IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1189/3/3/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

26 April 2012

Before:

THE HON. MR JUSTICE HENDERSON
(Chairman)

WILLIAM ALLAN
STEPHEN WILKS

Sitting as a Tribunal in England and Wales

BETWEEN:

TELEFONICA O2 UK LIMITED — Appellant

– and –

OFFICE OF COMMUNICATIONS — Respondent

– and –

(1) HUTCHISON 3G UK LIMITED
(2) VODAFONE LIMITED — Interveners

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H E A R I N G

APPEARANCES

Mr. Tom Richards (instructed by Ashurst LLP) appeared for the Appellant.

Mr. Pushpinder Saini QC and Mr. Andrew Scott (instructed by the Office of Communications) appeared for the Respondent.

Mr. Tim Ward QC (instructed by Herbert Smith LLP) appeared for the Interveners Vodafone.

Miss Monica Carss-Frisk QC and Mr. Fraser Campbell (instructed by Baker & McKenzie LLP) appeared for the Intervener Hutchison 3G UK Limited.

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THE CHAIRMAN: Yes, Mr. Saini?

MR. SAINI: I was going to complete my submissions by dealing with two additional matters, first the *Vodafone* case, and then I was going to run through Mr. Richards' five grounds of appeal and explain our summary answer to each of them.

Dealing first of all with the *Vodafone* case, which the Tribunal will find in authorities bundle B at tab 29. It starts at p.1023, the bottom right hand number, and as the Tribunal will be aware from its pre-reading, this case concerns a price control which the Competition Commission and then the Tribunal had decided was inappropriate, and there were remedial consequences that could follow from that finding, and ultimately the Court of Appeal decided that because a charge control could not be retrospectively amended there was no basis to require a repayment, the Tribunal having decided there should be a repayment of the elapsed period of the price control.

The paragraph I want to focus on is at 28 on p.1034 of the bundle, p.1677 of the report, and the Tribunal will have read Mr. de la Mare's submissions for Ofcom at that time. What Mr. de la Mare was there saying was that it was possible for an operator who considered a price control to be too high not only to appeal against that price control decision, as happened in that case, but also to raise the issue by way of a dispute, and in considering that dispute Ofcom may decide to order a repayment. Now, he was saying no more than that, in particular between B and D. I can pick up the language slightly below B. He says:

> "It may also be taken into account by Ofcom in disposing of any dispute arising under sections 185-190 in revision of the price controls set by that decision: for example, an operator who considers the controlled price to be too high may not only appeal against the price control decision but also raise at the same time a dispute with his counterparty as to the right charge for the service, and that dispute can be referred to Ofcom."

Then he goes on to say that Ofcom in theory effectively could use its powers of dispute resolution under s.190 to order a repayment. There is nothing inconsistent between that position and the position that we are maintaining in this appeal, which is that we accept that in an appropriate case – that is the important point – Ofcom could decide that although a communications provider had made certain charges in compliance with the charge control the particular circumstances were such that a repayment was required.

What Mr. de la Mare there was not committing Ofcom to is any particular position in relation to when that would happen.

THE CHAIRMAN: The point is that the more infrequently it is likely to happen the less it really helps as a kind of guide to the proper construction of the issue in that case.

MR. SAINI: Absolutely.

THE CHAIRMAN: That is where there is perhaps a slight tension between the approach that was adopted there and the approach you are adopting in this case.

MR. SAINI: And the Tribunal will know, and I think the other parties, who are all communications providers here will know that there are cases, in particular a case called the *LLU* case (this is another determination by Ofcom) where precisely this argument was taken up by somebody who had been charged in accordance with a price control and then sought a repayment. Ofcom considered all the factors and decided that they were not going to order a repayment in the course of dispute resolution. But it is important, which the Tribunal has already noted, I believe, at para.43 that Richards LJ does not actually go on to say anything or decide anything in relation to the extent of Ofcom's dispute resolution powers. That is the end of para.43.

THE CHAIRMAN: Yes.

MR. SAINI: But leaves the issue open as to whether or not there is a parallel remedy.

MR. ALLAN: Without wishing to dwell on this for too long, I suppose the thing that I struggled with a little bit in the final sentence at para.28 was what appeared to be Mr. de la Mare's proposition that the dispute resolution powers were pretty much a cure-all for the gap in the SMP charge controlling powers, which would seem to give us somewhat more, a somewhat broader scope for application of those powers than you are perhaps allowing now. But, is the *LLU* case something that is of any particular interest —

MR. SAINI: Well, we have got copies of it. We can provide it to the Tribunal. I was not going to dwell on it because no doubt if I provide it, my friends need some time to have a look at it. But certainly we have got copies and unless anyone objects I will happily provide them. The Tribunal can perhaps read the case at the same time. It is of limited assistance because it is not really — when one is considering what the legal position is, it does not really help Ofcom because they won in another case.

MR. ALLAN: No.

MR. SAINI: We decided that this was the correct approach. But it would explain, generally, from a policy background how Ofcom has approached repayment issues where one has a price control which everyone agrees is inappropriate. And apparently there seems to be a potential injustice because the paying party cannot get the money back. But, we will happily provide it and if, as I say, my friends object —

THE CHAIRMAN: Well, I am inclined to think if you can provide it to us simply as background material.

MR. SAINI: Yes.

THE CHAIRMAN: On the footing that it is not forming a plank of the argument and is really no more than just to help us fit in the —

MR. SAINI: Yes.

THE CHAIRMAN: — that would be acceptable. Plainly, if any other parties wish to comment on it, then they will be free to do so. But I imagine it must be well known to everybody and if anybody thought it was of importance we would no doubt have seen the reference to it in the skeleton arguments.

MR. SAINI: Absolutely. Going back to Mr. Allan's point, if I may respectfully say so, one could read that last sentence of para.28 in a perhaps more liberal way, suggesting a more liberal approach than that approach which has formed the basis of my submissions. But, ultimately it is, you know, it is a question of what the speaker intended and, ultimately, it is a question of law.

THE CHAIRMAN: And it is not a statute.

MR. SAINI: Absolutely.

THE CHAIRMAN: Right. I mean, the fact is, we are concerned with your submissions today; and if Ofcom has modified its position, well, that is a freedom which all of us have.

MR. SAINI: I am going to turn then to the specific grounds of appeal. I think it is important to focus on the actual grounds of appeal rather than the way they were put in the skeleton because the Tribunal will be aware that this appeal is to be decided under the statute as against the grounds of appeal. The best way of doing it is to take up the notice of appeal where Mr. Richards very helpfully summarised each of the five grounds over two pages. That is in core bundle A, tab 5, which is the notice of appeal, pp.132-133. The one ground that I will not say anything more about because I addressed that yesterday is Ground 5, which is that Ofcom had no evidential basis to conclude that Vodafone and H3G had not complied with the SMP regime. The simple answer to that is that this was not an allegation that was put to Ofcom, that there had been a failure to comply with the charge control. There is no legal basis for suggesting that Ofcom itself should have started an investigation into that issue, particularly because, as you have seen, Sir, Ofcom was separately considering that issue.

THE CHAIRMAN: Yes, it certainly seemed to me to open up a startling vista, if Ofcom is under a duty to investigate in relation to any complaint any potentially relevant matter, even if nobody is complaining, yes.

MR. SAINI: Yes, Sir. I will not take time by saying anything more about that. The other four Grounds are related, or certainly Grounds 1, 2 and 4 are related. Ground 3 raises a separate issue on which we spent some time yesterday, and I need to again come back to a question that Mr. Allan was putting to me yesterday, which with the benefit of looking at the transcript I now follow, which I obviously was not following yesterday, in relation to the old s.185 and the new s.185, and I just need to go back to those particular parts of the statute.

If I can deal with Ground 3, and before going back to those parts of the statute we have an overriding submission in relation to this issue of retrospectivity or not, which is that it appears to be common ground that all of the factors that apply under s.190(2A), the new section, are implicit in the six Community requirements, and therefore we say that they do not really add anything. Indeed, Mr. Richards, we say, with respect, had not been able to show that any of those requirements added something extra to the list of matters that Ofcom should have considered.

With that overriding submission the Tribunal is left with the retrospectivity puzzle: does this section apply? The Tribunal may decide that it does not really need to decide that issue given that it appears to be common ground that nothing new was added. I just need to make clear, particularly in relation to Mr. Allan's question, what we say about the structure of s.185(1). I start this by reminding the Tribunal – if one can perhaps go back to authorities bundle A and look very briefly at the Framework Directive, which is tab 4, and it is Article 20, p.99 - Mr. Richards drew the Tribunal's attention to this point yesterday morning, which is that he explained that when this Directive was amended, Article 20(1) was expanded so that not only could communications providers, as between themselves, notify disputes to the Regulator, but it was expanded by the addition of wording which permitted other undertakings who benefited from access to services to refer disputes. So there is a widening. That is the basis for the amendments that we are going to see to s.185. If one bears that in mind and goes ahead to tab 8C, p.281, prior to the introduction of s.185(1A) the only disputes that Ofcom could handle were those between communications providers. With the amendment to the Framework Directive the United Kingdom had to amend this section to create the ability on the part of a wider group of people to refer disputes to Ofcom. That was achieved through s.185(1A). So 185(1A) allows a wider group of people,

and it could include other organisations that happen to benefit from telecommunications services, who are not necessarily communications providers.

MR. ALLAN: If it would help you, can I say, looking at the statutes overnight I think my question to you yesterday was on a somewhat false premise, but what we do end up with, I think, is that cases that fall within 185 (1A)(a) can be a subset of cases that fall within 185(1)(a), so it is a partial overlap in the sections.

MR. SAINI: That is absolutely right, Sir, and that is why I was being hesitant yesterday in accepting the point that they were all subset cases.

MR. ALLAN: And I made that point because I misinterpreted (1A)(a). I think the correct approach is, having read it now, if you agree, is it is a partial overlap ----

MR. SAINI: Absolutely.

MR. ALLAN: And the only question is what are the consequences of that partial overlap?

MR. SAINI: Absolutely, but then the point remains, Sir, going on from that, Mr. Richards has not responded to this yet, that when Ofcom considers a dispute under the next section, 186 (p.287) it has to go through a classification exercise. It has to decide is this – I will use shorthand – an old type dispute or a new dispute? Then, as we looked at the new subsection 186(2A) yesterday, the old type dispute it has the ability to say we are not going to deal with it, a new type dispute it has to deal with subject to some very limited get-outs.

THE CHAIRMAN: And it is because of the existence of these different consequences that you have to decide which route you are going down.

MR. SAINI: Absolutely.

THE CHAIRMAN: So the road forks and once you have turned right or left you are then you have to stay on the road you have taken.

MR. SAINI: So one has to ask, putting oneself in Ofcom's shoes, we know that the legislation has been amended, when must Ofcom be asking these questions and under which particular sections must it decide the questions. We say the only way that this scheme can sensibly work is for Ofcom to apply the sections that exist as at the date the dispute is referred to them.

MR. ALLAN: Perhaps we can develop the thought in this way, that if it is the case that now a dispute must be either a (1)(a) case or a (1A)(a) case, and it has to fall into one track or the other, if we accept the argument that 190(2A) applies, sorry, you get that at one stage, if we accept the proposition that that subset of disputes between communications providers that falls within (1A)(a) has to be dealt with under that subsection rather than under the 185(1)(a) class on the basis that it is a more specific group within the wider class, then that

dispute would not fall within subsection 190(2A) today. If we apply 190(2A) to the present dispute, and we accept Mr. Richards' argument, we are effectively envisaging a rather strange hybrid case that exists between the date which applies only in relation to those disputes that were referred before the effective date and decided after the effective date.

MR. SAINI: That is absolutely right, Sir.

MR. ALLAN: And that, you might say, is a rather strange statutory interpretation?

MR. SAINI: Indeed.

MR. ALLAN: Is that the essence of your argument?

MR. SAINI: Essentially yes, Sir. There is also the unattractive position which we say the Tribunal should seek to avoid, which does not arise in this case, which is that imagine a case which is an old style 185(1)(a) case that lands on Ofcom's desk, and Ofcom is rather tardy in dealing with it and it waits until after 26th May. If that remains after 26th May a 185(1) old type case, it has the ability to say "sorry, I know we took a couple of months to get around to this, but now we have this new power, we are not going to deal with that dispute." It is not an attractive position.

THE CHAIRMAN: And all this seems even less plausible if you go back to the purpose of the amendments which is to give effect to the widening of the scope of Article 20.

MR. SAINI: That is correct, Sir.

THE CHAIRMAN: Which is, on the face of it, done by introducing the new (1A) category, but there is no sensible reason why it should carry with it the existence of a kind of hybrid period where you have the option of going under effectively either route.

MR. SAINI: That is correct, Sir. There is one point on which my note yesterday was inaccurate, and I did not make my submission clearly. The Tribunal will recall my point about costs on s.190?

THE CHAIRMAN: Yes.

MR. SAINI: The point was simply this: that there has always existed a power to require payment of costs to Ofcom, the radical change that was made by the amendments to s.190 and in particular (6A) and (6B) is that historically – and I will give you a reference to this because we do actually helpfully have the original unamended section in tab 6, but I will not ask the Tribunal to turn it up. I will summarise the submission this way: historically, Ofcom could only require payment of its costs in a case where the disputing party had acted in a frivolous and vexatious way. That was fundamentally altered by (6A) so there is no such hurdle to overcome, but if one looks at p.296 in tab 8, and one focuses on subsection (6A) there is a

new rule now about the circumstances in which costs are to be paid. So it is conduct and whether or not the dispute has been decided in favour of a party.

MR. ALLAN: But the point about the fork in the road does not apply to this, this applies across the board.

MR. SAINI: Absolutely, so again if I notified a dispute prior to 26th May, I knew that there were certain ground rules applying which is I had a very limited costs risk, and that is the basis upon which I went into it again. However, if this section applies whenever a dispute has been referred even prior to 26th May I am now facing different ground rules in terms of costs which again is unattractive. It is just an indicator and no more.

One thing I am afraid I cannot help you with, despite thinking about it overnight more and discussing it with Ofcom is the puzzle of s.190(2A) and why it was decided that those are the full requirement insofar as they add anything, were only going to apply in relation to 185(1) older disputes. The best answer I can give is the answer I gave yesterday which is there was no need for those requirements to apply because the legislator knew that in setting an SMP condition almost all of these requirements, three out of four at least, had to be considered by Ofcom in setting the original condition. It is not a wholly satisfactory answer.

THE CHAIRMAN: I take it there are no explanatory notes or anything like that?

MR. SAINI: I have certainly looked for them and I cannot find any, no. All I am told is that – again this may not be relevant – that this was all rather rushed in terms of drafting by the Parliamentary draftsman.

THE CHAIRMAN: I can well believe that but I speculated yesterday whether it perhaps might have been an oversight, but there was no solid basis for that.

MR. SAINI: So going back to the grounds, this particular issue, these issues arise under Ground 3 and our overriding submission is that it does not make any difference, it does not add anything.

The other three grounds I can deal with briefly. The first ground, going back to p.132 of bundle A is that Ofcom proceeded upon the fourth premise that the SMP regime was the only applicable regime. We say that there is no factual basis for that submission because if one looks at the determination, and we do not need to go back to it now, Ofcom clearly did conduct a two stage exercise.

For Mr. Richards to succeed on Ground 1 he would have to persuade the Tribunal that there was only a one stage exercise which is that they just looked at the SMP condition, full stop.

The fact is they looked at the SMP condition and they did go on to consider the other factors.

THE CHAIRMAN: Yes, so I think what you say is that if Ofcom had indeed done what Mr. Richards alleges, that would have been an error of law, but they did not.

MR. SAINI: Absolutely, and there is a whole second part of the determination, both the draft determination and the post-draft determination which goes on to consider the other factors and, in particular, focuses upon the specific factual point insofar as any were made by Telefónica in relation to competition, harm to consumers, etc. So if that error had been made it would have been an error of law but it was not made.

The second ground, which is related to this is that Ofcom failed to consider whether the October 2010 charges were fair and reasonable in the sense explained in *TRD*. Now, our primary submission in relation to that is that one cannot apply a fairness and reasonableness test in the *TRD* case in a case such as the present where one does not start with a clean page. However, whether or not that is right, it is absolutely clear that as a whole Ofcom did consider fairness and reasonableness matters generally as part of the six Community requirements. If one just looks at the language in that sub-paragraph (2) at the top of p.133, and particularly the last two lines after saying:

> "in the sense explained in ***TRD*** and ***08-numbers***: ie it failed to consider the appropriateness of those charges by reference to all relevant considerations including Ofcom's own regulatory duties and policy preferences".

It clearly did consider the appropriateness of charges by reference to all relevant considerations including Ofcom's own policy, because you will recall that it decided that although the charges, that this practice was unattractive, its policy preference (see the April 2010 paper) was to deal with these things in the future.

And the fourth and final ground that I need to address is the point that excessive weight was attached to putative compliance — I will put aside the putative point — but we say that Ofcom was entitled to attach substantial weight to the fact that there was a charge control and the need for legal certainty, but it did not close its ears to submissions made by Telefónica and indeed Cable and Wireless that, despite compliance or putative compliance with the charge control, there were other factors which ought to persuade Ofcom to uphold the dispute. So, unless one can say on a fair reading of the determination that all of the second half of it where Ofcom go on and consider other factors, was effectively not really a genuine consideration of other factors, and that Ofcom in reality simply decided that, because the charge control had been complied with, that was the end of the matter. This is a

case where it considered other factors, and Mr. Richards accepts that the weight to be attached to the other factors is essentially a policy matter for Ofcom.

THE CHAIRMAN: Yes, I think the burden of Mr. Richards' argument is that it is not legally acceptable to proceed in that way because you really have to inform yourself of the full range of considerations before you even embark upon the first stage, to which my instinctive reaction is, "Well, no, that is too formalistic an approach, and that really what matters is the substance of the matter and the way in which you set about it once you allow a reasonable degree of latitude to Ofcom; and provided at the end of the day one can see, on a fair reading, that all relevant considerations have been addressed".

MR. SAINI: Absolutely, Sir, and I do also make the point, which I made yesterday, which is that if there was some crucial fact or some really really terrible aspect of the behaviour which affected the competitive position of Telefónica in just October — because you recall this is just about October — not the wider issue of flip-flopping, then one would have expected Telefónica to raise it and, had it been a compelling factor one could well see in another case that Ofcom may decide, "Well, we know that these providers comply with the charge control, but this behaviour is not acceptable". But one looks in vain throughout the submissions made by Telefónica, for some crucial factor. The highest it gets to when one looks at their original dispute reference is that they just think they have been charged too much. And that may or may not be right, but that is not really enough; there must be something further. So, we say in answer to Ground 4, Ofcom considered a range of factors. The weight it attached to compliance with the SMP condition, the existing SMP condition, was a matter for it as long as it did not close its ears to other submissions. And it clearly did not. It is not suggested by Mr. Richards that insofar as the second half of the determination considers other factors, essentially Ofcom were going through the motions and not genuinely considering those other factors. That would be a serious allegation. He does not make that. So, on the face of the determination itself, we have considered all relevant factors, and matters of weight are for Ofcom.

Sir, subject to providing a copy of the *LLU* case to you, those are our submissions. Is there any particular point in relation to our note of yesterday that I can address? I should just mention one particular point which I think has been the subject of correspondence overnight, which is — I do not know if the Tribunal has the note there —

THE CHAIRMAN: Yes.

MR. SAINI: It is para.5 and it is p.3, and the Tribunal had asked us last week about the extent to which flip-flopping was widespread commercial behaviour, and we put some facts in para.5. I readily concede that there is no evidential basis for those.

THE CHAIRMAN: Yes.

MR. SAINI: And those facts have been obtained from material which Ofcom has collected internally. So, if Mr. Richards disputes those points then, you know, that may cause a problem. But we were simply seeking to assist the Tribunal as to how long we have known this has been going on.

THE CHAIRMAN: Well, I think plainly we must confine ourselves to the evidence before us unless it is agreed between all parties we can look at anything beyond. So, if this is not common ground then I think we disregard it.

MR. SAINI: But I think it is common ground, certainly common ground because it appears in the April 2010 paper, and no-one has disputed this, that the practice (putting aside when it started) was widely practised.

THE CHAIRMAN: One could infer that simply from the consultation and the fact that —

MR. SAINI: Yes, absolutely.

THE CHAIRMAN: — anyone had thought it worthwhile to produce such a detailed consideration of the topic. And, equally, this is consistent with what we were told yesterday that, so far as Telefónica are aware, they were the only communicator not to indulge in flip-flopping.

MR. SAINI: That certainly seems to be the position, yes. So, Sir, unless I can assist you with anything further, those are our submissions.

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

MR. SAINI: Thank you.

THE CHAIRMAN: Yes, Miss Carss-Frisk.

MISS CARSS-FRISK: Sir, we gratefully adopt the submissions made by Ofcom, and what I would like to do by way of addition rather than repetition, I hope, is to begin by offering you a little summary of all the propositions that are now common ground, so that one can see how narrow the issues have actually become. And then, secondly, to look at what we say are the key reasons why this appeal should fail.

Looking at what is common ground, the first proposition, which is fundamental, we suggest, is that O2 now accept that Ofcom was under no obligation to carry out a de novo or generalised assessment of whether the relevant charges were fair and reasonable. And you get that from their skeleton, para.41.2, and also reflected in Mr. Richards' oral submissions.

That is important not least because it is a softening of their position compared to the way it was put in the notice of appeal.

The second point which is closely linked to that one is that they have also acknowledged that, if you look at the *TRD* cases, *TRD* and *08- numbers* cases, it is a significant feature of the dispute in this case, as compared to those cases, that here we have ex ante regulation; we have the 2007 charge control which you did not, in those authorities. That is Telefónica's skeleton para.39.

Thirdly, they expressly recognise that it was held in the 08 numbers case that, whether or not a power of ex ante regulation has been exercised, is a highly material factor, highly material. That is their skeleton, para.34. Just for your note, that reference in 08 numbers is in para.277 of that case, bundle B, tab 32.

The fourth point of common ground is that O2 agree that as a regulatory tool dispute resolution should complement rather than contradict an existing charge control. In fact, they say they entirely agree with that proposition. That is their skeleton, para.41.5.

The fifth point so far as s.190(2A) is concerned is that they, themselves, say it introduces "no radical novelty" – their skeleton para.25.5. So even they do not suggest, and that is assuming the section applies at all, that it introduces anything particularly new.

Finally, but again fundamentally, of course, they are at pains to say that this is an appeal on a point of law – see notice of appeal, para.5, and indeed their skeleton, para.8.

So bearing all of that in mind it really does seem that the dispute is pretty narrow, and against that background here is why we say the appeal must fail.

Ground 1, they say Ofcom proceeded on the basis that the SMP regime was the only applicable regulatory regime. For the reasons given by Mr. Saini, we would, with respect, say that is a hopeless argument, looking at the determination, when Ofcom expressly directed themselves that they had to resolve the dispute in a way that was consistent with their broader regulatory duties, in particular under ss.3 and 4 of the 2003 Act – that was para.2.6 that you have been taken to. They expressly acknowledge, in particular at para.4.30, that there could be circumstances where it might be appropriate to impose different or additional obligations from what is in the charge control.

Mr. Richards, as I understood him, at one point suggested that Ofcom had said that they would not even consider their broader regulatory duties unless there were compelling reasons to do so, because of the existing charge control. If he did seek to suggest that, that is not right if one looks at the Determination where very clearly, we would say, Ofcom said there could be compelling reasons to depart from the charge control. In other words, they

were always prepared to and did consider their broader regulatory duties. Here we would highlight paras.4.27 and again 4.30.

What, in fact, seems to have triggered O2's stark submission under Ground 1 about "only regulatory regime" is that there are passages in the Determination where Ofcom does speak of the "only regulation". Trying to identify which passages they are, and I am not suggesting that you should turn them up now but for your note, paras.3.34, 4.27 and 3.30, where Ofcom does talk about the only regulation but crucially they say "at the time" – at the time – and that is the qualification that O2, with respect, conveniently ignore. In other words, all Ofcom is saying is that at the time of the October 2010 charges, which is what we are concerned with, the only regulation was the SMP regulation. It really is as simple as that. That seems to have inspired O2 to raise their Ground 1.

Moving on then to Ground 2, that Ofcom failed to carry out the requisite fair and reasonable assessment: here the key point is that first common ground that I asked the Tribunal to note – i.e. it being accepted that Ofcom did not have to start from scratch, or as if, to use Mr. Saini's expression, there was a clean page. It is accepted that it did not have to be a generalised *de novo* assessment of whether these charges were fair and reasonable. That being the case, really the detailed debate about what exactly one can derive from TRD and indeed 08 numbers is not really very relevant to this appeal. On the one hand, Ofcom clearly accepted, as was said in TRD, that dispute resolution provides a third regulatory mechanism – no dispute about that. On the other hand, O2 have now accepted they do not have to carry out an assessment from scratch, and that the existence of the charge control here was a highly material factor.

So, given all of that now being common ground, exactly what you could derive from TRD or 08 numbers ought not, we say with respect, really have to take up much of the Tribunal's time. Distinguishable as we would say those cases are, what is clear from them are the propositions that I have suggested and that are common ground.

Where then does that leave us in relation to this appeal? We suggest that it has really forced O2 into a position where in effect they challenge the weight that Ofcom has attributed to certain factors. They are unhappy with the conclusion that Ofcom reached. Indeed, Mr. Richards on several occasions in his oral submissions referred to how Ofcom had not "properly" considered various factors – not properly. That is, we would suggest, really referring to the weight that Ofcom attributed to various considerations, which, of course, is a matter for them, given that this is an appeal on a point of law only.

So far as the legal approach is concerned, we say Ofcom did precisely what O2 are suggesting they should have done. Here it may be useful just to recall how O2 put it at para.57 of their skeleton. You may not necessarily have to turn it up, but quoting from it, their proposition is:

> "… Ofcom should have weighed all matters that were relevant to its statutory duties and objectives (including the principle of regulatory certainty, the existence of the charge control …)"

Then they refer back to another paragraph, para.44 of their notice of appeal, and then just say:

> "… and should have formed a view as to whether the charges were appropriate having regard to its duties and objectives."

That is precisely how Ofcom proceeded. As to the point that Ofcom somehow did things in the wrong order, or considered their regulatory duties as an afterthought, there is no requirement for Ofcom to consider things in a particular order provided that in substance they consider the relevant factors. It was perfectly open to them, and indeed, we would suggest common sense, to home in first on the highly material factor that here you did have existing specific regulation in the form of the charge control, which clearly carried considerable weight, and to then go on to consider whether there were nevertheless countervailing factors that suggested that legal certainty would have to give way.

We would add that there is absolutely nothing wrong with putting it in terms of "were there compelling reasons to depart from the charge control?" "Compelling reasons" simply means reasons that compel a particular conclusion, i.e. were there reasons that would cause Ofcom to think, in the balancing of various factors, that the balance should be struck in favour of O2, despite the existence of the charge control. Now, of course, O2 then say: "Ah, well, but Ofcom gave excessive weight to the charge control. But, as I have said and Mr. Saini has said, weight is plainly a matter for the regulator. There was nothing in the determination to suggest that Ofcom did anything other than regard the charge control as a highly material factor, which it is accepted they were entitled to do. One may say: how could they do anything else, if you bear in mind their requirements under Article 8 of the Framework Directive, specifically Article 8(5)(a), whereby they have to promote regulatory predictability by ensuring a consistent regulatory approach? That does not mean they can never do anything different but, on any view, that shows how they were right to think the charge control was very important. Of course, you also have s.3(3)(a) of the Act which

refers to having regard to the principles under which regulatory activities should be, among other things, consistent.

It is fair to note that there were in this case particular reasons for Ofcom to regard the charge control as very important, and if I may I will just rattle through a little list of what we see as those particular matters.

First, you have the fact that Ofcom had specifically said in the 2007 charge control that rather than having a broad, fair and reasonable condition for these purposes, they would have the target average charge, and I quote: "to ensure that the MNOs have certainty in the context of what the appropriate charges should be". I know you have seen this before, it was para. 10.27 of the 2007 statement which, for your note, is in bundle B, tab 21, p.622 and it is also quoted in para. 3.16 of the determination itself.

Then you also have the important background that, as we have seen, the practice of flip-flopping was well established and familiar to everyone concerned, and to give a little more detail here, if we look at the timing it had clearly become an issue by April 2010 because we have seen that from the consultation at that time, specifically 9.110 of that consultation, bundle B, p.1062 where we were told that a number of fixed providers and one MCP had raised the issue.

Then you have the fact that, as my clients pointed out in their submissions in the dispute, O2 had actually accepted without challenge a number of instances of flip-flopping by Three. And here, to make that good, I would just ask you to turn up a part of Three's submission at tab 14 of core bundle A at p.335. It is para. 4.8 where Three say:

> "Furthermore, O2 had previously accepted at least 83 'flip-flops' notified to it by its competitors. O2 has proposed no basis on which to distinguish between the 'flip-flops' it previously accepted, and that which it has deemed neither fair nor reasonable."

Now, one little frill to note here, perhaps, is that Mr. Richards accepted yesterday that there could be occasions when flip-flopping would actually benefit the party on the receiving end and one can see the potential, and I say no more than that, for, as it were, gaming the system: for an operator in O2's position to say: "We are going to pick and choose which particular charges we are going to challenge as being an example of flip-flopping depending on what suits us commercially." I am not criticising that in any other way, well perhaps not at all, but I mention the point simply to say it all goes to show the good sense of Ofcom looking at flip-flopping in the round and in the longer term and having that very much in mind when it came then to assess this particular dispute.

If we stay for one moment still in Three's submissions at tab 14 I just ask you to note the point they make also at para 5.7 at p.337, where they said:

> "Added to this, if flip-flopping by the other MNOs was causing loss to O2, as it alleges, there was nothing to prevent O2 from responding by varying their own MTRs in much the same way – yet O2 chose not to do so, despite Ofcom's clear acceptance of the practice for the 2007-2011 price control. O2 has failed to explain the grounds on which it believes Three ought to bear the financial consequences of O2's failure to mitigate their losses like any efficient commercial entity would be expected to do."

MR. ALLAN: Miss Carss-Frisk, can I just be clear about what is being said there? If Telefónica were to engage in flip-flopping that would not directly mitigate the adverse consequences of another operator's flip-flop; it would mean that Telefónica would be taking advantage of the opportunity in a different set of transactions.

MISS CARSS-FRISK: Yes.

MR. ALLAN: Your argument comes close, does it, to saying almost two wrongs make a right?

MISS CARSS-FRISK: What you said is correct in terms of the mechanics, and all it is saying is that if you look at the overall fairness of the situation it would have been open to O2 to mitigate the commercial harm in that way, that is right.

MR. ALLAN: But in a sense aggravate the damage to the public interest in terms of impact on efficiency and competition?

MISS CARSS-FRISK: Yes, if any.

MR. ALLAN: If flip-flopping has an adverse effect.

MISS CARSS-FRISK: If, and that is of course where one looks at how the regulator has approached that.

THE CHAIRMAN: What Telefónica might have said, but I do not think they ever had, is "we decided not to do it because we regarded this as a commercially disreputable form of procedure".

MISS CARSS-FRISK: They have certainly not said that, no. At the end of the day, Sir, whatever expressions one might possibly care to use about the practice the reality is it was permitted, objectively speaking, under the charge control. Ofcom looked at it and took the specific view that they would not seek to amend the existing charge control, and parties were, with respect, entitled to act on that basis, subject, of course, to the consideration of broader regulatory duties which is what we are concerned with.

THE CHAIRMAN: And commercial respectability one might have thought. There is a similar debate in the context of the wilder forms of tax avoidance where, yes, it is within the letter of the law, but a lot of people take the view you just should not do it.

MISS CARSS-FRISK: It may be that some people do take that view but on the other hand, and I am not now proposing to go into the authorities that have been referred to, but those authorities which are cited in the skeletons do actually show that the courts have been pretty astute to protect a tax payer who, within the law, arranges his affairs in a particular way.

Carrying on looking at why we say there were particular reasons here to attach great significance to the charge control we also have the length of time that this practice had been going on. We are not seeking to dispute what Ofcom have said in para.5 of their note in that respect. There is, as has been accepted, very little in the evidence about it. I do not know if this is something Mr. Ward will come on to, but we noted that in Vodafone's submission in the dispute – perhaps I should just mention that – tab 15, p.351, they pinpoint the time when they say they started flip-flopping at January 2010, that is what they say and, no doubt, Mr. Ward can elaborate if appropriate. They also say, at p.349, that the practice among other MCPs started in 2008 to 2009. So that is, as it were, trying to see what is in a sense in evidence before you. It probably does not matter very much precisely when any given MCP started.

The next point still under this same heading is the point that the practice was never challenged by anyone until O2 decided to home in on these particular charges. It is not challenged by any dispute nor, indeed, as I know the Tribunal has in mind, by any appeal on that aspect of the 2007 MCT statement (although, as you will have seen and heard, there was in fact an appeal as to other aspects of that statement). Mr. Richards has accepted that there could, in principle, also have been an appeal in relation to the April 2010 consultation decision by Ofcom not to amend the 2007 charge control. That did not happen.

Then, in addition, if we still look at the overall fairness and industry expectations, of course it is very important that Ofcom had then decided, as evidenced by that April 2010 consultation, to deal with what they did see as an issue in a particular specific way, but reinforcing, if you like, the industry's expectations that they were entitled to apply the 2007 charge control in its terms.

So all of these matters really created and/or reinforced industry expectations, and I do not need to go so far as to say that they were legitimate expectations in a strict public law sense. I know that Mr. Richards would say: "were they devoid of any relevant qualification?", that kind of thing. All I have to say, or do say, is that on any commonsense view, industry had

these expectations, and were entitled to have them; that is not the end of the matter, but it is an important factor.

Mr. Richards, as I understood him, said the fact there was no challenge to flip-flopping was irrelevant, because that was not a factor that Ofcom had specifically mentioned in their determination. We do not accept that submission, because the absence of a challenge was clearly part of the factual background. It goes to the expectations of the industry, as I have said, and to the broad question of the fairness of departing from the charge control and we are entitled to rely on that factor to counter O2's argument that the charge control was given excessive weight.

May I just have one moment, Sir?

THE CHAIRMAN: Yes, of course.

MISS CARSS-FRISK: (After a pause) I am reminded, quite rightly, by those instructing me that there is very good reason to deal with this issue of flip-flopping through a different kind of charge control which would, of course, have the benefit of applying and benefiting all MCPs not just O2, not just a particular MCP that has chosen to raise a dispute and that, indeed, a retrospective adjustment of charges - in any event in this case - will not result necessarily in any benefit for end users, consumers, but just a windfall for O2. Those are also absolutely fair points to make.

Now, O2 has said, well, there is nothing in what they seek in this case that really undermines the charge control. It is all just part of parallel regulation. But we do not, with respect, see how one can really sensibly say that. In reality the effect would be precisely to undermine what the charge control allowed. And that cannot be a result that any responsible regulator would arrive at lightly. And that, of course, influenced the determination. I say that not least because of what the Court of Appeal said in the *Vodafone* case which has been referred to in various skeletons, but I think I am right in saying that, although Mr. Saini took you to para.28 of that case, you have not actually been taken to paras.41-42 yet. I would then ask you to go to those briefly. That is authorities bundle B, tab.29, p.1037 of the bundle. And this was, of course, looking at a different issue, it was looking at an issue of statutory interpretation and the question of whether retrospective variation of charge control was possible. If we look at the judgment of Richards LJ, para.41 between letters B-C, he said this:

"If, therefore, the amendment was valid, its consequence was that MNOs who had complied with the condition in the first two years of the four-year period became retrospectively and unavoidably in contravention of the condition in respect of those two years; which, in turn,

brought them within the scope of the enforcement provisions of sections 94-104, albeit Ofcom might be expected to exercise in their favour the various discretions it enjoys under those provisions.

42 If such a surprising result had been intended, I would have expected clear statutory language to that effect. There is no hint of it in the straightforward language of section 45(10)(e)".

Well, "surprising result", yes, and we would say it would be a surprising result in the context of dispute resolution too again, not impossible, we stress, not impossible, but it is right to say surprising given how people, operators in the industry, had been allowed to arrange their affairs.

THE CHAIRMAN: I am not sure I would entirely agree with that. I mean, I would not find it particularly surprising if there were a mechanism for allowing the reversal of conduct which nobody could have foreseen and which does not come within any reasonable notion of certainty.

MISS CARSS-FRISK: Well there is of course a mechanism, and we accept that, there is a mechanism if there is good reason to do so, absolutely.

THE CHAIRMAN: It may be said that is a very good reason for doing so. It is a way of stamping on disreputable behaviour.

MISS CARSS-FRISK: Well it is not, with respect, a good reason if you have the regulator not only allowing it in the charge control itself but being aware of this practice, forming a certain clear view about it and then saying expressly to the industry, "We think it is right to deal with it in the following way".

THE CHAIRMAN: I see the force of that. It was really a matter for the Regulator to decide how to deal with it.

MISS CARSS-FRISK: Yes, absolutely.

THE CHAIRMAN: But, had the regulator taken perhaps a rather stricter or more severe line about the undesirability of this practice, then I would not myself, I think, be very shocked at the thought that one could retrospectively recompense those who suffered from it.

MISS CARSS-FRISK: Well as I have said and Mr. Saini has said, we entirely accept that that was open to the regulator, if the regulator took the view that there was something so unacceptable about the practice that it should be dealt with in that way. Now, one has to say the same qualification might have been made in relation to the view expressed in the *Vodafone* case about how retrospective amendment of conditions would be surprising. Well, one might say in brackets: "Well, would it be so surprising if in fact there was

something that was sufficiently bad for the regulator to feel a need to deal with it by retrospective amendment?" In fact, the Court of Appeal expressed its surprise in those unqualified terms. But I entirely take the point about there could be circumstances. That is the whole point of this third type of regulation. But, it is for the regulator and they carefully considered it.

THE CHAIRMAN: Yes, and we have to remind ourselves time and again that this appeal, by deliberate choice on the part of Telefónica, is confined to legal issues only.

MISS CARSS-FRISK: Yes. Absolutely. Absolutely. And, indeed, their choice to do it now in this way.

THE CHAIRMAN: Yes.

MISS CARSS-FRISK: As opposed to challenging it in another way.

THE CHAIRMAN: It is not as though the appeal is by statute confined to points of law, quite the contrary. A full merits review is entirely open to any appellant who wishes to engage in it.

MISS CARSS-FRISK: Absolutely. That is right.

Finally, under this heading, I would just pick up one point about the assessment of harm that Mr. Richards referred to. He complained — and we say this is very much, again, under the heading of complaining about weight, but still I will deal with it — he complained that Ofcom had not properly considered the harm that might result from the October 2010 charges, and that the harm was not really properly quantified. Well, we point to the fact that in para.3.37 of the determination that you have seen many times, Ofcom looked carefully at harm and they did not only refer back to the April 2010 consultation, but they did refer to it, and they explained how in that consultation they had said that the continued application of flip-flopping in the long term would be likely to result in higher prices for consumers and an impact on competition; but that this dispute related to the much shorter period where the impact, they said, could not be any more material and was likely to be much smaller. That, in our submission, even if one assumes it is open to Mr. Richards to raise this point, we say shows perfectly adequate consideration of the question of harm. As they are saying, we have looked at this issue before; and set in that context, this cannot be any more material harm.

Moving on, then, if I may, to ground 3 of the appeal, this is the section 190(2A) point. Mr. Saini has explained why that section does not even apply, and I am not going to seek to add to those submissions. But, assuming that it applied we say Ofcom are also completely right in saying that a failure to refer specifically to that section by Ofcom was not material. As I said at the outset, O2 themselves have accepted that the section introduces no radical

novelty — as indeed it did not. What it is is, in essence, an elaboration on what is already in sections 3 and 4 of the 2003 Act. And you will recall in particular in s.4 sub-section 8, there is a reference to efficiency which Mr. Richards made clear is now the only factor out of the factors listed in s.190(2A) that he is relying on for this ground of appeal. That reference to efficiency was there before s.4 was amended through the 2011 regulation. So, there is no doubt that that was part of the section as Ofcom considered it; and we know that they expressly directed themselves to have in their mind their s.4 duties and the six Community requirements because they have said so. (See among other things para.2.6)

Mr. Richards then points to the subtle difference between the language of s.4 and the language of s.190(2A) and says, well, the latter required a particular thought process. But, again, it is a question of substance rather than of whether Ofcom used a particular mantra. And O2 have not suggested any way in which, if Ofcom had used the particular mantra and had posed themselves the question expressly in the terms as per s.190(2A), they have not suggested how that would or even might have made any difference to the determination. The fact is, as Mr. Saini pointed out, Ofcom had the efficiency issue in mind because they refer to it specifically at para.4.34 of the determination as part of something that they considered in the April 2010 consultation; and of course they were perfectly entitled to have those considerations in mind. But it is, frankly, unreal, we say, with respect, for O2 now to suggest that Ofcom's failure to then revert to that aspect, the efficiency aspect, as a separate issue in their conclusions either meant that they did not properly consider it, or that if they did not, it could have made any difference. That is particularly so as O2 themselves did not even expressly single out that factor in their own submissions to Ofcom. As we have seen (see para.39.4 of O2's request for dispute resolution) they refer to this obliquely, simply by referring to the April 2010 consultation. They did not say, "Oh, and by the way, a factor that you must consider is the impact on efficiency". So, for those reasons, in addition to the reasons about whether the section applies at all, that ground of appeal must fail, we say. That brings me very nearly to the end of our submissions.

As for ground 4 - excessive weight to compliance with the charge control - well, I suspect you have this well in mind: compliance with the charge control just was not in issue, as Ofcom record, specifically at para.4.6 of their determination. And, indeed, they mention the fact that that had just not been alleged (see also para.2.26 of the determination and para.3.8). And, I would add in, in a paragraph of their own request for dispute resolution, which I think you saw, para.29 at tab.12, O2 said that that was not part of what they asked Ofcom to resolve. So, it really could not have been clearer; and in addition you had the fact that

Ofcom actually was carrying out a separate monitoring exercise of compliance with the charge control as they said in para.4.6 of the determination. And, indeed, one may think, if you look at the way the dispute was defined and accepted by everyone, that in itself also makes it clear that compliance with the charge control was not in issue because what was going to be looked at was whether the October charges were fair and reasonable in light of the prevailing regulatory regime. Now, we know that regime had expressly ruled out a broad consideration of fairness and reasonableness; so, even the way the it was defined one gets the idea that this was not about looking at compliance with the charge control. And, of course, O2 fasten on the fact that the determination in some instances refers to how it was reached "on the basis" that Vodafone and Three had complied with the SMP conditions. That, in context, was plainly not a factual finding and did not involve a factual finding. It was simply a reference to the fact that this Determination was concerned only with the broader question of fairness and reasonableness and there was no allegation of failure to comply with the control.

To be fair, at the end of the day Mr. Richards conceded that, although he said that Ofcom sometimes, or generally perhaps, he suggested, would have to take the initiative to investigate matters, it did not always have that duty to take the initiative. We say that if you look at the circumstances it would, frankly, be a nonsense to suggest that Ofcom would have had to take the initiative in the context of this dispute to investigate compliance with the charge control, particularly as they had said, “We are doing that, that is part of a separate project, anyhow”.

That then means, if we are right so far, that O2’s fifth ground of appeal also falls away, because that alleges that there was no adequate evidential basis for finding compliance with the control. There was no such finding. In any event, it is right to say, as Mr. Allan suggested yesterday, that you really cannot sensibly look at whether there has been compliance in relation to charges over one month, because the way the system works is that you look at it on a yearly basis, charges over a year, set against core volumes the previous year. I would just add there that, contrary to what Mr. Richards suggested, we say the system in terms of checking for compliance is perfectly clear. That is, you can say with 100 per cent certainty, applying the system, whether you have complied or not by looking at the relevant years.

I am reminded too of the fact that it actually took O2 until literally a day or two, or maybe three or four, before the new charge control took effect to raise this dispute. You will remember they raised it at the end of March 2011, and the new charge control came in on

1st April 2011. That is interesting timing, and something to throw into the balance. (Short pause) I misunderstood the point suggested, although I am told that the point I made was also correct, which is useful!

The point was that O2 actually only raised the dispute, or mentioned the issue, a day before the particular October charges took effect, and it then took them six months to actually refer it to Ofcom.

THE CHAIRMAN: I am not really sure where that takes us Miss Carss-Frisk, apart from a little bit of prejudice!

MISS CARSS-FRISK: Always good!

THE CHAIRMAN: Always good, but to be guarded against, but thank you.

MISS CARSS-FRISK: Unless I can try to assist further, those are our submissions.

THE CHAIRMAN: No, thank you very much indeed. I think we might have a five minute break now, Mr. Ward, and then we will obviously hear you.

(Short break)

THE CHAIRMAN: Yes, Mr. Ward?

MR. WARD: The Tribunal has heard a good deal of intricate legal argument over the last two days. I am going to try very hard not to add to that at all. That is not just cowardice on my part, but, as the Tribunal is aware, Vodafone's essential submission is that the substance of Ofcom's decision is materially consistent with Telefónica's view of the law. At the heart of this case is simply a disagreement as to the relative weight that Ofcom afforded to different factors that it took into account. As a result, the differences of legal analysis are, in truth, immaterial.

What I am going to do is briefly address four points. Firstly, the scope of the dispute and a little of the history; secondly, the approach of the Tribunal to construing Ofcom's decision; thirdly, and very briefly, why we say there is no material difference of approach; and fourthly, the quality of the evidence. In doing so, I am going to touch on some themes that have already been addressed. I am going to endeavour not to repeat my learned friends, and I hope you will find that there is something distinctive that we are saying on these subjects.

Starting then with the scope of the dispute. As the Tribunal is well aware the dispute is solely concerned with the charges for October 2010. This is not an appeal against Ofcom's overarching policy review into the correct approach to flip-flopping. The reason why I emphasise that is that it is a persistent theme in Telefónica's submissions to try and have that both ways, to try and broaden the argument out of the specific October 2010 charge that they sought to challenge.

We did hear yesterday that complaints were made to Ofcom at a very early stage about flip-flopping, and Vodafone was, in fact, one of those complainants, and if I may I would like to show you just a little bit of Vodafone's submission in this dispute to Ofcom, and it is in core bundle A, tab 15, p.345. This is Vodafone's submission to Ofcom during the dispute process. It is in the form of a letter to Ofcom.

The passage I would like to show you is on p.349, because it actually sets out a little of Vodafone's dealings with Ofcom over this issue. What it shows you is that Vodafone was a reluctant player in flip-flopping and came to it only after it had tried to persuade Ofcom to take action. May I just take you through it briefly. It starts on p.349: "Ofcom's response to Vodafone in 2009":

> "Vodafone first discussed the issue of variations in mobile termination rates in early 2009 shortly after it was given notice by Orange UK that it had intended to vary its termination rates by the time of day.
>
> Given the commercial risk that Vodafone faced, it specifically highlighted to Ofcom the mechanism."

Then it talks about attending a meeting with Ofcom, and picking up in the last two lines of that paragraph:

> "Ofcom officials confirmed orally to Vodafone that they did not intend to take any action in respect of the policy of 'flip-flopping' espoused by the mobile operators.
>
> Vodafone again engaged with Ofcom later in August of that year about the practice. However, Ofcom indicated in correspondence that it would only be looking to address the matter in the design of the next charge control formula."

Then there was a further meeting between Vodafone and Ofcom and then it explains:

> "Vodafone therefore commenced the practice … to protect its commercial position."

So in other words, it took the issue to Ofcom. Ofcom said we will deal with it prospectively in the charge control, so Vodafone reluctantly decided to take part. Then it continues by saying:

> "Any lingering doubt was made emphatically clear in the consultation document in April 2010."

And this is the paragraph you have read a number of times, 9.126 which Vodafone quotes. It says:

> "What is notable from the above statement is that when Ofcom elected to remove the scope for mobile operators to vary their rates … it explicitly ruled out taking any action in respect of the 2007-2011 charge control period."

Skimming to the end of the page you will see Vodafone argues that that created a legitimate expectation, and you may have seen that in the dispute resolution Ofcom rejected that argument and said it was not sufficient to give rise to a legitimate expectation even though it acknowledged Vodafone's arguments to that effect.

I point this out really because I want to pick up on something that Mr. Allan said yesterday, namely, that it was open to Telefónica, as he put it, to provoke a decision from Ofcom if it wanted to challenge the fact that nothing was being done, and then it would have been able to appeal or judicially review as the case may be. But, of course, none of that happened, and one of the reasons it did not happen was that it appears that Telefónica had no concerns at that stage, and I would like, if I may, to show you something that Mr. Saini averted to but I do not think showed you in that consultation paper of April 2010. It is at core bundle B, tab 25, p.1066. This is at the end of the section dealing with flip-flopping.

Just for orientation, para. 9.126, which was just quoted in Vodafone's letter, is the paragraph which sets out their conclusion in the third line: "We have not revised the current charge control condition" in the third and fourth lines. Then the consultation question that follows immediately in the grey box, as it appears in the photocopy, question 9.3:

> "What is your view of the harm caused by flip-flopping? Please provide evidence to support your response."

As Mr. Saini pointed out yesterday, even though Telefónica replied to this consultation it did not address this question at all. A little further on there are some further consultation questions also about flip-flopping, albeit they are slightly more mechanical, I think, the issues, on p.1072 of the bundle, which is internal p.143 of the consultation paper, and questions 9.4 and 9.5: "Do you agree with our preferred option for resolving the issue" and then: "What would be your preferred option?" Then question 9.5: "Are there any other, more proportionate solutions that we should consider?" Ofcom had made its decision but even so the door was being opened for consultation responses if there were concerns. What, of course, happened was that Telefónica did nothing until 10 days after the 2011 statement had been produced, in the sense that that is the stage at which it referred this dispute to Ofcom; so just 10 days after.

What it did, of course, was to pick this particular month, and the reasons why have emerged through the course of the hearing. Mr. Richards explained to you yesterday that this appeal

was not a stalking horse, even though he was not prepared to offer an undertaking not to look at any other months. For your note that is on p.14 of the transcript, lines 21 to 24. He accepted yesterday that it was at least possible that flip-flopping benefited Telefónica in some circumstances, and that is in the transcript at p.18, line 24. I am actually going to take that a little bit further through the documents, and first, if I may, I will just explain, as my client has explained to me, how that is possible, at least in theory. I hope this is the realm of theory rather than me giving evidence, but essentially, of course, flip-flopping is about the balance of termination charges between weekend and week days, or peak and off peak. Whether you benefit from this or not depends on what the balance of traffic is, so if, in fact, you have more traffic terminating on, say, Vodafone's network during off peak periods than during peak periods, then when off peak charges are lower than the average TAC, then you may actually be better off.

I want to ground this point now in the documents rather than me merely explaining it in the lap of theory because Vodafone made exactly this point again during the dispute process. If I may, I will take you back to core bundle A, tab 15, which is Vodafone's submission. We made the point very shortly at bundle p.351, and there is a heading: "O2's conduct in this case." What Vodafone say is:

> "Vodafone notes that O2 has only chosen to raise a dispute about its mobile termination rates for October 2010. However, the dispute referral submission appears to suggest that O2 has an in principle objection to the ability of mobile operators to vary their charges."

Then Vodafone says we have been doing this since January 2010 and it would have been logical to raise the dispute at that stage if it had real concerns or objections, or express those concerns to Ofcom if it had real concerns or objections. It was very much along the lines of what I have just been saying.

> "Yet it appears to have done none of these things. Instead it remained silent … for just over nine months and expressed no view.

Then:

> Indeed, we note that when O2 did finally object, it did so at the last moment and only hours before Vodafone's revised mobile termination rates were due to come into effect."

Then this is the important sentence:

> "The clear inference is that these variations did not have a material impact upon O2 and that some of these variations may have operated to its benefit because of

> the profile of its outbound traffic to Vodafone in these months. What O2 is in effect demanding is that Ofcom should adjust retrospectively one monthly termination rate in a way that provides it with a commercial benefit. With respect, disputes should not be determined with a view to enabling one or more parties to benefit from an interconnection rate but rather in a way that is designed to realise Ofcom's statutory objectives."

We have, in the next tab, a document which was submitted by Telefónica to Ofcom by way of response to both Vodafone and H3G's submissions, and I just show you, so you see that it is there, but it does not actually answer this point. So in a sense it is a document that has a nil return in respect of this point.

What is the importance of this? It is not purely a point about prejudice actually. The reason it is important is that one has to focus very closely on the fact that for evident commercial reasons O2 has chosen to challenge a single month. It did not choose to take a broad scale attack on the approach to flip-flopping, it did not choose to raise as a dispute every month that had been flip-flopped. What it has done is cherry pick a month where, no doubt, it thinks its case can be made compellingly, but for reasons of commercial expediency. That is fine, but it simply cannot have it both ways. That means the Tribunal is focused on the harm, the question of the application of Ofcom's duties, as it applies to this one month of charges.

From there I want to move on to the question of how one should approach Ofcom's decision, and I want to make two overarching points. They are legal points, but they are pretty straightforward compared to some that we have heard and, I think, not controversial. The first is that the reasons given in the decision should be read in a generous rather than restrictive way, and the authority for this unsurprising proposition is one that Mr. Allan is very familiar with, the *BAA (No.2)* Judgment, which is in the authorities' bundle B at tab 33. May I take you to that now. The facts of that case need not detain us at all, it is simply general propositions of law expressed by the Tribunal. The key passage is at p.1315 of the bundle numbering. Of course, I am sure all members of the Tribunal are well aware this was a challenge to the ruling of the Competition Commission in respect of the proposed disposal of BAA airports – beyond that we are not concerned. It is p.15 of the Judgment, p. 1315 of the bundle. Here the Tribunal are setting out a number of principles that it will apply in adjudicating the dispute. If I pick it up at para. 20(8):

"Where the CC gives reasons for its decisions, it will be required to do so in accordance with the familiar standards set out by Lord Brown in *South Buckinghamshire District Council v Porter (No.2)*"

which, as was noted, was a case about planning law.

> "…'The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues' [and forgive me if I emphasise that] disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example, by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision … But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration".

Pausing there, that is obviously relevant to this discussion about Ofcom having regard to its whole basket of statutory duties.

> "They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact future applications".

And this I emphasise as well.

> "Decision letters must be read in a straightforward manner, recognising they are addressed to parties well aware of the issues involved and the arguments advanced".

Everyone here knew about Ofcom's policy review.

> "A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequate reasoned decision".

And then the Tribunal continues:

> "In applying these standards, it is not the function of the Tribunal to trawl through the long and detailed reports of the CC with a fine-tooth comb to identify arguable errors. Such reports are to be read in a generous, not a

> restrictive way … Something seriously awry with the expression of the reasoning set out by the CC must be shown before a report would be quashed on the grounds of the inadequacy of the reasons given in it".

Now, this is not a reasons challenge in the formalistic sense of reasons challenge. But what I do submit is that Mr. Richards is inviting you to engage in an excessively formalistic reading of a decision which, read sensibly, plainly encompasses the factors that Ofcom were required to consider. And, just to finish off with this authority, if I may just show you two further very short passages where this approach is encapsulated by the Tribunal, para.48 which is on p.1330, in the last four lines of that paragraph, this is where the Tribunal is dealing with some of the arguments (I am not going to trouble you with that) referred to this as, in the third line from the end of the paragraph, "the principal of generous construction", which is a shorthand we respectfully adopt. And then, finally, at the end of para.62 again, by way of shorthand, the Tribunal referred in the last three lines to:

> "… the width of the margin of appreciation or evaluative discretion to be accorded to the CC in making judgments".

So, in our respectful submission, what this suggests is that the wholly intricate approach and indeed formalistic approach of Mr. Richards to the decision is entirely misplaced. The questions are ones of substance rather than turning, for example, on precisely which order the paragraphs are expressed in and precisely under what sub-heading.

Now, the second point I wanted to touch on that both my learned friends have already addressed though, so I will be brief, is the question of weight, because we do submit that this is essentially a debate about weight, and Mr. Richards himself accepted yesterday that the weight to be given to a particular consideration is pre-eminently a matter for the Regulator, and that is p.49 line 11. This, of course, even though this is an appeal on the merits, Mr. Richards has not chosen to argue that on the merits a different balance should be struck. What he has argued instead is there is an error of law. It is something much more fundamental in the way the balancing exercise has been done. And I would like to show you one of his authorities referred to in his skeleton but not shown to you, because in my submission it demonstrates what that kind of error would have to look like, and it is apparent that it is not present in this case. It is at authorities bundle A, tab.12. It is a local government case, *Waltham Forest Council v Baxter* and we are not much detained with the facts but I will just briefly show you the head note:

> "… a council meeting at which the forthcoming rate was to be set, the members of the majority group held a private meeting at which they discussed what

> would be the policy of the group in respect of the level at which the rate would be set. The group's standing orders provided that members were required to refrain from voting in opposition to decisions of the group, with the sanction of withdrawal of the party whip … After discussion a vote was carried that the group would support a resolution proposing a rate increase of between 56.6 per cent and 62 per cent. Several members who had opposed the level of increase and voted against the proposal in the private … meeting nevertheless voted for the resolution at the council meeting and accordingly [it] was passed. The applicants, who were the ratepayers, [perhaps one might say understandably aggrieved] sought judicial review of the resolution on the ground, inter alia, that those members had voted contrary to their personal views and that had they abstained or voted against the resolution, it would not have been passed".

The challenge failed and, again, picking up the head note one sees the summary:

> "… in relation to a councillor's duty to make a personal decision as to how he should vote on a rates resolution … the fact that he voted to support a majority which had earlier considered and rejected his arguments, or what he faced the sanction of the withdrawal of the party whip should he vote contrary to group policy, was not necessarily evidence that his discretion had been fettered; that party loyalty or party policy were relevant considerations provided they did not dominate so as to exclude other considerations or deprive the councillor of a real choice".

That alludes to the passage that Mr. Richards relies on, which is in the judgment of Russell LJ at p.440 of our bundle, and I will just show you that. It is 428 of the **Law Report**. And between G and H is the passage that is summarised in the head note:

> "The vote becomes unlawful only when the councillor allows these considerations or any other outside influences to so dominate as to exclude other considerations which are required".

And that is the key. So, in other words, if it really was the case that Ofcom had simply looked at the charge control and excluded any consideration at all of its wider statutory duties, then this authority would undoubtedly assist Mr. Richards. But of course, as you have heard now at great length, and I am not going to develop again, plainly Ofcom was aware of its wider statutory duties and plainly it took them into account. What we are left with is a wholly unmeritorious challenge to the weight that was afforded to them.

With that, I will turn to my third point, which is why we say there is no issue of legal principle that falls to be decided. And here I follow gratefully Miss Carss-Frisk's submissions under this head, and I will not repeat them. Essentially, we submit that Ofcom did do precisely what Telefónica says it should have done. I would like to show you, just very briefly, a different section of my friend's skeleton argument to make that good. That is, of course, back in core bundle A, I think under the first tab. I would like to take you to para.39 of the skeleton which is on numbered p.16. And it is really paras.39, 41(1) and (2). So, the starting point is (and you have heard this a lot), I will be very brief:

> "Telefónica acknowledges that [the charge control] is a significant feature",

and, at the end of that paragraph:

> "Ofcom was entitled, indeed bound [to take it into account]".

And that is why we say immediately then it appears we are into the territory of weighing. But, in 41 Mr. Richards says:

> "It is important to focus upon the approach to dispute resolution for which Telefónica actually contends [and here we have it set out]:
>
> (1) Telefónica's case is that in determining the Dispute, Ofcom should have examined the fairness and reasonableness of the October 2010 charges by weighing in the balance, together with the criteria in the charge control and the interests of regulatory certainty" —

Pausing there, the things that Ofcom alluded to were legitimate thus far. But then he says weighing with that,

> "a number of other factors to which their regulatory duties require them to have regard: the interests of citizens and consumers".

And of course you have seen that the interests of consumers are considered, it is just that Ofcom concluded the harm to them was negligible. But, the next bit is very important:

> "… the consumer harm and inefficiencies associated with flip-flopping, their own policy views on flip-flopping, etcetera".

Now, one needs to tease that out a little, because it is undoubtedly true that Ofcom's policy approach to flip-flopping is shot through the decision in the sense as to context against which it was taken, and indeed the decision itself refers explicitly to that policy. And, just for your note, paras.4.21 Telefónica makes this argument; and at 4.27-4.30 Ofcom responds to it.

But there is something important that is lurking in those words that I think it is necessary to get out. This is a complaint about the generality of flip-flopping, the consumer harm and

efficiencies associated with flip-flopping, their own policy views on flip-flopping.

Mr. Richards is trying to smuggle in here flip-flopping as a whole as opposed to potential effects on consumers and competition arising out of the October 2010 charge control; and that, in my respectful submission, is a fallacy given the way in which Telefónica chose to litigate this dispute.

What I would like to do now is just focus, briefly, on the two particular factors which have featured in the oral argument, the factors that Mr. Richards tried to suggest were not taken into account and should have been. And they are briefly "historic harm" as he put it, and efficiency, and before we put the skeleton away we can start with historic harm and see what he said about it. It is at para.44(5) of the notice of appeal which is under core bundle A5, bundle p.138 and it is little (5):

> "The historic impact of flip-flopping (particularly from the perspective of efficiency, competitiveness and consumer harm) in the period prior to April 2011".

So, here again he is trying to smuggle in the harm from the entirety of flip-flopping. But that, in my respectful submission, is impermissible. But, if we are talking instead about the historic harm of October 2010 flip-flopping in particular, which is the subject of this dispute, one immediately asks, "Well, what historic harm?" Certainly we have seen no evidence of anything of the kind. But, just stepping back from it for a moment, Mr. Richards explained yesterday that those charges were not passed on to consumers, and that is in the transcript on p.11, lines 14-22.

If that is the case, what is the historic harm? One can understand prospective harm as a possibility, even if there is no evidence, but as a possibility prospective harm is intelligible, but of course, as you are well aware, Ofcom has found that the question of prospective harm went nowhere because it was negligible. That is in para.3.38.1 of the decision. I will just read you the sentence. I know it is very familiar:

> "The ongoing effects of any proposed determination on the October 2010 charges on consumers and competition on a prospective basis are therefore negligible."

So this appears to go nowhere, although I am, under my fourth head of submission, going to look briefly at what evidence there is.

The other point that Mr. Richards seized upon was efficiency. He did this because he was hoping that it established some daylight between what was in the decision and what was required by s.190(2A), where efficiency is prominent in the requirements imposed by the

Act. Of course, as you have heard, he has conceded that this actually adds nothing of substance to the considerations elsewhere in Ofcom's statutory duties.

What we are left with then are two questions: one is, does it matter that the word "efficiency" does not appear in para.3.38? Of course, the answer is no, and the *BAA* case makes that clear. In the passage I have already shown you, it is said that reasons must cover the main issues in the dispute, not every material consideration. You do not have to check-list off all of Ofcom's statutory duties, of which no doubt in truth there are hundreds

Then there is the question of evidence, because, of course, no evidence was put before Ofcom on any questions of efficiency. I am going to come and take you through what little evidence there is. It is really hardly surprising, just stepping back again, that if the impact on consumers and competition is negligible, as Ofcom has found and cannot be challenged, then it is hardly surprising if the impact on efficiency, however it is supposed to arise, might also be negligible. That is outside the scope of the decision. The question is: is there an error in the decision itself?

In order to see why there plainly is not, I want to turn, under my final and fourth head of submission, to the nature of the evidence that actually was in front of the Tribunal. Here I want to just start by making some very brief legal points on two additional authorities which I have handed up, which really have struck me as helpful in the light of the submissions that were made yesterday, even though again I think their content was fairly uncontroversial.

The first one is *British Telecommunications v. Office of Communications*. That is from the Court of Appeal. The other case is *TalkTalk Telecom Group*, which I will take you to shortly. Again, mercifully, we need not be detained by the facts.

The first of these cases, the *BT* case, was an interlocutory appeal brought by Ofcom, unsuccessfully it must be said, to the Court of Appeal, dealing with the question of admissibility of evidence in dispute cases. I can deal with this very briefly. Paragraphs 2 and 3 of the judgment of Lord Justice Toulson summarise the issue:

> "Ofcom's complaint in this appeal is that the CAT has agreed in a preliminary ruling to allow BT to introduce evidence on the appeal which it had not presented to Ofcom."

I should say this case concerned a dispute, just as ours does.

> "Ofcom is concerned about the effect of the ruling in the present case but it is still more concerned about the general principles involved. The parties have advanced wide ranging arguments supported by nearly 2000 pages of case law.

> The questions at the heart of the appeal are whether there is a general exclusionary principle which the CAT failed to recognise and whether, in so far as it had a discretion, it exercised that discretion unlawfully. Appeals from the CAT to this court lie only on a point of law."

I should have shown you in the first paragraph there that the Court of Appeal explains that it is an appeal relating to a dispute. So we are in precisely the same statutory territory as in the present case.

The short answer that the Court of Appeal gave was there was no such exclusionary rule. If I may, I will just show you paras.60 and 61 of the judgment, which are at p.14 of the report:

> "The task of the appeal body referred to in Article 4 of the Framework Directive is to consider whether the decision of the national regulatory authority is right on 'the merits of the case'."

Pausing there, "appeal body" means "Competition Appeal Tribunal", "regulatory authority" means "Ofcom" – "appeal on the merits", as I know you are well aware in this case.

> "In order to be able to make that decision the Framework Directive requires that the appeal body 'shall have appropriate expertise available to it'. There is nothing in Article 4 which confines the function of the appeal body to judgment of the merits as they appeared at the time of the decision under appeal. The expression 'merits of the case' is not synonymous with the merits of the decision of the national regulatory authority. The omission from Article 4 of words limiting the material which the appeal body may consider is unsurprising. When an appeal body is given responsibility for considering the merits of the case, it is not typically limited to considering the material which was available at the moment when the decision was made. There may be powerful reasons why an appeal body should decline to admit fresh evidence which was available at the time of the original decision to the party seeking to rely on it at the appeal stage, but that is a different matter.
>
> The construction for which Ofcom contends would be capable of causing real injustice, because it would preclude the appeal body from considering evidence even if it were highly material and if the party seeking to rely upon it could not be criticised for not having adduced it earlier."

So there is no general rule that excludes a party such as Telefónica from adducing fresh evidence at the appellate stage. There may be arguments about admissibility, and had it sought to do so in this case those arguments may have arisen. Actually all it did was

produce a statement from Mr. Wardle that Mr. Richards has not yet taken you to at all, although I shall very briefly in a few moments.

The crucial point I am making here is that this is an appeal on the merits. If there were important factors that Ofcom had not addressed Telefónica could at least have tried to adduce further evidence.

May I now just show you a quick passage from the *TalkTalk* case which builds upon that ruling? Here the challenge is not actually a dispute. The case was about some of the technicalities in a charge control decision. We need not be detained at all by the substance, I am pleased to say. Can I show you para.6 which summarises what the challenge was

> "By its Notice of Appeal, TalkTalk challenges the WBA Charge Control Decision on two grounds, which are summarised as follows …"

It is only the first ground that is of any relevance here:

> "'that Ofcom failed to take proper and sufficient steps to satisfy itself that it had complied with its [statutory] obligation …'"

in other words, it had gathered the relevant material. That argument was dealt with by the Tribunal, in so far as we are concerned, at para.123 and following, which is at p.52 of the judgment. The heading is "The relevance of a failure to consult in the context of an 'on the merits' appeal". I should say, just for the context of what is going to occur, the Tribunal rejected the underlying complaint of substance. It said, "There is nothing wrong with the substance and therefore your consultation complaint in effect just falls away, it does not bite on anything". I am trying my hardest not to explain the substance because it is technical and of really no relevance to this case.

If I may pick it up at para.124:

> "As we have noted, appeals to the Tribunal under section 192 of the 2003 Act are not dealt with on a judicial review standard, but 'on the merits'. The Tribunal is <u>obliged</u>, by statute, to take the 'substitutionary approach' that is not permitted in judicial review cases."

i.e. substitute its own view.

> "In this respect, appeals to the Tribunal under section 192 are more intrusive than a judicial review would be: the Tribunal is concerned with whether Ofcom's decision was <u>correct</u>.
>
> We consider that this has implications in those cases where – as here – the Tribunal has reached a conclusion that Ofcom's decision was, indeed, correct on the merits. In such a case, we do not consider that it is the function of the

Tribunal also to review Ofcom's decision by reference to the judicial review standard.

This conclusion is reinforced by case law dealing with appeals 'on the merits' … It is clear law that where a decision of an administrative body, such as Ofcom, is subject to a full, on the merits appeal, such an appeal is capable of making good any deficiency in the procedure of the administrative body taking the original decision. In other words, a procedural failure at the level of the first instance administrative body be remedied by a wide, on the merits, appeal."

Then summarising in 128:

"In the present case:

(a) As we have repeatedly noted, the appeal is 'on the merits'.

(b) Any person affected by Ofcom's decision may appeal to the Tribunal. Here, TalkTalk has availed itself of this opportunity.

(c) New evidence – that is, evidence that was not before Ofcom – is admissible …"

and that is the case I just show you. Then:

(d) There has been a two day hearing at which TalkTalk has been able to present its case orally, in addition to the voluminous written materials that were submitted to the Tribunal."

May I just say two things about this: firstly, this ruling is subject at the moment to an application for permission to appeal by TalkTalk, but not in respect of this piece of analysis. Secondly, there is an important difference here. In *TalkTalk* there was an argument about whether the merits of the decision were good or bad. Here you have not heard any argument of that kind at all. All you are asked to do is remit for reconsideration. The point is still important, namely, that if Telefónica wanted to point to additional factual material that might have helped it, it was wide open to it to do so.

THE CHAIRMAN: You say "wide open". Is there, in fact, any provision in the Tribunal Rules which deals with the admissibility of evidence? There are no kind of *Ladd v. Marshall* principles laid down?

MR. WARD: No, and that is partly why the case went to the Court of Appeal, that there was a genuine dispute. One of the drivers of Ofcom's concern was that the dispute mechanism is supposed to be resolved within four months, and they were articulating a policy concern that there was a risk that they would essentially be ambushed with fresh material at the appellate stage. I hope that even the truncated passage I read made clear that there are still

going to be issues about admissibility, but the suggestion that there was a blanket prohibition went nowhere. In fact, as we are going to see in a moment, O2 did actually put some evidence in.

I do not make the point that any evidence they submit would have axiomatically been admissible, rather that had they wanted to try, plainly the case law makes clear that they could have done so.

I just want to touch very briefly on another point which is in my friend's written submissions but has not been developed orally at all, and which links to this, which is the question of burden of proof. There are various suggestions in his submissions, based partly on the TRD case, that somehow the burden all fell on H3G and Vodafone to justify these changes. There really is a short answer to this, which again is non-legal. Ofcom did not decide this case by application of the burden of proof. What it did was assess the evidence in front of it advanced by all the parties to the dispute and make findings of fact. Those findings of fact have not been challenged. In a context where Telefónica could have produced evidence then, and could still have tried to admit evidence now, then this point, in our respectful submission, is entirely sterile.

With that, I want to turn very briefly to my final head of submission, which is to look at what the evidence actually was in front of Ofcom. It was very slight indeed. I will do this chronologically, and therefore I am going to start with something you have already seen, which is the reference to the dispute itself, which is core bundle A, tab 12. I want to show you paragraphs on p.297 of the bundle. At para.26 there are some confidential figures, and you will see those figures a number of times in the documents I am going to show you:

> "The combination of higher weekend charges and low daytime and evening charges (relative to the rates in place in September) had the effect of increasing O2's costs [by such and such an amount]."

Then at para.28:

> "However, despite these additional costs and risks, O2 did not enjoy any countervailing benefit."

Then at 39.4 is a passage Miss Carss-Frisk reminded you of where there is the most oblique reference to efficiency by the reference back to Ofcom's own policy:

> "Ofcom has explained in clear terms why flip-flopping is undesirable …"

Here again, Mr. Richards is smuggling in the general considerations about flip-flopping, rather than focusing on the particular harm we are concerned with here. I am not saying

those general considerations are irrelevant but I do say that the scope of the dispute was as defined by Telefónica.

So there is very little there indeed, and I just want to echo a point that Mr. Saini made, which is that it is just not good enough to say that we paid more money than we wanted to in order to demonstrate that somehow that translates into harm to consumers or competition or efficiency or any other statutory objectives.

Of course, it is very important again: this charge was not passed on to consumers. That does not prevent the possibility that through some economic mechanism there is some detriment. That requires some work.

If I can, I will refer again to what Vodafone said in response, which is in tab 15, the document you have already seen, p.350. Here is a second, "No identifiable detriment to competition and consumers":

> "O2 has been unable to demonstrate how the variation in Vodafone's termination rates for the month of October 2010 had any adverse impact on mobile consumers. To the extent that Ofcom were to require a payment to be made to O2 by Vodafone as a result of a retrospective adjustment to the October termination rates, this would be nothing more than a transfer of resources between mobile operators leading to a windfall gain for O2."

In other words, it may well just go in the pockets of shareholders.

> "It is difficult to see how such a windfall gain arising out of an historic dispute would operate to the benefit of mobile consumers. In such circumstances, Ofcom has no compelling reason for a departure from the unamiguous guidance that it has previously issued to industry stakeholders."

Again, Telefónica responded to that and, if I can take you to the next tab, tab 16, numbered page 356, picking up just below the second hole punch. It basically again states some confidential figures. Telefónica has overpaid Vodafone, and then says that means they are not competing effectively, and then a passage which is strongly echoed in Mr. Wardle's witness statement, which I am going to take you to: "For example, Telefónica UK's average subscriber acquisition costs …" are [X] and therefore the sum of [X] would therefore have been capable of acquiring customers. "Capable of acquiring", that is a significant number of customers, but it does not say that is what would happen. It is a hypothetical example. What we see is that this theme is taken up and a little bit further developed by Mr. Wardle in the witness statement.

I hesitated a little before showing you this because Mr. Richards has not relied on it. His own assertion is that this is purely a case on the law, but nevertheless as this question of the sufficiency of evidence has arisen in fairness I ought to show you and make clear our submissions about it.

The witness statement is at tab 10 ----

THE CHAIRMAN: I think when I put a slightly similar point to Mr. Richards yesterday his answer was to accept that relatively little, if anything, had been put forward by way of evidence. He said that is just tough Ofcom, they have jolly well got to go and take a proactive role, and embark on a massive investigation.

MR. WARD: Roving inquiries, full scale regulatory investigation, even though there is a four month statutory time limit.

THE CHAIRMAN: And even though it is on the back of a complaint about just one month.

MR. WARD: Exactly so, but just briefly, as much as anything just in case this rears its head in Mr. Richard's reply, may I just show you what Mr. Wardle said, the crux of it. It is tab 10, and I just wanted to show you paras. 29, 30 and 31 of the witness statement because what we see is a whole series of conjectures and suppositions, and not anything that constitutes firm evidence.

He says at 29:

> "It is difficult to be precise about the harm that resulted to Telefónica …"

Although, pausing there, Telefónica ought to know about whatever harm it suffered as a result of not receiving this revenue, even if it may not know about what might have happened elsewhere in the mobile market. Then:

> "Telefónica undoubtedly suffered harm, on the basis that the net difference is substantial and could have been used by Vodafone and H3G to acquire additional customers …"

Then in 30: "For example …" and then you see the same confidential figures I did not read out in their submission to Ofcom, "could have been used by Vodafone and H3G to acquire customers."

Then in 31: "Alternatively, Telefónica could have used these sums to attract greater numbers of pre-pay mobile customers." We did comment on this in our statement of intervention, and if I may I will just remind you what we said about it; that is at tab 9, p.226 of the bundle. At para. 48 we set out some of the passages I just drew your attention to from Mr. Wardle's evidence. Then at para.49 we make the point that he stopped short of saying that Telefónica would have done any of these things, and then we make a point

which, in my submission, is important and brings us straight back to Ofcom's determination: "The scale of the disputed revenue needs to be put in context." And you will recall what the confidential figures were, about how much money we are talking about here. Ofcom found that the average costs of customer acquisition, retention and service for each of the MCPs are £1.822 billion for the year of 2009. You will recall just how small relatively, in mobile phone terms anyway, the sums we are talking about are very small indeed.

That takes us straight back to para.338.1 of Ofcom's decision where it said that the effects of the October 2010 charges on consumers and competition on a prospective basis are therefore negligible. One can see vividly from those figures why Ofcom would have reached that view.

Sir, in my respectful submission, there is no error of law at all in Ofcom's approach either to this evidence or more generally. Unless I can assist further, those are the submissions from Vodafone.

THE CHAIRMAN: Thank you very much indeed, Mr. Ward. We have no further questions. So, Mr. Richards, it is getting on towards 1 o'clock, would you rather start now, or would you rather have a clean start at 2 o'clock.

MR. RICHARDS: I am very happy to start and make the most of the time, subject of course to the Tribunal.

THE CHAIRMAN: If you are happy to start now you have ten minutes and then we will break off.

MR. RICHARDS: Sir, I shall make my reply submissions under five heads: Statute, Context, Proper Approach, the Decision and Materiality. Beginning with the statute I have four points. First, to succeed in his case on temporal applicability of s.190(2A) Mr. Saini needs to persuade the Tribunal that it is a necessary implication that the scheme of the amendment that subsection (2A) should not apply in relation to disputes referred to Ofcom prior to 26th May 2011.

Mr. Saini had two arguments and neither of them, in my respectful submission, works. His first argument was based upon the two track regime introduced by the insertion of subsection (1A) into s.185. May I ask the Tribunal, please, to turn in authorities bundle A to tab 8C. At p.281 one sees new subsection (1A) and then if one looks ahead to p.295 we are back at s.190(2A). So what immediately leaps out from the page from p.295 in subsection (2A) is that the applicability of that subsection does not depend in any way upon any prior decision by Ofcom as to track allocation, it simply refers to s.185(1), and in a

sense incorporates by reference the language of that section. So in relation to a dispute relating to the provision of network access between different communications providers Ofcom must follow that approach. It is simply a question of asking whether it falls within the language of s.185(1) that that is the structure that Parliament has chosen.

So it is not either logically or practically necessary for Ofcom to have made a track allocation decision before one considers whether s.190(2A) applies.

In fact, Sir, Mr. Saini's entire argument proceeded upon a false binary distinction between s.185(1) and s.185(1A).

Turning back to p.281, it is, as Mr. Saini acknowledged in the course of argument this morning, clear that these are not exclusive categories. In the language of Venn diagrams there is an intersection between the two sets. If a case falls within that intersection then s.190(2A) applies to it, and that makes perfect sense because one thing we do know – and it is common ground – is that Telefónica is a communications provider and each of Vodafone and H3G are communications providers for the purposes of s.185(1)(a).

Mr. Saini relies upon s.186 if I could ask you to turn to that, please, on p.287, and he suggests that s.186 shows that something has to be, as a matter of logic, either a subsection 1 or a subsection 1A case. In my respectful submission that is not right, and s.186 is perfectly workable when one recognises that there is an intersection between the two classes.

In all cases, Ofcom must decide whether or not it is appropriate for them to handle the dispute. In subsection 1 cases, Ofcom may, in particular, take into account their priorities.

Of course, if you are in the intersection subsection (2A) of 186 is then trumped by subsection (3), because any dispute falling within 185(1A) has to be accepted except in certain circumstances.

But it is perfectly workable to recognise that a dispute can fall within the intersection.

THE CHAIRMAN: You would not expect it to be worded in quite this way if that was the way it was envisaged, would you? You would then expect something like "subject to subsection 3 below" at the beginning of (2A).

MR. RICHARDS: Sir, my submissions here are directed at Mr. Saini's argument that it is a necessary implication that s.190 has to commence at some later date, it has to be applicable only at some later date than 26th May, or in respect only of certain kinds of dispute, and my submission is that cannot be right. To realise that it applies to all disputes after 26th May 2011 does not cause any serious unworkability in this section because this section still works just fine.

MR. ALLAN: But, Mr. Richards, it is a logical consequence of your approach, is it not, that you envisage a distinction in the statutory scheme between those cases where the dispute is between an SMP, a communications provider, subject to an SMP condition with another communications provider and a dispute between a communications provider subject to an SMP condition and somebody who is not a communications provider, because the first example can be brought in 1(a), but the second example can only be brought in (1A).

MR. RICHARDS: Sir, that is right, the difference is this: the difference in treatment under the scheme of the Statute. In a new case, if a case is commenced today, a dispute is referred to Ofcom today, if it is a dispute between communications providers where one of them is also a person identified under a s.45 condition, that is an intersection case, as I have described it. Ofcom will be bound to accept that case, except in exceptional circumstances under 186(3), because it is a s.(1A) case.

Ofcom will also be bound to apply the s.190(2A) criteria to that dispute because it is at one and the same time a s.185(1) case and a subsection ----

MR. ALLAN: Why could Ofcom not say in relation to the prioritisation issue that the case falls within s.185(1)(a), and therefore the prioritisation criteria in 186(2) can be applied.

MR. RICHARDS: Sir, I can envisage that Ofcom might argue in a particular case that s.185(1A) is not intended to cover disputes between communications providers, so they might say they had the option to decide not to handle Telefónica's complaint.

MR. ALLAN: It seems a rather unsatisfactory basis for statutory interpretation to say it is up to Ofcom's option as to which way they appraise it. It also seems to me that it is a consequence of your interpretation that in a way the complainant is allowed to cherry pick, you are cherry picking the duty to deal in 186(3) because at that point you categorise the case as a 1(a) case, and then you cherry pick the statutory duties of consideration in 190(2A) because you are treating it as a (1A) case.

MR. RICHARDS: With respect, sir, I am not cherry picking, and my submission at the moment is simply on the application of s.190(2A).

MR. ALLAN: Sorry to interrupt you, it seems to me that it is helpful at least to consider your temporal question in the broader scheme of the statutory structure.

MR. RICHARDS: I would not need to make any arguments as to cherry picking in respect of 186 because, as the Chairman has said, this was already accepted by Ofcom prior to the amendments to 186 coming into force in terms of that distinct question that there is no cherry picking.

MR. ALLAN: I am sorry, my cherry picking comment was about the hypothesis that we are looking at a dispute that comes up today.

MR. RICHARDS: Well, sir, my single submission is that that is the effect of the Statute, and what is clear is that there is no necessity which Mr. Saini would have to show you to imply that even though there are no express transitional provisions to this effect, and there are in other cases, Parliament's intention was that it should only apply in relation to disputes referred after 26th May.

THE CHAIRMAN: Would that be a convenient point to break off, Mr. Richards?

MR. RICHARDS: Yes.

THE CHAIRMAN: Very well, we will continue at 2 o'clock.

(Adjourned for a short time)

THE CHAIRMAN: Yes.

MR. RICHARDS: Sir, I regret to say I was on point one of four in relation to the statute dealing with Mr. Saini's argument on necessary implication. I dealt with the first of the arguments. The second argument was a point about costs.

THE CHAIRMAN: Yes.

MR. RICHARDS: I have addressed that in my skeleton argument at footnote 19 on p.10 of my skeleton, but there are two short points. The first is that the amendments, the costs rules, in fact restrict Ofcom's power to award costs. The second is that the costs rules themselves are in no way logically connected to the test under s.190(2A).

THE CHAIRMAN: Yes.

MR. RICHARDS: My second point on the statute, Mr. Saini suggested that a possible rationale for sub-section (2A) of 190 not applying to sub-section (1A) of 185 is that (1A) of 185 covers price control disputes where the sub-section (2A) factors will already have been considered pursuant to s.88(1) of the Act. And, with respect to Mr. Saini, that submission just cannot be right. May I ask you in tab.8C of authorities bundle A to turn, please, to p.281. In sub-section (1A) one sees that the references to conditions imposed under s.45 without limitation. So, we are talking about any conditions imposed under s.45 of the 2003 Act. If we turn back in the authorities bundle to s.45 itself, behind tab.8B, p.220A, one sees that SMP conditions are but one sub-set of the conditions that may be imposed under s.45. But turning on, please, to p.247 (behind the same tab) to s.87 and over the page to s.87(9) we see that price controls themselves are but one sub-set of SMP conditions. Mr. Saini emphasised yesterday that they were the most intrusive kind of SMP conditions. If we look, then, at the test in s.88 (p.251 of the authorities bundle A) this test only applies in relation to

the setting of a price control. So, it applies only to a very small portion of the total universe of s.185(1A) disputes. In most other such disputes the matters in s.88(1b) were not — had to be considered in that this section would have applied already.

THE CHAIRMAN: I think Mr. Saini recognised it was at best only a partial explanation. What I do not think I had appreciated until you just pointed out, was how partial, how small a proportion of the potential past the point would apply to.

MR. RICHARDS: Sir, that is how partial it is.

THE CHAIRMAN: Yes.

MR. RICHARDS: That is why I say, with respect, that it cannot be right as an explanation, and it must remain, I am afraid to say, a mystery.

THE CHAIRMAN: Well, I was going to say, I am not really sure that it helps us beyond leaving us, as you say, with a puzzle to which there is no apparent answer.

MR. RICHARDS: Except, Sir, as you have observed, possibly a drafting oversight.

THE CHAIRMAN: One is reluctant to speculate about a drafting oversight without compelling evidence.

MR. RICHARDS: Sir, my third point on the statute relates to Mr. Saini's submission that, had Ofcom directed itself that sub-section (2A) of 190 was applicable or potentially applicable, it would also have said that this was a s.185(1A) case and not a s.185(1)(a) case. As to that, there are two short points:

The first, Sir, is the one that you observed yesterday, that this ex hypothesi is an old-style dispute and was accepted as a sub-section 185(1)(a) case prior to 26th May 2011.

The second short answer is that s.190(2A) refers, as I have shown, simply to the definition in s.185(1)(a) and it is common ground that Telefónica, Vodafone and H3G all meet that definition.

Fourthly, one comes to the question, "What is the point of sub-section (2A) of s.190?" And, in my respectful submission, Sir, it would be a bold and an erroneous conclusion for this Tribunal to say that sub-section (2A) is mere legislative superfluity. Its purpose, in my submission, is not actually clear because it had been remarked upon on several occasions including by this Tribunal in *TRD*, that s.190 did not specify the approach which Ofcom should adopt to the resolution of disputes. And it appears that what has happened is that the legislature has decided to insert a specific statutory duty telling Ofcom what its approach should be, and I shall return to that, sir, when I come to my return head of reply submissions at the proper approach.

MR. ALLAN: Mr. Richards, if it was Parliament's intention to fill the gap of statutory direction as to what the approach in 185 disputes should be, it is rather odd that it limits it to a certain class of those disputes, and does not take the opportunity to fill the gap across the board.

MR. RICHARDS: I respectfully agree that it is odd.

MR. ALLAN: So, merely another layer on the mystery.

MR. RICHARDS: Sir, yes.

THE CHAIRMAN: And further fuel for the speculation that it might indeed just be a mistake; in which case we are wasting our time if we are trying to find a rational explanation for it.

MR. RICHARDS: Well, Sir, it is unlikely that sub-section (2A) itself was inserted by mistake.

THE CHAIRMAN: Absolutely. No, the mistake would be the confining it in its reference to s.185(1).

MR. RICHARDS: Sir, yes.

THE CHAIRMAN: So it would be a mistake in the drafting of (2A). I do not mean it was not there, a mistake to put it there at all.

MR. RICHARDS: And my fourth point on the statute was that it must be there for something.

THE CHAIRMAN: Yes.

MR. RICHARDS: And it would be a remarkable conclusion for this Tribunal to conclude that it actually served no purpose at all.

That brings me to the second head of reply submissions context.

MR. ALLAN: Sorry, could I just — but, do you dispute what Miss Carss-Frisk said about, in her summary of the areas of common ground, that it is not your case that sub-section (2A) introduces any radical novelty to the assessment process?

MR. RICHARDS: I do take issue with the way that Miss Carss-Frisk has characterised it.

MR. ALLAN: To what end? Or, are you coming to that later?

MR. RICHARDS: I was going to come to it, but let me deal with it, I can deal with it now instead, sir. Let me do that. The approach which s.190(2A) mandates, I do not accept the suggestion that sub-section (2A) adds nothing to Ofcom's existing duties. That certainly is not common ground.

I agree, Sir, that the matters listed in sub-section (2A) all crop up elsewhere in Ofcom's regulatory duties. My submission was, and remains, that sub-section (2A) adds a specific new thought process which Ofcom is obliged to follow. And I made that submission yesterday. The reference in the transcript is p.25.

THE CHAIRMAN: Yes.

MR. RICHARDS: Sir, "thought process" was not my expression. I had borrowed it from Ouseley J. in a passage from a case which was expressly approved by Dyson LJ in the case of *Baker* which I showed you yesterday. The reference in the transcript is 28-29. And it is para.36 of *Baker*. So, my case is that sub-section (2A) introduces a mandatory and specific thought process. I told you yesterday the questions Ofcom must ask itself in determining a dispute. As I said in my skeleton argument, this is no radical novelty, because on my primary case it is simply an enhancement of the approach which Ofcom was already obliged to follow as a result of its various duties as interpreted in *TRD*. Now, of course, the other parties say that I am totally wrong in my interpretation of *TRD*, so they may characterise it as a radical novelty; but on my primary case, it is not —

THE CHAIRMAN: You place the weight of the section, so to speak, on the words "seems to them most appropriate for the purpose of". That is where one finds this new thought process according to your argument.

MR. RICHARDS: Sir, yes. And I distinguish that careful choice of language with the words used in Ofcom's s.4 duty which requires Ofcom simply to — I say simple, Ofcom may not think it is a simple matter in every case but — to act in accordance with. So that is the difference which sub-section (2A) makes. It creates a mandatory thought process for Ofcom to follow.

THE CHAIRMAN: Well the difference in the wording — for the moment I am slightly struggling to see what the distance in substance is.

MR. RICHARDS: Well, sir, the difference in substance is that Ofcom actually has to turn its mind to the question.

THE CHAIRMAN: Well if you have to act in accordance with it, you would think, because, in order to act in accordance with something, you have to mentally direct yourself to those particular criteria and direct your thought processes accordingly.

MR. RICHARDS: Well, with respect, Sir, s.4 is not quite as specific as that. And my submission is that it is evident in the language of sub-section (2A) that Ofcom must exercise their powers, so this is actually telling Ofcom how to determine a dispute, they have to exercise their powers in the way that seems to them most appropriate for the purpose of securing specified objectives. It follows from that, Sir, inevitably, that Ofcom must ask themselves a series of questions — "What is the way in this dispute that seems to us most appropriate for the purpose of securing efficiency?"

THE CHAIRMAN: It seems to me, if anything, it might be intended to allow a slightly larger degree of subjectivity, for example, where you get the formula "if it appears to so and so",

which is a well-known statutory technique for trying to make judicial review rather harder to obtain.

MR. RICHARDS: Sir, I respectfully agree that it may allow for a greater degree of subjectivity so long as Ofcom actually follows the thought process parliament has commanded it to follow.

THE CHAIRMAN: Yes. And from that point of view it might, if anything, be a slight relaxation of a purely objective s.4 criteria.

MR. RICHARDS: And, Sir, of course the s.4 criteria apply as well.

THE CHAIRMAN: Yes. True. Yes — I think this is getting us nowhere.

MR. RICHARDS: But, sir, it is a very important difference, in my submission, that s.190 sub-section (2A) is not just legislative dead space. It has been inserted in order to give clarity to the Regulator as to how it ought to determine disputes. And when parliament has done that, Ofcom has to follow its duties, and it has to ask itself the questions it has been told to ask, and it cannot say, as I shall come on to, "Well, we think that the way to approach this is to adopt a two-stage test. But, first, we just see what the prevailing charge control is" and, second, we think there are very compelling reasons to depart from it. You cannot do that, not least because parliament has said, "This is how you determine a dispute. You ask yourself these four questions".

So, that brings me to my second head of reply submissions, context. And there are four areas which I should address.

First, the history of flip-flopping. Mr. Saini and Mr. Scott in their note have given a history of when mobile providers started flip-flopping, at para.24-6.

THE CHAIRMAN: Yes.

MR. RICHARDS: We have not seen the evidential basis for it, and for that reason alone we cannot accept it, as such. We think they are probably more or less right, but we do not quite know the basis for it. I would though ask you to note six things about the history: first, H3G started flip-flopping the earliest of all. This was at a time when the effect of such flip-flopping would have been much less significant. We were towards the top of the glide path for the tack, so the tack was at its highest level, and flip-flopping would be relatively less significant.

H3G's flip-flopping to begin with was not as radical as it became, and H3G is, and was, the smallest operator. So in the beginning it was not an issue on Telefónica's radar. Flip-flopping was a phenomenon which started small and snowballed as it rolled along.

THE CHAIRMAN: But gathered no snow from Telefónica.

MR. RICHARDS: No, sir. The second of the six things to note is that the first time flip-flopping came up on Ofcom's radar so far as the evidence before this Tribunal is concerned, was in the April 2010 consultation.

The third point to note is that flip-flopping -----

MR. ALLAN: I am sorry, Mr. Richards, I think Mr. Ward reminded us of the conversations that Vodafone had with Ofcom early in 2009. Do you encompass that in the 2010 consultation process?

MR. RICHARDS: No, I do not, that is a fair point, with respect, sir. Of course, we do not know Ofcom's position on those conversations because we have not seen anything from Ofcom about that.

MR. ALLAN: We have not heard Ofcom deny that the conversations took place?

MR. RICHARDS: No, sir. So far as Telefónica is concerned, it was not party to those conversations, and it is not suggested that it was.

MISS CARSS-FRISK: On behalf of Three, can I just flag, I am not sure if there is any evidence for what my learned friend just said about Three's position, Sir, so I just put down a little marker if I may.

MR. RICHARDS: The third point in understanding the history of flip-flopping is that, as I said in opening the appeal, its commercial impact is not easy to predict in advance, particularly because of mobile number porting and other complexities.

Fourth, it was not until the responses to the April 2010 consultation that there crystallised an industry wide consensus that flip-flopping was a bad thing, and it was not until the notification of the October 2010 charges that Telefónica took the view that these charges were something that it was not prepared to accept and it really had to challenge.

Fifth, the fact that Telefónica did not join in, upon which Miss Carss-Frisk relied, was not considered by Ofcom in its determination for a start, so its relevance is hard to ascertain, and it is also something for which Telefónica can hardly be criticised considering that for Telefónica to join in would only add to the snowballing and consumer detriment.

Sixth, and lastly on this point, there were suggestions by both H3G and Vodafone that Telefónica was guilty of cherry-picking, in a sense, in challenging the October 2010 charges as if we were gaming the disputes mechanism. Sir, that was not something which Ofcom found to be the case, and it lies a bit rich in the mouths of H3G and Vodafone, who indisputably were gaming the charge control, to say that it is us who are playing games.

MR. ALLAN: Mr. Richards, could you just help us a little bit with Telefonica's view on what was said by Three to Ofcom during the determination process. Miss Carss-Frisk took us to

para.4.8 in their submission which is core bundle A, tab 14, p.335, and said that O2 had previously accepted at least 83 flip-flops notified to it by its competitors. Does Telefónica dispute that fact or that claim?

MR. RICHARDS: Sir, we have not counted them up. It is quite possible, but again the response to that is that Ofcom in its determination, which is what is relevant for the purposes of this appeal, made no finding, and it appears nowhere in Ofcom's reasoning that there was any waiver, as it were, by Telefónica in not challenging flip-flopping until the October 2010 charges. It may well be right that these were the 84th set of flip-flop charges, but I am not in a position to confirm it.

The second area in relation to context concerns the 2007 mobile calls termination statement, and the importance which Miss Carss-Frisk attached in her submissions to certainty, which was one of the aims in that statement. The short response to the reliance upon Ofcom's desire to create certainty in the context of MCT 2007 is that again it is hardly for H3G to pray in aid the ideal of certainty to which Ofcom attached importance, when flip-flopping, as the Chairman has observed in the course of submissions, is a cause of uncertainty, regulatory, in my submission, and commercial uncertainty.

Third, the April 2010 decision not to amend the charge control regime and the absence of any appeal against it does not assist Ofcom in resisting this appeal. There are four reasons why that it is so: first, may I ask the Tribunal, please, to look at para.9.126 of the 2010 Consultation in Core bundle B, tab 25, p.1066. What is said in a single sentence in that paragraph is:

> "We have not revised the charge control condition, considering that any risks of harm need to be considered alongside the need to preserve regulatory certainty once a control is set."

These matters need to be considered. It is not suggested that there has been an analysis of the relative costs and benefits or that consideration in any detail has been conducted. Sir, as Mr. Allan pointed out yesterday and Mr. Saini accepted (the reference is p.68 of the transcript), Ofcom's decision not to change the charge control was a question of practicalities in that we were running up to the end of the period anyway.

I ought briefly to address a suggestion by Mr. Ward that he relied upon p.1072 to suggest that Ofcom was consulting on its decision not to amend the charge control. Mr. Ward kindly indicates that was not his suggestion, and plainly that could not be right. That was not something on which Ofcom consulted. Ofcom was consulting on ----

MR. WARD: No, allow me to clarify: our submission was that there was a decision reflected in para.9.126.

THE CHAIRMAN: Thank you.

MR. RICHARDS: I am very grateful to Mr. Ward for that clarification. Secondly, on the April 2010 decision, contrary to what my learned friends and Mr. Saini and Mr. Scott say in their note of yesterday, that was not an appealable decision, and the reason why it was not appealable is s.192(7) of the Act. I do not suggest that the Tribunal turns it up, but in order to make the decision appealable Telefónica would have had to request that Ofcom make a decision. Indeed, the Tribunal might think it would be very surprising if a single sentence recording the fact that Ofcom had not decided to amend the charge control would be appealable, it would be very surprising if it were.

THE CHAIRMAN: Sorry, could you just give us that section number again?

MR. RICHARDS: Yes, of course, Sir, it is s.192(7), and I can give you the reference, it is authorities bundle A, tab 8C, page 301-302.

MR. ALLAN: Interesting question: is it necessary for Telefónica to launch an appeal that Telefónica be the party that made the request in 192(7)(b)? It is an open question: would it be sufficient if, for example, Vodafone or some other party had requested Ofcom to act, Ofcom had declined to act, and then Telefónica can launch an appeal in relation to that decision, that refusal to act? I do not know how far we need to go into this, because we are not actually deciding whether an appeal could ----

MR. RICHARDS: I do not think anybody asked Ofcom to make the decision, so it may be a new point. The answer, Sir, is that it seems not immediately to be clear to me from s.192(7) whether it would be good enough for somebody else to have made the request.

MR. ALLAN: We have probably had enough difficult questions of statutory interpretation not to worry about that one.

MR. RICHARDS: Of course, if we had asked for a decision that would, no doubt, have resulted in a reasoned decision one way or the other supported by analysis which we do not have, something much more extensive than that one liner.

The third point in relation to the April 2010 is that Telefónica was perfectly entitled not to seek to force a decision to amend the charge control for two reasons: first, there were all the practical difficulties I mentioned yesterday, including the fact that the decision making process, certainly any appeal therefrom, might well not have been completed before the new charge control regime came into force anyway. As an amendment to the charge control could only be retrospective it would ultimately have been an exercise in pointlessness.

The second reason we were entitled to adopt the approach was Ofcom's position in the *Vodafone v. BT* appeal at the time (authorities bundle B, tab 29). I do not think it is necessary to turn it up because we have looked at para.28 several times, but may I remind you of the date of the hearing in that appeal, which you will see in the headnote at p.1023 in tab 29. It was 10th and 11th March 2010. So this was Ofcom's position just before the April 2010 consultation was released. What para.28 shows, in my submission, is that Ofcom at that time considered, and were saying that they considered, dispute resolution to be an appropriate way to challenge a charge that was subject to a charge control. That is what I draw in particular from the *Vodafone v. BT* decision. Telefónica cannot be criticised for following an approach that Ofcom had suggested it was perfectly appropriate to follow.

The reason that the dispute only came before Ofcom in March 2011 is, of course, that Telefónica was not entitled immediately to run off to the Regulator. The route requires it to exhaust commercial negotiation before Ofcom will accept the dispute. So there is no basis on which to infer any cynicism in the timing of the reference for determination.

Finally, on the lack of an appeal to the April 2010 decision, in Ofcom's note of yesterday at para.2 there was an entirely new argument, essentially an abuse of process argument, to the effect the dispute jurisdiction was not the appropriate route to follow. May I just make three points on that. It played no part in Ofcom's determination, and so it is strictly irrelevant. It is inconsistent with Ofcom's position in *BT v. Vodafone*, as I hope I have shown, and the reasoning is wrong because Telefónica was not seeking to mount a collateral challenge to the decision not to amend the charge control. Telefónica's challenge was to behaviour which, whether or not it complied with the charge control, was, in Telefónica's view, inappropriate from a regulatory perspective.

The fourth area under the heading of "Context" is scope, the scope of the dispute. In particular, some emphasis was put by Mr. Saini and the interveners upon the fact that Ofcom defined scope as whether it was fair and reasonable to raise the charges in the light of the prevailing regulatory regime.

Two short points. First, Mr. Saini's point is entirely new, and he fairly recognises that he cannot actually seek to take it against me and it in no way restricts the arguments which I run in this appeal, as indeed Mr. Saini properly concedes, and the reference to the transcript is p.59, line 34 et seq.

Secondly, the Tribunal does not have the benefit of any of the correspondence about scope because it is not an issue. Ultimately though, on my case, there is nothing objectionable in how Ofcom have framed the scope of the dispute. They are entitled to consider fairness and

reasonableness in light of the charge control. What is not apparent from the scope of the dispute as stated is that the charge control criteria will be adopted as the sole criteria for dispute determination, and this Tribunal can be pretty confident that had the scope of the dispute been claimed as fairness and reasonableness solely by reference to the charge control, Telefónica would have appealed there and then.

My third head of reply submissions is the approach which should have been followed. I have already dealt with s.(2A) of s.190. There is one additional point I should make on it which is that Miss Carss-Frisk suggested that in connection with s.190(2A) I rely only upon efficiency, that is not right, the reference in the transcript is pp.29 and 30 where I hope in my submissions I made it clear that Telefónica's case is that Ofcom had failed to conduct a s.190(2A) analysis of competition or consumer harm. Efficiency, I said, was a point which worse still, Ofcom had not even touched upon in its determination.

There are three further areas I should address in the context of the proper approach, and it may well be that there is, in fact, considerable common between the parties on this, though I should say just for the record that Telefónica's position is that its own position has remained consistent throughout its notice of appeal and skeleton argument.

The first of the three further areas is the significance of TRD. The case which I advanced in opening is that there are three principles which can be derived from the Judgment which are of general application, and I hope I made it clear that that was my submission.

I do not suggest that the language of para.101 of TRD can be lifted, divorced from its facts and applied in the same words to this case. But I do say that the core principle which para.101 of TRD encapsulates, which is the principle explained in 08 numbers as well (and is my principle no.3) and is directly applicable to the circumstances of this case, and it is this, that Ofcom is required to adopt not a generalised assessment, or a *de novo* assessment, but a holistic assessment of whether any charge is appropriate in the round having regard to all relevant factors including the existing charge control and all of the statutory duties.

Mr. Saini's submission that TRD can only apply to a clean page dispute was a nice piece of forensic art perhaps but proceeded, in my respectful submission, upon a false premise, because there was no blank sheet in TRD. The factual context of TRD was that Ofcom had made a policy decision not to introduce any charge control for 3G services, and that is something which should not be forgotten when considering the extent to which the Tribunal's reasoning in that case is transferable to the present case.

Mr. Saini submitted that the charge control loses its relevance if one adopts the holistic approach for which I contend, (see day 1, p.60) but that is just not right in my submission. It remains perfectly relevant and Ofcom is entitled to have regard to it.

Next, on the proper approach, the approach for which I contend does not undermine or retrospectively amend the charge control. In this regard it must be noted that, at least as I understand it, it is common ground that flip-flopping is a harmful practice which is contrary to the intention of the charge control scheme. It is hard to say that a determination which says that flip-flopping is a bad thing would undermine the charge control.

Next, Miss Carrs-Frisk and Ofcom in the determination are wrong when they say that the charge control regime was the only regulatory regime at the time. Miss Carss-Frisk in particular emphasised those words, and said that when Ofcom made that statement in its decision it was entirely right. But, with respect, Miss Carss-Frisk and Ofcom are wrong because Ofcom is always there. It is always there with its disputes jurisdiction and it was there in the background at the time of the charges; this is different from the tax man because the tax man does not yet have a general anti-avoidance power. Ofcom has, I would not call it a general anti-avoidance power, but it has an additional string to its bow which Her Majesty's Commissioners for Revenue and Customs do not have. Ofcom has that string to its bow because, unlike them, it is a regulator.

THE CHAIRMAN: This may actually just be a semantic point, of course Ofcom were there, so to speak, in the background with their dispute resolution power, which is a third limb of regulation, as is common ground, but the only limbs which were actively engaged at that stage it might be said were the *ex ante* and *ex post* regulatory functions.

MR. RICHARDS: Well in a sense, Sir, that will always be true of the disputes function because it is always looking at disputes ----

THE CHAIRMAN: It brings one right back, one has to read the determination with a fair degree of generosity in the sense that one has to bear in mind it is addressed to people who know what the regulatory system is and one should not, perhaps, be too pedantic in how one interprets sentences saying: "This is the only form of regulatory control which applied".

MR. RICHARDS: Sir, I accept that one should not be overly pedantic. I do not accept that one should necessarily be generous for a reason which I shall come on to shortly.

Lastly, in relation to the question of undermining, or retrospectively amending the charge control, reliance was placed upon the Judgment of Lord Justice Richards in *BT v Vodafone*, but the Lord Justice in that case was directly concerned with retrospective amendment of the charge control itself, that has consequences potentially which exercise of a dispute

resolution does not have and, in particular, it might amount to retrospective penalisation because breach of a charge control can result in, among other things, depending on what exactly happens thereafter, a fine. So there is an important conceptual and practical difference between retrospectively amending a charge control and saying within the context of the disputes jurisdiction, although this is what the charge control says we think that your behaviour – irrespective of compliance – was not acceptable from a regulatory standpoint.

Lastly on approach, may I just deal with Mr. Saini's two stage test? There are two things that are wrong with the two stage test, but before that just a couple of short observations.

It is significant that Mr. Saini appears to accept that stage 1 on its own would not be enough to comply with Ofcom's obligations. Again, he accepts that in identifying the charge control as a relevant *ex ante* regulation and considering compliance with it from stage 1, Ofcom did not have regard to each of its regulatory duties. Mr. Saini disavowed what I might call the "hardcore argument" that it would be okay just to apply the charge control because Ofcom had considered its duties when that control was initially imposed, and the reference to that is p.4 of yesterday's transcript. Mr. Saini said that H3G or Vodafone might take it up for themselves but they chose not to do so.

The other preliminary observation I had was that my submission will be – I will make it shortly – that even if Mr. Saini is right on a two stage test, Ofcom still erred in law in the way it applied it in this case.

But to come to the three reasons why the three stage test is wrong. First, it is contrary to s.190(2A) as I have intimated because it does not admit of any opportunity for Ofcom to ask itself the necessary series of questions: what is the way of resolving this dispute that seems to us most appropriate for securing each of the listed regulatory objectives.

The second thing that is wrong with the test is that ----

MR. ALLAN: I am sorry to interrupt you, but why does it not admit of the possibility? Would it not be a question of the way in which the second stage in Mr. Saini's structure is actually applied, and in the sense the weight that is given to those factors in that process?

MR. RICHARDS: I think the way that Mr. Saini described the test as working is that first you apply the charge control, and second you ask, by reference to your statutory objectives, are there any compelling reasons to depart from this approach.

MR. ALLAN: So you are saying that in framing the test that way Mr. Saini is giving inadequate weight to the criteria in (2A), or is that not it?

MR. RICHARDS: No, it is a question of substance as to the actual substantive thought process which s.190(2A) requires Ofcom to engage in. Mr. Saini, as I understood his submissions,

did not suggest that Ofcom ever asked itself the question: what is the most appropriate way for securing X, Y, Z regulatory objectives?

MR. ALLAN: That takes you back probably to the question whether (2A) applies to this case at all.

MR. RICHARDS: Sir, it does.

MR. ALLAN: But looking at a dispute that comes up now, which exclusively falls within (1)(a) and so engages (2A) Ofcom will have to go through that process and it may take the view that where there is an applicable charge control in that context that Mr. Saini's two stage approach should apply in that context, modified to allow for the (2A) duties to be discharged; that seems to be a possible way of approaching it.

MR. RICHARDS: I certainly would not rule out that it would be possible to devise a two-stage test which did comply with a s.190(2A) duty. My submission is simply that if I am right on the effect of subsection (2A) of s.190, Mr. Saini's test, which he has articulated, does not meet it.

MR. ALLAN: In the circumstances of this case?

MR. RICHARDS: In the circumstances of this case. The next point, though, is that even if you are not with me on subsection (2A) and think it adds nothing, Mr. Saini's test is not good enough because it does relegate consideration of Ofcom's statutory obligations to a secondary status and I would ask the Tribunal to compare in this regard para.88 of the judgment in *TRD* which is in the authorities bundle B at tab.25, p.877. Just beginning at para.87 on that page in the quoted passage from Ofcom's defence, where it describes the exercises as appropriate, just halfway through that, Ofcom's case was:

> "In considering a dispute, Ofcom identifies the relevant regulatory framework and, in particular any existing *ex ante* obligations applicable to the parties. The methodology applied by Ofcom seeks to ensure that parties' freedom to determine their price is curtailed only insofar as necessary and proportionate <u>to fulfil the objectives of such obligations</u>".

So, that is stage 1, identify the relevant regulatory framework.

> "Ofcom will, however, also consider whether <u>there are any overriding policy objectives which should be taken into account</u>".

Effectively, that is Mr. Saini's stage 2. And the Tribunal addressed that attitude, that approach, in para.88, in particular the second sentence I would ask you to underline:

> "Any other considerations arising from Ofcom's statutory duties were … relegated to the consideration of whether there were 'overriding policy

objectives' which should be taken into account. This approach represented a fundamental error as to the task facing Ofcom in determining these disputes".

And my respectful submission is that Mr. Saini's two-stage approach makes the same error.

THE CHAIRMAN: But, he says all the difference is made by the fact that here, we have the existing charge control regime as an admittedly highly material starting point. And, in any event, I mean, we are not necessarily bound to agree with every single nuance of the judgment in *TRD*. It is an example of another Tribunal dealing with a different case and giving some general guidance. But I just would not construe it as though it were a statute.

MR. RICHARDS: No. Of course. I must accept that, sir. Mr. Saini does rely on *TRD* himself.

THE CHAIRMAN: I know he does, yes. I mean, you both seek to get help from different bits of it.

MR. RICHARDS: And, may I just explain why *TRD* does not support the two-stage test which Mr. Saini defends? In particular he relied upon paras.187-188 suggest that the Tribunal thereby approved the cross-checking approach which Ofcom took in this case. Those paragraphs, with respect, do not support Mr. Saini's submission.

First, I would note that s.187 itself says nothing about the stage in the analysis at which Ofcom's regulatory duties should be discussed. It simply says that the Tribunal would expect to see some discussion, perhaps unsurprisingly; and I would ask you to note, about six lines from the bottom of the page, it is not sufficient simply to refer to the relevant provisions of the legislation in general terms.

But, perhaps more importantly, Sir, s.187 cannot simply be plucked out of context. It is part of a coherent set of general guidance given by the Tribunal and to the extent that that general guidance is applicable — I say it is — one has to look at it as a whole.

Turning back to para.178, p.913 in the second sentence Ofcom says (Ofcom does not say, the Tribunal says) that:

> "Ofcom's first task is therefore to examine the reasons put forward for the proposed change in terms and decide whether they are justified. In considering this question Ofcom must have regard to what is fair as between the parties and what is reasonable from the point of view of the regulatory objectives set out in the Common Regulatory Framework directives in the 2003 Act".

So, I say that that is the starting point, a consideration of what is reasonable from the point of view of the regulatory duties.

Turning back, Sir, to para.188, Mr. Saini made a submission that the Tribunal there suggested that the way to consider your general duties in a stage 2 analysis by inviting

responses on the draft determination. With respect to him, that is not quite what the Tribunal said. They say that:

> "The principal way in which Ofcom ensures that relevant interests are taken into account is by consultation and the publication of a draft determination".

And there is certainly no suggestion that it will be appropriate for Ofcom to come up with a draft determination in which it had not considered any regulatory duties, send it out to the parties and say, "Now, tell us how to comply with our legal obligations, please, because we have not thought about it the first time round".

THE CHAIRMAN: It may be that is not ideal procedure, but if that is what in fact they do, and if the relevant considerations are then put before them and properly taken into account, it may not be an ideal procedure, but nevertheless it would end up being acceptable, would it not?

MR. RICHARDS: Sir, yes. And, as I said in opening, s.4 provided Ofcom with a chance to rescue the determination.

THE CHAIRMAN: Yes.

MR. RICHARDS: And my submission is that it failed to do so.

THE CHAIRMAN: Yes, and the real dispute between you was whether s.4 is sufficient for their purpose, I think, is it not?

MR. RICHARDS: Sir, I think it is.

THE CHAIRMAN: Yes.

MR. RICHARDS: And that brings me, if I may come to it now to the decision itself, on which I have four areas in which I should address the Tribunal. The first one, it is a simple point, that Ofcom is stuck with what it had actually said. It is stuck with the decision. Mr. Saini has submitted that the Tribunal could safely assume that Ofcom had not forgotten the reasoning set out in its previous consultations; or the reasons why it had chosen not to amend the charge control. The implication of his submission was, I think, that if the Tribunal thought the reasoning in this decision rather bare, it could clothe it in a generous interpretation by reference to what Ofcom has said elsewhere. To a limited extent, that sort of argument can work in an ordinary public law case. It does not work here because we are not in a plain vanilla public law case. We are governed by Article 20 of the Framework Directive. Can I ask you please to turn up, in authorities bundle A, tab.4, p.99.

I would draw the Tribunal's attention to para.4 of Article 20.

> "The decision of the national regulatory authority shall be made available to the public, having regard to the requirements of business confidentiality. The

parties concerned shall be given a full statement of the reasons on which it is based".

THE CHAIRMAN: I am not sure that is necessarily inconsistent with the proposition that when you read the determination, you should do so in a way which takes account of the fact that this is a responsible government body fulfilling a public function and addressing its decision to people who know perfectly well what the relevant background is. I mean, it is a question of degree, I accept.

MR. RICHARDS: It is a question of degree. But in assessing how generous one can be, in reading things into the decision that are not there, one has to bear in mind, in my submission, that there is a positive obligation under European law that Ofcom's obligation should be stated in full.

THE CHAIRMAN: Yes.

MR. RICHARDS: It is an express, enhanced, well, it is an expressed duty to give full reasons. And, as such, we are not quite in the same territory as the Tribunal was considering in the *BAA* case, where what was considered was the adequacy of reasons as a matter of ordinary English public law.

Sir, my second submission on the determination is that, whether I am right about *TRD* or whether my learned friend Mr. Saini is right with his two-stage test, and perhaps it does not make that much of a difference, Ofcom did not pay adequate regard to its duties. Mr. Saini has said, he said yesterday or perhaps he said it this morning, that there is no challenge to Ofcom's assertions that it has taken matters into account. Now, one has to be quite careful, in my respectful submission, in looking exactly at what Telefónica's challenge is. There certainly is no allegation at all of bad faith; but there is an allegation which is made fair and square that Ofcom's decision does not comply with its statutory duties to consider certain matters. And in particular, at para.56(1) of my skeleton I make the point that invocation of a statutory duty is not good enough. We saw that in the *TRD* decision. You cannot just refer to a statutory duty. You have to actually conduct some sort of analysis, and Article 20 requires you to give full reasons, so you need some explanation of what the analysis had been. Sir, that is a very important point because what I rely upon in saying that Ofcom did not comply with its duties, is not that it did not mention them — of course it mentioned them, but I rely on the absence of analytical consideration of, in particular, efficiency, historic competitive and consumer harm. And in the light of that absence, I say that the incantation of the relevant statutory provisions will work their magic.

It is important to be clear that this is not attack on weighting. I do not say that Ofcom has got the weight wrong. It has not done the necessary exercise to allow it to put one relevant factor into the scales. May I seek to make that good by reference to an example, efficiency, and I would ask the Tribunal to turn, please, in the Determination to para.4.34, which is Core bundle A, tab 11, p.276. Ofcom record the argument that Telefónica had made in relation to efficiency by reference to the April 2010 consultation:

> "… '… flip-flopping allowed [MCPs] additional revenue beyond that envisaged by the regulator … and ran counter to the efficiency objectives served by allowing price signals to indicate the relative costs of meeting peak demands'."

May I just observe that my learned friend Miss Carss-Frisk suggested that Telefónica did not raise the question of inefficiency. Ofcom certainly seem to have understood Telefónica to have raised that issue.

Ofcom's only response to that argument is at para.4.41 where it says:

> "We agree that Ofcom must have regard to the objectives identified by O2 and [Cable & Wireless) in resolving disputes. For the reasons set out at para.3.38 above, we considered that in the context of the particular conduct that is in Dispute (i.e. flip-flopping in October 2010), our Draft Determination was consistent with these duties.
>
> "We do not consider the comments received alter our assessment of the Dispute. We maintain that our Determination is consistent with the general duties in section 3 of the Act and the six 'Community requirements' …"

Then specific responses are given to submissions made by Cable & Wireless, but not to Telefónica point about efficiency.

Ofcom did refer to para.3.38, but turning back to that, p.270, there is not any discussion on efficiency.

THE CHAIRMAN: They are entitled to rely on their finding in 3.38 to the effect that the ongoing effects of any proposed determination on this one month of charging would be negligible. It must follow from that the efficiency considerations are equally not engaged in any substantial sense in this particular case, must it not, bearing in mind we have to focus, because this is the way the original dispute was referred to them, on this one month in isolation, although of course viewed in its broader context as well?

MR. RICHARDS: Sir, that is what we have to focus on, this month. What Ofcom do not do is actually look at this month and any efficiency impact. What they say is, "We do not really think it is a problem any more because we have sorted it out with the new MCP statement".

That is the thrust of it. There is not any quantitative or other assessment of the extent to any inefficiency caused by the October 2010 charges. In my respectful submission, Ofcom cannot rely upon mere mention of the Community objectives. It needs actually to give some sort of reasoned basis, otherwise it does not comply with its duty.

THE CHAIRMAN: I agree a mere mention may not be enough. Here there is a cross-reference back to 3.38 and the message that seems to me to come through fairly clearly is that in the wider context of things this is all practically *de minimis*. It is just what happened in one month in a situation where the whole situation is going to be put on a fresh basis from 2011 onwards anyway.

MR. RICHARDS: Sir, the difficulty with that in terms of 3.38.1 is that there Ofcom expressly is only dealing with the interests of consumers and the promotion of competition. It does not actually address efficiency in the section to which it refers.

THE CHAIRMAN: Can you suggest a way in which efficiency might have anything to add in that context? What different considerations could there be? It is not as though Telefónica provided any evidence or arguments to support such an argument.

MR. RICHARDS: What one would primarily see would be a discussion of what Ofcom itself thought about how flip-flopping caused inefficiency. That is not there.

THE CHAIRMAN: That has all been dealt with at length surely in the consultation, and so on, and here we are focusing on one particular month.

MR. RICHARDS: There is no assessment whatever of inefficiencies caused by the charges in that month.

THE CHAIRMAN: Probably because it is practically *de minimis*, or at least maybe that is the reason.

MR. RICHARDS: Sir, the difficulty is that the Tribunal cannot assume that had Ofcom asked itself – consider, for example, the s.190(2A), what is the way which seems to us most appropriate to determine this dispute to secure the objective of promoting efficiency? One cannot exclude the possibility, if Ofcom conducted the exercise it was legally required to do, that it would have reached a different conclusion.

THE CHAIRMAN: This is all highly theoretical unless you can suggest some really tangible potential counter-argument which might be advanced and where it might be said, had they taken that into account, they really might have reached a different conclusion.

MR. RICHARDS: Sir, it is a question of the legal approach one adopts.

THE CHAIRMAN: From our point of view they have adopted the right legal approach. They have referred to your argument which mentioned deficiency, and they have dealt with it,

admittedly in a rather oblique way, by referring back to what they said in 3.38. So one then has to read it, give it a reasonably benevolent reading to try and work out what they are saying.

MR. RICHARDS: One has to give it a benevolent reading. One has to assume also that Ofcom have complied with their duty to give a full statement of their reasons. These are as good as the reasons get. My submission is that they are not good enough, in particular in relation to efficiency, because it is not even mentioned. Ofcom does explicitly confine discussion in 3.38.1 to a consideration of consumers and competitive harm.

Another example of where Ofcom has breached their duties by failing to conduct the necessary analysis is into that question of historic competitive consumer harm. 3.38.1 is very much looking at the prospective basis, but I intend to come to that shortly, if I may, in relation to the question of materiality.

There is one last point on this particular point on the decision which is the extent to which Ofcom has to investigate of its own motion. It is not my submission that Ofcom is bound to act as a roving investigator. That is obviously putting it too high, and I do not do so. On the other hand, it is common ground that Ofcom has to do something more than a mere arbitrator might. I rely in particular upon the judgment of the Tribunal in TRD at para.180, where the Tribunal, in my respectful submission, very sensibly said of course Ofcom does not have to embark upon an investigation in all cases. That is not to say that Ofcom must, as a matter of course, consider everything afresh, but Ofcom must at least consider whether it should investigate more clearly. In circumstances where, for example, efficiency has been fairly and squarely raised by Telefónica, my submission is that is a matter which Ofcom, as a Regulator, has to think about and form an assessment on, even if it takes the view that Telefónica has failed to discharge the burden of proof or to adduce any evidence. The situation with historic consumer and competitive harm is rather different because Telefónica did advance specific evidence to which I will come in relation to the question of materiality.

The third point on the decision is a very short one. Even if Mr. Saini is right on his two stage process, my submission is that even stage one of Ofcom's analysis was not properly considered. That is my Ground 5 of appeal. Ofcom had no basis to work on the assumption or proceed on the premise that there was compliance with the charge controls. Just a couple of notes in this regard: at the time Telefónica referred the dispute, it would, in fact, have been impossible to allege non-compliance with the charge control as such because the relevant year had not yet finished. It finished in March 2011.

The Tribunal has, I think, observed that the assessment of charge control compliance would be a rather large exercise to embark upon considering that only the October 2010 charges had been challenged. The answer to that is the answer I gave yesterday, that this is a rod which Ofcom had chosen to make – they had made this rod for their own backs.

Fourthly and finally on the decision, are the flaws in Ofcom's resort to compelling reasons as a get out clause. Three short points: the resort to compelling reasons, in fact, does not act as a safety valve, it acts as a fetter on Ofcom's discretion and an impediment on a proper consideration of its duties. I repeat the point that I made in relation to the paragraphs of TRD where Ofcom's suggestion that an exceptionality approach was acceptable was specifically rejected.

The next problem with the compelling reasons approach is that one needs to conduct a proper analysis before one can tell whether there are compelling reasons. The danger of Mr. Saini's approach – in my respectful submission, it is a danger which crystallised in this case – is that considerations are dismissed before the analysis has been properly undertaken.

Thirdly, Mr. Saini was asked what exactly would constitute compelling reasons on his case? He gave, I think, only one example which was of flip-flopping targeted at an individual provider. With respect to my learned friend that is a bad example because that would already be in breach of the SMP conditions. Ofcom would not need to resort to compelling reasons. Condition MA2.1, which the Tribunal will find in core bundle B, tab 21, p.839, contained a prohibition on undue discrimination.

A better example, I would suggest, of a case where there are compelling reasons, even if Mr. Saini is right on his approach, would be general flip-flopping targeted against everyone but which causes particular harm to the complainant because the complainant is the sole mobile operator who is not up to it as well – that is to say this case.

MR. ALLAN: Can I just be clear about that, because although Miss Carss-Frisk raised this morning the possibility of Telefónica seeking, in a sense, to offset the damage that it suffers by engaging with … I understand your response to that proposition, but even if you accept it, it is not actually an offset in any way. There is no way that an operator can offset the damage caused by flip-flopping except by his own conduct in relation to the way in which it prices its own products to its consumers, and that is the point that Ofcom make about the generalised effect of flip-flopping on consumer prices. So I am not quite sure how your example of a compelling reason which happens neatly to fit this case, and where there is flip-flopping vis-à-vis all operators which particularly adversely affects the complainant because the practice of flip-flopping will have an effect on all originating suppliers.

MR. RICHARDS: Sir, that is right, although if you do not flip-flop you are likely to be worse off – certainly that is the position that Vodafone took, that they had to start flip-flopping because everybody else was.

MR. ALLAN: Well we do not know why Telefónica has not flip-flopped and, given where we are, I think it would be wrong for us to make a Judgment about why that is the case. It could be that Telefónica have made a rational decision that, given its core mix, and so on flip-flopping would not be a sensible commercial strategy.

MR. RICHARDS: I do not think there is any evidence ----

MR. ALLAN: There is no evidence at all one way or the other so, as I say, I do not think we can take that either against you or in your favour, we just have to accept it as a fact you did not do it.

MR. RICHARDS: Sir, yes.

THE CHAIRMAN: I am not sure that helps us any further.

MR. RICHARDS: Well the non-flip-flopping mobile provider is still worse off to the extent that all its competitors are milking more than Ofcom intended from the charge control regime and they are not doing the same.

THE CHAIRMAN: That brings us back to the same question: why did you not join in too? It is not as though you have put before us any sort of high minded policy positions, it is not something you wanted to be associated with or anything of that sort?

MR. RICHARDS: Sir, no. My submission was that Mr. Saini's example, which was the only one he could come up with was not a good one because that would actually be a breach of the charge control.

THE CHAIRMAN: Yes, I take that point.

MR. RICHARDS: So the only other case I can think of is my case.

MR. ALLAN: Well, what I was trying to suggest to you, I am not sure I am convinced yours is a very good example either which leaves us in the unhappy position of having no good examples, which may also make your case.

MR. RICHARDS: Sir, in my submission, that does rather tend to show that the second stage of Mr. Saini's test is effectively defunct, if one cannot think of any practical examples of how it would work.

MR. ALLAN: I suspect it shows the danger of speculating about these things outside a set of precise facts.

MR. RICHARDS: Sir, that may be right. There was an example in my skeleton argument, a rather different example, and this was in support of a submission that regulatory certainty

plainly cannot trump everything, and it was that a provider might, whilst complying with a charge control, abuse its dominant position by a margin squeeze and actually Telefónica, as I have explained in my skeleton, in Spain was found to have abused a dominant position by the Commission, notwithstanding the fact that the national regulator had found compliance with the charge control.

MR. ALLAN: Is not the particularity about that case that the third limb of the regulatory structure, which we have not talked about *ex post* competition law comes into play and alters the dynamic of debate. You in your skeleton went on to say *a fortiori* the same applies where the terminating supplier is not in a dominant position, it is probably a difficult concept given the view that all terminating suppliers have market power over those calls, but I am not sure that the *a fortiori* argument works because the absence of dominance is quite an important differentiating factor.

MR. RICHARDS: Where you have an abuse?

MR. ALLAN: I do not think you can readily accept from the notion that there is an abuse where the terminating supplier is subject to Article 102 and Chapter II controls into the way which you look at it in a dispute resolution.

MR. RICHARDS: I accept that they are different jurisdictions in which different considerations apply.

MR. ALLAN: And one does not necessarily move from one into the other very easily.

MR. RICHARDS: Sir, no, not necessarily. On my final topic, materiality, I have four points.

First, as I submitted yesterday, and nobody has taken issue with this submission, the scope for refusing to uphold an appeal on the grounds of immateriality is very limited. The Tribunal must be satisfied that the same decision would be inevitable and to that end the Tribunal would have to find in the decision itself and not in the assertions of my learned friend, Mr. Saini, reassuring as they always are, that nothing could have changed.

Secondly, let me say something in regard to materiality about the absence of any challenge to the facts in my appeal.

Telefónica has made it clear in the notice of appeal that it does not accept the factual findings of Ofcom, the reference is para.32 of the notice of appeal, but it advances no factual challenge in this appeal and has confined itself to what, in my submission, are Ofcom's legal errors.

In my respectful submission that is an entirely legitimate approach for Telefónica to adopt. It is a proportionate approach in particular because, if I am right on the law, it means that this Tribunal does not need to deal with the complexity of the factual disputes and I can say

with some confidence that had this been a full factual appeal we would have overrun not by an hour and a half at the last count, but probably by a week on a time estimate of a day and a half.

Lastly on the absence of any challenge to the facts, I do not think my learned friend, Mr. Ward, meant to suggest it, but if he did you were certainly not in a position to consider for yourselves the merits of the underlying dispute and hold that my appeal should be dismissed because in this Tribunal's view Ofcom's decision was right. The Tribunal is not in that position because it is not a factual appeal.

MR. WARD: Can I confirm that I did not mean to suggest that.

THE CHAIRMAN: Thank you.

MR. RICHARDS: In particular I would remind the Tribunal of s.195(2) of the Communications Act which requires the Tribunal to determine the appeal not only on the merits but by reference to the grounds of appeal, and those are of course only grounds of law.

Thirdly, a short point, I entirely and respectfully agree with Mr. Saini – these are his words – that it is difficult for the Tribunal to put itself in Ofcom's shoes and second guess Ofcom as to the balance between harm and legal certainty (p.65 of yesterday's transcript). I agree that it is difficult. In fact, in my submission it is impossible because Ofcom has not put into the scales the harm side of the balance, and that is why in my respectful submission the Tribunal just cannot be satisfied of the inevitability of the outcome.

Lastly, Mr. Saini made a submission yesterday about what I needed to show to justify the Tribunal remitting the matter. Does the Tribunal have the transcript for yesterday?

THE CHAIRMAN: Yes.

MR. RICHARDS: Could I ask you to turn, please to pp.71 and 72 of the transcript? Sir, at the bottom of p.71 Mr. Saini helpfully described what I had to do.

> "What he must do before this Tribunal is identify some fact, some economic fact relating to Telefónica business or the industry generally which convinces this Tribunal that there would be any purpose in remitting this matter if you thought there was otherwise an error of law. There is not any purpose because there would be no different result in this case."

Then, Sir, over the page you asked Mr. Saini:

> "THE CHAIRMAN: Was any evidence placed by Telefónica before Ofcom about the particular financial prejudice ----
>
> MR. SAINI: There was very limited evidence, and one sees in the Determination."

Then Mr. Saini took the Tribunal to the Determination. Then at line 12:

> "All that they said, and one sees this from this actual dispute reference which I showed you earlier this afternoon, "We have been charged too much". The Tribunal can go back and look at the factual case that was put by Telefónica. They do not say very much other than, "We have been charged too much and we do not like this". Had they gone the extra mile and said, "And the result of this, bearing in mind this is only October 2010, was that we suffered in our business in particular ways", one can understand there may have been something of a case in relation to these other Community law requirements, but they did not do that."

Sir, you said to Mr. Saini that that is what was occurring to you.

> "I can see perhaps force in an argument that even though Ofcom has decided for the future to regulate the position generally with effect from the new regime coming into force in 2011, if nevertheless a particular operator can show it, itself, has been caused financial prejudice by an application of an admittedly abusive process, in crude terms why should it not be able to recompense via the dispute?"

And Mr. Saini accepted it would be a very powerful factor to put into the mix. My submission is that Telefónica did put such evidence before Ofcom, and Ofcom failed properly to consider it. In fact, Mr. Ward has taken the Tribunal through this, but I ought just to re-emphasise what was said and what evidence was produced. First, in the reference itself at para. 26 in core bundle A, tab 12, p.297 which Mr. Ward has helpfully shown you already. Telefónica set out the additional costs, not just their charges but the excess charges on its case, to which it has been exposed, and the Tribunal will see there that those confidential figures are substantial, and substantial in absolute terms, if not relative to the total size of the industry.

These figures were queried by Ofcom and behind tab 13 the Tribunal will find at p.322 a request for a full breakdown of the figures which Telefónica relied upon. "Once we have this information we will open the enquiry and write to you again." Back on p.321 Telefónica wrote to Ofcom explaining its methodology, but across at p.320 Ofcom said: "It is helpful to see your methodology but can we have your underlying data", Ofcom here behaving as a regulator determining a dispute ought to, seeking to obtain information they thought necessary for the termination of the dispute.

Back on p.319 an email from Mr. Wardle of Telefónica responding and attaching the spreadsheets one finds at the back of that tab, p.325.

Moving on in tab 16 to a document which Mr. Ward showed you at p.356 of that tab, Telefónica explained why this just was not a complaint about being made to pay too much,

it set out the substantial figures, noted the net difference and translated that into how many subscribers could thereby be acquired making the point that, as a result, the parties are not effectively competing on the merits in the market because Vodafone and H3G have been able to obtain increased revenues through the charging of unfair and unreasonable practices.

THE CHAIRMAN: What this really boils down to is an attempt to claim consequential loss without satisfying the test of causation, this is just wild speculation. It is a rock edifice built upon nothing as far as I can see.

MR. RICHARDS: Sir, with respect, that is not at all what it boils down to because Telefónica is not seeking in this submission to claim consequential loss, it is seeking to make good its case that the payments of those sums are calculated to distort competition because Telefónica, Vodafone and H3G are competitors on the market; if one of them is forced to pay a sum, which it should not have paid, to the others – a very substantial sum, it will allow its competitor a significant competitive advantage which Telefónica vividly illustrated by reference to the example of the number of subscribers that could have been acquired, and the Tribunal will see that the numbers, which I will not read out in open Tribunal, are large. Then again, in its submissions on the draft determination at para. 21 and following in tab 18, p.404 Telefónica set out detailed submissions on the effect on consumers, relying again at paras. 24 and 25 upon the submissions it had made earlier, and interweaving those submissions with reliance upon Ofcom's own policy statements, for example, the 1st April 2010 consultation.

So, Sir, these were submissions in relation to the historic impact of the October 2010 charges on Telefónica. Ofcom might have said: "We do not know, this is not a full factual appeal". Ofcom might have said: "Telefónica we have considered your suggestions that the payment of those sums was calculated to distort competition, we take the view either that it would have no effect on the subscribers, or what you are saying is insignificant", or something to that effect. But it did not. It does not grapple anywhere in the decision with the historical effect on Telefónica's business, which Mr. Saini yesterday accepted would be justification to remit this matter to Ofcom, and in my respectful submission it is obvious that Ofcom ought to have conducted an actual reasoned assessment of the submissions which I have shown you even if only to consider whether there were compelling reasons to depart from the criteria in the charge control.

So even on Ofcom's own case there is a fundamental deficiency in the decision which demands that this appeal be allowed.

Unless I can assist the Tribunal further, those are my submissions in reply.

THE CHAIRMAN: Thank you very much indeed, Mr. Richards. Miss Carss-Frisk?

MISS CARSS-FRISK: There is a point of clarification I need to raise, I am afraid, if Mr. Richards has indeed now completed.

THE CHAIRMAN: Yes.

MISS CARSS-FRISK: It is just a little point about Mr. Richards saying we were wrong in our submission in saying that he had said that they were focussing only on efficiency as a factor under s.190(2A), and here I need to just point you to the transcript to make clear what I relied on in making that submission. It is p.27 of yesterday's transcript and, starting at line 4 on p.27, you, Sir, were putting to Mr. Richards:

> "By saying they considered the six Community requirements, have they also by necessary implication, considered the four issues that are identified in sub-section (2A)?

Mr. Richards:

> "If it were suggested, and if Ofcom actually had considered every single one of the facets of those Community requirements they would, in the course of doing so, have had to consider each of those four items. However, it is common ground, as I understand it, that Ofcom did not give any consideration in its determination to (a) efficiency; or (c) efficient investment and innovation.
>
> Now, I do not rely on the failure to give consideration to efficient investment and innovation ----"

So by a process of deduction we arrived in that context at: it is efficiency only. Thank you.

THE CHAIRMAN: Thank you very much. Good, well I think that concludes the oral proceedings. Thank you all very much for the excellent arguments we have had the benefit of listening to for which we are genuinely grateful, and we will produce a written decision in due course.

Thank you all very much indeed.

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