**IN THE COMPETITION APPEAL TRIBUNAL**

Case Nos. 1237/3/3/15
1238/3/3/15

Victoria House,
Bloomsbury Place,
London WC1A 2EB

18 June 2015

Before:

**ANDREW LENON QC**
(Chairman)
**WILLIAM ALLAN**
**PROFESSOR COLIN MAYER**

(Sitting as a Tribunal in England and Wales)

BETWEEN:

**TALKTALK TELECOM GROUP PLC** Appellant in Case 1237

- v -

**OFFICE OF COMMUNICATIONS** Respondent

**BRITISH TELECOMMUNICATIONS PLC** Appellant in Case 1238

- v -

**OFFICE OF COMMUNICATIONS** Respondent

**SKY UK LIMITED** Proposed Intervener

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# CASE MANAGEMENT CONFERENCE

# A P P E A R AN C E S

Mr. Meredith Pickford QC and Mr. Stefan Kuppen (instructed by TalkTalk Legal) appeared on behalf of the Appellant (TalkTalk Telecom Group Plc).

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

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

Mr. Kieron Beal QC (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Proposed Intervener, Sky UK Limited.

Mr. Robert Palmer (instructed by CMA) appeared on behalf of the Competition & Markets Authority.

THE CHAIRMAN: Good morning.

MR. THOMPSON: Sir, I appear on behalf of BT with Mr. Gibson and Miss Davies. You have the honour of having Mr. Pickford QC for TalkTalk, Mr. Palmer for CMA, Mr. Beal QC for Sky and Mr. Holmes and Mr. Jones for Ofcom, going along sequentially.

The Tribunal will have had our various responses and I am very much in the Tribunal's hands whether you want to hear from me on the basis of my skeleton argument, or whether you want to take the issues one by one, or how would be most convenient for the Tribunal to deal with it.

THE CHAIRMAN: Yes, thank you. We planned provisionally to run through the items in the order in which they are set out in the agenda, and to ask the relevant parties to advance their cases. We will then retire and rule on the various matters in one go, as it were.

MR. THOMPSON: Yes. The first item is the question of interventions. I think the BT application to intervene is uncontroversial; certainly, TalkTalk has not contested it. I do not know whether you want me to address all the issues of intervention at once, or whether we will take that one and see if there is any objection, and then if you want to deal with the other applications to intervene or shall I respond to the issue generally?

THE CHAIRMAN: There is no objection to BT's intervention in the TalkTalk appeal.

MR. THOMPSON: In relation to TalkTalk and Sky we see the good sense of TalkTalk being permitted to intervene in the CMA grounds that BT advances, effectively, though perhaps not surprisingly, TalkTalk thinks the condition could be made a bit stricter, whereas we, so far as the CMA grounds go, consider it could be made substantially less strict. Those issues obviously go together and we have no objection to TalkTalk intervening in our appeal in front of the CMA.

So far as the cap goes, insofar as there are non-specified price control matters that require resolution by the Tribunal, and I think it is agreed that there are at least some, then our basic position is that the case is not really made out for Sky and TalkTalk to intervene on the specific grounds which are run, which are essentially issues of either procedure or law. In particular the Tribunal will have seen that we have effectively three elements to our Ground 1, which are, first, that the market analysis that appears in s.3 of the final Statement is inadequate.

Secondly, there is an error of law and a misapplication of the guidance of the Court of Appeal in the H3G case.

Thirdly, and relatedly, there is a failure to take into account the restrictions of competition law on BT which is obviously related to the issue of law that we raise under 2, and we do

not, ourselves, see any burning need for Sky or TalkTalk to contribute to Ofcom's defence, which is essentially a matter for Ofcom to make out that it was correct on the law, and that its market analysis was sufficient.

In relation to the other two Grounds, Ground 2 and Ground 3, insofar as they are non-specified price control matters, we would say, again, it is very much a matter for Ofcom whether it took sufficient account of the Commission's comments. First, we would say that it actually made the conditions stricter (the Commission having said that it should be made less strict) and more restrictive. Secondly, we say that the response was contrary to the EU principle of legal certainty. Again, we do not see that those are issues that would particularly benefit from further contributions from private parties. That is our position, but there is an obvious fall back that if the Tribunal considers that these two parties, who clearly are retail competitors of BT, have a role to play, it should be a circumscribed role, either in terms of written observations or written statement of intervention, or if it goes beyond that, it should not go much beyond that and that that would have a significant impact in relation to disclosure and the length of the hearing and matters of that kind. So, that is our position in relation to those two statements of intervention.

Would it be convenient for me to let the others say what they want to say?

THE CHAIRMAN: Yes, thank you very much. Mr. Pickford?

MR. PICKFORD: Thank you, sir, members of the Tribunal. The issue in relation to BT's appeal is whether we are allowed to intervene in the non-price control matters. Obviously, Sky is in a different position because BT does not actually concede in relation to any part of its appeal, but I am not going to address the price control matters, because it has been conceded by BT.

We say that the question of whether a price control is imposed on BT to prevent BT from price squeezing TalkTalk and others, including Sky, is manifestly of very great importance to TalkTalk and others, such as Sky. Ensuring that we are able to remain effective competitors in the market is an essential objective of the regulation itself. If one could just very briefly turn to the Statement, which is to be found, for instance, in our appeal bundle at tab 4 – I do not know whether the Tribunal has a separate version. If one goes to para. 3.112, and in fact just before that looks back to start on p.40. On p.40 we see a title: "Options to Achieve our Regulatory Aim", so these are the remedies that are being considered by Ofcom in relation to the concerns it has about price squeeze.

Then, on p.42 under the title of "Effectiveness of Options 1 to 3 in Achieving Our Aim" it looks at the effectiveness of the different options.

It concludes, in relation to option 2, at para. 3.112 as follows

> "Currently, there are four large broadband suppliers, namely BT with a share as described around 30%, and Virgin, Sky and TalkTalk with a share of around 20%, 20% and 15% respectively. While we consider there to be a risk that the three main competitors to BT have slightly higher costs, or some other commercial drawback relative to BT, they already operate significant retail broadband businesses on which to build, meaning an even greater adjustment than required under option 2 . . ."

So, this is, in fact, Ofcom's third approach.

> ". . .is unlikely to be necessary to ensure they remain effective retail competitors. In reaching this view we are mindful that other CPs, most notably Sky and TalkTalk, also have large well-known multi-product operations with large customer businesses."

One sees implicit in that, that one of the objectives that Ofcom is attempting to pursue, ultimately to protect consumers, is to ensure that competition is not distorted, and "competition" in this context means, in particular, the competition that comes from Sky and TalkTalk as the two main competitors that depend on a wholesale input from BT. That is the first point.

The second point is that BT's appeal itself directly puts in issue the nature of competition between BT, Sky and TalkTalk. We are the very rivals that BT focuses on in particular in its Ground 1. At the heart of Ground 1 is the first point made by Mr. Thompson, and they say market analysis by Ofcom, in this case, was deficient, and if the market analysis had been conducted properly Ofcom would have appreciated there was no need for a price control at all; that is what they say.

In support of that ground, unsurprisingly, BT discusses at some considerable length the nature of competition in superfast broadband, and also standard broadband, and it contends that there is vigorous competition between, on the one hand itself, and on the other hand Sky and TalkTalk. One only needs to go to a few selective passages of BT's notice of appeal to see this theme occurring and re-occurring. This is in para 22, Ground 1, and BT says:

> "In particular, any assessment of the likelihood of such an exercise of market power on the upstream market for SFBB [superfast broadband] would have to take fully into account (i) the vertical integration of Virgin Media . . . (ii) the vigorous retail competition (from Virgin Media, Sky and TalkTalk in particular) on the

wider broadband market, including SBB provided to consumers by Sky and TalkTalk on the basis of regulated inputs from BT. . ."

Then we see very similar themes occurring at a whole series of further paragraphs, most of which are, in fact, noted in Sky's written submissions. There is considerable overlap between the ones that I am going to refer to and Sky's, but for the Tribunal's note, if you go to para. 41, to continue the flavour and then at some point I can potentially leave it to the Tribunal to read any further ones. We see that BT relies on the fact that they say:

". . . there can be no material risk that any of the major retail competitors could possibly be excluded from the relevant downstream market for retail broadband services as defined by Ofcom itself . . ."

Then, just over the page in paras.41 and 42 they emphasise how Sky and TalkTalk have access to the regulated inputs that require them to be able to offer SFBB, which Ofcom expects to remain part of the relevant retail market.

You get the feel, and we continue at paras. 47(1), 51(3) and (4), 52, 55(1), 55(4), throughout this section Ground 1 of BT's appeal, BT is discussing the nature of competition and the nature of competition in particular between itself and us.

It also raises the possibility of Sky and TalkTalk being able to re-enter the market if we are squeezed out. We see that in para. 45(7). It also discusses more generally other features of the market which it says means that it does not have any incentive to engage in margin squeeze, and we see that summarised at 45 and 46.

In relation to the other points that Mr. Thompson made about the other aspects of Ground 1, first, he referred to the equivalence of inputs point, so there is a question of law there, about the extent to which it was appropriate or not for Ofcom to take account of the equivalence of inputs obligations that are imposed on BT.

As well as a legal point, however, that implicitly raises a factual point about the effectiveness of those commitments. We are the parties who experience those commitments first hand, because we are the ones that actually buy the services from BT, and so we are extremely well placed to comment on how effective those are in reality to achieve the things that BT says that they do achieve.

BT also finally refers to ex post competition law. This is probably the smallest of the overlaps, but even there the Competition Act complaint that BT makes much of was one brought by TalkTalk and we are obviously in a particularly good position to explain the context for that and how that complaint came about. Finally, there is also a reference in the context of these other means by which BT says we are protected, to TalkTalk's and Sky's

ability to detect anti-competitive conduct. It says at para. 73 of its notice of appeal that there is not really a problem here either because if anything is going to occur then Sky/TalkTalk will pick it up

What one sees from that quick canter through Ground 1 is that BT is putting in issue points concerning, first, the nature of competition in broadband markets, the relationship between standard and superfast broadband, TalkTalk and Sky's ability to compete in superfast broadband and also standard broadband, the ability of Sky and TalkTalk to re-enter if we are squeezed out of the market and damaged, in the event that BT were then to raise its prices as a result and harm consumes, the efficacy of alternative remedies in ensuring that competition from Sky and TalkTalk is not hindered, and the ability of Sky and TalkTalk to detect that they are subject to a price squeeze.

We do not accept BT's case on these points for a moment, and say we are quite entitled to defend our interest in relation to those points. Moreover, we are also obviously in a particularly well placed position to assist the Tribunal to understand the market from the perspective of all of the key players that rely on BT's wholesale input rather than merely hearing from only one player, BT.

Obviously, you will hear from Ofcom, but in terms of the ability of people that actually operate in the market to give a real perspective we say that, given the central issue in the case is whether this price control is necessary and appropriate to preserve competition from the likes of my clients and Sky, it really would be absurd to exclude us from the proceedings when we are the very parties whose competitive interaction is in issue. So that is our position on our entitlement to intervene in relation to Ground 1.

On Grounds 2 and 3 I can be very quick, because our simple point here, and we will come on to this, I imagine, later, is that actually Grounds 2 and 3 are not properly points for the Tribunal at all. They are, in fact, correctly analysed, referable specified price control matters, and in that respect BT has already conceded it is quite happy for us to intervene in relation to those. So that is my position on them.

In any event, in the alternative, even if we are wrong about that, we say they ultimately engage the same fundamental matters as are engaged in Ground 1. It is the same price control, and we should also be entitled to intervene.

There is one final point in relation to the procedure rather than the substance, which is this: we say that we are likely to have a continuing interest in the procedure that is adopted in relation to the resolution of the matters in the BT's appeal as well as their substance. There is a very good illustration of that right now in the matters that are before you today, because

Ofcom says you should deal with BT's non-specified price control matters before its price control matters - that is point one in its reasoning. Also it says deal with TalkTalk and BT together, and therefore, by default, our appeal has to be stayed pending BT's non-specified price control matter appeal, because it is linked to BT's appeal. So procedurally, BT's substantive appeal on the non-specified price control matters is liable to affect our rights in relation to our appeal. So we should be entitled to intervene also on that procedural basis in addition to all of the other manifest reasons that I have given on substance.

I can deal if you would like with the issue of whether we should be entitled to intervene only in written form now or later, depending on the Tribunal.

THE CHAIRMAN: No, deal with that now.

MR. PICKFORD: Indeed. We, unsurprisingly, resist that. We say there is no basis to be confined to written submissions only. If we were mere bit part players on the periphery with a very tenuous link to these proceedings, that might be perhaps a compromise that the Tribunal would adopt in order to allow some party that it really was not sure had much of an interest to participate, but it would perhaps allow them to make written submissions. We are not those actors. We are, as I have explained already, absolutely essential to these proceedings. We have not even seen BT's evidence yet. It has declined to provide it to us. We asked for it, it said, "No, you can wait". We may very well wish to respond to that evidence. It purports to explain the dynamics of competition in the market, and we should be able to respond to that, if so advised, if it is appropriate to do so because there are things that are not covered by Ofcom. If we do that then we will probably need to attend a hearing and deal with that evidence, as is entirely normal in cases such as this.

There are many cases of this sort, and it is very rare, in my experience, for a party, certainly a party in our position to be confined to written submissions. Indeed, I cannot actually think of such an occasion.

Ultimately, of course, Ofcom is the respondent, but we will liaise and co-operate, as we always responsibly do, and the Tribunal has its case management powers to ensure that the proceedings are effectively managed, so there really should not be a problem in relation to that.

Unless I can be of further assistance, those are my submissions.

THE CHAIRMAN: Thank you very much. Mr. Beal?

MR. BEAL: Thank you, sir. I am going to deal with three points just on this issue of intervention: firstly, why, in our respectful submission, Sky has a sufficient interest to intervene; secondly, I will address the Tribunal on the issue of BT's fallback position; and

thirdly, I will deal with the issue of whether or not the price control matters provide a distinction on the issue of intervention.

Turning, if I may, to the first of those three points. Obviously the Tribunal is well aware that the remedy here is designed to protect against the risk of exclusionary conduct, and therefore it is with a degree of irony that we know that BT's submission is designed to secure our exclusion from these proceedings.

Putting that somewhat jury point to one side, there is a more fundamental reason why Sky, we say, does have sufficient interest, and why this Tribunal should, with respect, exercise its discretion to allow us to intervene. Firstly, all of the other parties, apart from BT, recognise that we do have sufficient interest, and it would be appropriate for Sky to be recognised as an intervener. That prompts, of course, the Christine Keeler response to BT's objection.

Nonetheless, underlying our intervention is the fact that we were extensively involved in the consultation process that led to the decision. Time after number, in Ofcom's Statement, the Tribunal will see repeated references to Sky's submissions, some of which were adopted. So we have been there from the beginning and some of our submissions were taken into account, and therefore we do have a direct interest in that respect. That is the first point.

Secondly, we are a major purchaser of VULA, we are a major purchaser of these services. We are a key player in the market, and I echo, with respect, Mr. Pickford's submissions that he has just made about TalkTalk's position.

We are able to assist the Tribunal as to the particular significance for this developing market of access to superfast broadband, why the next two years are, in our respectful submission, absolutely critical to the development of this very important market. That is where we can bring factual evidence to bear, and we would hope some economic analysis to bear, on the particular significance of this market to chime with the decision Ofcom has made.

The third point is that we are one of the major competitors of BT in the downstream retail market for broadband services. This remedy is designed to protect Sky's position as a potential victim of exclusionary conduct in exactly the same way that Mr. Pickford has identified.

Fourthly, we note that BT recognises that TalkTalk is an appropriate intervener, at least for the price control matters. If it recognises that, then unless there is some reason to hive off price control matters as being distinct from the substantive issues that would fall for the CAT to determine, unless there is a basis for that distinction, then that reasoning should apply by analogy to us as well. The fact that TalkTalk has its own appeal cannot

legitimately be a good reason to distinguish Sky and TalkTalk, because, of course, the question is a separate one of sufficient interest to intervene.

Fifthly, and this is important, our position is not on all fours with TalkTalk in this appeal, as you have seen from our written submissions. It is not simply a question of us saying, "Me too, we are in the same position as TalkTalk", we do have a different perspective to bring to bear and we do have different submissions that we would like to advance.

Finally, and again this echoes Mr. Pickford's submissions, and I do not propose to repeat them, the Tribunal only has to look at each of the individual grounds of appeal in BT's notice of appeal to see repeated and sustained allegations being advanced about Sky and its position, not just in this market but in the separate Pay TV market. When the Chilcot Inquiry was in the newspapers this morning for the length of time it is taking to allow the 'Maxwellisation' process to take place, in which somebody against whom an allegation is made has to be given an opportunity to respond, it is somewhat ironic that BT wants the Tribunal to be able to accept its assertions against Sky and Sky's position at face value without giving my client any opportunity to respond to those quite serious allegations.

I do not propose to take the Tribunal through each of the paragraphs that Mr. Pickford has already gone through, but I will, for the purposes of my third submission to show that it is not just Ground 1 that those allegations are found in, it is spread throughout the notice of appeal as a document, and the Tribunal will already have well in mind the fact that parts of BT's appeal on Grounds 4, 5 and 6 expressly cross-refer to earlier submissions in Grounds 1, 2 and 3. They refer to it expressly by earlier paragraphs and repeated allegations are made throughout the document.

That, we say, is the reason why, simply as a matter of equality of arms and public law fairness, we should be entitled to respond to some of the very serious allegations that BT has chosen to deploy.

Can I then deal with the fall-back position that BT has suggested, which is my second point? BT's fall-back position is, "You can intervene if you want as a statement of intervention, but we do not want you to duplicate anything Ofcom is doing, and we do not want you to be able to put in evidence". Just on that point, with respect, my client is not going to pay me to duplicate Ofcom's submissions. That is not what they are here for. They are here to bring value and benefit to the proceedings, and not simply to reiterate submissions that have already been made. What we are hoping to be able to bring to the benefit of this Tribunal is our own factual analysis of some of the assertions that are made and our own analysis of the particularly important market in this case.

With respect, it is very difficult *ex ante* for this Tribunal to give a prescriptive ruling as to what we should or should not do in response to BT's appeal. In our respectful submission, the more sensible way of approaching it is to allow us a degree of maturity of approach to recognise that we are not simply going to try and replicate Ofcom's submissions - that would not serve any purpose - and to judge us after the event once we have served our statement of intervention and once we have served our evidence. If you think there is too much of an overlap then no doubt the Tribunal will tell us, and you will not give us the time of day at the hearing to simply replicate matters that Mr. Holmes or his client are proposing to deal with in detail. That is my second point.

Thirdly, does the fact that the price control matters are going to have to be referred off to the CMA panel make any difference? In our respectful submission, it does not. We have as much of an interest in the design of the remedy as we do with the fundamental issues about the structure of the market and the criticisms that are made about the market structure and the market analysis. The reason for that is exactly the same as the six reasons that I have given this Tribunal as to why we have sufficient interest on what I term the 'CAT issues', i.e. the matters that are non-specified price control matters.

Mr. Pickford, I could have played the game of Bingo during his submissions, in which I said I agree with paras.22, 41, 47, 51, 55, 57. Each of those make allegations against Sky and its position in this particularly important market.

Ground 2, I accept is a discrete issue, but of course it is a discrete legal issue then this Tribunal will no doubt bear in mind that it is not part of my function, as I perceive it, simply to make legal submissions that Ofcom is quite capable of making on its own two feet.

Ground 3 deals with a separate point, which is the practicalities of compliance with a retail minus pricing standard. That is an area where Sky does have some experience, albeit in the distinct market of Pay TV, with the wholesale must offer obligations being imposed on Sky in that jurisdiction.

Ground 4: would the Tribunal please turn to para.168 of BT's notice of appeal. We are now into the heart of, as I understand it, what will be considered to be price control matters by my learned friend Mr. Thompson, and we see reference is essentially made that Ofcom's approach to the adjustment of the customer lifetime's data was overly generous and provided too much of an adjustment in favour of preserving competition from people other than BT, and therefore the approach to churn rate and ACL was flawed. That is an area that will quintessentially involve an analysis of both TalkTalk's and Sky's customer retention data. It is an area which will, we respectfully suggest, be subject to stringent commercial

confidentiality controls, but it is nonetheless very much an area where Sky has a very active interest in what findings are made and what the evidence is in relation to that issue.

Paragraph 180, we see some criticisms being made about sports costs and costs of sports channels, and it is being suggested that there are certain factors about sports costs which Ofcom has failed to take into account. Again, that is, with respect, something where Sky has a significant degree of experience.

Paragraph 188 on the next page, p.71: the allegation is made that Sky is a very powerful and well entrenched supplier at both the wholesale and retail levels with a much larger retail base of Pay TV customers. Again, allegations are being made against Sky which we would, with respect, wish to be able to address.

Paragraph 191: an allegation is made that there has been discriminatory treatment between Sky and BT. What BT is saying is, "Well, you have not adopted the same approach as you adopted with our WMO remedy in the Pay TV sector as you are adopting here". So again, questions of compare and contrast are very much coming to the fore. We respectfully think we can usefully help the Tribunal on those issues, or the CMA Panel if it is referred.

Paragraph 204, we now move into Ground 5: allegation is made there of Sky's long-standing monopoly power in respect of Pay TV.

Paragraph 215: we see an acknowledged overlap with some of the issues that are raised in relation to Ground 1 in relation to abusive margin squeeze. It is obviously in Ground 1 where we will be wishing to deal with the issues of what are the incentives for BT to be able to exercise a price squeeze, and what is the structure of the market which might allow it to take place? What would be the consequences for the market if the risk of that exploitative abuse came to fruition?

If there is a cross-reference back to matters that are perceived to be CAT issues, but it is before the CMA Panel, then it is no good, with respect, BT saying, "You can deal with this before the CAT", if those very self-same issues are going to be addressed to the CMA Panel, but we are not there because BT says, "This does not concern you".

Paragraph 226(5): again we see the compare and contrast with the WMO remedy.

Paragraph 236: we see a reference to the fact that adjustments in relation to the margin squeeze remedy should only be made when they reflect the market realities which Virgin, Sky and TalkTalk actually need. That is something, with respect, that we have very much an interest in being able to deal with.

Paragraph 249(3): an allegation is made that the effect of Ofcom's approach is to restrict BT's ability to compete in the market for sports rights. No prizes there for guessing who is on the receiving end of the criticism that they are being treated more favourably – that is us. Finally, Ground 6. Even there, we see at paras. 266 and 267 an allegation of what is said to be discriminatory treatment between Sky and BT. On standard fairness public law principles we should be allowed to respond to each of these points, and the suggestion that the price control matters are separate and distinct from the underlying CAT issues is simply not made out on the face of this pleading.

Unless I can be of any further assistance, those are my submissions on the issue.

THE CHAIRMAN: Thank you.

MR. HOLMES: Sir, Ofcom does not oppose the applications by Sky and TalkTalk Group to intervene in BT's appeal. All of BT's grounds do appear to us to raise matters affecting the potential interveners' interests and on which they may have relevant submissions and evidence to offer. In particular, BT's appeal generally concerns its competitive situation by comparison with TalkTalk Group and Sky specifically in various relevant markets.

If they are permitted to intervene we will liaise with them in the usual way to avoid duplication, and any duplication can also be avoided by scheduling the statements of intervention after Ofcom's defence so that they can prune in the light of what we say and avoid overburdening the Tribunal or the CMA with matters that have already been covered by Ofcom.

THE CHAIRMAN: Thank you. Mr. Thompson, do you want to say anything else?

MR. THOMPSON: If I can just address two areas in particular. First, in relation to the CAT Grounds, Grounds 1 to 3, I think Mr. Pickford, and it was really adopted by Mr. Beal, not surprisingly focus on Ground 1A, the market analysis, because I think they effectively are forced to recognise that the treatment of the legal issue and the response to the Commission, those points are essentially questions of law where, no doubt, they will have a view and will wish to row in behind Ofcom, but the core point they make is that the market analysis is an area where they will wish to weigh in.

The point that I made quite briefly I would reiterate and ask the Tribunal to bear carefully in mind, this is not a market investigation of the Pay TV and Broadband Market, this is a specific submission that the analysis in s.3 of this document does not stand up as the basis for imposing a burdensome price control. The prospect of Mr. Beal and Mr. Pickford coming along with witness statements and saying: "Ah, but there are all sorts of good reasons why Ofcom was absolutely right" is a classic case of bolstering a public law

decision after the event which should certainly not be allowed. So, insofar as that is really what they want to do in front of the Tribunal, that is a prospect which could considerably lengthen the hearing with the relevant material, which is effectively inadmissible, so that material should not be permitted.

So far as Sky's characterisation of its position, it is obviously common ground and well known that there is a high profile and commercial battle going on between Sky and BT, and we can see that in the newspapers. The point here is whether or not Sky is a useful assistant to the Tribunal in resolving these issues, and we say, first, for the reasons I have already given, that it is not and, in particular that Sky's position differs from TalkTalk in that it, in fact, made very brief contributions to the consultation – I think a nine page document - rather less than its skeleton arguments that it has so far put before the Tribunal were put in front of Ofcom. It took a very modest role and has now decided it wishes to barge in and we are not at all confident that it will not duplicate, and its conduct to date does not give any confidence in that respect in that it has put in full submissions as to how this case should be conducted even before it has been admitted as an intervener and has indicated that it may wish to include not only witness evidence but also expert evidence, so we do consider there are very serious risks of this case effectively getting out of control. I know we hear the reassuring statements from Mr. Beal, but if Sky is to be admitted then we would respectfully say that it should be put on a tight leash and no such general right, as I think Mr. Beal is seeking, should be permitted. I think, otherwise, I have made the points in opening, and I think I will not say any more, sir.

MR. PICKFORD: I do not wish to detain the Tribunal. It is obviously our application to intervene, and one point has been made which is a new one and which, if I am permitted, I would like to respond to?

THE CHAIRMAN: Yes.

MR. PICKFORD: It is simply this. It was suggested by Mr. Thompson that there is no role for us to adduce any evidence in this appeal because effectively it all depends on Ofcom's decision. Of course, BT are adducing their own evidence by which they hope to persuade the Tribunal to displace that decision, and it is a merits appeal, s.195(2), and the Tribunal's decision in this case has to be taken on the merits, which means effectively it is able to consider all of the factual material in the round, it is not a judicial review and therefore there is very obviously a role to play for evidence responding to the points BT make about market dynamics.

MR. BEAL: Sir, could I just indicate that we are demonstrating our self-restraint by not responding to anything Mr. Thompson said.

THE CHAIRMAN: I think that deals with interventions. Shall we then move on to confidentiality and disclosure?

MR. THOMPSON: Sir, there obviously are interactions between the two issues, so I think the Tribunal has my submissions in relation to the scope of any intervention that should be permitted in general terms. We deal with the issue of disclosure and confidentiality at paras. 6 to 12 of our skeleton argument, and our general position is that particularly if Sky is permitted to intervene in our appeal then that would indicate that there should be two confidentiality rings in that Sky has not sought permission to intervene in TalkTalk's appeal and so, on the face of it, it has no standing to see any documents that are disclosed in that appeal.

In terms of how the confidentiality ring should be set up, we have made submissions about TalkTalk who are, in fact, seeking, I think, to have two specified internal lawyers admitted into the ring, although in the notice of appeal it appears that they only wish to have external lawyers involved. In relation to that the Tribunal will have seen, in our skeleton argument, that we are prepared to accept that but on the basis that Mr. Ritchie and Ms Nightingale of BT are also admitted into the ring and subject to specific conditions set out at 9(1) and 9(2).

If Sky are permitted to intervene then that does raise serious questions of commercial confidentiality and commercial rivalry for the reason I have already alluded to, and we would be very concerned if a widespread disclosure were made, even within the scope of a confidentiality ring involving Sky because we see their role as effectively marginal at best, and they could make their own case without access to confidential information, they know this market very well and they can make whatever positive assertions they wish to make.

As far as TalkTalk is concerned, the Tribunal will have seen that there are two specific areas of disclosure under debate, and BT has made its position clear, I hope, that we have no objection to unredacted sections of the final statement being made available to TalkTalk insofar as they bear on the two areas that they are concerned with, and there is, in fact, a cross-reference in the final statement to a Competition Act decision that was taken, and we would have no objection to them seeing the relevant unredacted sections of that decision.

However, we do not see that they need to have general access to an unredacted version of the final statement, although we have invited, but I do not think received, any submissions or observations from TalkTalk about which particular parts of the final statement they wish to see.

So far as underlying data, which I think Mr. Pickford's clients seek disclosure of in relation to the two issues they raise, I am afraid that that discussion is at a rather early stage. It is effectively in Ofcom's court, and we have been given some rather general indications about what Ofcom would propose in relation to the underlying data. BT is concerned about that issue, both as a matter of principle and, without having seen the detail it is not really in a position to consent to what is proposed, so I think there will need to be some process laid down for disclosure, hopefully to be agreed, or some contingent arrangement if it is not agreed. There is a relatively small footnote, but no doubt there will be observations made about that as well, as noted in the Tribunal's questions. At para. 166 of our notice of appeal we refer to the ACL issue, which I think has already been mentioned about churn rates, and BT will be seeking disclosure of that and I think that will then need to go through a similar process, and I believe that Ofcom may have already put some process in train. There is reference to them having contacted interested third parties but we obviously do not know the details of that. Again, I do not think that is a matter that can be finally ruled on today, subject to the views of the other parties. I think that is where we are in relation to that issue.

THE CHAIRMAN: I suppose the main disadvantage with separate confidentiality rings and separate confidentiality regimes in relation to different parties is that it all becomes administratively very complicated and difficult to run?

MR. THOMPSON: I think that is why I would say it feeds into the submissions we have already made about the implications for the hearing of admitting Sky, because they are in a different position. We have particular concerns about our relationship with Sky and they are not an appellant or an intervener in the TalkTalk appeal, and so this complexity is not a matter of our making, but we would say it is a factor that the Tribunal should take into account in deciding how to go forward and what interventions to permit and on what terms.

THE CHAIRMAN: Yes. Yes, Mr. Pickford?

MR. PICKFORD: Dealing first with the issue of the confidentiality ring, the situation appears to be there is obviously no objection to the establishment of a ring either in our appeal or in BT's appeal. The first question is: should there be a joint ring, or should there be two separate rings. We said there should be a single ring, and there should be a single version of the statement, confidential version of the statement that goes into it, whatever redactions there might be in relation to that statement. What we do not want is everyone to be working off multiple different versions of statements for different parts of the appeal.

This is the normal practice in the Tribunal in a case such as this, where one has a number of different appeals. We referred in our written submissions to the case, the 1192, 1193 WLR

and LLU charge controls from 2012, and there was an order which we referred to in that – I can produce a copy for the Tribunal if you would like to see it, but there was a joint ring in that case for two sets of appeals and, indeed, moreover, there was a direction that evidence used in disclosure in relation to one appeal could properly be relied upon in relation to the other appeal, and that obviously makes perfect sense. Not only is it administratively more convenient and sensible to go about it that way, but actually it is very difficult to see how the CMA, indeed, the Tribunal, can properly perform their functions if they are supposed to have two separate brains for two different appeals, and they are not allowed to take account of what they have seen in a statement in relation to one appeal in relation to the other; it would be absurd.

As a practical matter, there is only one sensible way through, and that is to have a single confidentiality ring, and a single version of a statement. If one does not have that, we are not simply talking about two versions of a statement, we are potentially talking about four, perhaps five, different versions because what we will have is something in the BT appeal that BT and Ofcom could see, there will be a different version that we can see, because BT said we are not allowed to see all of the bits that BT can see in TalkTalk's appeal. Similarly in BT's appeal there will be different versions. The Tribunal will probably throw its hands up in the air and say: "Can we just have a single one which shows us everything", so that will be a fifth version. It is not the way the Tribunal has ever gone down previously, and we would strongly urge the Tribunal to adopt the normal course in relation to that.

The other issue that is raised by BT in relation to the constraints that should be imposed on in-house counsel in the ring – it raises two points at paras. 9(1) and 9(2) of its submissions. 9(1) concerns an undertaking that those in-house counsel should not be involved in other matters to which the information is relevant, and subject to agreement that I am sure can be sensibly reached between my clients and BT, we are happy with an undertaking along those lines. It would ordinarily be for a period of two years, and we suggest two years would be sensible in this case. Obviously, there might need to be the possibility of returning to the Tribunal if there were a further follow-up case to this one, for example, on the wording of BT's current suggestion the in-house lawyers would not be able to participate in that case before the Tribunal. That would seem to be very strange, so we will have to ensure that whilst they do not make inappropriate commercial use of the information that does not necessarily preclude them from acting in future cases where it is relevant.

The other point that BT wishes to make is that they say in 9(2) that there should be a sort of complicated scheme where effectively BT is the arbiter, I think, of what people get to see,

and then other people can make applications to see particular things – the particular words are there should be:

> ". . .additional wording included in the confidentiality ring order, as has been used in other appeals involving highly sensitive information, to allow a disclosing party to refuse to make disclosure to specific relevant advisers if that party considers it necessary to do so (subject to the requesting party and the right to apply to the Tribunal for disclosure in any event)".

So they are saying in the first instance: "We, BT choose what we are willing to give you and then you can apply if you do not agree."

Inherent in that is the beginnings of a dual confidentiality ring of two tiers, which is something I have said the Tribunal typically resists, in fact, this is not something which is normal, and it would be incumbent on BT to demonstrate that there is something very particular about one particular class of information for it to be withheld, and the appropriate course would be for BT to make that application, not for BT to be able to resist and other people to have to come to the Tribunal, so we do not accept 9(2) in relation to those restrictions.

Would it be convenient for me to go on and deal with the substantive disclosure points now?

THE CHAIRMAN: Yes, please.

MR. PICKFORD: In relation to the disclosure, we set out the nature of our application in our notice of appeal at annex C, and it might be convenient briefly to turn that up.

There are essentially two aspects to the substantive disclosure that we are seeking. First, subject to a qualification that I will come on to in a moment, we are seeking disclosure of the unredacted version of the Decision document in general.

The qualifications are as follows: We understand from Ofcom that its current position in relation to the issue of that disclosure is that it is happy to provide such a document subject to two issues. First, third parties, by which I mean parties who are not present today, Ofcom says in relation to the protection of their information it proposes a system where it is the arbiter in the first instance of what it thinks is relevant, and I understand it has contacted those third parties to say that it intends to disclose certain relevant information but insofar as the third parties do not have information which Ofcom considers to be relevant in the first instance, then Ofcom does not propose to disclose that. We are content with that, so we are not asking for that information.

Secondly, as I understand it, the reason why I am anticipating Mr. Holmes is because it is relevant to the nature of my application, implicit in Ofcom's approach is it will allow for the possibility of parties such as BT or others here to make an application to say: 'Actually, there is this part of the information which you should not disclose', and again we are happy in principle for that process, albeit we say the presumption should be we get the whole thing.

So, subject to those qualifications, that is what we are applying for in relation to the Decision document. As I understand it we are in accord with Mr. Holmes in relation to that, and he is nodding.

The difference then is between us and BT, and BT says that we can only see the parts of the Decision document that are directly effectively addressing the issues that we have referred to in our notice of appeal. There are a number of difficulties with that, the principal one being it is not just those parts of the Decision that are, in fact, relevant to our appeal. There is a practical issue for us in actually going through the entire Decision redaction by redaction to identify each individual bit that we want to see. There are 636 redactions in the statement alone, even before getting into the annexes, and to review them all would obviously be a very significant task. What we have done, however, is just focusing on our Ground 1, just to remind the Tribunal that is our point that there is insufficient protection in the mechanism of the price squeeze control to prevent a targeted price squeeze that is focused on, in particular, us. There is a substantial amount in the statement that is likely to be relevant to that, but goes beyond the particular passages that BT has said it is willing to give us.

First, and this actually really goes back to a point I was making in relation to BT's own appeal, there are a number of passages that deal with the extent, or the way in which BT, Virgin, TalkTalk and Sky all compete against one another in the broadband market. I have taken you to passages in BT's appeal which deal with those issues. They are all highly relevant to the questions of BT's incentive and ability to act in a particular way in light of the market dynamics, and thus whether the design of the price control sufficiently addresses BT's incentive and ability to price squeeze. So, we say, we need to see those, and that pervades a great deal of the statement. We also need to see passages which help us assess the magnitude of the potential detriment of a targeted price squeeze, because that is one of the issues that we raise as well, and there are other parts of the statement that potentially go to that. If the Tribunal would like me to I can just illustrate that briefly by reference to a few sample passages. My point is that I am not going to go through the entire statement

identifying them because obviously we will be here forever, but just to show you that there are a number of bits that go beyond the passages that BT said it was going to give us that would be relevant.

THE CHAIRMAN: Give us a couple just to get the flavour of it.

MR. PICKFORD: Yes. If one goes to para. 3.27 we see in the first bullet point issues relating to BT's forecasts about how the superfast broadband market is likely to divide up in terms of its particular customer base. That is obviously a key issue in relation to the dynamics of the market. There are a number of other very similar references to those kinds of issues.

If one goes on to----

MR. THOMPSON: I do not want to interrupt, but as I understand it, Ofcom's position is that they are intending to disclose relevant material. We have asked TalkTalk to specify what it says is relevant material and we have not had a response. It is not really an efficient process for Mr. Pickford to do it on the hoof, cold, now, so I am not quite sure what we are doing.

MR. PICKFORD: To be clear, what I am not asking the Tribunal to do is to make an order with reference to specific paragraphs of this statement now. What I am asking is for an order where, subject to any application that is made in the other direction, we get sight of an unredacted version of the Decision document. The reason why I am going through this particular process at the moment is to highlight that, if it is the other way around we will be here for a long time. Obviously, it is not an application that I can make now because I am not in a position to go through the entire statement and all the annexes to identify every single individual redaction.

The problem is, even if I attempted that once, inevitably what would happen is that we would see something in some paragraphs, something would be redacted, there would be a cross reference to something else, and we would say 'can we now see that?' and we would have to be back in front of the Tribunal again to see the next bit. It would become an iterative process, which is, we say, not a practical or sensible way forward.

The point I am making now is not to ask the Tribunal for a specific order in relation to these paragraphs, it is to illustrate that there are paragraphs dotted throughout the statement that we would wish to see and the sensible approach is the one that I have commended to the Tribunal.

Would it be convenient for me to refer to others? I can refer to one more or I can leave it as my point has been made, that there are likely to be points throughout the statement that we need to see?

THE CHAIRMAN: How does it stand as between TalkTalk and Ofcom at the moment then?

MR. PICKFORD: As I understand it, there is nothing between us on this. Obviously, Mr. Holmes can speak for Ofcom, but I understand that Ofcom is content to disclose a fully unredacted version subject to the protection of third party confidential information that it considers to be non-relevant, which we are content with – obviously, subject to the ability to apply. Secondly, the possibility of parties such as BT making an application to say: "No, you cannot see this particularly super sensitive bit and, really, this has nothing to do whatsoever to do with your appeal".

MR. THOMPSON: Just to be clear, the issue of relevance has been mentioned by Mr. Pickford for the first time, and we have had no indication from Ofcom what it considers to be relevant. There are sections of five or six paragraphs which are headed with the very bits that appear to be relevant to the Grounds, and which are specifically referred to in the notice of appeal, but we can only speculate as to which bits TalkTalk may claim are relevant, or which bits Ofcom may think are relevant, and it is really a hopeless process which is really very much raising the concerns that I started with about where this will all end if litigants of this kind are let through the door.

MR. PICKFORD: With the greatest of respect we are talking about TalkTalk's appeal here, so there is no application before the Tribunal for us to be prevented from coming through the door in relation to our own appeal, so I do not understand that particular point.

I am happy to cede to Mr. Holmes if it would be convenient for you, sir, to hear from him now in relation to where Ofcom stand. Obviously there are further points that I need to make in relation to the scope of the second part of the disclosure we are seeking, which is uncertain underlying documents, which again that Ofcom is content to provide us and BT is effectively saying it does not know what the position is yet, but I would like to address you on that.

THE CHAIRMAN: Can you deal with that now?

MR. PICKFORD: Of course. Can I take it as read that there are a number of points that I could go through in relation to this statement saying, "That is potentially relevant to our appeal, so is that, so is that". I am not going to take you through all of those now, but should the Tribunal wish me to I can provide a whole list of further paragraphs.

Moving on from that, which we say illustrates the difficulties if we are required to go through this on a paragraph by paragraph basis, we then also ask for supporting documents. There are effectively two categories of those. Again, going back to our appeal document, one sees them divided into category B and category C. The first category is in relation to our first ground, so that is the targeted margin squeeze point. We set out there at 2, 3 and 4

certain underlying documents that we say we need to see. I can take you through them individually. In essence, they are all of the underlying documents that go to the particular passages in the statement where Ofcom says, "You, TalkTalk, have raised this particular concern, you have got nothing to worry about, we have analysed it, we do not actually think that your suggested alternative" - for instance, we suggest a LRIC test on individual products in addition to the LRIC plus test on the portfolio - "is going to achieve anything, therefore we are not going to do what you suggest in the light of various bits of analysis that we have done". All we are asking for there is the documents that underlie that analysis - so, firstly, the documents that Ofcom produced itself that underlie its analysis; and secondly, the documents that Ofcom relied upon in coming to that view as expressed in its analysis. It is a very natural course of disclosure directly in relation to the particular aspects of Ofcom's decision on those points.

To be clear, that is one aspect of our application where we are not asking for whole reams of documents underlying everything. This one is particularly focused. It is focused on the very specific part of the decision where Ofcom deals with our concern. This is in contra distinction to the other issue where we say it is necessary for us to see the decision more widely.

The same goes in relation to category C. This is dealing with our provisional Ground 2, that we are concerned that Ofcom should have made some adjustment to account for what we consider is BT's likely incumbency advantage in relation to call revenues. Again, what we are asking for in 5 and 6 is the underlying documents that support the currently confidential analysis.

We cannot see any reason why there should be an objection to those. We hear that BT says that it has not actually formed a view yet. We do not think that is entirely satisfactory. We obviously alerted BT some time ago to the fact that we were requesting these documents.

In any event, if the Tribunal does take the view that this cannot be determined now, we would commend a very, very speedy process to be put in place to enable us to obtain the disclosure, which again I understand from Mr. Holmes Ofcom does not object to. It is entirely natural disclosure flowing from the particular grounds that we have raised.

Sir, unless I can be of further assistance on that issue, those are my submissions.

MR. BEAL: Sir, in the event that the Tribunal grants Sky permission to intervene I have three short points to make on the confidentiality issue. I obviously will not respond in any way to Mr. Pickford's application because we are not involved in that.

Firstly, we respectfully suggest that it is appropriate to have a single ring for confidentiality purposes covering both the TalkTalk appeal and the BT appeal. A lot of my learned friend Mr. Thompson's submissions were directed to Sky. I do not know what the corporate equivalent of *ad hominem* would be, but that was it. Can I just make clear: it is not Sky that will be in the ring. The people we are suggesting would be in the ring are me, external counsel, my instructing solicitors, Herbert Smith Freehills, and an external expert, likely to be Charles River Associates. Sky will not be there.

In terms of why one ring and why are we involved with the TalkTalk appeal as well for ring purposes, it is simply so that if something comes up in that appeal that is of relevance to the BT appeal in which we are intervening in support of Ofcom, *ex hypothesi*, we can see that material and respond to it. The alternative would be a recipe for potential unfairness and certainly procedural complexity. That is the first point.

In terms of having different rings for different appeals, we will spend more time arguing about what is in which particular ring than dealing with substantive issues and, with respect, that is simply not appropriate. Mr. Thompson simply has not identified why either myself, Herbert Smith or Charles River Associates cannot see material that is of commercial confidentiality to BT. We are not going to be involved with strategy decisions for Sky going forward.

Secondly, in-house lawyers: we do have a concern here - obviously our in-house lawyers are not being proposed to go into the ring. TalkTalk and BT are proposing to have in-house lawyers within the ring. Our preference would be not to have in-house lawyers in the ring, but at the same time we recognise that BT is prepared to offer some form of enhanced commitment to ensure that those individuals who see commercially confidential information who are employees of BT or employees of TalkTalk will not be in a position to use that commercially confidential material in a strategic sense, or where the risk of inadvertent disclosure is minimised. The sensible approach, in my respectful submission, is to leave it to the parties to formulate the form of words that would appropriately protect the commercially confidential interests.

The third point: should we have some sort of super-confidentiality ring within a ring, even within the external advisers' risk? In my respectful submission, there is no warrant for that at all. None has been put forward. Again, it would be a recipe for procedural complexity, if not disaster, before the CMA Panel where they rely on multi-lateral hearings. You would have to have people ducking in and out of different Panel meetings at different times,

depending on which ring was engaged. That would be very, very difficult, in my respectful submission.

THE CHAIRMAN: Thank you. Mr. Holmes?

MR. HOLMES: Sir, it is common ground that the proceedings will involve some relevant confidential material. Arrangements will therefore need to be put in place, and, in our submission, they should provide adequate protection for the confidential material. They should also be designed with a view to ensuring that they are as straightforward and workable as possible in order to avoid undue complexity and to ensure that the hearing runs smoothly. It is obviously appropriate to establish a confidentiality ring, as the Tribunal has done in previous cases, and it seems sensible to us that that should be a single ring without distinction between different categories of material.

There are applications for disclosure from each of the applicants. On the one hand, both TalkTalk and BT have sought various specific documents and data; and on the other hand, TalkTalk has sought an unredacted version of the Statement.

Ofcom does not oppose the applications, subject to the following five points: first, disclosure should obviously be within the confines of the confidentiality ring, once established.

Secondly, once the scope of the materials to be disclosed has been determined, we would request that that should be done by an order of the Tribunal. Ofcom has statutory duties in relation to the disclosure of confidential material, and an order of the Tribunal would put beyond doubt the appropriateness of disclosing those materials.

Thirdly, as regards the specific requests for documents and data - so that is leaving the Statement on one side for a moment - Ofcom accepts the relevance of all the material which is sought by both TalkTalk and BT.

Fourthly, as regards the Statement, Ofcom considers that a confidential version of the Statement should be prepared and made available for use in both appeals to avoid the significant complexity of multiple confidential versions, to which my learned friend Mr. Pickford has referred. In that version all material that is relevant to either appeal should be unredacted. Material that is not relevant should not be unredacted.

Fifthly, some process needs to be put in place to determine the scope of disclosure, and it appears to us that, regrettably, it will not be possible at this hearing for the Tribunal to resolve all of the issues that arise. That is so for two reasons: on the one hand, there is the material in the Statement which is confidential to the parties represented here today. As we have heard, there is dispute between the parties, or it appears likely that there will be dispute

between the parties, as to what material is relevant and what material is not relevant. There will, therefore, be opposition to the disclosure of some of that material by parties here present. The parties will need to liaise after this hearing to see what agreement can be reached. Ofcom has formed its own provisional view as to relevance, but it has not been possible in the time before this hearing to bottom-out with the parties whether that is agreed. We would, therefore, propose that the parties go away, liaise, and see whether agreement can be reached. In so far as agreement cannot be reached, then the matter, I suppose, will simply have to be brought back before the Tribunal and hopefully it can be determined on the papers.

The other reason why it will not be possible, in our submission, to arrive at a final conclusion as to the scope of disclosure today is because of the material which is confidential to third parties not here represented today. That includes both material within the Statement and material which Ofcom accepts to be relevant contained in the specific requests for documents and data.

Ofcom has written to the third parties concerned informing them in advance of the disclosure of their confidential material which is being sought so that they can raise any concerns as to whether and on what terms disclosure should take place. That was done a couple of days in advance of this hearing. The two parties in question have both asked for more information about the terms on which disclosure should take place. Ofcom proposes that, following this hearing, it would send them the terms of the confidentiality ring arrangements that are put in place. In our view, that should be sufficient to allay any concerns that they have, but if they do have any objections, then they should at that point raise them with the Tribunal, and that also will need to be determined.

Sir, subject to any questions that you have, that is Ofcom's position on the questions of disclosure and confidentiality.

THE CHAIRMAN: How long do you think it will take for the parties to reach an agreement on relevance, if they can?

MR. HOLMES: We all appreciate the need to get this done quickly so that there are no hold ups. We would propose to consult with the parties, setting out our position in correspondence by Monday of next week, and then they should have an opportunity to respond. It seems reasonable to allow them until the end of the week, until the Friday, subject to any submissions they wish to make. By then it will be clear what can and cannot be agreed. The parties will continue to liaise, and we would propose that the parties contact the Tribunal to inform the Tribunal three working days thereafter as to what has been agreed

and as to whether there are any matters in dispute. A process can then be put in place for resolving the areas of disagreement. We recognise, sir, that this is not ideal, but these are obviously complicated matters. There is a lot of material at stake and a number of different interests engaged, given that the material is confidential to parties here and parties not here. That would be our proposal for dealing with matters.

THE CHAIRMAN: Presumably the third parties can be dealt with in a similarly tight timescale?

MR. HOLMES: Yes, sir, we have already put that process in train, and we can continue to resolve it promptly. Depending on whether the terms of the confidentiality ring can be settled today, we can send those terms out by letter tomorrow, inviting a response early next week. We should be in a position to update the Tribunal on the same time line as we have proposed for the material confidential to the parties here present.

THE CHAIRMAN: Thank you.

MR. THOMPSON: Sir, I do not want to set up an endless round, but it may be helpful if I make some brief points in response. Obviously we rely in particular on the context here. In relation to whether there should be one or two rings, I would like to make clear that BT sees the advantage of having a single ring, and our concern is really driven by Sky's involvement in the appeal from the point of view of disclosure. If it is just Ofcom, TalkTalk and us, then we can merge the rings quite happily. That is a relatively limited point, and I do not think we get into the sort of complexities that Mr. Pickford is suggesting if Sky is simply treated as a non-confidential intervener, if it is an intervener at all.

THE CHAIRMAN: Mr. Beal's point is that we are only talking about external counsel and experts, what is the problem there?

MR. THOMPSON: There is a question as to whether or not expert evidence from Sky is really needed.

THE CHAIRMAN: Let us assume that it is. What is the problem there in terms of a confidentiality ring?

MR. THOMPSON: I think the point I made was that Sky is not party to the TalkTalk appeal, and, candidly, the position in relation to BT and Sky is a very acute one. In relation to Herbert Smith and CRA, they are advising Sky on a range of matters directly involving BT and Sky, both regulatory and potentially litigious, I think it is fair to say.

MR. BEAL: Sir, can I just clarify: is my learned friend really suggesting that those who sit behind me and instruct me are at risk of inadvertent disclosure of material if they are bound by obligations, ethical and otherwise, in a confidentiality ring?

MR. THOMPSON: Sir, there are obviously sensitive areas here, both professionally and commercially, but this is at the acute end. The Tribunal will be aware that the position changed in the last two weeks in a way that occasioned a consultation document that went out when BT launched its Champions League coverage. This is a matter that is directly in issue between Sky and BT, and has been for a period of years, and is extremely high profile for both parties. That is the factor. We are not making any sort of professional allegations of any kind against individuals, including individuals unknown, and we do raise the question, though the Tribunal will take its own view, that there really is not any need for Sky to call expert evidence in this case at the very least. I do not put it any higher than that. In relation to the decision document, I think I have made the point already that we have asked for relevance to be specified, but it has not been specified either by Ofcom or by TalkTalk. Likewise, although Ofcom said it accepted that all the documents requested were relevant, that really does not mean anything without identifying which those documents are. At the moment, all we have, I think, is a one page schedule saying, "Documents in so far as relevant", etc, and so we need to know specifically what it is that Ofcom considers to be relevant, both in the Statement and outside it, before we can understand what it is that we are being asked to agree to. That is really the process. It is not that we are being slow, it is that we have not actually been told what it is that is at issue.

THE CHAIRMAN: No, what I understood Mr. Holmes to be saying is that that process is now going to be taken forward.

MR. THOMPSON: Could I make a positive proposal, which would allow things to go forward? The specific paragraphs that Mr. Pickford relies on, which are the paragraphs which are headed with the relevant issues to his two grounds, are paragraphs 5.129 to 5.140, and 6.194 to 6.201 of the Final Statement.

THE CHAIRMAN: Sorry, where are you getting those numbers from?

MR. THOMPSON: Those are simply the numbers of the paragraphs in the Final Statement, and for good measure there is reference in the Final Statement to a series of paragraphs in the Competition Act 98 Decision, A213 to 218, and there is also a section relevant to our ACL issue, average customer length issue, which is at para.6.436 and following. It seems to us that, subject to the creation of the confidentiality ring, we could at least progress matters to the extent that those specific paragraphs would be provided to the parties in an unredacted form, and then a procedure of the kind that Mr. Holmes is suggesting could be carried out in relation to specific paragraphs that TalkTalk may identify, or that Ofcom may identify, as relevant to those issues, and in relation to documents that Ofcom may consider to be

relevant, subject of course to the interests of third parties of the kind that Mr. Holmes is proposing. It seems to me that that could at least take things forward and have a positive agenda. It may even be that some of the requests could fall away because there is a lot of information, which may be of interest both to ourselves and to TalkTalk, and obviously they are the primary relevant pieces of information because they are the actual bits that appear in the decisions themselves.

THE CHAIRMAN: No doubt the parties will have taken note of that?

MR. PICKFORD: Sir, might I make a very short responsive submission on our application? Can I deal with a couple of points: firstly, in relation to Mr. Thompson's proposal, we will take whatever is on offer as soon as it is on offer, so that is obviously gratefully accepted, at least in relation to those parts.

In relation to the other issue about identification of relevance, there is an important issue here and I want to make two points in relation to it: firstly, it is not a procedure that certainly I am familiar with where it is incumbent on the appellant to go through identifying the passages that it says are relevant. Ordinarily, the decision document is disclosed as a whole. It may be that in this case it is said there are particularly reasons to do it, even if it has not been done before.

What we seem to be looking at adopting here is a sort of reverse of the process that would ordinarily take place in relation to disclosure in the High Court. What happens in a normal disclosure exercise is that a party who has certain information in its possession, and knows what it is, is asked to disclose it in so far as it pertains to the issues in the appeal - either it supports one party's case or it goes against it. Of course, they are in a position, because they know what the information is, to form a view on that because, by definition, it is their information.

The slight difficulty with what I think appears to be being proposed now is that it is being said that it is incumbent on us, TalkTalk, who does not know the information precisely, we can see some of its context, we do not actually know what is there to identify what is and is not relevant. That places us in a slightly difficult position, because it is somewhat circular. There may be points that we do not know or fully appreciate the relevance until they are seen. So we would suggest, that if there is to be some sort of relevance process that is gone through, which, as I say, I think would be new in this context, it should be incumbent on those parties that want to resist providing something to say, "You do not need to see any of this because we have looked at your ground of appeal and our position is that it is not

relevant at all", rather than the burden entirely falling upon us to identify that we do not actually know about because we have not seen it.

THE CHAIRMAN: All right.

MR. THOMPSON: I do apologise, sir, there is one point I did not address. There was some criticism of our para.9.2 in the proposal of, as it were, super-confidential documents. I only wish to observe that it is not an unprecedented thing. It was done in the *Colt* and the *Verizon* case, I think, in the CAT and the CMA, and it would equally apply to all parties. So it is not just BT, as I think it was characterised. It is simply a further protection which I think has been used in some Telecoms appeals. That is all I wanted to say.

THE CHAIRMAN: Thank you. Shall we move on then to what is perhaps the most tricky area of this CMC, which is the two subsequent headings, the extent of overlaps in the appeals and specified price control matters?

MR. THOMPSON: Yes, sir. I am hopeful that questions 8 and 9, which we address in 13 and 14, are relatively uncontentious. I think it is really question 10. In my submission, although questions have been raised, both by Ofcom and by the CMA in relation to the borderline, it appeared to us that a degree of consensus was emerging. Perhaps slightly ironically, Ofcom appeared to be coming round to BT's point of view in relation to Grounds 2 and 3, and the CMA appeared to be coming round to BT's point of view in relation to Grounds 5 and 6. In my submission, both are to be congratulated, and it is gratefully received, the assistance that they are now offering.

THE CHAIRMAN: Have they fully come round or are they showing an inclination?

MR. THOMPSON: Sir, if I can explain what we have sought to clarify in relation to Grounds 2 and 3, and I think I may have said it already, Ground 2 comes down to a relatively short point, that the Commission indicated that a six months assessment period was unduly rigid, and, as we see it, Ofcom responded to that by turning the assessment period from six months to one month. We say that is not taking utmost account of the Commission's view. On Ground 3 we say that the material change of circumstances change that was introduced has, in fact, substantially undermined the principal benefit of this regime by introducing radical uncertainty into what was supposed to be a condition that conferred certainty, because it is no longer clear when the guidance will apply, and if it does not apply what will happen instead. This is not something that could not have been foreseen because the very subject matter of the consultation is the launch of Champions League which was obviously in everyone's mind at all times when this decision was being put together. We say both those are points of law which render the Statement unlawful. I think that is the point that

Mr. Holmes effectively accepts on behalf of Ofcom, although Mr. Palmer on behalf of the CMA expresses doubts about it.

THE CHAIRMAN: Is it a question of whether the matter is a question of law, or does it go back to the point in the *Hutchison* case as to whether the ground of appeal goes to the question of whether there should be any price control at all, as opposed to the detail, the structure of the price control?

MR. THOMPSON: The way I put it was that the Decision itself is invalidated because of errors of law, just as it is an error of law, in our submission, the way that the modified greenfield test is being construed, likewise we say it was an error of law to go against the Commission's comments and to introduce uncertainty into the condition, and we say that that undermines the legality of the Decision, effectively as a matter of public law, and we would say that is not a matter for the CMA. It is not to do with the design of the Decision, it is the fact that this instrument is invalid for these reasons, so that is what we are getting at with these points.

What we do concede, and it may be that two months may seem a long time, but it can seem a short time when you are trying to put together a document like this, is that some of the material that appears in Ground 2, I think Mr. Palmer rightly points out sits more happily on Ground 5, principally, in that it is effectively submissions as to the design, which are relying on the support of the Commission as indications that BT is on the right track, and they are matters that the CMA should take into account in assessing the specified price control matters and we, I think, accept that, and we accepted that in correspondence.

THE CHAIRMAN: Are you going to amend the notice of appeal to make the distinction clear, or how would you suggest that it is dealt with?

MR. THOMPSON: We could do that, but I think we have set out a number of cross-references from the price control section of the notice of appeal and obviously if there are concerns within the CMA we would be happy to address them as best we can, but at the moment I hope we have made the position clear in correspondence.

Can I turn to the other side where, if I understand it correctly, at para. 10(c) of the CMA note they appear to be accepting our complaint about the contested Decision is that it is disproportionate because it goes beyond a fair and reasonable condition. They appear to accept that that could be a matter of design or, as I would say, proportionality of the measure, because the Tribunal will understand that one of the aspects of proportionality is that the measure should be the least restrictive available, and if, in fact, the FRAND condition would have been a sufficient regulation of prices, then that would be an

alternative which needs to be taken into account in assessing the proportionality of this measure. One sees it both in s.47(2) of the Act, and in s.88(1)(b) – I do not know if the Tribunal wants to look at that. One way of looking at this is 88(1)(a) effectively establishes the jurisdiction of Ofcom to introduce price control, whereas 47(2), and 88(1)(b) introduce effectively a form of proportionality control on Ofcom's decision to introduce, and it is essentially the otiose 1(b) measures that we say fall primarily within the jurisdiction of the CMA, either as a matter of design or as a matter of proportionality.

THE CHAIRMAN: Just before you leave that, what is the answer to the point raised at 10(c):

> "BT is asked to confirm that these grounds proceed from the premise that at least some form of price control is necessary and proportionate. If that premise is in issue under these grounds then resolution of that issue would not be a specified PCM."

What do you say to that?

MR. THOMPSON: We say that the PCMs proceed on the assumption that Ofcom had jurisdiction to impose this measure and therefore the question is whether or not it is properly designed. We say that all of our three initial Grounds go effectively to the question of jurisdiction or legal validity, whereas Grounds 4 to 6 go essentially to design or proportionality.

There is just one indicator that we are correct on this, which I would like to bring to the Tribunal's attention because it appears in the final Statement itself. If the Tribunal looks at the last paragraph of s.4 of the Statement, you will see that the VULA condition that we are concerned with only applies in relation to consumers and does not apply in relation to business purchasers, and the consequence is stated there:

> "As a consequence of implementing the VULA margin control in a new SMP condition, we are removing the fair and reasonable charges obligation in the WLA market insofar as it relates to the VULA margin with respect to the packages offered by BT Consumer".

One sees that cached out in Annex 2 to the final Statement, which is p.8 of annex 2, which one finds towards the back of the clip. The document is 292 pages long, and then there is a short first Annex, and the second Annex starts at p.4 of the Annexes. You will see it is a notification about the setting of a condition. If the Tribunal turns forward to paras. 20 and 24 you will see that the VULA condition is effectively set under 20, that refers to condition 14, under sections 45, 87(9) and 88 of the Act.

Then the modification we were talking about is under para. 24, and you will see that the modification gives notice of its determination in accordance with section 48(1) of the Act and pursuant to its powers under sections 47, 87(5) and 87(9), and so the modification of the FRAND condition insofar as it relates to charges and consumers is treated as a form of price control there. In my submission that goes with the grain of my submission that, in principle, Ofcom could have jurisdiction to impose a price control but decide to stick with a fair and reasonable charges condition. We say that is a proper matter for the CMA to consider, whether that would be sufficient, and that is really what we are getting at in the passages that Ofcom has questioned in Grounds 5 and 6, that the CMA can properly consider that even if Ofcom had that jurisdiction it could have fulfilled it by maintaining the FRAND charges position, which is what they have done, in fact, in relation to business customers. I hope that clarifies the issue that we are trying to get at, and we are grateful to Ofcom and the CMA who I think have helped to clarify everyone's thinking by their probing questions. That is where we are.

THE CHAIRMAN: Thank you very much.

MR. HOLMES: Sir, the reason why we have ventilated this in correspondence, and also raised it in our skeleton is because this is a matter of jurisdiction and it is obviously important to get it right. The parties cannot confer statutory jurisdiction by agreement or waiver, it is what the Statute says, and it does require careful consideration of the parties pleaded cases to make sure that the classification is correct.

Just starting with the basics, we accept, sir, that there are price control matters in issue within the meaning of s.193(10). As the Tribunal will have seen that defines price control matters as matters relating to the imposition of any form of price control by an SMP condition, the setting of which is authorised by *inter alia* s.87(9). In this case the condition is authorised by s.87(9) and Ofcom accepts the condition under challenge is a form of price control.

It follows that matters relating to the imposition of the conditions are therefore price control matters and are raised in these appeals. Under the Statute not all price control matters are referable to the CMA under s.193(1) of the 2003 Act, the Tribunal is required to refer to the CMA price control matters arising in an appeal relating to a price control only to the extent that they are matters of the description specified in the Tribunal Rules, and the relevant matters are specified in the Competition Appeal Tribunal Amendment and Communications Act Rules 2004. Rule 3(1) is the key rule for understanding what matters are specified. It might be useful if the Tribunal could have it to hand.

THE CHAIRMAN: I have it in your skeleton argument.

MR. HOLMES: It specifies that every price control matter falling within s.193(10) which is disputed between the parties which relates to three types of matter:

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

In our submission, specified price control matters are therefore matters raised in an appeal which concern the way in which the price control imposed by that condition is designed. The matter must concern the principles applied in specifying the control or the method, calculations and data used for the provisions contained in the condition. Those matters do not include the prior question whether a price control should have been imposed at all by the condition that is under appeal.

It is clear from Rule 3(1) that this rule presupposes the existence of a price control and is focused on what form the price control takes, what it looks like.

Starting with TalkTalk Group's appeal, this raises two points which are clearly about the design of the price control, and that is not in dispute, and those are therefore specified price control matters.

Turning to BT's notice of appeal, BT has provided a classification of the matters that it considers are not specified price control matters, and those that it considers are specified price control matters. (1) to (3) are the non-specified matters and (4) to (6) are the specified matters. We have heard what my learned friend, Mr. Thompson, says today, but we do still have some concerns as to whether that classification is in all cases correct, and it is necessary to work through the Grounds systematically in order to explain why, so I hope the Tribunal will bear with me if I spend a little time on BT's pleading.

THE CHAIRMAN: Yes.

MR. HOLMES: Starting with Ground 1, this begins on p.13, para. 19. The heading above para. 19 indicates the subject of this Ground. BT's allegation is that the Decision fails to make out a relevant risk of adverse effects arising from the price distortion, so BT therefore contends that the Decision fails to meet one of the statutory conditions for the imposition of a condition under s.87(9), namely that contained in s.88(1)(a), and the relevant provisions are set out at paras. 24 and 25 over the page. You will see from s.87(9)(a), reproduced at

para. 24, that the imposition of a price control under that provision is subject to s.88, and s.88 then provides that Ofcom are not to set an SMP condition falling within s.87(9) except where it appears to them from the market analysis carried out for the purpose of setting the condition that there is a relevant risk of adverse effects arising from the price distortion. BT says that Ofcom has not shown a relevant risk of adverse effects. Absent that risk no price control could be imposed by the condition under appeal in any form.

On that basis we accept that Ground 1 raises a specified price control matter. It is worth noting, so that we can see where the division lies between specified and non-specified price control matters, that one of the arguments----

THE CHAIRMAN: What do you mean "specified or non-specified"?

MR. HOLMES: Indeed, sir, forgive me. One of the arguments which is relied on under Ground 1 is an argument that there is no relevant risk because of the existing constraints on BT, including those imposed in 2014 under the Fixed Access Market Reviews. For example, at para.45.1, Ofcom has overstated the risk of adverse effects having regard to the constraints on BT under existing regulation derived from the European Union under the Common Regulatory Framework and the Communications Act 2003, and we take it that that reference includes the specific constraints imposed under the Fixed Access Market Reviews, including the fair and reasonable condition.

The point is then developed further at 45.8, so BT submits that Ofcom's market analysis is systematically flawed in failing to take account of significant regulatory constraints acting on BT that need to be taken into account in assessing the reality and materiality of Ofcom's concerns.

Then at para.56 you see that specific reference is made to Fixed Access Market Reviews, so in addition to these points, Ofcom's market analysis is deliberately conducted without reference to existing legal and regulatory constraints. In particular, among other matters, the further regulatory conditions imposed by Ofcom under the Fixed Access Market Reviews. At para.64 in the second sentence, you see that BT accepts that Ofcom was entitled to find that it had significant market power on the WLA market, and to impose the existing form of price control. So this ground is therefore premised on the existence of a price control.

Ground 1 challenges whether the condition under appeal should have imposed a price control having regard to existing regulation, including the price control condition already in place from the 2014 Fixed Access Market Reviews. The reason why I am working through this is because it will be my submission that parts of Ground 5 are likewise premised on the

position that there should be no price control under the condition imposed by the condition under appeal having regard to existing regulation, including the price control condition already in place from the 2014 Fixed Access Market Reviews. That is Ground 1. We accept it is not a specified price control matter.

We then turn to Ground 2. This alleges that Ofcom failed to take utmost account of the views of the European Commission, and it starts at para.81. At para.109 you see that the conclusion that BT draws from the alleged failure:

> "For the above reasons, Ofcom's Decision should also be set aside for failure to take the utmost account of the Commission's Article 7(3) Comments …"

So looking at the way BT puts its case, its position here appears to be that no price control should have been put in place because of the alleged breach of the duty to take utmost account. So this is not a point, as we understand it, that is pleaded under Ground 2 going to the design of the price control, but rather whether there should have been a price control imposed by the condition under appeal. Seeing how that point is put, we accept that it is not a specified price control matter.

Ground 3 is a complaint alleging breach of the principles of legal certainty and transparency, and you see that from para.110 where it begins. If you turn to para.132(2) on p.55, you see that BT considers that it cannot finalise this ground of appeal pending the adoption of a final position in the consultation which is currently under way.

So it is unclear at this point exactly what conclusion Ofcom draws as to the consequences that should flow from the alleged of legal certainty and transparency. It may be that BT will indeed contend in due course, and this appeared to be foreshadowed by my learned friend's Mr. Thompson's submissions today that the condition should be set aside and that no price control should be imposed in any form by reason of the lack of legal certainty, and if that is the approach that they take in due course we accept that this would not be a specified price control matter. It would concern whether any price control could be imposed by the condition under appeal, and it would not go to the design of the condition. At this stage we say it is difficult to arrive at a final conclusion as to the proper conclusion of this ground. We would be happy to plead to it, in so far as we can at this stage, as a non-price control matter. If, following amendments that BT may bring forward, or further submissions it may make in the light of the consultation, once it has concluded and Ofcom has reached a final decision, it appears that this is, in fact, exclusively a matter of design, it can easily be removed at that stage from the matters that fall to be considered at the hearing of the non-

price control matters. So we say that we cannot reach a final conclusion but that should not hold up case management at this stage.

Turning to the specified price control matters, or the matters designated as specified price control matters by BT, the first is Ground 4, which starts at para.151. This identifies errors in respect of the methods applied, calculations used, and/or data used in determining the condition. We fully accept that these are specified price control matters. Just to take one example of this, one sees at para.152(a), one of the types of argument that BT intends to advance here, an allegation that:

> "Ofcom erred in implementing an unduly stringent 'LRIC+' test, requiring each cohort of customers (in each period under consideration) to contribute a defined amount to costs that are not incremental to the supply of those SFFB bundles to that cohort …"

So these points go to the mechanics of the price control, the nuts and bolts of the design of the price control and are clearly within the scope of Rule 3.1 in the 2004 Rules.

The next ground is Ground 5, and this we find more difficult, notwithstanding the helpful clarifications provided by Mr. Thompson. This begins at para.200 on p.74 of the notice of appeal. The ground is an amalgam of several complaints, some of which appear to us to raise the question of whether any price control should have been set by the condition under appeal. So beginning with Ground 5A, para.221, the heading is just above 221, "Ofcom was wrong to consider that any additional regulation was required beyond the existing regulation maintained under the FAMR 2014". The Tribunal will see the similarity with the points raised under Ground 1. The point is then developed at paras.221 and 222:

> "BT submits that the proposal to impose the Condition … instead of the fair and reasonable condition that had been in place since 2010 and that was renewed and enhanced as a FRAND obligation in 2014 for other services should have been rejected *in limine* by Ofcom for one or more of the following reasons …"

which are then given.

You see at para.222(3) reference to the existing regulatory regime imposed under the Fixed Access Market Reviews 2014, and the statement that these are relevant to the proportionality of the condition under s.88(1(b) and s.47(2)(a) and (c).

As pleaded there, BT is saying that there should be no price control set under the condition in question. Ofcom was wrong to set a price control under the condition in question. Adequate regulation was already in place by virtue of the fair and regulatory obligation arising under prior regulation. This, in our submission, is not a question which goes to the

design of this price control - the price control imposed in the condition under appeal. It is a question which goes to whether any price control should have been imposed, should have been set by the condition under appeal. What is already in place, it is said, is sufficient, and it would be disproportionate to impose a price control here and now. We say that is, with respect, indistinguishable from the issue which is raised under Ground 1.

In each case the issue is whether Ofcom should not have imposed a price control by means of the condition under appeal bearing in mind the existing regulation in place. It is true that under Ground 1, this is said to avoid any relevant risk of an adverse effect on prices for the purposes of s.88(1)(a), whereas here the point is put as a consequence of a need for the condition to be proportionate, and it is said that any price control condition would be disproportionate at this juncture because there is already sufficient regulation in the market place.

The question of relevant adverse effects on prices and the question of proportionality are both prior statutory conditions which must be met for the imposition in setting the condition. They both are statutory conditions which must be met. There is no distinction between them. They both are requirements, conditions precedent to the exercise of Ofcom's power to set a condition under s.87(9). Specifically as regards proportionality the condition is contained in s.47(2) of the Communications Act 2003, set out at para.205.

Indeed, in the *Hutchison* litigation the Tribunal considered, as a non-price control matter, whether it was proportionate to impose any price control at all by reference to this very provision, s.47(2).

MR. ALLAN: Mr. Holmes, could you just clarify for me how you see proportionality being treated in relation to Rule 3(a) and the principles: if I understand you correctly, you seem to be suggesting that the issue of proportionality as part of the design of the price control is not a specified price control, or have I misunderstood you?

MR. HOLMES: No, sir, I am grateful for that. I may unintentionally have misled you on that. Certainly issues of proportionality can arise in relation to the design of the price control. That is clear. So, for example, it might be said that the form of price control which Ofcom is disproportionate, and a different form of price control should, therefore, be set.

MR. ALLAN: This may be a naïve question, but are you treating as a FRAND obligation as a form of price control or not a form of price control?

MR. HOLMES: Sir, while we consider that there is room for doubt as to the clarification of a fair and reasonable obligation, we accept that Ofcom exercised a power under s.87(9) in imposing the fair and reasonable obligation in this case, and we, therefore, do not take issue

with BT's position that this is also a form of price control. Our point is that their argument does not go to the design of the price control to be set by the condition under appeal. The fair and reasonable condition which is in place was imposed at a prior stage under the Fixed Access Market Reviews 2014. No one appealed that. It is not contested and it is not now open to being contested. In so far as their point is that the imposition of any form of price control by this condition - the condition under appeal - would be disproportionate, that is not a specified price control matter. It is a matter for the Tribunal to consider. There is no daylight between the point that they have raised which says that, because of the existing regulation in place, the fair and reasonable condition, including the fair and reasonable condition under the Fixed Access Market Reviews, there is no relevant risk of adverse effect on prices on the one hand. They propose that because of the prior regulatory obligation, the fair and reasonable condition imposed under the Fixed Access Market Reviews, it would be disproportionate to impose any further price control by the condition under appeal. We say that BT in their classification of Ground 1, and the consequence is also, in our submission, that the point raised at Ground 5A should also be classified as a non-specified price control matter.

MR. ALLAN: I just wanted to be sure that I understood, because it seems to me that you are positing two scenarios - there is one scenario which is the one that we have here where the FRAND condition, if you like, is part of the background factual matrix against which the proportionality of the price control in question has to be assessed, and in that context you say that the proportionality of the price control is not a specified price control matter. There could be an alternative scenario in which, if you like, the facts all occur at the same time and Ofcom has to consider which of the price control measures it should impose: should it impose the FRAND measure or should it impose the LRIC+ measure? Are you saying that in that context the proportionality of the LRIC+ measure relative to the FRAND measure would be a specified price control question?

MR. HOLMES: In relation to the first limb of your question, the existence of the prior regulation, including the Fixed Access Market Reviews fair and reasonable condition could be advanced as part of an argument which challenged the proportionality of the particular form of price control that was imposed. You might imagine an argument to the effect that the fair and reasonable condition goes some of the way, but we do need something extra, just not what Ofcom imposed in this case, and there you would be debating the form of the price control. Sir, do you understand----

MR. ALLAN: I think my question is about the classification of an assessment. Just to simplify it, there are two choices open to Ofcom. Assuming some form of price control is required, the two choices are between a FRAND obligation and the LRIC+ obligation. What I am trying to get at is in what circumstances the assessment of the proportionality of the more intrusive measure is to be treated as a specified price control measure and in what circumstances is to be treated as a non-specified----

MR. HOLMES: I understand the question, sir. Your premise is correct, so if Ofcom were choosing between two forms of price control in the statement, starting from a blank page, that choice would go to the form of the price control, we accept that. The reason, sir, why we say that Ground 5A as it is pleaded by BT does not raise a specified price control matter is because the fair and reasonable condition was already in place, not open to appeal, it was part of the regulatory backdrop and so it arises in exactly the same way. Its relevance is exactly the same under Ground 1 and Ground 5A and they are both non-specified price control matters.

MR. ALLAN: But does that lead you to what might seem to be the slightly odd outcome that in the case where Ofcom is starting from a blank piece of paper, the proportionality of the LRIC+ control is a matter to be referred to the CMA for consideration by the CMA. In the circumstances we have here, it seems to be a matter for the Tribunal to decide. So we have exactly the same question where the adjudicating body is determined by the sequence in which things have emerged.

MR. HOLMES: Indeed, sir, the sequence in which they have emerged, and the matters which are open to challenge by way of appeal in these proceedings.

MR. ALLAN: I am not sure about that, because granted the FRAND condition is not open to appeal but the essential question in any event is the proportionality of the LRIC+ control, which is the issue that would arise in both scenarios, and is the issue here.

MR. HOLMES: We accept that. There is a need to decide where the dividing line comes, and the scheme has no perfect classification. As the Tribunal recognised in *Hutchison* there is a risk of overlapping points being classified one way or another, but you do need a bright line in jurisdictional cases and our concern is that without the classification as we have proposed it, we cannot currently see how Ground 1 is to be treated any differently from Ground 5A. Obviously, I would be grateful for any assistance that my learned friend, Mr. Thompson, can supply about that, but perhaps after I have finished my run through the Grounds, if that is convenient?

MR. ALLAN: Do carry on, please.

THE CHAIRMAN: I am not trying to hurry you, but how much longer do you think you will be?

MR. HOLMES: About another three minutes. We have covered the main points, so it is Ground 5A that appears. It may be I can simplify matters in relation to the other Grounds.

Ground 5B alleges various specific design flaws in the price control in 229 and we do not dispute that those are specified price control matters.

You see at para. 229, for example, an allegation that a static basis was applied using historical data in a 'bright-line' test.

Under Ground 5C, para. 244 you see allegations that the condition under appeal is in breach of various statutory requirements, such as the requirements of proportionality, the duty to promote efficiency and sustainable competition, discrimination, transparency and so on. Insofar as these failures are said to mean that there should be no price control imposed by the condition under appeal then these would be non-price control matters. Insofar as they militate in favour of a different form of price control, we accept that they are specified price control matters. It may be that my learned friend, Mr. Thompson, can rapidly dispel any concerns by saying that they all go to the form of a price control.

Then Ground 6 concerns the terms of the price control, and we accept that these are specified price control matters. Subject to the point which I have already developed in relation to paras. 260(a) and 262, which again raises the appropriateness of the condition, having regard to the *status quo* and the fair and reasonable access obligation which is already in place. You see at 262 the way in which this is put:

> "The Decision is defective in its failure properly to analyse the conditions of competition . . . BT submits that there was no sufficient basis to find that the existing regulatory *ex post* and *ex ante* regime was inadequate to address that risk."

We understand that to be saying that existing regulation is sufficient, therefore, no price control needs to be fixed by the condition in question.

These points, while they are very interesting, may be slightly academic, depending on the approach that the Tribunal takes to the sequencing of matters that arise in this appeal. It appears to us that BT already raises the consequences of the prior regulation as part of its non-price control matters, and that will be ventilated before the Tribunal, and will be considered by the Tribunal under Ground 1. Of course, what the Tribunal rules on that will have implications for the CMA's consideration of the price control matters which are referred to it. So simply by dint of going first, it may be that the problem falls away slightly. If that is what the Tribunal decides to do, BT and the other parties will see how the

Tribunal has addressed the existence of the regulatory framework already in place, and that may be sufficient to decide matters.

Otherwise, we do maintain our position that there are certain matters which BT identifies as specified price control matters which, in our submission, are not because they go to the question of whether any price control should be set under the condition which is under appeal.

Sir, those are my submissions.

THE CHAIRMAN: Thank you very much. We will rise until 2 o'clock.

(Adjourned for a short time)

MR. PALMER: Sir, may I start by setting out two propositions which I take it are completely uncontroversial. The first is that it seems to be common ground that the question is whether any particular issues to which a ground relates is either, firstly,whether a price control should be imposed; or secondly, if it is imposed, how it should then be designed, and it is that second question which falls to be determined on an appeal, in the first instance by the CMA. The second proposition is that whichever of those two routes it goes down, whether to the CAT under the first limb, or the CMA under the second, the appeal is an appeal on the merits, as s.195(2) clearly provides. It is now well established jurisprudence of this Tribunal that the question on an appeal is not whether Ofcom's statement was adequately or inadequately reasoned, but whether the answer it reached was the right answer on the merits.

So much for the uncontroversial bit.

When it comes to categorising which of the grounds go down which of the two channels, Ground 1 is uncontroversial, it clearly concerns the question of whether Ofcom should have acted at all.

Ground 2, I am mindful that Mr. Thompson rowed back from BT's initial position, but, in my submission, the tide which carried him back has not yet carried him quite far enough, and there is further room to go.

It is helpful to start by looking at how BT put Ground 2 in its notice of appeal, and I start in particular, first of all, at para.4. Paragraph 4 is in the introductory section to BT's notice of application, and in my submission presents the issues in a logical order. That order, first of all, is to raise Ground 1 under 1, and then 2, to skip to the Grounds 4 to 6, which concern, on BT's analysis, the design of the condition. Then at 3 in respect of Ground 2, it says this----

THE CHAIRMAN: Sorry, where are you reading from?

MR. PALMER: I am in para.4 of BT's notice of appeal. Here it is just a summary of the way BT at a very high level puts its case. You will, sir, it starts with Ground 1, and then skips to the design of the condition with which BT says Grounds 4 to 6 are concerned. Then next, under 3, in relation to Ground 2, "Both the above defects reflect a serious failure to take utmost account of the view of EU Commission contrary to the obligation of the Framework Directive".

Then the way that is developed under Ground 2, if one turns, first of all, to the principles of law on which BT found their case at para.92 - I will be careful not to stray into any of the merits of what BT is saying, so I will take as uncontroversial for the purposes of my submissions the way in which BT puts its own case on the law - BT sets out what the meaning of "utmost account" in the context of a complaint that Ofcom failed to take "utmost account" of the various Commission recommendations. One can see at 92(2) a reference to the *Vodafone* case:

> "The CFI [now the General Court] in considering the legal nature of a Commission letter of comments noted that the obligation to take the 'utmost' account of the Commission's comments indicated the non-binding nature of such a letter, such that after a careful review of the Commission's comments a national regulatory authority could decline to follow the Commission's approach."

So that I take as uncontroversial. Then (3) at the top of the next page:

> "In its final determination in *Cable & Wireless's* appeal against the 2009 Leased Lines Charge Control, the CC observed that the requirement to take the utmost account of a recommendation meant that while Ofcom is not compelled to follow it, Ofcom may not disregard the recommendation, nor treat it lightly and it should have good reasons as to why some other way of exercising its powers has more salience."

So on BT's case here, which I do not for the moment suggest is incorrect, the obligation on Ofcom was to have regard to what the Commission said, and if it was going to depart from what the Commission recommended and do something different, the obligation on it was to provide reasons for doing so, which, in its assessment, justified the different course, and there is a similar case put forward by BT at para.94 by reference to a domestic judicial review case referring in a different case to a considered decision that there is good reason to deviate from guidance.

So that is the legal basis upon which this complaint is brought. My central submission about Ground 2 is this: in the context of a merits review, the inquiry before whichever

tribunal body decides this ground will be to consider whether the reasons that Ofcom for departing from the Commission's recommendation where it did were relevant and sufficient, or, to put it another way, sufficiently salient, to justify that approach. In doing so, the question will not be whether the reasons given were expressed badly or inadequate in that sense, the issue before the Tribunal will be, on the merits has Ofcom here identified a sufficient case for departing from what the Commission recommended, such as the point where it ended up is the right answer?

My short submission is that that is quintessentially a merits point, and there is no other point beyond that which survives.

The way that BT puts it when they come down to the application of that principle to their actual complaints is shot through all the way with references to various aspects of the design of the condition, and I shall not labour that point because I understand that now to be largely common ground, but in respect of two paragraphs in particular singled out in BT's skeleton argument for today's hearing, it seems that BT is still advocating a different answer.

The two paragraphs that BT refers to paragraphs are 100 and 108. I will go to 100 first, where the case put forward by BT is, inconsistently with its obligations to take utmost account of the Commission's comments and its recommendation, the Final Statement aggravates the inconsistency of the condition with the Commission's view. The first point is that the Final Statement indicates that the condition will be applied on a monthly, rather than six monthly, basis, i.e. a significantly shorter period than the six month time interval for assessment which had been considered by the Commission to be already too short and inconsistent with the approach provided for in annex 2.

Just pausing there, I do not understand BT's case to be that simply because the Commission recommended a longer period than the six monthly basis, Ofcom was bound to adopt that recommendation. I understand their case to be that if they were going to depart from that they were to give sufficient reasons for doing so. That particular feature of Ofcom's reasoning is, as footnote 27 reveals, a complaint about the definition in the condition of the term "Compliance period". We do not need to turn it up, the condition itself, but it appears in Draft Condition 14 that you saw earlier, and it is the definition of "Compliance period", which is defined currently as "any period of one month over which Ofcom makes an assessment". It is that period of one month, as it appears, in the design of the condition with which BT wants to take issue, arguing that it should be certainly no less than six months, but in fact on their case longer than six months. We say that falls squarely into the design

of the price control, in particular Rule 3.1(c) of the Tribunal's Amendment Rules is where it would fall. Whether that case is right or wrong is a matter going to that issue on the merits. So reading on to para.2 under that heading:

> "The Final Statement rejects any forward looking analysis to the kind recommended by the Commission in its comments in its 2013 recommendation, preferring instead to compound the uncertainty which, as the Commission rightly observed, could have the perverse result of BT changing its behaviour in a market different from the regulated market to which the condition relates."

Again we say that squarely raises an issue as to the design of the condition.

THE CHAIRMAN: The trouble is it is very much a legal question, is it not, this ground. One would have thought this was better suited for the CAT to deal with it rather than the CMA?

MR. PALMER: Sir, the first point to make about that is I do not recognise any distinction between points of law and other points. That is not how the Rules, as to what is specified or non-specified, are constructed. The appeal under s.195(2) is an appeal on the merits, and that will embrace, certainly, questions of law, as well as arguments that a discretion should have been exercised in a different way, or an error of fact has been made. An error of law can be raised just as much as any other point on any issue. That is not the basis upon which the Rules split up and separate the issues arising. What they split up and separate is what those complaints go to, what the appellant is asking, or seeking to change, to put it another here. Here what BT is seeking to change is the design of the condition. On their case they say a good reason why it should be different is what they present here as an error of law.

THE CHAIRMAN: It is saying it should be set aside, is it not? That is the consequence of Ground 2.

MR. PALMER: I beg your pardon, sir?

THE CHAIRMAN: As I understand it, what they are asking for under Ground 2 is that the Decision should be set aside.

MR. PALMER: I am just coming to that. At the moment, and subject to what BT say, the CMA does not understand how that paragraph as to remedy can suddenly appear at the end of a ground which is directed, in substance, entirely to the merits.

THE CHAIRMAN: I apologise.

MR. PALMER: So I do see that, and if there were a pure point which went to jurisdiction - in other words, a question of whether a price control should be imposed at all, and of course I would be the first to accept that is a matter entirely for the Tribunal. In fact, when you look at the individual points which are raised all the way through up to that paragraph, each and

every one is concerned with aspects of the design of the condition. I do not want to labour it since it is largely accepted now. Whether that is a question relevant to the adoption or otherwise of the EEO costs standard, and whether that should be adjusted, conditions as to the length of time which the compliance period should be, these are all matters which appear in the condition.

When we get to paraa.108, which is the single other paragraph that BT still single out, this really is a trailer for Ground 3, it says:

> "Furthermore, as set out under Ground 3 below, the very limited changes made to Ofcom's Final Statement do not address the points made by the Commission by changing the condition or the accompanying guidance in the way the Commission suggests, but rather by heightening the uncertainty surrounding the application of the test, thereby exacerbating a risk identified by the Commission that the design of Ofcom's test may distort BT's behaviour on Pay TV markets, and breaching general principles of EU law, including transparency and legal certainty."

I can wrap up my submissions on that with my submissions on Ground 3. As appears from the paragraph I have just read, and from para.118, which is the first paragraph on Ground 3 under the heading "Application to present facts", it is aimed again squarely at the condition, albeit here also and associated guidance. The starting point has to be the condition, and it appears that BT is making a point that in the interests of legal certainty and transparency, and the various other principles that are relied upon, Ofcom is bound to set out in the condition more clearly, more certainly, what the circumstances are when the application of this condition will be varied, will be changed.

In so far as that is a complaint directed to the drafting of the content of the condition, that is a matter which falls to be considered in the first instance by the CMA.

Can I just show you a little bit more about that with reference to the Statement itself and the evidence which BT relies. In Ofcom's Statement, if you turn to para.6.5. This is in broad, high level terms, the part of Ofcom's Statement about which BT is aggrieved and of which it complains under Ground 3. I can go straight to 6.5 - do you have that, sir:

> "As set out in section 4, by setting out these details in guidance (rather than including them in the condition) we retain appropriate flexibility to adapt to material changes in circumstances while still providing stakeholders with as much certainty as possible on what our approach will be. Furthermore, in light of the European Commission's comments (see Section 7), we have recognised that our Draft Statement did not make sufficiently clear that we are prepared to respond

flexibly in our treatment of BT Sport costs if circumstances do change materially. Accordingly, we now provide further detail on how we may respond to changing circumstances."

Then guidance points are set out, and I can skip to 6.6:

"While we do not consider that it is appropriate for the details of the guidance to form part of the SMP condition, there are two exceptions to this …"

and Ofcom there stipulate two exceptions. Then 6.7:

"We consider that it is important to set out these two parameters in the SMP condition in order to provide BT with certainty, particularly as they are set with reference to other operators' data. We also consider that the values we have specified in the SMP condition are sufficiently reliable and fit for purpose for the period that the regulation will apply."

So the essential complaint here is there is not enough certainty in the condition, too much is left to the guidance. In the interests of legal certainty there needs to be more in the condition. We can see that if we turn to the evidence of Mr. Tickell on behalf of BT, which is behind tab 4 of BT's appeal bundle. It is internal p.85, and you can see the heading, "Section F, the European Commission's comments on Ofcom's Draft Statement and the relevance of a material change in circumstances", and F1, comments from the European Commission, and there are various concerns of the Commission set out. Then over the page we see at 206:

"The Commission then specifically requested that Ofcom revisit the design of its test to ensure that sufficient flexibility is given to BT to recover the considerable costs for BT Sport over a longer time arising, in particular uncertainties relating to scale and costs of future auctions."

So again the complaint, in so far as it refers to the utmost consideration of the Commission's recommendations, para.108, it is put in those terms about revisiting the design of the test to ensure that these results are reached.

Sir, we say the upshot of that, as it appears at the moment to the CMA, is the substance of the complaint here is as to the content, or lack of, of the condition, what it ought to provide for. That is a merits question in the first instance, it is not enough simply to say it is different from what the Commission suggested. You have to go further and engage with the reasons, and that is not simply a cut and dried question, but, even if it was, it is still a matter for the CMA to determine on the merits.

So those are our submissions on Grounds 2 and 3. Ground 4 is uncontroversially a specified price control matter.

I can go straight to Ground 5A. Sir, there has been some travel on this issue. This is, as far as we know, a novel issue. At first blush it appeared to us that this is simply a "whether" question and fell to be determined by the CAT rather than the CMA. We then listened very carefully to BT's case that actually what it was ultimately complaining of was that this was a different form of price control to the form of price control which already exists, and should be therefore a question of the content of the price control conditions. We listened very carefully to that.

We also listened to what Ofcom said this morning, and indeed to the questions of Mr. Allan to Mr. Holmes, and it does seem to us that the issue is whether there is a problem against the background of the existing regulatory landscape which requires a further remedy. If there is an issue as to what question there is under 5A, then we consider, on balance, doing the best we can in interpreting a complex statutory regime, that it is a matter for the Tribunal. If it is uncontroversial that there is a problem which needs a remedy, but the only question is what form should that remedy take, then that is a matter for the CMA. It comes down to the design of the condition.

Sir, we do say there is, in fact, some significance to the fact that the point being raised now, the condition being challenged now, is a different condition to the one which imposed the fair and reasonable charge condition in 2014. It is not anomalous, in fact, in any way to say, "If, in 2014, the debate had been, there is a problem, do we impose a fair and reasonable charges condition alone or do we also design a margin condition such as the present one?" That may well, in those circumstances, have been a matter exclusively for the CMA to determine.

Matters have moved on and it is not exactly the same question as would have arisen in that circumstance that arises now. The only question for the Tribunal now, we say, is whether there is an outstanding problem which needs to be fixed. So it is not just a question of whether or not this is a more or less proportionate way to fix it. Existence or otherwise of a problem which requires remedial regulatory intervention is a "whether" question, not a "how" question, if I can use that shorthand.

So we say that Ground 5A is best categorised as another "whether" question for the Tribunal arising out of another decision than that which imposed the fair and reasonable charges condition in 2014.

Sir, we say essentially the same applies under Ground 6 to the identified paragraphs in our skeleton. For your notes, it is paras.257 to 258, 260(a) and 262. It is all the same point, and it can all be dealt with by reference to that single paragraph, 262, if I could turn that paragraph up. Mr. Holmes did show it to you earlier. It is in substance, in so far as it is not a repetition of Ground 1, and it seeks to add to it, a repetition of Ground 5A, as you see at the end of the paragraph by the direct reference back and incorporation of paras.221 to 227 under Ground 5A. We do not distinguish a different point under 262, and we say that again it falls to be treated, whatever the answer is for 5A, in the same way.

Sir, those are our submissions on the issue of whether something is or is not a specified price control matter.

MR. PICKFORD: Sir, we would have gladly stayed out of this particular debate. Indeed, in our written submissions we did. Sadly, it has become necessary for us to engage in it at least to some extent because of the fact that Ofcom relies on its position in relation to what is a price control matter and what is not a price control matter, as something it develops to then underpin its position on the sequencing of the appeals. I can be very brief, but there are a few points that I would like to make if I may.

In substance our position is identical to that of the CMA. We say the CMA's analysis of what is a price control matter and what is not a price control matter is absolutely correct in relation to Grounds 2, 3, 5A and the parts of 6 that it identifies. The reasons given are also correct. Ultimately Grounds 2 and 3 go to the question of the design of the price control not the "whether" question of whether there should be a price control at all.

Ofcom says in relation to Ground 2, certainly in their written submissions, that it raises a point of law about the decision making process. They say that is why it is a matter for the Tribunal. We say in response to that, that is a rather artificial stance because ultimately it is not the case that BT is alleging that Ofcom actually failed to have regard to the Commission or European guidance in the sense of ignoring its existence. Clearly it was aware of it. It read the materials, it addressed them. The question, the ultimate question, is: in the light of those materials, was Ofcom's justification sufficient to lead to the adoption of the design of the remedy that it did. That is a quintessential price control matter.

In response to a question, sir, that you raised, does that not involve a question of law, we would endorse what Mr. Palmer says that, yes, it does involve a question of law, but that does not prevent it being a price control matter. To give one very obvious example, whether any particular remedy is a proportionate one involves a question of law. What is required by proportionality, how has Ofcom gone about assessing proportionality in the

given case? That does not prevent it from being a specified price control matter. If it did, then almost every single appeal that ever came before this Tribunal would be bifurcated, because the proportionality of the remedies is almost always in issue in relation to every aspect of them. So the fact that there is a point of law bundled into the question does not determine whether it is or it is not a specified price control matter.

Another point that was put to Mr. Palmer was: is there not an inconsistency between the remedy and what is being asked for in relation to Ground 2? Firstly, we would make the point that Mr. Palmer makes in relation to that. Secondly, it is conceivable, in the alternative, that, in fact, one could well see that there would be circumstances where, if a decision in relation to the particular form of price control was so flawed, the appropriate remedy might be to have it set aside and sent back. That does not mean that it was not appropriate to impose a price control, it simply means that there was such a problem in relation to the price control that was imposed that one has to ask Ofcom to think about it again. So the fact that BT may be asking for the price control to be set aside does not determine that it is, therefore, a non-specified price control matter.

Sir, beyond that, I think all of the submissions that I was proposing to make would simply be repeating the ones that you have already heard from Mr. Palmer. Those are my submissions on those matters.

THE CHAIRMAN: TalkTalk's position is that the CAT should deal with the non-specified control matters first?

MR. PICKFORD: No, it certainly is not. I had anticipated, because no one had addressed it, save for there being some hints of a position that Ofcom was going to take, that I was going to come on to deal with that. I am very happy to deal with it straight away now.

THE CHAIRMAN: Could I ask the CMA to deal with the sequencing point first?

MR. PALMER: Sir, we see some very good sense in the non-specified price control matters being dealt with first in the context of this particular appeal. There are circumstances in which it is possible to follow down a twin track, but in this case BT's appeal, however one draws the line between the specified and non-specified price control matters, undoubtedly raises issues of overlap to some extent. We say that it is necessary and appropriate in principle for the CAT's judgment to inform the CMA's consideration of those issues. Of course, if BT were to succeed on their Ground 1 or indeed on their Ground 5A, then all the remaining grounds would fall away in any event, because they seek to establish that there is no need for any such condition at all. So if we were to fire the starting gun straight away

then an awful lot of time, resource and indeed opportunity costs for the CMA may be completely wasted.

Sir, hand in hand with that are some pragmatic concerns which come down to the detailed timetabling of the appeals in any event. Sir, the CMA makes no submissions at all about the timetable which should be followed in respect of the CAT's own proceedings. Taking BT's skeleton argument to hand, they have proposed a timetable which I can refer to without in any way suggesting that that is the timetable the CAT should adopt because, illustrative of my pragmatic concerns in this case, if you look at that timetable you will see that the result of it is, as putatively put there, that the reference to the CMA would be made on 18th September.

Meanwhile, on the other track the substantive hearing of the CAT issues would be a month or so later - four or five weeks later in what is referred to as "late October 2015", so about five weeks there, and the judgment would be for the CAT afterwards, but one might postulate at some point in November, I do not know.

The time by which we are suggesting that the reference should be delayed is a matter of weeks. They are not unimportant weeks. If you look at what would be happening in the intervening period between the reference and the substantive hearing in the CAT, aside from the technical meetings you have the parties' core submissions. The Tribunal may know that under the CMA's established procedures and rules, within four weeks of the reference the parties have to submit their core submissions which form their essential submissions which they can only depart in very limited circumstances for the whole of the rest of the reference procedure. So that is the time that they would be settling those core submissions.

If the outcome of the Tribunal procedures fell short of allowing Grounds 1 and 5A, so there still was a live reference to be pursued, nonetheless, if I am wrong about the fact that all of Grounds 2 and 3 not being non-specified price control matters, that may have an impact then on how the parties put their own cases in their core submissions. So if there is a knock-on effect from the Tribunal's judgment, the very next thing that will have to happen is for leave to be given for the parties then to revise their core submissions. So although the Tribunal would have achieved the otherwise desirable objective of firing the starting gun sooner, it would have turned out to be a false start and it would not actually lead to any greater expedition in the subsequent process.

THE CHAIRMAN: Yes.

MR. PALMER: Sir, the only other points to be made about the timings, all parties who have commented on the point are agreed that the reference certainly should not be made until the close of pleadings, or at least until after Ofcom has served its defence in respect of the specified price control matters. We consider that to be absolutely essential, to know what the issues actually are as they crystallise. All parties also agree that the reference period should be around six months. I think TalkTalk suggested 28 weeks. That is the period we would ask for. That is what experience tells us would be necessary for a case of this kind and relatively detailed and complex points being raised.

Sir, both as a matter of best use of the CMA's resources, the logical way in which the issues arise and indeed the practicalities of the timings, meaning this will only boil down to a question of a few weeks either way, we submit that the most appropriate course would be to make the reference after the Tribunal has given judgment.

Of course, sir, it may be, and I make no comment either way, that the Tribunal considers that it can be in position to get to the substantive hearing and the judgment sooner than late October. If that is so, then again the difference between our respective positions would be that much less.

THE CHAIRMAN: Thank you.

MR. HOLMES: Sir, at the risk of chopping around, just a very brief point on that, we fully and gratefully adopt the submissions of Mr. Palmer. On the pragmatic point, we would just note that the date given by BT for Ofcom's price control defence is shorter than the date that Ofcom considers that it would need. When that is factored in, the point applies with even greater force. The timing of the reference would necessarily be later, and it is therefore likely that by the time that the reference is made it would be possible for the parties to have fully pleaded the non-price control matters and for a hearing to have taken place. Obviously it is a matter for the Tribunal when it can produce a judgment, but there is a fair hope that a judgment could be produced in short order, given the scope of the non-price control matters. The timetabling would anyway work out this problem of sequencing.

Sir, in case it assists, we have produced a modified version of BT's timetable which the other parties have and which it might be convenient to hand up. There are a few other differences between this and BT's proposal, but the difference that is of present relevance regards the date of the defence, and you will see that, in relation to the price control matters which are shown in the final column, we are proposing the date of 30th September for Ofcom's defences. Obviously the Tribunal will have to hear argument as to the

appropriateness of that date, but if it were accepted then it adds further force to the pragmatic point that Mr. Palmer made.

THE CHAIRMAN: Thank you.

MR. PICKFORD: Thank you, sir. We have a primary and secondary case in relation to the timing of the reference to the CMA. Our primary case is that TalkTalk's and BT's specified price control references should be made together as soon as practicable, subject to the necessary issue of amendment.

Our secondary case, and this is very much not our preferred option, is that if there is to be a delay in referring BT's specified price control matters because of a perceived inter-relationship between the various points raised in BT's appeal, that should not delay the reference of TalkTalk's appeal to the CMA.

The reason why I say that is very much our secondary case is that we recognise, as I think everyone here recognises, that there would be an obvious advantage in having the reference of our appeal and BT's appeal to the CMA at the same time. That is certainly the primary position which I hope to persuade you of in just a moment.

The reasons, however, that we are very anxious about the proposal that is being put forward by Ofcom and the CMA that we should await the determination of the Tribunal before make a reference are as follows: you will have seen from the Ofcom Decision that the current period is a particularly important one in the development of the industry, and if I may I would just like to take you to one paragraph of the Decision which really underscores that. It is right at the beginning, para.1.6, and there Ofcom says as follows:

> "Our approach to the VULA margin covers the 2014 to 2017 market review period, which we consider likely to be an important period in the transition from standard to superfast broadband. It will thus be important in determining whether the effective retail competition currently observed in broadband services is maintained in superfast broadband services as this transition occurs. During this market review period there is a heightened opportunity for retailers (including BT) to compete to attract new subscribers. However, this competition could be dampened were BT to set the VULA price in a way that allowed it to distort competition."

So it is quite clear that now is an absolutely critical time in the development of the superfast broadband market. It follows that if there is a problem with the design of the price control, it is in the interests of all parties to have that resolved, and for there to be commercial

certainty in relation to it as soon as possible, and we accept that applies as much to BT's complaints as it applies to ours, albeit we obviously say BT's complaints are ill-founded. Further we do have, as does BT, a Community law right to an effective appeal. That is enshrined in Article 4.1 of the Framework Directive. I do not know whether all members of the Tribunal are familiar with that. Would you like me to show you that provision or is that one that you are familiar with? I can do so very easily.

MR. THOMPSON: Certainly as against BT it is not dispute, and I doubt if it is in the CMA and Ofcom.

MR. PICKFORD: I am grateful. It is quite clear, as a matter of Community law, that we have a right to an effective appeal. That is the adjective that is used in Article 4.1. Against all of that, we say that what is being proposed by the CMA and Ofcom is likely, or at least runs a substantial risk of not giving effect to our rights to an effective appeal. I would like to explain why we say that is the case. The easiest way of doing it is by illustration and by reference to another case that has been before the Tribunal in recent years, which is the *Pay-TV* case. In the *Pay-TV* case Ofcom's Decision was taken in 2010. Ofcom was defeated at first instance by Sky. Then what happened is an intervener - in this case BT - appealed to the Court of Appeal. The Court of Appeal determined the appeal in favour of BT and the case has now been remitted to the Tribunal, but the determination of the remitted matters has not yet taken place. That is over five years after the original decision as taken.

What would happen if Ofcom lost at first instance in this case and the Tribunal had decided to stay the determination of the price control matters pending the decision of the Tribunal in relation to the non-price control matters? If TalkTalk's appeal has been stayed, then if Ofcom were to lose it is very likely that it would continue to be stayed pending the resolution of the determination by the Court of Appeal.

What if, then, there was success by an appellant in front of the Court of Appeal? Then, TalkTalk's appeal would have been stayed for several years before there was any reference to the CMA to have the matters determined, at which point insofar as there is a problem with the design of the remedy it will all be entirely a matter of history. The damage will have been done and we say that that would not be an effective remedy. The likelihood of an appeal, as I am sure the Tribunal is well aware, is an important factor weighing against, in ordinary cases, a preliminary issue. In our skeleton argument we refer to the case of *Lexi Holdings (In Administration) v Pannone and Partners* where Mr. Justice Briggs (as he then was) made the point that given there was a strong likelihood of one party or the other, the loser, appealing in that case he was disinclined, and it was a strong factor weighing against

ordering a preliminary issue to do so because, given the appeal that would simply elongate the whole of the process.

In the present case we say, given the importance of these issues and the kind of parties one has represented here, the chances of an appeal in this case must be fairly high - there have been a large number of appeals to the Court of Appeal in similar telecoms cases.

MR. ALLAN: But in the hypothesis you describe, the example you describe, if the TalkTalk issues were referred to the CMA, but BT was successful on Ground 1 in your view of the way the matters should be classified, there would then be a CMA reference which would proceed and would be, in a sense, inoperative unless and until there is a Court of Appeal decision reversing this Tribunal's decision. In a sense it is a precautionary reference which would spring into being.

MR. PICKFORD: Exactly.

MR. ALLAN: You say that is what is necessary to give you an effective remedy.

MR. PICKFORD: It is, because it would spring into being immediately and, moreover, insofar as there were issues to be----

MR. ALLAN: Or it would just die a death and have been a complete waste of time.

MR. PICKFORD: Plainly that is a risk where one has any legal proceedings where there are potential preliminary issues which could be determinative of the whole proceedings. You always have a choice. You can either decide certain things first and if you are lucky and get the right answer, and that is all upheld by the Court of Appeal and everything else is stayed, then there will have been a costs saving. But, the price that one pays for that invariably is that those other issues are then put back and, in this case, we say they could be put back a very long way and that would undermine ultimately our rights to an effective appeal, particularly because there may well be issues that need to be appealed in relation to price control matters as well as the specified price control matters, as well as the non-specified price control matters. Allowing all of those to run simultaneously now will put us in a position where at least we might be able to have some form of relief as opposed to effectively having an appeal which would be entirely pointless.

THE CHAIRMAN: So you are envisaging the possibility that there might even be appeals against a CMA decision on the TalkTalk reference, which are themselves hypothetical depending on the outcome of the appeal against a decision here in favour of BT.

MR. PICKFORD: I am saying that insofar as those matters might arise, which is quite possible, what we want to do is to ensure that everything is progressing as fast as it can do. I could come on to what we say the solution is, and it is not a million miles away in some ways

from what both the CMA and Ofcom say, but it is, nonetheless, significantly different. What we say in relation to their suggestions: "Don't worry, it's only a matter of a few weeks", that appears to us to be unrealistic. If there is no reference made at all until there is a determination by the Tribunal - obviously we will welcome a very speedy determination by the Tribunal, but given the amount of time that relatively complex litigation in this Tribunal generally takes, we think it is unrealistic that we are going to have, as Mr. Palmer was referring to, a potential decision in September of this year in relation to an appeal which currently, almost everyone seems to be in agreement, needs to be re-pleaded by BT because there is, at the very least some degree of imprecision in the way it has currently been put together. We would suggest that a more realistic timetable to envisage for a determination by the Tribunal would be towards the end of this year or the very beginning of next year. If that were the case and the two procedures were running simultaneously, the CMA's final determination could be set so that it does not actually have to give that determination until the Tribunal has ruled on the non-price control matters. That would allow the opportunity for the CMA to take account of what the CAT has decided in relation to non-price control matters, to ensure that there is no possibility of inconsistency. If necessary, there might need to be a very small further round of consultation and submissions where the CMA say that we do not think anything changes as a result of this because we had already taken the view on the various points that we had to take that is consistent with it, and we might say we have to change something in this particular way. That would allow the decision of the CMA to give effect to the Tribunal's determination, but what it would not do is lead to the risk of the determination of the CMA simply being put back, at the very least, for an extra six months. We say, potentially, given the sorts of circumstances that might arise, considerably further than that. That is what we say should happen instead.

In relation to the justifications that had been proffered for structuring the reference and the Tribunal proceedings in the way that is suggested by the CMA and Ofcom, we say there is less of a difficulty in relation to an interrelationship between BT's grounds than, in fact, appears to be the case. Ofcom says there is a problem here because there is an interrelationship between Ground 2, which is a non-specified price control matter, and Ground 4, which is a specified price control matter, and because of that interrelationship it is important that we know the result from the CAT before we go on to the CMA proceedings.

Our answer in relation to that is that that is not correct, because, in fact, Ground 2 is not correctly specified by BT. Ground 2 is, in fact, a price control matter and, therefore, just like Ground 4, it should be going off together, so there is not a problem with an interrelationship there. Similarly, in relation to Grounds 1 and 5, the bits of Ground 5 that concern Ofcom, where it says that actually there is a relationship between what is said under Grounds 1 and 5 here, they are, we say, the bits of Ground 5 that are properly not price control matters, but non-specified price control matters, and therefore they should also be wrapped up with Ground 1. When one actually reparses the notice of appeal of BT properly, one sees that the suggested interaction to a large extent drops away. We are not saying that in an ideal world it would not be nice to know what the answer is first, but we say that has to be balanced against the other considerations that I have set out in relation to the effectiveness of our appeal.

There are a few further points to make in response to Sky, we have not heard from Sky yet, but they make a number of points in their written submissions, and if I could just very briefly address those.

First, we do not actually understand why Sky is taking a position in relation to our appeal, it is not an intervener in our appeal, so we say it does not actually have standing to say anything about it. But, insofar as it is going to the points that concern Sky are, first, its own expenditure and what is administratively convenient for Sky. We say that is a price for intervening and, as an intervener, you have to take a somewhat subordinate role and, in any case, as they are not intervening in our appeal, it is hard to see that there is a major problem that is of concern in relation to that point.

Sky also mentions the efficient use of the CAT's and CMA's resources. We accept that. Those are plainly legitimate considerations but, as we say, balanced against that one has to give effect to our right to an effective appeal.

The final point is one of slight concern, which is at para. 15 of Sky's submissions, it says that there are sound administrative reasons why the reference procedure to the CMA Panel is usually a discrete procedure which generally follows on from the substantive CAT determination on any other issues.

We have prepared a table of all the proceedings of which we are aware that have raised both 'referred' matters and 'non-referred' matters, if I can call them that, under the 2003 Act. In the time available I cannot guarantee it is 100 per cent exhaustive, but certainly there is nothing that we have knowingly omitted. In relation to that, there is not one reference previously that has been made after the Tribunal's determination of the other issues in the

proceedings. I have provided the Tribunal with a small clip and if one turns to tab 4 of that, my Junior, who unfortunately could not be here today, has very helpfully prepared a summary page, which simply sets out the timings of various steps in all of the cases that we could immediately find where there has been both price control and non-price control matters simultaneously. In each one, one sees that the reference of the specified price control matters occurred prior to the judgment on the non-price control matters.

There may be other cases and obviously Mr. Beal has in mind something else, but certainly our understanding is that it certainly could not be said that what is being proposed now is generally the case. In fact, what is being proposed now would be the opposite of any case that has previously been before this Tribunal.

Sir, unless I can be of any further assistance, those are my submissions on that point. Thank you.

THE CHAIRMAN: Do you want to say anything, Mr. Beal, or not?

MR. BEAL: I would do, it is a question of whether Mr. Thompson has to go first?

THE CHAIRMAN: Do you mind, Mr. Thompson? I was going to suggest you carry on.

MR. THOMPSON: That is fine.

MR. BEAL: My short submission on this is that we support Ofcom and the CMA's approach to having the CAT deal with CAT issues before there is a reference. The primary reason for that is the risk of there being an inoperative reference and wasting everyone's time and money, it is not just Sky's money. Sky obviously cares about Sky's money, but there is the wider public purse issue which is more important for the Tribunal no doubt.

I have five very short points following on from that. First, my learned friend, Mr. Pickford, says he has a right to an effective hearing. So he does, but that cannot sensibly trump the right for this Tribunal to conduct an efficient hearing. An efficient hearing involves balancing competing interests between different parties.

Secondly, it is not efficient to have a degree of uncertainty as to the extent of the role as between this Tribunal and the CMA Panel.

Thirdly, the consequence of having a lack of clarity between two adjudicatory bodies would be the risk of divergent decisions or, at the very least, the risk of different submissions being made to two different bodies that tilt at different targets with the consequent mess that that might well involve.

Fourthly, we therefore say there good sense in the CAT dealing with the CAT issues, and then giving the CMA Panel free rein to deal with the CMA Panel issues, i.e. the price control matters, in due course, once any uncertainties have been clarified by this Tribunal.

The fact that that would then lead to an operative reference rather than an inoperative reference is obviously something which must weigh very heavily with this Tribunal because there is no point in wasting everyone's time and money on having something that may not be effective, and that goes as much for TalkTalk's appeal as it does for BT's, because the carpet would be pulled out from TalkTalk's appeal if some of BT's arguments on Grounds 1 to 3 worked.

The fifth point is that the *in terrorem* threat of appeals should not weigh heavily at all with this Tribunal. Appeals are a fact of life, they happen, they are dealt with. Until such time as the Tribunal's decision is stayed pending an appeal then you have an operative Tribunal decision and an operative reference.

Those are my only submissions, thank you.

THE CHAIRMAN: Thank you.

MR. THOMPSON: Sir, can I just pick up, first, on the issue of law that was debated over the short adjournment, but if I could just summarise BT's position on that. Ground 1 seems to be common ground that that is a matter for the Tribunal. Grounds 2 and 3 I have heard what Mr. Palmer says but, in my submission, the position is as the Tribunal put to him, that these are points of law whereby we say that this Statement was unlawful on two grounds and should be set aside on that basis. We say that is a matter for the Tribunal.

Mr. Pickford seemed to think that there was some sort of common view that BT's case would need to be generally re-pleaded, and I should just make it clear that we do not make that concession at all. On the contrary, it appears to us that Ofcom and the CMA has gradually moved in BT's direction and that our position is, in fact, correct.

So far as concerns Grounds 5A and 6, in my submission, the questions from Mr. Allan to Mr. Holmes were very much in point. The case in relation to proportionality is a matter for the CMA and concerns the design of this control and whether or not a FRAND condition would have been sufficient, and Ofcom appears to concede that a FRAND condition is a form of price control and, for what it is worth, it would make it very difficult to argue that, as a matter of proportionality no price control could be enacted here, given that BT has accepted a FRAND control since 2010, accepted it in the FAMR condition and continues to accept it in relation to business customers. So, in my submission, it is clear that the proportionality challenge is rightly brought before the CMA, and on the assumption - an assumption which we challenge - that Ofcom had jurisdiction to introduce a price control, but we say that the form of price control that it introduced was disproportionate, among other things because a FRAND condition would have been sufficient to deal with any risk

that may exist in this case. So, in my submission, Mr. Allan's questions were very much to the point, and this is a second type of proportionality challenge rightly brought before the CMA.

MR. ALLAN: But, I think Mr. Holmes' point, as I understood it, was that it does, nevertheless, raise a "whether" question as opposed to a "how" question.

MR. THOMPSON: It raises whether this control was rightly brought.

MR. ALLAN: Any control over and above the existing regulation.

MR. THOMPSON: Yes, but the existing regulation, I think on Mr. Holmes' concession, is a form of price control and we clearly do not challenge that, so what is being raised under the first Grounds is whether or not the market analysis was sufficiently robust, or was vitiated by a point of law, or whether the form of the statement is unlawful because it is inconsistent with the position of the Commission or legal certainty. Those are all points of law which we say makes this statement invalid. In relation to proportionality we say there was a less restrictive alternative of various kinds but, in particular, the FRAND condition which Ofcom itself accepts is a form of price control and, indeed, is maintained as such in relation to business customers. That is our position, sir, so we would not say that any substantial re-pleading is required, but I have already made one point which is that we accept that Ground 2 is, perhaps, infelicitously expressed in that it includes elements of design which are cross-referred from the later grounds, and we would accept that those matters are properly for the CMA, and we are considering, I think, three points that Ofcom has raised where they say that our pleading is insufficiently specific, and we will respond in due course, either by saying we think it is sufficiently specific or, if we accept the criticism, by making it more specific, but that is not a wholesale re-pleading.

So far as the debate that we have just had, the benefit of the various parties on timing, our position in our skeleton argument is broadly the same as Mr. Pickford's and, of course, although he feels aggrieved that his appeal is not being heard, we are the ones, in fact, subject to a fairly extreme form of price control so if it is unlawful we would like to get rid of it as quickly as possible, either as a matter of design or a matter of *vires*.

We recognise the somewhat illogical approach which, I think, has been adopted as Mr. Pickford rightly says, in a number of cases, of bashing on, even with the risk that the whole thing is a waste of time. We will, of course, co-operate with the guidance of the Tribunal, but our position, as set out in our timetable, is intended to allow for the possibility that the Tribunal will rule and its ruling will be taken into account by the CMA in due course, whether in BT's favour or otherwise. However, I can see it is a complex issue where the

matters are finally balanced, and where the issue of appeal, or the risk of appeal further complicates matters, but our position is set out in writing and in the schedule to our skeleton.

I think the detailed timing probably can be dealt with once the issue of principle has been resolved. We have set out some timings and they have been varied to some degree by Ofcom independently of this issue of sequencing.

MR. BEAL: Sir, could I just clarify, I did not make any submissions on individual timings because I thought it was premature to do so, I did not think we were there yet, so if I can reserve my position on that.

THE CHAIRMAN: The Tribunal is going to reserve its decision on the question of the classification of the grounds of appeal. We are not going to give a decision on that today. I wonder whether the parties would like to say anything further on timetabling generally, albeit that there is obviously uncertainty as to how the proceedings are going to pan out. If you have got anything to say then, of course, we will take your submissions into account.

MR. THOMPSON: Would it be helpful, as it were, to have a review of what questions are left unresolved----

THE CHAIRMAN: Sure.

MR. THOMPSON: --or undiscussed. I think we have made our position clear on the items set out at question 11. BT is not pursuing any case for a stay, and the matter, I think, has been explored in the skeletons, at this stage at least. The issue of amendment, I think, has already been discussed. We are not pursuing any application for interim relief or a preliminary ruling at this stage. In relation to experts, I think the only point that directly concerns BT is that we have one expert, Mr. Bishop, and I think there should be a letter to the Tribunal addressing an issue that Ofcom raised from Compass Lexecon, who had a report appended to the witness statement of Mr. Tickell, and Ofcom raised the question of whether they were subject to the rules on experts, and I think they should have written a letter to the Tribunal indicating that they are happy to be bound by those rules and duties. So far as whether other parties require experts, we have seen the report of Mr. Hoopis. We do not see the need for any further expert evidence from the interveners, and Ofcom, I think, has made its position clear that it will, in due course, adduce up to three witnesses, one of whom may be an expert or a *quasi* expert, as I think they have used in the past an internal Ofcom witness, and we have no objection to any of those cases.

I do not think we need any further preliminary issues, although in one sense the issues that we are putting forward for the Tribunal will, in one sense, be preliminary but, apart from that, we are not looking for anything more preliminary than that.

In relation to the dates I think that probably is a matter that will await the Tribunal's ruling on the main matters. We have indicated that we think it could be heard within a week, I think Ofcom is saying seven days. If we have a full force intervention from all the parties before the Tribunal it may be that the time estimate would need to be reviewed, but we think that the issues that are currently before the Tribunal could properly be heard in a week. I think those were the only issues outstanding.

THE CHAIRMAN: Do you have anything else to say, Mr. Holmes?

MR. PICKFORD: Just a very few points. In relation to the question of when our statement of intervention would be due in the BT appeal, assuming we are permitted to intervene, we have asked for 21 days. I think Ofcom normally has a fortnight in their proposed timetable.

In relation to the timing of the hearing, I think it would appear to us that probably early November is a more realistic time to have a hearing given that there may well be a number of things that need to be resolved prior to then, and it would be far better that we have a hearing that we can all make rather than set a very ambitious target of a hearing that then ultimately gets adjourned and the whole thing gets pushed back further, so we say be realistic now rather than trying to run before we walk.

In relation to timings of things like defences for Ofcom, that is really a matter, I think, for it; we do not have any particular problems as far as I can see, although I will just take further instructions on that, from what they said in the draft directions that we saw at lunch time.

THE CHAIRMAN: What about experts?

MR. PICKFORD: On experts, we seek permission to rely on the evidence of the expert that we have already adduced a witness statement in relation to for Ground 1. We seek permission, if so advised, to have a further expert statement on Ground 2. We anticipate that will be a different person, from the same firm but a different person, because one goes to general issues of economics, the second one goes to specifics to do with the mechanism, the price control, and it is just more efficient because each person has different specialities to do it that way. Obviously, because they go to different points, we do not have any duplication between them, so there should be no elongation of the proceedings whatsoever arising from that.

In relation to our intervention, we have not yet seen BT's evidence, but we do anticipate that we may need expert evidence to respond in particular to what BT says about the nature of

competition in the market and why it says, as a result of the competition between the various rivals it has no ability or incentive to price squeeze, so I think it is highly likely that once we have seen their evidence we would want permission to adduce one expert to respond to that. That is our position in relation to expert evidence. May I just take instructions to see if there is anything I have not covered?

THE CHAIRMAN: Yes.

MR. PICKFORD: (After a pause) Sir, I think those are the core matters, thank you.

THE CHAIRMAN: Mr. Palmer, you have nothing else to say, do you?

MR. PALMER: Sir, nothing on the matter of timetables, no.

MR. BEAL: Sir, could I just raise one issue, which I think probably has not necessarily been foreshadowed yet, which is I have a slight purist preference, on a personal basis, for streamlined pleadings, and no doubt the Tribunal would prefer that, and in an ideal world - it may be that we are a long way from an ideal world - if one could somehow envisage a system in which you had an amended notice of appeal, an amended defence, and then the statements of interventions you would cut down excessive duplication between different pleadings, and you would avoid the risk for inconsistent - or potentially inconsistent - or different points emerging between the CAT procedure pleadings and the CMA pleadings. So if there were some way of joining together for the pleading purposes, both for the CAT procedure and the CMA procedure, but still maintaining an early hearing for the substantive hearing, that would, in my respectful submission, be a preferable way of doing it just, as I say, from a purist point of view.

That said, if one is dealing with the perhaps more realistic world of the competing timetables that are before you, could I please ask that we have until mid-August for any statement of intervention in the CAT procedure for Sky, simply because there will be quite a lot to deal with. We have not yet seen any of the evidence at all from BT, and we do have certain key members of staff on holiday at various points which make it awkward.

If 31st July date is extended to mid-August - say, 14th August or so - that does not inconvenience any of the subsequent steps in the CAT procedure, because they all have then long lead-in times because of the need to build in the VULA consultation decision on UEFA rights, and so we cannot see why that would inconvenience anyone.

In terms of the beginning of the procedure, obviously, as I apprehend, the Tribunal will reserve not only the issue of jurisdiction but also the issue of intervention. If the Tribunal were minded to give an indication earlier, perhaps, rather than later as to whether or not we are interveners that would enable us to request the non-confidential versions of the

documents we simply have not seen, which Mr. Palmer cited earlier and I have no idea what he was talking about; I simply do not have it.

Secondly, it is not immediately apparent to us on Ofcom's timetable, with the greatest of respect, why, once the confidentiality ring has been adopted and put in place, we cannot have immediate disclosure of the confidential documents to the people in the room. When we are dealing with quite truncated timetables it would help us to be able to have as much time as possible and there does appear to be a week's delay between establishing the ring and then getting the documents, and that is simply, again, a slightly personal request to have as much time as possible to be able to turn things around.

Beyond that, if I could perhaps just give an indication that if you were minded to let us intervene in this we would try and restrict our evidence to one witness of fact and one expert as far as possible, but obviously we would seek liberty to apply in case something comes out of the BT material that we have not yet seen.

Unless I can be of any further assistance, those are my submissions.

THE CHAIRMAN: Thank you.

MR. HOLMES: Sir, I can see that the Tribunal might be reluctant to fix a timetable now when it is not quite clear what issues will be determined by whom, for example, for the period of time to be allowed for the trial, it might have knock-on consequences. I wondered, in the light of Mr. Pickford's comment about counsel availability, whether it would be worth canvassing, while we are all here, the dates that we could do in order to try and find a set of dates that would work for everyone in the autumn for hearing the non-price control matters. I think it is common ground that there are some such matters. That might also resolve any tensions regarding the timetable because it will make clear how long there is to fit in all of the steps that need to be accommodated.

THE CHAIRMAN: Might I suggest you confer with the other counsel and let us know as soon as possible what the available dates are.

MR. HOLMES: Yes, we could perhaps do that at the immediate conclusion of this hearing, if others are able to do so.

THE CHAIRMAN: Is there anything else anybody wants to raise? We will do our best to give our ruling as quickly as possible. Obviously, we understand the urgency of these proceedings. I am not going to say when we will be in a position to do so, but I would hope that we may be able to get something to you in the course of next week.

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