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IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1146/3/3/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

25th May 2010

Before:

MARCUS SMITH QC
(Chairman)

PROFESSOR PETER GRINYER
RICHARD PROSSER OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC — Appellant

– and –

OFFICE OF COMMUNICATIONS — Respondent

– and –

(1) CABLE AND WIRELESS UK
(2) VIRGIN MEDIA LIMITED
(3) GLOBAL CROSSING (UK) TELECOMMUNICATIONS LIMITED
(4) VERIZON UK LIMITED
(5) COLT TELECOMMUNICATIONS — Interveners

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HEARING
(Preliminary Issues)
DAY ONE

APPEARANCES

Mr. Graham Read QC and Miss Anneli Howard and Mr. Ben Lynch (instructed by BT Legal) appeared for the Appellant.

Mr. Pushpinder Saini QC, Mr. James Segan and Mr. Hanif Mussa (instructed by the Office of Communications) appeared for the Respondent.

Miss Dinah Rose QC and Mr. Tristan Jones (instructed by Olswang LLP) appeared for the Interveners, Cable & Wireless UK, Virgin Media Limited, Global Crossing (UK) Telecommunications Ltd, Verizon UK Limited and COLT Telecommunications (the "Altnets").

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1 MR. READ: Good morning, sir. As you know I appear on behalf of BT and with me are Miss
2 Howard and Mr. Lynch. For Ofcom is Mr. Saini leading Mr. Segan and Mr. Mussa. For
3 the Altnets, or the Interveners as I think I shall call them throughout is Miss Rose and Mr.
4 Tristan Jones.
5 Sir, as you appreciate, there are two preliminary issues here today. Can I first check as a
6 matter of housekeeping that your bundles have all been updated. You should have had
7 some additional authorities that have actually been given in the last day or so.
8 THE CHAIRMAN: Yes, I think we have those.
9 MR. READ: And there is a glossary and some slides which have also been added to that joint
10 bundle.
11 THE CHAIRMAN: We have certainly had those.
12 MR. READ: I do not think we need to actually spend a great deal of time looking at them
13 because they are primarily for the main hearing, but they are there should it be found to be
14 of assistance to actually see what a PPC looks like diagrammatically, but even that may
15 need a bit of explanation but I will not take you to that immediately.
16 Finally, there was a letter that BT sent to the Tribunal yesterday, making two points and
17 attaching a possible – I emphasise the word "possible" – set of questions that could be
18 referred to the Competition Commission.
19 THE CHAIRMAN: That too we have, Mr. Read. On our part we have just a couple of
20 housekeeping points ourselves. First, I think it is implicit in what you are saying that you
21 will deal with your two preliminary issues in one go rather than to have each party
22 addressed them one at a time.
23 MR. READ: Yes.
24 THE CHAIRMAN: I do not know if the parties have agreed a rough timetable for the next couple
25 of days.
26 MR. READ: I personally think I should be finished either at lunch time or just after. Mr. Saini
27 has indicated that he is probably going to take an hour and a half or perhaps a bit over, so
28 there is a possibility, depending on how long Miss Rose thinks she is going to take that we
29 could either get close to finishing it today or if we do not run it into not very long
30 tomorrow. So in other words we should be able to complete this well within the two days.
31 THE CHAIRMAN: That is very helpful, in that case I will say nothing more about that but just
32 indicate if it helps we can sit this evening until 5 o'clock if that would enable the parties ----
33 MR. READ: I think we will have to see how we go. Was that the ----
34 THE CHAIRMAN: That was all, yes, Mr. Read.

1 MR. READ: With that, can I make two introductory comments about the two issues, because
2 although the two preliminary issues apparently do not seem necessarily to be linked they do
3 highlight a particular issue in this case. We say it is slightly ironic that on the one hand in
4 the case of dispute resolution Ofcom vehemently rejects any restriction on the statutory
5 width of the dispute resolution provisions. But in respect of references to the Competition
6 Commission it rigorously seeks to limit the width of the statutory construction and the width
7 of the references to the CC. What we say this actually highlights when one gets down to it
8 is that there are innate contradictions in Ofcom's approach to the dispute resolution process,
9 because essentially what Ofcom claims it can do as part of jurisdiction and, indeed, as part
10 of application, but application will not concern us today, is that it can conduct a wide-
11 ranging historic investigation into compliance with SMP conditions based upon an approach
12 it says was inherent at the time that that SMP condition was imposed, for example, the use
13 of the DSAC test in the way it applied in the final determination was well understood at
14 2004 and, indeed, earlier.
15 Then, on the other hand it says that that principle methodology of the DSAC test need not
16 necessarily be referred to the Competition Commission. Now, BT says that this highlights
17 the underlying problem with the approach that Ofcom adopted in the final determination
18 which is that if it had accepted BT's contentions that it urged upon it in various places that
19 the dispute resolution process was not amenable to be used for historic compliance
20 investigations but was aimed primarily at resolving prospective disputes going forward,
21 then the issue of whether there needed to be a reference to the CC would virtually fall away.
22 It is only because of the approach that Ofcom has adopted to the dispute resolution process,
23 namely this wide-ranging historic compliance investigation that one then finds oneself
24 facing the ancillary question of whether or not matters relating to principles or methodology
25 of a price control matter are present and if they need to be referred to the Competition
26 Commission. I make that preliminary point because it is one that I suppose troubles BT
27 about the statutory interpretation of s.193(10) and Rule 3 of the 2004 Rules, that in fact if
28 BT is right, and either as a matter of jurisdictional discretion Ofcom should never have
29 approached the way it approached the dispute resolution in this case by this wide-ranging
30 historic compliance investigation, if it had not done that then there is simply no need to get
31 bogged down into the question of what may or may not need to be referred to the
32 Competition Commission. So the two are very strongly linked in that way and, of course,
33 certainly as we now apprehend the way that the preliminary issue (b) was put forward the
34 difficulty is it is only going to one element of BT's arguments on the dispute resolution

1 process because it is only going to the statutory jurisdiction rather than necessarily going to
2 the application. That, in a sense, is what is creating some difficulty for BT in the
3 submissions it puts forward on the issues about referring to the Competition Commission,
4 but the underlying problem with it is that if BT is right about the dispute resolution process
5 and, indeed, if BT is right on a number of other matters then there is no need whatsoever for
6 any reference to the Competition Commission.
7 The second preliminary point I want to make in this connection is what BT says is that
8 Ofcom's approach to the statutory construction is really a very, we say, simplistic approach
9 of whether or not something is an imposition or compliance. When you analyse what has
10 actually been done in the final determination you realise in fact that there are far more
11 nuances to that and such a sweeping – "simplistic" we would say – approach is not made
12 out on the Statute, and I will come back and develop that by particular reference to the
13 DSAC test in a moment.
14 The third preliminary point that I want to make is this, that there is criticism, it seems to us,
15 of BT for in effect raising the matter but not polemically arguing one way or another. It is
16 hinted, we think, in Ofcom's skeleton argument, it is certainly made explicit in the
17 Interveners' skeleton argument where they criticise us for putting the other parties and the
18 Tribunal to great expense in order to obtain a judgment on an issue in relation to which it
19 does not take a positive position. Our understanding is quite clear on this matter that it is
20 not simply an issue for the parties, it is an issue for the Tribunal and if one needs to see
21 authority on that point I can take you to the authorities bundle and by reference to what the
22 Tribunal said in the H3G case in 2007.
23 THE CHAIRMAN: Just the reference, I think, Mr. Read.
24 MR. READ: Yes, it is tab 13 and para. 4. I do not think that that has actually been highlighted in
25 the bundle, I may be wrong. They say in terms broadly speaking these provisions, and they
26 are talking here about s.193 to 195, require the Tribunal to identify whether the appeal
27 raises any specified price control matters as defined, if it does then those matters are to be
28 referred to the Tribunal, to the Competition Commission for determination.
29 It is clear from the Rules themselves, we say, also that that is right, because a party may
30 raise the issue in its defence, or its notice of appeal or its intervention, but it does not say
31 necessarily it must, and it is coupled with the fact that the obligation about the referral is
32 imposed upon the Tribunal, i.e. the Tribunal must refer, and of course the Tribunal can refer
33 at any time during the course of the actual hearing before it.

Although BT has concerns over the issues involved, we think it is slightly unfair on us to say that we should be polemically advancing a particular case or not a particular case, and having made that what we are trying to do before you today, sir, is to show the problems we can see without necessarily saying there is a clear answer to this, or there is not a clear answer for the very reasons I indicated earlier that ultimately it may well depend on how the Tribunal views what Ofcom did in the final determination as being correct or not correct.

Can I now turn to Ofcom's neat division between compliance and imposition, which really lies at the heart of the submissions. It seems to us that Ofcom's own case is that it deployed a test, a rule – we will leave it open at the moment as to what exactly it was – but it deployed something that was an adjunct to the cost orientation condition when that condition was imposed in 2004, because Ofcom's case quite clearly stated is that the DSAC test in the way it applied it was completely clear at the time that the cost orientation obligation was imposed, it says in fact it has been completely clear since 1997. The corollary of that is necessarily that they must accept that it was at least "an adjunct", to use a neutral phrase, when the cost orientation obligation was imposed in 2004.

Perhaps I can just illustrate this by posing this example, suppose condition H.3 at the time had said something along the lines of: "Each and every charge payable or proposed for network access covered by condition H1 is reasonably derived from the costs of provision based on a forward looking incremental cost approach and allowing an appropriate mark-up for the recovery of common costs including an appropriate return on capital employed, which will be assessed by reference to the DSAC of the charge." If you had had explicit words like that put into the cost orientation condition it seems to us it is almost impossible at that stage to say anything other than that is a matter that was imposed at the time the cost orientation obligation was imposed.

If, instead of being explicit, it is implicit then it is very difficult to see what difference there is and it must necessarily still be some form of methodology or principle linked to the condition and, in particular, to the condition that one is only entitled to recover incremental costs plus an appropriate mark-up and recovery of common costs.

I would just like to develop that a bit further by actually looking at what the DSAC test actually employs, because I know when one comes to a preliminary issue one does not necessarily know or fully understand all the vagaries of what is involved in the hearing to come. Perhaps if I can just illustrate this by asking you to look at the final determination, which I think is in BT 1 tab 3. If I can ask the Tribunal to look towards the end at p.212, para. A11.25, that sets out Ofcom's view about the relationship between DLRIC, DSAC

and FAC. It makes the point in A11.25, "There are numerous methodologies for generating FAC estimates, although typically use some form of activity-based costing form". What is involved? "-- namely allocation of costs, both incremental and common to individual activities, etc., etc. It then goes on to deal with that in a little bit more detail. Then, it says at 11.27,

"Where the relevant increment of output is the entire output of the firm, then the entire firm's costs are incremental, including costs that may be common to groups of individual services. As such the LRIC/DLRIC/FAC/DSAC/SAC measures all converge".

That point is made very clear over the page at p.213 at Fig.A11.4. That, diagrammatically, illustrates what setting the cost orientation condition by specific reference to DSAC actually means. You have, in effect, a price line being drawn. As it rightly says, the lower the level of granularity, the wider the price line diverges from the fully allocated costs and stand-alone costs, as one sees at the left-hand of the graph. On the right hand of the graph, as the granularity gets less, and you look at the firm overall, they converge.

But, the point I seek to draw from this is that it does illustrate very clear that DSAC is setting a line - a line above which, if Ofcom is right in the way it has applied the DSAC test - one cannot normally go beyond.

Again, sir, I want to make two points about the DSAC test. On its own case -- obviously says BT says something slightly different -- On its own case Ofcom says that the DSAC line is a very significant consideration in the conclusion of whether there is over-charging. The reference for that is Mr. Myers' witness statement at para. 10.F which is in bundle DF3/1. I do not think we need to turn it up. BT contends that that really mirrors what Ofcom said in the draft determination - namely, that a charge should be bound by the DSAC ceiling for that service unless BT had exceptional reasons. That can be found at para. 3. of the draft determination which is at BT1/4. Again, I do not think we need to turn it up.

So, essentially BT says that DSAC, in the way that Ofcom has been using it in the final determination, is a crucial principle, or methodology, for setting the price. It is effectively the most significant consideration in setting a price cap line for cost orientation. It is also clear, we would respectfully submit - and I do not want to spend too long on this - that it involves a complicated cost apportionment basis. There is quite complex allocation involved in coming up with that DSAC price line because it is dependant upon how exactly one allocates the costs. As Mr. Budd makes clear in his second witness statement - and, again, I will not ask you to turn it up - at paras. 6 and 7, on p.3 of that statement at BT4/3, in

1 fact the DSAC test depends essentially upon just looking at one way of allocating the costs
2 rather than seeing if there are different ways of allocating the costs.
3 So, what BT submits is that the DSAC test is quite plainly a very detailed costs allocation
4 basis for resolving exactly the level of costs that can be effectively recovered under the cost
5 orientation obligation. Now, Ofcom will no doubt say that that is not the way they
6 portrayed it, etc., etc. But, we say that on their own approach - which is a very significant
7 consideration, or save for exceptional reasons the price should not exceed DSAC - that is
8 something that is tantamount to a principle or methodology relating to the way of
9 controlling the price under the cost orientation obligation.
10 If one has to embark on that sort of inquiry we say that that is a natural area that one would
11 anticipate the Competition Commission to be looking at, particularly if it then has to
12 consider what are the precise effects on competition, etc, of using that particular principle or
13 methodology.
14 That is the starting point. As I have already indicated, we say that if it was explicit in the
15 cost orientation condition in 2004, it would be very unlikely that anyone would say that that
16 is not a price control matter. The problem, we say, is that it can not change simply because
17 the matter is, rather than being said explicitly, implicit because, as Ofcom says, it is quite
18 clear that the guidelines were present and ready for the cost orientation obligation, H.3 to
19 be gauged by, when it was imposed in 2004.
20 THE CHAIRMAN: Could it not be put the other way round though, Mr. Read - that if you look
21 at H.3.1 - it puts an obligation on BT to demonstrate to the satisfaction of Ofcom that the
22 price orientation has been followed -- BT to have a margin of discretion in terms of how it
23 does so. But, it is incumbent upon BT to show that that operates to the satisfaction of
24 Ofcom.
25 MR. READ: I think the starting point for that is that BT would fully endorse that if it was not
26 being tied to a specific line - DSAC line. In a sense, what Ofcom are saying is that if you
27 are above that line - that DSAC line - then absence of you being able to show some
28 exceptional reason for that, you have not discharged the burden placed upon you by
29 Condition H.3. If what was actually being said was, "Well, BT, it is for you to show us why
30 you say you are cost-orientated, and you can do that by a whole series of factors - return on
31 capital expenditure, SAC, combinatorial testings showing that there is no real evidence of
32 economic harm, and so on, and so forth - then, of course, the issue would not arise. It is
33 because Ofcom use the DSAC test as this very significant consideration (to use their own

words), to effectively draw a line, as that graph showed -- It is that that is the problem and gives rise to these issues about whether or not it is a price control matter, or not.

This is, if I can go back to where I started on this. This is one of the problems BT has with this, because if BT is right, and BT says, "Look, that was never an established rule. Look, it is a wrong rule to have applied in any event" -- then one never really gets to the issue of having to refer it to the Competition Commission because the DSAC test is not a price control matter. It is only because of the way that Ofcom have effectively set it as that price cap line – set it as the very significant consideration – set it as: "It is that unless you can show exceptional reasons". It is that that gives rise the difficulty of whether this was actually something that should be referred to the Competition Commission. That is the problem that BT has with all of this, but I am trying to address this from the point of view of what Ofcom itself is saying, and it is saying two very clear things: DSAC is a very significant consideration, and secondly, that that was understood and clearly understood at the time the cost condition was actually imposed.

The point that I wanted to draw out of this is that it really does not matter whether you call that assessment by reference to the DSAC line, a principle, methodology, or test – whatever – it plainly relates to the imposition of the cost orientation condition in 2004. What we respectfully submit is it is not the nomenclature that Ofcom is really digging away at, this distinction between imposition and compliance, it is actually the process by which the matter has come before the Tribunal, because it seems implicit in what is being said that if BT had appealed the Leased Line Market Review back in 2004 then it is quite conceivable that this would be a reference to the Competition Commission. It is the fact that it has arisen in the context of the dispute resolution process that leads to this black and white line being placed down, and saying: "You cannot have it in these circumstances. This is something that has happened after the original imposition in 2004, that was not appealed within the two months' time period referable then and, as a consequence it is too late now for anyone to consider a reference to the Competition Commission."

The difficulty we have with that line of argument is that it seems to us to ignore the fact that s.192 and s.193 of the Act – it might be worthwhile turning those up – I will come back to them in a moment in any event – they are either in the grey book, or alternatively they are in tab 6 of the authorities bundle, I am told it is p.31.

If one looks at s.192(1) is saying, it is saying in terms that the section applies to the following decisions: "A decision by Ofcom under this Part", that is the Part of the Act. That Part of the Act covers dispute resolution, which is contained in s.185 to 190. It covers

1 compliance, which is s.94 to s.103, and it covers the assessments of dominance (SMP – significant market power) and the imposition of the conditions following any assessment of SMP.

4 There is no distinction being drawn in s.192(1)(a) between an appeal that relates to a market review and the imposition of any SMP condition, or between dispute resolution. Again, when one looks at s.193 there is no distinction being drawn by the manner of the appeal that is actually being taken.

8 In other words, there is nothing inherent within the Act that says if something is an appeal from a dispute resolution process it is not referable to the Competition Commission, but if it is something relating to a market review then it may be dependent upon whether it is a price control matter and falling within the Rules or not. That rather points towards the fact that the neat distinction that Ofcom is now trying to demonstrate between compliance and imposition really does not stand up from the Act itself.

14 Can I then turn to the actual specific provisions of the Act itself? We say again s.192 and 193 do not draw any deliberate conceptual distinction between this imposition and compliance. One looks in vain for anything there that says in terms that compliance can never be a matter relating to imposition.

18 Can I specifically look at s.193(10) ----

19 THE CHAIRMAN: Can I just interrupt you there? One point which is, I think, slightly anterior to what you are going on to, in Ofcom's skeleton, para. 17 we have three conditions set out for what constitutes a price control matter, starting with 193(10), I just wanted to be clear that that was broadly speaking common ground between the parties or whether you had additional ----

24 MR. READ: I think it is fair to say that although it is not expressed quite in that language in the H3G judgment that that is what the H3G judgment, for the references to the Competition Commission says in I think it was the CAT 26 judgment rather than the CAT 27 judgment of 2007.

28 So we do accept that that is the process that you have to go through in order to consider whether or not there is a price control matter. Really in reality that is what I am moving on to because I am starting with looking at the first subsection of that paragraph.

31 THE CHAIRMAN: Indeed, I thought that was the case, I just wanted to be absolutely clear.

32 MR. READ: But I do want to make it in the context that obviously there is nothing in the Act that draws any distinction between appeals from market reviews and appeals from dispute resolution determinations.

1 Turning then to s.193(10), that obviously is a key section because it is the definition of what
2 a price controlled matter is. We draw a number of points. If one just concentrates on the
3 language of that particular section, it is referring to a matter relating to the imposition of any
4 form of price control. It is not using language that says in terms, "It is the imposition -- the
5 specific imposition of the obligation itself that can only be the sole focus of a price control
6 matter". It is saying that any matter relating to that imposition can so be. We would say
7 that something that is implicit in the SMP condition, such as if one accepts that it is implicit
8 within the SMP condition that the DSAC test should be used as the price cap benchmark,
9 then that is a matter which can relate to the imposition of that form of price control.
10 The second point that we make about s.193(10) is that it is quite clear that that had then to
11 be read in the context of the rules that were subsequently laid down in 2004. As the test laid
12 out in para. 17 of Ofcom's skeleton argument indicates, it is a three-fold test. You look (1)
13 whether it falls within the price control matter; (2) whether it is in dispute; but, (3) then
14 whether it falls within the specific elements of Rule 3 of the 2004 rules. In other words,
15 what we say s.l93(1) is actually doing is that it is effectively indicating and making clear
16 that it is not every price control matter that is going to be referred to the Competition
17 Commission. It is only those that fall within the smaller subset of Rule 3 of the 2004 rules.
18 THE CHAIRMAN: Yes. I see that. I take your point when you talk about a smaller subset. I
19 rather got the sense, reading your skeleton, that you were suggesting that Rule 3 could
20 almost create a larger subset than was envisaged by the statutory definition in s.193.
21 MR. READ: No. I was not putting it in quite that manner. What we were saying is that when you
22 look at Rule 3, you can use that as a guide to the interpretation of s.193(10). The very fact
23 that s.193(1) recognises that there will be a smaller subset we would say is actually a factor
24 that can be taken in to account in saying, "Well, how wide is s.193(10). If you have set up a
25 statutory system that actually envisages a narrowing of the scope, it is not obvious that you
26 therefore have to give a restrictive meaning to the definition, the original definition, which
27 the statutory scheme accepts is going to be narrowed down in due course. This goes to the
28 point that I think Ofcom effectively are saying - that s.193(10) necessarily has to be given a
29 restrictive meaning, and you cannot effectively use Rule 3 as an aid to actually giving any
30 meaning to s.193(10). We say to the contrary that you have to look at the two together in
31 order to make sense of what Parliament actually intended was going to be within a price
32 control matter.
33 There are two points that come out of that. The first point is that if you are looking at a
34 subset, it necessarily means that s.193(10) has a wider meaning. We would say there is no

1 reason, therefore, to give 193(10) an unduly restricted meaning. That is the first point we
2 say to come out of it.
3 The second point is that you can, in our respectful submission, glean some interpretation of
4 what. S.193(10) means by looking at what was being contemplated within the rules. In
5 other words, the two are part of the same statutory process and that as such you can use
6 them as some form of guide as to what s.193(10) may actually mean.
7 THE CHAIRMAN: But they are very different instruments. One is the primary act and the other
8 is a piece of subordinate legislation. Just as a matter of general principle is there authority
9 to suggest that one can -- I am anticipating ----
10 MR. READ: I will jump ahead a little. I think the starting place is to go to Tab 20 in the
11 authorities bundle, which is the section relating to **Bennion on Statutory Interpretation**.
12 If I can ask you, sir, to turn up p.706 in Tab 20, it is dealing with s.233 of Bennion's
13 Statutory Interpretation. One can see the principle that is actually outlined there by
14 Bennion.
15 "Delegated legislation made under an Act may be taken into account as
16 persuasive authority on the legal meaning of the Act's provisions".
17 Then, it comments over the page,
18 "The position regarding delegated legislation as a guide to the legal meaning of
19 the Act is similar to that in relation to official processing. Indeed, delegated
20 legislation closely resembles official processing, the difference being that the
21 former is a type of formal legislation. It is clear that an Act may be construed in
22 the light of delegated legislation made under it".
23 It then sets out an example where the Medicines (Prescriptions Only(Order 1980 was being
24 looked at. One can see there a comment from Lord Goff,
25 "It is unnecessary, in the present case, to consider whether the relevant articles of
26 the Order may be taken into account in construing s.58 of the Act of 1968; it is
27 enough, for present purposes, that I am able to draw support from the fact that the
28 ministers, in making the Order, plainly did not read s.58 as subject to the
29 implications proposed by counsel for the appellants".
30 It then goes on to deal with a judgment from Viscount Dilhorne, and says,
31 "In a later case however the House of Lords declined to take this as an authority
32 for the general proposition that subordinate legislation can never be used as an aid
33 to statutory interpretation".

The case cited there is the case of *Hanlon v. Law Society*, which is the case that in fact Ofcom rely upon in support of the argument that a delegated legislation cannot amend the primary legislation. We do not disagree with that. You cannot suggest that the delegated legislation amends it, but what you can say - and we say the authorities are very clear on this - is that you can use it, particularly when it is contemporaneous, as a guide to construing what Parliament actually intended should be the meaning of the Act. I will take you to *Hanlon* in a moment. Then it refers to another case which has also been, I hope, added to the bundle referring to the Cinematographic (Amendment) Act 1982, and whether or not the meaning could be arrived at by reference to the Cinematographic (Safety) Regulations 1955.

Lord Browne-Wilkinson said,

> "Although there are occasions on which regulations can be used as an aid to construction of the Act under which they are made that is only where the regulations are roughly contemporaneous with the Act being construed. [This is the comment made by Bennion] The latter qualification seems doubtful. Laws, J. said that a statutory instrument 'may be prayed in aid to construe main legislation, where it is clear that the two are intended to form an overall code'. he went on to say that it is immaterial form this point of view that the statutory instrument may yet be struck down by a negative resolution in Parliament".

Now, we say that that lays out in principle the point that we make - which is that the 2004 Rules were obviously contemporaneous in that they were contemplated by the very Act itself in s.193(1). They were laid down contemporaneously and it can be used therefore under this principle, given that they were all part of the legislative intention at the time in construing s.193(10). How, we do not say that it amends it. We do not say that Rule 3 in any way can be used as a means of, if you like, widening the scope of s.193(10) did not already, but we do say that in considering and construing the width of s.193(10) you are entitled to have regard to the rules in a matter of construction.

I think probably in fairness, because this is not necessarily a straight forward point, I ought to take you very briefly to the other two authorities that I referred to, namely, *Hanlon* and *The British Amusement Catering* case. The *Hanlon* case is at tab 11 in the bundle. It was quite a complicated case on the legal aid charge and how it operated vis-à-vis the Matrimonial Causes Act 1973 and how a charge the Legal Aid Authority actually had over property actually bit in favour of the Law Society as it then was, of course pre-dating the Legal Aid Board. I think it is probably not necessary to say anything more about the facts

but go straight to p.193 at G where Lord Lowry sets out his study of the cases and the leading textbooks, although at that stage **Bennion** obviously was not regarded as a leading textbook – I do not think it had been written by then to be fair, and he lays out the following propositions. These propositions are quite clearly not propositions that you have to fall within all six of them in order to qualify, they are separate propositions as to when it is right to actually use the subordinate legislation in construing an act.

> "(1) Subordinate legislation may be used in order to construe the parent Act, but only6 where power is given to amend the Act by regulations or where the meaning of the Act is ambiguous."

That, we say, is obviously in the case where effectively power has been given by Parliament for the Statute to essentially be amended by the regulations, and so obviously is not directly applicable here.

> "(2) Regulations made under the Act provide a Parliamentary or administrative *contemporanea exposition* of the Act but do not decide or control its meaning: to allow this would be to substitute the rule-making authority for the judges as interpreter and would disregard the possibility that regulation relied on was misconceived or *ultra vires*."

The next two are particularly important.

> "(3) Regulations which are consistent with a certain interpretation of the Act tend to confirm that interpretation.
>
> (4) Where the Act provides a framework built on by contemporaneously prepared regulations, the latter may be a reliable guide to the meaning of the former."

We say with both of these instances – (3) and (4) – that is precisely the situation we are in here. Then:

> "(5) The regulations are a clear guide, and may be decisive, when they are made in pursuance of a power to modify the Act, particularly if they come into cooperation on the same day as the Act which they modify.
>
> (6) Clear guidance may also be obtained from regulations which are to have effect as if enacted by the parent Act."

So there are six propositions, and then if I can ask you to turn on to tab 21, which is the *British Amusement Catering Trades Association v Westminster City Council* case, which was all about the British Cinematograph Amendment Act 1982. One can see from the headnote there:

> "Allowing the appeal, that in the context of the Cinematograph Act 1909, as amended, and the regulations made thereunder, an exhibition meant a show to an audience and not a display of moving objects on the screen of a video game."

So in other words they were using the regulations as a guide to this, and that can indeed be seen if one goes on to p.157H in the decision of Lord Griffiths where he sets out that in arriving at the conclusion he has reached he has, if one goes over the page, been assisted by a consideration of the content of the Regulations: "I cannot agree with Balcombe LJ when he said …" and that is in the court below:

> "it is not permissible to construe the Act of 1982 by reference to the regulations made under the Act of 1952."

He then sets out some case law, and particularly he refers to *Hanlon v Law Society*. Lord Scarman and Lord Lowry discussed it and then Lord Lowry, and that is the passage we were looking at earlier:

> "… identified a number of circumstances in which subordinate legislation may be used as an aid to the interpretation of the parent Act. Two of the instances given by Lord Lowry are of particular relevance.
>
>> 'Regulations which are consistent with a certain interpretation of the Act tend to confirm that interpretation. Where the Act provides a framework built on by contemporaneously prepared regulations the latter may be a reliable guide to the meaning of the former'."

Then in the next paragraph he goes on to say why they are particularly helpful in the circumstances of that case.

Finally, I do not think we necessarily need to look at it in any detail, but the next case behind tab 22 *Scottish Newcastle plc v Raguz* again that is a case of the House of Lords. The principal point that I think I would draw your attention to is at p.2504. Lord Scott, when considering the issue of whether or not various landlord and tenant notices which were imposd by regulations could be used as a guide, and he says at 2504 C – this is about the regulations:

> "They were, however, made in November 1995, more or less at the same time as the Act, and can, in my opinion, form part of the contextual background against which section 17 should be construed"

And there he cites, with apparent authority, the passage in **Bennion** that I have just referred you to.

1 I am sorry if that is rather a long digression, sir, but I thought it probably would be sensible
2 that we saw what the correct position was.
3 THE CHAIRMAN: No, that was very helpful and I asked for it.
4 MR. READ: I think I would have got there in the end in any event. Can I then return to
5 s.193(10)? What obviously we say is that the wording itself, in particular a matter relating
6 to the imposition is a wide word, meaning, the very fact that the Act itself contemplates a
7 smaller subset will be taken into account by the Rules, and it is not every matter that falls
8 within s.193(10) that necessarily leads to a reference to the Competition Commission, it also
9 has to go through the further hurdle of fitting within the subset within Rule 3. That fact, we
10 say, adds to the weight that you actually do not have give any form of restrictive meaning to
11 s.193(10).
12 The third point that I make is that obviously in construing what that actually means, a matter
13 relating to the imposition of any kind of price control by SMP Condition you have to have
14 some regard to what the rules themselves actually say.
15 Having made those three points I can now move on to the rules themselves, and in particular
16 rule 3.
17 THE CHAIRMAN: Just pausing there, the SMP conditions referred to in subsection 10 are those
18 under the three sections listed in (a), (b) and (c), which is by no means all the provisions
19 which can be used to impose SMP conditions.
20 MR. READ: Absolutely.
21 THE CHAIRMAN: So there is a subset there
22 MR. READ: Yes, perhaps I have been jumping too far ahead by not actually going through the
23 specific instances. I do not think there is any doubt here though that we are looking at
24 s.87(9) in respect of the cost orientation condition imposed in the Leased Line Market
25 Review in 2004. So, in other words, if the imposition of a test like DSAC was truly an
26 adjunct to that cost orientation condition in 2004, which we say in Ofcom's case they do say
27 it is an adjunct, but we say it was never an adjunct because it was never clear prior to that --
28 If that is the case then it plainly falls within (a) of s.193(10), and therefore although I agree
29 with you, sir, that the width of s.193(10) is reduced to the extent that it has to be one of
30 those matters in (a), (b), and (c), that does not take the matter any further in this instance
31 because we are plainly looking at (a) if the point I am making about it being an adjunct to
32 the original 2004 condition is right.
33 If one then turns to the Rules themselves, it is obviously Rule 3(1) that is important in this
34 assessment. We say that the wording of Rule 3 -- there is nothing inherent in that that

1 draws any form of neat distinction between, on the one hand, the imposition/compliance test
2 that Ofcom says applies to this or, on the other hand, any distinction between, if you like, an
3 appeal from a market review *per se* and an appeal from a dispute resolution process where
4 what is in issue is what exactly was the adjunct that was imposed when the costs orientation
5 condition was originally imposed.
6 The wording of Rule 3(1), we say, is relatively wide. So, if that is relatively wide we say
7 that it necessarily means that s.193(10) is relatively wide as well. Put another way, it is not
8 to be given an unduly restrictive meaning. In particular, it deals with the principles applied
9 in setting the condition which do not, in our respectful submission, just mean those that are
10 explicitly stated in the condition itself, but which underlie the assumptions that were made
11 with that price condition. (b) is, if anything, more capable of applying to the situation we
12 have got here because it is not simply dealing with the headline principles, but it is also
13 dealing with the methods applied or calculation used, or data used in determining that price
14 control. What we would say is that if you have a method that is an adjunct to the 2004
15 condition, then it falls bang within that meaning of s.3(1)(b).
16 Finally 3(c) I do not think is necessarily particularly applicable here, although again there is
17 nothing that overtly suggests that in fact it has any form of restricted meaning into what it
18 has actually to apply to. So, what we say is that these are wide words, and that it is Ofcom
19 who effectively have to say that you have to cut it down by, in essence, adding words to it
20 to make it clear that it must necessarily relate temporally to the setting of the price
21 condition, but effectively excluding anything that might ever go with it. So, if one accepts
22 that the DSAC test is an adjunct to the 2004 cost orientation obligation, it necessarily means
23 that in fact you have to go wider and say, "Unless it is actually that condition yourself that
24 you are appealing from the market review", then thereafter you cannot challenge it. There
25 is nothing within that regulation there that suggests that you have to artificially restrict the
26 principle, or the methodology, to meaning something that was effectively explicitly stated
27 within the cost orientation obligation itself. That is not really that surprising because, of
28 course, what it is obviously looking at, and certainly when it is looking at the principles and
29 the methodology, is it is looking at what led to, and underlay, the imposition of that
30 condition.
31 If the condition itself has, as a necessary adjunct, that it is being applied by referenced to a
32 DSAC test, then that plainly is part of the principle or the methodology that went behind the
33 setting of the condition in the first place.

1 THE CHAIRMAN: Looking at 3(1)(c), just so that I understand what its purpose is, that is really
2 where one would say. "This is a draft of our price control. What do you think?" It is as
3 wide as that, is it not? It is asking the Competition Commission effectively to comment on
4 price control conditions that have been formulated and really inviting us to say, "Does it
5 think they are good, bad, or indifferent?"
6 MR. READ: Yes. That really is in the context of what the Competition Commission is there to
7 do in any event, which is to effectively look, as we apprehend it, at the effects on the market
8 and the way that the methodology and principles have been derived, and to see the general
9 effect that the imposition of such a provision will actually have. The core point that I want
10 to derive from that rule is that there is nothing inherent within it that says it has to be given
11 the restricted meaning that Ofcom now indicate.
12 I am conscious I do not want to take too much time. I am afraid I am rather pointing out
13 what the problems are without necessarily giving any answers. The final point that I do
14 want to actually make clear is that it is suggested that if BT were to be correct, it is difficult
15 to conceive of any contentious issue concerning compliance with an SMP condition that
16 would not have been referred to the Competition Commission. That is a point that Ofcom
17 make in para. 26 of their skeleton argument. Now, we say that this comes back to where we
18 started, which is, Well, the real problem is the way that Ofcom have chosen to use the
19 dispute resolution process as a compliance investigation and which gives rise to the problem
20 in the first place. This problem is very unlikely to actually arise if the process was being
21 used either as a matter of jurisdiction or application in the way that BT says it should, which
22 is to decide what a fair price is, going forward, or the fair terms and conditions going
23 forward - not to engage in this historic cost compliance investigation which Ofcom
24 embarked upon. So, if there is a problem with there being wider referrals to the
25 Competition Commission as a result, it really comes back to the width that Ofcom have
26 actually imposed in the form of the dispute resolution process itself.
27 THE CHAIRMAN: Why is the historical element relevant to that? I mean, even if one said, "We
28 are adopting an entirely forward-looking approach - for the future it is DSAC and nothing
29 else. We cannot look back", assuming that were right -- You would still have the
30 complexity and the need to involve the Competition Commission.
31 MR. READ: That is right - if that were to be done in that particular method. But if, as BT
32 submits, really what should be going on here is setting a fair and reasonable price going
33 forward. Then obviously if one were to say: "I am now imposing a rule that cost orientation
34 must necessarily be DSAC", then yes, we agree that you probably will meet the same

1 problem again. But of course that is not the way that we say that the dispute resolution
2 process should actually be used. It should be used, as indeed has been said, for example, in
3 the *TRD* appeal judgment back in 2008, that effectively what you are doing is fixing a fair
4 and reasonable price going forward, and not linking it necessarily to whether or not you
5 have or have not complied with your cost orientation obligation. It would be perfectly
6 possible for Ofcom to do that without the rigid reliance on DSAC, but I agree with the point
7 you are making, sir, it does not always necessarily follow that simply because it is an
8 historic compliance issue or – I will put that another way – if it were focused at the point
9 that a challenge is made to the prices there may well have to be some consideration
10 depending on the way that Ofcom actually deal with the matter. There may have to be an
11 investigation if it is set by a rigid determination according to DSAC.
12 THE CHAIRMAN: Are you saying that a fair and reasonable price going forward can never be
13 determined by reference to a single rule. Is that the nub of your point?
14 MR. READ: Probably that is going into areas that perhaps we need to deal with in October. But I
15 think the point is this, we say that Ofcom is wrong to have applied DSAC in the way it did,
16 to use their phrase " a very significant consideration", or save for exceptional reasons prices
17 must be at or below DSAC. We say that was inherently wrong and that if you set a fair
18 price you would not necessarily do it by reference to that and if you wanted to do that you
19 would need to impose a rule or make a modification to the existing SMP condition in order
20 to do that.
21 You will appreciate, and I think it is flagged up in the skeleton argument, that one of the
22 issues that is bubbling away here below the surface is whether or not this is a rule, as we say
23 it is, that has been retrospectively imposed or, whether or not (as Ofcom claims) it is
24 something that is not a rule but has been around since 1997.
25 Ofcom in fact in their skeleton argument do actually make a concession which we think is
26 quite useful in illustrating the point, which is that if one looks at para. 30(ii) of Ofcom's
27 skeleton argument they say this:
28 "First, Ofcom rejects entirely that there was the introduction of a new rule under
29 section 87(9) or a modification under section 47."
30 So there is a line there.
31 "Second, in any event, BT's case is that if there was such a rule or modification it
32 was unauthorised by the relevant statutory provisions."
33 We agree with that.

> "If that is true, then the relevant matters would not constitute price control matters because under section 193(10) of the Act there is only a price control matter where the setting of the relevant SMP Condition is in fact authorised by section 87(9) of the Act. Simply put, irrespective of whether it is Ofcom that is right or BT that is right on this issue, the matters identified cannot possibly constitute specified price control matters."

Now, that is the first time that we have actually seen that point being so clearly made, but it is one that actually demonstrates the core problems in actually trying to tease out what exactly is a price control matter and what is not a price control matter, because obviously BT says you have imposed a rule, Ofcom says "No, we have not", even if that issue is decided in BT's favour, it still does not result in a reference to the CC for the very point that Ofcom itself has conceded.

So the suggestion, and this is what I was originally dealing with in Ofcom's argument, that it is difficult to conceive of any contentious issue concerning compliance with an SMP condition that would not have been referred to the CC, well that does not necessarily follow for the very reasons that is actually there, and it goes back to the point that you were making, sir, about whether or not you would have to have the reference to the CC in a case where Ofcom imposed DSAC. If they impose it as a DSAC and a rule going forward then the same point we say would be there and that it would not inevitably need a reference to the Competition Commission in the first place.

Sir, those are the submissions I want to make. We have obviously drafted three possible questions. I do emphasise that they are "possible" because we are back to this problem that we perceive in all of this that ultimately there is so much that is in issue between the parties and in particular the use of the dispute resolution process and what it is precisely that Ofcom has done, whether it has imposed a rule or whatever that it makes it very difficult to necessarily say that these are questions that must be referred to the Competition Commission.

I think the view that BT says that these may be issues that need to be referred ultimately, but we do not see at this stage that the Tribunal could make an order in these terms because there are so many issues that are there to be resolved before one can specifically say it is the principle or methodology that is the adjunct to the 2004 cost orientation that necessarily is in operation here.

That probably does not help the Tribunal necessarily in seeing a way forward, but I think the way that BT would envisage it is that the power of the Tribunal to refer is plainly a

1 power that exists at any time during the course of the proceedings between the Tribunal, that
2 can be seen from the Rules themselves, which are at tab 7 if anyone needs the reference.
3 THE CHAIRMAN: No, but you would say power and obligation to refer.
4 MR. READ: Yes, an obligation, but the point is that the obligation only arises when the proper
5 questions can be identified, and the point I was going to make was that rule 3(6) makes it
6 quite clear the Tribunal may make a reference to the Commission under para. 5 at any time
7 before it delivers its decision. So in other words, it is not impossible to see a situation
8 where one gets to the October hearing, the Tribunal is then in a position to formulate when
9 it sees the wood for the trees if I can put it like that and at that stage the matter will come
10 into sharp focus or not.
11 So to summarise it, BT finds this a troubling issue because although Ofcom's solution looks
12 very simple BT does not think it is as simple as it is portrayed, but it is very difficult at this
13 stage necessarily to identify what questions would need to be referred for the simple reason
14 that until a number of the sub-issues are properly considered and, if you like, the wood is
15 seen for the trees, that it is difficult to actually formulate necessarily the question that needs
16 to be referred. That is all I want to say on that matter unless there is anything further that
17 you wanted.
18 THE CHAIRMAN: No, thank you, that was very helpful.
19 MR. READ: In which case I will turn straight away to the second preliminary issue which BT
20 clearly does take a more polemic view on and that is the issue about jurisdiction of the
21 dispute resolution process.
22 Can I make four preliminary points? The first is that it seems to be accepted by the parties
23 that issue (b) is looking only at the question of jurisdiction. BT flagged this issue up in its
24 skeleton argument, no one seems to have suggested otherwise and it looks as though this
25 question must necessarily turn solely on the issue of jurisdiction.
26 That does mean, unfortunately, that the majority of the review of the dispute resolution
27 process and whether Ofcom was right to apply it in the way it did, will have to be left over
28 to the main hearing. It means also that a number of the arguments that I am now going to
29 advance today will end up being advanced again, if we get to the main hearing, on the basis
30 of even if Ofcom had jurisdiction to do it this way it was a totally wrong application of the
31 powers that it actually had and it should not have applied them in that way.
32 In particular the very fact of s.94 to s.104 we say is an important point for gauging the
33 statutory construction of s.185 to s.190, the very existence of those provisions, but – and I
34 think Ofcom itself accepts this – even assuming that that does not persuade you on the

jurisdiction point it will still come back into focus when one is dealing with the question of the application, and likewise we say the points we make about this being a swift and basic process will also come into play when one turns to the question of application.

The second point I wish to make is that there is a very stark contrast between the rival constructions and it is very important to see what they are. Effectively, Ofcom says that Parliament's intention was to give Ofcom a power to deal with historic investigations into whether or not BT had complied with the respective cost orientation obligations and that therefore it could conduct, as part of the dispute resolution process, a cost compliance investigation. That is specifically stated in Ofcom's defence, it was picked up, I think, in para. 29 of BT's skeleton argument, and I do not think there has been any dispute about that. Ofcom say that there is a power to determine whether or not BT had historically complied with the respective cost orientation conditions.

On the other hand, BT says that what s.185 to s.190 was all about was effectively a power to resolve disputes about terms and conditions going forward. It was relating to a challenge to the terms and conditions about the current or proposed future service on offer, and not some form of compliance investigation leading ultimately to a reimbursement for historic events many years earlier.

If Ofcom is right, we say that that necessarily infers that Parliament must have intended that a summary procedure, by which I mean the dispute resolution process was available to deal with breaches of the SMP condition despite having set out a detailed code for dealing with compliance issues in s.95 to s.104 including, I hasten to add the ability of third parties to gain compensation, because that is what s.104 is explicitly there dealing with. So that is the stark position between the rival contentions.

The third point I want to make absolutely clear is made in the letter yesterday, that BT certainly has not abandoned its pleaded case as Ofcom asserts at several places in its skeleton argument. We cannot help but note that the interveners did not suggest it in their skeleton argument, and BT certainly has not abandoned its case. It may be that Ofcom never clearly understood BT's case, and that in itself, we say, raises serious concerns as to whether Ofcom really understood the points that BT was making during the dispute resolution process itself. But, as I say, BT's case has always remained as it has been.

What was clear, we say, before the Notice of Appeal, and before that when we were putting in the respective submissions to Ofcom, is that BT was comparing a backward-looking historic dispute process in comparison with a current or prospective dispute as exemplified by the termination rates appeal. When BT talked about a current or prospective dispute, it

was always against the framework of the TRD appeal. So, therefore, the points that we make in our skeleton argument, listing out, for example, the time periods within the TRD appeal and how we say they actually apply, that should all have been absolutely obvious to anyone who properly read the pleading in the first place because it was made clear that that is what we meant by a prospective challenge, a prospective dispute.

Can I, just to demonstrate this, take you to one part of BT's Notice of Appeal which should be in Bundle BT/1. If I can just ask you to look at p.11 on the Amended Notice of Appeal -- When I refer to the Notice of Appeal, I am referring to the Amended Notice of Appeal. If one goes to p.11 one can look at para. 21:

> "The disputes in this case are between BT and each of the following CPs ... In contrast to the situation in other disputes that have been referred to Ofcom and then appealed (e.g. the TRD disputes), the PPC Disputes are retrospective in nature. Rather than challenging the parties' inability to negotiate prices that should apply going forward, the Disputing CPs are challenging prices that were agreed and paid pursuant to the terms of the PPC Agreement over four years previously".

If one looks down to Footnote 11, it says in terms,

> "The TRD disputes were prospective in that they concerned changes to mobile termination rates that the MNOs had sought to introduce through OCCNs as a variation to the prevailing rates in force under the SIA. In particular, BT challenged the proposed increases proposed by T-Mobile and O2 whereas T-Mobile, Vodafone and H3G challenged BT's proposals to reduce their MCT rates going forward : see TRD judgment at paras. 44 to 46".

Now, I do not think we need to turn those paragraphs up, but they actually express in greater detail the chronology that we have set out in the skeleton argument at paras. 33 and 34.

So, it is quite clear, in our respectful submission that what we were calling prospective disputes was precisely what we are now calling prospective disputes and the contrast was with historic disputes.

The reason we went through the process of setting that out in a bit more detail in the skeleton argument is because it did appear to us that the points being made on the cases referred to in the defence actually was looking at something that could be categorised as a prospective dispute under our terminology, but was in essence retrospective in that it was going back to the date that the challenge was first actually being made. For that reason

1 alone we went through the clarification in the skeleton argument in order to make sure that
2 there was no issue going on about that.
3 However, I cannot leave this without actually taking you to the BT1 file again, and to go to
4 Tab 7, the original response that BT put in to the requests for a determination by the
5 interveners in October 2008. If I can ask you to look at paras. 36 of that document, there it
6 sets out in some detail the distinctions that BT was drawing with the TRD judgment. If one
7 looks at para. 37,
8 "First, in the TRD case, the CAT was dealing with a prospective price
9 adjustment".
10 Then, again, it sets out the time period.
11 "The previously agreed and fixed prices effectively had lapsed and the parties
12 needed the new prospective prices to be fixed, in the absence of agreement ---"
13 And so it goes on. There were simply no pre-prices going forward from the dates that the
14 OCCNs took effect.
15 Here we say in para. 38,
16 "In stark contrast, there were very clear prices in place for PPCs between BT and
17 the claiming parties."
18 That may be an issue between us and the interveners, but that was the point that was being
19 made and that was the distinction that was being put forward very clearly by BT at the time.
20 So, the distinction we have drawn between prospective price disputes which can, if one
21 wants to use the terminology, be referred to in part as retrospective, because it goes back to
22 the period prior to Ofcom having either received the dispute or having actually resolved it,
23 that it was always very clear what exactly we were saying. It is impossible to think
24 otherwise if one actually analyses the TRD judgment in some detail.
25 MISS ROSE: I am so sorry to interrupt Mr. Read, and I am sure it is my fault. But, I am now
26 confused as to exactly what his definition is of historic disputes and prospective disputes. I
27 had understood when I read the Notice of Appeal that he was drawing the distinction that is
28 referred to in the response that he has just shown to the Tribunal - namely, the distinction
29 between a situation where the parties are unable to agree a price going forward to refer it to
30 Ofcom and a situation where the dispute is about prices that have been previously, as he
31 would put it, agreed and paid. But, as I understand the case he is mounting in his skeleton
32 argument for this hearing, he is now making a different distinction, which is that, yes, you
33 could have a dispute about the price which has previously been agreed and paid to be
34 determined by Ofcom, but, as I understood his case, it was only as from the date on which

1 one party had first questioned whether that price was compliant with the SMP condition. I
2 understood that to be the case he was running today. But, he now seems to be going back
3 to the case that was in the original notice of appeal. So, I would really welcome some
4 clarification.
5 THE CHAIRMAN: I think it is para. 34 of your skeleton, Mr. Read, that is causing a point to be
6 made.
7 MR. READ: Let me start by saying that if you look at the facts of the TRD appeal , there was a
8 very clear point where the prices were challenged going forward. That was when these
9 OCCNs were served by the parties in 2006. They are set out in para. 3 of the skeleton
10 argument. So, in other words, you had a point where the prices were being challenged.
11 That is that BT means by a prospective price dispute. It does not always have to be about
12 price, but if we just call it a price dispute for the time being. That is the point by which BT
13 defines a prospective dispute. That has always been the position. What BT is trying to
14 make clear in para. 34 ----
15 THE CHAIRMAN: But it is going forward in para. 34 when a challenge to the prices had first
16 been made. That is the line you are drawing.
17 MR. READ: Yes. Yes. That is always the line we have been drawing. That is always what we
18 have said from the TRD appeal - because in the TRD appeal there is not the slightest --
19 Maybe I need to go into the facts of the TRD appeal in greater detail, but there was a very
20 clear line that was drawn there about, "There was the dispute. There was the OCCN served"
21 and then within a very short timeframe you either had to accept or reject that. So, there was
22 a very clear point in time where the dispute arose. There could not be any real doubt about
23 it. That was a dispute about the price going forward from that date when the challenge was
24 made to the price. That is what BT has always meant by a prospective price dispute.
25 THE CHAIRMAN: Just pausing there. Are there not two questions there? There is the question
26 of when the dispute manifests itself, but then there is also - and I am not sure I quite see the
27 clear line you are trying to draw - what the dispute is about.
28 MR READ: I absolutely agree that there is a difference between when the challenge arises and
29 what the challenge may be about. That is actually quite important when one comes to look
30 at the wording of s.185(1) because it is not simply about a challenge - it is about a challenge
31 in respect of ongoing, we say, network access.
32 So, there is a very clear line between the TRD appeals, when there was challenge about the
33 price going forward, and this case where there is not a challenge about the price going
34 forward that affects the network access that is going on, but is about a price that is suddenly

said to now be in dispute several years earlier. So, in other words, to take the COLT example ----

THE CHAIRMAN: Let me ask you an example. Suppose a CP identifies that it may be being overcharged and investigates the matter, looks into it, and comes to the conclusion that it is indeed being overcharged by BT and raises that with BT and says, "Hey! You're overcharging me". It may be at that point there is a dispute. Maybe not. It depends how it is formulated. But, let us say there is a dispute at that point. There is obviously a problem going forward, but what about the overcharges in the past?

MR. READ: Obviously it would depend upon the nature of the overcharge in the past because if, in effect, BT has overcharged because it is in breach of a cost orientation obligation, there is a very straightforward way of dealing with that, either if you are Ofcom, s.94 and onwards, or, if you are a third party, s.104. The Act has laid down a very clear procedure for dealing with that. So, there is no question about the intervener or Ofcom not having some remedy to deal with it. The central question is whether or not, as a matter of statutory construction one can say that the challenge to something that happened years in the past can necessarily be used in the dispute resolution process.

Perhaps I can try and give an example of this. Let me first of all take the example of Colt. I do not think I need to turn the pages up, but, as you appreciate, the scope of the dispute was for the period between 24th June, 2004 and 30th September, 2008. If that needs a reference, it is in the final determination at para. 1.5. Colt first raised an issue with BT on 19th September, 2008, i.e. eleven days before the end of the period in question. The deadline for a response given to BT was after the end of the scope of the dispute on 3rd October, 2008. Again, if one needs that information, one can get it from Annex 9 of the final determination at p.204. Ofcom then proceeded to determine repayment from 1st April, 2005 up to 30th September, 2008. Again, if one needs the reference, that is Annex 6, p.189.

That brings into sharp focus, we say, what is a core element of both s.185(1) and the Common Regulatory Framework, and the other factors that one can put together in the Act of, "Is the dispute resolution process really intended to effectively allow a party to go back in time over a period when there never really is any question of it affecting the facilities going forward. Perhaps I can give another illustration of what exactly the argument being put forward by Ofcom leads to.

THE CHAIRMAN: Can I just ask you this, you say "going back years", suppose Colt had simply gone back six weeks, are you saying there there is a jurisdictional question which means that Ofcom cannot do that and must simply look at terms going forward?

1 MR. READ: In essence we say that is the conclusion you draw from the Act itself, because if
2 you do not you end up with even worse situations that can arise because the whole process
3 is so open. Effectively, if you say the dispute about network access can be historic it really
4 has virtually no boundary whatsoever.
5 THE CHAIRMAN: Right, so you are drawing an extremely bright line and that bright line is
6 from the date of the dispute?
7 MR. READ: Yes, there is a separate issue relating to all of this that when the “dispute” actually
8 arises, and we recognise that there may be some instances where Ofcom has to take a view
9 about that. So, for example, if one party said “I think you are overcharging me but not
10 giving any substance to it”, and six weeks later it then wrote another letter saying “I think
11 you are overcharging because of this, this and this”, there may be some debate about
12 whether it is the earlier six week period or the later period.
13 But the obverse of that is to take the other example: “What happens if Ofcom was actually
14 right about this?” You can postulate quite horrendous, in our respectful submission,
15 scenarios to all of this.
16 For example, supposing you have a communications provider who has been providing
17 regulated service X from BT to obtain network access so it falls neatly within s.185, and
18 then after several years that CP stops buying service X from BT but obtains it from an other
19 party. Two years later he comes back to BT because he has fallen out with the other
20 provider and requests the service from BT again. BT is prepared to offer that service at
21 price Z, which everyone accepts is at that point the true commercial price.
22 However, A, the communications provider, then informs BT that it is only going to accept
23 price Z if BT repays in full the amount it says BT has over charged it in the period over two
24 years previously because, for example, it claims that BT breached its cost orientation
25 condition in respect of that particular service, and when BT refuses to make such a
26 repayment A says: “I have tried to contract with BT going forward, but it refuses to meet
27 my demands that it repay this overpayment, I ask you, Ofcom, to rule on the dispute.”
28 There is no bright line between that example and this, unless you take BT’s approach, and
29 you say jurisdictionally the dispute resolution process must have been intended to
30 something going forward.
31 THE CHAIRMAN: You have anticipated a question that I think I had for Mr. Saini, but I will
32 raise it now. It is really what happens if a party sits on a dispute without raising it or
33 seeking to resolve it for a long time before seeking to have the matter referred to Ofcom, let

1 us say it sits on it for seven years, can Ofcom then deal with it? You are saying the only
2 answer ----
3 MR. READ: The only answer is plainly yes on the view that is being taken, because although it
4 may be suggested there are other ways of dealing with that, etc, we say it runs completely
5 contrary to what was envisaged, when you look at the Common Regulatory Framework, and
6 when you look at the other provisions in the Act, and s.185 itself.
7 My Junior is actually making a point, taking us back to the facts of the TRD appeal. The
8 argument in the TRD appeal was about the charge for blended rate, which effectively meant
9 a mixed rate of 2G and 3G, even though only 2G services were being provided. Vodafone
10 in that case had been charging that unbeknown to the parties since 2004, but the dispute
11 only crystallised in 2006, but no one in that particular instance suggested that in fact anyone
12 should be reclaiming for the earlier period between 2004 and 2006, and it rather illustrates
13 the point that you have just made that on Ofcom's reading it would be perfectly possible,
14 probably even now for BT to turn around and say: "We have been overcharged for that
15 period and want to raise a dispute."
16 I hope it is now absolutely clear what we are saying. We say that that has always been clear
17 because we have always drawn the distinction about what a prospective price dispute is by
18 reference to the TRD appeal where the lines were very clear.
19 The only reason that we entered into this discussion about true historic is because, as far as
20 the facts of the TRD appeal actually were, what Ofcom was it awarded compensation back
21 to the time that that challenge to the price was first raised. It is possible to talk about that
22 being a "retrospective" payment. So we wanted to codify the language we were using to
23 make sure that instead of using "retrospective" where you might have an ambiguity over
24 whether it was the period back to when the challenge first arose, or whether by
25 "retrospective" one meant going back years earlier than when the dispute was first put
26 forward. That is all we were trying to do in the skeleton argument, and in many respects I
27 perhaps wish we had not embarked upon it, but I hope it is now clear to the Tribunal what
28 exactly it is we are talking about.
29 Can I make one final point about this issue on the dispute resolution process before I
30 embark in looking in a bit more detail about the regulatory provisions, and that is this: it is
31 very important, when one comes to a consideration of each of the cases that are being relied
32 upon, and there are three of them, to recognise that all three of those cases were not dealing
33 with what BT has termed in its skeleton argument "the true historic dispute". So when one
34 sees words like "past" and "retrospective" in the context of those cases, it does not mean the

true historic dispute, to use that phrase, that BT is now putting before the Tribunal in this case. In all the cases they were about effectively prices going forward – what we call "prospective prices" – albeit that there may have been some discussion about what happens looking backwards.

Perhaps I can just illustrate the danger in leaping upon a *dicta* in a specific case and assuming that it must necessarily mean what Ofcom are contending for, without actually really doing a detailed analysis of what is involved. I can probably do this by taking you to the reply because it is set out in BT's reply. It is BT4, tab 1. Can I just ask you to look at para.57. One can see there the submission that was being put forward by Ofcom in *Vodafone & Ors. v. Ofcom*, that the prime focus in a dispute resolution should be about solving disputes going forward not turning itself into some surrogate court to resolve issues about accrued private damages claims.

I do not put that forward to make any point other than this: that if you are going to analyse the cases and leap upon *dicta* in those cases then you really do have to dig deep, very dip, into what it actually was that was being discussed and argued, because in each of the cases that Ofcom and the interveners have relied upon the issues involved in those cases did not involve the issue that is before the Tribunal now. We have dealt with those cases. I am not going to ask you to look at them. We have dealt with the observations about *T-Mobile v. Ofcom* in [2008] 12 Competition Appeal Tribunal, which of course is TRD appeal itself. We have dealt with that in paras.33 and 34 of our skeleton argument. We have dealt with the Court of Appeal case in *Hutchison 3G v. Ofcom*, which is at tab 18 in the bundle, at para.75 to 78 in our skeleton argument. We have dealt with *Orange v. Ofcom* on the preliminary issue, which is tab 14 of the authorities bundle, at footnote 70 and paras.71 to 72 of our skeleton argument.

In short, the point that you are being asked to look at is the use of historical compliance investigations in the dispute resolution process, and that is not one that has ever previously had to be assessed.

Can I now take you to the approach to the construction of s.185(1) in the dispute resolution process. The first point that I want to make is that it is trite law that one cannot interpret a provision of a statute without considering the context relating to the provision and the totality of provisions within the statute – so context and the other provisions. I do not think there is any dispute about it, but it may just be worthwhile to look at tab 9 in the authorities bundle, which is the case of *Canada Sugar Refining Company Limited*. It was a dispute about a Canadian statute in Quebec. I do not think we need to look at the issues involved in

1 any great detail, but if one turns to p.741, he makes the point half way down on the
2 highlighted passage:

3 "Every clause should be construed with reference to the context and the other
4 clauses of the Act, so as, so far as possible, to make a consistent enactment of
5 whole statute or series of statutes relating to the subject-matter."

6 It is almost a trite point of law, but it is one that is quite important when one is coming to
7 actually look at an individual provision within the Act.
8 Can I also make the second point that, of course, in the context of this case that includes
9 very much the European Common Regulatory Framework, and in particular the Framework
10 and Access Directives, in addition obviously to issues about the problems of European law.
11 That is made express in ss.3 and 4 of the Act in any event.
12 What I now propose to do is look at the context in which the statutory provisions sit before
13 turning to the specific provisions themselves. In particular, BT says that the crucial parts of
14 the context in which s.185(1) must be interpreted include, firstly, the swift and basic nature
15 of the dispute resolution process; secondly, the background in the Common Regulatory
16 Framework; and thirdly, the compliance provisions within the Act itself related to historic
17 allegations of breaches of SMP conditions, and in particular s.94 to 104.
18 Can I start, therefore, by making the point that we made in our skeleton argument that it is
19 quite clear that the dispute resolution process was intended to be a very swift and basic
20 procedure. Section 188(5) and (6), it may be worth looking very quickly at those. If they
21 are needed they are in tab 6 of the bundle, p.27. This sets out the procedures for resolving
22 the disputes and you can see from sub-clause (5), Ofcom must make the determination in no
23 more than four months after the following day (a) the decision by Ofcom that it is
24 appropriate to handle the dispute; and then (6), where it is practical for Ofcom to make
25 their determination before the end of the four month period, they must make it as soon in
26 that period as practicable. In fact, that is potentially a slight under-statement of the
27 Common Regulatory Framework actually requires, because the Common Regulatory
28 Framework, and I will take you to this in due course, talks about disputes being resolved
29 within the shortest possible timeframe. I do not want to get into a precise debate about
30 whether that has correctly translated it or not, but what it is illustrating very clearly is that it
31 was always interpreted as meaning a short and swift process.
32 This appears, we say, to be something that Ofcom has, itself, considered, because it does
33 indicate in its own guidelines, its 2004 guidelines, that there is a difference between the
34 swift and basic process of dispute resolution and a complaint about a breach of an *ex ante*

1 SMP condition. I think it is probably easiest to illustrate this by asking you to look again at
2 BT's notice of appeal. If one looks at para.48 of the notice of appeal, which is on p.22,, BT
3 has set out there Ofcom's July 2004 guidelines, where it says at para.3 about the dispute
4 resolution powers:

5 "*These powers are limited in scope and do not cover all of the subject areas within*
6 *Ofcom's remit*."

7 Then at s.2 it:

8 "*... 'discusses the difference* *<u>between a complaint and a dispute' ... 'The ex ante</u>*
9 *<u>conditions relevant for these guidelines</u> are imposed under the Communications*
10 *Act ...*

11 Paragraphs 21 and 29 ... '*There is <u>a difference between a complaint and a dispute</u>*
12 *... <u>a complaint for the purposes of these guidelines is an allegation ... a specific ex</u>*
13 *<u>ante condition has been breached</u>*."

14 So when Ofcom itself formulated the guidelines in 2004 and these have not been withdrawn
15 or amended, they, themselves, appear to have expressly acknowledged that it is a swift and
16 basic procedure.

17 That is what the Tribunal itself has previous indicated. Perhaps one can go to the
18 authorities bundle at tab 17. This is the judgment on the rates in dispute. It is the TRD
19 appeal again. It is a subsequent judgment on the specific rates. At para.5 there is some
20 discussion about what should actually happen in the judgment of the material, and the
21 Tribunal towards the end of that paragraph says:

22 "Although mindful of the importance of these issues to the parties because of the
23 large sums of money at stake, the Tribunal is concerned at the length of time that
24 has already elapsed since these disputes were referred to Ofcom. The dispute
25 resolution procedure is intended to be a rapid and relatively informal means of
26 breaking a commercial deadlock between the parties. These particular disputes
27 have, for entirely understandable reasons, already generated a large volume of
28 documentation and hard fought legal issues. The Tribunal has concluded that it is
29 time now for the rates to be set."

30 It is making the point there that it is recognised as being a rapid and relatively informal
31 means of breaking a commercial deadlock.

32 I think it is necessary in this instance to actually give a flavour of the task that Ofcom
33 undertook in this final determination. To illustrate this, I would ask you to take the first
34 volume of BT's notice of appeal, BT1, tab 3, which is the final determination. Can I ask

1 you to turn to p.73. That, I hope, should be 6.15. It sets out Ofcom's assessment and
2 conclusions on the relevant base data. I will not spend a huge amount of time looking at
3 this, but you can see what Ofcom has done from this. It has concluded that it is appropriate
4 for it to resolve the disputes using data from BT's 2007 Regulatory Financial Statements,
5 but then says in 6.16:

6 "Given the errors identified by BT in the published regulatory financial statements
7 for 2004/05, 2005/06 and 2006/07, we do not believe that this data is reliable.
8 Instead, we believe that the corrected preparation methodology used by BT when
9 preparing its 2007/08 and 2008/09 regulatory financial statements, including
10 restating certain PPC data for 2006/07, provides us with a more accurate data set.
11 Although BT did not publish restated financial statements for 2004/05 and
12 2005/06, we have obtained data for these years that was prepared on the same basis
13 as the 2007/08 financial statements.
14 In order to help us assess the accuracy of the restated 2006/07 data, which has been
15 audited by PricewaterhouseCoopers ('PWC'), we commissioned consultants
16 Analysys Mason to carry out an independent review."

17 It then goes on setting out its methodology. You can see over the page at figure 6.1 there is
18 a comparison of published DSACs with restated DSACs. Then there are various issues
19 raised by the disputing CPs, including, if one looks at para.6.31, the comparison of the
20 2004/05 revenue data with the data for subsequent years.
21 Over the page one can see a heading "Accuracy of the 2004/05 volume data", and then we
22 have various discussions about calculating trunk volumes. Over the page, p.79, figure 6.4,
23 there is a comparison of route and radial volumes and costs. If one then goes on to p.81 at
24 para.6.59, you can see that six adjustments were identified, appropriate for us to make the
25 data provided by BT and explain the impact, and they are set out. Then there are various
26 responses, including about payment terms, resilient services, ancillary services, as you can
27 see from p.82. Over the page at p.83, the appropriateness of introducing adjustments to
28 BT's data. Then, as you can see on that page, various headings where things are
29 considered, attributable costs and revenue, then on p.84, third party customer and local end
30 equipment, payment terms. Then over the page, p.85, resilient circuit, 86, trunk/distribution
31 rebalancing. Then, p.87, next generation works, 88, residual accounting adjustments. Then
32 on p.89, current cost normalisation. Then on p.91, in addition to the ones that Ofcom itself
33 proposed, there are adjustments proposed by RGL as part of the process of adjusting the
34 figures. Then, in tabulated form, there is a table setting that all out.

1 Then at p.95 we see calculations about the impact this had on the return on capital
2 expenditure and FAC.
3 Then finally at para.6.131, we get to the crunch position, which is:
4 "Having identified the adjustments that we consider should be made to BT's FAC
5 data, we need to identify how these FAC adjustments translate into adjustments to
6 DSAC."
7 Then we have another quite long section dealing with that.
8 I do not think it is necessary for me to take you in any further detail through it, but I want to
9 illustrate what was actually involved in a historic compliance dispute like this. It was a
10 lengthy, a very lengthy process. That is the inevitable effect of having a jurisdiction which
11 allows, mandates to Ofcom – because I will come back to the question that they must take
12 the dispute – the need to enquire into those provisions.
13 THE CHAIRMAN: Is that a convenient moment, Mr. Read?
14 MR. READ: That would be a convenient moment.
15 THE CHAIRMAN: We will reconvene at two o'clock.
16 (Adjourned for a short time)
17 MR. READ: Sir, before the short adjournment I was dealing with what has actually gone on in
18 terms of the effort that was put in to working out cost allocations and the like in order to
19 investigate this historic compliance dispute. We say that in such a mammoth historical
20 investigation, with a particular focus, going on a period back to 2004/2005, far from being
21 swift and basic is the antithesis of what the dispute resolution process was intended -
22 namely, to achieve a decision, a determination within the shortest possible time and, in any
23 event, save in exceptional reasons, within four months. We say that it is a necessary adjunct
24 of Ofcom saying that there is jurisdiction to use the dispute resolution process to carry out
25 such investigations, and that that in itself suggests that care has to be taken with any
26 construction of the relative sections relied upon.
27 At this stage I do want to make one point about the fact that inconvenient results militate
28 against a construction of a statute that leads to those inconvenient results. In other words,
29 if the results of a construction suggest considerable inconvenience is going to flow from it,
30 then an alternative construction that causes less inconvenience should be preferred. There is
31 authority for this proposition. I would ask you to look at **Bennion**, at Tab 20 of the
32 authorities bundle. At p.979 of the extract that you have, s.314, we see Bennion's analysis
33 of avoiding an inconvenient result. You can see from that that,

1 "The court seeks to avoid a construction that causes unjustifiable inconvenience to
2 persons who are subject to the enactment since this is unlikely to have been
3 intended by Parliament. Sometimes, however, there are overriding reasons for
4 applying such a construction - for example, where it appears that Parliament really
5 intended it, or the literal meaning is too strong".

6 Then it sets out the general presumption against absurdity and an unworkable or
7 impracticable result and inconvenience.

8 "The argument from inconvenience is a familiar one to lawyers: *argumentum ab*
9 *inconvenienti plurimum valet in lege* (an argument based on inconvenience is of
10 great weight in law)."

11 Then, it sets out a modern version which is given by Lord Shaw. I will not bother reading
12 it, but it sets out the passage there. That case, incidentally, is included in the bundle -
13 *Shannon Realties v. Ville de St. Michael*. It is actually at Tab 10. I do not think it is
14 necessary to take you to it because effectively that passage confirms what Lord Shaw
15 actually indicated in the course of that judgment.

16 We say that that brief perusal that I took you to of s.6 of the final determination shows the
17 sort of laborious process that is going to be involved in going through this historic
18 compliance investigation that Ofcom says is allowed under the jurisdiction of ss.185 to 190.
19 We say that this is exactly the sort of situation where that presumption should be applied,
20 albeit that obviously we fully accept what is said - that if the Act is so clear that its literal
21 construction must mean the inconvenient alternative, it cannot override it. But, there is a
22 presumption against it, and if there are alternative meanings one should adopt the least
23 inconvenient meaning.

24 Can I now move on to the Common Regulatory Framework which we say is another part
25 and parcel of the matters that one has to look at and consider when one is dealing with the
26 interpretation of s.185(1)? Can I ask you to go to slightly earlier in the judgments bundle
27 and look at Tab 14, which is the judgment on the preliminary issues in the *Orange Personal*
28 *Communications* appeal, CAT36. I ask you to note para. 7 and what the Tribunal said in
29 that case.

30 "It is common ground between the parties that the provisions of the Directives not
31 only require Member States to confer on national regulatory authorities the powers
32 specified but also preclude Member States form conferring any wider powers for
33 dispute resolution jurisdiction on those authorities. All the parties therefore made

1 their submissions on the basis that a dispute cannot fall within s.185 if it does not
2 also fall within one or both of those two Directive provisions".
3 That really establishes the point that the primacy for interpretation has to be the Common
4 Regulatory Framework.
5 Now, perhaps I can ask you to now turn to the Access Directive, which, if you do not have
6 it elsewhere, should be in Tab 4 of the authorities bundle. Can I ask you first to look at the
7 recitals, and in particular Recital 5 which appears on the bottom of the first page. It sets out
8 there, "In an open and competitive market, there should be no restrictions that prevent
9 undertakings from negotiating access and interconnection arrangements between
10 themselves, in particular on cross-border agreements, subject to the competing rules of the
11 Treaty. In the context of achieving a more efficient truly pan-European market, with
12 effective competition, more choice and competitive services to consumers, undertakings
13 which receive requests for access or interconnection should in principle conclude such
14 agreements on a commercial basis and negotiate in good faith".
15 So, one of the starting points with the Access Directive is the fact that there is an
16 encouragement towards negotiating agreements on a commercial basis and in good faith.
17 Recital 6 goes on to indicate that what happens where,
18 "-- there continue to be large differences in negotiating powers between
19 undertakings, where some undertakings rely on infrastructure provided by others
20 for delivery of their services, it is appropriate to establish a framework to ensure
21 that the market functions effectively. National regulatory authorities should have
22 the power to secure, where commercial negotiation fails, adequate access and
23 interconnection and interoperability of services in the interest of end-users. In
24 particular, they may ensure end-to-end connectivity by imposing proportionate
25 obligations on undertakings that control access to end-users ----"
26 And what was to happen if network operators were to restrict unreasonably end-user choice
27 for access to internet and portals, and services.
28 So, again, we say that Recital 6 remains focused on preserving adequate access. We say
29 that the wording is looking forward, when it is talking about commercial basis with good
30 faith negotiations that they are forward-looking. It is contemplating agreements going
31 forward and not arguments about what happened in the past.
32 Likewise, Recital 6, and that because it follows on from Article 5 one obviously has to read
33 these in a unified context.

1 Can I then now move on to the Articles themselves? I will start with Article 2 which
2 provides the definition of access.
3 "'access' means the making available of facilities and/or services to another
4 undertaking, under defined conditions, on either an exclusive or a non-exclusive
5 basis, for the purpose of provide electronic communications services. It covers
6 inter alia: access to network elements ...."
7 Again, it is the 'making available of facilities'. It is a present tense and we say it is a
8 forward-looking provision because that is what is contemplated by the CRF - the Common
9 Regulatory Framework - and that where you are dealing with the Access Directive you are
10 dealing with access going forward rather than disputes relating to the past. I just ask you to
11 note 'interconnection' which is effectively specified as a specific type of access in the
12 definition in Article 2(b).
13 Then, Article 3. I will not read it out. Effectively it is mirroring Recital 5 when dealing
14 with no restrictions preventing undertakings from negotiating in good faith. Article 4 sets
15 out the rights and obligations of the operators of public communication networks.
16 Finally we come to Article 5, and in particular Article 5(4), which is, we say, the impetus
17 for s.185(1). One sees at Article 5(4),
18 "With regard to access and interconnection --" So, we have seen that access and
19 interconnection are, we say, forward-looking items. "-- Member States shall
20 ensure that the national regulatory authority is empowered to intervene at its own
21 initiative where justified or, in the absence of agreement between undertakings, at
22 the request of either of the parties involved in order to secure the policy objectives
23 of Article 8 of the Directive in accordance with the provisions of this Directive
24 and the procedures referred to in Articles 6, 7, 20 and 21 of the Framework
25 Directive".
26 Can I make two preliminary points about it? The first is, as you can see, there is the
27 opportunity for regulators to carry out their own investigations. That power is mirrored in
28 the Act in s.105, but it does not concern us only for the purposes of the present preliminary
29 issue.
30 The second point that I would make is that Article 5(4) is obviously providing for a specific
31 type of dispute resolution but it is specifically cross-referenced to the procedures that are in
32 Article 20 of the Framework Directive. That is important because when one comes to look
33 at the Framework Directive one sees that the Framework Directive was dealing with a
34 different type of dispute because Article 5(4) was dealing with disputes about access and

1 interconnection whereas Article 20 in fact is dealing with something different, but the
2 procedures that are in Article 20 are expressly incorporated into the procedures envisaged
3 by Article 5(4).
4 Can I then move on to the Framework Directive itself, which is in the next tab, tab 5, and if
5 I go first to (6) and make one further point about the swift and basic procedure that we say
6 dispute resolution envisages. Article 6 is dealing with consultation and transparency
7 mechanism and, as one can see, that is except in cases falling within Articles 27.6, 20 or 21.
8 So in other words, it appears to be explicitly excluding dispute resolution in the format of
9 Article 20 of the Framework Directive from the consultation and transparency mechanism.
10 I mention that only for this purpose to say this shows the Common Regulatory Framework
11 itself was assuming a swifter and more basic process for dispute resolution than one would
12 have, for example, with market reviews and other items provided for in accordance with the
13 Directive or the other specific Directives.
14 Now, can I take you on to Article 20 which deals with dispute resolution between
15 undertakings and, as one can see from that, it is:
16 "In the event of a dispute arising in connection with obligations arising under this
17 Directive or the specific Directives between undertakings providing electronic
18 communication networks or services in a Member State, the national regulatory
19 authority concerned, shall, at the request of either party, and without prejudice to
20 the provisions of paragraph 2, issue a binding decision to resolve the dispute in the
21 shortest possible time frame …"
22 And that was the phrase I picked up earlier for saying that s.188 may not necessarily reflect
23 the urgency with which it is anticipated the dispute resolution process should be occupied.
24 Just going back, there are two points I think one makes about this. Article 20(1) is dealing
25 with a different type of dispute to Article 5(4) of the Access Directive. It is dealing with
26 disputes in connection with obligations specified arising under the Directive, or the
27 specified Directives.
28 What that would mean if one takes, for example, an end to end connectivity obligation, is
29 that if that was specified under one of the SMP conditions actually required, it would be a
30 dispute – if there was a dispute – in connection with an obligation arising under Article 20
31 of the Framework Directive within the encompass of Article 21 of the Framework
32 Directive. But that is different from the situation where you have disputes about access
33 which is dealt within Article 5(4). They are different methods, requirements, procedures,
34 for dispute resolution.

1 Now, in fact, when the draftsman of the Communications Act came along he seems to have
2 picked up on that by splitting off s.185(1) from 185(2), which is of importance when one
3 comes to consider whether their meaning between 185(1) and 185(2) is necessarily the
4 same. It is not entirely easy because you may, of course, have disputes that are about
5 network access which also involve disputes about obligations, but there is one jurisdictional
6 basis or other, or both, for it. In this case, we say Ofcom has in fact elected its jurisdictional
7 basis which is 185(1) and it cannot now come back and seek to say it was justified on a
8 different jurisdictional basis 185(2) – I will deal with that later on. But the fact that you do
9 have two different mechanisms anticipated is relevant, and those mechanisms flow from the
10 differences between Article 5(4) and Article 20.
11 Article 5(4) talks about the procedures in the Framework Directive Article 20. So in other
12 words the procedures of Article 20 are incorporated into a dispute under Article 5(4) for that
13 is different from saying they are the same sort of dispute resolution process, they come from
14 different origins.
15 One point that I should have made when looking at the Access Directive is that when one
16 looks at the provisions leading up to Article 5(4) they are grouped together in Chapter II
17 which is the general provisions, so if one looks at tab 4 one sees on the third page in, above
18 Article 3 that these are grouped together as General Provisions under Chapter II. Above
19 Article 3 there is "Chapter II General Provisions", and that includes the items that I outlined
20 to you earlier including the specific Article 5(4) which deals with access and
21 interconnection disputes. That is different from Chapter III which then goes on to deal with
22 something very different, which are the requirements to carry out market reviews and, in
23 particular the various obligations that may be imposed by a national regulatory authority
24 including obligations of transparency – Article 9, obligations of non-discrimination –Article
25 10, obligations of accounting separation – Article 11, and obligations of access to and use
26 of specific network facilities – Article 12 and Article 13 – price control and cost accounting
27 obligations.
28 The reason that I flag that up now is because one of the points that Ofcom has raised in its
29 skeleton argument is the very fact that the Access Directive itself contains these respective
30 obligations. We say that is right at one level, but it is not right to say that they are
31 necessarily impacting upon the matters that I have already dealt with because they are quite
32 clearly being dealt with in a different and separate Chapter dealing with general provisions
33 about network access.

In summary, what we say is that the central thrust of the Common Regulatory Framework is that it is focused on encouraging communication providers to negotiate prospective network access between them when the dispute resolution is there if such negotiation fails . What we say it does not contemplate is arguments about the repayment of alleged historic overpayments years previously generated by historic allegations of breaching a cost orientation obligation.

Ofcom's argument is that the dispute is not limited by reference to whether or not the dispute relates to current or prospective issues. That leads to the type of scenarios that I was outlining earlier on. Now, we say that that scenario, where you can have such historic claims being put forward, is completely inconsistent with the forward-looking nature of the CRF, and, in particular, Chapter II of the Access Directive.

Can I now turn to the third factor that we pray in aid in construing s.185 - the provision with the Act of ss.94 to 104. These, again, are set out in, I think, Tab 6 of the bundle, p.13. they basically set out, BT says, a very detailed structure, procedure, for dealing with breach of an SMP obligation. It is an explicit mechanism for any investigation relating to whether or not BT has complied with its cost-orientation obligations. That is absolutely clear from the detailed steps that are involved in this. So, for example, in s.94(1) Ofcom has to determine whether there is reasonable grounds for believing a person is contravening or has contravened a condition under s.45. They may give a notification under the section. Then it sets out what the notification in the section is. That requires also a specification of the opportunity for doing the things that are specified in subsection (3) - so, in other words, within the notice the party receiving the notice has to be told exactly what it is that he can do, and those things are making representations about the matters notified; complying with notified conditions of which he remains in contravention; and remedying the consequences of the notified contraventions. So, subsection (3) prescribes a very clear process, a very delineated process for how exactly breaches of contraventions of SMP conditions are actually to be dealt with.

If you look at s.94(10) the process itself is specifically prescribed.

> "Ofcom must not give a notification under this section in a case in which they decide that the more appropriate way of proceeding in relation to the contravention in question would be under the Competition Commission 1998 and they publish a statement to that effect in the manner as they consider appropriate".

So, it is a very carefully delineated process that is actually being set out here. That process goes on, when one turns to s.95.

1 THE CHAIRMAN: I am sure you will come to this, Mr. Read, but it is a process that is initiated
2 by Ofcom whereas the dispute resolution process is one, one might say, that is initiated by
3 the parties to the dispute.
4 MR. READ: Of course, a party may write to Ofcom saying in terms, "There has been this breach
5 of an SMP condition. We insist that you investigate this under s.94, etc., etc., and use your
6 powers, and so on, and so forth". So, there is that route there. But, as I will come on, there
7 is in fact a separate way of the CPs doing it, contained in s.104. As my very clever junior
8 has pointed out, of course, that is one of the things that was specifically provided for in the
9 Ofcom's 2004 guidelines about making a complaint in respect of breaches of SMP
10 conditions. You will remember that I took you to it earlier on in the reply. There is a
11 distinction specifically being drawn in those guidelines between dispute resolution and
12 making a complaint about breach of SMP conditions. So, obviously, Ofcom itself
13 envisaged that there would be a different opportunity for the parties to be able to deal with a
14 complaint about breach of an SMP obligation.
15 If I can perhaps just take you through a few more -- Then I will take you to s.1 which I think
16 really, at the end of the day, deals with the specific point that you have actually been
17 addressing there. So, s.95 prescribes the action which Ofcom can take if the notified party
18 does not comply with the terms of the notification. You can see that set out very clearly in
19 s.95(1) and s.95(2). Allied to that, there is a very clear power about injunction. First of all,
20 there is a duty imposed under s.95(5). Now, under s.95(6) that duty is enforceable in civil
21 proceedings by Ofcom by injunctions, specific performance or any other appropriate
22 remedy or relief.
23 Section 96 provides for penalties for contravention of conditions. I think it is worth making
24 one point at this stage: that the penalty that can be imposed is specifically circumscribed. If
25 one goes to s.97(1) one sees that that is circumscribed --
26 "The amount of a penalty imposed under s.96 is to be such amount not exceeding
27 10 percent of the turnover of the notified provider's relevant business for the
28 relevant period as Ofcom determined to be (a) appropriate and (b) proportionate to
29 the contravention in respect of it which is imposed".
30 So, there is a 10 percent cap actually provided for there.
31 Now, it is of some note - and BT makes this point (but I do not think we need to turn it up)
32 in para. 216 at p.85 of its Notice of Appeal - that in fact what Ofcom did in this case
33 amounts to effectively a fine on BT of something approaching 50 percent of the revenues in

1 the particular part of the business involved. There might be a dispute about the relevant part
2 of the business, but the point is made in para. 216 of the Notice of Appeal.
3 There are further powers contained in ss.98 to 103, including suspension of services in
4 s.100 and ultimately leading to criminal sanctions in s.103. I do not want to spend a lot of
5 time taking you through those.
6 Then we come to s.104. S.104 provides for civil liability for breach of conditions or
7 enforcement notification.
8 "The obligation of a person to comply with the conditions set under s.45 which
9 apply to him and also enforcement notification under (b) [and then under (c), the
10 conditions imposed by a direction under s.98 or s.100] shall be a duty owed to
11 every person who may be affected by a contravention of the condition or
12 requirement".
13 Now, that imposes a statutory duty for compliance with s.45 SMP conditions. Subsection
14 (2) provides that where that duty is breached, and that causes a person to sustain loss and
15 damage, then it is actionable at the suit of the person who suffers the damage. It then
16 prescribes how this shall be proceeded with. You can see that there is a defence given in
17 s.104(3) that,
18 "In proceedings brought against a person by virtue of subsection (2)(a) [that is
19 where there has been effectively a breach causing damage] it shall be a defence for
20 that person to show that he took all reasonable steps and exercised all due
21 diligence to avoid contravening the condition or requirement in question".
22 Then (4) provides that the consent of Ofcom is required for the bringing of proceedings by
23 virtue of subsection (1)(a), which would include the imposition of conditions.,
24 So, in other words, you have a very carefully delineated process within the Act itself
25 dealing for how exactly a party can recover its loss and be compensated for a breach of an
26 SMP condition. We say that in reality the statute has provided for exactly the sort of
27 situation that you were talking about earlier - that if one of the parties considers it as being a
28 breach of the cost orientation obligation, it has its remedy there. That has been prescribed
29 by Parliament. I should make a final point about it, of course s.104 is not dependent – or
30 not completely dependent – upon the provisions I have taken you to earlier on, s.94 to s.103
31 because the duty under s.104(1)(a) arises independent of any of the enforcement
32 notifications under the previous sections that I have taken you to, s.94 to s.103. The only
33 requirement would be that you would then have to get the consent of Ofcom under s.104(4)
34 because you have brought proceedings by virtue of s.104(1)(a).

1 We say it is very clear that Parliament intended a carefully delineated procedure when you
2 are dealing with alleged contraventions of SMP conditions which include a range of
3 escalating measures, various safeguards, the opportunities for parties who have suffered loss
4 to be recompensed specifically under a specific section dealing with that matter. We say
5 that that is completely alien to Parliament having ever intended that a compliance
6 investigation should be dealt with by the swift and basic procedure that is envisaged by the
7 dispute resolution process under s.185 to s.190. We say it is completely understandable if
8 you have a situation where something approaching (BT says) a 50 per cent fine is being
9 imposed on it, it is right that you should be going through the procedures that are carefully
10 circumscribed in s.94 to s.103, and that if the interveners should want to raise a damages
11 claim then they deal with it in s.104 which actually gives a statutory defence to BT under
12 s.104(3).
13 THE CHAIRMAN: I see that, but you said "fine" earlier, it is not really in this case a question of
14 a fine, is it? What Ofcom would be ordering is a payment going from BT going back to the
15 Altnets?
16 MR. READ: It is undoubtedly – if I can put it like this – a parallel to a restitutionary payment.
17 Effectively what Ofcom have sought to do is a reimbursement, and whether you call that a
18 form of restitution or whatever, it is effectively a recompense through that method and if
19 indeed the interveners can actually prove they had suffered that loss they would be entitled
20 to that under s.104 in any event, because that would be their damages.
21 THE CHAIRMAN: Yes, quite, I think the point I was making was that the penalty is something
22 of a side issue.
23 MR. READ: I understand, but perhaps I should make the point that BT says it is a genuine fine
24 because in this particular instance there is no clear evidence of the true economic loss that
25 has actually been occasioned to the interveners. Again, I do not want to get too far into that
26 because that is obviously a matter that will have to be discussed in October, or investigated
27 in October, but it is certainly the way that BT approaches it, and BT says in essence, that
28 although the way that Ofcom has dressed it up is not a fine, that is in effect what has
29 happened to BT, because Ofcom say in terms that in fact what repayment is intended to
30 achieve is an "incentive" – and that is the word they use – an incentive to BT's future
31 behaviour. Again that is a matter we will have to explore in October.
32 THE CHAIRMAN: Yes, that is a matter for October.
33 MR. READ: But that is why it is characterised by BT certainly as a fine.

1 THE CHAIRMAN: But for the purposes of argument on who is right and who is wrong on the
2 statutory construction it does seem to me that the question is much more s.104 and its
3 equivalent under the dispute resolution procedure reimbursement provisions.
4 MR. READ: Yes, s.104 but also, we say, the fact that you have a procedure that actually deals
5 with the specific investigation of a breach of compliance which, if you like, provides a route
6 that does lead to a particular fine, has to be compared with effectively what Ofcom did in
7 this case which is going through the same procedure but using the dispute resolution
8 process. Now, we can have an argument about whether it truly was a "fine" or not a fine,
9 but that is certainly what BT suggests is an anathema to the fact that Parliament has actually
10 provided specifically for such a process in s.94 to s.103 and s.104.
11 As my very able learned Junior has pointed out again there is no preclusion if the s.94
12 process is used that you cannot also use the s.104 process as well. But, the important fact is
13 that there has to be proof of damage in that particular case.
14 Can I just deal with one specific point that is raised by Ofcom in its skeleton argument, and
15 that is this: it is said about s.94, if I can just take you back to it, and I think the interveners
16 adopt this in their skeleton argument as well, that s.94 is not just contemplating historic
17 disputes because it uses the words "is contravening or has contravened". So in other words,
18 it demonstrates that there must be some form of overlap between s.94 and the dispute
19 resolution process and that proves that historic compliance was contemplated within the
20 dispute resolution process. In other words, if you have overlap there is no suggestion that
21 the overlap must be limited simply to present disputes.
22 However, we say that that really does injustice to what s.94 is actually dealing with when it
23 is talking about that a person is contravening or has contravened a condition. It is quite
24 clear in both instances that a contravention has historically taken place, it is just that in one
25 case it may be continuing whereas in another case it may have terminated.
26 We say it is a necessary adjunct to do this in order to give powers to Ofcom to deal with
27 ongoing breaches and that is quite clear from s.94(8) which provides that notification may
28 be given in more than one contravention, and given in respect of a continuing contravention.
29 So there had to be a distinction drawn between contraventions that were ongoing and
30 contraventions that had ended. But that, in our respectful submission, does not in any way
31 undermine the point that we make about s.94 to s.103 or, indeed, to s.104 because it is
32 obviously necessary to avoid a cat and mouse type situation when one party were to claim
33 that Ofcom could not deal with an ongoing breach and that is why it is explicitly
34 incorporated in to the Act. But far from detracting, we say, from the point that we make on

1 this, it actually reinforces the point that Parliament pre-suppose that s.94 would be dealing
2 with historic contraventions. You had to have some form of contravention in the first place
3 for s.94 to bite.
4 If I can round this point off by simply saying that we think that you cannot under estimate
5 the importance of s.94 to s.104 and we have mentioned in our skeleton argument at paras.
6 38 and 39, the importance that Lord Justice Richards gave in the recent *Vodafone v Ofcom*
7 case which, for your reference is in tab 19, although I do not ask that you turn it up at this
8 stage. The importance that was given to the inclusion within the Act of specific powers
9 dealing with contravention and historic cost orientation breaches. This, we respectfully
10 submit, reinforces the point that we say is already obvious, that if you have such powers
11 included they must be there for a purpose and they must have an effect on the construction
12 for the other parts of the Act.
13 So those are the three preliminary items that we say have to be taken into account when you
14 turn to s.185(1). With that in mind I would ask you to look at s.185(1) in that tab bundle at
15 tab 9. The section is specifically delineated to cases of a dispute relating to the provision of
16 network access. It is not just triggered by a dispute, it is triggered by a specific dispute
17 relating to the provision of network access. One of the difficulties we think, with Ofcom's
18 argument, is that it hangs the whole of the matter on the word "dispute" rather than the
19 actual words of the sub-section, namely "a dispute relating to the provision of network
20 access". The reason, we would submit, that 185(1) uses not just "dispute", but "dispute
21 relating to the provision of network access" can be seen from the fact that it picks up, in our
22 respectful submission, Article 5(4) of Access Directive. I will not take you back to it, but
23 you obviously saw how that was in contra-distinction to Article 20, which was dealing with
24 something different.
25 BT contends that when you are construing 185 and what is and is not within it, you have to
26 construe the whole of that phrase "a dispute relating to the provision of network access".
27 We say that when you put that alongside the other material, and particularly the Common
28 Regulatory Framework and in particular the Access Directive that leads up to Article 5(4) –
29 in other words, those Chapter II provisions I took you to earlier – clearly, in our respectful
30 submission, is concentrating on a forward looking provision of network access. We say that
31 is actually reinforced by the very word that is used in it, which is that it is using a present
32 participle relating to the provision of network access rather than a dispute related to the
33 provision of network access.

1 Both the interveners and Ofcom say that this argument proceeds on the basis that because
2 there is no express restriction in the words of s.185(1), that means that any dispute
3 whatsoever, even if it is a historic compliance dispute, is caught within the dispute
4 resolution process. I think it may be worth just illustrating this by reference to what the
5 defence itself has to say. I would ask you to look at volume DF1, tab 1, and if one turns to
6 p.25, para.82(i), where it is dealing with s.185 on its face. In sub-section (i) of that
7 paragraph it says:
8 "The ordinary meaning of the word 'dispute' extends to disagreements about rights
9 and obligations, no matter when such rights or obligations arose or were allegedly
10 breached. In short, a dispute can concern past, present, or future obligations."
11 Again we say that is wrong because it puts the focus on the word "dispute" rather than on
12 the full phrase, which is a "dispute relating to network access". Then (ii):
13 "Parliament did not intend to apply any limitation on the concept of a 'dispute' for
14 the purposes of section 185 based on the time at which the underlying right or
15 obligation arose. It would have been open to Parliament expressly to qualify the
16 jurisdiction under section 185 so as to make clear that it only extended to 'disputes
17 as to present or future obligations'. Despite carefully prescribing the classes of
18 dispute falling within the dispute resolution jurisdiction, Parliament chose not to
19 impose any time-based restriction on the basis contended for by BT."
20 Then it goes on:
21 "In the circumstances, for the dispute resolution jurisdiction to be engaged, all that
22 is required is that there be a 'dispute' falling within section 185(1) or (2)."
23 In other words, this is actually a very wide submission that is being put here. When I gave
24 the example earlier on of the communications provider who originally buys a service from
25 BT, then goes away for two years and then comes back, on Ofcom's case that falls plum
26 within the meaning of "dispute" with s.185(1), because there is no, to use that phrase,
27 "bright water line" as to when you can draw stumps on the jurisdiction. That is, in our
28 respectful submission, unbelievably wide in its effect. There is no real half measure to their
29 argument that no matter how historic our attachment to the current network access sought or
30 existing between BT and the other party, it is still within the DR jurisdiction.
31 We say that it is very clear that a simple reliance on the fact that there are not express words
32 restricting the statute can never be a complete answer to this. Can I very briefly take you
33 back to **Bennion** again to give you a specific example of this, tab 20, p.553 in the extract. It
34 is part of the comment on the code that a certain amount of common sense must be applied

1 in construing statutes, but at 553 it specifically deals with the position regarding a drafter's
2 silence:

3 "When a particular matter is not expressly dealt with in the enactment this may
4 simply be because the drafter thought that as a matter of common sense it went
5 without saying."

6 We would say that when you put it alongside the whole framework and context of the Act,
7 including the CRF, in fact, common sense would say, "Why there is a need for any express
8 words to be put in there?" It is an accepted principle of construction and we say it is one
9 that is completely apposite in this particular instance here.

10 We do pray in aid the fact that there are actually, even if one was just looking at s.185 itself,
11 clear indicators that, in fact, it is looking to the future, to prospective issues, rather than
12 historic compliance issues. One can see that, both from the point I have already made to
13 you, which is that the phrase is "relating to the provision of network access", but also, we
14 submit, from the phrase of s.185(8), and that provides that:

15 "For the purposes of this section [i.e. s.185]:
16 (a) the disputes that relate the provision of network access include disputes as
17 to the terms or conditions on which it is or may be provided in a particular case ..."

18 It does not say "the terms and conditions on which it was provided in a particular case".
19 The point that is made against me is to say, "Words of inclusion do not necessarily mean
20 that it excludes the past", but we do say you can gain insight into what the draftsman was
21 actually thinking about by the fact that the specific examples that have been given there are
22 examples as to the present and future rather than to the past.

23 Again, in this respect, we rely upon a passage in **Bennion**. I will take you very briefly to it,
24 but it makes a fairly general point. Again it is in tab 20 p. 1225, dealing with the principle
25 of *noscitur a sociis principle* (you know it from its friends, companions). It is headed
26 'Section 378'.

27 "-- a word or phrase is not to be construed as if it stood alone but in the light of its
28 surroundings".

29 We say this is a classic instance of this - that if you have a provision that deals with what
30 the Act itself includes as a dispute, then you are entitled to gain context from that. Over the
31 page on p.1226, which I think should be highlighted in your bundle, you can see,

32 "A word or phrase in an enactment must always be construed in the light of the
33 surrounding test ... words, and particularly general words, cannot be read in
34 isolation; their colour and content are derived from their context ..."

There is an authority also in the bundle to that effect, I think at Tab 10, called Shannon Realties. (After a pause): I am sorry. Ignore that last observation.. It is just the section in **Bennion**.

There are two additional points I want to make about this. I have already referred to the principle that inconvenient results militate against a construction that leads to them. We would say that there is a further application of that principle in this instance because, as one can see from the rest of the framework of s.185 to s.190. Ofcom is mandated to accept disputes if they fall within the definition of s.185(1) or, indeed, s.185(2). Then Ofcom is actually mandated to accept that dispute. One can derive that from the wording of s.186, which I think is on p.25 of the statute extract at Tab 9. You can see that under s.186(2), "Ofcom must decide whether or not it is appropriate for them to handle the dispute". Then, under (3), "Unless they consider [and various alternatives there] .... their decision must be a decision that is appropriate for them to handle the dispute".

So, in other words, there is no discretion given to them as to which disputes they can and cannot take. BT says, "If you are looking at the whole context of this dispute resolution process - the swift and basic method, the CRF, s.94 to s.104 - it would be an incredibly inconvenient job that Parliament mandated to them using the dispute resolution process for these historic compliance investigations. So, we say that that is a further reason for not accepting that s.185(1) deals with the sort of historic compliance dispute that we have seen that Ofcom have conducted in this case.

I would add a further point in dealing with this, to say that there is obviously a principle against retrospection. It is set out in Bennion. I will not take you necessarily to it at this stage. It is at s.97 in the clip that you have at Tab 20. We say that it is unlikely to be conclusive on its own, and when you put it with the rest of the factors together it is yet one further thing that tips this into the balance. That is set out in a bit of detail in our skeleton argument. I will not take it any further at this stage.

Can I now turn to s.185(2) which, of course, is what Ofcom rely upon for saying, "Well, this would have been in dispute in any event under those provisions. So, what is the concern?" Can I make a preliminary observation about this? We are extremely concerned that in answering this question it is not answered on the basis of Ofcom could have accepted this dispute under s.185(2) and so, therefore, there is no point in us considering s.185(1) and whether the dispute was properly accepted by Ofcom and adjudicated by Ofcom under s.185(1). First, we say it is wrong as a matter of principle that s.185(2) adds anything further in any event to s.185(1). I will come back to that point in a minute. But, there is

1 another preliminary point that we really do want to urge upon the Tribunal at this point.
2 Because Ofcom have accepted a jurisdictional basis for the consideration of the dispute
3 under s.185(1), it cannot now purport to put that determination forward on an entirely
4 different jurisdictional basis - namely, s.185(2). In para. 42 of their skeleton argument
5 Ofcom seeks to argue that it can now, effectively, rely on an entirely different jurisdictional
6 basis of s.185(2) because Ofcom cannot possibly have ceased to have jurisdiction on one
7 basis merely because it considered it had jurisdiction on a different basis. No authority is
8 cited for that proposition and it is wrong at a number of levels.
9 Can I start by saying that if I have not made it clear already, s.185(1) and 185(2) mirror the
10 distinction, we say - maybe not completely, but they certainly have their origin from, on the
11 one hand, Article 5(4) of the Access Directive and, on the other, Article 20 of the
12 Framework Directive. That seems to be the sort of symmetry that has been picked up in
13 the Act. That in itself is a factor that will cause one to stand back from this and say, "Well,
14 one cannot make the assumption that they are necessarily having the same effect, although
15 BT says in fact that they do when you come to analyse it.
16 If I can return to this point about Ofcom now seeking to rely upon a different jurisdictional
17 basis for the final determination -- I should add that there is no dispute - it is stated very
18 clearly in para. 2(1) of the final determination that the dispute was accepted and the
19 determination was made upon the basis of s.185(1).
20 The first point is that Ofcom is under a statutory duty to give reasons for its decision,
21 including the basis of its assumption of jurisdiction, which emanates directly from the terms
22 of the Act of 2003 itself and the Common Regulatory Framework. If one were to go back -
23 and I do not suggest one does, but I will make the points - Article 20(4) of the Framework
24 Directive requires Ofcom to make its decision available to the public and then provide the
25 parties concerned with a full statement of the reasons upon which it is based. That is also
26 reflected in s.188(7) of the 2003 Act. Then, Ofcom must send a copy of the determination,
27 together with a full statement of the reasons for it to every party in dispute. This is a
28 contemporaneous account, therefore, of what the jurisdictional basis is.
29 Further, s.3(3) of the Act makes clear that in performing its duties under s.3(1) of the Act
30 Ofcom must have regard to the principle that its regulatory activities should be transparent,
31 and accountable, and represent the best regulatory practice. Plainly changing jurisdiction
32 after a Notice of Appeal has already been lodged does not fall within that category.
33 Section 186(4) indicates that as soon as reasonably practical after Ofcom has decided that it
34 is appropriate for them to handle the disputes, it must inform the parties to the dispute of

their decision and their reasons for it. So, again, Ofcom is under a duty to provide reasons for the basis upon which it is handling the dispute - not only at the final determination but also on acceptance of the dispute itself.

Again, s.192(5) of the Act says that there is a specific duty upon Ofcom to specify the basis for its assumption of jurisdiction and that it is inherent in the appeal process. The point is there is a duty on the party to specify in the Notice of Appeal the provision under which the decision appealed against was taken. So, in other words, the Act itself recognises that the jurisdiction upon which the determination has been taken has to be specifically specified within the Notice of Appeal and, of course the Tribunal in reaching a decision does so on the basis of not only the merits but also the grounds of the appeal itself. We say the whole process contemplated by the Act contemplates Ofcom having decided a particular jurisdiction and then having elected that jurisdiction being stuck with it and therefore not trying to do as Ofcom now appear to be doing at this stage, which is to say: "It does not matter, because we could have got in under the wire on this one instead".

Even if that was not clear from the Act itself, we say that as part of administrative law it is recognised that whilst an administrative entity may be allowed to add to its reasons it is generally wrong for that entity simply to change its jurisdictional basis and that is illustrated by the case of *R v Westminster City Council ex parte Ermakov* [1996] 2 All ER at tab 23. I do not want to spend a long time looking at it. It was a case involving intentional homelessness and if I can perhaps just take you to p.310C it sets out the argument involved:

> "Starting from this point of principle, Mr. Samuels' argument, expressed in the simplest form, is that it cannot be right to admit, for the purposes of it being relied on in justification of the decision, such evidence as admitted in this case since to do so nullifies the very objects and advantage underlying the requirement to provide reasons. He concedes that there are authorities which support the proposition that evidence may be admitted to amplify the reasons given in the decision letter, but he seeks to distinguish them from the present case, and argues that the weight of authorities allowing wholly deficient statutory reasons to be made good by affidavit evidence in the course of the proceedings."

Then at p.315 Lord Justice Hutchinson sets out at "f" his acceptance of Mr. Samuels' submissions and the various observations that he makes about the position concerning additional evidence and seeking to change the reasons for the decision in some detail. That is said obviously in the context of that particular Statute, but it does illustrate an underlying principle of administrative law that as a general principle you cannot effectively

1 change your reasons after you have given them. You may be able to add to them by
2 additional evidence but you cannot simply say: "I am going to proceed on a different
3 jurisdictional basis", and we say that if that is the position in that case it is certainly *a*
4 *fortiori* in this case where you have all the provisions I have already taken you to about the
5 need to specify it.
6 I spent quite a bit of time on that point because it is a trap that I would not want the Tribunal
7 to fall into in my respectful submission. Having spent that time on it I would make the
8 point that in any event s.185(2) does not provide the solution that Ofcom suggests it
9 provides for construing s.185(1).
10 Obviously we accept that if you have the word "dispute" used in two different subsections
11 you may glean from the second subsection something from that in respect of its application
12 in the first subsection and vice-versa. But of course, it goes back to the point that
13 subsection 185(1) is not just dealing with a dispute, it is dealing with a dispute relating to
14 the provision of a network access, and subsection 185(2) is dealing with any other dispute if
15 it relates to the rights or obligations conferred under this part of the Act. So in other words
16 you cannot immediately draw the assumption that in any event whatever is in 185(2)
17 necessarily has the same effect in 185.
18 But in any event the language is similar to the language in s.185(1) and again it is using, we
19 say, forward looking language. It relates to rights or obligations conferred or imposed, and
20 then when one looks down the page one sees that just as there was in 185(8)(a) a forward
21 looking observation concerning the terms and conditions on which it, i.e. network access, is
22 or may be provided, so in subsection 185(8)(b) the disputes that relate to an obligation
23 include disputes as to the terms and conditions on which any transaction is to be entered
24 into for the purposes of complying with that obligation, not the terms and conditions on
25 which any transaction was entered into.
26 Again, we say that that supports our construction of s.185(1) because it is showing again
27 that principle of dispute resolution is forward looking, and that is absolutely consistent, we
28 say, with all the other factors that we have outlined previously.
29 That really deals with s.185(2) and the fact that far from giving weight to Ofcom's case we
30 say it actually strengthens our case because of the forward looking nature contained within
31 the wording.
32 Can I now turn to s.187(2), another provision which Ofcom relies upon. It specifically
33 argues that because 187(2) provides that a reference back to Ofcom, under this Chapter, of a
34 dispute does not prevent Ofcom from exercising any of their other powers under the

enactment in relation to contravention of such an obligation or, indeed, to give notification in respect of something they have reasonable grounds for believing a contravention of an obligation imposed by or under any enactment.

We say this is really a bootstrap argument on Ofcom's part, because the argument goes: "This proves that s.185(1) and s.185(2) must necessarily contemplate historic compliance conditions because otherwise why have a power in s.187(2) and s.187(2) must therefore necessarily prove that s.185(1) and s.185(2) relate to historic compliance investigations.

We say that is wrong because that is pre-supposing that giving the notification in respect of anything you may have reasonable grounds for believing is contravention, or the exercising of other powers under any enactment in relation to contravention of such an obligation necessarily prevents the forward looking interpretation that we say s.185 and ss.185(1) and (2) actually involve. But it does not, in our respectful submission, for this reason: you can easily postulate the situation where a dispute is referred. A party says: "I want to change the price going forward because we think that we are being overcharged with the price going forward. Ofcom accept the dispute under s.185(1) or s.185(2). What s.187(2) is actually doing is then stopping a party turning round and saying, "You cannot do anything else in the interim, you cannot now go back and say that there should be a compliance investigation" because it is all encapsulated within the dispute resolution. The core point is, what this is doing is laying out an alternative, but that alternative does not, in itself, provide for jurisdiction that was not there originally. It is perfectly consistent with the scheme within the Act that we say is involved for the dispute resolution process that you have a provision like that. It is to stop one party turning round and effectively stopping Ofcom using a regulatory power because it says a different regulatory power has been engaged, but it is a different regulatory power.

Can I now look at s.190(2)(d), which again is relied up by both Ofcom and the interveners as demonstrating that the Act must have provided for historic dispute compliance. What is said about this obviously is that this allows an adjustment of prices which have been paid. Therefore, because it has been paid, it is argued, that necessarily means that it must countenance the situation that Ofcom, in fact, engaged in in this particular final determination.

We say it is perfectly consistent to have s.190(2)(d) in the Act and still have a prevention, or still have an interpretation of s.185(1) and indeed 185(2), which provides for only dispute resolution of a forward looking basis. As I think we have demonstrated in the forward looking basis, if you have the prospective disputes that you had in the TRD appeal you need

a power like that for no less than two reasons: firstly, by the time Ofcom actually reaches its determination, time will have elapsed, so you need the power to be able to adjust the payments between the period that Ofcom make the determination and the time the dispute is referred to it. In any event, we say it also deals with the situation where you have the challenge to the dispute in the first place and you can relate it back to that, which is exactly what happened in the TRD appeal. In fact, if one did not have a provision like s.190(2)(d) the risk is that you have a party claiming that, in fact, the determination could adjust prices only going forward from the date of that determination.

That is not fanciful because that is exactly the argument that was run in the *Vodafone v. Ofcom* case in the Court of Appeal, which is at tab 19, where in respect of a market review appeal it was held that even though the prices Ofcom had originally set in 2007 were wrong, it could not adjust them back when it adjusted the prices in 2009. There was no opportunity, even though BT in that particular case had won on the facts of appeal – had won on the appeal – the Court of Appeal held that there was no power for the Tribunal to actually effectively change the prices going back to 2007, although that paraphrases what is actually quite a complicated argument in that case. Again, I do not propose taking you to it, but it is at tab 19 in the bundle and dealt with in our skeleton argument.

The other point that I think is particularly relevant in respect of s.190(2)(d) is that it is one of the powers which Ofcom has where Ofcom makes a determination for resolving disputes referred to them under this Chapter. In other words, unless a historic compliance investigation is already capable of forming a dispute which can be referred under this Chapter, the existence of s.190(2)(d) cannot make it one. So again, it is a type of bootstrap argument that if 185(2)(d) is there and has a purpose as BT says it quite plainly has a purpose, there is no need then to reinvent the construction of 185(1) and 185(2), there is a perfectly logical reason for 190(2)(d), as I have explained and on the facts of the TRD appeal, and therefore it cannot actually make a determination for resolving a dispute referred to it under this Chapter different from the jurisdiction that was already there or not there already.

Can I also just very briefly now touch on a number of points which we say do not really bear scrutiny. First of all, Ofcom say in their skeleton argument that our construction would create a great hardship on them, because it would have to consider when exactly the prices and terms that were being challenged, when that dispute arose. Really this is not as great a hardship as Ofcom suggest it would be, because Ofcom already has to decide that there has been some form of challenge to the prices, otherwise there can be no dispute. You need to

1 have some form of challenge, you need to have some form of negotiation process, which
2 Ofcom, itself, requires the parties to provide in order to accept the dispute in the first place.
3 So Ofcom cannot duck the issue of considering whether there is a real dispute going on.
4 Can I perhaps refer you – it is probably not necessary to turn it up – to Annex 9 of the final
5 determination. One sees there a very, very clear delineation in an investigation by Ofcom
6 of when exactly the parties started challenging the prices. That, in our respectful
7 submission, shows that this is a process that, in fact, Ofcom is already having to go through.
8 Of course we accept that there may be cases, less clear cut cases, that make this slightly
9 more difficult. There might be an argument, I do not know, as to whether or not the Cable
10 & Wireless and Energis instance actually demonstrates that or not. I think it is from the
11 interveners' skeleton argument where they have set out in a little bit of detail their points
12 about it. We can have a discussion about that if it actually arises as a serious matter in this
13 hearing.
14 The core point is that Ofcom has still had to go through it, and what is more all the material
15 that the interveners now rely upon was already referred to Ofcom when the dispute was
16 originally put to them. Perhaps I ought to just demonstrate this by asking you to look at
17 volume BT1, tab 6. That is the original submission to Ofcom of the dispute by the
18 interveners. Can I just ask you to turn to p.46. (After a pause): It should be p.46, I hope.
19 You can see there that there is a detailed table setting out lots of material about the dates
20 and what happened, and the document reference numbers, and so on, and so forth, which
21 runs through to p.54 from p.46. All of that is the material that is now relied upon by the
22 interveners as saying, "Well, that just shows you that this dispute went back further than BT
23 pretended it did in the case of Cable & Wireless". So, the process is already being
24 addressed and gone through by Ofcom as part of the submission process that is put before it
25 by the disputing parties. So, there is not going to be any real major hardship over and above
26 what Ofcom has to do in the first place. So, we say it is really a non-point.
27 Can I deal with another point made by the interveners? That is, "Well, it is very difficult for
28 us because the regulatory financial statements BT publishes are only published
29 approximately two years after the event. Therefore if dispute resolution was not able to
30 encompass a complaint made two years later, we are prejudiced". I suppose I might turn the
31 point on the head and say that actually the fact that BT itself does not know the regulatory
32 financial statements until two years after the event actually potentially causes BT far more
33 harm in that it is not aware of where the DSAC limit is set, and certainly cannot change
34 prices until about the same time period. But, perhaps that is a Jury point

1 THE CHAIRMAN: I think that is a Jury point.
2 MR. READ: The key point with this is that that is precisely why you have s.94 and s.104. If you
3 have really suffered loss, there is your solution. So, it is not dependent upon when the
4 regulatory financial statements are published. You have a methodology for getting the
5 money back. It is also suggested it will lead to protective disputes and that you will have
6 parties issuing letters saying, "You are in breach of your cost compliance obligation. I want
7 a reduction in price in order to protect the position". Again, that is not really a significant
8 factor in itself. As you have seen from the CRF and seen from the other material that we
9 have actually taken you to, there has to be demonstrated commercial negotiations on a
10 proper commercial basis involving good faith negotiations, and the negotiations have to
11 have broken down before the parties can refer the dispute to Ofcom.
12 So, I think it is a little bit far-fetched to suggest that in any way or form a party who fires off
13 letters indiscriminately will necessarily be able to claim that he has raised the dispute earlier
14 than in reality he has.
15 Now, I am not for a minute suggesting that there may not be more difficult cases that one
16 has to consider in this. But, it comes back to the point that we discussed earlier - well, if you
17 do not draw the bright line at the point of the challenge in the dispute, no matter how much
18 that may in itself cause some difficulties, you are left with the alternative which was
19 reflected in the passage in Ofcom's defence (which I took you to) of showing an
20 inordinately wide range for disputes to arise relating back many years and in many different
21 circumstances. So, our submission is that that in itself just simply cannot detract from the
22 underlying pointers to the fact that s.185(1) was intended to apply primarily to the
23 prospective prices going forward and was not intended to apply to the historic cost
24 orientation investigation that Ofcom has actually done in this final determination.
25 Sir, we pray in aid the factors of the swift and basic investigation, the Common Regulatory
26 Framework itself, s.94 to s.104, the very wording itself of s.185, and, in addition to that, the
27 other material which we say simply does not support the construction that Ofcom is actually
28 putting forward.
29 My learned junior is again making a very valid point: I have taken you, and shown you, part
30 of the process Ofcom had to go through in order to complete this historical compliance
31 investigation. It took fifteen months.. It did not take the four months period that is actually
32 prescribed as the long stop in the statute itself. Really, that speaks many millions of words,
33 we say, in terms of, "Was this a process that the jurisdiction of the dispute resolution
34 process was intended to deal with?" We say, "No".

1 Sir, unless there are any other points, those are BT's submissions in respect of the second
2 preliminary issue.
3 THE CHAIRMAN: Thank you very much, Mr. Read. That is very helpful.
4 MR. SAINI: Sir, can I address the price control issue first? There has been some criticism from
5 Mr. Read of our side for being too simplistic in the approach to price control. But, in our
6 submission, the issue is actually very simple. The starting point is the statute itself, and in
7 particular s.193 which is at no. 32 in Tab 6. Our first submission, sir, is that one has to
8 identify objectively where one finds a price control. There must be a place where a price
9 control is identified,. The answer to that question is given by s.193(10). If I could ask you
10 to look at that, sir. It says,
11 "In this section price control matter means a matter relating to the imposition of
12 any form of price control by an SMP condition the setting of which is authorised
13 by …"
14 I would ask you to underline, please, sir, the words 'by an SMP condition'. So, the
15 draftsman is asking us to look at the SMP condition and that is where one will identify the
16 price control. What was the SMP condition in this case? The SMP condition in this case
17 was Condition H.3 which you have been shown by Mr. Read. That appears at various
18 places - that SMP condition. I think you may have been shown it in the defence, and you
19 may have it in mind. However, that SMP condition makes no reference to DSAC. Mr.
20 Read's point was that either DSAC is an adjunct to that SMP condition, or that it is implicit
21 in that SMP condition. We say, with respect, that what is said about that is irrelevant
22 because all that the Tribunal can look at is the SMP condition itself because that is what
23 s.193(10) requires one to look at.
24 The fact that in assessing compliance with an SMP condition Ofcom applied the DSAC test,
25 or indeed that it may have applied a test involving combinatorials, those factors do not
26 amend the SMP condition. Those are simply ways of assessing compliance with the SMP
27 condition. What the SMP condition is must always be a matter of objective fact,
28 ascertainable by looking at the condition.
29 Now, with that in mind, if one turns to look at the rules themselves, which appear at Tab 7,
30 it is Rule 3 which is relevant. One must therefore read Rule 3, bearing in mind that the
31 price control that is in issue is the price control which one has identified under s.193(10),
32 namely what appears on the face of the condition, that is the price control. If one goes
33 through the limbs of para.3 with that in mind, one can readily see what the draftsman is
34 aiming at here. 3(1)(a): "The principles applied in setting the condition which imposed the

1 price control in question." In other words, what exercise did the regulator – here Ofcom –
2 undertake by way of process in setting the condition. That has nothing to do with the
3 principles applied by the regulator in subsequently assessing compliance with the relevant
4 condition. "(b) The methods applied or calculations used or data used in determining the
5 price control." Again, what is the price control? It is what one sees in black and white in
6 Condition H.3. Here the draftsman is concerned with those methods that were applied in
7 formulating Condition H.3. What the draftsman was not concerned with are the methods,
8 calculations and data used to assess subsequent compliance with Condition H.3. This is
9 what should be the substantive content of Condition H.3.
10 We do say, with respect, sir, that it is actually a very simple exercise and it has to be very
11 simple, because as the Tribunal knows if a price control matter arises then the Tribunal is
12 compelled to refer it and as a previous Tribunal has noted – I will just give you a reference
13 rather than turning it up in the interests of saving time – in the *Hutchinson 3G* case at tab
14 12, [2007] CAT 26, there was an extended discussion of price control issues, where the
15 Tribunal set out the way that ss. 193 to 195 worked and at para. 37 they concluded, having
16 conducted that survey that:
17 "This points to a price control matter being a matter which is a fundamental aspect
18 of the appeal, capable of being identified as a potential price control matter from
19 an examination of the Notice of Appeal."
20 So what the Tribunal there, we say with respect, was rightly saying was that once you look
21 at the notice of appeal, that document alone because that is the document by which the
22 appeal is to be decided, and see whether or not there is anything in that document which
23 challenges the price control. We say there is no part of the notice of appeal, nor indeed any
24 submission made by Mr. Read this morning and this afternoon, which challenges the price
25 control as defined by the Statute. The price control, as defined by s.193(10) is what appears
26 in black and white in the position.
27 Thus far I have focused on DSAC, but in fact although the position is not absolutely clear
28 on this BT suggest in their letter of yesterday that it is not just DSAC which might be a
29 price control issue, but there are a further two matters, and just for completeness it might be
30 worth looking at those, because as I understand it this is effectively now all of BT's case as
31 to what may be price control matters, although in their skeleton they suggested that there
32 may be others. I do not understand any other matters to have been put forward. If the
33 Tribunal would kindly turn to the annex to that letter. If one takes the three points in turn,
34 the first is:

1 "Was Ofcom's use of DSAC (in the manner set out in the Final Determination) an
2 appropriate principle or methodology for determining the level of costs which
3 could be recovered under BT's SMP cost orientation Condition H.3?"
4 We say this is a potential complaint about compliance with a condition rather than the
5 condition itself.
6 The second claimed price control matter, which the Tribunal can read for itself, concerns
7 broadly what one might call: "economic harm". Again, the complaint is here that in
8 assessing the compliance with Condition H.3 it was inappropriate for Ofcom not to consider
9 in a more appropriate way the absence or lack of evidence of economic harm. It is a matter
10 of compliance, not any complaint about the condition itself. The same point applies to the
11 third, which is the aggregation/disaggregation point, not a complaint about the terms of
12 Condition H.3, of a complaint about the approach of Ofcom in determining whether
13 Condition H.3 had been broken.
14 So we say, with respect, there is a binary distinction between imposition and compliance.
15 That is not something that we have invented, because it comes directly from the primary
16 legislation and the delegated legislation.
17 I hope I can deal briefly with the point in relation to the relevance of delegated legislation in
18 construing primary legislation because with respect to Mr. Read his point really goes
19 nowhere once he has accepted that the three tests that we set out in para. 17 of our skeleton
20 need to be satisfied.
21 If I could ask the Tribunal please to turn to para. 17 of our skeleton at p.5? The thrust of
22 Mr. Read's submissions was that because one sees a narrowing of the type of price control
23 matters in the delegated legislation in the regulations that must mean that s.193(10) itself
24 had a much wider meaning. But whether or not that is right, which we do not accept for the
25 moment, it is, with respect, completely irrelevant, because Mr. Read accepts he has to get
26 himself within the narrow terms of the rules. In other words, he has to satisfy (i), (ii) and
27 (iii) in para. 17. So it is rather difficult to see what the point is of a rather academic
28 argument about how wide 193(1) may be when, in fact, however wide it is you still have to
29 get through the rather narrow gateway of Rules 3(a), (b) or (c). We would respectfully
30 invite this Tribunal not to get involved in the interesting exercise as to whether or not one
31 can look at regulations to interpret a provision of primary legislation. You certainly have
32 our submission. If the Tribunal wants to go down that road one cannot, as a matter of
33 established authority, expand on what appears in primary legislation by looking at delegated
34 legislation. In a sense, it is an arid dispute in this case. It just makes no difference.

1 That is all I was going to say about price control matters unless there is any specific point I
2 can address in relation to from the members.
3 THE CHAIRMAN: No, that is very helpful, thank you.
4 MR. SAINI: If I could then turn to the larger issue of dispute resolution, and Mr. Read divided
5 his submissions on this issue into four parts. First of all, he dealt with what one could
6 perhaps call the "inconvenience factors" and the need for a swift resolution. Secondly, he
7 referred to the Common Regulatory Framework. Thirdly, he referred to the other remedies
8 available and the relevance of those other remedies. Then, finally, he came to the terms of
9 s.185 itself. I am going to address each of those four points, but not in that order.
10 I think it is important at the outset to be absolutely clear as to what Mr. Read's case now is.
11 I do not say that in any disrespectful way, because both I and the Tribunal need to know the
12 target that I am trying to aim at. As I understand it, and Mr. Read will correct me if I am
13 wrong either this afternoon or tomorrow, Mr. Read contemplates three types of case. The
14 first type of case is what I will call a "pure prospective dispute", and by that I mean a
15 situation where no monies have been paid historically, a party wants access to, for example,
16 BT's network, or the network of another communications provider, there is a disagreement
17 about the terms, which may include a disagreement about price, and they refer that dispute
18 to Ofcom under s.185. That is the first type of case.
19 The second type of case I will call a "purely historical dispute". That is one where there is
20 no ongoing relationship, so no current access, but at some point historically sums of money
21 were paid over to BT, there is a dispute as to whether or not there has been compliance with
22 the cost orientation obligation and that dispute, together with a claim for repayment, is
23 referred to Ofcom.
24 The third type of case is neither purely prospective nor purely historical. It is a case where
25 there is an ongoing relationship, an ongoing need for access, but historically some sums
26 have been paid over to BT. There is a dispute as to whether or not those sums should have
27 been paid over. That dispute is communicated between the parties and the matter lands on
28 Ofcom's desk.
29 As I understand Mr. Read's submissions, he accepts that dispute type one, what one calls a
30 "purely prospective dispute" falls within s.185, and he accepts that dispute type three – in
31 other words, where there has been a historical relationship but there has been a
32 communication of a dispute by, let us say, an Altnet to BT – that type of dispute falls within
33 Ofcom's jurisdiction under s.185. He does not accept the second type of situation, the pure
34 historical dispute.

1 The distinction he draws between the second purely historical dispute and the third type of
2 dispute is that all the difference is made by the fact that there was a communication at some
3 point between BT and an Altnet of a dispute.
4 When one gets to s.185, we will say that Mr. Read's acceptance that part historical disputes
5 are within jurisdiction is fatal to his argument on the construction of s.185.
6 With that introduction and looking at Mr. Read's four points, the point I want to start with is
7 the Common Regulatory Framework. I believe it is common ground that that Framework
8 must inform the interpretation that this Tribunal gives to s.185. I would ask the Tribunal
9 that, rather than struggle with the Access Directive, we start with the Framework Directive,
10 Article 20, tab 5. In Article 20(1) ...
11 "In the event of a dispute arising in connection with the obligations arising under
12 this Directive or the Specific Directives between undertakings providing
13 electronic communications networks or services in a Member State, the national
14 regulatory authority concerned shall, at the request of either party, and without
15 prejudice to the provisions of para. (2) issue a binding decision to resolve the
16 dispute".
17 If I just stop there for the moment. We know that the Specific Directives in this case include
18 the Access Directive. Just by way of cross-reference, if one looks at the definitions under
19 Article 2, which are a few pages before this, Article 2 defines 'Specific Directive' to include
20 the Access Directive.
21 Before turning to the Access Directive it is important to bear in mind that the language in
22 this sub-paragraph (1) is wholly general. It says that "in the event of a dispute arising in
23 connection with obligations"; it is not restricted to past or future obligations - it is purely
24 general. What are the obligations then in this case, sir? That requires one to turn to the
25 Access Directive. If one goes to the previous tab, Tab 4, Article 8, one sees there,
26 "Member states shall ensure that national regulatory authorise are empowered to
27 impose the obligations identified in Article 9 to 13".
28 So, Member States have to be able to impose these obligations. Going to Article 8(2), it is
29 those entities which have significant market power, and market power being identified
30 according to Article 16 of the Framework Directive, it is those entities that can have these
31 obligations imposed upon them. I do not need to trouble you with the rest of that, but I
32 would ask you to look at the particular obligation which was imposed in this case. One can
33 see that in Article 13. You will recall that Articles 9 to 13 identify the obligations under

1 Article 8(1). Article 13 permits a national regulatory authority to impose, effectively, a cost
2 orientation obligation.
3 So, what we are dealing with here, sir, going back to Article 20 and bearing in mind the
4 terms of Article 20, if a dispute arises in connection with an obligation imposed under the
5 Access Directive, namely a cost orientation obligation -- Standing back from that, one asks
6 rhetorically, "What is there, either in the Access Directive or in Article 20 of the
7 Framework Directive, to carve out of disputes for the purposes of Article 20 those disputes
8 which are historical? There is nothing there to do that. Indeed, were the United Kingdom,
9 as a matter of domestic law, to do that, to carve out of Article 20 those disputes which were
10 purely historical -- were it to seek to do that, that would arguably be in violation of the
11 obligation under Article 20. What is important to bear in mind, sir, about this case is that it
12 is about obligations arising under the Directives. It is not generally about access terms and
13 conditions. I will explain that in a bit more detail as it is an important point. The relevance
14 of this point is as follows: These two Directives require Member States through national
15 regulatory authorities to resolve two types of dispute (and on some occasions there may be
16 an overlap between them). Article 20 of the Framework Directive requires a national
17 regulatory authority to determine a dispute arising in connection with an obligation arising
18 under a Directive, such as an obligation to have cost orientation. That is one dispute
19 resolution function. But, there is also a wider dispute resolution function which concerns
20 access or interconnection generally. One gets that, as the Tribunal will have picked up from
21 Mr. Read's submissions, in Article 5(4) of the Access Directive, if I can go back to that at
22 Tab 4. There one sees that,
23 "With regard to access and interconnection Member States shall ensure that the
24 national regulatory authority is empowered to intervene at its own initiative".
25 So, access or interconnection generally have to be the subject of dispute resolution
26 procedures. We know that. We also know that in parallel runs a dispute resolution
27 procedure where obligations arising under the Directives are in issue. That is Article 20.
28 The present, sir, we say is a case that falls within both. I have already shown you how,
29 looking at Article 20 and the terms of Article 20, which refer back to, amongst other
30 Directives, the Access Directive -- There is a dispute about cost orientation provisions, a
31 dispute about obligations arising under the Directive and therefore falls, bang centre, within
32 Article 20.
33 However, we also say that this is one of those disputes that concerns access and
34 interconnection within Article 5(4) because, we say, whether or not an entity with

1 significant market power has complied with a cost orientation condition imposed under the
2 Access Directive it is a dispute concerning access and interconnection, just as a matter of
3 language. Mr. Read suggested in his submissions that this dispute does not concern access.
4 He referred you to Article 2 of the definition. That is access in the sense that he was
5 suggesting that access means forward-looking access. But, if one looks at the definition of
6 access in the Access Directive, back under Article 2(a),
7 "…'access' means the making available of facilities and/or services to another
8 undertaking under defined conditions".
9 One of the defined conditions is cost orientation. We say, just on the Common Regulatory
10 Framework, under both the Framework Directive and the Access Directive the United
11 Kingdom was obliged, through the national regulatory authority to entertain this dispute. It
12 was simply not lawful for the UK to carve out historic disputes.
13 If one then turns to the language in s.185 and asks the question: "How did the UK go about
14 implementing those two obligations one sees in the Framework Directive and the Access
15 Directive in the type of case such as the present. We say that the UK went about complying
16 with those obligations in the present type of case by enacting s.185(1).
17 Section 185(1) deals both with what I may call "general access disputes" under Article 5(4)
18 of the Access Directive, and also access disputes that arise from or out of obligations within
19 Article 20 of the Framework Directive, it deals with both of them. We do not accept the
20 submission made by Mr. Read that s.185(1) is just dealing with Article 5(4), it is dealing
21 with both in the context of access. Indeed, one will see in due course, the Tribunal may
22 have already seen this from the *Orange* case that in fact in the *Orange* case the Tribunal
23 came to a conclusion which was directly contrary to the submissions Mr. Read has been
24 making. The Tribunal concluded that s.185(1) was addressing both Article 5(4) and Article
25 20 and that s.185(2) was basically dealing with anything else that had to be caught as a
26 matter of Community law obligations.
27 I will come back to the *Orange* case in a moment, but I just want to address, while we are
28 on s.185(1) the point I made in opening, which is that when one looks at the case being
29 made by BT at this hearing and in particular their acceptance that certain types of historic
30 disputes are within jurisdiction it is difficult to see how their argument on construction
31 really works, and the best way to frame my submission on this is to look at BT's arguments
32 as to the construction of s.185, which were essentially repeated this afternoon, but it is
33 worth having them open to one side while looking at s.185.

If one goes to BT's skeleton argument at pp.25/26, we are taken to task in these paragraphs, particularly para. 58. We are accused of some real error in ignoring the "forward" to s.185(1) and just focusing on "dispute" and ignoring the words "relating to provision of network access". Mr. Read says all of these words here are forward looking. We ask: how is that reconcilable with his submission that Ofcom does have jurisdiction in disputes which are partly historical. Because, as I understand Mr. Read's case, he accepts that Ofcom may entertain a dispute where there is no ongoing access at all, as long as at some point prior to the dispute landing on Ofcom's desk there had been the communication of a dispute about sums paid. So if Mr. Read is right that s.185(1) is only forward looking then his concession is wrong. Equally his points in relation to s.185(8) which concern the general description of disputes that may be included. He is using the general meaning of s.185(8) to drive the general meaning of s.185(1). How is that argument consistent with his concession concerning historical disputes, where there is no question of ongoing access, ongoing negotiation as to terms and conditions, he accepts that those are within jurisdiction. Another problem flows from his acceptance that historical disputes are within jurisdiction which is that all of the complications that he says will arise in terms of the investigation, the delay, they will all arise on his concession, in fact the ones he has made in this very case on the way that he has reformulated BT's jurisdictional position. The only difference that one can identify is that he wants to argue that at the end of the day Ofcom has no power to order a repayment. The factual enquiry as to whether or not there has been a breach of the condition will be exactly the same. That is why we say, sir, that what this dispute was really about, or what the debate is about, is not really s.185. What this debate comes down to is some form of unwritten exception that BT would like to have written into s.190, because the real concern in this case of BT is the fact that they may have to pay back money going back many years. That is what this dispute is really about. It is not a debate. Once a concession has been made about s.185, this is not really a debate about the meaning of s.185 once the acceptance has been given that some historical disputes can fall within it. The fact that that is the real complaint is made absolutely clear when one looks at BT's skeleton argument. Could I ask the Tribunal to go back to that, to para.35 at p.16. Just to put this point in context, if you go to p.15, para.34, here for the first time it was explained to us, because clearly we had misunderstood before, that in some sense BT were accepting that historical disputes are within the jurisdiction, and they were saying it is in a sense used in the TRD case. If one goes to para.35, they say:

> "What was never contemplated in that case (either by Ofcom or the parties) was to use s.190(2)(d) to make a truly historic change to the period before any dispute had actually arisen. Thus Vodafone had in fact been charging an excessive rate (the blended charge) from September 2004 and Orange from May 2006."

If I can just jump a few lines to the middle of that paragraph, it says:

> "It is an order for repayment for a period of this type, before the challenge to the price had ever arisen, which BT contends was not contemplated by the Dispute Resolution process. To avoid any confusion, BT will call this a 'true historic' change to prices."

So the real complaint here that BT have is not really properly articulated as a dispute about the construction of s.185, it is really a dispute about the exercise of a discretion to order a repayment under 190(2)(d).

Can we just look at s.190(2)(d) itself, the Tribunal already has the point that this is the strongest possible indicator that there is no historical limit to be read into s.185. One cannot possibly read into s.190(2)(d) a limit on the power of Ofcom to order repayment of under or over payments according to when the parties formally notified one another of a dispute. It is just not there.

Sir, you raised the point when Mr. Read was making submissions, and this was essentially a point for Ofcom, what if someone turns up many years later and has a dispute they want to raise? Our submission is that, subject to the very limited discretion which Ofcom enjoys under s.186(3), and it is worth looking at that at p.25, there is a very limited discretion to decline to handle a dispute. Ofcom is obliged under domestic law and indeed under the Directive to accept the dispute and to resolve it. It does not have any choice apart from the very limited carve out where other means are available for resolving the dispute under s.186(3). However, one can readily see that if a stale dispute comes before Ofcom, Ofcom is very likely, when deciding on remedies under s.190(2), and particularly on financial remedies, to decline to make any order for repayment.

The answer to your question, sir, is that, subject to the discretion, which runs on very narrow lines under 186(3), Ofcom has to accept the dispute.

While I am on section 185, again Mr. Read took us to task for suggesting that there must be jurisdiction under s.185(2). You have our primary submission which is that Ofcom enjoyed jurisdiction under s.185(1), but if that were wrong, and this a dispute outside s.185(1), then we say it clearly falls within s.185(2)(a), and the point there is simple: that 185(2)(a) is a dispute relating to rights or obligations conferred or imposed by or under this part, and we

1 know that the obligation in question in this case is an obligation imposed under s.45 under
2 this part of the Act.
3 That is very much a secondary submission, but it is not open to a party when an issue of
4 jurisdiction is an issue, which is ultimately a matter for the Tribunal or a court, to argue that
5 if, in fact, there was jurisdiction under another basis the Tribunal should shut its eyes to
6 that. It would have been perfectly open to Ofcom in this case just to say that it is exercising
7 its dispute resolution powers under s.185 without saying which particular sub-section.
8 Indeed, when one comes to the *Orange* case one will see that, in fact, the Tribunal in that
9 case decided that there was jurisdiction under s.185(1), and that it went on, even though it
10 was no longer necessary for the decision, to decide that even if there was not jurisdiction
11 under 185(1), which is what the parties were arguing about, there was jurisdiction under
12 185(2).
13 Just while we are on that issue, I should just seek to distinguish the *Ermakov* case. We say
14 the principle in *Ermakov*, which is a well known principle in public law, has nothing to do
15 with jurisdictional issues. The principle stated in *Ermakov* is a public authority which has
16 given certain reasons for a decision – in other words, the facts upon which they based a
17 decision – should not readily be able to adduce affidavit evidence giving different or
18 supplemental reasons later on, and that the court should view with circumspection any
19 evidence that comes after the original decision. That is nothing to do with jurisdiction.
20 That is just simply the principle that your reasons should be your reasons, as they were at
21 the time the decision was made. It is nothing to do with the question of whether or not the
22 legal basis upon which you made your decision was correctly identified. Ultimately, all
23 issues of jurisdiction are for the court or the Tribunal.
24 So, we say, sir, before turning to the *Orange* case that s.185(1), construed consistently with
25 the Directives, is not concerned with ongoing access It is concerned with a dispute relating
26 in any way to network access - which this clearly is - and indeed Mr. Read's concession that
27 some historical disputes fall within s.185(1) completely explodes his argument that s.185(1)
28 is concerned with only future issues.
29 Sir, if I could ask you to turn briefly to the *Orange* case at Tab 14? There are various points
30 in this case which are not all connected. I will give you the references and identify the
31 paragraphs. First of all, there is a freestanding conclusion by the Tribunal in this case in
32 relation to the meaning of disputes at p.31. If I can just explain the context here? There
33 was a dispute between Orange and BT concerning certain terms and conditions. Under the
34 contract between BT and Orange, called the SIA - the Standard Interconnect Agreement -

there was a contractual (one can call it) dispute resolution procedure that the parties were obliged to follow. Because of certain things that had happened in the course of that dispute resolution procedure Orange were saying that in fact there was not a dispute because essentially BT had failed to use the contractual dispute resolution procedure. One can pick that up in para. 92. “at the hearing of the preliminary issue the point was put rather differently by Orange. Orange submitted that there was no ‘dispute’ within the meaning of s.185 because at the time that BT purported to refer the matter to Ofcom in January 2007 they had failed first to use the contractual mechanism set out in the clause 13 by issuing a further OCCN” (that is a form of notice).

At para. 93 what one sees is that both Ofcom and BT argued that what ‘dispute’ means in s.185 cannot depend upon what the parties have done in relation to one another within their particular contractual regime. The conclusion one sees at p.34, para. 97:

> “The Tribunal agrees with Ofcom and BT that the meaning of the word ‘dispute; cannot depend on the terms of the contract between the parties. There is nothing in the statute that suggest that anything other than the ordinary meaning of the word is intended. The absence from s.185 of a provision in terms of s.187(4) is a strong indication that the parties were not intended to be able to affect Ofcom’s jurisdiction by their own agreement”.

Two points follow from that. First of all, this Tribunal, as the Tribunal in *Orange* proceedings, should proceed on the basis that ‘dispute’ means ‘dispute’. It is an ordinary English word. Is there a dispute between BT and the Altnets? Clearly there is. Secondly, and this is of more tangential relevance here, what was clearly being decided in this case is that the *inter partes* exchanges between the two disputants in relation to a dispute which ultimately ends on Ofcom’s desk -- those exchanges are not really relevant to Ofcom’s jurisdiction. As we understand Mr. Read’s case, what Ofcom has to do in every situation when a dispute lands on its desk is that it has to do some archaeological work on the history of the dispute between the parties and decide whether or not, in fact, at some point prior to the dispute landing on Ofcom’s desk, a dispute was communicated between the parties. Whether or not they do that fundamentally affects Ofcom’s jurisdiction.

We say the principle that comes out of this case is that Ofcom’s jurisdiction does not depend in any way upon the interchanges between the parties prior to Ofcom being handed the dispute. The only issues for Ofcom are those identified in s.185 itself, which, just to remind you -- S.185(1), the fact that there is a dispute and the dispute is between a communication provider, etc. These are the subsection (1) criteria that need to be satisfied.

1 Those are the only factors that Ofcom needs to be satisfied about before a dispute is
2 properly before it, not any historical matters concerning exchanges. These are two points
3 that come out of that para. 97.
4 I need to go back to the earlier point which is the submission that Mr. Read made that
5 s.185(1) is only implementing Article 5(4) of the Access Directive and not Article 20 of the
6 Framework Directive. Exactly that submission was made by Orange. In order to put para.
7 76 of this judgment in context, one needs to look at the earlier paragraphs which I will not
8 do now (the Tribunal can do that when it retires). However, the submission was being made
9 that 185(1) s only concerned with Article 5(4). At paras. 77 to 78 and in fact it carries on
10 over to paras. 79 and 80 . The Tribunal concluded : "Such a submission faces insuperable
11 obstacles in the wording of the statutory provisions." So it is not a new submission, it is a
12 submission which has already been made. But even without looking at what is said between
13 76 and 80 one can readily see, just looking at Article 5(4) and Article 20 in the context of
14 this particular dispute, why s.185(1) satisfies the dispute resolution obligation under Article
15 5 and Article 20. The conclusion I would ask the Tribunal to look at at para.81. There, the
16 Tribunal held that
17 "… the dispute between BT and Orange overt he BT OCCN is a dispute relating
18 to the provision of network access within the meaning of section 185(1) of the
19 2003 Act. It falls within that subsection insofar as that subsection implements the
20 United Kingdom's obligation under that part of Article 5(4) of the Access
21 Directive which concerns resolution of disputes."
22 However, one sees that they went on, at paras. 82 to 88 to consider even if they were wrong
23 on their construction of s.185(1) whether, in fact, as a matter of jurisdiction the dispute fell
24 within s.185(2). The conclusion in relation to that is at para.88.
25 Sir, I am going to put that case away now, and turn back to Mr. Read's submissions. Of the
26 four points I have addressed the Common Regulatory Framework. I have addressed the
27 language of s.185 itself. I want to address two further points: One is the inconvenience and
28 swiftness intended, and the second is the other remedies. If I can deal with the
29 inconvenience and swiftness intended very briefly. I have already made the point that all of
30 the inconvenience which Mr. Read complains about is going to arise in any event following
31 his concession that part historic disputes are within jurisdiction.
32 As you will have seen, sir, both the domestic legislation and the Directive – in particular
33 Article 20 – contemplate that certain disputes may arise which cannot be properly resolved
34 within four months. Our overarching submission in relation to that is that if the Community

1 Law obligation is clear, which it is in this case, the fact that a particular dispute may take
2 longer than four months to resolve does not mean to say it falls outside the Community Law
3 obligation.
4 Mr. Read's argument is essentially that you have to qualify the Community Law obligation
5 in those cases where the dispute is going to take more than four months to resolve. So one
6 could have, let us say, a dispute on exactly the same facts as our present dispute, but let us
7 say it was resolvable within one month – does it fall within jurisdiction or outside
8 jurisdiction? So how long it takes to resolve a dispute cannot determine the issue of
9 jurisdiction.
10 Dealing with the final section of Mr. Read's submissions, which is the other remedies, this
11 requires one to go back to tab 6 and the other procedures. Our submission, before one
12 looks at the three different procedures that exist, is that they can all run in parallel. The fact
13 that they can all run in parallel is made clear by s.187, which is at p.26. Before one looks at
14 the separate procedures 187(1) makes it clear that legal proceedings can be started even if a
15 dispute is being considered by Ofcom, and subsection (2) allows the continuation of
16 Ofcom's own initiative investigations into a breach of conditions. The Parliamentary
17 intention is that they can all run in parallel.
18 If one looks at the three particular procedures that exist. The first is what one can call "the
19 s. 94 procedure" going back to p.13. That is Ofcom's own decision to notify a
20 contravention of conditions. You will note, sir, at 94(3)(b), that one of the things that
21 Ofcom can require when it serves a notification is certain action by the licensee remedying
22 the consequences of contraventions which could include, as we made clear in our defence,
23 an order for reimbursement. We say that under s.94, reading through to s.96 Ofcom can,
24 not only enforce conditions by way of mandatory orders, but it can also require penalties
25 and could require reimbursement. There is nothing in the existence of that procedure which
26 would indicate that one has to give a narrower meaning to s.185(1) bearing in mind always
27 that 185(1) finds its origins in the Directives which impose an obligation upon national
28 regulatory authorities to take action once notified of a dispute.
29 Section 94 is dealing with a completely different issue, which is the regulatory authority
30 itself deciding to pursue contravention action.
31 Section 104 at p.23 concerns civil liability. Again, there is nothing in here in itself which
32 would suggest that one should adopt a narrow construction of s.185. What is particularly
33 notable, sir, about s.104 is that, subject to obtaining the consent of Ofcom, it would be open
34 to a person who is damaged by the contravention of the condition to go back many years to

1 claim loss and damage. Subject to statutory limitation periods, there is nothing to suggest
2 that this individual could not go back to as many as six years. There is nothing in either
3 s.104 or in s.96 limiting the period of time that those complaining under those sections can
4 go back. Why should one impute to Parliament an intention, when one looks at s.185, to
5 adopt a completely different approach which is to rather arbitrarily limit the period that one
6 can go back, limit it only to, what I understand to be the case, partly historical dispute – in
7 other words, only some of the period covering the dispute? One would need some very,
8 very clear wording indicating that there was a different intention being applied to s.185.
9 We wholly accept, sir, that the existence of s.94, and potentially the existence of s.104, are
10 relevant to Ofcom's discretion under 186(3), which is the discretion that Ofcom has to
11 decline to entertain a dispute if there are alternative means available, and it will be a
12 question for the Tribunal in October as to whether or not there were alternative means
13 available. At this point in time we are just considering the issue of jurisdiction. We submit
14 that there is nothing in ss.94 or 104 to require this Tribunal to undertake a massive
15 redrafting exercise as far as s.185 is concerned, and to draft into s.185 an exclusion for
16 historical disputes.
17 So that is what I want to say in relation to the four particular points that Mr. Read placed
18 reliance upon in seeking to construe s.185, but I just wanted to, finally, go back to what I
19 began with which is the target, so that there is absolute clarity as to what BT are and are not
20 saying. This requires one to go back to the skeleton and the paragraphs I took you to briefly
21 a while ago, which were paras.32 and 34, but I want to just go back to 32 to make sure I
22 have addressed the specific point there. I gave the Tribunal my understanding of the three
23 categories of dispute, one being purely prospective, one being purely historical and one
24 being partly historical. As I understand it, in para.34, and it comes particularly from the end
25 of para.34, BT accepts that a historical dispute is included as long as a challenge to prices
26 has been made, and it is only from the date of that challenge to prices that Ofcom has
27 jurisdiction.
28 We ask, if that is the position and one goes back to s.185, where does find anywhere within
29 s.185 such a distinction? The reality is that Mr. Read wants to insert into s.185(1) a new
30 sub-para.(f). He wants to make it a condition of a dispute being within Ofcom's jurisdiction
31 that a challenge has been made to the conduct of the communications provider prior to the
32 reference of the dispute to Ofcom. He wants to add a further section to this Act - that
33 Ofcom shall only enjoy jurisdiction over the dispute insofar as it relates to the period
34 following the aforesaid challenge.

1 Now, one finds that nowhere within s.185, but were such wording to be included in the Act
2 there would be a direct violation of the Directive because United Kingdom law would
3 exempt a national regulatory authority from investigating and ruling upon, for example, a
4 cost orientation obligation - even a serious breach of a cost orientation obligation - merely
5 because certain formal steps have not been taken by a disputing party when the Directive
6 itself requires no such formal steps to be taken..
7 Sir, I believe I have concluded my submissions, but may I have overnight just to take
8 instructions? I do not believe that there is anything further I would wish to address, subject
9 to any questions from the Tribunal.
10 THE CHAIRMAN: That is fine. We will rise now. You can think overnight as to whether there
11 is anything you want to add and we will hear from Miss Rose in the morning.
12 (Adjourned until 10.00 a.m. on Wednesday, 26th May, 2010)