IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1146/3/3/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

26th 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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Transcribed from tape by Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

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HEARING
(Preliminary Issues)
DAY TWO

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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THE CHAIRMAN: Good morning. Mr. Saini, any overnight thoughts?

MR. SAINI: One final point to clarify a point I made last night. As we understand the BT case now, they are saying that there are essentially two conditions that one needs to read into s.185(1). I was in rather a hurry yesterday. I can deal with it with a bit more care now. They are saying that one needs to read into s.185(1), as a condition of Ofcom entertaining the dispute, or rather as a condition of Ofcom having jurisdiction to hear the dispute two matters which must be established. First of all there must have been a challenge to the pricing prior to the referral of the dispute to Ofcom. It is not clear from BT's skeleton and their oral submissions what that challenge must amount to. Is it an oral challenge or a written challenge? Secondly, the second condition is that Ofcom only has jurisdiction in respect of the dispute as regards those aspects of the dispute that arise after the challenge has been made. We say that there is simply no means by which one can arrive at inserting those two conditions into s.185(1) as a matter of interpretation. In fact, as I said yesterday, if they were to be interpreted into s.185(1) there would be a breach of Article 20 and Article 5(4) of the relevant Directives.

Sir, unless you have any questions that concludes my submissions.

THE CHAIRMAN: No. Thank you very much, Mr. Saini. Miss Rose?

MISS ROSE: Sir, on behalf of the Altnets we adopt the submissions of Mr. Saini. I want to add only a very few words on Issue 1 and then say a little more about Issue 2. On Issue 1 the question of price control matters. In our submission it is very clear from s.193(10) that price control matters are matters which relate to the imposition of a price control by an SMP condition. They are not matters relating to compliance with a pre-existing price control, the imposition of which was never the subject of any appeal. Rule 3 of the 2004 rules cannot, as a matter of principle expand upon the scope of s.193(10). Not only is Rule 3 a part of sub-ordinate legislation, but the opening words of Rule 3 make it clear that the price controls which are specified in Rule 3 are all, as a necessary condition to be price controls within the meaning of s.193(10). In any event, the wording of Rule 3 itself makes it clear that Rule 3 equally, just like s.193, is directed at appeals which are a challenge to the imposition of the price control, and which do not concern a decision relating to compliance with the price control.

If we just look very briefly at Rule 3 in the authorities bundle, at Tab 7, first of all the opening words of 3(1),

> "-- there is specified every price control matter falling within subsection (10) which is disputed between the parties and which relates to …"

So, the first point is that the first condition for a price control matter is that it must be within s.193(10). Then, when you look at (a), (b), and (c), "(a), the principles applied in setting the condition …" In other words, setting the SMP condition which imposes the price control.

> "(b) the methods applied or calculations used or data used in determining that price control"

In other words, directed at the decision of the regulator when setting the price control, the methodology for setting the price control. Finally,

> "(c) what the provisions imposing the price control which are contained in that condition should be …"

All of those three matters are directed to the imposition of the price control and not compliance with the pre-existing price control.

This is not an appeal which concerns the imposition of Condition H.3 . If it were, it would have been brought many years out of time. This is an appeal in which there is a challenge to the methods used by Ofcom to determine the question whether, in accordance with Condition H.3, BT had satisfied Ofcom that its prices were cost-oriented. That does not engage s.193(10) and it does not engage Rule 3.

Finally, on Issue 1, the Tribunal yesterday heard the remarkable submission of Mr. Read that at this stage he is unable to say whether this is an appeal that raises price control issues, or to formulate what questions should be referred to the Competition Commission. He says that he puts forward his proposed questions merely as possible questions, but that the question whether any price control matters arise, which must be referred, may not emerge until some undefined stage during the main hearing listed for eight days in October.

As Mr. Saini showed the court, that is contrary to the approach that has been followed by the CAT in the *H3G* case where the CAT said that the price control matters must be detectable from the Notice of Appeal. It is also contrary to common-sense and to any sensible form of case management. The parties are going to incur very significant legal costs preparing for an eight day hearing before this Tribunal in October; expert evidence will be called; there will be cross-examination. The idea that at some point during the course of that hearing issues will emerge which the Tribunal will then decide should cause the appeal to be stayed and the matter referred to the Competition Commission for it to take a period of months to conduct an investigation we submit is a truly extraordinary proposition. We are also very surprised that BT thinks that that is a sensible way forward for it, given the delay and the waste of costs that would necessarily result.

We also say that such an approach is contrary to principle. The question whether an appeal raises a price control matter ought to be easily discernible from the pleadings, and the approach adopted in desperation by Mr. Read demonstrates very clearly that there is no such issue in this appeal.

Turning then to the second question of jurisdiction, again we adopt Ofcom's submissions. It is not in fact BT's case that Ofcom does not have jurisdiction under s.185(1) to receive disputes relating to historic matters – rather, as Mr. Saini explained yesterday, it is BT's case that Ofcom does have jurisdiction to consider historic matters, but only where one party has notified the other party that there is a dispute, and only in relation to events occurring after the notification of the dispute. So, BT in fact accepts that there could be a situation in which there is no ongoing network access, where the agreement between the parties has come to an end, but where at some point in the past during the currency of the agreement one party notified to the other a dispute about prices and that that party could then refer that dispute to Ofcom and Ofcom would be obliged under s.185 to determine that dispute. That follows from the submission of BT.

BT also accepts – and, indeed, tenders the termination rate dispute appeals as an example of this - that in a situation where there is ongoing network access and a dispute has been raised in the past about prices that Ofcom and subsequently the Tribunal would have jurisdiction to consider not only the prices going forward but also the level of past prices after the date the dispute has been notified. He accepts both of those situations that Ofcom would have jurisdiction.

The way that BT puts its case means, as Mr. Saini submitted yesterday, that all of its submissions concerning inconvenience, concerning the construction of s.185 and the CRF as forward looking, and concerning overlap with s.91 to s.104, all those submissions fall away.

Putting the matter simply BT's submissions are inconsistent with the case it is actually advancing. Since BT accepts that Ofcom does have jurisdiction to receive historic disputes provided that one party has previously notified the dispute to the other, all of its submissions about inconvenience of investigation of historic disputes, or the legislation being forward looking are simply irrelevant.

BT instead needs to find some indication somewhere in both the national and the European legislation that entitles and requires the national regulatory authority to refuse to entertain a dispute about payments in a period prior to a complaint being made by one private party to another, not disputes occurring prior to a dispute being referred to Ofcom. In other words,

it is BT's case that the statutory jurisdiction of the regulator to receive the dispute is triggered by a purely private act between two private commercial parties between themselves. There is nothing whatsoever in the national or European legislation that would support such a construction. On the contrary, such a construction is wholly inconsistent with the statutory scheme. As is apparent and as I do not understand Mr. Read to be disputing, the investigations regime under s.94 permits the regulator to remedy breaches of an SMP condition and would include a general power to the regulator to order repayment of overpayments without any necessity for a triggering dispute. He also accepts that under s.104 a party which has suffered loss as a result of a breach of an SMP condition has a right of action in damages, and again that right of action in damages is not limited by any past triggering dispute. So why then, would Parliament have placed such a limit on Ofcom's jurisdiction to order repayments when a dispute is referred to it. What is asserted to be the statutory purpose? Why the inconsistency between those remedies? There is no answer provided to that question.

Indeed, in the *Orange* case the CAT deprecated the attempt that was being made by Orange in that case and indeed which was being strongly represented by Mr. Read to use the private law transactions of commercial parties as the trigger for the jurisdiction for consideration of disputes. If we just turn up that case it is in tab 14 of the authorities bundle. The argument that was being run in that case was slightly different, but in my submission the reasons given by the CAT for rejecting it are equally applicable to the argument being run by BT in this case. What was being said by Orange was that Ofcom did not have jurisdiction under s.185(1) to receive a dispute unless and until the private parties had themselves properly operated the dispute resolution mechanism in their contract; and that argument was rejected by the CAT. If we go to p.26:

> "73. But, as Mr. Roth, appearing on behalf of Ofcom, pointed out, it cannot be right that Ofcom's jurisdiction should vary according to the terms of the interconnection agreements. If the terms of the contract are decisive then Ofcom would be required to look at the contractual framework and to consider whether, for example, a notice to terminate where the contractual period is four weeks notice has a different effect on Ofcom's statutory jurisdiction from a 24 month notice to terminate. We agree that it cannot be intended that the regulator should undertake such an investigation or that jurisdiction should depend on the outcome of such an investigation.

> 74. Such an interpretation of the provisions would undermine the underlying purpose of the Access Directive. It would encourage the parties to include shorter rather than longer notice periods in their interconnection agreements and to resort to serving a termination notice more frequently than they currently do in order to generate a dispute over which Ofcom has jurisdiction. A party may be prompted to serve a termination notice as a bargaining tactic even if in reality it knows that it will withdraw the notice if the other party maintains its refusal to accept the OCCN. This makes interconnection less secure rather than more secure. Given the large sums of money that turn on these contractual variations, we cannot accept Orange's assertion that this is an implausible outcome of the narrow construction for which they contend."

Then going on in the judgment, this is addressing another argument that there actually had to be a risk that interconnection would be withdrawn before Ofcom had jurisdiction.

> "The Tribunal does not consider that in order for this to be the case it has to be established that the parties subject to the obligation felt sufficiently strongly about the subject matter of the dispute that it would have considered it was or might be entitled to terminate end to end connectivity. It is not practicable to make Ofcom's jurisdiction to consider a dispute contingent on it arriving at an answer to that kind of question and that cannot have been the intention of the legislator."

Then para. 99, and here we see the submission that was being made by Mr. Read on that occasion:

"BT's arguments and evidence were primarily directed at countering Orange's reliance on the strict wording of the SIA. But they were also directed at illustrating what BT described as the "Admin Hell" that would result from the Tribunal finding that Ofcom's jurisdiction dependent on the terms of the parties' contact. The Tribunal does not need to determine the issues BT raises as regards the proper construction of the contract or whether BT can rely on estoppel by convention. But the evidence adduced by BT shows that its submissions cannot be easily dismissed as without merit. We agree that it cannot have been intended that Ofcom should undertake this kind of analysis each time a dispute is referred. The private law consequences of a failure by one or both parties to comply with the contractual provisions are not a matter for the Tribunal to determine and cannot affect the statutory jurisdiction conferred on Ofcom."

Then finally at 100 again one sees the end of that paragraph:

> "Again the Tribunal does not accept that Ofcom's jurisdiction is dependent upon it examining such documents to determine whether the dispute was still alive as at January 2007."

Then at 101:

> "The fact that Ofcom as a matter of good practice encourages parties to a potential dispute to explore fully the possibility of resolving their differences first, is a very different matter from holding that Ofcom's jurisdiction depends on contractual dispute resolution mechanisms having been exhausted."

What one can see from those passages is the emphasis being placed by the Tribunal on the fact first that there is no discernible statutory intention that the statutory jurisdiction of the regulator should depend on the private transactions of individual commercial parties; and secondly, that such an interpretation would be unworkable in practice because it would necessitate the regulator conducting a detailed factual investigation of the particular arrangements between the parties and the circumstances of their commercial agreement before it could decide that it had jurisdiction and that is what BT in that case called "Admin Hell".

We submit that precisely the same considerations apply to the construction for which BT contend in this case.

On BT's case, in order for Ofcom to decide whether it has jurisdiction to receive a complaint it must first answer the following questions: first, has a dispute been raised by one party to the other? Secondly, what was the date when a dispute was first raised? Thirdly, was the dispute raised at that time the same as the dispute that is now being referred to the Regulator? If it was different, was it so significantly different as to deprive Ofcom of jurisdiction? How significant must the difference be for that to be the case? Finally, have any subsequent events caused that dispute to lapse so that a fresh dispute would have then to have been raised and, if so, has it been and does it satisfy those conditions? All of those questions would have to be investigated in any case before Ofcom could decide that it had jurisdiction. The facts of this particular case demonstrate that the complexities and controversies to which that investigation leads are far from hypothetical or fanciful.

In this case, Energis, now part of Cable & Wireless, one of the interveners in this appeal, first raised the dispute with BT in 2004. Energis says that that dispute was about BT's charges for trunk and whether they were compliant with its costs orientation operation. It appears that BT is denying that, because BT has suggested in its reply at para.49 that that

original dispute was not about trunk charges but about BT's offer to rebalance its charges. So BT, it would seem, is seeking to say that that dispute raised in 2004 is different from the dispute being raised now and therefore not sufficient to trigger jurisdiction. So that question would have to be resolved.

BT then says that because Ofcom in 2005 discontinued its own initiative investigation against BT because it did not have the information to determine the question, that that in some way, unexplained by BT, caused Energis's complaint to lapse.

We can see how BT puts this in its skeleton argument. It is footnote 48 of BT's skeleton argument, p.16. At footnote 48 they quote Cable & Wireless's dispute in 2008 and it says:

> "It should be noted that in the previous paragraph Ofcom refers to Energis raising an issue in August 2004 and C&W expressing concerns to Ofcom (but not BT) in 2005. BT deals with this in its Reply, but given the way that Ofcom closed its own initiative investigation in December 2005, BT contends it is not possible for C&W to contend that it had raised a specific challenge to BT's PPC prices until 21 January 2008."

There is no explanation from BT there as to why a decision by the Regulator to discontinue an investigation should have an effect on the fact that one party has raised a dispute with the other – completely unexplained – but clearly BT is intending to argue that point. We submit that, precisely for the reasons identified by the CAT in the *Orange* case it is wholly unworkable for the statutory jurisdiction of the Regulator to depend on this sort of factual inquiry.

You will also note that some of the disputes were raised orally and some in writing. Some were raised in meetings. What happens if there is a dispute between the parties as to whether a dispute was raised in a particular meeting, which could be years earlier? How is the Regulator to resolve that question?

We submit that this sort of factual inquiry is unsuitable in principle as a basis for the establishment of jurisdiction. Using the raising of the dispute as the trigger for jurisdiction gives rise to serious injustice. It provides a perverse incentive to a dominant company, such as BT, to conceal its revenues and costs from other players in the market for as long as possible so as to prevent them from raising disputes complaining of overcharging and thereby lessen BT's vulnerability to being required to repay the sums that it has overcharged.

Let me just be clear about one point. BT suggested that these charges have been agreed and paid. The Altnets have no choice. If they wish to conduct their businesses they have no

choice but to connect with BT and to use BT's facilities. They have no choice about the price they were to pay. Those prices were imposed by BT. There is, in no sense, any commercial negotiation or agreement of these prices. That is what SMP means, and that is why BT's prices are regulated by Ofcom and not by free market negotiation. Of course, if a party does not know whether it is being overcharged because it does not know what the revenues and costs of BT are, that makes it very difficult for it to raise a dispute.

A remarkable submission was made by Mr. Read on this point. He said it was unfair to BT if BT was not in a position to know whether its own regulatory financial statements were accurate or not. With respect, that is an absolutely startling proposition. It cannot seriously be being suggested by BT that it is not in a position to know what the costs of its own business are, and what the revenues generated by its own business are. The fact of the matter is that this is information which is under the control of the dominant party in the market and which the regulatory regime requires that party to make available to other parties and the Regulator so that parties know whether they are being overcharged or not. On BT's case the longer they are able to conceal the true position the greater their power to overcharge with impunity.

Again, this is not a hypothetical issue, that is precisely what happened in this case. As you will have seen from the notice of appeal, the defence and the statement of intervention, what happened in this case was that BT's regulatory financial statements were inaccurate. They understated BT's revenues for these services, and it was only in 2008 when an accurate picture of BT's revenues was finally provided that the Altnets really understood the extent to which they were being overcharged. We do not need to turn it up, but can I just give you references here: Mr. Harding's first witness statement, that is the first interveners' bundle, tab 2, p.8, paras.26 to 32; and Mr. Robinson's witness statement, para.27. Those passages explain why the timing of these disputes depended on the timing of the accurate information finally be provided by BT.

BT recognises the significance of this point in its own reply. If you take up bundle BT4, tab 2, para.38 on p.14, it says:

> "The Disputing CPs, however, seek to justify the delay ..."

that is the delay in raising a dispute –

> "... on the grounds that BT was restating its RFS. Thus, Mr. Harding suggests '*... the delay in resolving the dispute was primarily caused by BT's restatement of its RFS in September 2008'*. This is rather looking at events, to put it neutrally, through '*rose tinted spectacles*'. BT made crystal clear to Ofcom

> prior to its acceptance of these disputes that BT would be restating its RFS and that Ofcom should not accept the disputes in July 2008 because prior to the restatement, it could not be clear that there was a dispute or the precise nature of it ... Perhaps more to the point, BT had previously made it absolutely clear to the disputing CPs that any discussions about BT's charges should await Ofcom's consideration of BT's RFS and, in particular, the replicability and re-statement of them".

So, BT itself is saying that the parties should not raise a dispute until they have seen the accurate accounts, and then it is saying, "But, if they delay until they have seen the accurate accounts, they cannot be awarded repayment". Ofcom has no jurisdiction to consider the dispute for any period prior to the re-statement of the accounts. So, BT's only successful concealment of the accurate costs and revenues is then used by it as a basis for denying Ofcom's jurisdiction to provide a remedy to those parties who have been overcharged by BT. We submit that cannot have been the intention either of the European Union or of Parliament.

BT's approach also gives rise to wholly arbitrary results. A company which is well resourced and well-advised will be more likely to raise a dispute with BT as soon as it has an inkling of the possibility that it is being overcharged, and that, as you have seen, is exactly what Energis did in 2004. But, a much smaller company that is less sophisticated and does not necessarily have access to legal advice, and which does not appreciate that it has been overcharged until it has seen the accurate accounts, is much less likely to raise a dispute, and less likely, on BT's case, to be able to recover for the overpayment. BT says, "Well, that's okay. You can sue for damages under s.104". But, that is not an answer to the small start-up company. BT is suggesting that there is no lacuna of protection in this statute because a company in this situation could take commercial litigation against a company the size of BT with all the attendant cost risk that that entails. Again, we ask, what is the Parliamentary intention for requiring a vulnerable party in that situation to go to court rather than permitting the regulator having found an overcharge to provide the appropriate remedy? How does this promote competition and assist consumers?

Indeed, Mr. Read's proposal that the lacunae of protection would be filled by a damages claim under s.104 is tantamount to an admission that his case does give rise to a lacuna in protection. We submit that that is an admission that his construction of s.185 is contrary to the Common Regulatory Framework and a breach of Article 20 of the Framework Directive.

BT's construction also has arbitrary results in other respects. On BT's case Energis (now a part of Cable & Wireless) would be able to refer a dispute to Ofcom in respect of the years 2004/2005 and the years 2007 and 2008. In respect of both periods BT accepts that a dispute had been raised. But, BT says that the middle period, because, by some unexplained mechanism Ofcom's discontinuation of the own initiative investigation in 2005 causes Energis' original dispute to lapse, he says Ofcom has no jurisdiction about the middle period. So, on BT's case Ofcom can give a remedy for those periods, but Energis must go to court to get damages for the central period. Again, we submit that makes no sense at all.

What BT's admission that we could get damages and that Ofcom could award repayment under s.94 demonstrates is that there was no Parliamentary intention to protect an overcharging, dominant provider, like BT, against the risk that it must repay the sums that it has overcharged in breach of an SMP condition. That being so, there is no principal reason to exclude this question from Ofcom's jurisdiction, and, by that means, prevent parties from accessing the simplest and most cost-effective remedy.

It will already been seen, from what I have said, that BT's submissions have no bearing at all on what they complain about as the complexity or inconvenience of Ofcom's investigation. First, on BT's case Ofcom had jurisdiction to consider these disputes. The only question is for what period of time Ofcom had jurisdiction to award repayment. So, all the questions about what is the correct allocation of BT's costs, and what is the actual maximum ceiling of price that BT could charge - all the matters that Mr. Read showed you in the determination -- All of those matters would still have had to be decided by Ofcom, but they would only have been able to award a remedy for a much shorter period of time. The real inconvenience of which BT complains here is not the complexity of the investigation, but that BT is liable to repay the sums which it has wrongly received in breach of the SMP condition.

Of course, also, as a matter of principle, Mr. Read has failed to explain why it is that he says that a historic investigation would be more complicated than an investigation into an ongoing breach of a cost orientation provision. Let us say that it is accepted that Energis raised a dispute in 2004. At whatever date Ofcom came to examine that dispute the scope of the investigation to be undertaken by Ofcom would be the same - whether Ofcom considered it in 2004, 2008, or 2010. The questions would be the same.

Finally, the adverse consequences. I have already identified the unfair results of BT's contentions. But, we also submit that just as the CAT indicated in *Orange*, BT's approach

would have adverse consequences on future commercial relationships between private parties because if BT's submissions were correct the only safe course for any party entering into a contract with BT for interconnection or access to its network would be for that party immediately, at the same time to send a letter saying, "This agreement is without prejudice to whether or not your prices are excessive. We hereby formally dispute all of your prices unless and until we have seen satisfactory regulatory financial statements that persuade us that you are not in breach of any SMP condition". We submit that that conduct is not conducive to good commercial relations, and it also indicates the futility of BT's position because if that becomes the standard practice, as it would have to be if legal advice were not to be later vulnerable to negligence claims, then Ofcom's jurisdiction will be exactly the same as it is now. All that BT will have achieved is to require the insertion of an additional formality into the contracting arrangements for private parties.

For all those reasons we invite the Tribunal to decide the preliminary issues against BT.

THE CHAIRMAN: Thank you very much.

MR. READ: Sir, can I briefly address the issues relating to the reference to the Competition Commission? I do not want to spend very long on this because obviously one has seen the issue in the round and BT's case is obviously not necessarily that a reference is necessary at this stage. So, I want to limit myself really to two points on this. The first point is that even Mr. Saini's own position -- Ofcom's own position really is not as simple as we say he indicates the position to be. He said yesterday that what you essentially have to do is look at the SMP condition that was imposed for the purpose of deciding what is a price control matter within s.193(10) and what is not. He said, in effect, that all the Tribunal can look at is the SMP condition itself because that is what s.193(10) requires one to look at. But, in our respectful submission that misses the point. If one looks at Condition H.3 it is quite clear that what the condition is actually allowing is an appropriate mark-up for the recovery of common costs and an appropriate return on capital employed, and that is the very real point in issue in this case, what is the appropriate mark-up for the recovery of common costs and the appropriate return on capital Ofcom has imposed? We say even on the test that Mr. Saini set himself, he said was necessary to set for the purposes of reference to the CC, even on that basis it does not meet the criteria he imposed, because it is an integral part of that condition that was imposed that BT should be able to recover an appropriate mark-up for the recovery of common costs and the appropriate return on capital employed.

In any event BT says that is a completely formulaic way of trying to address the matter because that is not actually what s.193(10) says. Section 193(10) says, in terms that it is "a

matter relating to the imposition of any form of price control by an SMP condition." It does not say that it is the SMP condition itself. It says that it is a matter relating to the imposition of that condition. So for all the reasons that we advanced previously we say that this very simple distinction that is sought to be drawn between imposition and compliance really does not stand up to the language that is actually being used within the Act itself.

The second point is that I received quite a lot of criticism in the submissions from the interveners today for not being able, even at this stage, to put forward defined questions. The fact is that what the Tribunal has to look at is the matters in dispute. That, if you recall, from s.193(10) is an express requirement for it to be a price control matter. The problem that BT has with all of this is that effectively Ofcom have put in dispute a number of matters which BT simply says is wrong. I gave the example yesterday about this assertion that the DSAC test was all clear and was a necessary adjunct to Condition H.3 at the time it was imposed. BT simply does not accept that, and if that point is decided in our favour, then the issue about whether or not this is something relating to the imposition of a price control matter falls by the wayside, and the problem that BT has in all of this is that it is possible to identify scenarios where it will be in dispute – and very clearly in dispute – those three questions we posed in the letter. But the problem is that at the moment because there are, if you like, prior questions and prior questions have always been recognised as being necessary to address by the Tribunal before one necessarily has the reference to the Tribunal or possibly in tandem, that is what came out of the H3G case. Those have to be considered and dealt with before you can move on to the next question of what exactly the reference is going to be, and we say that is precisely the case in this case. It is unfortunate because there is this very real issue over what exactly was being imposed in 2004, but as that issue is there, once that issue is resolved one way or another, if it is resolved in the way that BT says it should – nor reference to the CC. If it is resolved in the way that Ofcom says it may require a reference to the CC, depending what exactly the Tribunal thinks at the end.

THE CHAIRMAN: So just to take a concrete example, how would that work this October? The parties make their submissions, the Tribunal then rules and, let us say, the Tribunal rules against BT on the particular point you are addressing, it would then be a matter for identifying the questions that arose, send it off to the Competition Commission and then ----

MR. READ: Four months later get hopefully the ----

THE CHAIRMAN: -- four months later get to the answer, probably come back here again, depending.

MR. READ: I agree. I am not running away from saying this is unsatisfactory, whichever way one looks at it. On BT's part we would actually love to be able to accept Ofcom's submission that it is a very clear distinction between compliance and imposition because then all of this would fall away. But this is why we have felt it is not really right for BT to simply say there is no issue, because we simply do not believe it to be as simple as is portrayed by Ofcom and the interveners. Now, if unfortunate consequences flow out of that in the circumstances then that unfortunately is what one is stuck with. But it would be very unfortunate, we say, to adopt Ofcom's approach in this case in order to provide a neat solution in the circumstances of this case if, fundamentally that is not what was envisaged under the terms of the statute. I suppose it is a case of a bad case making bad law. But I have said all I can on that point so can I now briefly deal with the dispute resolution issues. Can I start with a point that Mr. Saini tried I think on several occasions to deploy, which was that I might call it an *in terrorem* argument. Effectively he said that if this Tribunal were to interpret s.185(1) as BT now suggests then it would put the UK in breach of its obligations to comply with the CRF. That pre-supposes that his interpretation of the CRF is correct. It also pre-supposes that when the CRF was being implemented it was always understood and clear that the dispute resolution process would be mandated in a particular form.

The reason I make that second point is because there are a number of points that you can make about the dispute resolution process that show when the Directives were being promulgated they were not being focused on dispute resolution providing, if you like, a regulatory mechanism for investigating the markets, and investigating the effects in the market and so on and so forth. The reason why we say this is that it is quite clear here that disputes only affect the individual parties involved, they do not affect the market place as a whole. That is quite clearly formulated when you look in the Act itself, where it is made quite clear that an award only binds the parties themselves not other non-parties. Indeed, it has been accepted by Ofcom in this case because they have urged BT to apply it elsewhere but recognise it is not actually a binding matter between other parties. So in other words, the dispute resolution procedure is a slight oddity in itself in that it is not the more general market place investigation and market place control that the rest of the Common Regulatory Framework deals with. Indeed, that is reflected in the very fact that, for example, the obligations about transparency, which I took you to yesterday, are specifically exempted from the dispute resolution process.

The other point relating to that is that it does not require consultation with the Commission prior to the issuing of any of the determination. So it is very much focused on the single individual relationship between the actual parties to the dispute rather than a wider market based investigation.

If I can go back to one point that Mr. Saini made yesterday when he was addressing you on the Access Directive, which is in the authorities bundle at tab 4. He looked at the definition of access in Article 2(a). He said, when he was addressing where it says "under defined conditions" in Article 2(a), that necessarily meant that that included the obligation under cost orientation. He did not really develop that in a major way, so it is not absolutely clear the point he was specifically making there, but if it is being suggested that the phrase "defined conditions" means an SMP condition then that plainly is not correct, because what that means is that you have transferred the meaning from the 2003 Act where it talks in terms of SMP conditions and employed it in the Access Directive when the Access Directive uses something completely different when it is discussing things like cost orientation obligations and reporting cost control, and so on and so forth. If you remember, we looked at those in Articles 9 onwards subsequently. They are referred to as "obligations". If in the definition of "access" it had been intended to say that it was going to be under the "defined obligations", that is the word that would have had to have been used.

What we say that plainly means is obviously the defined conditions being the contract terms, but also in particular, in the context of the telecommunications sector, the fact that you do have to have very clear technical protocols for actually allowing the interconnection of telephone networks. There are various protocols, etc, etc. Someone cannot come along and say, "I would like to interconnect with your system on the basis of technology A", if, in fact, your system only operates technology B.

The other point is that I think one can also say that if it meant under "defined conditions" meaning "under defined SMP conditions" it would actually run contrary to what the court said in the first *H3G* case, which I do not think is in the bundle but was the original one that dealt with whether or not you needed an SMP condition before the dispute resolution process could be engaged. It is not necessary because the dispute resolution process under Article 5(4) is not linked to any SMP condition. If you recall, that is the distinction with Article 20 which does relate it to the obligations, which are translated into the UK Act as SMP conditions, that is what is dealing with those obligations, not this, which does not require any form of SMP condition to be in place before the dispute resolution process is

involved. That goes back to the point I was making yesterday relating to access in s.185 being necessarily not the same as talking about obligations or conditions as in Article 20.

Can I now turn to the argument about what exactly BT's case is. We actually had some difficulty reading the transcript in understanding what Mr. Saini was actually alleging, what BT was alleging to be its case, because he seemed in two places to have actually changed from one thing to another. I do not want to get into a semantic argument because we say it is absolutely clear what we are saying, and I think Miss Rose was categorising it relatively fairly. There are nuances. Perhaps just to assist with this, we have prepared a short note. All of this note seeks to do is, firstly, to set out the two elements of the transcript which Mr. Saini addressed yesterday, and then at the bottom similarly go back to the TRD appeal, the dates that are absolutely there.

We think that what is, in fact, going on here is a false categorisation, that in fact it is very neat to be able to dress it up as BT having only three categories, and these are what they are, in order to try and dismiss the points we are making. We are saying, if I can look at the bottom line, very clearly that the key date in the TRD appeal was 19th June 2006 when BT challenged the Vodafone prices. I picked on Vodafone simply by way of example to lessen the confusion even further.

The challenge relating to network access was going forward – in other words. BT says that the dispute resolution process is engaged and goes forward and the jurisdiction relates to the period from 19th June 2006 onwards. What it does not do is relate back to the period December 2004 to 19th June 2006. That is what we say is the difference between prospective and historic prices, we have always said that to be case. Within the elements going forward from 19th June onwards you can, of course, and we have put them there, look at other dates and say, "How does apply within the dispute resolution process?" The short answer is, we are just looking at the period from 19th June 2006 going forward. That is what we call a prospective appeal, that is what we say is caught within the jurisdiction, not something earlier.

A lot of the points are actually being put forward by Mr. Saini seem to us in any event to be addressing something that we were never actually arguing about.

We fully accept, and can I make this absolutely clear, because I think this was squarely put forward, that our argument does involve the fact of accepting, reading in, construing, however you want to put it, s.185(1), that the jurisdiction only extends in respect of the dispute going forward in the example of TRD case from 19th June 2006.

That is all we are saying we are indicating should be construed within the terms of the sub-section because Mr. Saini said yesterday – and I think he said it clearly yesterday but he also repeated it today – that there are two conditions being involved here, that BT is saying that there are two conditions that are involved here: one, a challenge to the prices; and two, the element that I have just described, namely jurisdiction over the disputes from the date of the challenge. One is inherent within it in any event because you have to have a dispute before Ofcom has jurisdiction. No one seems to be arguing about that, so you have to have the challenge to the prices, it is accepted by everyone in this case that, in fact, there needs to be a challenge to the prices, otherwise Ofcom can never have jurisdiction, because there cannot be a dispute unless there is a challenge. So it is only what he called the second condition that is actually in issue in this matter.

Linked to that was the point that Mr. Saini was making that, effectively, this is an argument about BT not wanting to repay under s.190(2)(d), and therefore it is, in reality, an exercise of the discretion. Of course, I fully accept that part of what BT is concerned about is the fact that it has had to pay tens of millions of pounds going back many years under the s.190(2)(d) issue. Of course, that raises questions about discretion as well which we can deal with in October.

That is not the only reason why BT says that the construction of the Act is wrong – or, Ofcom's construction of the Act is wrong because it is also about the energies that have to be put into resolving such a dispute. I took you yesterday through the process by which Ofcom had to re-allocate costs, investigate them, check on this, check on that, etc., etc. That was only one element of this. You will appreciate that in the main part of the appeal there are going to be all sorts of issue about whether combinatorial testing should have been conducted, and BT carried out combinatorial testing, and it carried out the combinatorial testing for the years previous. So, in other words, it is the inherent problems with having to involve all this detail going back four/five years earlier. Mr. Saini very boldly yesterday accepted that actually any dispute, no matter how far back it went, would be caught. It was a very open and bold concession to make. He seemed to want to try and limit it by saying, "Well, maybe there is some discretionary way we can actually deal with this afterwards". But, he accepted the point. It is the huge resource and inconvenience that is going to be entailed in having to have that sort of length of investigation that is one of the key points that BT says can never have been intended when this swift and basic resolution period was imposed firstly by the CRF and then translated through into the 2003 Act. So, we say it is not just about money. It is actually about what the consequences are and for all the reasons

about inconvenience that is a very strong factor, we say, which should be taken into account.

Can I deal with the *Orange* case now? It is complicated in many respects from the way that the case was actually being presented by Orange at the time. It is not entirely easy to understand the comments that were put forward. Can I take you then to Tab 14? In case it is not clear already, can I mention that there were originally two preliminary issues which were designated in that case. The first was Orange's jurisdiction point; the second was an appellate point that simply does not concern us. So, it is only Ground 1 that is of concern. Can I take you to para. 37? You see the way that Orange puts its case -- or, put its case. What had actually happened was that Preliminary Issue 1 got effectively changed down to Preliminary Issue 1A and 1B. Having looked again at the transcript last night of the hearing there was considerable complaint from BT at the time that this was a moveable feast and the goalposts were changing, and this was not really the way to deal with it. In any event, I think the point is made very clearly there in para. 37 as to how Orange's final arguments were developing. That is the first limb, Ground 1(a):

> "… the alleged dispute does not fall within either s.185(1) or s.185(2)".

That is an important point because there was no issue in that case that in fact both 185(1) and 185(2) had been engaged within the final determination. It goes on:

> "The second limb (Ground 1(b)) is that, having regard to the terms of the SIA [the Standard Interconnect Agreement] there is no 'dispute' between BT and Orange within the meaning of s.185."

It was in that Ground 1(b) that Miss Rose was taking you to this morning about the "Admin hell" (as I think the phrase was used in that case) that would be created by having to look at whether the contractual mechanism had been engaged.

Can I ask you now to look at paras. 39 and 40? This deals with the construction of s.185.

> "… it is common ground that: (a) s.185(1) of the 2003 Act implements that part of Article 5(4) of the Access Directive which requires the national regulatory authority to be able to intervene in the absence of agreement between the parties with regard to the access and interconnection matters covered by that article; ... (c) s.185(2) of the 2003 Act implements that part of Article 20 of the Framework Directive which requires the national regulatory authority to be empowered to issue a binding decision in the event of a dispute arising in connection with regulatory obligations at least where those obligations do not relate to access or interconnection".

Paragraph 40 then sets out the nub of it:

> "The parties do not necessarily agree as to whether the part of Article 20 which requires the national regulatory authority to be employed to resolve disputes which arise in connection with the regulatory obligations which concern access and interconnection has been implemented by s.185(1) or (2). Whether the Tribunal needs to resolve that question depends on the Tribunal's conclusions as to the meaning and scope of the Directive provisions".

At para. 43 - and I will not read it into the transcript - it effectively sets out what Orange were actually arguing about in that case. What, in essence, they were saying is that once you had a contract any argument about the price under that contract was not relating to access because what effectively was being said was, "You have got your access. You are simply arguing about the price. It is irrelevant". That was really the nub of Orange's argument in that case - not about whether something was ongoing or retrospective, or whatever. It was simply about whether or not if you had the contract in existence, that was sufficient to satisfy Article 5(4) and therefore no-one could actually raise a dispute upon it. That was the key point within it.

Then, at para. 67 one gets the Tribunal's answer to this.

> "The Tribunal rejects that construction. The Tribunal agrees with Ofcom that the general objective of the Directive is to ensure adequate access and interconnection and that there is no reason, either looking at the wording of the Directive or considering the policy behind it, to limit this in the way suggested by Orange".

Then it goes on to talk about the reality of the markets.

If I can just then take you on to paras. 79 to 80 to complete this -- One of the arguments that was being put forward - and this is the reasoning of the Tribunal for reaching its judgment - quite properly by Ofcom and Miss Rose, that Orange's approach was wrong was because s.190(2)(d) showed that it expected to resolve disputes which related to an ongoing agreement. That was reinforced, in fact, by s.185(8)(a). In other words, those two sections demonstrated that you were not just looking at the situation where someone said, "I would like interconnection." "No, you cannot have it". There is the dispute. It was dealing with, "I have an ongoing interconnection agreement with you. I would like to deal with the prices going forward". They were the facts of the TRD appeal. The other party says, "No". That also was a dispute, although Orange was saying that it was not.

Then it goes on in para. 80, which we say is quite key in understanding this case,

> "If, then, s.185(8)(a) and s.190(2)(d) make it impossible to argue that s.185(1) is limited to pre-contractual disputes, that must mean, on Orange's construction of Article 5(4), that part of s.185(1) implements the obligation on Member States in Article 20 insofar as that Article applies to disputes in ongoing-arrangements arising from regulatory obligations relating to access and interconnection. If this is correct, the reader faces an intricate task in trying to unpick what the apparently simple phrase 'disputes relating to the provision of network access' means. It encompasses pre-contract disputes, disputes relating to access where interconnection is in jeopardy and disputes arising from a regulatory obligation concerning access and interconnection. But, it excludes, on Orange's submission, disputes which relate to network access in the absence of a regulatory obligation and in the absence of any threat to continued interconnection".

So, the difficulty with this *Orange* case and relying on the parts of the judgment that Mr. Saini took you to yesterday, is that actually the complexities of the arguments that were being advanced actually meant that it was part of Orange's case that in fact the methodology that Article 5(4) implements the obligation of the Member States in Article 20.

I do not want to spend any more time going into the *Orang*e case in any great detail because in my respectful submission it is very fact-specific, and what is absolutely clear is that it was not relating to the point before you.

I should have perhaps taken you finally to para. 88 as well where one gets the final conclusion.

> "The Tribunal therefore holds that, in the event that the dispute does not relate to the provision of network access for the purposes of s.185(1) it does relate to rights and obligations conferred on or imposed under Part 2 of the 2003 Act, namely the end-to-end connectivity obligation imposed on BT in September 2006".

Then, at para. 89:

> "Given that the Tribunal has found that the alleged dispute did relate to the provision of network access within the meaning of s.185(1) or alternatively that it did relate to rights and obligations conferred or imposed under Part 2 of the 2003 Act within the meaning of s.185(2), it is necessary for us to consider Ground 19(b) of Orange's case".

As I say, I am putting those in the context of the points I think that Mr. Saini was trying to derive yesterday from it, about how the Access Directive and the Framework Directive simply was not the point that was before them in that hearing.

While we are on the *Orange* case, can I deal with the point that Miss Rose put this morning with some considerable clarity, about the problems in that case that would have been generated if the Tribunal had to look at the contractual issues in order to determine whether or not there was a dispute, because there were some very difficult contractual arguments in that case as to whether or not the contractual provisions had been triggered or not. We fully accept, and we did accept in that case, that there is absolutely no way that Parliament or, indeed, the authors of the CRF could ever have anticipated that there would have to be this massive investigation of contractual issues like contractual terms, estoppels, waivers and so on and so forth – we entirely agree with that. But it is not the same to say that Ofcom face the same "Admin Hell" in investigating whether a dispute has arisen. Ofcom have to determine that question in any event because they have to determine whether there is a dispute before they can possibly decide (a) whether they have jurisdiction to deal with the matter, but (b) what the scope of the dispute is actually going to be, because there was some considerable correspondence even in the circumstances of this case as to what exactly was going to be the precise scope of the dispute, and ultimately we know what it was because it is set out in the first part of the final determination. So there is something slightly unreal in drawing the comparison between what was being suggested in the *Orange* case and what is actually BT's position here, which is that when Ofcom has to investigate the dispute in order (a) to see whether it exists, and (b) to see what the scope of that dispute actually is, it is somehow going to be incredibly inconvenienced while carrying that out from saying a third factor: "When do we think the challenge first arose?"

I fully accept that in some cases it may be more difficult than in other cases. For example, yesterday I showed you the example of Colt, you will see that right at the end of the scope period they put in a letter to BT challenging the prices and, in fact, gave BT the right to reply to that after the period had actually expired. It is so easy for Ofcom to see where the challenge arose on that.

I agree that with the Energis and the Cable &Wireless example, it is not necessarily quite so easy. There are issues involved in there, but they are issues that Ofcom were presented with and had to consider at the time it received this dispute complaint anyway. As I showed you yesterday, the material upon which the argument about when the dispute arose is precisely the material that was put to Ofcom when this dispute was first submitted to it in June 2008.

So the suggestion that there has to be some great huge archaeological dig is really fanciful in our respectful submission. It is happening already, the material is there already, the parties are required to submit it already and Ofcom will just have to go one step further in drawing the precise line and in most cases, as this case illustrates – I think it is six out of the seven – it is very easy to do as illustrated by BT in the skeleton argument. The fact that there may be the occasional one that causes more problems is neither here nor there.

Can I return briefly to the point that Miss Rose was making that it is suggested that regulation is being determined by a private act between the parties is the way she put it. Well that is inherent in the dispute resolution process in any event because it is an *inter partes* challenge, dispute, squabble, that triggers the jurisdiction. You have to have a dispute in order to fall within s.185(1) and this is accepted. But it is implicit within the way the dispute resolution process has been set up that it is considering the private relationship between those parties because as I indicated earlier – and I think it is probably worth looking very quickly at this – it is made clear in the Act that in fact it is only dealing with the position between the parties. (After a pause): I have lost my reference to that so I will move on while we find it. Can I deal with the other – if I can call them – "merits" or even "jury points" that were being put about what are the consequences of what actually happened.

The first of these is that it creates a perverse incentive for BT to effectively hide its revenue and costs from other parties so that it prevents them from having the opportunity of challenging it. That cannot be right because there is still s.94, there is still s.104, added to which, as Mr. Saini himself put forward yesterday, on Ofcom's case s.94 specifically allows Ofcom, as part of its notification procedure under the Act to require repayment. If that is right then plainly s.94 is a complete answer to all of this, coupled with s.104, it cannot create a perverse incentive in the way that was suggested.

Then there was an attempt to play on the vulnerable start-up companies up against the "Big Bad BT". In reality what seems to be behind that is that the regulator should act as a party to effectively resolve private law disputes that have accrued between parties under the dispute resolution process rather than letting the parties get on and deal with it themselves. We, on this side, think that that submission flies completely contrary to what in fact Ofcom itself was telling the Court of Appeal in the *Vodafone* case – if you remember I took you to the submissions made there. In fact, dispute resolution should not be about having to in effect sort out accrued private law damages claims for vulnerable start-up companies. If

Ofcom thinks someone has not been playing fair then it has the other powers, it has it in s.94 to do something about it in any event.

So the example of some poor vulnerable company being beaten up by the Big Bad BT does not bear scrutiny.

The other point that was being made, and again it is taking it to a conclusion in order to try and, in effect, demonstrate a point that is not really there. It is said that the Altnets have no alternative about the price. That simply is not right. Can I show you this by reference to BT's reply, which is in BT4, tab 2. Can I ask you to go to p.15. paras.40 and 41. I do not propose to read them out, but it sets out there very clearly what, in fact, is the basis upon which a challenge to prices can be mounted. I do not think it is being suggested that BT is a monopolist here. Yes, it has SMP, but the suggestion that there are no other players in the field is a little unreal and so this characterisation that somehow the Altnets are being forced to buy all these PPCs from BT, because it has no other choice and no choice to challenge the prices other than through the retrospective historic application of a cost compliance investigation under the dispute resolution process, just does not bear scrutiny.

I suppose I deal with it, although I do not think it is going to take the matter much further, but BT was heavily criticised for daring to say that the regulatory financial statements put BT in as bad a condition as somebody else. It is a point that we actually make, and can I ask you again to look at the reply at para.79(b), very clearly in this context, that it is Ofcom's application of the DSAC test that gives BT real problems in actually working out cost orientation compliance. BT's case, and I would not want this lost, is very clearly that cost orientation has to be assessed by a number of other factors of which DSAC is only a very limited test. Therefore, the criticism that, because we say we have a problem in getting the regulatory financial statements until two years later and therefore seeing what the DSAC is, is not some outrageous suggestion on BT's part, it is actually illustrating what we have said all along, that the use of the DSAC test, as a very significant condition, is flawed.

Can I just briefly give you the reference, I will not ask you to turn it up. Section 190(8) of the Act is the sub-section that makes clear that the determination binds the parties to the dispute and not the other parties.

One other point that Mr. Saini makes on the way that BT's case was involved is that he sought to draw the distinction between disputes that would take very little time to resolve and ones that would take a lot of time to resolve.

Then he makes the point, that how long it takes to resolve a dispute cannot determine the issue of jurisdiction. Our point is that if historic compliance investigation is likely to take a

long time in a number of cases – and one can put to one side whether a number is a lot, a few or some in the middle – but if that is the effect of the construction then it strongly militates against the intention of the legislature to have intended that. That is not true not only of the Act but also of the Common Regulatory Framework as well. It really goes back to this point that what is absolutely clear is the dispute resolution process was intended to be a swift and basic process, and that it was never intended to involve any cases that were going to take the length of time that was actually involved.

Sir, I wonder if I might just ask for a very short adjournment, perhaps of five minutes, just to check with my learned junior that I have covered all the points that she quite properly says I should be making. I think it would be quicker for me to do that rather than going through the list and perhaps duplicating what I have already said.

THE CHAIRMAN: Very well, we will rise for five minutes.

(Short break)

MR. READ: I am grateful, sir. I only want to make one final point and that is to go back to the Common Regulatory Framework. That is in essence a harmonised framework that is being prescribed to which Ofcom, obviously, as an NRA, is supposed to be contributing. The distinction is very clear between the general harmonised framework which is contributing to the uniformity of the market and the effectiveness of the market as opposed to the ad hoc process that dispute resolution entails under Articles 5(4) and Article 20. The reason why I say that is because obviously it is only for the parties to the dispute. It does not have the transparency, etc. that is required. As a result it does not contribute to the uniformity and effectiveness and EU law as we have said. Now, the core point about this is that if you look at s.94 (as opposed to s.185) that would be an industry-wide procedure, certainly if you accept the basis that Mr. Saini was putting in submission – that you can effectively order BT, under those provisions, to pay back the over-compliance to everyone within the process. So, again, we say that that distinction between the *ad hoc* nature of the dispute resolution process within the CRF framework and the contrast with, for example, the compliance procedures demonstrates that the CRF itself contemplated that this was to be a swift and basic procedure, it was an *ad hoc* procedure, and perhaps most importantly of all it is because of that that we say that the UK, despite Mr. Saini's submissions, is not going to be in breach of any EU regulatory requirements, even if, sir, you were to hold that s.185 does not relate or give jurisdiction for disputes going forward.

That was the last point that I wanted to make.

THE CHAIRMAN: Thank you very much. Thank you all very much, that was extremely helpful.

MR. SAINI: Sir, may I just make one finishing point because I do not want the Tribunal to go away with a wrong impression. The Tribunal will be aware that the vast majority of disputes are, in fact, resolved within the four month period, and the Tribunal will also bear in mind the principal reason why this dispute took longer than four months to resolve which is that part way through the four month period BT took the step of re-stating its accounts. So that is a factual point which may be ultimately disputed but I do not want the Tribunal to go away thinking that somehow Ofcom were deliberately slow or incompetent in some way in dealing with this dispute, there is a particular reason why it took so long.

THE CHAIRMAN: Thank you, Mr. Saini, that is explained in the determination.

MR. SAINI: I am obliged, sir.

MR. READ: Sir, I think I ought to make one point in reply to that, which is that certainly in the notice of appeal BT drew specific attention to the Commission report where one of the issues that was being put forward by the Commission was that the UK NRA regulator was not resolving disputes within the four month period. We can have a discussion about to what extent that is or is not a problem probably left over to the October hearing ----

THE CHAIRMAN: I think that is not a point for now, but could you just give us the reference?

MR. READ: The reference is at para. 63(e) and footnote 47, which refers to the EU report in question. It is not in the bundle, but the link is in the electronic copy of it. Obviously I do not want to get into an issue about that, it is probably not going to help you.

THE CHAIRMAN: No, I do not think it is. Well if there is nothing more, thank you very much, and we will hand down our judgment in due course.

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