IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1238/3/3/15

Victoria House,
Bloomsbury Place,
London WC1A 2EB

16 December 2015

Before:

ANDREW LENON QC
(Chairman)
WILLIAM ALLAN
PROFESSOR COLIN MAYER

(Sitting as a Tribunal in England and Wales)

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC — Appellant

- and -

OFFICE OF COMMUNICATIONS — Respondent

- and -

SKY UK LIMITED
TALKTALK TELECOM GROUP PLC — Intervener

_____

Transcribed by BEVERLEY F NUNNERY & CO.
(a trading name of Opus 2 International Limited)
Official Court Reporters and Audio Transcribers
5 Chancery Lane, London EC4A 1BL
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com

_____

HEARING - DAY FIVE

A P P E A R AN C E S

Mr. Rhodri Thompson QC, Mr. Nicholas Gibson and Ms. Anita Davies (instructed by BT Legal) appeared on behalf of the Appellant (British Telecommunications Plc).

Mr. Josh Holmes and Mr. Tristan Jones (instructed by Ofcom) appeared on behalf of the Respondent.

_____

Wednesday, 16th December 2015

(10.30 am)

Closing submissions by MR. THOMPSON

MR. THOMPSON: Good morning, sir.

THE CHAIRMAN: Good morning. Before you start, can I say on behalf of the Tribunal how grateful we are to both sides for the documents you have produced. We appreciate it must have been a lot of work, it's a busy time of year, and I believe they are going to be very useful to us in writing our judgment.

MR. THOMPSON: I hope so, and I hope they may be useful in the shorter term in that the elves have been working overnight and there is now a cleaner version, which is substantially the same in terms of paragraphing but has got some additional references. The Tribunal will have seen there were some gaps in the document put in at 5 o'clock, so I am proposing -- and I prepared my closing on the basis of the document put in at 5 o'clock, so I hope that the additional references will be helpful, but they will be substantially the same.

THE CHAIRMAN: Yes, there is obviously no need to repeat what is in the note because we have read it and we have absorbed it. What would be useful is if you could respond to Ofcom's note. That is another job for you.

MR. THOMPSON: Yes. I must confess I hadn't anticipated that approach. I was proposing to make the points --

THE CHAIRMAN: Take your own course. If there are outstanding points we would like you to deal with we can no doubt put them to you specifically.

MR. THOMPSON: Yes. By way of general comment on Ofcom's note, and in particular in relation to two particular parts of it, paragraph 39 and then 29. In relation to paragraph 39, as we read it, although it is presented as a reason not to have conducted a cost-benefit analysis, in my submission what it does in fact is set out a number of important considerations as to why a cost-benefit analysis was in fact needed, because of the complexities and ambiguities of this market. That was particularly the case and accepted as the case in my cross-examination of Mr. Matthew where he accepted the complexity of the market. So by way of introductory comment, it appears to us that that goes with the grain of Mr. Bishop's criticism rather than a defence to it.

The second point I was going to pick up was at paragraph 29, where Mr. Holmes or Ofcom make what to us is a somewhat curious point where they effectively concede that on a conventional economic approach of a SSNIP test, standard broadband does operate as

a constraint in relation to superfast broadband, but then make a different point which is that if one applied a different test in relation to a response to a margin squeeze you might get a different answer. But in my submission, that doesn't address the basic economic point that is being made by BT and Mr. Bishop that, on any standard view, the response of knowledgeable consumers, which is what Ofcom itself took into account in 2014 and maintained in 2015, would strongly indicate that standard broadband does operate as a significant constraint on superfast broadband.

So it seemed to us that it wasn't a particularly helpful approach.

In relation to the general treatment of Mr. Bishop's evidence, I will obviously listen to how Mr. Holmes put it, but there are quite a number of references to Mr. Bishop's evidence in Mr. Holmes' note, and in my submission there is quite a lot of extracting gobbets from Mr. Bishop which are not set properly in context, and by way of general comment I would invite the Tribunal to read Mr. Bishop's evidence carefully and as a whole, particularly in those areas where Ofcom seeks to place reliance on Mr. Bishop, and indeed it is striking that that approach has been taken, as we see it, rather more than putting forward a positive case by reference to its own analysis or Mr. Matthew's evidence, and we would invite the Tribunal to find that that confirms rather than casts doubt on our doubts about the cogency of that positive case.

By way of introduction to our closing submissions, and I must confess I would be quite unhappy if the exercise that we have undertaken over the past 24 hours somehow was thought to curtail our rights to bring the case together as we see fit in closing --

THE CHAIRMAN: Absolutely not.

MR. THOMPSON: So I'm hoping that is not the Tribunal's intention. As we have indicated at the start of our note, we still rely on our pleaded case in the Amended Notice of Appeal and the four limbs of that case. First of all, the inadequacy of Ofcom's market analysis, Ground 1A, the error of law in relation to the relevant constraints and, in particular, the failure to consider the impact on BT's incentives of the undertakings. The failure to consider competition law and the past evidence of compliance or conduct. And fourthly, the lack of justification, Ground 1D, for the enhanced price control beyond a FRAND condition.

We have simply sought to clarify the matter in our reply skeleton and in our opening submissions, and the helpful exercise that we have been asked to undertake for the Tribunal hopefully focuses the matter down yet further.

So this is a further effort but not a substitute, indeed we couldn't put in a substitute at this

stage under the statute which requires us to argue by reference to the Notice of Appeal in any event.

We have identified two questions which we say the Tribunal needs to address, namely, what constitutes a relevant risk of adverse effects within the meaning of 88(1)(a), and secondly, how is Ofcom required to demonstrate the existence of that relevant risk. That is section A of our note.

We have then made six points in response to the question of whether the final statement satisfies those two requirements which we say arise under the statute. First of all, whether Ofcom erred in law by failing to apply the right test for abusive margin squeeze, and we say yes, it did. Secondly, whether Ofcom erred in law by failing to take account of regulatory constraints acting on BT independently of the proposed VULA condition, and we say, yes, it did. Thirdly, whether Ofcom erred in failing to analyse the prevailing market conditions. Fourthly, whether Ofcom erred in taking account of the market share statistics. Fifthly, whether Ofcom failed to conduct a proper cost-benefit analysis. And sixthly, whether Ofcom failed to conduct a proper cost-benefit analysis of the benefits of regulation as against leaving well alone, given Ofcom's general stance in relation to regulation.

In relation to the third part, our remedy, we say these were clearly material errors which go at least as far as the Vodafone case and we would say significantly beyond it. Also we would say, and this is the point that was raised by Mr. Allan in my opening, the fact that some of these issues were addressed as matters of design in section 4 and subsequent sections does not remedy a defect in market analysis because if the market analysis is wrong, the characterisation of risk is wrong, and it cannot be remedied at a later stage.

So I will take these, given the indication from the Tribunal, and I was going to do that anyway, I will take the points as swiftly as I may.

First of all, the specific question raised by the Tribunal as to the relationship between the margin squeeze and the issue of effect. You will have seen in my submissions that we say it is a unitary test, and I think it is worth just looking at the statute briefly, which is at tab 16 of the first bundle of authorities.

Tab 16, pages 53 and 54. The Tribunal will recall that the general power to impose price controls, on page 52, at 87(9), is subject to section 88, and the core wording which has been the subject of debate is the relevant risk of adverse effects arising from price distortion, and that primary wording clearly makes the risk specifically of adverse effects so it's a straightforward question. And the role of the margin squeeze is, as it were, a causal role, it has to be arising from price distortion, so it's a risk of effects arising in a particular way.

When one looks into 88.3, I hesitate to criticise a Parliamentary draftsman, but I think it is easy when you first look at it is to think that the primary focus here is the imposition of a margin squeeze, but in my submission that is not correct, because there is the word "so" in 83B, and so it's "so impose a margin squeeze as to have adverse effect ..."

So in effect it's a different version of the same concept because the governing wording is "the dominant provider might have adverse consequences for end-users", or possibly "the imposition of a price squeeze might have adverse consequences for end-users". And the wording "so impose a price squeeze" is, as it were, a modal wording saying how you are going to have those effects.

I was thinking about it overnight in the light of the Tribunal's question. If I so arrange my tax affairs as to have no liability for income tax, for example, then I have no liability for income tax, and the way I have achieved that is by arranging my tax affairs rather than by earning no money, so it's a modal way of achieving the adverse consequences.

As I say, it's slightly curious to have done what I would say is the same thing in two slightly different ways, and the position is made even more curious because when you look at the EU legislation, which one finds at tab 3, you find a much more straightforward wording on page 17 of the Access Directive copy that we have. It says "may apply a price squeeze to the detriment of end-users", so it's simply two lapidary expressions sitting side-by-side, but you obviously need to have both of them and I think that is how it was reflected in our skeleton argument. But the way in which the UK legislator has done this is to focus the issue on the risk of effects, and in my submission that is a perfectly right and proper way to do it. We have put in our note the reference to Mr. Bishop's, as it were, logical explanation that the margin squeeze is a necessary condition but the effects are the sufficient condition, and in my submission that gets to the same general point.

The other point we make in this first part of our skeleton, unless there is anything more I can say on the statute, is that so far as the EU concept of a margin squeeze goes, that is exactly the same approach that has developed from the recent case law of the Court of Justice, and in particular the leading cases of Deutsche Telekom, which is at tab 28, and TeliaSonera at tab 29.

The first was an appeal which went up and various points of principle were decided in a telecoms case relating to margin squeeze in Deutsche Telekom, and then in TeliaSonera shortly thereafter a preliminary ruling was made by the Swedish courts for guidance on the concept of a margin squeeze, and in both those cases it was made clear by the Court of Justice that the concept of effect was inherent in the EU concept of a margin

squeeze. So happily both the EU legislator and the UK legislator has precisely reflected the development of the case law of the Court of Justice, as it were anticipated it by a period of some five or ten years. So, in my submission, the position is clear and not in any real doubt.

The only other issue I should touch on is one that I think we haven't specifically looked at which is the point that emerges from our reply, at tab 9, about whether the fact that this is a prospective as against a retrospective analysis makes any difference. That is tab 9 of bundle I. It's paragraphs 24 and 25.

We make two points there. First of all, by reference to the Impala case, which we gave the reference to, also called the Bertelsmann case we referred to -- it's in the authorities, I can find the reference -- that the EU regulator, and for these purposes Ofcom is an EU regulator, can't water down the relevant concept. And then, secondly, the point at 25 is that it's clear from the merger context that the fact that something is a prospective or a retrospective case makes no difference to the analysis.

So for example in the subsequent case of Piau, which was a competition case, a retrospective case, the approach that the Court of Justice had taken in a prospective case, the merger case of Airtours, was simply cited without comment. So we say there is no reason why the concept of what has to be proved varies because one is looking at the matter in the past as against in the future, that it's the same concept. How you prove it is a different matter, but what you are trying to prove is exactly the same thing.

The relevant references are: Bertelsmann is at tab 26, Piau is at tab 23. And we haven't got the Airtours case but I think that is sufficient for present purposes.

So that is what we say about what has to be proved. Then in terms of how it has to be proved, we make a number of points which are all important points, some of which we have touched on in opening but some of which we haven't, and obviously the ones I have taken in opening I will take as briefly as I may.

The first point is that it has to be decided by EU law, that is the point we made at paragraph 14, and that has been recognised not only by the Court of Justice in The Number case we looked at, which is at tab 30, but also by the Supreme Court which is perhaps worth looking at, which is at bundle IV of the authorities, tab 52.

Most of these cases Mr. Holmes was in, I'm not sure whether he was in this one, but this was a case about a practice called ladder pricing whereby BT altered its wholesale price depending on the retail price that was being charged downstream, and that led to a long and complicated piece of litigation. But for present purposes, the only points I refer the Tribunal to are paragraph 5 on page 768, where Lord Sumption makes a general comment

about the nature of the CRF directives with which we are concerned, but then more particularly paragraph 14 where Lord Sumption says:

> "This effect is given to directives in the United Kingdom by the Communications Act 2003. Under the Act, Ofcom is the national regulatory authority for the purposes of the scheme. Since it is common ground that the directives are accurately transposed in the Act, it will generally be convenient to refer to European rather than domestic legislation."

And then is reference to a particular provision. Then sections 3 and 4 provide in terms corresponding to the directives for the matters to which Ofcom must have regard in performing its functions generally, and then there is reference to -- perhaps it is not there, but there's reference somewhere to the nature of an appeal in this jurisdiction. I will find that reference in a moment.

So this is an EU matter which is governed by EU law and we would say not only as a matter of statute but as a matter of principle.

The second point we make is that it is regulated to a stringent standard, and you will recall we opened with that. There was some push-back by Ofcom on that issue in its opening, and I think that is maintained by Mr. Holmes, where he correctly says that we are operating here within a narrower field in that we are not here concerned with whether the market is effectively competitive or whether BT has significant market power, so we are looking at a narrower question about price control, and within that in that narrower question a yet narrower question about enhanced price control.

But we would submit that the general context remains the same, there is still a condition -- you will recall we looked at specific and general conditions in the guidance of the Court of Justice, so it is still within that general context, and it is still a stringent standard both on its face and because of the nature of the restriction that is in issue here, namely, a pricing restriction.

The third point we make at paragraph 16 and also again at paragraph 19 on the more specific issue of cost-benefit analysis is that the market analysis that Ofcom is required to carry out must assess BT's incentives and the likelihood of consumer harm and, if necessary, must carry out a cost-benefit analysis to the standard that will withstand profound and rigorous scrutiny. We looked at the Vodafone case in opening and particularly paragraphs 46 and 47 where that is said in terms, and we looked more briefly at the Tetra Laval case, and I think I gave specific references, and I think it is particularly the area around paragraphs 37 and 74 where the Court of Justice on appeal confirmed that in

a prospective area, the lack of concrete evidence means that the balancing exercise needs to be carried out very carefully.

And at 74, they made the particular point that the incentive effects of whether or not proposed conduct or anticipated conduct might be unlawful is something that the regulator must take into account. We obviously take that into account as a statement of the highest authority, which in fact bears also on the legal question we will come to in a moment about how credible it is that you are actually meant to not think about those issues which would be diametrically opposed to the guidance of the Court of Justice itself.

Then the third point, which is one that was adverted to by Mr. Bishop at several points in his evidence but wasn't actually in the papers, is the fact that in the closely analogous field of non-horizontal merger control, this very issue has been the subject of guidance from the Commission, and that is the second of the two authorities we handed in which should be at tab 11A of the Tribunal's papers. It's the first bundle of authorities, tab 11A. Has that been added to the Tribunal's papers? It should be at the back of 11.

Can I hand up another copy? (Handed)

The Tribunal will understand that -- I think the point was put to me by Mr. Allan, that the position of a conglomerate merger, where you have disparate firms joining together, raises particular concerns, and that was an issue in Tetra Laval. And one of the points they made, apart from the general guidance, was that in that particular area you need to be particularly careful. And the point I made in response was, well, everyone agrees that this is also an area which is very ambivalent where there will be benefits on the upstream, benefits on the downstream, long- and short-term and so the balance is also complex.

But I think the point that Mr. Bishop was getting at was that this area, non-horizontal mergers, so where you have vertical integration between two firms at different levels of the supply chain, is very closely analogous to the issues that one faces here, that you then are looking at the motivation of the integrated firm which is really the same issue that you are looking at here.

The guidance of the Commission is at paragraphs 40 to 46 and many of the issues that are identified in that passage are extremely reminiscent of issues that have been debated in this litigation, and I would refer the Tribunal in particular to paragraph 40 which states:

> "The incentive to foreclose depends on the degree to which foreclosure would be profitable. The vertically integrated firm ..."

So in this case BT:

> "... will take into account how its supplies of inputs to competitors downstream

> [VULA] will affect not only the profits of its upstream division [Openreach] but also of its downstream division [BT Consumer]. Essentially, the merged entity faces a trade-off between the profit lost in the upstream market due to reduction of input sales to actual or potential rivals, and the profit gain in the short or longer-term from expanding sales downstream or, as the case may be, being able to raise prices to consumers."

So very much the issues we have been debating between the economists and experts are set out in terms by the Commission.

Then a more detailed account of the different factors is given between 41 and 45, and you will recall in particular the points that Mr. Bishop made about the competitiveness of the downstream market, the fact that superfast broadband forms part of a larger market which Ofcom itself has found satisfies the SSNIP test and is within the scope of the relevant market, and in particular that there is a large, indeed a market-leading, competitor with approximately 80 per cent of the market in the areas where it is active which provides a very substantial and direct constraint on BT were it to render its retail offering uncompetitive by engaging in price increases on the upstream market.

So we say that this --

MR. ALLAN: Sorry, Mr. Thompson, I haven't quite followed your last statement. You say that it would render its retail offering uncompetitive by raising upstream prices. But surely the essence of the margin squeeze that we are concerned about the possibility of here is one where BT holds its retail prices constant.

MR. THOMPSON: Sir, I perhaps -- that is one possibility, and I will come to the possibilities in a moment. But I think you have been quite correct to pick me up on it because the constraint would arise most directly, assuming that BT to some degree holds its prices down and the competitors put their prices up but that wouldn't necessarily be what would happen, but if they did, then BT would be faced with a trade-off because some of those people would have a very obvious option of going across to Virgin, who, on this hypothesis, would be holding its prices constant. So that is the trade-off I think in that particular case that is being talked about.

But the point I am making here is that the Commission is identifying precisely that type of trade-off, and the need to look in detail at how the market works, to reach a view as to where the balance is likely to go and where the incentives are likely to lie, and that is really the whole burden of Mr. Bishop's critique of the Ofcom approach that none of that exercise has been undertaken. There has been no attempt to carry out what is, in fact, a complicated

balancing exercise.

The other point I was going to take the Tribunal to, because to some extent it bears on the point Mr. Allan put to me on the first morning, is that paragraph 46 expressly refers to the Tetra Laval guidance in relation to taking into account the possible illegality of conduct, and it qualifies it, as the Court of Justice does, by saying that it doesn't require:

> "... an exhaustive and detailed examination of the rules of the various legal orders which might be applicable and of the enforcement policy practised within them."

Then the footnote gives what I would submit to be a somewhat revealing example of the Commission attaching importance to the fact that the national Hungarian regulator for the gas sector indicated in a number of settings that although it has the right to control and to force market players to act without discrimination, it wouldn't be able to obtain adequate information on the commercial behaviour of the operators.

So it's that type of exercise that the Commission is not required to go into. But I would contrast the present case where Ofcom, during this very consultation, had investigated the very question in issue, and so the constraint of competition law in this particular case was a particularly acute and obvious one and we would say, on this guidance, should clearly have been taken into account.

So we rely on that guidance as well in relation to regulatory constraints and in particular the constraints arising from the undertakings and from competition law.

The next point we make, which is at paragraph 17 of our note, is the question of the standard of proof, if I can put it that way. We say that the latest case law, and we did look at this, the Post Danmark case, at tab 34, paragraph 74. The Court of Justice was specifically asked what the standard of proof was, and came back with the answer "probable". So that is what the Court of Justice has said in the analogous case of anticipated prospective effects in relation to competition law.

We also refer to the Microsoft case. Actually the relevant passage is set out in the reply so it's the most convenient place to look at it, again at tab 9 of the first bundle. It's at paragraph 27, just after the passage we were looking at before, where we make a submission and then we quote the relevant passage in Microsoft where the Court of First Instance says this:

> "The expressions 'risk of elimination of competition' and 'likely to eliminate competition' are used without distinction by the community judicature to reflect the same idea, namely, that article 82, now 102, does not apply only from the

time where there is no more or practically no more competition on the market. If the Commission were required to wait until competitors were eliminated from the market or until their elimination was sufficiently imminent for it being able to take action under article 102, that would clearly run counter to the objective of that provision which is to maintain undistorted competition."

We make two points. One, it is analogous because it is, as it were, a precautionary approach which is taken under 102 but it is also a statement as to the standard. But I heard the indication from the Tribunal that you think a standard of probability cannot be right in a case of this kind and I understand why that is said. In my submission, the Court of Justice guidance does tend to suggest that it is a substantive hurdle, whether or not above the balance of probabilities, and I wouldn't necessarily press for that. It seemed to me it was more in the area of what you might call an umbrella test, whether the weather is bad enough that you take out an umbrella, it doesn't necessarily mean you think it is more likely than not that it will rain, but you wouldn't bother to take it unless you thought there was a real chance of it raining. It is more in that sort of area, and obviously that partly depends on how burdensome it would be. You wouldn't take an extraordinarily heavy waterproof coat unless you really thought there was going to be a downpour, you wouldn't put on the Gore-Tex, but there is a trade-off there. And in my submission, for this type of regulatory restriction, the guidance of the Court of Justice suggests that the standard is a high one.

MR. ALLAN: Mr. Holmes might suggest that all he has to show is you need to take some measure of waterproofing out. Sorry, that is just an aside.

More seriously, could we just explore a little bit more your comments on probability. To start with, I must say I find the Microsoft paragraph you quote quite a difficult paragraph to interpret, particularly in view of the first sentence. But to go to Post Danmark II, if we could, I just wonder how you interpret, or how you suggest we should interpret probability in the context of the rest of what the court has to say.

MR. THOMPSON: Tab 34?

MR. ALLAN: Wherever Post Danmark II is to be found. Sorry, I'm not familiar with --

MR. THOMPSON: I wasn't sure whether you wanted to turn it up.

MR. ALLAN: I do.

MR. THOMPSON: It's at tab 34.

MR. ALLAN: I am looking particularly I think -- the discussion of effects is at paragraphs 63 to 74 generally.

MR. THOMPSON: Yes.

MR. ALLAN: But for present purposes I think it would be helpful to look particularly at paragraphs 71 and 72. 71 emphasising the well-known special responsibility of dominant firms, and paragraph 72 reciting again the well-known standard in Hoffmann-La Roche which, as you say, is a precautionary standard.

Then, when we come to paragraph 73, talking about the fact that no de minimis or appreciability assessment is required in relation at least to abuses of this kind, and saying:

> "That anti-competitive practice is, by its very nature, liable to give rise to not insignificant restrictions of competition."

So given that sort of language, what are we to make of the probability assessment that you are urging upon us and how do we make that assessment?

MR. THOMPSON: I think it all fits together with the Tetra Laval point, which is you are dealing here with something forward-looking, which is inevitably therefore somewhat uncertain, and Tetra Laval says in that sort of situation there must be something concrete to justify your concerns, and that is partly why I cross-examined Mr. Matthew about what I call the ghost of a chance point. That whatever standard it is, the ghost of a chance can't be enough, there has to be -- or the chance of a ghost, perhaps I put it that way, that it cannot be enough that somebody is a bit afraid, that Mr. Matthew feels it in his water that there might be a margin squeeze or Mr. Heaney says "I am very, very frightened". That is not enough, there has to be something concrete, and that is the Tetra Laval point, and that seems to me to fit with the probably point; that there has to be something real there.

What I think the Court of Justice on the other side is saying, given the scale of the issues you are dealing with here, you have a dominant firm, if you demonstrate that it will probably do X, then you don't have to prove very much -- or perhaps I should say will probably cause X so that there will be an effect, then you don't have to do very much in terms of scale because inherently it is going to be important because you have discovered that a dominant firm is going to cause consumer harm, you don't then have to weigh up how much.

But it doesn't go away from the fact that you do have to prove it. But if you haven't proved anything, you have just got some general fears, then that is not good enough. What you need is something concrete, at Tetra Laval, to render the effect probable Post Danmark.

That is how I read it. But I obviously see the issue about scale and that it makes the issue a difficult balancing exercise. That is of course why we say they need to do it carefully.

MR. ALLAN: But it also goes, doesn't it, to the extent to which we look at the nature of the

conduct and its impact on consumers, because what the Court of Justice is saying here in Post Danmark is that we don't need to make an appreciability assessment in terms of the number of consumers that might be affected, and the same point was made by the General Court in Intel, paragraph 116. That obviously is under appeal to the Court of Justice.

So I guess the thing I am struggling to be as clear about as possible is in the context of a direction that you don't make an appreciability assessment, so if one looks at Intel it is sufficient that one or two customers are affected, and the focus is then on the nature of the conduct, rather than the consumer assessment, quite what you make of that in terms of probability.

MR. THOMPSON: I think some of these issues were -- there was a skirmishing between Mr. Holmes and Mr. Bishop about the relationship between incentives and effects, and whether or not it's like a sort of snail in his shell and they are both part of the same entity, and I think it is in that area, and I think it probably does take us back not only to Tetra Laval but also to the non-horizontal merger guidelines, that given that you have this complicated assessment of what it is that BT might or might not do, you have to feed in quite a lot about the market and undertake some careful assessment about what its incentives actually are, for the reason that you give, that if BT will engage in what I called in opening a real margin squeeze, then the likelihood is that there will be at least some effects because of the intrinsic nature of the conduct.

But that does then mean there needs to be a proper assessment of what it is that BT is actual likely to do. I think the way Mr. Bishop was seeing it is you have to do it -- you either do it by a sort of slightly artificial stage one, stage two, conduct, effects, or else in assessing what the conduct is, you look also at what its likely effects are to be, in which case you are actually doing the two stages as part of a rolled up exercise which I think on the statute, for the reasons I have given, is in fact entirely consistent with what the statute requires, that it is effectively doing X by means of Y, and therefore in a sense you can look at X and Y together.

These are difficult issues but I hope that is of some help. Given there are a number of factors here, the point that is being put to me is that in that mix one is also looking at both what it is that might happen but also what it is you might do, so the nature of the restriction you are thinking about imposing and also the inherent likelihood of the relevant events occurring given the particular market characteristics that you are looking at, and I think somewhere in the papers is the famous tiger, or some people remember it as a lioness, in Regent's Park and the Alsatian, how inherently likely it is that this or that is likely to

happen.

That is where Mr. Bishop starts saying you have got yourself a vertically integrated competitor with an established market position, you have a highly competitive retail market, how likely is it that the vertically integrated company will say, "I know what I will do, I will embark on a margin squeeze", given it is highly unlikely to be successful and would be very expensive if the effect is to promote the position of Virgin or leave Sky in the field and/or possibly provoke a response, a regulatory response from Ofcom. So that you will have cut your profits during the period when you have got a brand advantage and you made the investments and you won't recoup anything because everyone will still be there and then you will have your prices regulated at the second stage.

So there is that. Then there is the further point that you have just been investigated by Ofcom. You have TalkTalk breathing down your neck making allegations all the time. How likely is that you take the risk that you do something unlawful and think you will get away with it?

So there is quite a lot that packs in which we say Ofcom really hasn't taken properly into account.

Going back to our note, paragraphs 18 picks up the point of principle that we made in paragraphs 8 to 23 of our skeleton by reference to the structure of the CRF, principles of economics, Ofcom's policy which we have looked at a number of times, the impact assessment guidelines and the bias against regulation, and then we add for good measure common sense. How could it be that a statute which is expressly based on effects doesn't require an effects analysis either before the regulation is put in place or in relation to the regulation itself? We say that intuitively that is a ridiculous position.

Then finally in that section, we revert back to the case law on margin squeeze and abusive pricing, paragraphs 20 and 21. That is a point that we made in our original Notice of Appeal at paragraphs 37 to 40 by reference to three cases, the two telecoms margin squeeze cases I have already mentioned, Deutsche Telekom and TeliaSonera, and also a case in a different area but which helpfully summarises the issues, Post Danmark, which we quote in our Notice of Appeal.

Thinking about it again overnight, I think the three possibilities identified at paragraph 20, if I can put it this way, the first and second, an exclusionary strategy or pricing below average variable costs, are effectively subjective or objective bases for a presumption of abuse, that if you set out -- if there is an email saying let's get rid of Sky and TalkTalk, then that raises a presumption of abuse. That is not what a dominant firm should be doing.

Secondly, if the evidence is that you are pricing either below your wholesale price, which I think was the position in Deutsche Telekom, and certainly was the position in Albion, so that there is a zero margin, then that raises a presumption of effects. If you are pricing below your variable costs, going back to the case law, right back to AKZO, that raises a presumption of abuse.

If not, if you are between -- if you're pricing above your variable costs but somewhere up to total costs, then the case law of the Court of Justice has consistently been that there needs to be a convincing effects analysis, so it takes us back to the same point by a different route from the horizontal merger guidelines, but we say that that margin squeeze case law is entirely consistent with the approach that the Commission has indicated should be taken in the prospective merger context.

So we say it all comes together and is a consistent package.

MR. ALLAN: Have you more to say on ...

MR. THOMPSON: No, that was what I was going to say about what Ofcom has to do.

MR. ALLAN: Could we just look at the case law again a little bit more closely, just to see precisely what it is Ofcom has to -- and perhaps I could just start by asking, Mr. Bishop in his evidence I think said that if you are looking at the third category of potential abuse, the relevant cost parameter was a short-run marginal cost assessment. Is that your position?

MR. THOMPSON: I think we are going to get into issues --

MR. ALLAN: You are going to come to this.

MR. THOMPSON: I was going to say we are going to get into issues of design because there obviously is a question --

MR. ALLAN: I think you put it as a threshold question as to what the nature of a margin squeeze is.

MR. THOMPSON: What is it that Ofcom is actually looking for? And you will recall I put a number of the examples set out at paragraph 22 of Mr. Matthew's statement to him. What I think emerged from his evidence was that Ofcom is not really saying that BT might enter into what I might call a Deutsche Telekom or Albion type margin squeeze, a truly exclusionary margin squeeze. What he is looking at is a series of gradations, and where we seemed to come out in cross-examination, because in my submission it is wholly unclear from the final statement or from his witness statement as to what the standard is, is that he thought it was enough if there was a fear, although that was only an additional point, but he also seemed to think that there had to be a sufficient umbrella for competitors to be able to cover not only their short-run fixed and common costs but also their investment costs, and

that obviously takes us back into the issues of design and he quite properly pointed to that. But if he is saying that, that what he was concerned about is the possibility that BT might at some point, and again we are back into design, that for a month BT's retail margin might not be sufficient to cover its latest sports investment, however large and however risky, then that is precisely the point Mr. Bishop is making, that that is a massive overregulation with potentially very damaging effects on competition, because it opens the door to inefficient competition, and doesn't reflect what a competitor would actually be looking at in considering whether or not to enter or remain in a market.

MR. ALLAN: I understand that aspect of the discussion. What I am focusing on at the moment is rather the exchanges there were with Mr. Bishop about what the essence of a margin squeeze is, and the requirement that there is -- or what is it that makes competitors able to respond to a price squeezing, a price offered by BT, to which I think in evidence he said it is having a positive margin. What is a sufficient positive margin? In this instance at least covering short-run costs, marginal costs. I'm just trying to understand if that is your conception of a margin squeeze.

MR. THOMPSON: It is difficult to avoid the design issues, because we haven't challenged --

MR. ALLAN: Sorry, I'm not sure I follow that this is a design question. It's a point about Mr. Bishop's observation about what the nature of a margin squeeze is.

MR. THOMPSON: If I can respond --

MR. ALLAN: An anti-competitive market squeeze.

MR. THOMPSON: The difficulty here was what was Ofcom looking for? And at its height, our criticism is it seems to have been looking for really nothing at all and just a concern. But if we try and work through -- one of our criticisms is it is just wholly obscured from the final statement what it is that they think BT might do. The wording of much of Mr. Matthew's statement and much of the final statement would work perfectly well with: BT puts its price up upstream or puts its price down downstream, which is just retail competition.

So if that is not enough, and we would say that is definitely not enough, what more is it that Ofcom is afraid BT might do? And that is not just a flippant point, because it goes with the market share risk. The risk is that BT continues to compete legitimately, and the market does not develop to be as competitive as the standard broadband market.

MR. ALLAN: I'm sorry to interrupt you but this is not getting to my question, which is quite a simple question, which is: what is BT's conception for the purpose of this case of what is a margin squeeze, how do you see it? And when you are talking about the ability of competitors to respond to a pricing initiative by BT, what measure of cost are we to take

into account?

MR. THOMPSON: I am trying to answer your question. I think you are not entirely seeing where I am going with it. Because what I am saying is there has to be some conception, that is why I talk about the bear in the woods. You have to know what you are looking for and whether it's a real bear. And I think what you are asking me is what does BT say a real bear would look like? I think you are saying that Mr. Bishop seemed to say it has to be right down to short-run marginal costs, and unless you are getting down to that sort of level then it's not a margin squeeze at all.

But I'm not saying that. What I am saying -- and I think Christopher Bellamy used to talk about a market opening price, that the reality is -- and I think Mr. Tickel actually gave some very helpful evidence, that the point is that you shouldn't give somebody something on terms that they can't use it, and it's that that we are looking at.

I think what Mr. Bishop and Mr. Tickel are saying is you don't need long-run investment margin to be able to use VULA. What you need is -- it's true you need some contribution, you need some positive margin, you need some contribution to your fixed and common costs, but Ofcom appears, as we understand it -- wasn't clear in the document which appeared to think that a price increase of any kind might be a margin squeeze, and that appears from some of Mr. Matthew's express evidence but they seem to be setting it well above that level, and we say that is far too high and not the right test. They are not looking for the right thing.

MR. ALLAN: I think Mr. Bishop said that the rival would need to have the expectation of covering its investment, but not necessarily the guarantee, is how I understood him to be putting it.

MR. THOMPSON: Yes. I am not proposing to say anything different from what Mr. Bishop says --

MR. ALLAN: I'm just trying to get clear what your case is.

MR. THOMPSON: I am trying to articulate what it is we are saying. I think in a way perhaps what Mr. Tickel said is the most helpful, that it shouldn't be delivered on terms that makes it unusable. And that fits with, we haven't looked at it, but the 102 guidelines where margin squeeze is treated as a constructive refusal to supply, that in effect you give it on terms and you take it away by the price because you can't use it.

I think what is being put to me is that in one sense, if it makes any contribution to fixed costs at all, that should be good enough. We are not inviting the Tribunal to reach that conclusion, but what we are saying is that the level that Mr. Matthew seemed to be talking

about is way above that. And if you go to the level of you don't actually have to do anything but people might be a bit afraid that you have to do something, that is clearly not enough, and that seems to be the level of vagueness in the test.

MR. ALLAN: I think the Commission guidance uses the LRIC standard in relation to margin squeeze.

MR. THOMPSON: Yes, and it is true, it's a point I put to Mr. Clarkson, that that was the approach that Ofcom originally suggested they would use in the 2010 FRAND case. I think that is the point that we have accepted, that we were happy for it to be tightened up. But clearly if they had gone down the option A route and given guidance then there might still have been a question about whether the guidance was itself too stringent but that was all debated with Mr. Clarkson.

We have perhaps gone slightly --

MR. ALLAN: I think --

MR. THOMPSON: Does the Tribunal want to take a break?

PROFESSOR MAYER: I am still a little bit unclear as to precisely what your response is. So are you saying you would be content with the standard being a LRIC one?

MR. THOMPSON: I think we have said, and that is why I say we keep getting into design issues, but I think we have -- by the standard, you mean -- obviously in a sense we would be very content with that because that would be a high hurdle for Ofcom to get to. But we are not pushing for that, and we haven't maintained that, that you can't take into account fixed and common costs at all. Our criticism is that the position here seems to be a much, much more lax approach than that, that the scale of the plus is far too high, and then when we get to it, the level of scrutiny on a monthly basis is far too tight, and that that isn't a margin squeeze because nobody would be excluded by such a high level looked at on a monthly basis.

No one would expect to recover their long-term investment costs on a monthly basis.

PROFESSOR MAYER: So it's the plus you object to?

MR. THOMPSON: Yes, it's the scale of the plus.

PROFESSOR MAYER: The scale of the plus. So there is some plus, but it is how much should be included in the plus.

MR. THOMPSON: Yes. If the plus is so large and the scrutiny is so tight, which -- it is difficult. Because Ofcom doesn't define what it is that it's looking at, then the onus comes back on to me to try and define it. But when you look at paragraph 22 of Mr. Matthew, which is about as close, you get a whole range of possibilities, some of which look very much like retail price competition, and you have no clear line as to which of these he thinks are offensive.

Then at 88, he says, oh, people may have different views about what a price squeeze is, and then he says it's all going to be decided by the CMA.

But that is ambiguous as to whether he says the standard of the remedy they have put in place is what they were looking for to make sure that BT didn't, on any month, fail to recover the costs of Champions League, or whether he was looking for something else and, if so, what it was he was looking for. The whole thing is just totally uncertain.

PROFESSOR MAYER: There might then be some basis on which agreement could be found as to what could be or should be included in the plus?

MR. THOMPSON: Yes, I think -- well, part of our general complaint under Ground 1D is that the FRAND regime had gone along perfectly happily with everyone having a general sense of how it worked and with the market developing, and then they have come clonking in with this what we would say is a very inappropriate additional constraint applied on a very inadequate basis. That is the gist of our complaint.

PROFESSOR MAYER: Thank you.

THE CHAIRMAN: That may be a convenient moment for a break.

(11.35 am)

(A short break)

(11.40 am)

MR. THOMPSON: Just to summarise that interesting debate, I think BT's position, and that really reflects Mr. Tickel's "don't give somebody something they can't use", is that we are looking here at whether BT has the incentives to price VULA at a level that leaves a margin that means competitors would be unable to compete in the long-run.

But I will make four qualifications to that. One, that this is by reference to BT's own costs. Secondly, there is the concern, which I think Mr. Matthew accepted was a real concern, which Mr. Bishop identified as a concern, that the effect in the short-run of giving too much margin could be in fact consumer harm by increased prices so it's a reason to be careful.

The third point is that, and I think I put it to Mr. Matthew in various ways and it is reflected in paragraphs 34 and 90 of his statement, and also I would say in paragraph 3.55 of the final statement, there is a strong flavour that the dynamic effects which are referred to in paragraph 7.50 appear to be, in part at least, a desire to have the market shares for the superfast broadband segment approximate to the market shares for the standard broadband segment, and we would say that was no part of the correct justification for price control of this kind.

Then finally, the fourth point, where one does stray into the issue of design and the critique

of the Commission of the way in which Ofcom has chosen to proceed here, is that if one is going to have originally a six-monthly assessment, which was a point that was of concern to the Commission, but ultimately a one-month assessment, then if that is going to be the approach to assessment, then the level of risk should also be looking in the short-run. And that is the point I made before the adjournment, that you wouldn't expect BT or anybody else to be recovering their long-run investment costs month by month, one would look at that over a longer period. That is the principal critique that the Commission makes of the design, but equally in my submission it applies to the issue of risk. If you are going to be looking at that level of micro-management, then it doesn't matter month by month. You need to stand back a bit and see whether or not over the longer-term a competitor is going to be able to compete. If you are looking month by month then you are taking a tight focus.

Just for the Tribunal's reference, the passages from Mr. Tickel are I think at page 42, lines 8 to 13 and page 47, lines 3 to 12. And the debate with Mr. Bishop, the questions from the Tribunal, is at Day 3, pages 18 through to 20.

So I have sought to rationalise the points but they may have been made more clearly or more eloquently, they well have been made more clearly or more eloquently by Mr. Tickel or Mr. Bishop.

Turning now to our critique of what Ofcom did. In the terms of the note, we have identified two areas of error of law: the issues about the nature of the margin squeeze, which I suspect we have already debated so I will take that as shortly as I may, and also the question of the existing constraints on BT which is the modified greenfield issue.

We haven't actually looked at the cases relating to that, but I don't know whether the Tribunal feels that it is sufficiently seized of it or whether you wish me to take you through the cases. I will do it quite quickly.

THE CHAIRMAN: We would find it helpful if you could take us through the cases on the modified greenfield approach.

MR. THOMPSON: I am grateful. The points in relation to the failure to apply the test for a margin squeeze are set out at paragraph 25 under six or seven headings, and I think given that indication I will rely on the written note in relation to that and the evidence that was given.

Moving to the greenfield issue, just to set it in context, we would say that it was obvious that in principle one should take account of the existing constraints certainly in a case of this kind, and we have given various analogies. The prisoner analogy: if you were thinking of putting him into solitary confinement, you should think about the position he is in now.

And the traffic analogy: if you were thinking of putting in an expensive additional protection for pedestrians, you should think about the existing position. And one could think of a number of cases of a more domestic kind. Whenever a plumber comes to my house, they invariably say the way it was put in was completely wrong, but it doesn't mean I immediately take my plumbing out and start again with a more perfect system.

So in my submission, as a matter of principle, one should look at the existing regulatory position before adding to it.

Indeed, the Tribunal will recall that that reflects the approach of Ofcom itself in its impact assessment where we looked at paragraph 3.3, that they are talking about new regulation and there being a bias against new regulation as well as a bias against regulation at all. Likewise, we would say the Tetra Laval guidance of the Court of Justice suggests that that is the correct approach.

So in my submission, it would be very surprising in an economically realistic area of this kind that one was required to do this as a matter of EU law because of some obscure regulatory principle. And the matter becomes even more surprising if one looks at the basis for it. If one looks first of all at the position that exists at the EU level, and that is set out in the RegTP case, which was considered in the Hutchison 3G case, and I think it was treated as a matter of EU law. One finds that at authorities bundle II, tab 35.

This was a case that, as it were, went one stage beyond the present case where the Commission not only expressed concerns about the approach of the German regulator but actually took a decision that they got it wrong, and the issue was whether or not, because of the market power of Deutsche Telekom, other operators couldn't have market power in relation to the areas where they had a monopoly, the termination on their particular networks, and the Commission said the Germans had got it wrong and that just because Deutsche Telekom had significant market power and was a powerful operator generally didn't mean the individual operators couldn't have market power on more narrowly defined markets.

But the issue in relation to modified greenfield or strict greenfield, the points of principle are set out at paragraphs 22 and 23, and they are the passages that appear and were debated in the Hutchison 3G case. In particular you see at the top of 22 very much the same approach as the Tetra Laval approach is described:

> "On the basis of competition rules applicable with articles 14 and 16 of the Framework Directive, in particular article 82 of the EC Treaty, an analysis of dominance, i.e, SMP, requires taking into account the concrete economic

circumstances, including legislative and administrative acts. In economic terms, it is not appropriate to exclude regulatory obligations that exist independently of an SMP finding on the market under consideration that can have an impact on the SMP finding on the markets under consideration."

And so they set out -- and then:

"From a methodological viewpoint, obligations flowing from existing regulation, other than the specific regulation imposed on basis of SMP status in the analysed market, must be taken into consideration when assessing the ability of an undertaking to behave independently of its competitors and customers on that market. In the Commission's view, this could only be otherwise where it is uncertain whether the regulation concerned will continue to exist throughout the period of the forward-looking assessment."

Then it goes on:

"The purpose of a greenfield approach is indeed to avoid circularity in the market analysis by avoiding that, when as a result of existing regulation a market is found to be effectively competitive, which could result in withdrawing that regulation, the market may return to a situation where there is no longer effective competition."

By reference to my prisoner analogy, I have said what this is getting at is if you are thinking of letting someone out of jail, then you don't think about the position while they are in jail, you look at the position when they are out of jail, otherwise you might let people out too soon because you would say he has been very well behaved, and then as soon as he goes out he is badly behaved.

In the same way, you don't withdraw SMP regulation on the basis that Deutsche Telekom, to take a case at random, has been well behaved because of the SMP regulation, you look at what the position would be if you withdrew it. So that is the sensible point that is being made there. And the way it fed into this case was that you took account of the position of Deutsche Telekom.

The complexity that arises is I think twofold, that because of this particular case, where we are not talking about whether or not the market is competitive or withdrawing regulation from BT, but rather whether you are looking at additional regulation on top, in my submission this principle would suggest that a realistic approach requires you to look at the actual position of BT, not at some hypothetical position that BT would be in if there was no regulation on it at all because of the narrow focus of this case. So in my submission, this

goes perfectly well with the general position, the Tetra Laval point that I have made.

The complexity that has arisen is caused by the H3G case in the Court of Appeal where I see Mr. Holmes was present. That unfortunately requires a short digression, if I may. The best way into it I think is the Supreme Court judgment we looked at a moment ago, the 080 judgment which is at bundle IV, tab 52.

The reason why this is relevant is that the case turned, in the Supreme Court and in the Court of Appeal, on the nature of the exercise that Ofcom was performing when it was resolving disputes under the Framework Directive. It was not only a case about ladder pricing, but it was unfortunately a case where Ofcom decided this, the Tribunal overturned Ofcom, the Court of Appeal overturned the Tribunal, and the Supreme Court eventually reinstated the position of the Competition Appeal Tribunal.

The crucial point in the case emerges at paragraph 30 where the Supreme Court considers how disputes are resolved under the Framework Directive and Lord Sumption says this:

> "Lord Justice Lloyd attached considerable importance to the nature of the function which Ofcom is performing when it resolved disputes about charges under an interconnection agreement. He considered that dispute resolution is a form of regulation in its own right to be applied in accordance with its own terms. In his view, the terms of the interconnection agreement were of little, if any, relevance because their effect was that any new charges introduced by BT were liable to be overridden by Ofcom in the exercise of its regulatory powers."

So the Court of Appeal's approach was that effectively the commercial terms between the parties didn't really matter because Ofcom could simply replace them in the context of its dispute resolution functions. So the way that that was important was that, where there was a dispute over price, the effect was that Ofcom could simply substitute what it thought was the fair price for the price that was actually agreed between the parties. And the significance of that is that is a sort of ad hoc form of price control, that the Court of Appeal took the view that Ofcom had a sort of ad hoc price control power that could really substitute whatever was agreed commercially.

The following analysis goes through it in great detail and comes to the conclusion that that is a fundamental error of principle, that Ofcom has no such power. That if the parties are operating commercially, there is a strong presumption that Ofcom's role is to uphold the commercial bargain, and it is only in exceptional circumstances that Ofcom should intervene between the parties in the absence of significant market power.

One sees that in express terms at paragraph 48, it is a more complicated question about

whether there should be a reference, but the specific point is at the second half of 48 where Lord Sumption says this. He qualifies the submission from BT but then he says:

> "It only means that Ofcom may not exercise its regulatory power to control prices."

Then he draws a distinction between exercising a regulatory power to impose price control in order to correct market failure or control the abuse of a dominant economic position, and then the alternative issue, deciding whether a particular proposed tariff change advances consumer welfare which was the issue in that case.

So what he is saying there is that BT is right that there is no power under SMP regulation to impose a price control but that that doesn't decide the issue.

Anyway, so the point that is made that I rely on is that Ofcom has been found not to have a power in non-SMP dispute resolution to set prices or to determine price control. That was the key issue in the H3G case, so the H3G case effectively proceeded on a false basis. One finds the H3G case in volume III, tab 44.

You find at paragraph 39, it doesn't seem to be paginated, the three issues in the case. The three issues: the first one was whether BT could lawfully be required to pay a price appreciably above the competitive level so that H3G is not able to act independently of BT and doesn't have SMP. So that is the point that it was argued that Ofcom could effectively set the prices for -- even in a non-SMP case, and that that meant that H3G didn't have SMP.

Then there were two other issues. The second one is the first point that I think Ofcom has relied on, that you should disregard Ofcom's dispute resolution powers when considering whether H3G had SMP. And then in relation to risk, this is in a sense similar to the issue that we are debating here, but it turned again on whether or not the dispute resolution powers should be taken into account.

One sees that I think most clearly in the discussion of Ground 1 which appears right at the end of the judgment, paragraphs 109 to 110. You see that Lord Justice Etherton summarises the point as:

> "H3G contends the Tribunal erred in concluding that Ofcom could determine a price dispute between H3G and BT by setting a price appreciably above the competitive level."

Then there is reference to a Court of Appeal case where I think the question of excessive pricing was debated.

Then Lord Justice Etherton says:

> "I am inclined to agree with Miss Rose's submissions [that's for H3G] that

'reasonable terms and conditions' for BT's E2E obligation are those which are reasonable as between the parties, and also reasonable having regard to Ofcom's statutory duties and duties under the CRF, so Ofcom could not lawfully require BT to pay a price for call termination which was so appreciably above the competitive level that H3G was rendered dominant in the market."

So effectively what they are saying is that Ofcom had powers to set the prices in a non-SMP dispute and that it was a difficult question about how it should exercise that power, whereas it is now clear that no such power exists. And the whole basis for the reasoning in relation to non-SMP regulation was premised on the possibility that that might solve the whole SMP issue because if Ofcom had this power to regulate H3G's prices, then the argument was H3G couldn't have significant market power because Ofcom could always intervene and fix BT's prices. And there are references to setting or fixing prices throughout the judgment, in particular at paragraph 72, at 75, and the passage I have already shown you at 109 to 110.

So it is a bit of an intricate web, but the point I am getting to is that the reason why the Court of Appeal felt driven to find that non-SMP dispute resolution must be ignored was because they were concerned that, if not, they might be in the paradoxical situation that no firm could ever have SMP because you could always go to Ofcom, and say: I don't like this term or that term, and Ofcom could tear up the contract and put something else in place. But the burden of the Supreme Court judgment is that that was a misunderstanding of Ofcom's powers, and with that point out of the way, Ground 1 would simply have been rejected and grounds 2 and 3 would never have arisen.

So whether or not the Court of Appeal is right that non-SMP dispute resolution should be ignored for the purposes of an SMP analysis, which to my mind is a somewhat marginal issue for present purposes, there is no basis to extend that rationale to other issues such as competition law which arises independently of the SMP regime, or the 2005 undertakings which are not dependent on the SMP regime.

I also say that in this particular case the FRAND obligation should be taken into account, because the specific issue that the Tribunal is trying to think about is whether it was necessary to add to that obligation, and it makes a nonsense of that question if you ignore the very regulation that is in issue in debating whether or not you should go further.

So that is the way I take it. I have tried to take it as promptly as I may, and I have read this judgment a number of times and it is not the easiest to follow, but that is I hope a helpful explanation of the written case that we have already put forward.

THE CHAIRMAN: Speaking for myself, I find paragraph 67, which is the paragraph cited by

Ofcom, extremely hard to understand. But insofar as it starts by saying that Miss Rose's submission that dispute resolution cannot be ignored because it is a regulatory obligation that exists independently of an SMP finding on the market, that really seems to support your position, doesn't it?

MR. THOMPSON: That is the submission that was made, and in my submission that is -- I'm not really in the business of overturning the Court of Appeal and I think it would be difficult for me to advance such a submission before the Tribunal, except on the basis that the Supreme Court has effectively shown that they were operating per incuriam, but --

THE CHAIRMAN: In a sense, that is a sort of slightly separate issue. They got it wrong in terms of their interpretation of the dispute resolution powers. But as I read that paragraph, it does actually support your position. Where it gets very obscure is -- he goes on to say -- well, the submission is accepted in principle, Lord Justice Lloyd says it is fairly made. But then he goes on to say, well, I'm going to ignore it because of the decision the Commission reached on the facts of that case, without really explaining what was going on there.

MR. THOMPSON: I think he thinks it must be wrong because it is contrary to the Commission's finding on the facts, but then he comes to this paradox, that Miss Rose obviously persuaded the Court of Appeal was a real paradox, which is obviously a tribute to her advocacy skills if nothing else, that the effect of the non-SMP regime might be that in reality this all was a bag of tricks, because nobody could have SMP because you could always take a dispute to Ofcom and they would sort it out.

So I think they thought, well, this can't be right, this is some bizarre European feature, and so in order to keep the SMP regime on the road, we've got to reject that submission. But my basic submission is that the Supreme Court has undercut that whole argument by saying, well, no, you can't just go off to Ofcom and say I don't really like the price that BT is charging, and Ofcom say, well, it is a bit expensive, we will bring it down.

Ofcom's dispute resolution power, as Lord Sumption explained in some detail, is basically a power to give effect to the contract and to arbitrate it, unless there is something wrong with the contract from a regulatory perspective, but it is not a general price control power.

MR. ALLAN: I think the slight problem we are having with the relevance of the Supreme Court judgment is that the piece of general regulation upon which Miss Rose relied is ultimately found, as you say, by the Supreme Court not to have the meaning she attributed to it.

MR. THOMPSON: Yes.

MR. ALLAN: Whereas the pieces of background regulation that you are relying upon are indeed, in your submission, fully effective and binding. So in a way we have to approach H3G on

the premise that she was right about the dispute resolution position and what do we then make of that.

MR. THOMPSON: I don't want to waste time on this --

MR. ALLAN: No, I --

MR. THOMPSON: I have made a number of efforts in writing and I have now tried to explain it orally. I don't know whether I need to say any more on this?

The one thing I -- I thought that was a no, probably.

THE CHAIRMAN: What I get from this case is there is nothing to cast doubt on the proposition that the strict greenfield approach is wrong.

MR. THOMPSON: That is correct.

THE CHAIRMAN: Yes.

MR. THOMPSON: Yes, it just goes -- and it has been relied on by Ofcom to have quite wide implications. My point is that it actually has quite narrow implications and it is possible, even on its own issue, that it was decided inconsistently with the subsequent ruling of the Supreme Court because there was really no need to go to grounds 2 and 3 because Ground 1 was hopeless.

Can I just -- I embarked on this perhaps ill-advisedly with Mr. Matthew, but can I just give the Tribunal the references to the status of the FRAND condition independently of this debate. I think it is worth turning up the FAMR decision itself. We did look at it briefly, I don't know whether the Tribunal has this in mind, but annex 29 of FAMR, do you have the FRAND condition in mind or should I show you? It's at the back of tab 8 of bundle III/II, the first page of the last pink sheet.

The FRAND condition itself is at 1.2, and then there is a variation of it in cases where price controls are imposed in conditions 6 and 7 so that the charging issue is excluded by 1.31 and 2.

The relevance of that is that when one comes to the decision itself, which is at bundle III/I, I started on this but I will just complete the references. First of all, 4.68, page 68, it's the first three lines and the bracket. One sees that had option A been maintained, then the FRAND condition would have stayed in place.

Secondly, 5.69, page 96. You find that the FRAND condition does stay in place in relation to business users, and it's clearly relied on as the margin squeeze regulation in relation to business users.

And for good measure, at 6.68 you find that:

"While the new SMP condition sets out in this statement applies to new

superfast broadband subscribers, the fair and reasonable terms, conditions and charges of VULA obligation will continue to apply to existing subscribers."

So FRAND continues to apply not only to business users but also to existing subscribers and that is reflected in the definition of the condition itself, which one finds at the back in the separate tab at page 9 ... sorry, at the back of tab 1, behind the pink sheet again, it's a separate document.

The annexes are sequentially numbered, and if you turn to page 9 you will find paragraph 24 of the legal instrument which starts at page 5, which is annex 2. You see the way it works is that condition 1.3 is modified and extended to the VULA margin, so the exemption in relation to charging is limited to the VULA margin condition, and then there is a definition given at 1.8. And then finally the schedule to the instrument which was signed by Mr. Clarkson on 19th March, you find that the condition itself relates to VULA provided by the retail divisions, and the condition is imposed in relation to new customers. So in my submission, that is an answer to whatever Mr. Clarkson was being told about what the position was in the absence of the measure that, just as BT and I think Ofcom understood at the time, the FRAND condition continued effectively unchanged from 2010 through to March 2015.

Then a point we make at 37, that under that regime Sky and TalkTalk had expanded rapidly and no disputes or enforcement action had been required in relation to that regime.

In relation to the competition law, I think the Tribunal is probably familiar -- that is at paragraph 31 -- with the points we make about that. We say under Tetra Laval that it was a national regime that Ofcom and BT were well aware of and have should have taken into account in relation to BT's incentives. We note the very recent decision in relation to the TTG complaint, and I will come if I may to the issue of materiality and the relationship between 3 and 4 in a moment.

The undertakings. I think that issue was pretty comprehensively explored in evidence. We say the issue of discrimination is an important one and was addressed by the undertakings. It is clear from the Commission recommendation that a discriminatory margin squeeze is a possibility and so that is a relevant matter. Mr. Matthew denied that was part of his concerns but his statement is riddled with statements of preference.

In relation to the undertakings themselves, we have given references to the original consultation document and the better regulation document which indicate that it was intended, in part, to address concerns over margin issues. I think the legal point was made at some length by Mr. Holmes by reference to the Commission recommendation. We

would say that that, to some extent, misses the point, that while it certainly leaves open the possibility that there could be margin regulation in parallel to equivalence of inputs obligations, it certainly doesn't say that EOI is irrelevant to the question.

In any event, the Tribunal heard and saw extensive evidence that the effects of the 2005 undertakings and the functional separation of Openreach and the positions that had been put in place to protect the position of Openreach go well beyond pure discrimination and were seen as such in the consideration document itself and were intended to have considerable incentive effects on the staff. Mr. Petter gave, in my submission, convincing and eloquent evidence about the effects that that has had, the training he has had, and the incentive effects of the structure of BT. And indeed he also gave evidence as to the economic effects -- or commercial effects on the BT share price resulting from that structure and from the fact that Openreach is a regulated firm.

So all that, in my submission, needed to be taken into account and Mr. Matthew confirmed that he didn't take it into account and it wasn't taken into account in the decision.

The other positive points I will take more quickly because they are really issues in relation to evidence. At B3 of our note we make various points about the prevailing market conditions. The failure to read across the incentives analysis from FAMR at 12.134 in relation to retail constraints, the risk of regulatory error, and the impact on incentives, we say that that was relevant context.

The points about Virgin, Sky, bundling, the advantages that TalkTalk and Sky have had in relation to standard broadband, and the prospects of re-entry/recoupment if BT engaged in this pricing strategy, particularly given the risk that that might lead to regulation on the wholesale market, all those points have been explored in evidence and we rely on them.

So far as BT's incentives go, the Tribunal will recall the points that we took Mr. Matthew through, which he largely accepted, concerning the investment and differentiation that BT had engaged in, and the branding of Infinity and issues of that kind. In my submission, annex 1 to his statement, rather than supporting Ofcom's concerns, casts further doubt on them because they strongly indicate that BT's strategy has been to create an upmarket competitor to Virgin, and it wouldn't be consistent with that or with the commercial interests of BT to undermine that by a price-cutting strategy, particularly if the effect was to shift profits into the wrong part of BT and potentially trigger a regulatory response from Ofcom.

So all that is, in my submission, clear and goes against Ofcom's case.

The position on market shares we deal with at 40 to 42 and you will recall the

cross-examination of Mr. Matthew on that. We make various headline points. We say it is the only enurable evidence that Ofcom put forward, but rather than supporting Ofcom's case, it actually illustrates the structure of investment and branding that Virgin and BT have engaged in since about 2009 and the successful effects of one and then the other. But it also shows Sky and TalkTalk emerging rapidly under the existing regime and the predicted regime, and the concentration ratio, insofar as it is relevant at all, of the superfast broadband segment falling rather than rising. So there is actually a mistake even on its own terms in footnote 117 of the statement. It is at least misleading. And that the only risk that seems to be identified is that the market or the submarket for superfast broadband may develop more slowly from Ofcom's point of view than the standard broadband market, but there are obvious reasons for that in terms of the particular position of Virgin and the investment that it has made in superfast broadband and the focus that BT has had on that product for the past five years, as well as the advantages that Sky and TalkTalk have had on the standard broadband market over the same period which are gradually being addressed by Ofcom. So we say none of that gives any support to Ofcom's case.

The lack of a cost-benefit analysis, basically the Vodafone point. I think you have our points on that, Vodafone and Tetra Laval, and Mr. Bishop gave what we would say was eloquent evidence of that both in writing and orally. We would say it is not a matter for BT to carry out that analysis or put things right, and some flavour of that in some of Mr. Matthew's responses that somehow BT should have done the job for Ofcom, we say that is completely wrong, and I have referred the Tribunal to the Commission guidelines. Then for good measure, we obviously don't think that the two passages from the evidence of Mr. Heaney, which were perhaps slightly oddly described as the best available evidence, are in fact evidence of the kind that either Ofcom or the Tribunal could safely rely on. In relation to the first evidence, it doesn't in fact give evidence in relation to superfast broadband at all, it's undifferentiated evidence about the whole market. And the second one, the issue of spin down, is in our submission a very narrow issue as against the whole market and not sufficient to form the basis for a margin squeeze.

The one point that I think may be worth just spelling out, because it is partly a statutory issue, is the nature of the price margin squeeze with which we are concerned. The Tribunal I think will remember some cross-examination of Mr. Matthew in relation to that issue, whether it was a discrimination margin squeeze or an excessive pricing or a predatory, if I can look at it in those three ways.

That appears at ... I will just find it. (Pause) It's at paragraph 47.2 of the note. We address

the issue of discrimination, I don't propose to say anything more about that orally. But in relation to the retail issue, that was touched on with Mr. Matthew and the Commission letter was referred to. But just for the statutory position, if we could look at authorities bundle I, I think the Tribunal will recall that we started the statutory trek with the Authorisation Directive in article 6.2 which sets out four possible ways in which specific obligations could be imposed. That is at tab 4 and the relevant provision is at pages 10 to 11.

I identified four different categories and the third one was article 17 of directive 2002/22, the Universal Service Directive. The significance of this is, you may recall, in the Framework Directive, which both I and Mr. Holmes took you to, there was, as it were, a binary possibility, you were forbidden from imposing certain types of regulation unless the market conditions were as specified and you were obliged to impose them if they were. If we just look at that very briefly, that is at tab 2. Article 16 is at page 34. You will see that while we focused on article 8 of the Access Directive, article 16.2 also refers to article 17 of directive 2002/22, so there are two possibilities.

If one turns to the newly added 5A, you will find the Universal Service Directive which, despite its name, is actually -- has 5A turned up in the bundles?

THE CHAIRMAN: Yes.

MR. THOMPSON: You will see it is actually the Universal Service and Users Rights Directive. And if one turns into the tab, you find at page 19 regulatory controls on undertakings with significant market power in specific retail markets, and a set of provisions in relation to that. In particular, over the page, 17.2, a sort of summary of the article 8 approach saying they have to, based on the nature of the problem identified, be proportionate and justified, and:

> "The obligations imposed may include requirements that the identified undertakings do not charge excessive prices, inhibit market entry or restrict competition by setting predatory prices, show undue preference to specific end-users or unreasonably bundle services."

So the whole issue of pricing and bundling on the retail market is subject to a separate legal regime and I think that is important context for the Commission letter. You will recall the passage I showed you, where the Commission said there is a risk that what you are doing here actually is in the wrong part of the market, where you haven't found market power. And again that touches on some of the design issues that if possibly the object and certainly the effect of Ofcom's regulatory approach is to curb BT's freedom on the retail market, for example to add products on the retail market without putting its prices up, then there is at least a serious question about whether that was within the powers of Ofcom and that is

the concern I think that is being expressed by the Commission.

Just for completeness, the UK implementing provision is section 91 of the 2003 Act which I think summarises this and takes much the same approach in relation to retail market competition.

So overall we would say that far too low a standard has been applied, and in particular the sort of Domesday concern about prices being held up indefinitely are effectively fanciful given the particular incentives and regulatory structure of this particular market, and that they only become credible by ignoring the real world.

There is a document which has been prepared, I don't propose to take any time on it, but it spells out in greater detail the scenarios that were put to both Mr. Matthew and Mr. Bishop. If I could just hand it up. I have given it to my learned friend.

MR. HOLMES: I am sorry, sir, I haven't seen this document.

MR. THOMPSON: Sorry, I thought it had been handed to you. (Handed)

MR. ALLAN: Is this the one we had the other day or a new version?

MR. THOMPSON: I thought in terms of cross-examination, to get into the back pages, we might have been here some time, so I only put the first page to Mr. Matthew. I think the first page may have been tidied up slightly just to clarify the drafting but in substance the first page is the one put to Mr. Matthew. But then we have gone on with a more detailed analysis of actions and reactions and the likely outcome, starting with the different starting points of whether the end-user is on superfast or standard broadband, whether the conduct of BT is to put up its wholesale price or reduce its consumer price, and the response of the consumer, and the overall effects on BT's overall profitability.

I'm obviously very happy to answer questions on it, but I think the gist of the submission is that it paints a complex picture from which it could not at all be assumed that this strategy would be in BT's interests, that almost all of the instances are ambivalent at best for BT Group and negative for BT Consumer. And even in relation to Openreach, it is only on certain assumptions that one makes that the position would be profitable for Openreach.

In a sense, this is an indication that if Ofcom had undertaken the task that the Commission said it should have undertaken had this been a merger, that this would have been a complex exercise to work out what the incentive effects would be on BT. So it essentially makes vivid the Vodafone point that there was a need for a careful cost-benefit analysis in this case.

MR. HOLMES: Sir, this document isn't illustrated by reference to any of the evidence which the Tribunal has heard or the reports that have been submitted. We will obviously need to take

this away and see if there are points that we need to respond to. I doubt whether we will be able to do so today while I'm on my feet.

MR. THOMPSON: Certainly I can see it is quite a complicated document. If Ofcom wanted to comment on it in some way ...

I should only say that the assumption we have made, which is perhaps -- it's not one we necessarily accept, is that the overall effect of the squeeze has been that BT Group's margins are at least maintained overall and I think in fact assumed to be marginally positive, overall. But obviously Mr. Holmes is free to comment as he sees fit.

MR. ALLAN: Would it be fair to say this document purely tries to assess short-run immediate effects? If I look at the various column headings --

MR. THOMPSON: Yes, I think that would be fair.

MR. ALLAN: So you don't try to do the next step which is to see the trade-offs between longer-run effects --

MR. THOMPSON: Not in this way, because there are so many imponderables such as diversion to Virgin or response of Sky.

MR. ALLAN: I am just trying to frame what this document is about.

MR. THOMPSON: Yes. As I understood it, that was the basis on which Mr. Bishop was cross-examined and Mr. Matthew, so we have simply tried to drill down a bit further into that issue. But it is true that the broader picture would need to be considered as well.

MR. ALLAN: Thank you.

MR. THOMPSON: So I think that takes us in a slightly telescoped way through to the end of B5, paragraphs 47. The position in relation to the risks of regulation issue, in effect that is how we have put the issue of effect, and in particular I have already mentioned the question about whether, given the effective concession both in the statement itself and from Mr. Matthew that the effect of this could be to put short-term retail prices up, whether Ofcom had done enough to balance the benefits of this initiative against the short-term downsides.

I think that was the subject matter of Mr. Bishop's written report, and also there was some eloquent evidence from Mr. Petter and Mr. Tickel about their concerns over BT's incentives in certain respects, which we deal with in paragraph 50, and also the question of false positives which is another aspect of the risk that regulation of this kind has.

The overall submission that we make, which comes out at 52, is that we reject Ofcom's suggestion which appears in its skeleton, and I think that is the one area where Dr. Caffarra has emerged as a protagonist in this particular forum, to say that we shouldn't be making

a fuss because it is not particularly onerous.

We accept the point about it not placing a cap on our wholesale price, but we do maintain our complaint that if you impose a condition of this kind without properly assessing whether it's needed at all, and in a rigid form that applies on a monthly basis at a level well above short-run average incremental costs, then there is indeed a significant and inappropriate risk that it may lead to consumer harm rather than maintain it, and it will lead to short-term increases in cost without there being any proper assumption or proper evidence to support an assumption that in the longer-term it will do some good. So it will effectively have negative effects in the short-term, and no clear benefit in the long-term.

Again we move towards the design issue. But in my submission one can see what is being done here, it is not a question of design in that sense, it is a rigid monthly condition reflecting new business and it is requiring BT to cover a significant plus, and we say that bears with it a significant risk of consumer harm which hasn't been properly balanced or justified by reference to any long-term benefits to competition but rather by reference to market shares and a rather ill-structured thought that it might be better if the market for superfast broadband, when it emerges, looked a bit more like standard broadband than currently seems likely without any assumption of anti-competitive behaviour.

So just finally, and I see the time, I think I have two more issues which are both important. Mr. Holmes referred to the EE case, I wouldn't propose to go to it. The point there was that not every error, however trivial is sufficient to lead to a decision being set aside, because one of the benefits of an appeal on the merits is that some issues can be resolved by the Tribunal without remitting the matter back to Ofcom or finding that in substance it got it wrong.

In my submission, we are a long way away from that situation. There are basic errors of law which have coloured the whole analysis and coloured Mr. Matthew's evidence. There are major omissions of analysis. There is a failure to conduct a cost-benefit analysis of the kind which the Commission has specified. There is a failure to follow the guidance of the Court of Justice in Tetra Laval or the general guidance in relation to margin squeeze. And we would say this was a case that was well beyond the Vodafone case, which is probably the closest case that the Tribunal has had to deal with, where it was found that the cost-benefit analysis in that case was inadequate.

There is a lot at stake here and we say it wasn't properly done at all.

Then finally, there is the question about whether or not omissions at the analysis stage can be remedied at the design or proportionality stage. That is a point that we have dealt with

quite carefully in writing, and we say it's wrong in principle because the outcome of the analysis stage colours the proportionality analysis, because until you know what sort of bear or problem you are dealing with, you can't design an appropriate way to deal with that problem, and that is intrinsic to the regime. We refer to article 8.4 of the Access Directive which requires all SMP regulation to be based on the nature of the problem identified. So if you haven't identified the problem properly you can't exercise that power properly.

Secondly, there is the problem that, even on its face, section 4 is an incomplete response in that it doesn't deal with the incentives issue by reference to the functional separation of BT's upstream access service business under the 2005 undertakings, which the Tribunal has heard detailed evidence that that does have significant incentive effects and was intended to have incentive effects by Ofcom, including in relation to margin squeeze. So even if you could somehow read the thing backwards, which we say you can't, it wouldn't get Ofcom anywhere, because there is a big hole in the analysis as a whole rather than just in section 3.

Then the third point we say is that it actually isn't the same question, and we give various reasons why that is the case. In section 3 you are looking at BT's incentives, fundamentally. That is the core analysis. In section 4 and thereafter you are looking fundamentally at the design, and I have given various analogies and it is a different question whether you need to replace your roof from, if you were going to replace your roof, would you put up the roof you've got already? That is a different question and it goes through the whole analysis and it is not the same question. That is the first point.

The second point is that the standard may not be the same. If you are aware that you've got a problem, a serious problem, then you will take steps to eliminate that problem and you will want to effectively wipe it out. But that is a different question from whether that problem is realistically likely to arise at all, particularly in the light of the protections you already have.

So the question of whether to take an umbrella is affected by whether or not you are wearing a raincoat. So the fact that there wasn't complete analysis is one factor and the other is that the standard that you will apply in dealing with a problem will be different from the standard you apply in identifying whether there is a problem that actually needs dealing with in the real world. So that is the other point we make.

I think I have already said the point that I think we repeat at 61.4, the point that the assessment, even on its own terms, is incomplete in section 4.

So that is our positive case. I must say I was intending to wait and see what Mr. Holmes says but clearly I don't want to take up too much of your time.

Our summary is that we say there are serious errors of law, serious errors of fact, that they are well beyond a marginal stage. I don't know if the Tribunal has particular points that Mr. Holmes has raised that, given the time, I could address now?

THE CHAIRMAN: I think it would be more sensible to hear what Mr. Holmes says and then, if there are any other points, we can raise them then.

MR. THOMPSON: Given the time, shall I just see if anyone else wants me to say anything positive and then we can either take an early lunch or Mr. Holmes can have an initial salvo. (Pause). I think everyone has heard enough from me, so I don't know whether you want to have lunch or hear from Mr. Holmes.

MR. ALLAN: Sorry, there is one thing that I would just like you to think about, not for you to address now. One of the points that you make is that proper and full account should be taken of Sky's position and potentially on other markets.

MR. THOMPSON: Yes.

MR. ALLAN: I would just like your comment, perhaps this afternoon, on the significance in that context of what the Court of Justice had to say in Deutsche Telekom.

MR. THOMPSON: A point I haven't got in my mind.

MR. ALLAN: It is authorities bundle II, tab 28. It is paragraphs 230 and following, so page 1564 of the print, where essentially they say that it is not legitimate to take into account in relation to a margin squeeze assessment affecting one market revenues that might come in for other providers on another market. I'm looking particularly at paragraph 236.

This essentially is just an open question to you, where I would appreciate any comments that you have to make on that section of the Court of Justice's judgment when you have had a chance to reflect on it. I'm not looking for an answer now.

MR. THOMPSON: No. I think I hadn't thought of it because I think I had thought it was more about costs than about commercial strength, but I will certainly reflect on it.

MR. ALLAN: I'm not saying this is an immediately comprehensible passage, but I would just like to hear your views on it.

MR. THOMPSON: Certainly. I am very happy to do that. Obviously we had a number of points about Sky and Mr. Petter made some of them eloquently.

MR. ALLAN: I understand your points. I just want to see how it maps into what the courts say.

MR. THOMPSON: I am grateful. I will see if I can understand it.

MR. ALLAN: Thank you.

PROFESSOR MAYER: Could I just ask in relation to the scenarios paper you very helpfully provided us with. I would appreciate some clarification as to how one should interpret these

tables. Mr. Holmes I think initially provided a relatively small number of alternatives, which were then added to and now we have several pages of possible alternative scenarios. I would just like to understand how one should really think about those in the context of this case. Is it sufficient if one identifies one of these branches of the tree as being sufficiently probable, so that, if one looks at that branch and interprets what it says about incentives and effects, that it is then sufficient essentially to discard the other branches?

Let me give you an example: supposing one looked at 1A which involves increasing prices with a switch of end users to BT's superfast broadband. If one looks at that, the implication is of losses to consumers and an incentive for BT. Supposing that one concluded, well, actually there is a high probability associated with that particular branch. Would that then satisfy your probability requirement?

MR. THOMPSON: I think in a way what this does is -- I would have to think about that in the abstract, as it were; that, if this was a market where there was a straightforward knock-on effect from one to the next and all the others were fanciful, then that would be one thing. In a way the point of this is that this is very far from such a market, because it is unclear how, for example, Sky would respond under 1 given its advantages and the bundling nature. It is unclear even how TalkTalk might respond, although they might say they would have to do certain things but they wouldn't necessarily respond in that way. And, even if they did, there is the possibility that there would be a diversion to Virgin rather than to BT. So, in a way, what it does is illustrate the complexities of this market.

So if you are inviting me to say: well, if this was a different market and the answer was obvious, would that get Ofcom home? That might do, but our point is that, in this market, the answers are far from obvious because of the actual constraints on BT, and so you can't tell where you are going to go. It takes us all into the question of incentive balancing, which is the issue that we say Ofcom has singularly failed to address about BT's likely behaviour or indeed what the other parties in the market are likely to do.

PROFESSOR MAYER: I suppose my uncertainty derives from the fact that I'm not quite sure where this gets us. The world is inherently complex and there are lots of possible developments that can take place in any market. Nevertheless, if one is undertaking this type of forward-looking analysis, one has to have a way of cutting through that complexity, and in essence, by showing a tree that has lots of branches associated with it, one isn't shedding a great deal of light as to how to resolve that. So the question I am posing to you is: if one, for some reason or other, felt that one of these particular branches had a high degree of probability associated with it, would that be sufficient to make the case?

MR. THOMPSON: I think it might be. I think probably the better answer was the one to a different but perhaps related question that you put to Mr. Bishop, when you said: well, what do you say Ofcom should have done? Because, until you've got some data, however imperfect, to feed into these boxes to get a feel for how this market actually works, you are pretty much shooting in the dark. I think Mr. Bishop is saying: look at this market, it's very competitive at the retail level and you've got a Virgin Media over here and you've got a Sky over there. So the answers to these questions are far from easy.

Ofcom just hasn't done the work to establish that there is a real risk, given the complexities. He gave some specific examples of what he would expect to be done for a proper market analysis and cost benefit analysis in a complex issue of this kind. I am aware there may be people behind me saying: oh, no, he's not saying the right thing, but that is the gist of what I would say. If they do tell me that in five minutes' time, perhaps I could have a chance to say something else at 2 o'clock. But I think that is the gist of the answer.

PROFESSOR MAYER: I think perhaps if you would like to reflect on this over lunch then one way of addressing it might be to say what data would assist us in determining which of these branches is the most relevant branch. That may be another way of thinking about it.

MR. THOMPSON: Sorry, which ...

PROFESSOR MAYER: What data would be helpful in seeing one's way through this complex tree and determining which are the most relevant branches.

MR. THOMPSON: I think it goes back to Mr. Bishop's first report, which is: look at this market -- points I have made -- look at this market, this looks very complicated and where is the evidence? Nowhere. That is really the gist of his critique.

THE CHAIRMAN: 2 o'clock.

(1.00 pm)

(The luncheon adjournment)

(2.00 pm)

MR. THOMPSON: Sir, just to pick up on Professor Mayer's question very briefly. I will just explain first of all the reason for the expanded table. I think the most important reason is to break out the situation of someone who is a superfast broadband end-user as against somebody who is still a standard broadband end-user.

Just to give some sense of the quantities involved, for the entire BT broadband business, approximately 75 per cent is still on the standard broadband service. Obviously for rival CPs, such as Sky and TalkTalk, that proportion is much higher. So the preponderant commercial issue is at the bottom, the response in relation to standard broadband.

It was accepted by Mr. Matthew in his evidence, in fact he said he liked the term "slow down". That is Day 4, page 41, lines 5 to 6. The matter that would be at the forefront of BT's mind, in my submission, would be in fact on the third page, if the effect of a margin squeeze was that customers who might otherwise have been open to go up to superfast broadband in fact remained on standard broadband with their current CP, which would be a lost opportunity for Openreach, and would therefore -- and although it is just a single box that is a potentially enormous number. And for what it's worth, I think the assumption here is that Openreach would be pricing above the profit maximising level, and so at the level of Openreach, it would be by definition cutting into its profits.

So those are two big considerations that would be in BT's mind which we say at a sort of cosmic level would tend to go against this as a sensible strategy.

I think what we are saying, or Mr. Bishop is saying, is without some quantitative analysis of where the weight lies between these various possibilities in terms of consumer reactions, you have really got no feel for how the market would work or what the incentives of BT might be, and that there are serious reasons to doubt that this would be a credible strategy, and Ofcom hasn't even begun to embark on that difficult exercise, which is fundamental to getting a feel for how this market is likely to go and how BT is likely to act.

Then the further point, which is the context point, is the presence of Virgin, Sky and TalkTalk on the standard broadband market and, in the case of Virgin, on superfast, makes the likelihood of this strategy succeeding very remote in that I think it was accepted by Mr. Matthew that it is very unlikely that any of them would go and certainly very unlikely that Sky or Virgin would go. So if one came to the sort of good side, the recoupment side, quite apart from the regulatory risk, the commercial likelihood is that you wouldn't really have achieved anything, so there is that.

I think there was under an undercurrent of whether this was all too difficult and an unfair burden and I think BT would push back on that pretty hard because as the guidelines we looked at indicate, this is the standard sort of activity that you would expect in a merger analysis which certainly is carried out in comparable timescales and sometimes in much quicker timescales than the nine months that Ofcom took in this case.

So we don't think it is an unrealistic or unreasonable burden for a major competition and regulatory authority to be able to do a proper job on an important case of this kind.

So I think that is our general position. We don't think it is good enough for them to say oh, well, BT hasn't done it, because we are now six months on, we are subject to a burdensome regulation, and the job should have been done by the regulator.

Just for completeness, in relation to Deutsche Telekom, I think my short answer would be I think that issue was concerning whether or not you took into account revenues on another market in deciding whether or not there was a margin squeeze. That is not what we are asking for here, we are not saying that Sky's profits, if it makes profits, which we suspect it may do, on pay-TV, should be called into account in seeing whether or not this is a margin squeeze.

What we are saying is when looking at BT's incentives and the overall analysis, it's relevant to take into account that there is not only a vertically integrated competitor in the form of Virgin but a different form of vertically integrated competitor with very significant competitor advantages, and a market leader in bundling who is sitting in this market as well, in determining the likelihood of BT embarking on what we would say would be a highly questionable commercial strategy, quite apart from its illegalities. So that is the answer I think on that.

So I think that is the end. I will turn round and see if anyone wants me to say anything else. No, those are my submissions. Thank you.

Closing submissions by MR. HOLMES

MR. HOLMES: Sir, I will divide my closing submissions into three parts. First I will address BT's claims that Ofcom applied the wrong standard of statutory relevant risk, secondly, I will address BT's allegations that Ofcom erred in law by failing to have regard to existing regulatory constraints, and thirdly, I will respond to BT's complaint that Ofcom's substantive analysis is insufficiently robust.

Beginning with the relevant risk test. BT's central allegation is that Ofcom has misconstrued the test by failing to apply a standard of realistic likelihood or of probability when assessing the risk of a harmful price squeeze occurring. One sees that from paragraph 24 of BT's skeleton argument, and the point appears again in paragraphs 16 and 17 of the list of issues which BT produced for today.

We say that BT is wrong to advance a standard of likelihood or probability. Mr. Thompson somewhat softened his stance in his oral submissions this morning but still contended for some enhanced standard of risk so I think these points apply equally to his modified position.

In relation to this I make five points. First, the test as laid down in section 88 is whether there is a risk that the dominant provider might so impose a price squeeze as to have adverse consequences for end-users and we say that, on its natural and ordinary meaning,

this test does not require a showing that the dominant operator is likely so to impose a price squeeze as to have such effects. If that had been the intended standard, the legislature would have said so.

Second, the test laid down in section 88 is fully consistent with the test in Article 13 of the Access Directive and this appears to be common ground. Mr. Thompson referred you to the comments of the Supreme Court in the 080 case suggesting that one begins with the common regulatory framework.

Article 13 provides that a price control may be imposed where a lack of effective competition means that the dominant operator may apply the price squeeze to the detriment of end-users, and again on its natural and ordinary meaning, Article 13 requires only that there be a risk and not a likelihood of such conduct occurring. So there is no justification as a matter of European law for applying a different interpretation to section 88 than is suggested by the plain meaning of the words used.

Third, the relevant risk test, read according to its natural and ordinary meaning, is also consistent with the regulatory scheme provided for in the common regulatory framework. It applies in a situation where there is already a finding of significant market power that the relevant market is not effectively competitive.

Before imposing a price control to address the risk of a margin squeeze, Ofcom must also show that the margin condition would be proportionate in the sense that it is both necessary and appropriate to deal with the risk.

The relevant risk test is therefore only one of a series of preconditions which, in combination, ensure that regulation is targeted and appropriate. There is therefore no need to adopt a restrictive interpretation of the test in section 88 and indeed to do so would risk distorting the balance which the legislature has chosen between these various conditions.

Fourth, there is no binding or persuasive authority which requires the section 88 test to be read other than in accordance with its natural and ordinary meaning. BT relies on snippets from two cases to suggest the test must be applied strictly or stringently. In our submission, neither of the judgments relied on provides any basis for reading into section 88 the requirement of likelihood or probability.

First, BT relies on a single paragraph in a judgment of this Tribunal sitting in a different formation, with Mr. Allan, in the Telefonica case. The reference is authorities bundle IV, tab 49.

The paragraph in question, paragraph 25, appears in the legal background section of the judgment. The substance of the case was not concerned with the application of

section 88 at all but with Ofcom's dispute resolution powers. The paragraph notes that the imposition of price controls is generally recognised as the most intrusive form of regulation available to a National Regulatory Authority and that stringent conditions must therefore be satisfied.

It is of course the case that a price control can be an intrusive measure. The degree of intrusiveness will vary with the design of the control. As recital 20 of the Access Directive points out, some controls may be relatively light and others much heavier in terms of the obligation in place.

As paragraph 25 explains, there are therefore a number of conditions governing the imposition of regulation which work together to ensure properly targeted regulation. But we do not read the Tribunal in Telefonica as suggesting that the individual conditions should be construed other than in accordance with their natural and ordinary meaning. In combination, they are already sufficiently stringent.

The other authority cited by BT in this connection is the judgment of the Court of Justice of the European Union in the case of The Number. That is at authorities bundle II, tab 30, but I don't think we need turn it up.

From this, BT extracts a reference to strict interpretation in paragraph 31 of the judgment. We say that BT's reliance on paragraph 31 is misplaced. The case in question concerned whether a National Regulatory Authority could impose a specific obligation when no express power to do so arose under the Universal Service Directive.

As we read paragraph 31, the point being made is that the regulator should not read a power to impose additional obligations into the framework absent express provision. The present case is different in that there is clear express provision made in Article 13 of the Access Directive to impose an obligation not to engage in a price squeeze. The tests for applying such an obligation are clearly specified in Article 13, including the requirement that the dominant operator may apply a price squeeze to the detriment of end-users. And the judgment of the Court of Justice in The Number provides no authority for varying the intensity of the test laid down by the legislature.

Finally under this head, BT also seeks to use ex post competition law to import a test of likelihood into section 88. We say that the relevant risk test already reflects adequately the requirements of ex post competition law.

It is a trite observation, but ex post competition law obviously applies where conduct is already occurring. Likely effects are then assessed by reference to that conduct to see whether the conduct will be harmful.

Ex ante regulation is addressed at preventing harmful conduct which might arise in the future.

MR. ALLAN: Sorry, Mr. Holmes, I wonder if you are going a little bit too far when you say that ex post competition law necessarily applies to conduct that is already occurring. The Court of Justice has been at pains in Tetra Pak, in the paragraph in Microsoft we saw this morning, to say that it is important to construe that article in a way which allows for the Commission to intervene to pre-empt the consequences of anti-competitive behaviour.

MR. HOLMES: That is true, sir. I take that point. Yes, sir. But where an intervention of that nature is made, it would be addressed to particular and specific conduct by a particular and specific undertaking on the market where there is a concern that such conduct is likely to eventuate, so it's a somewhat different context.

MR. ALLAN: You are talking about a condition here now addressed to a particular undertaking concerned about particular conduct.

MR. HOLMES: That is true, sir, but subject to a risk of the conduct arising, subject to a test of risk.

The point that I was seeking to make is simply that the risk element goes to whether conduct may occur. Ofcom accepts that there must be a risk of harmful conduct occurring. So we accept the notion of a unitary test, and we accept also that what Ofcom must show is not only that conduct may occur, that there is a risk of conduct occurring, but there is a risk of harmful conduct occurring. We say that that is on all fours with the position in ex post competition law.

That is not to say, of course, that Ofcom's market analysis must show that whenever a price squeeze occurs, anti-competitive effects would be likely to eventuate. The legislation doesn't specify a two-stage test of that kind. What is required is a showing that there is a risk of conduct which, if it did occur -- of a margin squeeze which, if it did occur, would result in anti-competitive conduct.

BT's other allegation of legal error in relation to the statutory test is that Ofcom has not correctly construed the meaning of price squeeze, and as to this we say there is no real doubt as to the meaning of price squeeze in the European legislation.

One sees in recital 20 of the Access Directive that it arises where the difference between an operator's retail prices and the interconnection prices charged to competitors who provide similar retail services is not adequate to ensure sustainable competition, and Ofcom applied that meaning in the contested decision. It set that interpretation out in paragraph 3.4 of the decision which I showed you in opening.

Ofcom also clearly explained in the decision the difference between retail prices and interconnection prices which it considered would prevent sustainable competition.

I showed you in opening that Ofcom proceeded on the basis of BT's own costs subject to minor adjustments to reflect advantages on the part of BT that could not be matched by other communications providers in a reasonable time.

You will note this is explained in the decision at paragraphs 3.100, 3.104 to 3.107, and the conclusion is summarised in 3.131. So in our submission, there was no lack of clarity as to the meaning of price squeeze in this case.

MR. ALLAN: Do you see a significant difference between the meaning of price squeeze that you describe and the meaning of price squeeze as defined by the Court of Justice in the 102 cases?

MR. HOLMES: No, sir. It is clear that in the 102 cases the test that is applied is to have regard to the costs of the dominant undertaking, an equally efficient operator test ordinarily. That is the standard approach. The reason why that approach is appropriate in an ex post context, as is explained in the Deutsche Telekom case, is because there are considerations of legal certainty when assessing whether past conduct is compliant. Obviously a dominant firm knows its own costs, there can therefore be no doubt that it can ensure compliance with a test that is set by reference to those costs.

In an ex ante context, one could set out a modified test which didn't give rise to legal certainty concerns, because it would be clear what the test was, where some measure other than just the downstream costs of a dominant firm is needed in order to ensure sustainable competition. We have seen in the -- I can take you there again if you like, in the 2013 recommendation, a reference to a reasonably efficient operator test as an example of an ex ante test which departs from the measure of costs of the downstream arm of the dominant firm's own operations.

In this case, Ofcom didn't go so far as a reasonably efficient operator test, it adopted an adjusted equally efficient operator test, although I accept the two can sort of blur into one another. It made some modest adjustments where there were features of BT's costs which it considered competitors could not match.

So there is that difference in relation to the costs standard.

Also, as the Tribunal will be aware, the costs measure ordinarily applied for margin squeeze in an ex post world is long-run average incremental costs and one sees that -- perhaps we should go there quickly -- from the article 102 enforcement priorities guidelines. I see Mr. Allan nodding. It may be that we don't need then to open --

MR. ALLAN: I recall it.

MR. HOLMES: Very good. So there may be differences, but by and large we say the measure is long-run and by and large, in this case in any event, the measure has been adopted by reference to the costs of the dominant undertaking.

MR. ALLAN: So just to finish it off, of the three options that you canvassed in the statement, presumably option 1 is the EEO standard?

MR. HOLMES: Subject to modest adjustments in relation to average customer life. And bandwidth costs, Ofcom considered that BT's bandwidth costs, BT might enjoy particular advantages, which meant its bandwidth costs, the costs I believe of the backhaul element of the network of supplying bandwidth, were different for reasons I think of economies of scale and scope.

MR. ALLAN: Thank you.

MR. HOLMES: The impact of those adjustments -- to be clear, the marginal impact of those adjustments is modest, and I can show you that, sir, if that would be helpful.

MR. ALLAN: Yes.

MR. HOLMES: If you take up hearing volume bundle III/I, picking up firstly at page 45, there are the three options which I showed you in opening submissions.

I am reminded that option 1 was an unadjusted equally efficient operator, and that it was in fact option 2 that Ofcom selected. Forgive me if I misled the Tribunal about that. So option 2 was the one that Ofcom took.

You will see at 3.104 the observation that the difference between option 1 and option 2 is likely to be small. If you then turn on within the statement, there is a helpful table, which it may take me a moment to locate, which shows the scale of these adjustments.

So at page 261 you see a table, "Indicative Estimate of the Impact of VULA Margin Regulation". I should tread carefully because these are obviously all confidential figures, but at paragraph 6.475 over the page you see an indication of the retail revenues at the first bullet point, the final figure of the first bullet point. Do you have that?

MR. ALLAN: Yes.

MR. HOLMES: Then you compare that over the page with various adjustments. You'll see that the impact of the adjustment of reducing the average customer life is shown in the fourth row, and the total impact of the switch from LRIC to LRIC plus and of the ACL adjustment is shown in the row below.

So I only show you this to give some indication of the parameters within which these different -- the debate about these different cost measures takes place.

MR. ALLAN: Thank you.

MR. HOLMES: So my overall submission on the first part of BT's case is therefore that Ofcom correctly applied the statutory test in the contested decision.

Let me now turn, if I may, to the second limb of BT's case. This alleges that Ofcom erred in law by failing to take account of the existing regulation to which BT is subject when assessing whether there was a relevant risk, and these are Grounds 1B to 1D of BT's Notice of Appeal.

BT relies on three pieces of regulation. The first is the SMP conditions requiring it to supply VULA on fair, reasonable and non-discriminatory terms and on an equivalence of inputs basis, the second is ex post competition law, and the third is the undertakings that BT gave in 2005 to avoid a market investigation reference.

The Tribunal will recall that in paragraphs 3.59 and 3.78 of the contested decision, Ofcom took the position that as a matter of law other regulatory constraints on BT should not be taken into account when assessing whether there is a relevant risk of a price squeeze. It referred in that connection to the judgment of the Court of Appeal in the Hutchison case which you were shown this morning.

It noted, however, that it took other regulation into account in section 4 of the decision and assessed whether such regulation would provide sufficient constraints to deal with the risk.

As regards the legal position, my submission is that Ofcom was correct to disregard other regulation on BT, and I shall make that good in a moment, I am afraid we will need to return to the Hutchison judgment. But in any event, my second submission is that while there are interesting legal debates to be had, the various pieces of regulation invoked by BT are clearly insufficient in this case to remove the relevant risk identified by Ofcom.

BT's legal argument is, therefore, not material to Ofcom's decision even if it were accepted, and if the Tribunal considered that existing regulation did require to be taken into account, it is well placed to uphold Ofcom's decision based on its own assessment of the regulation.

Let me deal first with the law. If I could ask the Tribunal to pick up authorities bundle III, and to turn to tab 44, the Hutchison case. The judgment followed an appeal by the mobile operator Hutchison against a decision of the Competition Appeal Tribunal in which the Tribunal had decided, amongst other things, that certain regulatory provisions governing the terms on which Hutchison and BT did business with one another should be disregarded both when assessing whether Hutchison had significant market power, the preceding stage of analysis in our case, and when assessing whether there was a relevant risk of excessive pricing for the purposes of section 88(1)(a) and 88(3). So the case was relevant to the stage

of analysis with which we are concerned, or the other limb of the relevant risk test, the excessive pricing limb rather than the price squeeze limb.

The market in question was the market for the termination of calls on Hutchison's mobile network and there were two regulatory provisions that were considered. The first was an end to end connectivity obligation imposed by Ofcom on BT. This was not SMP regulation, but rather a general access related condition imposed under national provisions implementing article 5 of the Access Directive which Mr. Thompson took you to in opening.

The second regulatory provision was the possibility of dispute resolution pursuant to Ofcom's power to resolve disputes between operators in relation to network access and again that power does not depend on any finding of significant market power.

Hutchison challenged the Tribunal's decision that these regulatory provisions should be disregarded both as respects SMP and the relevant risk assessment. Its grounds of appeal, which you have been shown already at paragraph 39 of Lord Justice Lloyd's judgment, were firstly a debate about what would happen in a dispute resolution. The Court of Appeal did not find it necessary to reach a determination on Ground 1, and one sees that, just for your note, from paragraph 77 of Lord Justice Lloyd's judgment and from paragraph 109 of Lord Justice Etherton's judgment.

They considered the issue of principle, namely, whether regulation other than SMP regulation should or should not be disregarded, and having decided that it should be disregarded, they did not then consider it necessary to determine exactly how a dispute would or would not be determined.

In our submission, that means that the observation of Mr. Allan or the question of Mr. Allan was correct in its premise this morning, that the outcome of the 080 case does not remove the binding force of the Hutchison case which determined, as a matter of principle, whether regulatory constraints other than SMP constraints should be disregarded.

Let me show you now what we say the Court of Appeal decided. The case involved a consideration of the European Commission's decision to veto a proposal of the German telecoms regulator, RegTP, to find that various non-incumbent fixed network operators in Germany lacked SMP in the market for call termination on their respective networks.

We don't need to go deep into the detail of that case. For present purposes, the key point is that the Commission made clear that when assessing whether there is SMP in a market, one should ignore at least existing SMP regulation in that market. This is described as the greenfield approach, the same proposition applies whether one adopts the strict or the

modified greenfield approach, and one sees that in a quotation from the RegTP judgment which is set out at paragraph 47 of Lord Justice Lloyd's judgment.

It is paragraph 47 and the correct reference is paragraph 23:

> "The purpose of a greenfield approach is indeed to avoid circularity in the market analysis by avoiding that, when as a result of existing regulation a market is found to be effectively competitive, which could result in withdrawing that regulation, the market may return to a situation where there is no longer effective competition. In other words, any greenfield approach must ensure that the absence of SMP is only found and regulation only rolled back where markets have become sustainably competitive and not where the absence of SMP is precisely the result of regulation in place."

So the basic principle, when you are assessing whether a party has SMP, leave aside the complexities of both the Hutchison case and the RegTP case, the basic proposition that you disregard SMP regulation, regulation imposed under the SMP powers in Articles 9 to 13 of the Access Directive, should be disregarded when you are assessing whether there is SMP. And that I think is common ground.

The basic proposition is then explained by Lord Justice Lloyd at paragraph 53 of his judgment:

> "As the Commission said in paragraph 23 of the RegTP decision, the point of the modified greenfield approach is to avoid circularity in relation to a market assessment as regards SMP. SMP is not to be found absent from a market if its absence is the result of regulation which is in place."

The same is true, as he goes on to explain, in relation to regulation that might be put in place.

He concludes in paragraph 53:

> "Whether a market is effectively competitive must be assessed regardless of the regulatory constraints that might be imposed if it is found that it is not, otherwise the regulatory regime would in this respect be self-defeating."

There is no dispute in the Hutchison case before the Court of Appeal about this basic proposition. The issue for the Court of Appeal was whether the greenfield principle applied only to SMP regulation under the common regulatory framework or whether it also extended to other types of regulation, including regulation formerly imposed upon a party other than the party being assessed for SMP, the counterparty, which also operated to constrain SMP.

You see the submission of Miss Dinah Rose at paragraph 62 of Lord Justice Lloyd's judgment. Miss Rose argued that:

> "... as enunciated in RegTP at paragraph 22, the modified greenfield approach does not require or permit to be ignored any regulatory obligations that exist independently of an SMP finding on the market in question, nor obligations flowing from existing regulation, other than that which is imposed on the basis of the SMP status on the market in question."

And the upshot of that submission was, she argued, in the final sentence:

> "The dispute resolution provision and its consequences are regulatory obligations that exist independently of an SMP finding on the market under consideration which have to be taken into account because of what was said in paragraph 22."

And the argument was BT is subject to an end to end connectivity obligation, that is not an SMP obligation, so it falls to be taken into account, the obligation is not an obligation to interconnect on any terms but only on reasonable terms, and therefore BT has countervailing buyer power to resist any unreasonable terms and conditions that Hutchison might propose. So on that basis, no SMP.

The Court of Appeal rejected that submission. It agreed with the Competition Appeal Tribunal that other regulation besides SMP regulation should also be disregarded. You see this from paragraph 64 of Lord Justice Lloyd's judgment where he adopts a broader formulation of the modified greenfield approach than that which Hutchison was urging on the court:

> "As it seems to me, one of the critical aspects of the modified greenfield approach is that it requires that a feature of the regulatory regime be ignored in a market assessment as to whether an undertake has SMP or not if otherwise it would provide the answer to the question whether the undertaking does or does not have SMP."

So one doesn't only disregard regulation which has its formal source in a finding of SMP and specific obligations imposed pursuant to Articles 9 to 13 of the Access Directive, one takes a broader approach than that.

Again at paragraph 66:

> "A regulatory provision which, if used, would have the effect on the freedom of an operator to act independently of its customers cannot be allowed to provide an a priori answer to the question whether that operator does or does not have

SMP."

In other words, regulatory obligations which constrain market power are to be disregarded when assessing SMP whether or not based on an SMP finding on the market in question. It followed that both Ofcom's ex post dispute resolution powers and the end to end connectivity obligation which required BT to interconnect, which governed the terms on which BT and Hutchison did business, were both to be excluded from consideration when assessing whether Hutchison had significant market power.

Sir, you referred to paragraph 67 and I should deal with that point. What Lord Justice Lloyd was saying in this paragraph, as we understand it, is that he accepted that paragraph 22 of RegTP appeared to be more narrowly framed than the conclusion that he was arriving at because it referred specifically to regulation imposed as a result of an SMP finding. But he also makes the point that that reasoning is not consistent with the final conclusion arrived at by the Commission in the RegTP case.

So in the RegTP case, RegTP pointed out that the counterparty, DT, like BT in the Hutchison case, was subject to an obligation to interconnect, and also that the obligation was not to interconnect on any terms but on reasonable terms.

If those combined facts were effective to remove SMP, then one would expect a different conclusion to have been arrived at in the RegTP case which concluded that RegTP should have made a finding of SMP in relation to the ANOs, the alternative network operators.

So I think that is the purpose of 67, to make a point that whatever the Commission may have appeared to say in paragraph 22, that was not consistent with the outcome of the case.

THE CHAIRMAN: Unfortunately when one looks back at paragraph 50 it appears the Commission didn't actually give any reasons for its conclusions, so ...

MR. HOLMES: Indeed, sir. That was one of the difficulties in the case. But it involves a level of complexity which doesn't really arise in our case because it concerned whether to disregard regulation not imposed on the party that was being assessed for SMP but on another party, and the implications that that regulation might have for SMP.

Turning to paragraph 75, one sees there that the same conclusion that was found in relation to SMP, namely, that one disregarded dispute resolution powers and the end to end obligation, also applied when one came to the question of relevant risk.

As Lord Justice Lloyd states at the end of paragraph 76:

> "In light of this, it seems to me that Hutchison could only show that section 88 was not satisfied by reference to the regulatory powers to control its prices, but that is a circular argument of exactly the kind that the modified greenfield

approach excludes."

I should show you briefly Lord Justice Etherton's judgment --

MR. ALLAN: Sorry, Mr. Holmes, which paragraph were you just quoting from?

MR. HOLMES: The relevant paragraphs are 75 -- I was quoting from the conclusion of 76, the application of the reasoning in relation to SMP, also at the relevant risk stage of the analysis, which shows the relevance of Hutchison to this case. And I do rely not only on the end of 76 but on 75 generally.

At paragraph 79 Lord Justice Etherton begins his judgment. He agrees that the appeal should be dismissed. At paragraph 85 he distinguishes between ex ante and ex post regulation. He notes that ex ante regulation includes SMP regulation, and then in the middle of the paragraph he says of ex post regulation, that it includes:

"... resolution of disputes by NRAs in connection with obligations arising under the CRF directives, the 2003 Act, and the application of article 82 of the EC Treaty or chapter 2 of the Competition Act as regards the abuse of dominant position."

Article 82 is of course the provision of ex post competition law, now renumbered as article 102 of the Treaty on the Functioning of the European Union, the provision that BT relies on in this case.

Then at paragraph 92, Lord Justice Etherton refers to the greenfield approach and quotes again the passage from paragraph 23 of the RegTP decision which you have already seen. At paragraph 98, he considered dispute resolution powers and he rejected the contention that they were merely regulation of BT, Hutchison's counterparty. He says, picking it up halfway through the paragraph:

"It seems obvious that Ofcom's dispute resolution powers are capable of both protecting the mobile network operators from unreasonably low prices put forward by BT and protecting BT from demands by mobile network operators for excessive prices. Insofar as Ofcom's dispute resolution powers embraced the latter, they are ex post regulation of mobile network operators, including Hutchison, which the Tribunal was right to ignore on the modified greenfield approach."

Then at paragraph 100 he states:

"Dispute resolution, the restriction of an end to end obligation to reasonable terms and conditions, and article 82 [that's article 102 of the Treaty] are plainly not suitable or sufficient substitutes for the thorough ex ante regime intended

> under the CRF for the protection of consumers by enabling NRAs in Member States across the EU to determine whether voice termination markets are effectively competitive."

At paragraph 112, Lord Justice Etherton considered the implications of the relevant risk test and agreed with Lord Justice Lloyd that the same logic applies. And at paragraph 114, just to complete, Lord Justice Ward agreed with both of his judicial brethren.

So standing back, we make four submissions based on the Hutchison case. First, it is clear the Court of Appeal's decision relates not only to SMP but also to the relevant risk test. Hutchison challenged both SMP assessment and its finding of relevant risk by reference to existing regulation, and the Court of Appeal held that existing regulation should be disregarded at each stage. So it is therefore relevant to the stage of analysis with which our case is concerned.

Second, it is also clear that existing ex ante SMP obligations are to be disregarded when assessing relevant risk. This was not in dispute in the Hutchison case, it is clearly stated by the European Commission in the RegTP case, and for your note it is also clear from the 2014 markets recommendation of the Commission. Let me give you the reference, authorities bundle I, tab 9, recital 8.

Ofcom was therefore right to exclude from consideration both the 2014 FRAND obligation, which is an SMP remedy on BT, and the equivalence of inputs obligation, also imposed as an SMP condition on BT.

Third, other ex ante obligations that constrain SMP are also to be disregarded. This was the main import of the Hutchison case. In that case, the end to end connectivity obligation on BT was disregarded, and in the present case we say that the BT undertakings are to be disregarded on the same basis as a constraint on BT's pricing which it would be circular to rely upon at the risk stage in order to roll back regulation.

In this case, there are particular considerations in support of that conclusion. BT relies on two aspects of the undertakings: functional separation and equivalence of inputs.

As regards functional separation, the common regulatory framework has been amended since the undertakings were given in 2005 and functional separation can now be imposed as an SMP remedy. If it were imposed in that way, it would fall to be disregarded. The fact that for purely historic reasons that obligation arose in another way should not affect the correct legal analysis.

As regards equivalence of inputs, this obligation applies in the present context both by virtue of the undertakings and by virtue of SMP regulation. It would be inconsistent to take

the same equivalence of inputs obligation into account in the context of the undertakings, but to leave it out of account in the context of SMP regulation.

Fourth, the Hutchison case also supports the proposition that ex post competition law should also be disregarded as a measure directed at controlling BT's market power. I have shown you Lord Justice Etherton's remarks on article 102 with which Lord Justice Ward agreed.

So we say that as a matter of law, Ofcom was right to disregard other regulatory constraints on BT when assessing whether there was a relevant risk of a price squeeze.

Other regulation may of course be relevant to the proportionality assessment when assessing which combination of remedies to impose, and indeed Ofcom did consider the FRAND obligation and ex post competition law at that point of the analysis. But as a matter of law, we say that they are not relevant when assessing the risk of a price squeeze, and Ofcom was right to disregard them at that stage based on the Hutchison case.

MR. ALLAN: Just to put it summarily, you are saying that this is a section 88(1)(b) question, not a section 88(1)(a) question.

MR. HOLMES: Yes, sir, precisely. So that is the legal submission.

My second submission is that interesting though the Hutchison case is, the legal issue is in any event a sterile one. None of the various regulatory obligations to which BT now refers could safely be relied upon to remove the relevant risk identified by Ofcom. And in relation to the FRAND obligation and ex post competition law, the contested decision contains reasoning to that effect in section 4.

In this connection, we maintain our submission that there is no meaningful difference between a finding that a regulation does not remove a relevant risk and a finding that a regulation adequately addresses a relevant risk. They amount to the same thing.

In relation to the other obligations, the position is also clear and the Tribunal is invited to uphold Ofcom's decision accordingly.

Taking first the FRAND obligation, Ofcom considered whether a FRAND obligation was sufficient to deal with the risk of a price squeeze, paragraph 4.68 of the decision, and it held that this type of condition would result in too much uncertainty for BT and other communications providers.

We say that the present case amply illustrates the inadequacy of a simple FRAND obligation. Ofcom and BT do not agree about what the test for a price squeeze should be, and that is the dispute which is before the Competition and Markets Authority, what costs should be taken into account. Such uncertainty gives rise to a risk of breach.

Ofcom's approach in setting a detailed margin condition, rather than a bare FRAND

obligation, also accords with the Commission's 2013 recommendation and with BEREC's best practice guidelines which I showed you in opening. As the Tribunal will recall, Ofcom is required to take utmost account of both of those.

In opening, we saw the 2013 recommendation suggests that a national regulatory authority should include in its SMP measure details of the ex ante economic replicability test that the authority will apply, including detailed design parameters and the procedure that will be followed. The reference is authorities bundle I, tab 8, page 24, point 56.

Similarly, the BEREC best practice guidance specifies that the National Regulatory Authority should make known in advance the chosen principle and methodology for the assessment of a margin squeeze. The existing FRAND condition does not achieve this. The reference for your note is hearing bundle IV, tab 1, page 20, best practice 49D.

There has been some debate in the evidence about whether the 2014 FRAND obligation could be applied to address a margin squeeze and let me deal briefly with that now.

The issue arises because the 2014 Fixed Access Market Review statement refers to a risk of excessive pricing but does not identify a risk of a price squeeze. As a legal matter, it must therefore be open to doubt whether the condition could be applied for the purpose of controlling a price squeeze, however we say that the Tribunal need not determine this issue.

If the FRAND obligation could apply, it would not be adequate to remove the risk of a harmful price squeeze for the reason I have given. It therefore cannot assist BT.

Conversely, imagine a world without a FRAND condition. The reason why I think the issue of the vires under the 2014 condition takes one nowhere is because imagine that Ofcom in the future imposed a FRAND condition, BT would then be advancing exactly the same arguments about how far that FRAND condition was sufficient to address the relevant risk, and therefore it really does not matter to the Tribunal's assessment whether or not there was a power to use the 2014 FRAND regulation for the period between 2014 and 2015 to deal with margin squeeze.

Turning to ex post competition law, Ofcom considered whether this was sufficient to deal with a risk of price squeeze at paragraphs 4.15 and following of the final decision.

Essentially Ofcom decided that ex post competition law was not sufficient because of the uncertainties that would persist about how margin squeeze would be measured and whether an infringement would be found pending an ex post decision. Such uncertainties give rise to a risk of infringement. Moreover, the infringement would continue while potentially lengthy investigations took place.

Moreover, as I have already suggested in response to a question from Mr. Allan, the ex post

test would not necessarily be the same as the ex ante one. That is because at the ex post stage, one applies a strict equally efficient operator test, in an ex ante context a reasonably efficient competitor test may be appropriate, and therefore ex post competition law may not be sufficient to achieve effective competition insofar as there are unmatchable advantages enjoyed by the dominant operator.

A further point: Ofcom's conclusion on competition law accords with the approach taken at the European level. The Tribunal will recall the 2007 recommendation on identifying relevant markets which stated that competition law interventions are unlikely to be sufficient where the compliance requirements of an intervention are extensive or where frequent and/or timely intervention is indispensable. The reference is authorities bundle I, tab 7, paragraph 13.

The Commission's identification of market four already rests on a general finding that competition law is inadequate. We don't say this is determinative but it is consistent with Ofcom's conclusion in this case and it does shed light on the level of analysis that is required in considering whether ex post competition law addresses relevant risk.

The witness evidence also tends to support Ofcom's conclusion, it shows the lack of agreement on what would constitute a margin squeeze, and BT's own witness evidence was that ex post competition law was inadequate to constrain Sky's position on wholesale pay-TV markets.

The non-horizontal merger guidelines we say are also consistent with this position. If I could ask you to turn those up, they are in authorities bundle I in the insertion at tab 11A. You will see from paragraph 46, the passage you were taken to this morning, that only a summary analysis is considered appropriate when considering whether ex post competition law removes the risk of foreclosing activity following the merger.

While we are in this document, could I also take you to paragraph 71 which appears in a section headed "Incentive to Foreclose Access to Downstream Markets".

We would note paragraph 71:

> "When the adoption of a specific conduct by the merged entity is an essential step in foreclosure, the Commission examines both the incentives to adopt such conduct and the factors liable to reduce or even eliminate those incentives including the possibility that the conduct is unlawful."

At footnote 3:

> "The analysis of these incentives will be conducted as set out in paragraph 46 above."

In our submission, that incorporates the reference to summary analysis which appears at the end of that paragraph.

BT has also relied at the appeal stage on the 2005 undertakings. BT has criticised Ofcom for not addressing these undertakings in its decision and the Tribunal will recall Mr. Matthew was set some homework by Mr. Thompson which was to go away and see whether there was a reference to the undertakings to be found anywhere in the 2015 decision.

Mr. Matthew confirmed that there is no reference to undertakings and that is correct. But he also pointed out that BT's consultation responses at the administrative stage equally did not refer to the undertakings, and Ofcom in our submission cannot be faulted for failing to address a point which was not put to it in consultation. Moreover, BT's failure to identify the undertakings in itself provides some indication as to their real relevance in this case. Ofcom submits that the undertakings make no difference to the analysis.

Taking the two features in turn, the first is equivalence of inputs. This requires Openreach to supply downstream competitors of BT on the same terms and conditions as BT Consumer. This obligation cannot remove the risk of a margin squeeze, this is because a margin squeeze can arise without any discrimination.

I think that is common ground. You saw the European regulators' group guidance on this point in opening and Mr. Bishop confirmed in his evidence that a margin squeeze need not involve discrimination. We give the reference in our list of issues note. Therefore an obligation not to discriminate cannot solve the problem which the VULA margin condition seeks to address. This applies to the equivalence of inputs requirement under the undertakings and to the same requirement imposed as SMP regulation.

The correct position is that equivalence of inputs and a margin squeeze condition are complementary measures as the Commission's 2013 recommendation makes clear. The guidance there is that National Regulatory Authorities should normally remove upstream price regulation, as Ofcom has done, only after imposing both an equivalence of inputs requirement and an economic replicability test, and the reference is authorities bundle I, tab 8, pages 10 and 11, point 52.

The other aspect of the undertakings is functional separation of Openreach. As to this, the undertakings do not provide sufficient comfort. A long list of people from BT Group are permitted to participate in and influence Openreach's commercial policy, moreover, there is no restriction on the formulation of a commercial policy of general application which it is appropriate to set centrally. One saw that from the definition of commercial policy in the

undertakings.

The general provision, in paragraph 20.9, requiring the individuals in the annex to respect the intent of the undertakings is in our submission too vague to provide a satisfactory constraint. The intention of the undertakings is not set out, the predominant purpose at the time of their adoption was to address discrimination, and Ofcom made clear that any concern with margin squeeze would be addressed separately through ex ante regulation.

The Tribunal will recall the part of the table in the final statement that Mr. Clarkson highlighted in his re-examination. The reference is hearing bundle IV, tab 3, page 56, final row.

There are therefore the means by which Group can influence the commercial policy of Openreach, notwithstanding functional separation, and we say this is sufficient to preserve the risk of a price squeeze. And Article 13 of the Access Directive shows that SMP remedies can operate alongside functional separation.

So my submission in relation to the second limb of BT's case, the alternative regulation issue, is that Ofcom was right about the law, and in any event it was right to dismiss ex post competition law and FRAND when it considered the proportionality of an intervention, and it makes no difference that it considered those matters under that head. And equally it cannot be faulted for not dealing with the undertakings because they were not raised in consultation, and in any event they would make no difference, the Tribunal has sufficient material before it to make its own assessment in that regard.

We would invite the Tribunal, if it decides the legal point in our favour, to proceed to make findings in relation also to the factual points in order to ensure that the materiality or immateriality of any legal point then arising can be assessed in the light of those findings having regard to possible further appeal proceedings in the case.

THE CHAIRMAN: What do you say in response to paragraph 61.3 of the BT note? That looks like a new point. I'm not sure I have focused on this point before. It's right at the very end, the penultimate page.

MR. HOLMES: 61.3?

THE CHAIRMAN: Yes.

MR. HOLMES: This is the suggestion that there may be a different standard applicable for the purposes of assessing proportionality and for considering risk.

THE CHAIRMAN: This is one of the arguments that I understand BT to run, to say that it does matter which section you do the analysis.

MR. HOLMES: Sir, in our submission, the question of whether a piece of legislation removes the

risk ensuring that BT cannot impose a price squeeze is effectively -- one can be over-refined, I think, about this. It is effectively the same question as to whether no risk arises because of the existence of such regulation.

So in this case at least, there might be some daylight in some contexts between those two questions, but in this case the factors that were relied upon in section 4 are exactly the types of consideration which would inform a consideration of whether there was no risk by reason of the FRAND obligation and ex post competition law. Therefore, at least for the purposes of this case, the distinction is one without a difference.

MR. ALLAN: I hate to do this to everyone but can we go back to H3G because I am still struggling with that a little bit.

MR. HOLMES: Of course. It is not a straightforward case on any view.

MR. ALLAN: I have two questions. One is, if you like, a fundamental question of principle, the second is to try to make sense of Lord Justice Lloyd's judgment, if one can say that without lese majeste.

The first question is: the constant theme through the treatment of the issue is to avoid circularity.

MR. HOLMES: Yes.

MR. ALLAN: I am struggling a little bit to understand where the circularity would arise in our case if the existing regulation were to form part of the modified greenfield. That is not to assume that it is adequate, it is merely to try to set the premise.

MR. HOLMES: Yes, sir.

MR. ALLAN: The second question which relates to the judgment is that it seems to me one needs to look, particularly at the last sentence of paragraph 76, against precisely what it was that Miss Rose was arguing which one gets from the first few sentences of paragraph 73 where, so far as I can understand it, and I may not be right, but as far as I can understand it, the argument seems to have been that, somewhat similar to this case perhaps, the criticism is that Ofcom has made its decision that H3G had the ability and incentive to raise price purely on the basis of the existence of the SMP and has not actually considered the constraints that are imposed upon H3G by virtue of the SMP finding. In other words, it seems to be that the threat of price regulation would be a sufficient deterrent. If that is the case, I can fully understand why Lord Justice Lloyd was unimpressed by the argument, and it is a bootstraps argument, but I'm not sure that is the same point that we are dealing with here.

MR. HOLMES: Yes, sir. So taking the circularity question first, and it may in fact shed light

I think on the second question as well. If we take first of all FRAND regulation, the submission that is being made is that there is no risk of a margin squeeze because of SMP regulation that can be used to address margin squeeze. That argument might equally well be made in the absence of any existing FRAND obligation as a means of defeating a more involved margin condition of this nature. If that is the point that is being made then there is circularity, because you are saying that because a FRAND condition exists or could be set, there is no scope to set a margin condition addressing the same risk, namely, a risk of a margin squeeze.

So while the existence of FRAND may be relevant to the proportionality of going further and imposing a more worked out margin squeeze condition, it cannot be an objection to the existence of a risk for the purposes of determining whether to impose regulation to address margin squeeze because otherwise that circularity would arise, in our submission.

MR. ALLAN: One thing I am struggling with in that sense is the question that we are presented with here is whether there is a sufficient risk to demand enhanced price control, so that it seems almost to build in as a premise the regime of existing price control, if one describes it as such.

MR. HOLMES: Yes, sir. In our submission, the correct legal position is that the relevance of FRAND goes to the proportionality of the measure and whether there was a less restrictive measure that might be put in place.

Insofar as the existence of FRAND is taken into account as a basis for defeating the existence of a relevant risk, one thereby does create this risk of circularity. So in our submission the enhanced price control point, it is not appropriate to take into account existing price control when assessing whether there is a need for an enhanced price control as regards relevant risk. The place to take that into account would be when assessing whether the proportionality condition is met, it is just a different place in the analysis, which is why this point is, in our submission, rather a sterile or an academic one. The point will arise, we are not saying there isn't scope for discussion or debate --

MR. ALLAN: I understand that. Probably we have taken this point as far as it goes, I just need to invest in some more cold towels I think.

MR. HOLMES: Good luck with that, sir. I remember the pain of the case itself all too well.

The next submission then concerns the substance of the analysis and the allegation here is that Ofcom's analysis is insufficiently robust to withstand profound and rigorous scrutiny.

A small observation, which may seem perhaps pernickety but is relevant to the correct legal analysis, we say that profound and rigorous scrutiny, insofar as it is anything, is about how

the Tribunal goes about looking at the issues which arise in this case, it does not in itself identify a ground of appeal. The correct approach is to consider, in relation to particular criticisms, whether they involve an allegation of error of law, an allegation of error of fact or an allegation of error in the exercise of discretion.

There is then a question about how the Tribunal should go about considering each of those errors. We accept on questions of primary fact that the Tribunal hears evidence and reaches its own conclusion based on the witnesses that appear before it, and insofar as there is an error of primary fact, the Tribunal corrects Ofcom. Equally, as regards error of law, the Tribunal is obviously the arbiter.

As regards errors in the exercise of discretion, we say that Ofcom is to be afforded a margin of appreciation, if one wants to call it that, as a specialist regulator, and for the reasons set out in the passage from the pay-TV judgment which I showed you in opening which has been endorsed by the Court of Appeal and which applies equally to appeals under this part of the Communications Act as is clear from the comments of Court of Appeal.

My submission is that Ofcom's decision is well motivated and clear. It is neither theoretical nor abstract, rather it rests on certain key features of the market structure and on a realistic assessment of current market conditions.

Let me briefly recap on the findings in the decision. Ofcom identified the following relevant features of the market: first, BT has significant market power at the wholesale level. Second, it supplies a key input at the wholesale level. Rivals other than Virgin who wish to provide retail superfast broadband must purchase VULA from BT. Third, BT is vertically integrated competing downstream to provide retail superfast broadband. Fourth, BT has a strong position in the retail superfast broadband segment and that position is continuing to strengthen.

Fifth, the market is entering a transitional period with opportunities for BT and its competitors to win over retail customers from downstream rivals. Sixth, such rivals could struggle to win share back subsequently, given customer inertia and contract lock-in. Seventh, rivals could also lose economies of scale and thereby be placed at a disadvantage. Eighth, the future of the market lies in superfast broadband, and shifts in the superfast segment during this market review period could themselves therefore have enduring effects stretching into the future.

BT accepts, I think, that significant market power and vertical integration are sufficient to establish an ability to price squeeze. As regards incentives, Ofcom found that the transitional period, combined with subsequent inertia and potential effects on economies

of scale, give rise to a real and significant risk that BT will have the incentive to marginalise its retail competitors in order to gain a longer-term competitive advantage.

Against this, in this appeal, it is said that there are competitive constraints in the market that remove any incentive to price squeeze through an increase in the VULA price, and it is said those constraints would cause BT to lose wholesale volumes following such an increase in the short-run, potentially outweighing its wholesale and retail gains, and would prevent BT from charging excessive retail prices in the longer run.

There are six potential constraints identified. The first such constraint is said to arise as a result of competition from standard broadband. That constraint is however reduced by differentiation of superfast broadband. Superfast broadband is a better quality product, it is priced at a premium, and is recognised as the future of broadband.

As Mr. Murray put it during his oral evidence:

> "Initially I think it was a risky bet, but certainly now I think everyone is agreed it is the way forward, and discussions have now to a great extent moved on to: what is the next thing in terms of ultrafast broadband?"

And the reference is given at paragraph 19B of Ofcom's list of issues.

Such constraints as currently arise can also be expected to decline as standard broadband customers come to value superfast more highly and an increasing proportion of customers has already made the switch to superfast. The evidence before the Tribunal is that customers are increasingly migrating to faster packages to support an increasing number of devices in the home. The reference is paragraph 97 of Mr. Murray's witness statement.

The evidence also suggests that customers who do switch to superfast are unlikely then to switch back. Mr. Murray agreed with the statement taken from a BT internal strategy document that access speed is one key factor both to the broadband experience and to customer perception of ISP performance. That is Day 2, page 57, line 24.

Mr. Heaney's evidence is that consumers are highly unlikely to switch back from superfast to standard. That is paragraph 30 of his statement in hearing bundle II, tab 14.

This evidence is consistent with Ofcom's decision in the Fixed Access Market Review statement not to impose a cost plus control. Ofcom there recognised there was a risk of excessive pricing of VULA and that a separate superfast broadband market might emerge in the future. The reference is hearing bundle III, volume II, tab 8, paragraphs 12.135, 12.148 and 12.149. There is also express reference to VULA margin regulation as itself serving to constrain the risk of excess pricing in footnote 954.

The evidence is also consistent with Ofcom's retail market definition in the WBA statement.

Ofcom found that on balance there was a single retail market but recognised that a separate market might emerge in the future and that superfast broadband was a differentiated product. The reference is hearing bundle III, volume II, tab 7, paragraphs 3.67 to 3.71.

So we say that the current differentiation and increasing differentiation of superfast broadband, and the unlikelihood of switching back after the move to superfast broadband, both reduce and can be expected increasingly to reduce the constraint that standard broadband provides for superfast broadband.

The second potential constraint relied on is competition from Virgin. However, it is common ground that such a constraint is limited by Virgin's geographic coverage.

Paragraph 18 of Mr. Heaney's witness statement also suggests that consumers leaving one VULA-based competitor are considerably more likely to go to another VULA-based competitor than to Virgin. As set out in the VULA statement at paragraph 3.82, third bullet point:

> "Competition from Virgin alone could not be relied on to prevent BT gaining longer term advantages from a strong retail position."

The third potential constraint relied on by BT arises in relation to triple play bundles, that is bundles comprising pay television, phone line and superfast broadband, and it is said that Sky in particular could absorb increases in the VULA wholesale price from its profits on pay television, thereby avoiding a retail price increase and preserving its retail competitiveness in the supply of packages that include superfast broadband.

However, only a minority of consumers purchase triple play bundles and this constraint therefore would not work against a price squeeze in relation to the majority who do not purchase pay television with their broadband.

Moreover, in relation to triple play, if a communications provider's profitability were reduced, this would itself risk reducing competitive pressures on BT in relation to retail offers that include superfast broadband. The provider might choose to promote standard broadband bundles instead of bundles that included superfast broadband, and the provider would also face fewer incentives to invest in superfast broadband offerings.

The final point on triple play is that if a communications provider did absorb a VULA price increase in this way, then that price increase would be profitable for BT, potentially increasing its short-run incentives to price squeeze.

For all these reasons, we say that the possibility of a communications provider cross-subsidising superfast broadband from profits obtainable from pay television does not remove the risk of a price squeeze.

The fourth potential constraint relied on is the possibility of re-entry by excluded competitors at a later stage, and this goes I think to long-run incentives rather than short-run incentives. The contention here is that if VULA-based competitors were marginalised by a price squeeze, they could re-enter easily and at minimum cost later, constraining BT's ability to exploit its market power at some future point.

There are, in our submission, three difficulties with this. First, it assumes that BT would stop price squeezing at some future point. Absent regulation, there is no reason to assume that BT would do this. A price squeeze can be end to end profitable and can therefore in principle be sustained indefinitely. BT can take its profits upstream.

Just to show you a short passage from a case which illustrates this point, the TeliaSonera case, which is in authorities bundle II, I believe, at tab 29, explains this point when emphasising that there is no need to show recoupment in relation to the margin squeeze. You see this at page 1025 of the internal numbering. The relevant paragraphs are 99 to 101. The Court there makes the point that:

> "An undertaking which engages in a pricing practice which results in a margin squeeze on its competitors does not necessarily suffer losses and there can be no need, in order to establish existence of abuse, to show evidence of the capacity to recoup such losses. The possibility that competitors may be driven from the market does not depend on either the fact the dominant undertaking suffers losses or the fact that that undertaking may be capable of recouping its losses, it will depend solely on the spread in prices."

We say that is consistent with the conclusion that a price squeeze might continue absent intervention.

If BT did maintain a price squeeze, there might be no prospect of profitable re-entry. Second, re-entry would not be costless. Re-entering providers would have to overcome consumer inertia. Many consumers would be locked in by minimum contract terms. There would be marketing costs in re-establishing the provider's brand as a credible and reliable source of superfast broadband. This is set out in the evidence of Mr. Heaney for TalkTalk at paragraphs 39 to 41.

Third, re-entry would be discouraged by the perception that BT might reimpose a price squeeze. If ex post competition law did not deter the conduct from occurring once, there is no reason to suppose that it would do so on a second occasion.

The fifth potential constraint relied on is the possibility of upstream entry by VULA-based competitors of BT. Despite the valiant efforts of Mr. Bishop in advocating this possibility

on behalf of BT, it is clearly a distant hope as there are significant barriers to entry. The York trial that is cited as an example of such entry is clearly very small and it is at an exploratory stage as Mr. Murray agreed. The evidence of the intervenors is that BT's rivals will rely on regulated access to Openreach's network for the foreseeable future.

The sixth potential constraint relied on by BT is the possibility of VULA competitors absorbing a VULA wholesale price increase offering superfast broadband at a price sufficient to cover only their short-run incremental costs.

As to this, a price squeeze could remove the possibility to recover even short-run costs, and in any event this is the wrong metric. The sustenance of competition in the longer run requires at least the recovery of LRIC, and the Commission recommendation makes clear that it may be appropriate to use an economic replicability test on a LRIC plus basis.

So we say that none of the alleged constraints by BT removes the risk that BT might have incentives to price squeeze.

The other point made by RBB is that the VULA statement does not contain a quantitative analysis which works out the balance of costs and benefits to BT for the purposes of assessing incentives. Ofcom's position is that such an analysis would be extremely complex to undertake, would itself involve a series of judgments, and would be unlikely to advance matters.

Mr. Thompson relied on the complexity of assessment as a point in his favour but we say that it's a point which cuts both ways and may make it difficult to arrive at any meaningful quantitative assessment in a fast-moving market. For example, Mr. Bishop suggested a survey to address the extent to which consumers might divert to different communications providers in the event of a price squeeze.

However, such a survey would itself contain a degree of imprecision. There would be obvious complexities: what level of retail price increase would be considered in the survey given that the squeeze could cover a range of values, for example. The evidence is that this is a fast-moving market in which consumer preferences are changing all the time towards superfast broadband, so how much weight should then be given to their present preferences when assessing the possibilities for diversion?

More problematically a survey would only be the first step in an analysis and could only inform an assessment of BT's short-run incentives based on the balance of increases in wholesale revenues per subscriber, gains in retail volumes, and losses in wholesale volumes. It would leave open the extent to which BT had long-term incentives to price squeeze.

We would also note that BT did not itself provide any evidence of its own on the vertical arithmetic or on diversion ratios although it obviously has relevant information on these matters particularly as regards its own costs.

BT says it is for Ofcom to meet the statutory test and that's of course true. We say, however, that Ofcom has provided a concrete account of BT's incentives based on actual market conditions and that it is BT, not Ofcom, that has chosen to proceed by way of a generalised allegation of insufficient analysis, rather than bringing forward concrete indications of its own.

The final aspect of Ofcom's analysis concerned adverse effects on end-users. Ofcom pointed to the fact that in the event of a price squeeze through increased wholesale prices, consumers would be likely to suffer immediate detriments. Retail price would increase, some consumers would switch to a second best provider, and Mr. Bishop agreed such short-run effects would be detrimental to affected consumers.

In this connection, we would adopt the question of Mr. Allan or the suggestion made by Mr. Allan regarding the appreciability threshold for effects. When considering whether there is consumer detriment, there is no requirement as a matter of European ex post competition law to consider the extent of harm in the market, and we say that must hold true in this case when considering the extent of consumer detriment.

And in the longer run, Ofcom relied on BT's gains in retail market power which would be likely to harm consumers given the difficulties of re-entry, and we say this analysis is unexceptionable. Ofcom did consider the position of consumers and its concern was not about protecting competitors, rather it was concerned with protecting the process of competition against the risk of a harmful price squeeze, and no error has been shown in that analysis.

May I briefly address at this point the table that was handed up. We are still digesting this table and if any further points strike us we will of course raise them as soon as possible with the Tribunal. But the short points to make are, first of all, this only concerns short-run incentives, the point that Mr. Allan made before lunch. The second point is that we do not accept the reference to incremental losses in paragraph 1A, fourth column of the table, on the first page, and at other points, equivalent points in the table. So over the page at 1A again, every 1A indeed throughout the table.

The margin squeeze test would still allow BT to earn gross margins. This was a point that was made in Mr. Matthew's evidence. So there is no assumption to be made that incremental losses will flow to BT at the consumer level as a result of a switch of

a consumer to BT's superfast broadband service. Their gross margins may still be positive. The third point is related to the question that was raised by Professor Mayer, that is to say whether it was sufficient for the Tribunal to find one route through this table.

We do say incentives require to be assessed in the round and that therefore one needs to be cautious about taking an individual line from this table. However, we also say that there is evidence before the Tribunal about the comparative likelihood of different outcomes arising, for example, from the degree of constraint that standard broadband imposes, the degree of constraint that Virgin imposes given its limited footprint and given the evidence on diversion that Mr. Heaney provided, and that therefore the Tribunal can consider this evidence on the basis of the probability of different paths on the table, if that makes sense. So that would be our response to your question before lunch.

I am now very close to concluding. The final point is BT contends that Ofcom failed to weigh the cost of its intervention. We say this is incorrect. Ofcom did consider whether its intervention was proportionate in the statement and found that it was. The suggestion that the margin condition is unduly restrictive because of its design is a matter that the CMA will consider and will form its own views upon.

Sir, those are Ofcom's submissions in closing.

THE CHAIRMAN: Thank you.

How long are you going to be, Mr. Thompson?

MR. THOMPSON: I think we discussed this last Friday, and I don't know whether Mr. Holmes' contribution counts as fast bowling or not, but I have a number of points I would like to -- if I was given a little bit longer I might be able to put them into better order, or if the Tribunal is feeling tired we could come back tomorrow and I would put them in better order in, say, an hour tomorrow. I don't know which is better.

THE CHAIRMAN: I think our preference would be to take a break now and carry on.

MR. THOMPSON: So if we, say, started at 4 pm and I will endeavour to do it in under an hour, is that acceptable? If I can do it in half an hour so much the better. It is difficult to know.

THE CHAIRMAN: Yes.

MR. THOMPSON: So if we say we can sit until 5 o'clock?

THE CHAIRMAN: Yes.

(3.50 pm)

(A short break)

(4.00 pm)

Reply submissions by MR. THOMPSON

MR. THOMPSON: Sir, inevitably a reply carried out in these circumstances in the case of this complexity may lack the polish of an initial presentation but I will try to cover the matters reasonably clearly without undue repetition.

I think the first two points that are perhaps worth taking is that I don't think Mr. Holmes made any challenge to the guidance of the Court of Justice in the Tetra Laval case either in terms of relevance or in terms of substance, and likewise he made only one point in relation to the Vodafone case which he described himself as pernickety.

So in my submission, the starting point for the Tribunal is the guidance of the Court of Justice about what is required in a prospective risk assessment, that it must be done on the basis of evidence and that it must take into account all relevant considerations including regulatory constraints and the risk of illegality.

On that basis, we say that there are material errors in the risk assessment, errors of fact and law, and that they are material and, what is more, they are not of a kind that can be remedied by this Tribunal in that, as in Vodafone, they are matters that require empirical research which is, in effect, a job for the national regulator, not for an appellate Tribunal even in a case decided on the merits.

I would also say that there are two, in fact I think three, somewhat unattractive features of Ofcom's case, one of which we are all familiar with because it has been manifested throughout the hearing, which is a backing off from the market definition which Ofcom itself took in 2014 and confirmed in this very decision and which it has sought to push back from by reference to obviously self-interested evidence from Mr. Heaney. In my submission, that is not a proper basis for a regulator to back off from its own finding about the issue of constraints in market definition which is obviously fundamental to this whole case.

Secondly, Mr. Holmes sought to back off from the significance of the undertakings in two respects: one, he appeared to take the point picked up from some evidence of Mr. Matthew that this was a new point, which I'm not sure whether he was saying was actually not permitted, but he obviously knows because he added the authority to the bundles, that appeals of this kind are not constrained in terms of adducing new evidence, and there was detailed evidence and submissions from Mr. Petter and from Mr. Tickel and the matter was pleaded both in our Amended Notice of Appeal and in our Reply and no issue was taken about the significance of the undertakings.

It does appear to be a very unattractive submission to take such a point in closing

submissions on the basis of a chance remark of a witness.

In terms of the significance of the undertakings, if one looks at the assessment that Ofcom actually made of this issue in 2005, it may be worth just reminding ourselves of what that assessment was. That is at tab 2 of bundle IV.

The Tribunal will recall that there was specific reference to concerns over margin squeeze at two points in the consultation document, 4.24, and 5.15. The finding at 5.17 was in general terms not limited to discrimination and it was said that:

> "The undertakings are apt to address the competition concerns identified because whilst they allow BT to retain its vertically integrated structure, they set out a detailed basis on which BT can operate within the context of its market power and vertical integration and they constrain its ability and remove the incentives of its component divisions to engage in the types of conduct identified which have the effect of restricting competition."

So that is an entirely general finding.

At 5.27 to 5.29 there is a description of the incentive effects of the creation of Openreach.

Then the conclusion at 5.60 and 5.61:

> "Ofcom believes this package of undertakings offered by BT represents as comprehensive a solution as is reasonable and practicable for the adverse effects on competition and to the detrimental effects on customers described above. A more restrictive set of obligations on BT would come at a cost in terms of flexibility, practicability and efficiency. In particular, in Ofcom's view, it would not be proportionate at this time to seek the structural separation of the BT Group."

And then their overall conclusion at 6.1.

So, in my submission, that approach is not consistent with Ofcom now coming forward and saying the undertakings were purely about discrimination, and even if we didn't think about this, it doesn't really matter, particularly when there has been detailed evidence given by Mr. Petter and Mr. Tickel about the seriousness with which they take the undertakings and the effects it has on their incentives.

If I now go to a more micro-level, if I may. There was reference to The Number case, and I think a point was taken, a different issue was taken about whether or not Ofcom in that case was, as it were, going beyond the specific powers in the legislation. I think the Tribunal will recall that I relied on that point not for any specific authority in my favour but for the general point that, where specific regulation is derogating from the free movement of

services, it is to be construed strictly and, at that level, it appears to me that it is high authority that supports that proposition.

There were various submissions made by Mr. Holmes which, as I understood it, were effectively saying that the level of risk, or the subject matter of the risk, was to be identified in an ex ante case by the nature of the remedy that was put in place to address that risk. There was some detail of whether option 1 or option 2 was the correct approach and that the issue of legal certainty which has been of concern to the Court of Justice in the ex post case doesn't apply in the same way in the ex ante case.

It was a new point to me and, in my submission, it is a bad point, because at this stage we are considering the issue of risk and the remedy has not been imposed. So, for that purpose, the fact that Ofcom may favour this or that remedy doesn't particularly assist in assessing what it is that it is looking for.

In the case of risk, as in the case of an undertaking considering how to behave to avoid a breach of 102, it is necessary to have some sort of definition and, in my submission, the only fair way to define the risk is by reference to the costs of the undertaking itself because they are the only one that knows what they are, so effectively the same point arises in a different way in an ex ante context as in relation to competition law.

So in my submission, that doesn't really get Mr. Holmes anywhere, or away from our general complaint that the standard of risk that has been applied in practice here is a very low one, both in terms of what it is that Ofcom claims it is afraid of or might happen, and also the standard of whatever that thing is actually happening. So we maintain our position that what they need to show is a real risk in the real world of a real margin squeeze.

If we go then to the legal question and the vexed interpretation of the H3G case, I think Mr. Holmes made two points, one that he was actually right on the legal interpretation, although I don't think anyone would say it was an easy case to distil its essential reasoning, but in any event it didn't matter because the issues that were overlooked, even if it doesn't assist him on the law, were not sufficiently material, and I think he was saying that the remark that Lord Justice Etherton made about competition law suggested that it didn't need to be taken into account.

In my submission, that is not what Lord Justice Etherton said. He was effectively discussing at the level of design that competition law obviously has defects because it is unpredictable. But it would be, in any event, difficult to take that dictum in preference to the ruling of the Court of Justice in Tetra Laval and the non-horizontal guidance which were to contrary effect.

If one takes up H3G, however reluctantly, hopefully for the last time, can we just look briefly at the authority which is at tab 44 of authorities bundle III.

I'm attempting to try and bring the matter into some sort of focus and clarity, and I think it is consistent with the type of analogies that we have tried to draw. If one turns to paragraph 47 and the quotation from the RegTP decision, I think what is crucial to remember is that this case was primarily about the competitiveness of the market and whether or not H3G had SMP, although it did go on to make a risk assessment but again by reference to the somewhat curious argument that there was no question of SMP or of a risk of excessive pricing because of this magical dispute resolution power that could avoid all problems.

But if you look at the end of 47, you see the quotation and in particular the last sentence of 23. It says:

> "This implies that regulation which will continue to exist throughout the period of forward-looking assessment, independently of an SMP finding on the market concerned, must be taken into account."

In my submission, that clearly covers the undertakings in this case. What I think might assist would be to focus on the point of what it is that is actually at issue here, and if one substituted the words "independently of the imposition of the VULA margin", then the whole analysis would fall into place and make rational sense, because you would then have a realistic economic approach that took out of account the regulatory issue in dispute, but therefore didn't infringe on any sort of irrational circularity that there might be. It seems to me that that is really at the heart of the illogicality of the approach that Ofcom has taken.

If I may just push back slightly on the illogicality of the Commission's position. As I understand it, and I'm not quite sure what Lord Justice Lloyd was getting at at paragraph 67, as I understand it, what happened was that the Commission decided on the facts that the end to end obligation in that case, the Deutsche Telekom case, didn't negate the relevant German operator's SMP. The same conclusion was reached by the Tribunal in the H3G case as one can see at paragraphs 103 and 104, I may have the wrong reference, but there was a finding on the facts and the Tribunal upheld Ofcom on the facts I think in relation to the market power of BT not being sufficient to rebut the presumption of H3G's market power.

In my submission, that is a factual conclusion that was consistent between the Commission approach in the German case, and Ofcom and the Tribunal's approach in this case.

Where, in my submission, the case goes wrong, both in relation to SMP and in relation to

pricing, is at paragraph 72 and paragraph 75 of Lord Justice Lloyd's analysis, where one sees the reasoning that:

> "It is part of Ofcom's regulatory functions ..."

And reference to, in the middle:

> "The Tribunal decided in H3G2 that Ofcom might lawfully fix a rate of charge that was appreciably above the competitive level."

And imposing terms in 75.

That is the point that Lord Sumption found was really a misunderstanding, that Ofcom didn't have a general power to fix charges and so the whole Ground 1 point was a dead loss, and this attempt to avoid circularity was really unnecessary because the whole case was based on a house of cards, effectively.

So I don't know if that assists, but I have tried to deal with the matter twice in writing or maybe three times --

MR. ALLAN: It is another towel.

MR. THOMPSON: And I have tried again.

So far as competition law goes, I have made the point, it's at paragraph 100 of the judgment. There is reference to the fact that article 82 is not a suitable or sufficient substitute for the thorough ex ante regime. In my submission, that is effectively saying that that is not sufficient, it's not saying that you mustn't even think about it, and that is the issue that we are concerned with here, and you have my submissions about the significance of competition law in practice in a case like this, where Ofcom has just investigated this very matter and everyone knows very well what the rules and risks are.

It went quite quickly, but I think there was reference to a number of EU recommendations and whether or not BT's position was consistent with those recommendations. I think the gist of it was that there is provision for clear guidance to be given in relation to margin squeeze and positively encouraging that.

Just to be clear, BT has no objection in itself to clarity, and had no objection to option 1. As I hope has been clear from our evidence and my approach, the objection has been to the rigidity of the condition and the fact that it is a binding additional condition which we say was superfluous given the existing regulatory structure.

MR. ALLAN: Sorry, you said option 1, did you mean option A?

MR. THOMPSON: I think it is option A, sorry, yes. I get my As and 1s sometimes confused.

That is right. I am grateful, sir.

So far as the point about whether FRAND had the wrong legal basis and might therefore

have been challenged, I don't think it is a point that ever occurred to anybody until these hearings. If one goes back to the FRAND condition set in 2010, I'm not sure if it was actually set on the basis of 88(1)(a) and 88(3)(b) either, and I don't think it has ever been in doubt that wording of that kind is suitable to address a margin issue and has been assumed by all parties since 2010. So the likelihood that that might have been questioned in my submission is unreal.

Yes, we would say that the question is what was the effect of that legislation, rather than what was the statutory intention, and the legislation hasn't changed in substance since 2010.

There was a very quick reference to Sky and the treatment of competition law. I think it is probably sufficiently clear, both from our submissions and from the evidence of Mr. Petter on this particular issue, that we don't see any close analogy between the limited, as we would say, restrictions that have been placed on Sky's competitive freedom, and in particular by the WMO obligation which has now actually been withdrawn, and the functional separation, equality of inputs, compulsory supply on a range of markets, a whole host of regulatory obligations that have been placed on BT, and I'm not entirely clear what point was being made beyond that that could assist Ofcom's case.

I think I'm now hopefully moving into the home straight. I think there was a question from the Tribunal about the relationship between the section 3 and section 4 analysis and whether a different standard was appropriate. It's the point we make at paragraph 61.3 of our written submission.

Of course we complain that too low a level of risk was applied in the section 3 point, and we say that it's not an over-refined point that if one takes a proper level of risk at stage 3, and the approach to eliminating risk that is taken at stage 4, then there is a marked difference and that it is not simply a theoretical point.

I think it feeds into another theme which came towards the end of Ofcom's submissions that we had failed to show that various things eliminated the risk and it's a point that we have made in our pleadings. But that is not the right approach. It is for Ofcom to show the existence of risk, and we rely on the FRAND condition, the existence of competition law and its deterrent effects and the incentive effects of the undertakings as matters that are relevant to the assessment of risk but which were either not taken into account at all or not properly taken into account by Ofcom, and so we feed them into the Vodafone analysis as saying they were inputs that should have been taken into account by Ofcom but weren't.

Various points were made by reference to the evidence of Mr. Murray and Mr. Heaney about the significance of standard broadband. As I said a little earlier, the point that we rely

on is the market definition of Ofcom itself, and the constraints that Ofcom itself found, that standard broadband still applied and was likely still to apply until 2017 at least. We agree with that analysis and have given various points to support it.

Mr. Holmes made some reference to the fact that the issue -- I think he made a legal point by reference to the TeliaSonera case, that a recoupment possibility was not a necessary feature of a margin squeeze. I'm aware of that authority, but it seems to me not to follow that the likelihood of long-term recovery, indeed it is a point that has been put to me by the Tribunal itself, that the long-term position is irrelevant and the likelihood of re-entry is, in my submission, a powerful consideration given the position of Virgin Media and Sky and the fact that BT is regulated on the upstream market.

In relation to TalkTalk, it is a point that Mr. Bishop has made, that at footnote 119 of Mr. Matthew's statement, TalkTalk is quoted as saying that the costs of entry into fibre are relatively small, and that is I think manifested by the fact that Vodafone has recently entered and no doubt there are other possible entrants that could come into the market.

There was some reference to this being a fast-moving market and the need to act, but one needs to feed into that point the speech from Mr. Chisholm, which I do not think we have looked at but which we have referred to on various occasions, and the general bias against regulation, that although this is a fast-moving market, so far as one can see it is moving fast in the right direction with the smaller players expanding fast, and we would say that the bias against regulation in such a market would tend to come down in favour of leaving the matter to ex post competition law in the absence of any clear evidence of a risk of misconduct.

We would also say that it is not an argument for failing to do your homework as to what the actual incentives are of the major players on the market. I will particularly refer I think to page 2 of Mr. Chisholm's speech, I don't think we necessarily need to turn it up, but he summarises his second point:

> "The significant risks associated with premature broadbrush ex ante legislation or rule making point towards a need to shift away from sector-specific regulation to ex post antitrust enforcement which is better adapted to the period we are in and its fast-changing technology and evolving market reactions."

It's that type of point.

Then I think finally I would just go back to the issues that were debated in relation to the table and the questions of short and long-run costs. Our essential point is that without any proper analysis even of the short-run and the likelihood of BT having incentives in

the short-run to act in particular ways, i.e. whether or not consumers would tend to do things that would benefit BT rather than harm them, one hasn't really got to first base in a sensible analysis of what is likely to happen on a market of this kind.

We were puzzled by the suggestion that we were somehow wrong to suggest that there were incremental losses, because if the strategy, whatever it is, actually increased BT's profitability both upstream and downstream, it does really defeat me how that could be described as a margin squeeze based on any sensible use of the term. It appears to be the opposite of a margin squeeze, it appears to be successful competition on the merits leading to an increase in profits.

We had some discussion of short- and long-run assessments, and I think we have accepted in principle the conventional approach of LRIC or indeed LRIC plus. I think the issue for us, and it does move into the issue of design, is if you are going to assess matters on a very, very short-term basis, then the justification for a LRIC approach essentially falls away.

I think in that respect again, our approach is in line with the concerns expressed by the Commission at a six-month assessment, and we would say that those concerns would only be more acute if, as Ofcom has actually done, the assessment was taken on a monthly basis.

I think I have got most of my points that I had in my mind. May I just turn around and see if I have missed anything out? (Pause)

I think it is a leitmotif of our concerns, but the concern that the short-run effect of this might actually be consumer harm rather than consumer benefit, as conceded both in the statement and in Mr. Matthew's evidence, is obviously at the core of our concern, and we feel that a proper job has not been done in the assessment of risk to justify a remedy with that potential harmful as well as whatever beneficial effect Ofcom thinks it might have.

Unless I can assist further, those are our submissions.

THE CHAIRMAN: Thank you very much, Mr. Thompson. That concludes the hearing then?

MR. THOMPSON: I think so, yes.

THE CHAIRMAN: Thank you very much again for all your submissions and to whoever put the bundles together.

MR. THOMPSON: I have less experience of the interaction between what is now the CMA and the Tribunal, but I take it that we don't need to discuss any further role that the Tribunal may have in relation to the CMA matters, and that the matter will ultimately be referred in due course, there is nothing we can usefully discuss now unless Mr. Holmes wishes to raise it.

THE CHAIRMAN: I'm not aware anything else needs to be done today, no. Thank you.

(4.40 pm)

(The Hearing Concluded)

INDEX