition Commission of course claims sweepingly, in the paragraph to which I referred earlier, that it has done all of that. The Competition Commission has also emphasised in the other crucial paragraph that Miss McKnight took you to, 2.7.40, that there is a need in a case such as this for transparency, because otherwise there is a risk that the decision maker will not perform the job that it is intended to do. Those considerations apply with equal force to the Competition Commission (although it is an appellate body subject to judicial review, very unusually) as it would do to any other body in this sort of case.

The second point is that the case law shows that when you are judicially reviewing a decision which is taken in the context of and pursuant to EC principles and rules, such as the present case, the court will require that decision in a judicial review to be cogently justified. A higher level of scrutiny is required in that sort of case as opposed to some of the ordinary domestic cases that have been referred to on the other side.

If I may invite the Tribunal to pick up the second authorities bundle and go to tab 33, you will find the case which is one of the leading cases in this field, albeit a first instance decision. It is *Ex parte First City Trading.* It is a decision of the Crown Office list, Mr. Justice Laws as he then was.

MR. SCOTT: Did you say 33?

MR. TURNER: Yes.

MR. SCOTT: I have *Agriculture, Fisheries and Food.*

MR. TURNER: That is it, and then it goes on *Ex parte First City Trading*, I am sorry. It is *R v Ministry of Agriculture, Fisheries and Food*. The other respondent was the Intervention Board, and it was at the suit of *Ex parte First City Trading*. Now, first, on the first page – I am told that you might have a different version from me.

THE CHAIRMAN: We have a Westlaw print out.

MR. SCOTT: I only realised it was *First City Trading* when I turned to p.2 and saw who was representing.

MR. TURNER: Yes, right, well one of the points is that my headnote does not exist in your version either. We can hand up one copy, but I will simply tell you the basic facts, they are not long to explain.

This was a case about a decision to adopt emergency measures to secure protection against disease in humans which people thought could arise from consuming beef from cattle infected with BSE. The Commission prohibited the export as you will remember of meat bovine animals slaughtered in the UK. That led to a problem for meat exporters who faced huge losses. The Government, the Ministry of Agriculture instructed Coopers & Lybrand to prepare a report on the problems being suffered by exporters and as a result of their report an aid scheme was announced. The aid scheme only benefited those exporters who also carried out their own slaughtering and cutting activities. So six meat exporters who did not do their own slaughtering and cutting applied for judicial review, and they claimed that their exclusion from that scheme was discriminatory and unlawful, because the scheme operated in a community context, and they said it was therefore subject to the fundamental principles of Community law including equal treatment. Those were the facts.

In fact the court found that the scheme was not an instrument of EC law and so those principles would not be engaged, but the judge went on to consider the situation in the event that he was wrong about that. I will have to check the reference in the Westlaw version ----

THE CHAIRMAN: I think it is para. 67.

MR. TURNER: I am going to go to para. 69 directly, which summarises the point.

> "The difference between Wednesbury and European review [judicial review in a European context] is that in the former case the legal limits lie further back. I think there are two factors. First, the limits of domestic review are not, as the law presently stands constrained by the doctrine of proportionality. Secondly, at least as regards a requirement such as that of objective justification in an equal treatment case, the European rule requires the decision-maker to provide a fully

reasoned case. It is not enough merely to set out the problem and assert that within his discretion the Minister chose this or that solution, constrained only by the requirement that his decision must have been one which a reasonable Minister might make."

Pausing there, that is very similar to the language that the Competition Commission itself adopted in para. 2.7.40 of the determination.

"Rather the court will test the solution arrived at, and pass it only if substantial factual considerations are put forward in its justification: considerations which are relevant, reasonable and proportionate to the aim in view. But as I understand the jurisprudence the Court is not concerned to agree or disagree with the decision: that would be to travel beyond the boundaries of proper judicial authority, and usurp the primary decision-maker's function. Thus Wednesbury and European review are different models – one loser, one tighter – of the same juridical concept, which is the imposition of compulsory standards on decision-makers so as to secure the repudiation of arbitrary power."

MR. SCOTT: Mr. Turner, you are talking about the interaction of European and domestic law, and unfortunately we have precisely the same word "review" both in terms of what we are meant to do under domestic law and in terms of Article 4(2) of the Framework Directive, which is what happens when the work of an appeal body not judicial in character comes for review before a court or Tribunal.

MR. TURNER: Yes.

MR. SCOTT: What you appear to be saying to us by implication from this case is that we need to read Article 4(2) into our role today and not simply Wednesbury judicial review domestic law from the Communications Act. Is that correct?

MR. TURNER: I confess, sir, I would first of all have to go back to Article 4(2) to verify that particular point, but I am saying that when it is a judicial review in a context where European principles are being applied that this judgment tells you that you apply a more anxious level of scrutiny than simply standing back and allowing a decision maker to say, to assert: "I am the expert, this was reasonable, or in this context this was proportionate, and that must be accepted unless it is clear on the face of the record that I was wrong."

THE CHAIRMAN: But is not the first finding of Mr. Justice Laws that this was not actually a case in which European principles were raised?

MR. TURNER: That is so, this is *obiter*.

THE CHAIRMAN: Yes, but how does that bit apply to this case? If you look at para. 45 Mr. Green failed to import the doctrine of equal treatment into this case because the judge held that the beef stock transfer scheme was not a measure taken pursuant to Community law either as implementing a Community provision, or because it relied on a derogation. But are you saying that the proportionality principle applies because this is a provision that is pursuant to Community law? It may be the same question actually that Mr. Scott was asking.

MR. TURNER: I believe it is because in our case the common regulatory framework principle was in the Framework Directive, in the Access Directive, and implemented through the Communications Act 2003, show that what is happening here is that the decision maker whose decision you are looking at was applying the principles required by the European legislation to be followed. I have shown you where the Competition Commission accepts that what it was doing was in accordance with that. The difference with *First City Trading* was that counsel did not succeed in establishing to the court's satisfaction that there the scheme they were looking at, that particular aids scheme, was a part of Community law, so that the general principles came into the way it should be applied. That is not the case, and could not be said to be the case about the common regulatory framework, and the machinery which you are applying.

Madam, in relation to the point about it being *obiter* I have also mentioned that the case was subsequently followed. The next tab is an example of that. It is *The Queen (on the application of Mabanaft Limited)*. I do not know what form of print out you have, again I do not have a Westlaw print out.

THE CHAIRMAN: No, we have the web print out.

MR. TURNER: You will see from para. 1 it is a very recent case of last year. That was a case where under an EC Directive the UK ----

THE CHAIRMAN: The oil stocks.

MR. TURNER: Yes, was obliged to hold compulsory oil stocks in times of crisis, and there was a decision to introduce a new system of stocking obligations and the claimant, who was the largest of 10 oil importing companies challenged the decision to fix a differential and maintained it should be greater, so that looks like a fairly strong attack almost on the merits of the decision which had been taken. But because this was considered to be in the application of the European Community law obligations, you will see at para. 66 under the heading: "The approach of the court" that Mr. Justice Beatson now says, in 2008, that,

> "The principles upon which the court should proceed in a matter such as this are reasonably well established. In the context of European Community obligations the reviewing jurisdiction goes beyond domestic *Wednesbury* principles. It has regard to the doctrine of proportionality and tests the solution arrived at according to the factual considerations justifying it"

It then refers both to *the First City Trading* case and, in fact, the *Spectrum Auction* case, I believe it was, *ex parte BT/3G* and *One2One*.

"It is, however, not necessary in a judicial review involving rights conferred by Community law for the national court to substitute its assessment of the facts and scientific or technical evidence for the assessment of the competent national authorities".

It then refers to extracts from the judgment in First City Trading. At para. 68,

"As to the width of the margin left to the primary decision-maker depends on the nature of the decision and the context".

So, I do not claim that our case is the same as the oil stock scheme in that case. What I do say is that our case similarly involves the application of the Community law principles of proportionality, equal treatment, and so forth, and that in those circumstances the Tribunal, with its supervisory jurisdiction is not only entitled to, but it must, ask whether the asymmetric treatment which has been given to H3G, and the extent of it, have been properly justified by the Commission in the determination or not. We come back to paras. 6.19 and 6.20 which is where that matter is addressed.

Finally, then, I would ask the Tribunal to look at those paragraphs. I will make some brief points about them, and that will conclude my submissions. 16.19, as I mentioned earlier, is the culmination of the reporting of the different positions taken by the parties - BT, H3G, Ofcom and so forth - in the earlier paragraphs. H3G, you will see at 6.12, had been urging the Competition Commission to apply the 2G cap to the 3G-only operator, if at all, consistently with Ofcom's MCT costs model. Then you have the two solutions which were proposed. Everybody's position is recorded.

Then you come on 16.19. At 16.19 the Competition Commission says that, "On balance we have decided that the position taken by H3G on this point should be adopted". (a), (b), (c), and (d) are meant to be the reasons for adopting H3G's position. Looking at those in that light, and if one begins with sub-paragraph (a), the inadequacy of each of these points becomes clear. First, in relation to (a), the Competition Commission is emphasising explicitly that it has not rejected the proposition that an appropriate proportion of 3G spectrum costs should be recovered through regulated charges. But, that reference which

you see half-way into para. (a) to an appropriate proportion of spectrum costs being recovered merely takes one round in a circle. If you go back to 2.3.17 you see there, in its initial assessment in s.2, that the Competition Commission says that,

"Recognising an appropriate proportion of spectrum costs should be included within the MCT charge controls begs the question of what the appropriate proportion is. Determining that requires a view to be taken on the basis on which spectrum costs should be assessed, bringing us back to the question of the appropriate objective".

So, you come round in a circle to the 2G cap principle. In the last sentence of sub-paragraph (a),

"The Competition Commission then emphasises that the 2G cap approach does not deny MNOs [and that will include H3G] the opportunity to recover their efficiently incurred termination costs".

It refers to a number of paragraphs - 2.3.12, 2.3.63, and 2.9.168(a) - to support that proposition. If you look at those now -- 2.3.12 is the point that MCT revenues only account for a relatively small proportion of MNOs' total revenues. So, that is a reason for saying, "Well, actually, our approach involving the pure 2G cap methodology need not prevent MNOs from recovering their efficiently incurred termination costs". 2.3.63 is merely a stepping stone. That was the next one referred to. That refers back to 2.3.12 and refers forward to the last paragraph of the three, 2.9.168(a). 2..168(a) is quite important because that is where there is a pragmatic assessment in which the Competition Commission looks at the 2G cap-derived charge controls and says, "Well, might that not be sufficient for some reason?" In para. (a) there what they say is that, "There is no reason to think, under these different scenario out-turns that might eventuate that you would not obtain a good return on investment, or that MNOs -- or that any potential investors would be deterred from investing in the UK mobile telecoms industry".

So, when you go back to 16.19(a) and stand back from that paragraph, this is not something which is saying, "Here is a reason for granting H3G different treatment from the application of the 2G cap principle at all". What this sub-paragraph is doing is saying that the 2G cap principle, the pure principle, is enough. It is no support for asymmetrical treatment at all. Other factors must be in play. Indeed, if it tells you anything, this paragraph, it tells you that the asymmetric treatment which has been given to H3G, in a sense, you might say is not cost-based because the appropriate approach to costs they have described is the forward-looking approach below the cap. They are saying that, "This is different. What we will do

for H3G is different from that. It is a departure". That, in a sense, will take you back to the considerations in s.5, which look at the matter more generally.

16.19(b) says very little. It is the last sentence which matters. "Late entry raises separate regulatory issues." That perhaps is the slight tension between myself and Miss McKnight because I accept that if there are separate regulatory issues -- if the statutory objectives would be advanced by giving H3G preferential treatment in some way, then, yes, you could depart from a pure application of the cap in an appropriate case. But, all they are saying in (b) is that late entry raises separate regulatory issues. That is not saying what they are.

So, one arrives at (c). (c) refers to the positions other regulators and previous regulatory practice to recognise difference in costs that are outside an operator's control, such as initial smaller scale due to late entry. Now, we see in fact from 16.10(b) above that what we are talking about here is indeed the materials that were discussed in s.5 of the determination because it is they that demonstrate this supposed widespread recognition at the European level of the legitimacy of reflecting differences in efficient costs. So, there is a pathway back to s.5. So, you do need to go to s.5, and when you do that - and I would invite you to turn to s.5.4.50 -- I shall not go through the recitation of each of these individual regulators and authorities. At 5.4.50 you have this key paragraph - also referred to by Miss McKnight - in which they summarise their understanding of the position of the other regulators. In the last sentence of 5.4.50 there is a recognition of the need to consider these differences in the light of the particular market circumstances that an NRA is dealing with.

So, 16.19(c) is referring to the position that is taken by these regulators, as reflected in s.5, and that in turn tells you that before allowing asymmetry in a particular case you must look at the particular market circumstances. It is that which was not done in this case - save for this: the UK market circumstances are addressed in three paragraphs. I would not wish that to be forgotten. Those are: 5.4.59 (over the page) to 5.4.61. These are the only paragraphs in the entire determination, in our submission, that relevantly deal with the UK market circumstances, those three. The first paragraph, 5.4.59, in fact says that there is some evidence before us that the market is such as to make the benefits of asymmetric regulation lower, and the distortions it brings greater than in the other markets in relation to which we have been precedence, demonstrating that asymmetric regulation has been applied; and also a reference to H3G having already been allowed a degree of non-cost based asymmetry, and so forth.

Then 5.4.60, we refer to specifically in our written submissions, which is where the Competition Commission also points out the special position of H3G as respects obtaining

its spectrum licence, that it was obtained for £1.6 billion less than was paid for equivalent licence that was not reserved for a new entrant. You see from the end of that paragraph that this was viewed as one instrument for compensating for the challenges facing an entrant. That means that further asymmetry might effectively compensate H3G twice.

How does the Competition Commission deal with our point about this in its written submissions? If you go to the first bundle and open the Competition Commission's submissions, which are at tab 5, the Competition Commission deals with that point, auction fees, at para.54. Here the Competition Commission is saying in its submissions, not in the determination, that they consider this factor to be irrelevant to the question of how to apply the 2G cap to the 3G only operator. Their first point in (a) is:

> "... the relevant operator to consider is a hypothetical efficient 3G only operator, not H3G."

Pausing there, we say in response, well, why should one leave out of consideration that this hypothetical efficient 3G operator has already received a regulatory benefit in the auction for a licence for 3G spectrum? When you are considering how this relates to the wider objectives, that is plainly a relevant consideration.

Then at (b), the second point referred to by the Competition Commission is that they:

> "... considered the 200 auction fees to be a problematic proxy for forward looking opportunity cost ... "

That is fine.

> "The fact that one operator may have paid less in 2000 than others is not relevant to the 2G cap."

That is fine, that is also correct, but we are now talking, not about the application of the pure 2G cap, but making an exception about a departure from the 2G cap in the case of H3G. If you are deciding whether asymmetric treatment is justified for exceptional reasons, it is clearly right, in our submission, to take into account that the challenges faced by the now not so new entrant were eased in the auctioning process.

For those reasons, one stands back and looks at 16.19(c) and sees that it does not provide a justification for the more favourable treatment received by H3G, leaving only 16.19(d). This is the supposed point of inconsistency - what we have described as an analytic point, that it would be inconsistent to give a smaller allowance for the spectrum for one MNO than for the others, for the reasons already explained by Vodafone.

I would add this to what Vodafone has already submitted: in the case of T-Mobile, a point also made in our written submissions, we do have a smaller allowance for our 3G spectrum

costs than Vodafone and O2. Why? Because our network costs, or the efficient network costs of a 1800 MHz only operator are materially higher by 0.3p per minute, a figure that you will find in para.9.138 of the MCT statement, we need not go there now, but our costs are materially higher than those of the combined 900 and 1800 mgH operators - those are network costs - by interestingly enough the same quantum, 0.3p per minute as is in dispute now with H3G. So that means that we receive a smaller return on our spectrum investment than Vodafone and O2. We are squeezed in that respect, but that is not regarded as inconsistent by the Competition Commission in para.16.19(d). Similarly, the fact that we do have, our efficient costs are higher results from matters which are outside our control. They might not be initial smaller scale due to late entry, but these are features of the equipment that we have which means that our coverage is less good and we need more equipment per sales, and so forth. So we suffered from this disadvantage, and being subject to a common cost control Vodafone and O2 can make more per unit of termination than we can.

So if there is inconsistency, as we have urged in our written submissions, it is inconsistency in the Competition Commission's own determination.

This is not, finally, treating all assets in the same way for all operators to hold constant the spectrum allowance for H3G as the Competition Commission urges at para.49 of its written submissions. If you are to treat all assets in the same way for all operators, you should follow through on the principle of the 2G cap and apply it equally to H3G as you do to the other operators, and that has not been done.

So the conclusion is that there are no reasons which adequately justify the asymmetry of treatment which has been accorded to H3G. This is a clear case, in conclusion, where the Competition Commission has fallen into error by according asymmetric treatment and without the necessary thought processes being evident or explained. The proper course, in our submission, is to set aside that part of the Competition Commission determination which relates to the application of the 2G cap to H3G. For the reasons explained in our written submission, we do not say that this will cause delay or any mischief, but it is a matter that requires in good conscience to be corrected.

Unless you have any questions, those are our submissions.

THE CHAIRMAN: Thank you very much. Miss Demetriou, do you have anything to add?

MISS DEMETRIOU: I do not wish to add anything to the submissions that have been made already.

THE CHAIRMAN: Thank you very much. So, Mr. Sharpe, I think it is for you.

MR. SHARPE: I have just one thing to hand out, just one page. (Same handed)

THE CHAIRMAN: Mr. Sharpe, is this because you have regard to what Lord Justice Carnwath had to say about applying to textbooks rather than the case law?

MR. SHARPE: I am going to do both, I am afraid. It is one of those cases where it is sometimes difficult to see the wood for the trees. I had the pleasure of being taught by Professor Wade, so I have some sort of filial loyalty from beyond the grave.

Madam, gentlemen, it is well known that this procedure derives from s.193(7) of the Communications Act and that just applies to the duty under s.193(6) and that is in accordance with the determination of the Commission, and the determination does not bind you to the extent that, applying the principles applicable on judicial review it could be set aside.

As you are well aware, unlike the situation which existed in Tesco for example, the Competition Commission in this case is exercising an appellate jurisdiction. In other words its task was not to pursue an inquiry into adverse effects on competition, any features of the market, it was examining the grounds of appeal that were set out before it in the light of the reference questions you gave us. The grounds of appeal were circumscribed by the notice of appeal as amended, and our task was to follow the amended notices of appeal and to answer the reference questions you gave us, and nothing else.

So this should not form an opportunity to expand the nature of our already long inquiry into matters which were not properly appealed against, or to remedy any defects in any appeal. In other words, to go back and say: "We did not appeal on X but we can come back and have the matter redressed now".

First, may I begin by expressing the Commission's appreciation of the fact that in every respect but one you were content to rely upon written submissions so far, it has greatly foreshortened and abbreviated the procedure, and in nearly every respect we rely upon our determination.

I plan to divide my submissions as follows. First, I am going to offer some observations on the distinction between an appeal and review. I suspect, and I will not overstay my welcome, that it is very familiar ground, but I feel I have to address one or two of the points that have been raised. Secondly, I want immediately to address the very interesting points you raise in your letter of 10th March. Plainly you have concerns and I am here to satisfy them. Thirdly, I want to approach the challenges made by the interveners by looking first at Ofcom's decision which is the subject matter of this appeal from the beginning and then I want to address fourthly the submissions made by Vodafone and T-Mobile. Then I am

going to come finally to the question of adequacy of reasoning of asymmetry, and also the calculation of the methodology adopted by the Commission in the light of Ofcom's letter of 18th March with which the Commission respectfully agreed, as set out in its letter of 20th March.

Now, on judicial review and the difference between that and appeal, the consistent approach of the courts to questions of economic regulation by expert regulatory bodies appointed by statute has been one of restraint. In recognition, if I may put it this way, the institutional competence of the parties. Let me first hand up and take you to an extract from the text book of Sir William Wade and Christopher Forsyth. If we can pick it up briefly at p.157, the last paragraph:

> "The Court of Appeal has held that in reviewing a regulatory body the court should allow a margin of appreciation and intervene only in cases of a manifest breach of principle. It has been recognised that the judicial review courts can play a role in overseeing the decision making process of regulators from the perspectives of rationality and legality, and ensuring that decisions are made which are not simply pandering to the special interest at the expense of wider public policy goals. It may be expected, however, that the courts will recognise the expertise of the regulators and be cautious before quashing their decisions and they will not view sympathetically the dilemmas faced by regulators such as the FSA who may destroy a viable business if they intervene too soon, so it may hasten disaster if they delay."

Then there is the observation that most challenges fail. I am going to give you that as the clearest statement I have been able to find of the approach that any court – any court – the Administrative court but also this Tribunal should take, at the threshold of analysis of a judicial review case.

I am now going to take you to the *Cellcom* case. it is at B1 at tab 7. I have the Westlaw print of this, and may we take it at the bottom of p.10. In large part this would not have been necessary but for some of the submissions we have heard this morning, the traditional category of rationality should be turned into reasonableness, and that somehow or other you are detached from conventional judicial review standards in part. What we have here is an affirmation of any court as to the appropriate position and principles upon which you should act. If we pick it up at para. 26 at the bottom:

> "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 applicants have no right of appeal: in these judicial review proceedings so long as he directs himself correctly in law, his decision can only be challenged on Wednesbury grounds. The court must be astute to avoid the danger of substituting its views 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."

I will take you down, if I may, missing the extract. My friend, Miss Dinah Rose, suggests that you will see this also in the *Pulhofer* judgment, its application is criticised. I think it was suggested by my friend, Mr. Turner, that the *Pulhofer* decision had somehow been overridden ----

THE CHAIRMAN: No, I think he was suggesting it is confined to its rather particular facts, I think that was the suggestion. But nothing that I heard before the short adjournment indicates that the other parties disagree with this as it is, the question is does this apply in this case?

MR. SHARPE: In the end it is for the Tribunal to decide. I could say words "you must not substitute your own judgment for that of the Commission", and those words mean something, but in the end it is a matter of your judgment.

THE CHAIRMAN: But do you accept that this is a *First City Trading* type case where, because we are applying provisions which derive from Community law that the test is further along the spectrum than would be suggested in the *Cellcom* case?

MR. SHARPE: I have hesitation about the easy application of that. Yes, rights are conferred to some degree under Article 4(2) here but they are not the rights which are comparable in *First City Trading*. It was even argued I that case that Article 40 of the Common Agricultural Policy was directly affected, and therefore created rights in the national court, which is nonsense, as Mr. Justice Laws (as he then was) found out. We are content, I think, to address four our ground that insofar as the difference between the two scenarios is one of proportionality we have adopted a proportionate solution and it is noteworthy that, despite endless written submissions, and the opportunity to make submissions today, nobody has come up with an alternative solution which is more proportionate than ours other than a blanket alignment of all the termination charges. Indeed, there is no good reason why a mere relying on a document itself should constitute a more proportionate reason.

There are real difficulties in arguing that Community law, as it were, amputates -- dismisses other cases in the field of judicial review when so many of our areas of law are

indeed governed by Community law. The two can actually live in peaceful co-existence. Now, if it is correct - and I apprehend that it might be - that the Tribunal is au fait with this jurisprudence, is well aware of its responsibilities, and would not wish to substitute its own judgment for that of the Commission, then it is really not necessary for me to push forward on it. We deal with it, of course, at some length - and we are criticised for this - in our written submissions. Indeed, we quote from the *IBA* decision.

There is, of course, the relatively recent judgment in the *BSkyB and Virgin* case, which I guess you are all familiar with ----

MR. SCOTT: Just pause on *IBA.* One of the distinctions that was made very strongly to us on behalf of the OFT in *IBA* was that there was a distinction - that IBA was purely domestic and despite what had been said in the explanatory notes, reasonableness and proportionality should have absolutely not part in our considerations. Now, here we are dealing with the common regulatory framework. We are dealing with a situation where Article 4 is there in the framework and specifically provides for the review by a court or a tribunal of just the sort of situation where the Commission is operating in an appellate role. So, I am slightly wary of the way you have talked about peaceful co-existence as what may be a quasi-resolution of a problem that is actually there between pure domestic judicial review and what happens when judicial review meets a European context.

MR. SHARPE: On whom is the obligation placed? The challenge is against the NRA - Ofcom. Was it for the Commission who adopted that position - in which case we say we did and discharged that obligation - or is it in addition to, or in substitution for, you, the Tribunal, reviewing the Competition Commission's determination? Plainly that was not the issue that was being addressed by Mr. Justice Laws. Now, if it is the former we say we have discharged that. I am addressing the latter situation of your role now to review the proper discharge our appellate functions.

I was going to take you to *BSkyB and Virgin*. Perhaps I could just summarise? Quite simply this: it was argued very forcefully by my learned friend, Mr. Beloff, in that case that by virtue of your own special expertise and experience - and I am referring in particular not merely to the legally qualified chairman, but to what is called 'ordinary members' that you should, in some sense, be able to dig deeper and drive the arguments much further than the ordinary administrative courts. I am sure you will know by now that that was, of course, explicitly rejected. That is not to say that your expertise is of no value - far from it. It just means that you can grasp the points a little bit quicker than I fear that certainly I would be able to do in your position. I leave the point there because it is just actually a sub-point of

the broader one - that the task is to review and not the substitution of judgment, however well informed it may be. I do not doubt that there will be circumstances - and I make a more general point - that in this type of situation the members of the Tribunal could easily say they would have done a different job - maybe even a better job - than the Commission. But, that, respectfully, is not quite where we need to go.

In that case I shall now go on briefly to your letter -- I have now gone to 10th March and your letter. I am not going to take you to it - because you presumably know it. The letter states,

> "Having regard to what is said in s.5.4 of the determination, particularly, paras. 5.4.50 and 5.4.61 and para. 16.19.20 of the determination, the Tribunal is particularly concerned to understand the reasoning underlying the Commission's decision on balance to permit asymmetry in 2010/11 on the basis of the specific conditions in the UK market".

Now, in analysing this comment I have found it useful to remember the distinction between two points that are conceptually distinct and which were treated separately by the Commission - that is, between cost-based asymmetry on the one hand and non-cost-based asymmetry on the other. Now, I will attempt to re-draw that distinction. Section 5 of the determination dealt explicitly with Question 2 of the reference on the H3G appeal. Now, for your note - but only your note - the reference question can be found at A3 at the back of the determination. But, it is also picked up at 5.1.1 of the determination to which I now take you in Bundle A1, Tab 1. 5.1 will be paid at p.5.1.

> "This section sets out the Competition Commission's conclusions as to whether the price controls imposed on H3G were too low relative to the price controls imposed in the other 2G/3G MNOs because Ofcom erred in failing to take account, or sufficient account, of the financial impact of these controls on H3G's business and on the adverse effect of that impact on competition for the reasons set out in paras. 3.3 to 3.12 of the H3G Amended Price Control Appendix".

In saying that I, as it were, underline the reference to 'too low relative to the price controls imposed on the others', 'financial impact of those controls on H3G's business', and 'the adverse effects on competition'. Now, let us note, the question was not about the calculation of the correct cost benchmark for H3G. It concerned matters that were independent of any assessment of costs - namely, the financial impact of the price controls in H3G and the impact of that on competition. It plainly asked whether that price control had been set too low relative to the other MNOs.

Now, the Commission made this clear at the outset of Section 5 at para. 5.3.2(a), which you will find on p.5.4. It said this,

> "H3G's appeal on price control matters has two components: one which relates to Ofcom's modelling of costs and its selection of charge controls based on its efficient cost benchmarks, and one which does not relate to Ofcom's cost modelling at all. This particular section is concerned with the latter - i.e. the arguments made by H3G in paras. 3.3 to 3.12 of its Price Control appendix are arguments that Ofcom should have allowed it a higher mark-up over costs )or reduced the 2G/3G MNOs; charge controls below cost), and do not relate to the proper calculation of the costs of the 3G-only operator's MCT service itself. Before dealing with H3G's specific points, it is therefore necessary to address, at least to some degree, whether and in what circumstances asymmetries that are unrelated to the cost of MCT may be justified".

So, the emphasis is clear: we are drawing a very clear distinction between the two. He states explicitly the justifications for asymmetries are 'unrelated to cost'. That is all Section 5 is doing.

Now, you mention in your letter in particular paras. 5.4.50 and 5.4.61 of the determination. 5.4.50 sets out the ERG and European Commission's broad position on asymmetry. It should be temporary, based on certain cost differences with the exception identified above, have a number of potentially negative effects associated with the need to be considered in the light of the particular market circumstances that an NRA - in this case Ofcom - is dealing with. There is no doubt that the discussion is dealing with the question of whether any greater mark-up over costs should have been given to H3G. That is how it was understood.

At para.4.61 over the page, there is an important paragraph as it is essentially the conclusion that the Commission comes to on this matter. Indeed, on the matter of everything that is discussed in the whole of s.5.4. Again, the Commission makes it very clear that the issue being addressed is that of whether a greater non-cost based asymmetry should have been allowed. This is explicit in the wording of 5.4.61. It may be possible that a case could be made for further asymmetric treatment, a greater level of asymmetry than had been allowed by Ofcom:

> "... we would expect it to be based on unavoidable competitive disadvantage, and a sufficient lack of competition, before it could potentially be justified. Even then, there would be a serious question as to MCT rate asymmetry would be the

appropriate response. Based on the arguments that have been made and the evidence we have been given, however, H3G has not satisfied us that further non-cost based asymmetry could be justified in this case."

Can we pause there and just remember, the outcome of course was that prior to the Commission's determination the differential between 2G and 3G was 0.8, whereas the Commission came down in favour of a 0.3 differential as it has now become.

THE CHAIRMAN: What does it mean "a sufficient lack of competition" there. What is that referring to?

MR. SHARPE: Sorry, we are in?

THE CHAIRMAN: In 5.4.61:

"... expect it to be based on an unavoidable competitive disadvantage ..."

So that presumably is the fact that their efficiently incurred network costs are higher than the other 2G MNOs. What is the "sufficient lack of competition"?

MR. SHARPE: What was going through the Commission's mind, and I daresay we might be able to find an extract to make it good, there were four major MNO players, and H3G was the fifth. Is there a danger of that fifth player disappearing? So, in a sense, what we are doing here is making some allowance for a relatively new entrant, one with a very low market share, if I may go back to the situations pertaining the United Kingdom, and the incremental benefit that a fifth competitor would have in the UK market.

So you see that the Commission concluded that based on the arguments we have seen that it was not satisfied that further non-cost based asymmetric costs would have been justified. It did not purport to reach, and it did not reach, any conclusions on cost based asymmetry. The reason for that, of course, is, respectfully, obvious. That was what we were asked to do. Reference question 2 was not about cost based asymmetry. None of H3G's argument in relation to question 2 addressed that. No reference question asked the Commission to consider whether Ofcom's decision to allow cost based asymmetry was wrong.

Nobody has mentioned question 2, but I am afraid I have to come back to what we were doing, what the Commission was doing. We were answering questions and that was the question.

PROFESSOR BAIN: Mr. Sharpe, are you saying that all the material in this document about the ERG common position with EU referred only to non-cost based asymmetry. As I read it, it is a discussion about asymmetry which may be cost based or may not be cost based. The conclusions, and particularly 5.4.50, are trying to rule out non-cost based and saying that if there is to be any then it has to be cost based. Is that not right?

MR. SHARPE: Two points. Chapter 5 deals only with non-cost based asymmetry. Chapter 5, as I have pointed out, is addressing question 2. Question 2 was addressed in that. We could not and did not wish to, and it would have been wrong to have gone beyond that in question 5. Yes, there is discussion throughout the determination of cost based asymmetry, and there is some discussion I think in s.16 on that.

MR. SCOTT: And you mentioned in 5.4.50 that ERG is concerned with cost based asymmetry but not just with cost based asymmetry.

MR. SHARPE: Yes, absolutely, the greater shall include the lesser. That is how we interpret it. Once this distinction which I think comes out of our treatment in chapter 5 is understood, one can see that s.5 and the relevant paragraphs of s.16 deal with conceptually different subject matter. Paragraph 16.19(c) deals with the fact that Ofcom recognised differences in costs that were outside an operator's control, such as the smaller scale, which is attributed to late entry. It is about cost based asymmetry at that point. It says nothing about non-cost based asymmetry. I should say that the Commission would, in my submission, have great difficulty in deciding that Ofcom's decision to allow cost based asymmetry was wrong. The Tribunal has, on a number of occasions, stressed the need to keep the appeal grounded in the notices of appeal. Let me take you to bundle B1, tab 22, p.14. When you see it you will remember it, I am sure, the bottom of p.19, para.55, the very bottom, the penultimate line:

> "The Tribunal has stressed on a number of occasions to the parties that the role of the Competition Commission in determining the specified price control matters is not to conduct a completely fresh investigation into all aspects of the price control set by Ofcom. Rather it is to consider the specified price control issues raised by the appellants and determine those issues."

If we go to para.156, right at the end, p.50, the very last sentence:

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

THE CHAIRMAN: So what are you saying then, that it was not part of this appeal that there should be no asymmetry between H3G and 2G/3G MNOs?

MR. SHARPE: Symmetry, did you say, or asymmetry?

THE CHAIRMAN: No asymmetry.

MR. SCOTT: So you think that BT had not suggested that the uniform application of a 2G cap?

MR. SHARPE: No, they did not, and I am going to take you to that.

PROFESSOR BAIN: I do wonder, Mr. Sharpe, if it was not part of the appeal why you held plenary sessions in October and November discussing it?

MR. SHARPE: Just nearly everything was brought up.

THE CHAIRMAN: Let us move on to BT.

MR. SHARPE: Professor Bain, as always, has alighted upon a point. I will deal with it later in detail and give you the reference, but my friend Mr. Turner says it is all part of BT's appeal, and I will take you to where they said it was part of their appeal. One looks at the reference. The reference, of course, is not the amended notice of appeal, because he cannot find it in the amended notice of appeal and I am sure he has looked very hard. What he found was this reference in the plenary. Now, we did at times attempt to discipline the parties in plenary and indeed the bilaterals, and say "We cannot deal with these things", but I think we took the path of least resistance.

PROFESSOR BAIN: The problem that is bothering me, Mr. Sharpe, is that if this was the view taken by the Competition Commission why did they not simply rule it out at an early stage. It seems to me that it has been discussed at considerable length, the buyers have put in a lot of submissions about how this asymmetry should be treated, going from zero to 0.3, Ofcom amongst them, going from zero to 0.3, there has been a great deal of discussion of it, and the first notice that I have had that this might not be admissible has come in the documents that you have been putting forward at this stage and I do not think it appears in the determination. Now, I may be wrong, you may be able to point to something in the determination where the Competition Commission said: "Really we wondered whether this was admissible", but I could not find anything of that sort, and I also found it difficult to understand why, if the Competition Commission thought it was inadmissible, it was such a difficult decision to take. If it was inadmissible it was inadmissible, stop.

MR. SHARPE: The progression of the Commission's analysis of all of these problems proceeded in this way, whether or not we had jurisdiction to deal with it, did we or did we not? Was there a contrary argument? Possibly, as you heard at length. If there was a contrary argument do we have any further reasons to deny it, or to go one way or the other. Now, we can put our arguments as many ways as you like. The first issue is we have no jurisdiction. You will not find, I think, anything in the determination which says that we do not have jurisdiction to deal with that, we were too busy trying to determine those matters on which we did have jurisdiction. That is a trite answer, but it is a true one.

Those other issues we dealt with on the basis of alternative arguments, which we did. We will come on to this but you will recall in our submissions we put forward a number of other

considerations as to why we did address this issue of asymmetry and the fact that we addressed them in some detail, all of which of course was now judged to be irrelevant. Whether we had any especial difficulty, I should add, in relation to this I am not so sure, it was not materially more difficult than the other considerations we had to deal with.

Our submission, and I think it will be plain and I am going to take you to the notice of appeal, is that neither H3G on the one hand, and BT challenged Ofcom's decision not to align all the MNOs' price control levels at the end of the review period, that was Ofcom's position in the decision. It is not in the notices of appeal, there is no reference question asking us that, asking us to make a determination on that issue. Indeed, we had no hard evidence as to how we could possibly determine that issue, because it would have required something akin to a market investigation of competition between mobile phone companies. Do we need a fifth player? How effective a competitor is it? Those were not issues that, happily, we were asked to decide. Nor was there an issue on which evidence was led by any of the parties.

My friends for Vodafone and T-Mobile have made strenuous efforts today to persuade you that BT's notice of appeal did indeed raise the issue of cost based asymmetry, and I am going to deal with it if I may, but I think it is best done after I show you the Ofcom decision, and you can see what was said there, it makes more sense to do that. Our position is that cost based asymmetry was not challenged.

Without taking you to it may I just ask you to recall, in your judgment on the powers of the Tribunal on the disposal of the appeal, and I will give you a reference, it is B2, tab 35., the decision that you took that BT was not allowed to open up aspects of the glide path which were dependent on principles applied by Ofcom that BT had not challenged (paras. 25 and 26). At para.29 you set out an approach to the glide path which I will respectfully term as one which did "least violence" to those aspects of Ofcom's decision that had not been appealed.

The Competition Commission in section 2 of its determination, found that Ofcom had erred with respect to 3G spectrum costs. I refer you now to paras. 16 to 19, and 16.20 of the determination and I will not take you to it for the moment, but para. 16.19(c) which my friend, Mr. Turner, took you to. At these points the Commission made the consequential amendments to the price controls that did, we say, the least violence to other unchallenged aspects of Ofcom's decision. In doing so, respectfully, we followed, acted in accordance with, the Tribunal's own approach.

One further point on your letter, you wrote that the alleged irrationality of reasoning behind the decision to set a higher TAC for H3G to reflect its higher network costs as well as its higher administrative costs, are suitable for an oral hearing; here we are.

The Competition Commission, you will recall, rejected BT's appeal on administration costs. That appeal did not explicitly challenge the higher administrative costs or allowance for H3G in any event. Given that, it is not obvious to me how they could have determined that H3G's administration costs could have been reduced.

Plainly we are going to return to the concerns of your letter, but I hope I have laid out the ground and method of approach.

THE CHAIRMAN: Just going back to the distinction I made very early on which is, is the 2G price cap methodology limited to the spectrum allowance or does it cover the whole price? Is it your case then that really it only covers the spectrum element and since there was no challenge to the asymmetry in the Ofcom costs' model in relation to network costs or administration costs, you needed to reflect those asymmetries in the final amount?

MR. SHARPE: Yes.

THE CHAIRMAN: Would that be a summary of ----

MR. SHARPE: That is exactly it.

THE CHAIRMAN: -- your position.

MR. SHARPE: Yes. Let us turn to Ofcom's decision.

MR. SCOTT: While we are at that point, in 16.19, the Commission says that this was difficult. Why is it difficult if it is obvious?

THE CHAIRMAN: Well I think we have been round that, let us move on. Where is Ofcom's decision?

MR. SHARPE: May I just deal with that. Yes, it was difficult in one respect because we were not dealing with this in a vacuum, we were dealing with it in the light of the Ofcom decision and, as you see, we did take a somewhat different, perhaps rather tougher view than Ofcom did, and so it was incumbent on us, and I hope meeting some of the admonitions of my friend, but if one is going to depart from Ofcom, do violence to it, it was incumbent to actually come to a view, and we did, and I hope that is an answer.

Ofcom's decision – what I would like to do actually is take you to our written response because I think that is the most economic way of proceeding. You will find it at A1, Tab 5. We pick it up at p.14 at para. 32. I appreciate you will have read this, but will you forgive me if I take you through it again because it is rather important? Here we see it is addressing T-Mobile's arguments. Can I just add in parenthesis here that when we look, as we did, at

16.19 earlier I was reminded of Mr. Justice Auld's warning that one must not look at these things as if we are dealing with statutes - we must look at them in the round. It is perfectly clear there that they think it is explicit in the opening that we were all too frequently in the determination addressing arguments that had been put to the Commission. So, you will see in 16.19 that we were explicitly mentioning - and seeking to address - T-Mobile's argument. So, perhaps if there is a fault, it was perhaps regarding it as a reason as opposed to an attempt to engage with T-Mobile and address their concern. There is precious little thanks for doing that. Nevertheless, that was plainly what was meant.

If we go to para. 32 -- We rely on paras. 32 to 37 to show that the decision on H3G's Year 4 TAC was entirely consistent with Ofcom's approach. Now, perhaps rather than me read it, I wonder if I could ask you to read paras. 32 to 37? (Pause whilst read):

THE CHAIRMAN: Just looking at the table, Figure 1, on p.16, is the one that is in italics and underlined the Scenario 7?

MR. SHARPE: Yes, madam.

THE CHAIRMAN: The footnote at 30, that is presumably the explanation from Mr. Turner's final point.

MR. TURNER: For your note, madam, para. 53(c) I think addresses it.

MR. SCOTT: Paragraph 53(c) of **your** response.

MR. SHARPE: Of the response, yes.

THE CHAIRMAN: So, what you are saying is that, "We have decided that the 2G price cap should not just be Scenario 7. It should be the whole thing". When we are looking at how that affects what we do on network costs, does the logic of that mean that we have to do violence, as you put it, to the Ofcom decision on network costs? Answer, "Not really". Hence, Ofcom's decision on network costs stands.

MR. SHARPE: Are you 'we' for these purposes or you?

THE CHAIRMAN: Yes. I am putting myself in the shoes, momentarily, of the Competition Commission?

MR. SHARPE: Scenario 7 is, in fact, the 2G cap. Ofcom did consider this. It is one of their scenarios. It is Scenario 7. That was the medium forecast, I think that is right, which we were dealing with.

THE CHAIRMAN: So, for that reason then you say you did not have to go into the whole question of, "Well, what's competition like in the market in the UK? Does that justify an asymmetry network costs?"

MR. SHARPE: It is also worth recording that Scenario 7 did not just deal with spectrum. It virtually came out with a charge that we should accept or reject. It did not just deal with up to a line and no further. It actually provided a candidate charge for us to consider.

THE CHAIRMAN: Yes - which included an asymmetry for network costs and administration costs.

MR. SHARPE: Yes. If I may, let me just develop this a little bit, but not at length. I am conscious of the time. Under the heading of 'Alignment', first, Ofcom recognised that single charge control over four operators would reflect the position that would prevail in a competitive market, and it stated 'it was desirable to move towards that position where a single charge applied to all MNOs'. I am going to give you a reference, but I am not going to take you to it - para. 33(e)(i) of our response, with the references there contained. Ofcom then went on to consider whether all the MNOs' charge controls should be aligned by the end of the control period. In respect of the 2G/3G operators it decided that they should be aligned. You will recall the previous position where there were differences for 900, 1800, and so on (para. 33(e)(ii)). That decision on alignment was not subject to any appeal. Ofcom also considered whether the 3G-only MNOs' charge control levels should be aligned with all the others and concluded that it would not be appropriate by 2010/11. That decision, we say, was not subject to appeal. In other words, in our submission, the general question of whether cost-based asymmetry was quite simply outwith the appeal.

Now, under the general heading of Ofcom's treatment of the 2G cap, I have the following to say: Ofcom accepted the principle behind the 2G cap. This is where we come back. This is what we call the true 2G cap. You see that at para. 33(a) of our response, and that in turn references Ofcom's response to the provisional determination on spectrum costs. For your note - and I will give it to you, but I am not going to take you to it - para. A.14.74 to 14.87 of the MCT statement.

Now, as you have observed, Ofcom constructed a scenario based upon the 2G cap. That scenario did not lead to a single charge control level for all MNOs. It led to a higher charge for H3G. Now, its methodology involved, first of all, determining the 3G spectrum valuation, but for a 2G/3G operator in 2010/11 under a medium voice and data scenario it would equate the 2G and 3G unit costs of termination, that is for the 2G/3G operator; and secondly, taking the 3G spectrum value and using it as an input in order to derive the 3G only operators' MCT rate.

During the appeal, in its response to how to apply the 2G cap to the 3G operator, Ofcom submitted that a simple application of Ofcom's modelling approach would lead to a higher MCT rate for the 3G only operator. You will find that at B2, tab 23, p.29. That is true. It also observed that from an economic perspective there is only a single opportunity for a 3G spectrum and that was reflecting differences in costs which are outside the control of an operator. Reflecting those differences would be consistent with past regulatory policy. Under the general heading of "Consistency with Ofcom's approach", Ofcom applied the 2G cap in such a way as to lead to a higher MCT rate for the 3G only operator. It considered that the application of its modelling approach by the Competition Commission would also do so. They had also decided explicitly that complete convergence for the MNOs' MCT rates should not take place by the end of the review period, as you have seen.

The Competition Commission's application of the 2G cap is completely consistent with all of that. The submissions that T-Mobile and Vodafone are making are, by contrast, completely inconsistent with Ofcom's approach, in particular with the decision against convergence. The attacks are based on alleged inconsistencies with Ofcom's model approach. I hope I have shown you, perhaps at rather greater speed than I would otherwise have wished, that that is not right. It is abundantly clear that Ofcom was perfectly prepared to accept non-alliance at the end of the review period. On one level one could characterise that the T-Mobile/Vodafone approach is actually departing from the 2G cap, and this actually sums up their challenge to us. We think that is not an appropriate characterisation. The Commission applied the 2G cap in a way which did, we repeat, the least damage, the least violence to Ofcom.

I said earlier I would come back to the claim that BT had challenged the principle of cost based asymmetry and take you through the relevant parts of the Ofcom decision. Now is the time to do so. Can I take you, please, to the notice of appeal, which was handed to you earlier today.

MR. SCOTT: Is this at the back of tab 35 in B2?

MR. SHARPE: That is possibly where it has been put. I am afraid I have it in loose leaf format. It should have been given to you in loose leaf this morning by one of my friends. We are going to pick it up at p.31 under section E, Grounds of Appeal. Do you see the heading, "Ofcom's treatment of Spectrum Costs"? This is BT's amended notice of appeal, grounds of appeal, extracted from that. We, first of all, note that this appeal addresses the valuation of spectrum not network costs, not administration costs. The asymmetry in H3G's MCT rate under the Competition Commission's approach derives from its higher modelled

network and administrative costs. Skipping over the summary of the alleged errors in Ofcom's approach, can we go straight to p.35, please.

"*Errors of principle*

*(i) Reliance on actual auction fees*"

If you are free to read it, I will say that this section does not mention asymmetry network costs directly or indirectly. I know you will have an opportunity to revisit this in what I expect to be a reserved judgment. That is p.35.

May we go to p.37 under the heading "*Ignoring the Commission's view*". The same comment applies, no reference to asymmetry network costs.

Over the page to p.38, we see a heading "*Ofcom's failure to cap the value at the cost of providing 2G spectrum*". Here, 104, we see a clear statement of BT's basic position and it is worth reading:

> "The simplest and most straightforward approach would be to start from the principle that the deployment of a superior technology that is inherently more efficient ought to reduce not increase costs. This suggests that the maximum efficient price for using 3G technology for voice call termination (which has no added functionality) should be the cost of terminating calls using 2G."

That is very reminiscent of the reasoning that you have already seen in para.16.19(b) of the determination. The Commission was drawing a distinction between the effect of the introduction of a new technology and the position of a later entrant. If you wish to read on you will find no attack on the principle of cost based asymmetry, no criticism of Ofcom's explicit decision not to mandate completely the convergence in this price control period.

Can we take it up again at p.41. There is nothing of significance in the interim, I think. I will take you to para.116. The relevant part of para.116 is four or five lines up, on the right hand side.

> "However, 3G's spectrum does lower the cost of voice call termination and it is this cost saving which provides the best indication of the value of 3G and its use for call termination. This is in effect the marginal forward looking value of 3G's spectrum for voice call termination."

Now, that means that the cost saving from using 3G instead of 2G gives the best indication of the allowance for 3G spectrum to be included in the charge controls. They also say nothing about convergence or network or administration costs asymmetry, nor does it say that different spectrum valuations should have been given for different operators. If we take it on quickly at para. 117 on p.43 BT says that:

"Ofcom should have attempted to estimate a single value of 3G spectrum, not multiple values."

Well we do not comment on that, and then we go down to para. 130 at p.46. We see a short paragraph under 130, BT mentions price per minute rates, its own, but it does not say anything about H3G's, and one would have expected something. Again, if we go forward to p.47, para. 135, it is worth reading the whole paragraph if you would kindly do that, and place particular emphasis on the last sentence: "Far from the seventh scenario …" (After a pause) We will see, of course, that scenario seven was Ofcom's implementation of the 2G cap. Now set out in our written submissions, and again for your note, 32.37 which you have seen, it resulted in a single overall spectrum value being assigned to all operators and a higher benchmark for H3G. BT does not appear to take issue with those outcomes.

Perhaps lastly if I could take you to p.48, under the heading "Cross check was flawed". BT's criticism of Ofcom's so-called cross check, and if you read that you will see that it is focusing on the 2G/3G MNOs price control levels, and not 3G only.

THE CHAIRMAN: I have just noticed, looking forward, that in the administration cost ----

MR. SHARPE: Sorry, which paragraph?

THE CHAIRMAN: On p.50 in the administration costs' section of that notice of appeal, the arguments raised are of a very different nature from the arguments raised in relation to the spectrum value.

MR. SHARPE: Well, they failed.

THE CHAIRMAN: Yes.

MR. SHARPE: Respectfully, I think they are separate and they can I think decently be discarded. In our submission there is nothing in BT's amended notice of appeal which challenges (i) H3G's higher network allowance, (ii) H3G's higher administration costs' allowance, and as you have heard the appeal on that failed in any event, (iii) no challenge to the principle of cost based asymmetry; and (iv) Ofcom's decision not to converge all the price control periods in this review period. Perhaps I should add, as you will well recall, the reference questions were constructed after, shall we say, extensive consultation and argument. Nobody raised the question of the need for any question in relation to cost based asymmetry or differential treatment, or unfair treatment, or favourable treatment for H3G. There was nothing about H3G's network costs were higher or not, we were asked, as you recall, about spectrum costs.

May we now turn to BT's submissions on appropriate figures for the MCT charge? I think this was yet another document that came this morning.

MR. SCOTT: This is the one with the table at the back?

MR. SHARPE: Yes.

MR. SCOTT: So in para. 17 there is a table under the title "Conclusion"?

MR. SHARPE: Yes. I want to take you through this fairly quickly, I am very much conscious of the time.

THE CHAIRMAN: Yes.

MR. SHARPE: I have had two opponents against me who both exploited their allocation to the full if not further, but I did undertake to try and finish in an hour and I think I am perhaps a little optimistic, and I am sorry for that.

I have taken you to BT's amended notice of appeal and I am taking you to this because a similar story is told. Starting at para. 6, which is on p.2, the basic proposition: "New technology should not make customers worse off." I can hear Professor Yarrow in the background, "nothing about later entrants or cost based asymmetry generally". If you go down to para. 8 you see BT acknowledging the 2G costs' model by Ofcom, we are dependent on traffic volume assumptions, and the type of operator the cost modelling related to, but no reference again to 3G only.

Paragraph 9 over the page: "BT states it has used Ofcom's medium voice and data traffic forecasts" which is the scenario 7 which we have been discussing, in order to do their own calculations. Then they propose at para. 12 they should be allowed the full 3.7 ppm and they add at para. 12 at the bottom:

> "Valuing 3G spectrum in accordance with the cost savings that … operators is similar in principle to the way that Ofcom currently values 2G spectrum …"

Again, there was nothing to suggest that 3G spectrum should have a lower value for some than for others. The position is made even clearer when we turn to para. 13 to see the valuation of 3G spectrum implied by this charge level is consistent with Ofcom's scenario 7. Remember the true 2G cap. This not only implies … valuation but Ofcom's scenario 7 implied a higher benchmark for H3G and that was understood.

So respectfully, there is nothing addressing the principle of cost based asymmetry and in this BT submission, and nothing even attempting to address Ofcom's reasoning that led it to decide not to mandate convergence of all of the MNOs price control levels in this control period.

Mr. Turner took you to para. 16.14 of the determination. Would you please go to that? (After a pause): I have alluded to this. You see the point I am going to make. He took you to this to show that BT notwithstanding -- Out of all the things I have shown you there are

two documents which are perhaps the only documents of any legal significance - especially the amended notice of appeal. He took you to the plenary. What he overlooked to show you was the footnote reference which you see at Footnote 8 - 21st October. Not in any pleading. In short, they were seeking to do precisely what you warned against, and had felt obliged to warn against, in December.

Now, madam, gentlemen, let me turn finally to Vodafone and T-Mobile's overall contentions. I have dealt with this on the way of course. Perhaps I could be uncharacteristically blunt. It seems now quite clear that in their submissions they are attempting to use this opportunity at the latest stage - I hesitate to say 'the last stage' - for the Tribunal to consider whether the determination should be set aside in order to argue a point that the parties could have, but chose not to, appeal against.

Turning to these attacks, they are not based on a mistaken analysis of Ofcom's modelling approach, but they are in essence attacks upon the principle of costs-based asymmetry. All the various permutations, whether they come in the form of distinctions between market values or value in use, or in the form of an analysis of what would happen in the competitive market are variations on this theme.

Now, to take the analogy of a competitive market, the argument is that as the 2G cap is based on the proposition that the introduction of new technology in a competitive market should not lead to an increase in price, no operator, whatever its circumstances, would be able to charge above the level implied by the application of the 2G cap to the established operators. Putting it another way, the competitive market means that no costs-based asymmetry could be justified.

Now, it is important to understand precisely where the Competition Commission disagrees with T-Mobile and Vodafone on this. It is not the steps in the logical chain employed by them with which we disagree. If you push the competitive market analogy to its logical conclusion, no MNO would be able to charge more than the lowest cost operator. The Competition Commission recognises that Ofcom also recognise that there would be a single price in a competitive market. What the Competition Commission does not accept - and clearly Ofcom cannot accept it either - is that there are no other considerations to take into account. Specifically, considerations relating to cost-based asymmetry That is the dispute at the core of this ground of challenge. Now, the Competition Commission did take into account considerations relating to cost-based asymmetry. I refer you once again to paras. 16.10 and 16.19 of the determination. I think you are probably all pretty familiar with these

paragraphs. With any tribunal less familiar, I am afraid I would have inflicted them on you, but they are important statements of the way the Commission approach this.

Plainly - plainly - Vodafone and T-Mobile are of the view in this instance that cost-based asymmetry is not a good thing. They disagree. They disagree on the merits. They think the Commission was wrong to give the factors that had anything to do with it any weight at all. We do not accept that. But, moreover, and perhaps this is the key point, the question is not whether the Commission came to a decision that Vodafone and T-Mobile - and perhaps even the Tribunal - would have come to. But, whether its decision was irrational. Wednesbury mad, if you like. I am not going to pussy-foot about words like 'reasonable' and 'irrational'. If 'irrational' is a good enough word for the President of this Tribunal in Virgin, it is a good enough word for me. Here is where T-Mobile and Vodafone, in a sense, really part company. For a moment this moment I thought they were parting company with each other, because I think T- Mobile got very near to abandoning the irrationality claim.

THE CHAIRMAN: Just so that I am sure I understand this, the decision that the Competition Commission made - was it both, or either, of these - either the decision that in this market there should be costs-based asymmetry for network costs and administration costs, and therefore those aspects of Ofcom's model would not be disturbed and/or was it this: that the conclusion when considering how much of Ofcom's model had to be disregarded because of the decision that you had come to on the 2G price cap principle for spectrum value, you decided that it did not mean -- your adoption of that methodology for the spectrum value did not mean that you had to re-visit what Ofcom had said about network cost asymmetries and administration cost asymmetries. Perhaps it was both, but ----

MR. SHARPE: Actually it was both, yes. It is an easy answer - it was both. Throughout the construction of the determination we were quite determined to approach matters from all corners, as it were - not to, as it were, go nap on any particular -- simply to avoid this sort of thing. We certainly had limited faith in the Ofcom model, but when we thought it was robust, we used it, as did, indeed, BT and others. What I am about to describe, of course, represents these other reasons. We thought, well, to the extent that there is an argument about jurisdiction - and there plainly is - or, if I may say so, was - there are very good reasons set out (particularly in 16.19 in the determination) which would indicate very clearly that the Commission addressed itself to the right things and took into account all relevant considerations. So, whatever may be the position about jurisdiction, there is almost a fall-back position.

I am a little bit in the air. I am not inviting my friend to repay my discourtesy to him in interrupting him, but I am unclear what the position of T-Mobile is on rationality and irrationality. I had thought that Vodafone would have had a word with him over the short adjournment, because if it is true that T-Mobile have abandoned the irrationality claim, then it leaves Vodafone alone - which Miss McKnight would regard as a perfectly acceptable situation, and no less dangerous.

MR. SCOTT: In my note I put down that Mr. Turner had less emphasis on logical contradiction, but that did not mean that he was abandoning it.

THE CHAIRMAN: You can continue with your submissions ----

MR. SHARPE: Miss Dinah Rose and Mr. Turner will have a further opportunity.

THE CHAIRMAN: In any event, Vodafone are pursuing it. So, it has to be dealt with.

MR. SHARPE: Yes. In my note here this question of rationality is where both of them part with reality - quite apart from with each other. It is extraordinary to say it was irrational for the Competition Commission to take into account the following features -- I will deal with them in short order. First of all, I have shown you that Ofcom had allowed costs-based asymmetry, even in the 2G cap scenario, notwithstanding the effect of the single price we have in a competitive market. Secondly, this was entirely consistent with past regulatory practice and was consistent with positions taken by the ERG, other NRAs elsewhere, and the European Commission. Thirdly, the fact that Ofcom explicitly decided not to align prices, converge them, in this review period. The fact that they had decided not to do that, and the fact that they had not been appealed against by anyone. These are all perfectly proper legitimate considerations. I am bound to say that if we had not taken them into account -- if we had ignored them, I think we would be in very deep trouble.

In a sense this illustrates what is so unusual about these proceedings because normally in judicial review, in my experience, somebody is accusing - and I am accusing somebody else - of not looking at anything. They have failed to take into account the evidence is inadequate. There is not factual basis. One brings out the Mahon case, and all of these cases, almost in a sort of job lot as constituting the basis of a judicial review. It is very rare indeed for somebody to say, “Well, actually you took into account these factors which have been set out by Ofcom in the determination, and you should have given them no weight at all”. That is a very unusual state of affairs. It is for you to judge but the reasons we have given, and I have just described them to you, appeared to the Commission to be entirely proper reasons and their considerations are entirely rational. Any failure on their part to consider would have brought their decision making into harsh question.

Of course, we have never said that the Commission is not above judicial review. That would be an idiotic submission. We have never said that. Of course, *Tesco* gives comfort to all potential claimants. *Tesco,* of course, is a million miles away from this case. The obvious point, market investigation, broad brush. I opened by saying that we were constrained by the terms of the appeal and the terms of the reference. It cannot be the case that we can just go walk-about.

The fact is that in *Tesco's* case, which you have been taken to - I hesitate to say "selectively", but it is there for you to read - if you go back to it the critical point about *Tesco,* unfortunately for the Commission, is that it proposed a remedy which critically required some factual sub-stratum in relation to what people would do if this planning restriction had been imposed. There was a yawning gap in the Commission's report which was readily identifiable, and absent that factual underpinning with evidence, then the report was unsafe. That element had to be quashed and then remitted. I have no knowledge of what will happen, but I suspect the Commission will have no particular difficulty going back, drawing upon the necessary evidence and re-presenting the report, but that is nothing to do with me. That is a million miles away from the situation we are describing here where we do have, in our submission, a very satisfactory factual sub-stratum evidence. Indeed we are accused of having too much regard to the evidence, not too little. Once again, I come back to my opening submissions about the Standard of Review. Nobody has pointed to anything, I think, that we have omitted to examine or to investigate. We have done that. The intensity of the investigation, should we have gone even more deeply into various points? Well, I would respectfully submit that goes beyond the standard of review that would be appropriate in this instance. Our approach throughout was to do the least violence to Ofcom's decision. Of course, it should be recalled that we found error in Ofcom's decision in relation to spectrum costs. It considered the 2G cap methodology could be used to derive an appropriate allowance for 3G spectrum. We disagree.

THE CHAIRMAN: I am conscious of the time and we do want to get on to the other parties. Are there any further points that you need to make?

MR. SHARPE: I am going to simply say that I ask rhetorically that this cannot really be said to be a decision that no reasonable Competition Commission could have arrived at.

I am also conscious that there were a large number of points raised by T-Mobile and considerations in relation to the adequacy of reasoning. I am quite happy to foreshorten my old submissions. I am being advised on this occasion ----

THE CHAIRMAN: Was that something that you are going to be dealing with as well?

MISS ROSE: Madam, I am concerned because we know, of course, that the challengers, to call them that, went very substantially over their estimates. I would be very concerned as a result of that, if the response of the Competition Commission were to be constrained and it may be that we have to come back tomorrow, madam.

THE CHAIRMAN: I just see that you are also down for an hour. I struggle to see what you are going to talk about in that hour. If Mr. Sharpe now deals with the points about inadequate reasoning, I am not sure whether you have liaised as to whether you are dealing separately with different points. I do not wish to ----

MISS ROSE: Yes, but we had submissions this morning between 10.30 and 2.45.

THE CHAIRMAN: Yes. Miss Rose, what I am trying to ascertain is what further topics Mr. Sharpe has to deal with and then what topics you are going to deal with. Mr. Sharpe, what further topics do you have?

MR. SHARPE: I was going to address some of the remarks of T-Mobile, which, in my judgment, I am required to address. I was going to the inadequacy of reasoning. I do not think there is anything left in the error points and calculation of methodology.

MR. SCOTT: In your six points, adequacy of reasoning was your fifth, and you were then going to come to calculations in the light of the correspondence of 18th and 20th March.

MR. SHARPE: It seems to me, sir, that we may have been overtaken by events and I am very happy to address you on that. It did rather seem to me that we had reached a consensus that if we are going to move to 4.3 that I think deals with both questions which have arisen. If that is right then there is probably no need for me to address you on that.

THE CHAIRMAN: It is right, Mr. Sharpe.

MR. SHARPE: I am very conscious of leaving enough time for my friend, I really am. Let me then just address a couple of points raised by my friend. I will deal with this briefly. Let me make a general point and you can apply it to my friend's submissions. This is really about 2G/3G and the role it played in the Commission's thinking. Thee is a danger, I think, of regarding it as a sort of rigid mechanical template against which the Commission applied all the numbers. That is simply not true. I think Professor Bain expressed it absolutely accurately this morning. It was an approach. "Methodology" is perhaps a word we have used so much we cannot really resile from it, but it was something less than a mechanical application of a particular formula. We do refer at times in the determination to the "construct", a method of thinking, a framework for thought. I hope that is not too rarefied a point for our purposes, but I think there is a danger of assuming that here we have a formula

and any departure from it - the very words "departure from it" is doom-laden and value-laden as well. It is not quite the approach the Commission adopted.

My junior properly reminds me that, having said that, we should also see it as a means by which, a tool we could use, to get over the hurdle of spectrum valuation. That is really how it seems, and I think, madam, you were on to that point an hour ago.

Adequacy of reasoning: I am going to make the point very briefly. Adequacy of reasoning means no more than this, that when you make a decision of a judgment or determination, it must be said properly and fairly by somebody reading it, the prisoner in *Doody*, "I do not understand why I am here, I do not understand why I am being incarcerated, I do not understand why I am not being released or put on parole, what's the story? The justification and determination is a bad determination because nobody can really understand what it is all about". Such an argument in this case is ludicrous. We have had deeply sophisticated submissions for months on end about the nature of the Competition Commission's reasoning and its determination. Indeed, if the parties had said less their case would carry more weight. The legal test is impossible or very difficult for them to understand why the Commission took its decision. For your note I would take you to para. 119 of our written response.

I have just one point of correction, I misspoke earlier, and it is important that I do correct the record, when I said the Commission had little confidence in the Ofcom model I misspoke, I did not mean that, they certainly did have quite a lot of confidence in aspects of the model, but it is very clear from our report that we had reservations about the determination, but it is not quite the same thing as having little confidence, and those people who have worked very hard on that model wanted me to correct that.

Ladies and gentlemen, unless I have any further submissions, I am happy to pass the baton to Miss Dinah Rose.

THE CHAIRMAN: I think your Junior is trying to attract your attention.

MR. SHARPE: My Junior wanted to make the point that he is very upset by the selective nature of my friend's quotations.

THE CHAIRMAN: Quotations from?

MR. SHARPE: Almost everything but including the determination.

THE CHAIRMAN: Well we have read the determination and I am sure we will re-read the relevant parts of it in due course. We are well aware of the importance of not taking things out of context.

MR. SHARPE: He is quite correct and I should have mentioned it. Are there any matters you would like ----

THE CHAIRMAN: No, thank you, Mr. Sharpe. Yes, Miss Rose?

MISS ROSE: Madam, I am conscious of the disadvantage that must accrue to any advocate who gets to her feet at quarter past four when the Tribunal has been sitting since half past ten. There are a number of things that I need to say and I think the question does arise whether this Tribunal is able to sit tomorrow, because of course there are still two replies to come after me.

THE CHAIRMAN: Well unfortunately we cannot sit tomorrow. Just wait one moment.

(The Tribunal confer)

THE CHAIRMAN: I think we will press on, certainly you feel at no disadvantage as far as we are concerned standing up now. If you would like a break for five minutes then we can certainly do that. We are just checking with the transcribers that it is all right for them to carry on, but why do you not make a start?

MISS ROSE: Madam, before I come on to the question of the proper test for judicial review, I would just like briefly to address the question of T-Mobile position. As I recorded the submission that was made by Mr. Turner, what he said shortly before the short adjournment was because of the approach that it had taken the Competition Commission needed to examine and justify its departure from the principle of equality. He said "We do not rule out the approach the Competition Commission took, but it must be justified". Then in response to another question from you he said that "T-Mobile's position was that because there was a discretion to be exercised, the matter should be remitted to the Competition Commission for reconsideration."

We submit that it necessarily follows from that position that he is accepting that the Competition Commission could, on reconsideration, rationally reach the same conclusion that it reached in this decision, but he would say with fuller reasoning and justification and therefore, in my submission, it must be that T-Mobile is not at one with Vodafone in relation to what Miss McKnight referred to as the self-contradictory reasoning irrationality point, because if I understand Vodafone's position it is that as a matter of logic it is simply impossible for the Competition Commission to have reached the conclusion that it did about network costs.

THE CHAIRMAN: It is impossible because it is self-contradictory?

MISS ROSE: Because it is self-contradictory, and that is not the position that has been adopted by T-Mobile.

Can I now come to address the question of the proper test.

MR. TURNER: Just to say that is broadly right, we are not saying it is logically impossible.

MISS ROSE: I am very grateful. Can I now come to address the question of the proper test for judicial review, and we agree with Mr. Turner that the statutory context is important, indeed critical, when considering the proper scope for judicial review ,and here there are two principal sources of statutory context, the first is s.193 of the 2003 Act and the second is Article 4(2) of the Framework Directive. Looking first at s.193, in my submission Parliament's intention is clear. Parliament took the view that the Competition Commission, partly because of its particular areas of expertise and experience, and partly because of its different processes which are essentially investigative and not adversarial was better placed than the Competition Appeal Tribunal, notwithstanding the expertise that is available to this Tribunal, to determine price control matters. For that reason Parliament took the highly unusual course of hiving off from an appellate function of this Tribunal specific types of issues which were to be sent to a different specialist body for determination by that body, subject only to judicial review principles.

In my submission, that is a very strong indication on the part of Parliament that Parliament was bestowing the responsibility for making the particular economic and factual judgments and predictions that lie at the heart of these decisions, that was being delegated specifically to the Competition Commission and, in my submission, that is a strong indication that this is a case in which the *Cellcom* principles apply.

My learned friend argues that that does not apply here because he says this is an EC case, and he relies on two cases for that proposition, the *City Trading* case at tab 33, and the *Mabanaft* case at tab 34. Neither of those case is an economic judgment case. One is about livestock and one is about oil stocks, but if we just go to tab 34 and look at *Mabanaft* in my submission this is the more significant of the two since, as my learned friend frankly accepts, the *City Trading* case is an *obiter dictum*. It is para. 66 in *Mabanaft*, first of all there is the point that he relies upon which is the *City Trading* case, having regard to the doctrine of proportionality in testing the solution arrived at according to the factual considerations justifying it. Then it said:

> "It is, however, not necessary in a judicial review involving rights conferred by Community law, for the national court to substitute its assessment of the facts and scientific or technical …"

(mobile phone ringing)

THE CHAIRMAN: Could everybody, please, take a moment to switch off their mobile phones if they are on, it is very distracting for the Tribunal and for counsel.

MISS ROSE: The second point that is made at para.66 is that it is not necessary "in a judicial review involving rights conferred by Community law for the national court to substitute its assessment of the facts and scientific or technical evidence for the assessment of the competent national authorities." The Tribunal will see that there is there a reference to the *Upjohn* decision of the ECJ. The significance of that decision was considered in the *Interbrew* case, which you have in file B1, tab 8. I have this as a Westlaw print-out. So, I have page numbers at the top right-hand side. If you look first at para. 1 you can see the factual context which is that the Competition Commission reported that Interbrew's acquisition of the brewing interest of Bass could be expected to operate against the public interest and recommended that it should be ordered to divest itself of the United Kingdom beer business of Bass. The recommendation was accepted and Interbrew challenged the recommendation of the Competition Commission on the grounds that it was a grossly disproportionate method of dealing with the anti-competitive consequences of the acquisition".

In the course of this decision there was consideration by the Administrative Court of the standard of review, given that this was an EC competition context. We see this at para. 27.

> "There was, however, considerable dispute as to the intensity with which this court should review the decision. The applicant contended the review should be intense. Even if the right enshrined in Article 1 of the first protocol is not as fundamental of those protected in earlier provisions of the Convention, it is, nevertheless, important. Furthermore, the restrictions imposed on Interbrew amounted to a restriction on its right to establishment in the United Kingdom conferred by the combined effect of Articles 437 and 56EC".

So, there is a specific allegation of a breach of Community law.

> "Accordingly, the court is required to scrutinise with intensity the justification for the interference although Mr. Sumption, Q.C. accepted that the role of the court remained supervisory. It will 'only intervene when the decision fell outside the range of responses open to a reasonable decision-maker'. Although the courts is supervisory it nevertheless imposes a test lower than that of Wednesbury irrationality".

So, a submission somewhat similar to that made today by Mr. Turner.

"These submissions as to the approach this court should adopt were challenged by both the Commission and Secretary of State. The correct test, so they contended, was that which would have been applied by the European Commission had it not referred the merger to the United Kingdom Competition Commission. The European Court of Justice affords a wide margin of appreciation in questions of economic policy and evaluation. The approach of the court is to examine whether a manifest error of appraisal can be discerned".

Then there is a citation from the *Upjohn* case.

"According to the court's case law, where a Community authority is called upon, in the performance of its duties, to make complex assessments, it enjoys a wide measure of discretion, the exercise of which is subject to a limited judicial review in the course of which the Community judicature may not substitute its assessment of the facts for the assessment made by the authority concerned. Thus, in such cases, the Community judicature must restrict itself to examine the accuracy of the findings of fact and law made by the authority concerned in verifying that the action take by that authority is not vitiated by manifest error on mis-use of powers and did not clearly exceed the bounds of its discretion ----"

This approach is similar to the approach of the UK authorities which acknowledge a wide margin of appreciation in implementing social and economic policies".

Then it was also argued the right of freedom of establishment was not engaged. Then he said:

"These issues may be important. There may be cases where it is essential that the court identifies the correct approach. The quality of the argument excited a desire to resolve the controversy. It is disappointing therefore for me to say that I do not think it necessary to resolve the conflicts. The challenge to the reasoning was that it lacked cogency and any reasonable foundation. The reasoning is also challenged because it failed to take into account the balancing test inherent in the test of proportionality. The Commission and the Secretary of State respond by submitting the reasons are intelligible, cogent and sufficient. The balancing test had no part to play. These arguments will not turn on the approach I should adopt. In the instant case it does not seem to me my ruling depends on the extent to which I think those reasons lack cogency. If the reasons make no sense and are without foundation, then I should so rule".

Now, we derive three points essentially from these authorities. The first is that the more intensive standard of review, if there is such a more intensive standard of review, applies where the allegation that is being made in a claim for judicial review is that there has been a breach of Community law. The Tribunal can see that allegation being made here. The complaint was that the action taken by the regulator, which was the subject of the judicial review, was a disproportionate interference with a Community law right. So, that is the first point.

The second point is that the Community law standard of judicial review when what you are reviewing is a complex assessment of economic policy by an expert regulator, is, in substance, no different from the *Cellcom* standard. We see that from the citation in *Upjohn*.

The third point is that given the grounds of challenge which are actually being pursued in this case, we submit this is a case in any event in which the Tribunal finds itself in the same position as Mr. Justice Moses - that although the question may be of fascinating legal interest, it is not determinative of this challenge, because essentially the start points that are made, on behalf of Vodafone, the reasoning is self-contradictory and therefore irrational, and on behalf of both Vodafone and T-Mobile, the reasoning is so inadequate that it does not meet the basic public law standard that we must know why we are here.

THE CHAIRMAN: So, you do not accept that the fact that the Commission accepted that it has to apply the s.47 and s.88 criteria and that those criteria derive from the common regulatory framework – you do not accept that that brings you within the *First City Trading* scenario where you are dealing, in effect, with an EC point?

MISS ROSE: I do not accept that that in itself would alter the standard of review that this court would have to apply. Now, the situation would be different, or might be different - I do not accept there is any difference in standard anyway, but the situation might be different - if the ground of judicial review relied upon was that the Competition Commission had breached a duty under the Framework Directive. But, that is not what is relied upon.

Can I then deal with Article 4.2?

MR. SCOTT: While you are in *Interbrew*, *Interbrew*, in the end, turned on procedure. As I recall, it turned on the adequacy - if one goes to para. 95 - the procedure by which the conclusion was reached was unfair. My question to you is: Does that lead on to the procedural objections that the applicants are taking?

MISS ROSE: Clearly, procedural unfairness is a separate ground of judicial review, but that is not something we have been asked to address in the oral hearing.

THE CHAIRMAN: Thank you.

MISS ROSE: Can I now deal with Article 4(2) because, as the Tribunal will have in mind, the position is -- If we just turn up the Framework Directive in Bundle B1, Tab 19 --

> "Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications and networks or services who is affected by a decision of an NRA has the right of appeal against the decision to an appeal body that is independent of the parties concerned. This body, which may be a court, shall have the appropriate expertise available to it to enable it to carry out its functions. Member States shall ensure the merits of the case are duly taken into account and there is an effective appeal mechanism".

So, the first point is that under Article 4(1) there has to be an appeal which duly takes account of the merits. You will recall the interesting argument about what that means. That body may be a court, but does not have to be a court. In relation to this type of decision, the approach that has been taken by the United Kingdom parliament is that there is an appeal to a court - this tribunal - in relation to non-price control matters and an appeal to the Competition Commission - not a court - in relation to price control matters.

That then brings us to Article 4(2) which says,

> "Where the appeal body referred to at para.1 is not judicial in character. Written reasons for its decision shall always be given".

So, there is clearly an obligation on the Competition Commission to give reasons.

> "Furthermore, in such a case its decision shall be subject to review by a court or tribunal within the meaning of Article 234".

You will immediately appreciate that the reference to Article 234 is, of course, the reference to the process for a preliminary ruling from the ECJ.

The meaning of Article 4(2), and in particular what standard of review was envisaged either by Article 4(1) or Article 4(2) was considered by the Court of Appeal in the T-Mobile case. If we just turn up the T-Mobile case at Tab 32 in Bundle B2 at para. 33, p.5 at the top of the page -- "I have already referred to Lord Pannick's intensive review point based on *Mobistar*. He also sought to support the point by a linguistic contrast. Article 4 uses effective appeal mechanism in 4(1) and subject to a review by a court in 4(2). Lord Pannick suggested the difference in language pointed to a higher standard for a 4(1) appeal. I think that is much too semantic an approach. The point of Article 4.2 is to ensure that if the appeal body is not a court it gives proper reasons. The reference to "review by a court" is so that it is possible for a reference to be made to the ECJ under Article 234 of the Treaty.

It is only courts which can make such a reference. It is inconceivable that those who drafted Article 4 had in mind the sort of distinction English law draws between review and appeal. Therefore, the point is made by the Court of Appeal that you cannot draw any inference at all from Article 4.2 as to what is the standard of review. Indeed, the normal approach of the ECJ would be that national procedural rules apply unless they either discriminate against those who seek to rely on European based rights or make it effectively impossible for them to do so - the *Rewe* principle. So, in my submission, Article 4.2 is entirely neutral on the question of the standard of review. The right approach is that enunciated in *Cellcom* and we say reflected in *Upjohn*, a wide margin of discretion to the expert regulator nominated by Parliament under this statutory scheme specifically in order to make complex economic judgments following an investigatory process, and not an adversarial process. This Tribunal will immediately be aware of the advantages that the Competition Commission had, bilateral meetings, plenary sessions, numerous iterations of written submissions, provisional determinations, and so forth.

Simply, we submit, notwithstanding the undoubted expertise of this Tribunal, it is not an acquisition to enter into the merits of the arguments. What you have heard today, as my learned friend correctly said, is essentially an all out assault by Vodafone and T-Mobile on the economic principle that cost based asymmetry is an appropriate method by which to set MCT charges. We submit that is wholly inappropriate for this court. They may dislike the conclusion that first Ofcom and then the Competition Commission came to on those questions, but that is not remotely within the scope of judicial review.

Can I now come to our position on the merits. We do adopt the submissions of the Competition Commission. I want in particular now to focus on the question of the scope of BT's appeal and of the implications of the scope of BT's appeal for the complaints that are now being made by Vodafone and T-Mobile.

Can we just return to the question that was asked by this Tribunal in its letter of 10th March. That is at volume A2, tab 28. In particular can we go to the third paragraph of this letter, where it is said:

> "... the Tribunal is particularly concerned to understand the reasoning underlying the Competition Commission's decision, on balance, to permit asymmetry in 2010/11 on the basis of the specific conditions of the UK market."

In my submission, it was never a matter for the Competition Commission to consider that question. The Competition Commission was not conducting a review of the conditions in the United Kingdom mobile call termination market in order to determine whether it was

appropriate in the particular competitive conditions of that market for there to be an asymmetry in the year 2010/2011. What the Competition Commission was doing was considering the specific questions referred to it by this Tribunal within the four corners of the notices of appeal that had been submitted by BT and by H3G.

THE CHAIRMAN: They did have to consider whether there should be a non-cost based asymmetry, but you are saying they did not have to consider whether there should be a cost based asymmetry?

MISS ROSE: What I say is there is this clear distinction here. The issue that was reference question 2 was whether H3G's rate was too late. There was never any issue about whether H3G's rate was too high by comparison with the other MNOs. That issue was never before the Competition Commission. Essentially, in our submission, the error which permeated the whole of Mr. Turner's submission, the way that he characterised it was the Competition Commission decided to treat H3G more favourably than the other MNOs and it has got to justify that position. Ofcom decided to treat H3G more favourably. I say that in brackets, because, of course, it is just as discriminatory to treat those who are in different circumstances in the same way as it is to treat those similarly situated differently. Ofcom concluded that H3G's circumstances were different, because it sufficiently incurred costs were higher. That is why they gave them the higher rate.

The error in Mr. Turner's approach is that he seeks to characterise this as a decision made by the Competition Commission. It was not, it was Ofcom which permitted the cost based asymmetry to H3G and nobody challenged that decision. That is absolutely critical. We submit that that is why the question, with respect, in the third paragraph of this Tribunal's letter of 10th March is put in the wrong way, because that was not an issue that was before the Competition Commission or an issue that they had to resolve. In my submission, their reasoning has to be considered in the light of that important fact, that essentially what they were doing at para.19 in section 16 was upholding Ofcom's decision that this cost based asymmetry was acceptable. That was all they were doing. They were saying Ofcom were not wrong in reaching that conclusion. I am going to come back to that paragraph in more detail.

THE CHAIRMAN: So the question really which the interveners are asking is whether it is a necessary consequence of having abandoned the cost based assessment of the 3G spectrum that you also abandon the cost based assessment of network costs. The Competition Commission said, "No, that is not the logical consequence of how we have decided to deal

with spectrum costs", and the interveners say that is inconsistent with their reasoning or that they were not entitled to come to that decision.

MISS ROSE: Vodafone says that, but T-Mobile does not. That is why, in my submission, T-Mobile's case collapses completely because they accept that it was a rational position for both Ofcom and the Competition Commission to adopt, that it did not automatically follow, and we say rightly, from the fact that they valued spectrum by reference to the 2G cap that they had to conclude that no special provisions should be made for the new entrant with the particular circumstances applied to the new entrant. They accept that. Therefore, in my submission, their claim collapses.

Vodafone take the purist logic point and we agree that that is the point that the Competition Commission correctly were addressing at para.19 of s.16, and they said it is too simplistic to say that just because you are valuing spectrum by reference to the 2G cap, you do not take into account any other circumstances, particularly, of course, where what Ofcom were seeking to do was to introduce a solution that complied with s.88. Therefore, Ofcom's consideration includes sustainable competition and maximising benefits to consumers. Ofcom has concluded that taking into account these efficiently incurred costs is the best route and nobody challenges that.

Can I then come on to the question of the scope of the appeal? Mr. Sharpe has taken you in some detail to BT's notice of appeal and, in my submission, it is absolutely clear from an analysis of that notice of appeal that BT were not seeking to challenge the cost based asymmetry or the maintenance of a differential in price in year 4 of the charge control. Indeed, it is striking that neither Vodafone nor T-Mobile has sought to rely upon any passage in the notice of appeal, rather they have sought to rely upon BT's submission [this document] and upon much later oral submissions made in the course of the Competition Commission sessions.

We submit that neither of these documents are of any relevance to this question. I am going to come in some detail to the admissibility decision of this Tribunal in relation to H3G's pleadings, but in my submission, what matters is what is in the notice of appeal, and what matters is not submissions that were made at Plenary sessions; that cannot conceivably change the scope of the appeal, or change the scope of the questions that have been referred to the Competition Commission.

So far as this document is concerned, we adopt the submissions made upon it by Mr. Sharpe, and there are two further points that I would like to make. First, if you look at the introduction, the scope of this document is made clear in the first paragraph. I am told it is

at the back of B2. If you look at the first paragraph, we see what the scope of this document is.

> "BT's notice of appeal states at para. 18:
>
> BT will make submissions as to what the appropriate figure [for MCT charge] should be in the course of its Appeal and reserves its position on this question but it currently considers that it should be lower than 4.3 ppm for the four 2G/3G operators."

In other words, this document is addressing the question of the appropriate level of charge control for the four 2G/3G operators. It is not addressing at all the question whether any asymmetry based on cost is appropriate for the 3G only operator. The only reference that you will find to the 3G only operator is the reference to administrative costs which is at para. 15, but more significantly if you go to para. 14 we see BT's comments on the charge that it is proposing. It says:

> "BT notes that the proposed charge:
>
> a. makes no allowance for the gains that the MNOs stand to make from sharing their radio access networks. The potential for these gains was described in BT's Notice of Appeal …
>
> b. is based on the costs of a 2G/3G 1800 MHz only operator even though these costs are higher than those of the 2G/3G 900 MHz /1800 MHz combined operators."

In other words, BT say: "We are being very generous because we are allowing the higher costs of the 1800 MHz operator", but they do not address at all the still higher costs of the 3G only operator, and in my submission, if this document had been intended to be in some way an amendment by BT of its notice of appeal to make it clear that it was seeking to challenge the cost based asymmetry that Ofcom had provided for in its model, it utterly failed to do so. Not only that but both Vodafone and Orange accepted before the Competition Commission that Ofcom's approach to taking into account the efficient costs incurred by H3G was reasonable and made it clear that they were not seeking to appeal those findings by Ofcom. If we can just take up vol. A1, H3G's response to the judicial review challenges is at tab 6 – I am afraid the pagination slightly falls down here, but I hope you have behind tab 6 two red inserts each of which have a schedule behind them. No, sadly only me. If you can find about 20 pages in Schedule 2. This is a series of extracts from transcripts of various sessions held by the Competition Commission. If we go first to p.4 of this exhibit, this is Orange's bilateral hearing, and ----

MR. SCOTT: Just for clarity this is 17th September 2008.

MISS ROSE: That is correct. Line 11 on p.5, the question is put by the Competition Commission:

> "It has been put to us that asymmetric rates are actually quite a common feature of MCT rates across Europe. Given that that is the case, why should allowing further asymmetry than that which has already been allowed by Ofcom necessarily be out of step with the NRAs?"

So you can see that they are addressing there H3G's appeal, and H3G's argument that it should have greater asymmetry than that allowed for by Ofcom. The answer:

> "Across Europe there are asymmetries in MCTs for different reasons, for exogenous reasons, so for reasons such as – spectrum allocation is probably the primary reason, in a historical sense, and also for endogenous reasons, so the late entrant argument which Hutch has specifically benefited from."

So a recognition there by Orange that across Europe asymmetries are provided for late entrants and for those with different spectrum allocation, of course both of these being conditions that applied to H3G.

Then over the page, this is still Miss Hayes speaking, line 8, she says:

> "I think with new market entry historically across Europe you have seen entrants benefit from this but I think there is a feeling now that markets have matured to the level whereby there is no justifiable reason .
>
> You can use other elements, such as spectrum allocation, to the benefit of new entrants. So, for example, in the UK Hutch benefited from being allocated one of the licences, you know, as the new entrant; that could be seen as a benefit construed to them. They were also allowed to negotiate a national roaming contract; they have one now with Orange.
>
> So I think our view is that: yes, there have been reasons in the past for asymmetry, but we are moving to a situation now where …"

and then it becomes confidential. Then:

> "… what in your view would H3G need to show to establish that there were justifications for additional asymmetry? You have accepted it in principle, so what is it that they need to show?
>
> A. Significantly higher costs, justifiably higher costs."

So specifically a recognition by Orange that higher efficiently incurred costs by H3G justify asymmetry.

Then again at p.7:

> "… do you have a justifiably higher cost and are you still an efficient operator and therefore what benefits do you bring to the market if your costs are much higher than anybody else's?"

Then Professor Mason also acting on behalf of Orange as an economist says:

> "I think given the set off constraints that face you as an operator, are you performing as efficiently as you can, and given that you are doing that, are your costs still materially different from your rival operators? Thinking about spectrum is perhaps the easiest example. When spectrum is not traded and the order in which people entered the market determined in part the allocation of spectrum that they could achieve, that is an obvious factor which could lead to an asymmetry."

And as Tribunal will have seen from the passages in Ofcom's decision that Mr. Sharpe showed you earlier, the fact that spectrum was not currently being traded was specifically a point that Ofcom relied upon as justifying the maintenance of the cost base asymmetry until year four.

Then at p.8 Professor Mason again, he says:

> "I think in part we may have responded to that earlier, where we mentioned that in the short-to-medium term there will be differences in spectrum holdings which are material and there are questions of different market shares which imply different cost structures, but there is a path over which that happens."

Then crucially at line 22:

> "So in the short term it is allowable in my view, as Ofcom has done, to reflect the differences in spectrum and market share but those are not two things which we see persisting."

So specifically acceptance there that Ofcom's approach was allowable. Then Vodafone - this is the bilateral of 24th September, 2008 – here again we see the question put by the Competition Commission at p.10, line 6,

> "I suppose there are number of questions around that, the first is whether or not asymmetric regulation can be justified as a matter of principle in some circumstances, and, if so, what those circumstances would be".

Mr. Biro deals with this point as an economist. He says,

> "Well, from an economic perspective, if you were to ask yourself would asymmetric regulation improve welfare, one can conceive perhaps of certain circumstances in which that is theoretically possible, yes. One cannot rule it out as

a matter of principle in all cases. What we are saying is that Hutch has not made its case and brought the relevant facts to bear in this case to justify a departure from Ofcom's statement"

You will see what is being said there. Then the Competition Commission were pushing a little bit. "What are the circumstances that would justify asymmetric regulation?" He says,

"There would have to be an asymmetry between the entrant and the incumbents in the market. There would have to be an asymmetry that was in some sense fundamental or inherent to being a late entrant as opposed to, say, following from a commercial decision at the discretion of the entrant".

Then, at p.11, line 17,

"I suppose one source of that fundamental asymmetry could be costs; is that right?"

Then, this,

"Yes, and Ofcom, I think, under the heading of 'Costs' took into account two considerations, there was a technology component, where the technological reasons, of a fundamental intrinsic sense, as opposed to commercial decisions one makes, would lead to a cost structure that was a 3G adjustment, and, secondly, there is a more temporary issue, which is whether an entrant would suffer from a shorter on costs advantage due to lack of scale during the period in which it is growing".

I think both of these are considerations which we felt were reasonable considerations for Ofcom to have taken into account and we did not challenge that both of these factored into Ofcom's thinking. So, there was a specific concession by Vodafone that it was not challenging the fact that Ofcom had taken into account costs-based asymmetry in reaching its decision.

Then, at p.13 Mr. Sandbach - and I am not sure who Mr. Sandbach is, but I am sure someone will tell me - says,

"I think it is fair to say that Ofcom had a history anyway of doing cost-based termination charges, so in a sense it would have been foreseeable H3G would have been regulated on some form of cost, of cost-base".

Then Mr. Biro says,

"That is, if you like, partly factored into our not challenging, taking those considerations into account".

I am told it is Vodafone's Head of Regulatory Economics.

"… partly factored into our not challenging Ofcom, taking those considerations into account because what Jonathan is saying is H3G may reasonably have expected Ofcom to have done son at the time when it bid for its licence".

The point that is being made here is that because of past regulatory practice being to set call termination charges on the basis of efficiently incurred costs, it was reasonable for a party bidding for the 3G licence, as H3G had done, to anticipate that it would be regulated in that way, and that therefore it would be unfair to H3G if it were not to have a call termination charge that made allowance for sufficiently incurred costs. That, of course, feeds directly into the point that is made then by the Competition Commission which is that one of the reasons that justify taking these costs into account is past regulatory practice. It is not just that, "Oh, well, they have done it in the past, so it is okay to continue doing it". It is that the fact they have done it in the past may rationally affect the behaviour of the party that bids for the licence, and therefore it is reasonable to take it into account in the future. It is specifically said by Vodafone that that is a reason why they decided not to challenge it. Then Miss McKnight makes some submissions at p.15 which, with respect to her, are strikingly different from the submissions that she has made to this Tribunal today. At line 20:

"Of course, when we have effective competition with four incumbents, a fifth entrant arguably adds less and therefore facilitating the growth and success of the fifth entrant is less material in public interest terms. So allowing it the recovery of its 3G, additional 3G, costs might have been a less weighty factor, because Ofcom is obviously looking at, and weighing, a variety of different factors. So, whilst it would have been a relevant precedent, it would not have been obvious that it would follow through. But, as Zoltan and Craig have said, when Ofcom decided to allow some degree of asymmetry to H3G through this price control decision, Vodafone thought in the round that was not unreasonable and did not appeal. So, we are not challenging the extent of the asymmetry already built into the charge control decision, but we are saying we certainly see no compelling case for any further asymmetry".

THE CHAIRMAN: Just remind me on the timing of this. This was 24th September.

MISS ROSE: Yes.

THE CHAIRMAN: Had the provisional termination ----

MISS ROSE: No, it had not been made.

MISS McKNIGHT: If I can defend the consistency of what I have said on the two occasions -- We acknowledge we did not appeal against the asymmetry. What we say is that once a different methodology had been proposed, questions of asymmetry reared their head by virtue of consistency considerations.

THE CHAIRMAN: That is what we have to decide.

MISS ROSE: As the Tribunal will see, that is consistent with the internal self-contradictory reasoning argument. But, with respect, it gets neither Vodafone, nor T-Mobile anywhere on their inadequate reasons point because once they accept that it does not inevitably follow from the fact that the spectrum is valued by using the 2G cap principle -- Once they accept that it does not follow from that that any cost base asymmetry automatically falls. Then, in our submission, the task of the Competition Commission becomes much more straightforward because in that situation the Competition Commission does, as it did in this case, feed the 2G cap into the model in order to value the spectrum and otherwise applies Ofcom's model in terms of the costs-based asymmetry which has not been subject to challenge.

So, in my submission, this judicial review, in light of the fact that there was no appeal, and in light of the positions that were taken by the parties before the Competition Commission, cannot get off the ground on adequacy of reasoning. It must get off the ground, if at all, on Vodafone's extreme point.

The next point, still on the question of the fact that points were not taken on appeal, is that it was suggested by Mr. Turner on behalf of T-Mobile that there was unfairness to the other MNOs if H3G were given this costs-based asymmetry. With respect, of course, it is impossible to see how there is any unfairness since the costs-based asymmetry had always been their Ofcom decision and nobody had appealed it. It had been accepted. We submit that that is the end of Mr. Turner's argument. But, there is, in my submission, potentially a very serious unfairness here indeed in what Vodafone and T-Mobile are asking this Tribunal to do. The unfairness is to H3G because, in effect, what is being put forward by Vodafone and T-Mobile is that they should be permitted at a very, very late stage of these proceedings to challenge the costs-based asymmetry that never formed a part of the appeal in circumstances in which this Tribunal knows very well H3G was prevented from running a whole range of arguments that related to asymmetry. The significance of this is profound because if there had been a ground of appeal in BT's notice of appeal challenging the allowance of asymmetry to H3G, then in my submission this Tribunal would not have reached the decision that it did reach in striking out parts of H3G's statement of intervention

because that decision was reached on the basis that BT was not challenging the asymmetry, but only specific aspects of the costs model.

To make that good, can I now refer you to the decision of the Tribunal on the admissibility judgment in Volume B1 at Tab 22. We start at para. 133 at p.43 where the Tribunal considered H3G's statement of intervention in the BT appeal.

H3G was granted permission to intervene in BT's appeal and served its outline statement of intervention, and Ofcom and the 2G/3G MNOs object to much of what is pleaded in that Outline SOI on the grounds that it goes beyond responding to the points that BT has made in its appeal and attempts to introduce into the BT appeal the same issues as H3G raises - or has attempted in the supplementary material to raise - in its own appeal. Miss Lee, who appeared on behalf of BT confirmed what is plain from BT's notice of appeal: that BT's appeal is limited to challenging three aspects of Ofcom's treatment of the MNOs' costs namely the treatment of spectrum costs, the treatment of the MNOs' administration costs and the inclusion of a network externality surcharge. The remedy BT seeks is that MCT rates should be set at 3.73ppm. You will notice immediately that there is no challenge asserted there by BT to the question of asymmetry or to the inclusion of additional efficiently incurred network costs in H3G's MCT rate.

Then it is said that H3G's arguments favour NPZ have nothing to do with any of these three grounds.

Then the point is made by the Tribunal that H3G have sought to rely on passages in BT's witness statements to argue that these points were being argued by BT. Paragraph 137 the Tribunal rejects the suggestion that an intervener is entitled to treat evidence served by an appellant as in effect extending the scope of the appeal in a way which then also entitles the intervener to raise those issues even if they are not included in the notice of appeal itself.

> "The fact that the Tribunal's Rules provides that the notice of appeal must as far as practicable have annexed to it a copy of every document on which the appellant relies ... does not mean that every point made by a witness is to be treated as part of the grounds of appeal ..."

We say, *a fortiori*, submissions made many, many months later by parties in a plenary session of the Competition Commission certainly cannot be treated as extending the scope of the notice of appeal.

Then we come to para.141.

> "**Section 2 headed 'The Context in which to assess the imposition of the price control remedies'.** This broadly sets out a description of the market as H3G sees

it summarising those parts of H3G's own notice of appeal which set out why H3G argues that it should not be subject to a price control at all. These passages are inadmissible because they do not relate to BT's appeal. Further in para.2.1(d)(i) H3G refers to on-ne/off-net pricing strategies adopted by the 2G/3G MNOs as having an averse effect on H3G. This is precisely the point that the Tribunal ruled H3G was not permitted to raise in its own appeal. BT's appeal does not depend in any way on the existence or effect of such an alleged differential. On-net/off-net pricing or causes of traffic imbalance as between H3G and other 233g MNOs is not put in issue by BT's appeal and is not admissible in the Outline SOI."

Now the Tribunal can see why we say that the question posed by this Tribunal on 10th March, with respect, was the wrong question, because H3G were specifically precluded from putting to the Competition Commission in this appeal information about the competitive situation in the UK market that would justify an asymmetry on the basis that that was not within the scope of BT's appeal.

Then para.144:

"**Section 5 headed 'BT's MCT appeal incorrectly assumes that Ofcom's overall approach in setting the price control was correct'.**"

The first part is dealing with close to zero, new ground, and then:

"There is nothing in BT's notice of appeal which puts the whole of Ofcom's costs analysis in issue and in so far as such arguments are referred to in BT's witness statements, the Tribunal has explained that H3G's reliance on those statements is misconceived. Paragraphs 5.5 to 5.8 raise the question of on-net/off-net price differentials which is impermissible. Paragraphs 5.9 to 5.11 raise the NPZ argument ... It is not appropriate for these issues to be duplicated here because they do not arise from the BT notice of appeal. Paragraphs 5.12 to 5.15 raise the same issues as regards asymmetry price regulation that are raised in H3G's own appeal with the addition of the on-net/off-net pricing issue. In the Tribunal's judgment, the whole of section 5 should be excluded."

So specifically material dealing with asymmetry and the appropriateness of asymmetric regulation was excluded by this Tribunal from the scope of H3G's SOI on the basis that it did not arise in BT's appeal.

In my submission, the implications of this judgment are profound, because what is now being said by Vodafone and T-Mobile is that they should be permitted to challenge the conclusion of the Competition Commission simply endorsing Ofcom's view that cost based

asymmetry should continue and that they should be able to challenge that, firstly, we say effectively on the merits, but they say because it is inappropriate, and secondly on the basis of inadequate reasoning in circumstances in which we had to fight that issue with our hands tied behind our backs. . We submit it would be fundamentally unfair and inappropriate for any such challenge to be permitted to proceed before this Tribunal.

So then to address T-Mobile's appeal in particular, I have already addressed the point that T-Mobile has effectively disowned Vodafone's irrationality challenge and accepted that it could be legitimate for the Competition Commission to make special provision for a new entrant with a smaller market share, but, says T-Mobile, it was incumbent upon the Competition Commission to produce a clear justification for treating H3G more favourably in what would otherwise be discriminatory manner. Our fundamental objection to that is we say it is the wrong question. That was the question for Ofcom to address. Ofcom did address it and there was no appeal against Ofcom's decision.

In any event, we can see that the reasoning of the Competition Commission on this issue is perfectly clear if we take up again the crucial section, 16. First of all, 16.10. The first point that is made in 16.10 is that the Competition Commission refers back to the multitude of references in section 2 of its decision, but the use of the 2G cap as a method of valuing the spectrum does not follow from that automatically, that that should be applied to set the MCT rate for the new entrant. To the extent that it is said that that issue was not taken into account and was not considered, plainly it was. It is said:

> "This is because there are two competing considerations to balance ..."

and then they set them out. First of all, the 2G cap, and this is the pure logical argument which Vodafone endorsed, but then:

> "On the other hand, Ofcom allowed for certain differences in the level of efficient costs to be reflected in the final charge control levels. We note, similarly, that whilst we rejected H3G's argument for greater non-cost-based asymmetry, the materials discussed in Section 5 of this determination ... demonstrate a widespread recognition at the European level of the legitimacy of reflecting differences in efficient costs in the case of later entrant operators, at least temporarily."

This Tribunal will have seen that that is entirely correct, that the ERG and the Commission and the national regulators have accepted that it is legitimate to assist new entrants into the market by providing an extra allowance for their efficient cost based charges while they grow to scale. That is a broadly accepted principle. Unless it can be shown that there is some fundamental reason why that should not be applied here, we submit that all that the

Competition Commission are doing is saying, "That is what Ofcom did and there is no reason to say they were wrong".

Then that reasoning is elaborated on at 16.19. The crucial paragraphs here, we submit, are (b), (c) and (d), and (b) is where the point is made that you can make a valid distinction between the regulatory treatment of a new technology and a new entrant, and they say that the 2G cap implies you should not get an increase as a result of new technology, but that is not necessarily the position for a later entrant. That is the point of principle, if you like.

Then, at 19(c) they say that Ofcom's modelling approach recognised differences in costs and it is consistent with previous regulatory practice. You have my submission on that point and with the European materials.

Then the crucial finding:

> "We do not think it could be said that Ofcom's decision to recognise these cost differentials was wrong."

This is the fundamental flaw in the adequacy of reasoning arguments. There was no obligation on the Competition Commission to conduct its own detailed and exhaustive analysis of the reasons why Ofcom were right. In circumstances in which nobody was appealing this finding by Ofcom, and in which the Competition Commission were saying Ofcom was not wrong, in other words there could be no successful challenge against it that was sufficient. The reasoning for this conclusion if it is to be sought anywhere is in the MCT statement and has not been challenged.

Then at D, D is an additional point upon which the Competition Commission rely, they accepted a point which was put to them by H3G, which was that in principle it is inconsistent to have a smaller allowance for 3G spectrum costs for one MNO than others so it would imply there was more than one opportunity cost for 3G spectrum.

There was an interesting debate on this question, it may be an indication of how sad we all are that we think it is interesting, but there was an interesting debate on this question earlier today. You can say "Is it right to have the opportunity cost for spectrum constant, or to have the cost allowance constant?" You can argue about that question and ultimately that is a question of economic judgment, and with great respect to my learned friends they know exactly why they lost this point, they are not in the dark, the reasoning is not inadequate, and their complaint goes directly to an exercise of economic judgment and is impermissible, whether you apply a European or a British approach to judicial review.

Indeed, in my submission had the Competition Commission taken the opposite approach and said "There is to be no cost based asymmetry and H3G's costs are to be capped at 4

ppm, I would have now an unanswerable ground for judicial review, namely, the Competition Commission had no jurisdiction to make that decision because it was not within the scope of the notice of appeal.

THE CHAIRMAN: That depends on whether it does necessarily flow from the rejection of the cost based valuation of the 3G spectrum that you should not make any cost base differentiation for any other aspect, so that if the logic of the price cap is that it should apply to the price and not just to the 3G spectrum allowance, then that might follow, but you would say that would have been a very big jump indeed for them to take.

MISS ROSE: Yes, because all that the Competition Commission were saying was it is very difficult to value the 3G spectrum. The prices that were paid at the auction are not a reliable guide, and there is no clear method to use, we are going to use this method because we think it is about the best we have available, and it is a method of valuing the 3G spectrum. It is not a methodology, and it is not a model which is to be applied to determine the price, it is simply a tool for valuing the 3G spectrum, which is fed into Ofcom's model, the other parts of which have not been subject to challenge, and unless it can be shown that that approach is one that no sane regulator using economic expertise could have adopted in my submission this challenge fails.

Can I now just briefly address the question of what happens if we are wrong? In other words, the question of the appropriate relief?

THE CHAIRMAN: It may be that we should ----

MISS ROSE: Maybe I do not need to?

THE CHAIRMAN: Well I would not wish to say you do not need to … (laughter) … but it may be in view of the time, because we have received quite a lot of written submissions.

MISS ROSE: Sorry, I do not mean on the question of the form of order. It is simply ----

THE CHAIRMAN: No, I know, but what you are coming to is: does it go back to the Competition Commission?

MISS ROSE: Yes.

THE CHAIRMAN: Do we decide it? Does it go back to Ofcom, and there are all sorts of views that have been expressed on that, by people who are not really down to speak today, I think that may well be a matter that we can come to in due course should it prove necessary.

MISS ROSE: Well can I reserve my position on that?

THE CHAIRMAN: Yes.

MISS ROSE: Just very briefly, we agree with T-Mobile that the only correct course would be to remit the matter back to the Competition Commission and I can expand on the reasons for that at greater length.

THE CHAIRMAN: Well we may or may not need you to do that in due course.

MISS ROSE: The final point was that there was a new issue that was raised in the recent letter from this Tribunal relating to the backing in and out methodology, but it may be that that issue has now gone.

MR. SCOTT: Point 3.

MISS ROSE: It may be that that issue is now a moot point.

MR. SCOTT: We asked you earlier whether it had gone?

MISS ROSE: I do not mean the 4.4 versus 4.3 point, I mean the recent letter from the Competition Appeal Tribunal in relation to the question of the allocation between voice and data.

PROFESSOR BAIN: I think it is now irrelevant.

MISS ROSE: Thank you, I am grateful. Those are my submissions.

THE CHAIRMAN: Thank you, very clear as ever, Miss Rose. Now, who else is on our list? Ofcom, do you need your 15 minutes, Mr. Holmes?

MR. HOLMES: Madam, I am sure that everyone will be very relieved to hear that we do not in fact need any of our 15 minutes and that we have no submissions to make.

THE CHAIRMAN: So then it is a matter of replies. I think whatever we decide to do we will break for a moment, perhaps Vodafone, T-Mobile and Orange during that moment you can have a discussion about whether you want to do replies now. The alternative being that they should be in writing, which I hesitate to suggest to have more written submissions. Certainly I think we would only want one submission, but if you can be brief in your replies then I think we would probably prefer to finish up today. But we will rise for about five minutes. Thank you.

(Short break)

THE CHAIRMAN: Where are we then, Mr. Turner?

MR. TURNER: Madam, we have decided that, with your permission, we will deal with it in writing, mainly because the nature of the answers that you have heard today were on a rather different basis from what we had apprehended about the nature of the appeal and taking you to lots of documents. In reply we would also want to draw your attention to different things, and we feel that that can most efficiently be done in writing. We would ask only until the end of this week to lodge a combined brief written reply submissions.

THE CHAIRMAN: Do you have any comment you want to make on that, Mr. Sharpe or Miss Rose?

MR. SHARPE: Year 3 starts on 1st April. We have really got to get a move on on this. Now, the end of the week may not seem much, but normally we would get up and deal with this on our feet. I do not see any particular reason why we should have a 100 page essay on this. I would have thought that sometime around close of play tomorrow would be perfectly fair.

THE CHAIRMAN: Yes, I agree with that. I think by close of play tomorrow we will have very brief submissions from you in writing.

MR. TURNER: The difficulty is that we will need to co-ordinate with each other and produce a combined submission. Perhaps given other obligations as well that may make things difficult, if we may ask for two days – I cannot really see that this is necessary to argue about.

THE CHAIRMAN: We will split the difference and give you until close of play on Thursday. Do your best to co-ordinate your response. We are certainly not looking for an extensive document here. It should be as close as possible to what you would have said had we not been finishing this at 5.30 and you had made your submissions on your feet.

That covers Vodafone, T-Mobile, and Orange.

MISS LEE: Madam, having given two days to reply, we are terribly worried on our side in relation to timing. Each day I think is costing £100,000 or £140,000. Really the process is going on inordinately.

THE CHAIRMAN: We are also considering all the other issues on the papers. So, it is unlikely that those two days are going to hold up the resolution of all the issues that we are going to incorporate in a single decision.

MISS LEE: It may be that, as T-Mobile has suggested, we could split out the T-Mobile issues in relation to a resolution. I have made the point that we are very concerned about the timings.

THE CHAIRMAN: We will have any written reply by close of play on Thursday, and we will then deliver a ruling on all the issues as soon as possible.

Thank you very much everybody for both your written and oral submissions. It has certainly helped clarify things. We will be in touch through the usual channels.

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