



Neutral citation [2007] CAT 26

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1083/3/3/07

Victoria House
Bloomsbury Place
London WC1A 2EB

15 August 2007

Before:

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

Sitting as a Tribunal in England and Wales

BETWEEN:

HUTCHISON 3G UK LIMITED

Appellant

-v-

OFFICE OF COMMUNICATIONS

Respondent

supported by

O2 (UK) LIMITED

T-MOBILE (UK) LIMITED

VODAFONE LIMITED

ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED

BRITISH TELECOMMUNICATIONS PLC

Interveners

RULING ON THE FORMULATION OF THE PRELIMINARY ISSUE

APPEARANCES

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

Mr. Peter Roth QC, Mr. Josh Holmes and Mr. Ben Lask (instructed by the Office of Communications) appeared for the Respondent.

Mr. Gerald Barling QC and Miss Sarah Lee (instructed by BT Legal) appeared on behalf of British Telecommunications plc.

Mr. Nicholas Green QC and Miss Kelyn Bacon (instructed by S.J. Berwin) appeared on behalf of O2(UK) Limited.

Mr. James Flynn QC and Miss Marie Demetriou (instructed by Field Fisher Waterhouse) appeared on behalf of Orange Personal Communications Services Limited.

Mr. Meredith Pickford (instructed by Miss Robyn Durie, Regulatory Counsel, T-Mobile) appeared on behalf of T-Mobile (UK) Limited.

Mr. Stephen Wisking (Partner, of Herbert Smith) appeared on behalf of Vodafone.

Mr. Ben Rayment appeared on behalf of the Competition Commission.

I INTRODUCTION

1. This appeal is brought by Hutchison 3G UK Limited (“H3G”) against the statement made by the Office of Communications (“OFCOM”) entitled “Mobile Call Termination” which was published on 27 March 2007 (“the Decision”)¹. The appeal is brought pursuant to section 192(1) of the Communications Act 2003 (“the 2003 Act”) and is, along with the appeal lodged by British Telecommunications plc (“BT”) against the Decision (Case Number 1085/3/3/07), the first appeal to come before the Competition Appeal Tribunal (“the Tribunal”) engaging the procedure for reference of price control matters to the Competition Commission set out in section 193 of the 2003 Act.
2. In the Decision OFCOM concluded, as regards H3G, that:
 - (a) A separate market exists for the provision by H3G of wholesale mobile voice call termination (“MCT”) in the UK to other communications providers;
 - (b) H3G has significant market power (“SMP”) in the market for termination of voice calls on its network;
 - (c) a charge control should be imposed on the supply of MCT by H3G and should apply for 4 years from 1 April 2007;
 - (d) the “target average charge” (“TAC”) of H3G under that charge control should be reduced to 5.9 ppm by the final year of the charge control, with the change to be implemented by an initial reduction to 8.5 ppm followed by three reductions each of equal (percentage) change across the next three years; and
 - (e) further conditions should be imposed requiring provision of voice call termination on fair and reasonable terms and conditions (including contract terms), prohibiting undue discrimination, and requiring transparency.

¹ H3G have also appealed against a second decision published by OFCOM on 27 March 2007 entitled “Assessment of whether H3G holds a position of SMP in the market for wholesale mobile voice call termination on its network” (“the SMP Reassessment Decision”), this reassessment having been conducted following the Tribunal’s judgment in Case 1047/3/3/04 *Hutchison 3G (UK) Limited v Office of Communications*, [2005] CAT 39. Where reference is made in this Ruling to “the Decisions”, this means the Decision (as defined above) and the SMP Reassessment Decision.

3. Broadly speaking, the procedure set out in sections 193 and 195 of the 2003 Act requires the Tribunal to identify whether the appeal raises any specified “price control matters” as defined. If it does, then those matters are to be referred by the Tribunal to the Competition Commission for its determination. Matters raised by the appeal which are not price control matters are to be decided by the Tribunal. Once the Competition Commission has notified the Tribunal of its determination of the price control matters referred to it, the Tribunal must decide the appeal on the merits and, in relation to the price control matters, must decide those matters in accordance with the determination of the Competition Commission, unless the Tribunal decides, applying the principles applicable on an application for judicial review, that the Competition Commission’s determination would fall to be set aside on such an application.

II THE IDENTIFICATION OF PRICE CONTROL MATTERS

4. The definition of a specified price control matter is complex. Section 193 of the 2003 Act provides, so far as material, as follows:

“193 Reference of price control matters to the Competition Commission

(1) Tribunal rules must provide in relation to appeals under section 192(2) relating to price control that the price control matters arising in that appeal, to the extent that they are matters of a description specified in the rules, must be referred by the Tribunal to the Competition Commission for determination.

...

(9) For the purposes of this section an appeal relates to price control if the matters to which the appeal relates are or include price control matters.

(10) In this section “price control matter” means a matter relating to the imposition of any form of price control by an SMP condition the setting of which is authorised by-

(a) section 87(9);

(b) section 91; or

(c) section 93(3).”

5. It is common ground that the Decision imposes a form of price control by an SMP condition, the setting of which is authorised by section 87(9) of the 2003 Act.

6. The Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (SI 2004 No. 2068) (“the 2004 Rules”), which were made pursuant to the power in section 193(1) specify, for the purposes of section 193(1), the extent to which price control matters must be referred to the Competition Commission under this procedure.
7. Rule 3(1) of the 2004 Rules provides as follows:

“Reference of price control matters to the Competition Commission

3. - (1) For the purposes of subsection (1) of section 193 of the Act, there is specified every price control matter falling within subsection (10) of that section which is disputed between the parties and which relates to-

- (a) the principles applied in setting the condition which imposes the price control in question,
- (b) the methods applied or calculations used or data used in determining that price control, or
- (c) what the provisions imposing the price control which are contained in that condition should be (including at what level the price control should be set).”

8. The effect of section 193 of the 2003 Act and rule 3 of the 2004 Rules is that, in order for a matter to be a “price control matter” which the Tribunal must refer to the Competition Commission in accordance with section 193(1), the matter must:
 - (i) be a matter relating to the imposition of any form of price control by an SMP condition the setting of which is authorised by (in this case) section 87(9) of the 2003 Act;
 - (ii) be in dispute between the parties; and
 - (iii) relate to (a), (b) or (c) of rule 3(1) of 2004 Rules.

9. Rules 3(2) to (4) of the 2004 Rules go on to say that the parties may indicate in their pleadings what matters they consider to be price control matters. Rule 3(5) of the 2004 Rules states that the Tribunal shall refer to the Competition Commission for determination in accordance with section 193 of the 2003 Act and rule 5 of the 2004 Rules “every matter which ... it decides is a specified price control matter.” It is clear from this provision that the question whether a matter is a specified price control matter or not is a question for the Tribunal to determine and that the Tribunal is obliged to

refer all specified price control matters raised by the appeal to the Competition Commission.

III H3G'S NOTICE OF APPEAL

10. H3G's Notice of Appeal was lodged on 23 May 2007. So far as relates to the Decision, H3G challenges the finding by OFCOM of SMP and challenges the imposition of the price control.
11. In Section B(2) of H3G's Notice of Appeal, headed "Summary of Grounds of Appeal", H3G sets out a summary of its arguments on the SMP issue under the heading "SMP/Dominance".
12. Then, under the heading "Price Control Matters", the Notice of Appeal summarises the remainder of the appeal, cross-referring to the relevant paragraphs in an Appendix to the Notice. The summary states, so far as relevant to the point currently being considered, as follows:

"2.6... The SMP/Price Control Decision constitutes an error of law and/or assessment as to the facts and/or analysis relied upon and/or the reasons given. It further tilts the playing field against the recent entrant and makes it more difficult to compete in the retail market. This is unnecessary and/or disproportionate. There are a number of reasons for this including: the price control imposed on the 2G/3G MNOs has a TAC that is not justified by the underlying cost model and is too high (both for mobile-to-mobile calls and fixed-to-mobile calls); and it generally ignores or fails to take sufficient account of the impact of the price controls in terms of payments by H3G to its competitors and the resulting distortion of competition and dynamic incentives. Any remedy should have mitigated or eliminated distortion to competitive conditions if at all possible (Appendix, Sections 4, 6, 10-12).

2.7 In addition or in the alternative, OFCOM errs in the SMP/Price Control Decision regarding its decision to impose a price control on H3G in that:

- (a) The price control is a disproportionate or inappropriate remedy (Appendix, Sections 3 and 4).
- (b) OFCOM uses a methodology, "economic depreciation", which requires assumptions to be made regarding levels of demand over a period of more than 50 years^[20] ... (Appendix, Section 5 and "Commentary").

^[20] OFCOM's model has an explicit forecasting period of 14 years from 2007/08 to 2020/21, together with an assumption (i.e. an implicit forecast) that all parameters including demand stay constant into perpetuity beyond 2020/21. References to forecasts "over 50 years" are made herein as a shorthand description of this approach to add clarity of expression.

- (c) OFCOM has erred in its choice of glide path ... (Appendix, Section 7).
- (d) OFCOM has failed to allow for H3G's customer acquisition, retention and service ("CARS") costs when this is appropriate given its new entrant status, its low market share, and the assumptions made about it by OFCOM in the cost model (Appendix, Section 8).
- (e) OFCOM fails to properly address the distortion created by the current arrangements as to MCT rates chargeable for calls to "ported" numbers (where customers have switched network and taken their number with them) ... (Appendix, Section 9)."

13. The relief sought by H3G is that the Tribunal:

- (a) set aside the relevant parts of the Decisions in full; and
- (b) direct OFCOM to find that H3G has no SMP; or
- (c) direct OFCOM to impose no more than an obligation on H3G to set its MCT rate on fair and reasonable terms (with suitable guidance to be issued by OFCOM taking into account actual market circumstances); and/or
- (d) direct OFCOM to impose any price control conditions, and glide paths, in line with the determination of the Competition Commission.

14. Under a later heading, "**Procedural Issues**", H3G states:

"4.1. (c) The "price control matters" (described in the attached Appendix) should be referred to the CC as soon as possible with a direction that the CC determines the issues by reference to the notice of appeal (i.e. determining only those issues raised in this notice of appeal) ..."

15. The remainder of the main body of the Notice of Appeal sets out H3G's arguments in relation to the challenge to the finding of SMP. It is common ground in this case, at present at least, that the challenge to the finding of SMP is not a price control matter or does not incorporate any price control matters and therefore that it falls to be decided on the merits by the Tribunal.

16. There is then an Appendix to the Notice of Appeal headed "Price Control Matters – For Reference to the Competition Commission". In paragraph 2.4 of that Appendix, H3G states "H3G considers that each of the matters below constitute (*sic*) a price control matter that should be referred to the CC".

17. The first such matter is described in section 3 of the Appendix headed “The price Control Remedies are Disproportionate/Inappropriate”. H3G sets out the arguments on which it relies which can be summarised as:

- (a) The effect of the price control would be “to tilt an already tilted playing field further against the recent entrant and to dampen competition on an ongoing basis at the retail level”.
- (b) The financial impact of the price control on H3G is considerable, leading to a substantial increase in the net payments that H3G will have to make to the other mobile network operators because of the imbalance between the volume of traffic which originates on the H3G network as compared with the volume that terminates there.
- (c) This financial impact will have an adverse effect on competition because it will reduce H3G’s ability to act as a “maverick” competitor.
- (d) OFCOM’s welfare analysis is flawed and OFCOM has failed to demonstrate any net welfare benefits from regulating H3G’s termination charge over the period in question and that any reliance on the welfare analysis did not and does not justify the imposition of a price control on H3G.
- (e) That OFCOM reached a premature view that a price control remedy was appropriate prior to it having completed its assessment of countervailing buyer power and that, having regard to the mechanisms available in the 2003 Act for the reference to OFCOM for determination of disputes over its MCT rate, at most a condition requiring H3G to set its MCT rates on fair and reasonable terms, with OFCOM issuing any guidance thought appropriate, was and is necessary.

18. The subsequent sections of the Appendix – sections 4 to 12 – set out H3G’s challenges to the price control imposed in the Decision, arguing first for an alternative approach which would set all operators’ charges to zero; second that OFCOM’s economic depreciation approach to cost recovery is flawed; third that OFCOM erred in relation to the glide path that it has imposed on H3G (that is the annual percentage reduction by which the target rate is reached); and so forth.

19. On 10 July 2007 the Tribunal made an Order granting permission to intervene in this appeal to T-Mobile (UK) Limited (“T-Mobile”), O2 (UK) Limited (“O2”), BT (as defined above), Vodafone Limited (“Vodafone”) and Orange Personal Communications Services Limited (“Orange”).
20. On 12 July 2007, in preparation for the Case Management Conference fixed for 26 July 2007 (“the CMC”), the Tribunal wrote to the parties in order to narrow down the range of issues to be considered at that CMC. Paragraph 23 of that letter, so far as relates to the H3G appeal, was as follows:

“23. The Tribunal considers that the issues raised in these appeals which do not comprise price control matters are as follows:

- i) In the BT appeal ...
- ii) In the O2 appeal ...
- iii) In the H3G appeal – whether OFCOM was right to conclude that H3G had or has SMP in the wholesale MCT market in the United Kingdom as defined; and
- iv) In the H3G appeal – whether the imposition of a price control with effect from April 2007 is an appropriate response to the finding of SMP.”

21. The parties responded to that letter, as requested, on 20 July 2007. The responses to the question raised by the Tribunal were varied. Subject to certain comments and caveats, none of the parties disagreed with the Tribunal’s classification of point (iii) above as not being a price control matter. However, in relation to point (iv):

- (a) OFCOM said that in its view, whether or not, and to what extent, the issue in point (iv) of the Tribunal’s letter raises price control matters requires careful consideration of section 3 of the Appendix to H3G’s Notice of Appeal, having regard to the definition of price control matters in section 193(1) of the 2003 Act and rule 3(1) of the 2004 Rules. OFCOM submitted that in its opinion, section 3 of the Appendix to H3G’s appeal contains both price control and non-price control matters;
- (b) BT said that point (iv) was a price control matter, and that to treat it otherwise would give rise to the risk of inconsistent findings of the Tribunal and the Competition Commission;

- (c) H3G referred to its Notice of Appeal, in which it had indicated that it considered issue (iv) to be a price control matter, but did not object to the Tribunal's view as expressed in the 12 July 2007 letter that this issue may be considered by the Tribunal rather than the Competition Commission;
- (d) Vodafone and T-Mobile submitted that this issue was not a price control matter and, furthermore, that H3G's appeal also raises a number of other non-price control matters, including various factual matters raised by H3G in its appeal, which would need to be determined by the Tribunal (rather than by the Competition Commission). Vodafone also submitted that, until the close of pleadings, it would not be possible definitively to identify all the issues raised in the appeals, nor, *a fortiori*, which of them are price control matters and which are non-price control matters;
- (e) O2 said that it tended to agree with H3G's view as expressed in its Notice of Appeal that this matter is a price control matter, but suggested that the issue be considered by the Tribunal as a preliminary matter. O2's suggestion of a preliminary hearing was supported by T-Mobile and a similar suggestion was also made by BT;
- (f) Orange submitted that, in its view, it was premature at this stage for the Tribunal to determine in respect of each and every issue raised by the appeal whether or not it constitutes a "price control matter" as defined in the legislation. Orange referred to the 2004 Rules which, in its submission: (i) give OFCOM the right to include in its defence a statement indicating its view of what does and does not constitute a price control matter; and (ii) require the Tribunal to take account of such statement before making any determination of what constitute price control matters to be referred to the Competition Commission. Orange also indicated that, in its view, H3G's Notice of Appeal was confusing and should be amended or redrafted before the issue of what matters in the Notice of Appeal are price control matters is determined.

22. During the course of the CMC on 26 July 2007, it became apparent that the question whether this part of H3G's appeal (to put it neutrally) was a price control matter or not would need to be determined as a preliminary issue by the Tribunal. However, it also

became apparent that there was a disagreement between the parties as to what was the nature of the “matter” which may or may not be a “price control” matter.

23. The Tribunal had been proceeding on the assumption that the “matter” could be expressed as “whether a remedy short of price control would be a sufficient response to a finding of SMP”, so that the question to be decided as a preliminary issue was whether that “matter” was a price control matter to be referred to the Competition Commission or not. OFCOM, however, argued that the “matter” which may or may not be a “price control” matter is not that kind of matter, but rather, requires the Tribunal to split out the different elements on which H3G relies within that issue and identify which of those relates to any of the things set out in rule 3(1)(a) to (c) of the 2004 Rules.
24. The Tribunal must therefore decide what the nature of a “matter” is for the purposes of section 193 of the 2003 Act before the parties can make their submissions as to whether or not that matter is a “price control matter” at the hearing of the preliminary issue.
25. Following the CMC, H3G and OFCOM circulated amongst the parties different formulations of the question that the Tribunal must decide as a preliminary issue. In the event, three different formulations were proposed. Pursuant to the Tribunal’s Order made on 26 July 2007, the parties then lodged written submissions with the Tribunal as to which of those formulations, if any, correctly described the issue which the Tribunal had to determine.
26. The three alternative formulations of the matter to be determined by the Tribunal as a preliminary issue circulated by OFCOM to the other parties on 31 July 2007 for comment were as follows:

“Question 1

Whether on the proper interpretation of section 193 of the Communications Act 2003 and rule 3 of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004, the following is a specified price control matter:

Whether in the light of the matters relied upon in Section 3 of the Appendix to H3G’s Notice of Appeal, the imposition of a price control on H3G with effect from April 2007 is an appropriate and proportionate response to the

finding of SMP, or whether a remedy short of price control would be sufficient.

Question 2

Whether on the proper interpretation of section 193 of the Communications Act 2003 and rule 3 of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004, any and if so which of the particular matters relied upon in Section 3 of the Appendix to H3G's Notice of Appeal is a specified price control matter.

Question 3

Whether on the proper interpretation of section 193 of the Communications Act 2003 and rule 3 of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004, any and if so which of the particular matters relied upon in the Appendix to H3G's Notice of Appeal is a specified price control matter.”

27. In its subsequent submissions on this point, OFCOM says that Question 1 is flawed and inappropriate because it presupposes that the ground of appeal contained in section 3 of the Appendix to H3G's Notice of Appeal must be classified in its entirety as raising either a price control or a non-price control matter. OFCOM repeats its submission that section 3 of the Appendix to H3G's Notice of Appeal in fact contains both price control and non-price control matters. In relation to Questions 2 and 3, OFCOM says that it considers that, apart from section 3, the Appendix raises only price control matters and that, in OFCOM's submission, Question 2 is therefore the appropriate question for determination at a preliminary hearing.
28. In contrast, H3G submits that, of the three options circulated by OFCOM, the appropriate preliminary issue is that set out in Question 1. H3G says in its submissions that Question 1 best secures the clarity sought by the Tribunal and is consistent with the purpose of the legislation, whereas Questions 2 and 3 err in examining the individual arguments raised in support of or in opposition to the relevant ground of appeal. H3G submits that Question 3, in particular, would create unnecessary and inappropriate delay.
29. BT also considers that the correct approach is that enshrined in Question 1, and submits that it is not necessary or appropriate to look at each and every argument that H3G wishes to raise in support of that part of its appeal to see whether or not they should be categorised as “specified price control matters” in their own right. BT argues, amongst

other things, that in the present case there is a very clear distinction between a ground of appeal on the basis of which particular relief is sought and the individual factors or arguments which H3G wishes to rely upon in support of that ground of appeal. Further, BT submits that “an overly sophisticated process of looking at individual arguments risks drawing out the process of framing a reference in a manner which is too cumbersome, unnecessary, and likely to lead to delay”.

30. Vodafone favours Question 3, since it considers that there are issues raised not only in section 3, but also in other sections of the Appendix to H3G’s Notice of Appeal, that are not price control matters and therefore fall to be determined by the Tribunal. Vodafone also rejects Question 1 on the basis that it is too limited: Vodafone considers that Question 1 fails to ask what additional issues raised in H3G’s Notice of Appeal would or would not be specified price control matters if the Tribunal or, as the case may be, the Competition Commission were to decide that it is appropriate to impose a charge control on H3G. Vodafone states as follows:

“Vodafone wishes to have the opportunity to argue that there are issues raised not only in section 3, but also in sections 4 to 12 of the Appendix to H3G’s Notice of Appeal that are non-price control matters and that therefore fall to be determined by the Tribunal. By way of example, section 8 of the Appendix to H3G’s Notice of Appeal appears to raise a factual issue as to whether, as a “late” entrant into a “saturated” market, H3G is at a competitive disadvantage and, in particular must incur additional levels of CARS [that is, customer acquisition, retention and service] costs in order to attract subscribers to its network. Vodafone considers that this factual issue is a non-price control matter to be determined by the Tribunal and will make full submissions to that effect in due course.”

31. T-Mobile agrees with Vodafone in that, of the three alternatives, it considers Question 3 to be the most appropriate. T-Mobile refers to doubts having been raised as to whether a number of issues which go beyond those referred to in Questions 1 and 2 are properly specified price control matters. T-Mobile submits that it would defeat the purpose of the preliminary hearing to limit at this stage the scope of the preliminary issue in the way suggested in Questions 1 or 2.
32. O2 submits that none of the three questions contained in the document circulated by OFCOM on 31 July 2007 is satisfactory. Rather, O2 favours the framing of a question for the preliminary hearing in neutral terms, which would enable all parties to put forward full submissions on the interpretation of the relevant legislation (i.e. section

193 of the 2003 Act and rule 3 of the 2004 Rules) and its application to H3G's appeal. O2 therefore proposes the following alternative formulation of the question for the preliminary hearing:

“Whether and if so the extent to which, on a proper interpretation of section 193 of the Communications Act 2003 and rule 3 of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 any matters arise in the Appendix to H3G's Notice of Appeal that are not specified price control matters.”

33. Orange submits that, on reflection, even the question of whether, on a proper interpretation of the legislation, a “specified price control matter” refers to a ground of appeal or any argument relied upon in support of or against a ground of appeal should itself only be determined after a hearing. Orange submits that a two-stage approach to the necessary determination of whether and to what extent the Appendix to H3G's Notice of Appeal raises price control matters which must be referred to the Competition Commission is, in Orange's view, unhelpful in this case. Orange therefore submits that the prior question of the meaning of “specified price control matter” should be rolled up and heard with the preliminary issue on 19 September. Nonetheless, subject to this primary contention, Orange goes on to consider the three alternative formulations circulated for comment, but, like O2, concludes that its own, slightly different formulation is more appropriate. The formulation proposed by O2 is as follows:

“Whether and if so which, on a proper interpretation of section 193 of the Communications Act 2003 and rule 3 of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004, any of the grounds of appeal in the Appendix to H3G's Notice of Appeal are specified price control matters.”

IV TRIBUNAL'S ANALYSIS

34. First, the Tribunal does not consider that it is necessary to hear oral argument on this point either before or at the start of the hearing of the preliminary issue. We therefore reject the suggestion made by Orange and O2 that we should “roll up” the determination as to what is the correct question with the hearing as to what the answer to that question should be. The parties had an opportunity to make oral submissions on the point at the CMC on 26 July 2007 when the difference of view became apparent, and have since made written submissions. It is important that the parties know in

advance of the hearing of the preliminary issue fixed for 19 September 2007 what the question that the Tribunal must decide is. The Tribunal considers it is neither necessary nor desirable to postpone determination of this point.

35. In the Tribunal's judgment, the question which must be addressed as a preliminary issue is a question along the lines of Question 1 and the approach put forward by OFCOM and supported by some of the interveners to the identification of price control and non-price control matters is misconceived.
36. It is important, when considering how the procedure set out in sections 193 to 195 of the 2003 Act is intended to work, always to keep in mind what the Tribunal's task will be at the end of the process. According to section 193(6), where a price control matter arises in an appeal and is required to be referred to the Competition Commission, the Tribunal, in deciding the appeal on the merits under section 195, "must decide that matter in accordance with the determination of the Commission". This means that the matters referred to the Competition Commission must be such that, when the determination comes back from the Competition Commission, the Tribunal can use that determination to decide the appeal on the merits and by reference to the grounds of appeal set out in the Notice of Appeal.
37. This points to a price control matter being a matter which is a fundamental aspect of the appeal, capable of being identified as a potential price control matter from an examination of the Notice of Appeal.
38. Further, the 2003 Act places an obligation on the Tribunal to refer price control matters to the Competition Commission rather than conferring a discretion on the Tribunal to do so. Section 193(2) and rule 5 of the 2004 Rules also make clear that the Competition Commission *must* make a determination of each price control matter referred to it. We accept the point made by BT that it cannot have been intended that each argument in support of a ground of appeal would be referred to and determined by the Competition Commission, even if the Competition Commission regarded the point made as irrelevant. This indicates that the "matters" referred to are the broad issues raised by the appeal, not the individual arguments raised in support of those issues.

39. OFCOM's approach would result in the Tribunal's reference to the Competition Commission in this case comprising several, perhaps dozens, of individual questions if it is to encompass all the different "matters" – in the sense of arguments – that the appellant raises. The requirement to identify, refer and determine specified price control matters applies as much to those matters which are indisputably price control matters as to those which could be argued to be either one or the other. Thus, even if, as OFCOM and H3G both assert, it is the case that all the other "matters" contained in sections 4 to 12 of the H3G Appendix to the Notice of Appeal are price control matters, it would still be incumbent either on the Tribunal in framing the questions for reference or at least on the Competition Commission in determining them, to identify each individual "matter" to ensure that the duties under the legislation are complied with. The same exercise would have to be undertaken in relation to the BT appeal. In addition, in carrying out such an analysis the Tribunal would need to consider all the criteria set by rule 3 of the 2004 Rules including that the price control matters "is disputed between the parties". We cannot accept that that was the intention of the legislator.
40. The problems which are likely to arise from such an approach are amply demonstrated by the submissions of some of the interveners on this point. We agree with the submission by BT that an overly sophisticated process of looking at individual arguments risks drawing out the process of framing a reference in a manner which is too cumbersome, unnecessary, and likely to lead to delay. The prospect raised by Vodafone of a hearing at which the parties dissect the many individual paragraphs of the pleadings and argue which fall within rule 3 and which do not, confirms the Tribunal in its view that this is not an exercise that the statute requires.
41. The Tribunal accepts that the approach manifested in Question 1 set out earlier has the disadvantage that the same argument may fall to be considered both by the Tribunal in relation to the challenge to the finding of SMP and by the Competition Commission in relation to the challenge to the price control. Insofar as those arguments incorporate disputes of fact, there is a risk that the Tribunal and the Competition Commission may arrive at inconsistent decisions. However, we agree with BT that this is an unfortunate yet unavoidable consequence of the split procedure envisaged by the 2003 Act being carried out in parallel rather than consecutively.

42. The Tribunal should record that it does not accept the argument put forward by BT and H3G that OFCOM's approach would have the result that the Competition Commission would be able to hear certain arguments but not others in relation to a particular ground of appeal. The legislation does not limit the issues that the Competition Commission can take into account to those which are referred to it by the Tribunal. In a case, for example, where SMP was not in dispute but where the level of price control was referred to the Competition Commission, the Competition Commission is not precluded from taking account of the background of SMP in its assessment of the price control matter before it. However, the Tribunal does accept that the reference of a multitude of questions which include some but not all of the points that the Competition Commission is likely to consider relevant would not facilitate the Competition Commission's task and may make it less likely that, at the end of the process, the determinations notified by the Competition Commission will enable the Tribunal to decide the appeal "by reference to the grounds of appeal set out in the notice of appeal".

V THE WORDING OF THE QUESTION

43. The Tribunal has considered the wording of Question 1 put forward by the parties. The Tribunal does not consider it is appropriate to limit the scope of the statutory provisions which may be relied on as aids to the proper construction of section 193(1) of the 2003 Act and rule 3 of the 2004 Rules. Further, the Tribunal is concerned that the inclusion in the proposed question of the words "in the light of the matters relied upon in Section 3 of the Appendix to H3G's Notice of Appeal" might be taken to assume that whether or not the challenge to the proportionality or appropriateness of a price control remedy constitutes a "price control matter" depends on or may be affected by the kinds of arguments raised by the party bringing the challenge. The Tribunal is not convinced that that is the case.
44. The Tribunal therefore determines that the preliminary issue for consideration at the preliminary hearing is as follows:

Whether on the proper interpretation of the Communications Act 2003 and the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 the following is a specified price control matter:

“Whether the imposition of a price control on H3G with effect from April 2007 is an appropriate and proportionate response to the finding of SMP, or whether a remedy short of price control would be sufficient”.

Vivien Rose

Andrew Bain

Adam Scott

Charles Dhanowa
Registrar

Date: 15 August 2007