

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos. 1259/3/3/16
1260/3/3/16
1261/3/3/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

29 September 2016

Before:

THE HON. MR. JUSTICE SNOWDEN
(Chairman)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

TALKTALK TELECOM GROUP PLC Appellant

- and -

OFFICE OF COMMUNICATIONS Respondent

- AND -

BRITISH TELECOMMUNICATIONS PLC Appellant

- and -

OFFICE OF COMMUNICATIONS Respondent

- AND -

CITYFIBRE INFRASTRUCTURE HOLDINGS PLC Appellant

- and -

OFFICE OF COMMUNICATIONS Respondent

- with -

VIRGIN MEDIA LIMITED
NDR INTERVENERS (VODAFONE LTD AND HUTCHINSON 3G UK LTD)
GAMMA TELECOM HOLDINGS LIMITED
CP GROUP (TALKTALK TELECOM GROUP PLC, VODAFONE LIMITED, COLT TECHNOLOGY
SERVICES AND HUTCHINSON 3G UK LIMITED)

Interveners

VTESSE HARLOW LIMITED

Proposed Intervener

Transcribed by BEVERLEY F NUNNERY & CO.
(a trading name of Opus 2 International Limited)
Official Court Reporters and Audio Transcribers
25 Southampton Buildings, London WC2A 1AL
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com

CASE MANAGEMENT CONFERENCE

A P P E A R A N C E S

Mr. Philip Woolfe (instructed by Towerhouse LLP) appeared on behalf of the Appellant TalkTalk Telecom Group Plc and the Intervener CP Group.

Mr. Daniel Beard QC, Mr. Graham Read QC and Mr. Robert Palmer (instructed by Openreach) appeared on behalf of the Appellant British Telecom.

Mr. Thomas Sharpe QC and Mr. Owain Draper (instructed by Preiskel & Co LLP) appeared on behalf of the Appellant CityFibre.

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

Mr. Duncan Liddell (Partner, of Ashurst) appeared on behalf of the Intervener Virgin Media.

Mr. Stefan Kuppen (instructed by Towerhouse LLP) appeared on behalf of the Intervener NDR Intervenors.

Mr. Tim Johnston (instructed by Charles Russell Speechlys) appeared on behalf of the Intervener Gamma Telecom.

Ms. Emily Neill (instructed by the CMA) appeared on behalf of the Competition and Markets Authority.

Mr. Aidan Paul (Director, Vtesse Harlow Limited) appeared on behalf of the proposed Intervener Vtesse Harlow Limited.

1 MR. BEARD: Sir, good morning.

2 THE CHAIRMAN: Good morning.

3 MR. BEARD: I am going to go through the introductions. I have been through with the
4 Référendaire, but it may be of assistance to you, Sir, just to go through.

5 I appear in this matter for BT in their main appeal with Mr. Palmer, who is just to my left.

6 Further to my left is Mr. Read QC, who is acting for BT in the intervention in TalkTalk.

7 Focusing for a moment on the parties in the primary BT appeal, at the far end of the bench
8 are Mr. Lowe, Mr. Holmes, and Mr. Jones, all of whom are acting for Ofcom and, indeed,
9 they act for Ofcom in relation to all of the matters that we are dealing with today.

10 In relation to putative interveners in the primary BT appeal, for the CP Group, Mr. Woolfe
11 on my far right, behind me, Mr. Liddell for Virgin, and Mr. Johnston for Gamma are in
12 attendance.

13 If we then move on to the other appeal by CityFibre, Mr. Sharpe QC and Mr. Draper are in
14 the middle, I will not go through repeating names of the interveners. It is worth picking up
15 though that in relation to TalkTalk's appeal Mr. Woolfe acts for TalkTalk, same cast for
16 Ofcom, but in relation to the interventions by the NDR Intervenors, Mr. Kuppen is here (to
17 my right). There is one other name to mention, Ms. Neill appears for the CMA. I think that
18 covers the introductions.

19 THE CHAIRMAN: First, I will give you two apologies just to start, and then one bit of
20 housekeeping. The first apology is my voice, as you can probably hear now, is not at its
21 usual best. If you have any problems hearing me then let me know.

22 Secondly, I am notoriously useless with names so this is a challenge. So do not feel at all
23 inhibited in reminding me who you are if you feel the need.

24 Thirdly, we started early so I do intend to take a mid-morning break around 11.30, just to let
25 people stretch their legs, etc.

26 Finally, do we have anybody from Vtesse present, because I thought there was----

27 MR. PAUL: Yes, Sir.

28 THE CHAIRMAN: There probably is not much space----

29 MR. PAUL: I am happy here.

30 THE CHAIRMAN: Yes, but I probably would be happier if you were a little closer, it means you
31 do not need to shout at me.

32 MR. PAUL: I will walk forwards.

33 THE CHAIRMAN: Either that or there is a seat right in the front row, so if you would like to
34 come and make sure you have a seat.

1 MR. BEARD: I was going to set off with a broad sense of good news, in that it seems that there
2 is a reasonable degree of agreement in relation to a range of matters, certainly in respect of
3 BT's appeal. As you know, Sir, the key concern in relation to all of this case management,
4 and all of the issues that we are dealing with today is that the decision that is subject to
5 appeal at present imposes a remedy, that Dark Fibre Access Remedy, to come into effect on
6 1st October 2017. So, to some extent, what we have been thinking about is how we can
7 sensibly ensure that we do have a proper preparation and timetable, but making sure that
8 this Tribunal is able to give a judgment well in advance of that deadline in order that there is
9 a degree of certainty for all concerned in relation to this industry. Indeed, it was for this
10 reason, of course, that we pressed for the ordinary CMC process; we cannot quite
11 understand why that was not possible, but, nonetheless, it does mean that there may be some
12 points along the way where we have disagreements with one or two people on timetabling
13 because we do think that, for instance, Ofcom have had the relevant material for some
14 substantial period of time, and that as the Tribunal itself warned, when talking about
15 timetabling issues in correspondence, they should really be ready to go pretty much
16 immediately on the defence.

17 THE CHAIRMAN: Again, let us get some cards on the table. The Tribunal, and by that I mean
18 myself plus wing people, is unlikely to be, I am told, able to be constituted before the
19 beginning of April, and that is, I understand, due to difficulties in locating suitable wing
20 people. That is simply what I am told, and there is nothing I can do about it. That may
21 "assist" (in inverted commas) a timetabling debate, but that is the start date that we are
22 realistically looking at.

23 I can also tell you that those who were interested in February would not have found any
24 availability from my perspective either, so realistically that is the starting time. As I
25 understand it, Good Friday is 14th April, and people may want to have a little think about
26 whether running a hearing either side of Easter is appropriate, desirable or otherwise.

27 THE CHAIRMAN: Mr. Sharpe?

28 MR. SHARPE: Sir, if I may? This has come as terrible news for CityFibre because, as my
29 learned friend, Mr. Beard, pointed out the Dark Fibre Remedy takes effect towards the end
30 of 2017.

31 THE CHAIRMAN: There is a price change in April.

32 MR. SHARPE: Precisely, which is, if anything, of greater importance to CityFibre, and that takes
33 place on 1st April.

1 THE CHAIRMAN: I am afraid it is something of which I learned this morning, and it is due
2 apparently simply to the availability of a Panel of suitable wing people. I am telling you
3 that is what I have been told. If there is a very good reason that people want to make
4 submissions to the powers that be which, I am afraid, is above me, then so be it, but at the
5 moment I am told that there cannot be any reliable guarantee of a properly constituted
6 tribunal before that sort of start date.

7 MR. BEARD: BT has obviously focused on the Dark Fibre Remedy. I think it is a matter that is
8 a great cause for disappointment in relation to these matters. We quite understand, Sir, the
9 difficulties you may have had in February, but in relation to an appeal that was lodged in
10 June for this Tribunal which, in the past, at least, has prided itself on being able to dispose
11 of matters relatively quickly, to be looking only at a hearing almost a year later casts
12 something of a shadow over this, and Mr. Sharpe crystallises that particularly, because that
13 is going to cause a range of difficulties.

14 THE CHAIRMAN: Because this is something that I learned myself only relatively recently, i.e.
15 this morning, the most that I can do, if this is something that we need to take up now before
16 engaging in debate on other matters, is for me to rise and take back to the Registrar and
17 anyone else I can find who has informed me of this position, to see whether there is any
18 flexibility at all. But, the danger I think, as I understand it, is that there simply is not a
19 Panel that is available to do it.

20 MR. BEARD: I understand, Sir, of course. I will take, if I may, brief instructions, but I note Mr.
21 Holmes is standing, so he may have some comments.

22 THE CHAIRMAN: I sense that people are not happy! (Laughter) So what would assist me is
23 not just a succession of people saying: "We are not happy", I will take it as read that nobody
24 has leapt up with a broad smile on their face.

25 MR. HOLMES: That is well understood, Sir, and I was not proposing to join the chorus.

26 THE CHAIRMAN: Right, what I am particularly interested in knowing is something specific, as
27 it were, that you can send me back with to see whether I can, in any way – I should
28 emphasise, as far as I understand this is not a difficulty of the making of the Tribunal itself,
29 this is a recruitment question, which goes beyond the Registry and anybody else, so just to
30 make sure that people are not pointing fingers in the wrong direction.

31 MR. HOLMES: That is fully understood, Sir. For our part we understand the Tribunal's practical
32 difficulties. We share the appellants' desire to get this determined as expeditiously as is
33 possible in a fair manner. I think the debate will resolve over a matter of a month. BT's
34 timetable proposes a hearing in March, our timetable also proposes a hearing in March. We

1 are very sceptical of whether realistically a case of this scale and complexity with the
2 number of parties that there are could be brought to trial before March. As between March
3 and April, March would be preferable, but if that is not possible then we would fully
4 understand that. May I suggest, Sir----

5 THE CHAIRMAN: One possibility, and again this is simply a provisional view from me, having
6 obviously read all the submissions that have been made it did occur to me that there would
7 be merit, obviously, in having the CMA reference done and completed certainly by the time
8 the CAT came to give its determination but possibly even before we started and at least as a
9 provisional idea there seemed to be a number of people who were of the view that a
10 reference to the CMA could take place at the beginning of December, which I understand
11 the CMA do not like the idea of a four months' reference, but if it were a four months'
12 reference it would, in essence, produce a result around about the start of April.

13 MR. HOLMES: That could be taken into account at the trial, if the trial were in April, which
14 might, in some ways, be more efficient in so far as it had any bearing on the issues in the
15 BT appeal.

16 THE CHAIRMAN: The sort of timescale, provisionally, that I was looking at, was essentially
17 pretty much after the CMA has produced its determination, which would be in the first full
18 week of April, which gives one and a half weeks before Easter, and I would have to take a
19 straw poll of people's availability over the Easter week, but then running it on after that.
20 I stress I have not made my mind up at all because, obviously, I am just simply testing the
21 waters from the various representations, and I am well aware the CMA says it would like
22 longer.

23 MR. HOLMES: For our part, we would be content with that. As a practical suggestion, given
24 that we now understand the Tribunal's position, I suspect the parties may be able to agree a
25 timetable to the hearing, a sticking point was the timing of the interventions, but given the
26 dates we are now working with it should be possible to give the interveners sufficient time.
27 I do not know if it would be possible----

28 THE CHAIRMAN: I might give you a few minutes, yes. Before all leap up and everybody has
29 their 'four penneth', obviously one of the questions that we need to consider is the question
30 of the stay of the TalkTalk appeal. The stay which is being asked for is until the beginning
31 of December. Again, and I simply indicate a provisional view – and I stress that – my
32 provisional view was that I would prefer there to be one Reference to the CMA of all
33 relevant specified matters, price control matters, rather than two, which I think is the
34 preference of the CMA, to have, as it were, all the questions that they have to deal with in

1 one go not two, as I understand it. Again, provisionally, it seems to me that those questions,
2 including the TalkTalk question ought to be ready to go to the CMA in December, and
3 provisionally I was not attracted by the idea of staying the TalkTalk appeal simply because
4 nobody can give any assurance as to what is going to happen between now and December
5 as far as the non-domestic rates are concerned. It also appeared to me that most of the effort
6 that would be required in that intervening period is not actually going to come from
7 TalkTalk itself, but from others.

8 MR. HOLMES: Indeed, Sir, principally from Ofcom, and you have seen, Sir, that Ofcom is
9 happy to provide its defence by mid-November----

10 THE CHAIRMAN: So, in order, perhaps, to encourage to have a discussion offline, while I go
11 and reiterate the sense that I have gathered, at least provisionally my view was to run a
12 timetable for the production of the various statements of intervention, defence and other
13 documents to result in questions going to the CMA in all appeals, but both appeals that
14 involve specified price control matters, at around the beginning of December which, with a
15 four month period would enable the CMA to deal with matters approximately or, in fact,
16 before we kick off a hearing in the CAT.

17 That is just a provisional view and I stress I am very happy to listen to people trying to
18 persuade me otherwise, but it is often, if I give you a provisional view then at least you have
19 something to work with in discussions.

20 Just a second, Mr. Sharpe, we will give the CMA a chance to have a go first.

21 MS. NEILL: I am grateful. From the CMA's perspective, it might be helpful for us to explain
22 why we think this is a six, perhaps five, months reference; it is to do with the content and
23 the circumstances of the reference.

24 In terms of the content, this is a new remedy in relation to a new product, so it is not
25 something that the CMA has experience in dealing with before.

26 In terms of the circumstances, if there is going to be parallel CMA and Tribunal
27 proceedings, the parties are going to be requiring capacity to deal with Tribunal matters, and
28 that is going to have an impact on the CMA's ability to engage them in its processes.

29 The CMA does consider that this case is particularly certifiable as a case that requires six
30 months, possibly five months. It also considers that it may not be necessary for the
31 determination to have been finally made by the time the hearing in the CAT opens, so it
32 may be possible that that is some degree in which we could have a bit more time, because it
33 is not essential for it to be entirely determined before then.

1 THE CHAIRMAN: You have wriggle-room at the end of the four-month period, let me put it that
2 way, in the sense that you, at the moment, take the view that it would be better to have
3 pleadings closed before a Reference is made.

4 MS. NEILL: Yes.

5 THE CHAIRMAN: Again, looking at the balance of submissions, and just thinking about it, the
6 main documents that you need to have seen are obviously the appeals, which you have, the
7 statements of intervention in support of the appeals to the extent they might raise different
8 points, and Ofcom's defence.

9 MS. NEILL: Yes, not replies.

10 THE CHAIRMAN: You do not need the rest of it.

11 MS. NEILL: No.

12 THE CHAIRMAN: And so it may be that a Reference to the CMA with questions could go
13 slightly earlier, which would give you a little bit more time. I accept the point you make, it
14 may not be necessary to have a final determination before we start, but everybody, as I
15 understand it, thinks it is desirable, so far as possible, that it comes either before or as soon
16 after the start as possible.

17 MS. NEILL: Yes.

18 THE CHAIRMAN: Again, I confess not to being on top of the nuance of that, and people may
19 want to think about whether it is possible to start without that CMA determination, and it
20 may be that others, in the time I am going to give you when I rise quickly, can think about
21 whether that is a way of accommodating the various timetables.

22 MS. NEILL: We would be grateful for that, and as long as we had the defence we would be able
23 to start work proper.

24 THE CHAIRMAN: Now, Mr. Sharpe, you wanted to have another go?

25 MR. SHARPE: Yes, if given the opportunity I was planning to make submissions about the CMA
26 letter and perhaps it is not appropriate now to do that, but before we adjourn to discuss
27 timetables, might I just query one or two assumptions?

28 THE CHAIRMAN: Yes.

29 MR. SHARPE: The key document which the CMA in its correspondence omit to mention but,
30 Sir, you are on top of it, is the reference document. This is the document----

31 THE CHAIRMAN: The questions that need to be----

32 MR. SHARPE: The questions, yes. The guidance that the CMA refer to expressly refers to the
33 notices of appeal and the reference questions. It is the reference questions that govern the
34 conduct of the CMA inquiry.

1 THE CHAIRMAN: Correct.

2 MR. SHARPE: The pleadings are important but in our correspondence we did say they were
3 incidental and, in my experience – and I have done more than my fair share of these things
4 – the pleadings rather fade away in the course of an inquiry.

5 THE CHAIRMAN: That is not unique to CAT proceedings either. (Laughter)

6 MR. SHARPE: I forbore to say that. Therefore, first, I think you seized the point that we do
7 not really need to have a reference which commences in December and, in our submission,
8 we want to be able to accelerate the process, it is simply in this case to give the CMA the
9 flexibility – four months may be tight, six months may be too much.

10 THE CHAIRMAN: In a sense the CMA may have to discuss with you the trade-off between the
11 counsel of perfection and seeing, as it were, the close of pleadings or all of the pleadings,
12 and the extra time that they want, but that is a debate I am going to let you have off-line. I
13 understand the point you are making.

14 MR. SHARPE: That is what I thought we could do.

15 THE CHAIRMAN: Obviously, the purpose of me being here is if you cannot agree to the point
16 then I will decide it.

17 MR. SHARPE: If I may expand slightly, we are thunderstruck a little by the change in the
18 timetable. It does rather beg the question of what Ofcom's position is going to be in relation
19 to the reduction in leased line charges in April. We were rather hoping, certainly as far as
20 the CMA is concerned, it would have reported back to the CAT.

21 THE CHAIRMAN: It was never going to be realistic to expect a CAT determination by April.

22 MR. SHARPE: That is certainly so, yes, but we would have had a CMA report which, as you are
23 well aware – unless it was barking mad which, of course, it would not be – would bind the
24 CAT. So, by the time of the report we would know pretty well what the position was which
25 easily could have required a reference back to Ofcom. That is the timetable we were
26 anticipating. It was not happy and satisfactory even on those terms, it is much less
27 satisfactory now.

28 The question then becomes: is Ofcom going to proceed with its reduction in leased line
29 charges on 1st April? Given the position we are in, we are unlikely to get a judgment from
30 the CAT until June, ultimately; it is a difficult matter, but well into the period of the new
31 charge control and I suppose what I am looking for is some undertaking on the part of
32 Ofcom that they will reconsider the timetable.

1 THE CHAIRMAN: In a sense you can make your point, but you are probably making it through
2 the wrong conduit, in the sense that is not within my remit. I have many things on my desk,
3 but that is not one of them.

4 MS. NEILL: Sir, if I could just rise briefly to perhaps correct the impression that we see the
5 defence as a 'counsel of perfection'. We see the defence as essential. The CMA will not
6 know the basis on which Ofcom wants it to----

7 THE CHAIRMAN: I think I identified the Ofcom defence as a document that you would need,
8 but the other subsequent documents are almost certainly ones I suspect you do not need, and
9 whether you do want to wait for the defence – the point that Mr. Sharpe is making is that if
10 that is what you want to do you may have to trim yourselves a little at the other end of the
11 timetable; you probably cannot have your cake and eat it and accommodate everybody.
12 That is the general thrust I am getting. You will have to have your debate with Mr. Sharpe
13 in a few minutes.

14 MS. NEILL: I understand that.

15 MR. WOOLFE: Sir, clearly you have given a provisional view, an indication of how you see
16 it----

17 THE CHAIRMAN: It is simply how I saw it on the basis of the written materials.

18 MR. WOOLFE: And obviously we will take that and discuss it with the other parties. If I can
19 just explain briefly the reason why we are asking for a stay.

20 THE CHAIRMAN: Yes.

21 MR. WOOLFE: There is no magic in 9th December, it was a convenient date. As it happens,
22 because of the way the CMC has fallen and other things, it now seems that other parties are
23 talking about a Reference going off then. The difference, really, between us and everybody
24 else is not the date then, it is more what happens when that date is reached, because when
25 we proposed 9th December we were not proposing an absolute stay until 9th December and
26 then the bugle sounds and everybody charges off into the distance.

27 We were really proposing that that would be a convenient date for reviewing the matter to
28 see what had happened with Government, and then whether the matter should be dropped,
29 or should definitely proceed or, perhaps, there should be a short further stay of a month or
30 two. We do not want there to be a stay for much longer, I will be honest, because we do
31 want to know what is happening with the price for the start of the price control. We do not
32 mind too much if the price changes a month or two into the new price control, we can live
33 with that. What we do not want is long periods of an incorrect price, so we do see some
34 pressure to get on with it, but we do not want to set everybody on course of incurring

1 substantial cost preparing an entire appeal that then proves to be entirely unnecessary. That
2 was our logic.

3 THE CHAIRMAN: I understand that. Again, if we are putting cards on the table, just so people
4 know the way I am thinking at the moment, your appeal is focused – I am assuming, by the
5 way, just for the purposes of this debate that your appeal does raise a specified price control
6 matter as you contend it does. I am aware that at least one person disagrees with that, but let
7 us assume it does for a moment, and that it is to go to the CMA. It would seem bizarre that
8 it would not go at the same time.

9 MR. WOOLFE: I can see certain reasons of efficiency to have the same Panel hearing it would
10 make sense, the same people.

11 THE CHAIRMAN: It is essentially all about the design of the remedy, is it not?

12 MR. WOOLFE: I can pursue that point. The issue that may come is if Ofcom spend time and
13 money preparing a defence and then individuals spend time preparing a defence, and then
14 we withdraw our appeal not because it is a bad appeal, it might be totally well-founded, but
15 because it has proved to be unnecessary, what then happens? There is that----

16 MR. HOLMES: Sir, I can cut through that, we would not seek our costs in those circumstances.

17 THE CHAIRMAN: That is helpful. If I am putting my cards on the table again, just to assist
18 people in a debate, because it is always useful for you, as it were, to reach a regime that you
19 are happy with to the greatest extent possible rather than me simply impose it, it
20 undoubtedly is unfortunate that, at the moment, the position in relation to the NDR regime
21 is unclear, and if it changes it changes. I am afraid that is just the world we are in, and I am
22 afraid at the moment my view is that we have to deal with the here and now. The here and
23 now is that we have a differential regime and a remedy modelled on it, and we need to get
24 on with your challenge to that.

25 MR. WOOLFE: Sir, on the basis of that indication we will take it away and discuss with the
26 other parties but I may come back and address you.

27 THE CHAIRMAN: Before my voice goes completely, at least at this early stage, is there
28 anything else that anybody wants to say which is, as it were, critical to the debate which I
29 have instituted? Obviously, I have a number of other questions which I am going to have to
30 deal with in any event - I am thinking particularly of the Vtesse intervention and the
31 questions relating to the confidentiality rings. Would it be sensible for me to let you have
32 10 minutes/quarter of an hour, there or thereabouts to have a chat with those behind you
33 about the timetabling?

1 MR. BEARD: Yes, I think if we could have 20 minutes I think that would probably be sensible,
2 Sir.

3 THE CHAIRMAN: That is fine. As I say I will return and see if I can find any more input but---

4 MR. BEARD: We will work on the basis of the indication having been expressed, and the
5 concerns expressed, we will now go away and see what we can do.

6 THE CHAIRMAN: Very good, I will look to come back about 10 to 11. If, in the light of what I
7 have said, people are making progress in other areas of debate about the sequence of
8 production of documents or anything else then do not be afraid to say you would like a few
9 more minutes, but I do not want it to take beyond 11. I definitely want to be back in here
10 with a progress report at 11 at the latest, please.

11 MR. BEARD: Yes.

12 THE CHAIRMAN: Good.

13 (Short break)

14 THE CHAIRMAN: I delivered your message to the CAT. The difficulties do not lie in this
15 building, it is a recruitment point, and the date that you have been given is the one where it
16 is as confidently as can be expected that there will be available a suitable, for example,
17 economist, to sit on the Tribunal as a result of an anticipated recruitment exercise which has
18 still to be authorised. That is the position. So, if people are concerned they need to direct
19 their communications, concern about the position probably elsewhere than in this building.

20 MR. BEARD: Mr. Holmes is going to come back with timetable, but just on that I think it may
21 behove all of the parties to communicate to the Tribunal, because I imagine for all of us
22 what will be important is, for instance, if it is going to be an economist wing member they
23 have had adequate time to read into all of this material before the hearing.

24 THE CHAIRMAN: And finding an economist who also has availability for six weeks, or four to
25 six weeks, or whatever it is going to take is not something that you get in people's diaries at
26 the drop of a hat, and that is the other concern. It is something that has been thought about,
27 and it is as confident as it can be that there will be somebody available with time to read by
28 that date, but anything earlier than that and you have no guarantees, I am afraid, that is the
29 problem.

30 MR. BEARD: I am grateful to you, Sir, for making inquiries.

31 MR. HOLMES: We are grateful for the time that you have allowed us to try to seek agreement,
32 and I am pleased to report that the exercise has been a fruitful one, and the parties do have a
33 timetable to propose to you.

1 It might assist, Sir, if you were to turn up tab 72 and turn to p.6 of Ofcom's written
2 observations – this is the correspondence bundle for today's hearing which I hope has found
3 its way to you. At p.6 is our proposed timetable, and it is on the basis of that that the parties
4 negotiated.

5 THE CHAIRMAN: Right, and this assumes that the sequence will be interveners in support of
6 appellants, then a defence from Ofcom in a sense dealing with everybody, and then any
7 interveners in support of Ofcom?

8 MR. HOLMES: Yes, Sir.

9 THE CHAIRMAN: So that is the sequence.

10 MR. HOLMES: It has been possible to accommodate that, and the parties have reached a sensible
11 compromise on the basis of allowing enough time for the interveners in support of the
12 appellants to be able to formulate their positions. This is where the parties have got to,
13 subject to your approval.

14 The disclosure of confidential material will take place, the bulk of it on 3rd October 2016.

15 There is a rump of material in the CityFibre and TalkTalk appeals, in relation to which there
16 are still some administrative steps to be taken, and that will be disclosed during the course
17 of the week of 3rd October and, in any event, by 7th October, the end of that week.

18 THE CHAIRMAN: Right. Are you telling me that you have actually resolved all the questions in
19 relation to the confidentiality rings, or are there still some that I need to resolve?

20 MR. HOLMES: The confidentiality rings, I believe, are agreed amongst the parties.

21 MR. BEARD: I think there might be one wrinkle from Mr. Woolfe----

22 MR. WOOLFE: I think there are two for us. One is I have to tell you about an agreement that
23 has been reached in respect of a Ms. Sorensen between TalkTalk----

24 THE CHAIRMAN: I do not need the detail now, I just need to know----

25 MR. WOOLFE: And there is one short issue between----

26 THE CHAIRMAN: There is still an issue. So we are still going to need to look at that. You say
27 disclosure from 3rd to 7th.

28 MR. HOLMES: Yes, Sir. We would be grateful if the confidentiality order once any wrinkles
29 have been resolved, could be made during the course of today if that were possible, to allow
30 for disclosure next week.

31 THE CHAIRMAN: Fine, let us crack on then.

32 MR. HOLMES: The next date is the date for amendments to the notices of appeal, and that
33 remains as stated in this timetable, 13th October. The date for the interveners in support of
34 the appellants has been pushed back to 3rd November 2016.

1 THE CHAIRMAN: These are all Thursdays, I take it, are they?

2 MR. HOLMES: I believe so, Sir – I will be corrected if I am wrong.

3 THE CHAIRMAN: Fine, yes.

4 MR. HOLMES: The next date is the date for Ofcom's defences, and the proposal is that they all
5 be served on the same date, 17th November 2016. The reason for the additional week is to
6 allow time to consider the interveners in support of the appellants' interventions which now
7 come later.

8 THE CHAIRMAN: Yes.

9 MR. HOLMES: The interveners in support of Ofcom then file and serve their statements of
10 intervention and supporting evidence on 1st December 2016 in place of 24th November
11 shown here. The proposal with which I understand the CMA is content in the light of your
12 comments before we adjourned, is that the order for Reference should be made in both
13 appeals on 17th November 2016, the same date as Ofcom's defence, with the parties liaising
14 to agree questions in advance of that date.

15 THE CHAIRMAN: Sorry, the Ofcom date was what date?

16 MR. HOLMES: 17th November 2016.

17 THE CHAIRMAN: So the order for Reference to the CMA should be the same date?

18 MR. HOLMES: Yes, and the thinking behind that, Sir, is that the only document which could
19 realistically affect the scope of the appeal is the defence insofar as Ofcom were to concede
20 any points, otherwise the grounds of appeal will stand until they are determined. I can say
21 immediately that we think it unlikely at this stage that there will be any concessions, but
22 there is no need to await the statements of intervention in support of Ofcom before a
23 Reference is made.

24 THE CHAIRMAN: No.

25 MR. HOLMES: The Reference questions can be crystallised as at 17th November.

26 THE CHAIRMAN: And Ofcom will know what Ofcom is going to say in any event in
27 negotiating the formulation of the questions.

28 MR. HOLMES: The formulation of the questions. We have not yet made provision for this, but
29 it might be sensible for the Tribunal to specify a date, perhaps a week in advance, by which
30 the parties will submit the Reference questions agreed insofar as possible, so that the
31 Tribunal can resolve any differences between the parties as to the terms of the Reference
32 questions. We think it unlikely there will be any such differences, but that will ensure that
33 there is no delay in making the reference.

1 THE CHAIRMAN: That sounds sensible to me. That would suggest something like supplying
2 the agreed questions or issues to be resolved to me at round about 11th November, is that
3 about right – the previous Friday?

4 MR. HOLMES: Yes, Sir.

5 THE CHAIRMAN: Is that the sort of timescale you have in mind?

6 MR. HOLMES: Yes, Sir.

7 THE CHAIRMAN: I will just have a quick look and see what I am doing around that sort of
8 time. (After a pause) Yes, that should do it.

9 MR. HOLMES: The CMA, for its part, has indicated that four and a half months should be
10 sufficient, based on the material currently available to them to determine the specified price
11 control matters.

12 THE CHAIRMAN: And critically they get the questions earlier, not just, as it were, coming up
13 against Christmas, and in any event is there a jurisdiction – I am not encouraging this – is
14 there a jurisdiction in any event to extend if circumstances arose?

15 MR. HOLMES: There is, Sir, and the Rules provide expressly that such an extension can be
16 made at any time prior to the determination of the Reference, and we would propose, Sir,
17 subject to your views, that there be a general liberty to apply in the order.

18 THE CHAIRMAN: It is going to have to be a general liberty to apply, not least because, for
19 example, the Government may change the regime in relation to NDRs.

20 MR. HOLMES: Indeed.

21 THE CHAIRMAN: So, for my note, the four and half months would take us to when?

22 MR. HOLMES: I do not have the exact date, but it would be either at the start of April, or very
23 early in April, so by the time of the hearing the Tribunal would see the Determination. The
24 parties will, of course, be able to prepare their submissions based on the provisional
25 determination, which is the CMA's practice to publish and to provide for consultation in
26 advance of their final determination. So there should not be any surprises which might
27 cause difficulty.

28 THE CHAIRMAN: No, and presumably the CMA may indicate in any event, as I understand it,
29 its view if it was to find there was something wrong with the way the price control had been
30 designed, you would at least know, without the numbers, what had been considered to be
31 wrong earlier?

32 MR. HOLMES: Yes, Sir.

1 THE CHAIRMAN: So, again, you would have warning. So, basically what you are saying is you
2 are not just going to get an envelope land on the desk at the beginning of April, you will
3 have had some chance to accommodate this in preparation for the hearing.

4 MR. HOLMES: Yes.

5 MR. BEARD: It may just be worth, in the order, specifying 31st March, which is the Friday,
6 which does give four and a half months.

7 THE CHAIRMAN: Okay, is that right, does everyone agree? I should really ask the CMA –
8 does the CMA agree that Friday, 31st March sounds a convenient date?

9 MS. NEILL: Yes, we do; we are happy with that. Perhaps the following Monday would be more
10 realistic. No, we will stick – we are fine with the Friday, and we are agreeing to the four
11 and a half months on the basis that the parties are going to be able to engage with us on the
12 core submissions process and have that completed by December, and we may need to apply.

13 THE CHAIRMAN: Let us hope not, and everybody has heard your plea for engagement.

14 MR. WOOLFE: Sir, TalkTalk rise in support of the CMA on that point, about if there is need for
15 liberty to apply that it is a real liberty because we are concerned that our Reference, which
16 is not going to be the subject matter of the second trial, is determined correctly and got
17 right, and we are more concerned with that, than it be done quickly. We do not want the
18 CMA being crammed in because they need to get back for another trial, we want to make
19 sure they have enough time to do the job they feel they need to do.

20 THE CHAIRMAN: CMA are happy with 31st March at the moment, and if I say 'liberty to apply'
21 I mean liberty to apply.

22 MR. HOLMES: The next date is the timing of the replies and supporting evidence. 16th January
23 is the proposed date for that.

24 THE CHAIRMAN: The replies are going to come from the appellants and the interveners who
25 support the appellants, is that it?

26 MR. HOLMES: The usual practice, Sir, would be to make provision for replies only by the
27 principal parties. We have no principled objection to the interveners----

28 THE CHAIRMAN: I am more than happy to go with the flow if that means there are fewer bits
29 of paper flying around, and anybody else who absolutely is bursting to say something that
30 they have not been able to persuade the primary appellants to say will have to just come and
31 justify it.

32 MR. LIDDELL: Just on the subject of replies, I do not think Virgin Media would want a formal
33 right to reply, but we would like to have liberty to apply to submit further evidence because

1 we have changed the scheduling of the statement of intervention and the defence, we would
2 like to have the opportunity to submit further evidence in response to a defence if necessary.

3 THE CHAIRMAN: In which case you will be able to take up the liberty to apply if needed.

4 MR. LIDDELL: Exactly.

5 THE CHAIRMAN: Yes, like everybody else, yes. So it is replies just from the appellants in the
6 first instance?

7 MR. HOLMES: And, indeed, from non-price control appellants, that is to say BT and CityFibre,
8 because----

9 THE CHAIRMAN: The others will be off----

10 MR. HOLMES: --TalkTalk will do theirs as part of their core submission to the----

11 THE CHAIRMAN: So it is just from BT and CityFibre, yes, okay. And that date was?

12 MR. HOLMES: 16th January, in place of 9th January. The parties are generally agreed that a
13 second CMC or pre-trial hearing would be a sensible precaution in this case. If, in the
14 unlikely event that it turns out to be unnecessary, then it can always be vacated, and we
15 propose 23rd January, subject to the Tribunal's availability.

16 THE CHAIRMAN: Right, that does sound a familiar date for some reason. That is a Monday,
17 so we will say 23rd January. Yes, it will be there or thereabouts, I think. First, I would
18 assume I need to check that it can be accommodated here, that they have a courtroom
19 available on 23rd January. I have nothing in my diary that is up here at the moment, so that
20 seems to be fine, but if it is not I will find out pretty soon. So, provisionally, the second
21 CMC on Monday, 23rd.

22 MR. HOLMES: Sir, if I might take you back to the preceding bullet, I omitted to include
23 provision for Gamma to apply to make oral submissions if so advised.

24 THE CHAIRMAN: Yes, I am going to come on to the extent of participation. Gamma, as I
25 understand it, are content that, at least at the moment, they should simply have permission
26 to put in written documents.

27 MR. JOHNSTON: Sir, if I can assist, that is absolutely the position, with the proviso that should
28 we wish to apply, and it would obviously be an application, we would do so on that date.

29 THE CHAIRMAN: By that date, yes.

30 MR. JOHNSTON: By that date, indeed, Sir.

31 THE CHAIRMAN: Yes. Sorry, the date was?

32 MR. JOHNSTON: 16th January.

1 THE CHAIRMAN: One thing I was not clear about, just so I know, Three and Vodafone, the
2 NDR Interveners, who want to intervene as well, it was not entirely clear to me on what
3 basis you want to intervene. You want to put in written material is that essentially it?
4 MR. KUPPEN: That is correct. We want in the first place to put in written material. I guess the
5 question of oral participation does not really arise in the first place here as it is on the
6 assumption that it is specified price control matters that we are talking about.
7 THE CHAIRMAN: And it is only the TalkTalk appeal.
8 MR. KUPPEN: Yes, exactly.
9 THE CHAIRMAN: That is fine.
10 MR. KUPPEN: And then, Sir, we will leave it to the CMA to decide on how far oral submissions
11 will be helpful.
12 THE CHAIRMAN: Right. And the CP Group, again your intervention into BT and CityFibre
13 appeals, is that on the basis of, as it were, full participation or are you just anticipating at the
14 moment to do it on paper with a liberty to apply if you want to----
15 MR. WOOLFE: It is on the basis of full but focused participation. So we should have liberty to
16 intervene generally but we will keep it focused.
17 THE CHAIRMAN: So that the only party who is intervening who, at the moment, wants to
18 restrict themselves, but with a possibility of applying, is Gamma?
19 MR. JOHNSTON: Indeed, so, Sir, an indication of our intention at this stage.
20 THE CHAIRMAN: Right.
21 MR. HOLMES: As regards the skeleton arguments I am afraid we did not work out the exact
22 dates, but the principle that was agreed upon between the parties that they would simply
23 follow four weeks, three weeks, two weeks and one week before the hearing.
24 THE CHAIRMAN: I am happy to leave it to, frankly, the second CMC to discuss those because
25 not the whole shape but the shape of matters may change.
26 MR. HOLMES: Yes, Sir.
27 THE CHAIRMAN: People have indicated, as is obvious, that there will need to be plenty of time
28 for pre-reading to focus the hearing, and so at least indicatively what you said goes, but we
29 will review it again at the second CMC.
30 MR. HOLMES: I am grateful, Sir.
31 THE CHAIRMAN: Or, alternatively, if everybody is actually agreed and we do not need a
32 second CMC everybody will have the timetable. That is as much as we need to plan at the
33 moment.

1 MS. NEILL: Before we move on from the time, a couple of matters that it is perhaps important
2 for the CMA to note that this is the first case it knows of in which the parties have required
3 its decision to be made before the hearing has commenced. The parties have presented us
4 with a chorus of voices about what they want. Obviously, that is something that we,
5 ourselves, do not take a view on, we do not quite understand the reasons for it, and it may
6 be something that we would need to address if we are going to make an application.

7 MR. BEARD: Is it worth just clarifying the terms of the hearing? As I understand it, Sir, the
8 indication was it would start on 3rd April, or could do.

9 THE CHAIRMAN: Before we actually hit the agenda, because I rather hijacked the agenda----

10 MR. BEARD: It is a significant topic in the agenda, Sir.

11 THE CHAIRMAN: Yes. As I understand it, the question I left you with was: do you want to
12 start the hearing and then have a break for Easter and, if so, how long do you need to have a
13 break for Easter? Or, do you want to start it after Easter? Is the answer generally that
14 people wanted to make the start before Easter and then break?

15 MR. BEARD: Certainly, from our point of view the answer would be, yes, start before Easter,
16 have a break in recognition of the fact that there are holidays then but a short break, and
17 then carry on, otherwise we end up with the risk of starting towards the back end of April
18 and that seems to us unfortunate. If it is only a short break that is being put in the middle
19 that seems to us to be much the best way of dealing with matters.

20 THE CHAIRMAN: Provisionally, because at the moment, again, it is very difficult to predict the
21 timetable, we have not even discussed exactly the number of witnesses, but if we were to
22 start on 3rd April, provisionally, which is what I was suggesting----

23 MR. BEARD: Yes.

24 THE CHAIRMAN: Maundy Thursday is 13th April. I have not booked my Easter holidays just
25 yet, but I was planning at least to have some thought about it, but I do not know whether
26 anybody else feels particularly strongly – well, you do not feel particularly strongly about
27 my Easter holiday (Laughter) but you may feel more strongly about your own. Of course,
28 the other thing is there will be two other people who may already have holiday plans, whose
29 attendance may also have to be accommodated.

30 MR. BEARD: We are conscious of that, and it is for that reason I really rise now, because it
31 seems to us that an indication that we would be starting on 3rd April and that the intention
32 would be to have – I was going to say as short a break as possible, but that probably is not
33 the phraseology that anyone would want to put in any order – a short break, Good Friday,
34 Easter Monday bank holiday weekend, and then coming back and recommencing if at all

1 possible the week of bank holiday Monday. I recognise, of course, the point you make, Sir,
2 that you do not know with whom you would be sitting and, of course, you, Sir, have
3 concerns about your own holiday. Nonetheless, an indication at this point that we would be
4 intending to try, if we were to be thinking of a three to four-week hearing, effectively
5 concluding it by the end of April/beginning of May that, I think, would be important to set
6 down at this point because it is a chunk of time, and it is important that people's diaries are
7 now booked out for this.

8 THE CHAIRMAN: It seems to me that people's diaries, frankly, ought to be booked from the
9 beginning of April to, I would have thought, a point in May, say, 12th May, simply because
10 at the moment the estimates have run from what I regard as a wildly optimistic three weeks,
11 to a 'let us try and get it shorter' six weeks, I think – if I have read the skeletons correctly.

12 MR. BEARD: Yes, I think there are even tighter estimates than three weeks.

13 THE CHAIRMAN: Really?

14 MR. BEARD: I think we were in the three to four-week category ourselves. You think we are
15 unduly optimistic, Sir?

16 THE CHAIRMAN: Just totting up the number of witnesses, and the amount of documentation
17 and the number of people sitting in the room, three weeks is really very abbreviated.

18 MR. BEARD: Obviously, it will be very sad to lose them, but there will be a cohort that will
19 depart for rooms upstairs for the CMA hearing in relation to TalkTalk, so it will not be quite
20 so many people involved in all of this at the hearing, but nonetheless, the point is well
21 taken, Sir.

22 THE CHAIRMAN: All right. At the moment I will provisionally say that I will reserve a wider
23 window – unless you are going to tell me you do not want to start on 3rd April.

24 MR. HOLMES: I understand that this is not something that is going to be determined for
25 counsel's convenience. In truth, I have a holiday booked for the week of 3rd April. I do not
26 propose that that should delay matters, because I understand there are urgent public interests
27 at stake. All I would say is, if it turns out that six weeks is overly lengthy and that the trial
28 can be accommodated in a shorter period of, say, four weeks, it might be preferable to take
29 the latter portion of the window and to commence without a break for Easter, but I say that
30 with some trepidation because I understand, of course, the----

31 THE CHAIRMAN: You do not need to be concerned about saying it. If I operate on the basis
32 that we have a six-week window starting on 3rd April, because nobody has yet suggested
33 that we ought to try and start earlier, and the problem with starting earlier is we potentially
34 have a problem with getting other people, if we have a six-week window we can reassess

1 the actual trial date at the CMC in January. Who knows? We may be in a slightly different
2 world, the issues may have narrowed, people will be in a better position to understand what
3 the actual issues to be tried are.

4 MR. HOLMES: It may be that some of the factual evidence is not contested.

5 THE CHAIRMAN: We will come on to the question of experts in a few minutes, and whether
6 there should be meetings of experts, for example, which might serve to shorten issues, but
7 does anybody suggest there is something wrong with saying, at least provisionally, people's
8 diaries ought to be fixed for that six-week period. Right.

9 Forum – we are all agreed that we are in England and Wales? Perhaps we should have done
10 that at the start technically! (Laughter)

11 MR. BEARD: Yes, the easy bit first. All content with forum

12 THE CHAIRMAN: Interventions – As I understand it everybody is agreed that BT and CityFibre
13 are intervening in each other's appeals. Virgin Media are going to intervene in both appeals.

14 MR. LIDDELL: Just in BT's appeal.

15 THE CHAIRMAN: Just BT's?

16 MR. LIDDELL: Right.

17 THE CHAIRMAN: Gamma, you are, I think----

18 MR. JOHNSTON: In all three.

19 THE CHAIRMAN: All right, I am just doing BT and CityFibre at the moment. So you are in
20 both BT and CityFibre, but on paper at this stage with permission to apply by the date we
21 have discussed.

22 The members of the CP Group you are intervening in both appeals but indicating you are
23 going to co-ordinate and have one voice, as it were, in the firm?

24 MR. WOOLFE: Indeed, yes.

25 THE CHAIRMAN: Is there anybody else who is wanting to intervene in either BT or CityFibre, I
26 do not think I have missed anybody, have I?

27 MR. BEARD: No, I think we just have to put down the marker at this stage about whether or not
28 oral interventions by the CP Group are going to be appropriate, but we will leave that for
29 the present. Mr. Woolfe has indicated he wants full intervention but at this stage it is
30 perhaps premature to work out precisely what is going to be required.

31 THE CHAIRMAN: Right. TalkTalk – are BT and CityFibre intervening in TalkTalk?

32 MR. BEARD: BT are certainly intervening in the TalkTalk appeal.

33 THE CHAIRMAN: And I think CityFibre as well, as I understand it?

34 MR. BEARD: Yes.

1 THE CHAIRMAN: Yes, CityFibre, where are we?

2 MR. BEARD: Mr. Sharpe.

3 THE CHAIRMAN: Yes. Gamma we have already dealt with. The NDR Interveners, Three and
4 Vodafone – just my ignorance, why have you termed yourself "NDRs"? I just could not
5 quite figure that one out?

6 MR. KUPPEN: Just simply because that is the issue in dispute, and that appealed to differentiate
7 it from the CP Group, which also contains----

8 MR. WOOLFE: This is for Non-Domestic Rates.

9 THE CHAIRMAN: I understand what NDRs are (Laughter) I just did not know why Three and
10 Vodafone decided to call themselves after a tax. (Laughter).

11 MR. BEARD: Is it partly because they have lost one of their members, because one of their
12 members is leaking out so they cannot be the CP Group, because, of course, the CP Group
13 is TalkTalk as well.

14 THE CHAIRMAN: Okay, well I now understand who you are anyway, and how you want to be
15 termed. As I understand it, there is no objection to that intervention into the TalkTalk
16 appeal?

17 MR. BEARD: I do not believe there is any objection to that, and that will obviously be a matter
18 that is dealt with by the CMA in terms of the process thereafter.

19 THE CHAIRMAN: Yes, that is fine. Vtesse. First, have you had the opportunity to see what has
20 been said by all the other parties about your intervention?

21 MR. PAUL: Partly, but there are only three of us in the company so getting all this stuff printed
22 and all the rest of it has been a bit of a challenge. One of the principal objections by BT, for
23 instance, is that the matter is decided – I would like to refer to the Regional State Aid
24 Decision itself, para. 176.

25 "There is no evidence the application of a different valuation method to BT and to
26 Kingston has resulted in an advantage to these firms . . ." etc.

27 THE CHAIRMAN: Just before we go launching into that, can I just identify – to make sure I
28 have understood it – in a sense who you corporately are.

29 MR. PAUL: Yes.

30 THE CHAIRMAN: As I understand it Vtesse Harlow Limited is the proposed intervener, and
31 that is a company that represents the former shareholders of Vtesse Networks.

32 MR. PAUL: Yes, just to give you the background to that, to give you the context, I was the
33 former managing director and chairman of Vtesse Networks. We had a long running
34 dispute which has been referred to here. At the time that we sold the company two years

1 ago to Interoute. As part of the sale and purchase agreement of that we carved out the rates
2 and Vtesse Harlow was the vehicle for continuing with that rates discussion, and the
3 company concerned, which then changed the name to Interoute Vtesse Limited, has given
4 Vtesse Harlow authority to carry on all matters relating to rates on what is called the "2010
5 List".

6 THE CHAIRMAN: Right, so the claim that you are now pursuing relates to historic rates?

7 MR. PAUL: It is the appeals' process, and the rates, it takes a very long time, so the rates are
8 done in five year chunks. We are in the Valuation Tribunal tomorrow on the 2010 list
9 appeal.

10 THE CHAIRMAN: But your interest, Vtesse Harlow Limited, does not, for example, have any
11 interest in how non-domestic rates are going to be treated as part of the calculation of the
12 Dark Fibre Access control charge from next October?

13 MR. PAUL: Only in a general sense in that our general activities since 2002 has been that this is
14 all unfair and ought to be sorted out, so it is a more general issue. We have a direct
15 financial interest in the outcome because if anything that comes out of these proceedings
16 helps in the 2010 appeal, then that has a direct financial result on our ability to settle the
17 rates bill as opposed to the historic rates bill for Vtesse Networks----

18 THE CHAIRMAN: That is why you very fairly say in your letter that you have no direct interest
19 in the outcome of the proceedings, but you have a broader interest in the proper
20 administration of non-domestic rates. That well underlies your observation there.

21 MR. PAUL: For the simple reason that the first thing is: are the facts on which TalkTalk base
22 their appeal correct? If they are, then those facts alone assist us in the other proceedings.

23 THE CHAIRMAN: Two points. That is not an interest in the outcome of the appeal, you are just
24 interested in what evidence might come up in it?

25 MR. PAUL: Yes, but we have a general interest, because of what has happened in the past, that
26 the matter is finally resolved.

27 THE CHAIRMAN: You have a general interest in a challenge, or a more particular interest
28 actually, in a challenge to the way that non-domestic rates were levied over a period of time
29 when the company whose rights you are asserting operated.

30 MR. PAUL: That is right.

31 THE CHAIRMAN: As I understand it, the TalkTalk appeal says Ofcom have adopted, as it were,
32 the wrong approach in relation to how they design the charge control in relation to non-
33 domestic rates, but Ofcom is saying: "This is the regime that exists, and this is the way we
34 are going to allow for it", and Ofcom have also said: "We have asked the Government to

1 change the regime", but I do not at the moment understand how the TalkTalk appeal is
2 going to touch any of the issues that were raised in your historic proceedings about----

3 MR. PAUL: Well, it will do, because it will demonstrate that there is, in fact, an advantage to BT
4 in the way that the non-domestic rates regime is constructed. It is the evidence that we have
5 sought since 2002.

6 THE CHAIRMAN: Yes, exactly so. Your interest is not in the outcome of the appeal. If you
7 look at the grounds for intervening in a Competition Appeal Tribunal case it is that you
8 should have an interest in the outcome of the appeal. I think you were directed to the Rules.

9 MR. PAUL: Yes, I was.

10 THE CHAIRMAN: Your interest seems to be more directed at, as it were, the evidence that
11 might come up, and you very clearly say that you would quite like to see some of the
12 materials, but that is not really an interest in the outcome, is it? You are interested in the
13 area; you would like to know perhaps some facts.

14 MR. PAUL: Yes.

15 THE CHAIRMAN: But the justification for intervening in these proceedings is that you have a
16 sufficient interest in the outcome, which usually means that you are commercially
17 affected----

18 MR. PAUL: We are commercially affected.

19 THE CHAIRMAN: --will be commercially affected by the outcome of the challenge to Ofcom's
20 determination which will kick in in October 2017, so at the moment I do not understand
21 how you can be interested in that, given that you are pursuing an historic claim. Vtesse
22 Harlow Limited is not conducting any business, is it, at the moment? It is not trading in this
23 market; it is not operating in this market?

24 MR. PAUL: No, it is not, but it very much depends upon what the outcome of the appeal is. If,
25 for instance, the outcome is to determine that, in actual fact, the cause of TalkTalk's
26 complaint is that there is State aid through the rating system, and that needs to be resolved,
27 then that is one of the possible outcomes that could result from this. If that is the case that
28 is to the benefit of ourselves.

29 THE CHAIRMAN: I will be corrected if I am wrong, but I do not understand that to be part of
30 the TalkTalk appeal.

31 MR. PAUL: No, but that is why we have intervened.

32 THE CHAIRMAN: The TalkTalk appeal is directed, as it has to be, at whether the regime which
33 Ofcom has designed to apply to people who are operating in the market from 1st October
34 2017 is correctly designed.

1 MR. PAUL: That is right, but----

2 THE CHAIRMAN: You are not operating in the market, you cannot, therefore, be affected in any
3 financial sense by the outcome of TalkTalk's appeal, and they are not going to be running
4 the sort of points that you historically have been interested in about whether historically BT
5 has been given State aid or not.

6 MR. PAUL: But the cause of TalkTalk's complaint is the discriminatory application of business
7 rates, and that is if the business rates' regime was applied equally to TalkTalk's use of BT's
8 fibre to BT using it itself, there would be no basis for the TalkTalk complaint. So TalkTalk
9 and the administration by Ofcom, all of this construction, has itself been caused by the
10 asymmetry in the non-domestic rates regime.

11 THE CHAIRMAN: That is true, but surely what is happening here is TalkTalk is saying nobody
12 here can change the Government's mind, other than by persuasion, it is up to the
13 Government whether they change the regime for the future. Ofcom have said: "We will
14 assume the regime is going to be the same as it currently is, and on that basis we will design
15 a price control." That is the basis of the Determination which TalkTalk are disputing,
16 because TalkTalk say, as I understand it, and I will give you the chance to correct me if I
17 get it wrong, TalkTalk are saying: "Assume that the Government does not change the
18 regime, this is the way that the price control ought to be designed to run from 1st October
19 2017." TalkTalk say: "You are wrong, Ofcom, you should have designed it differently".
20 Nobody is saying in the appeals it is just not up for grabs in the appeals that the Government
21 ought to have a different regime, because that is not----

22 MR. PAUL: I have the Commission Notice on the Enforcement of State Aid Laws by National
23 Courts 2009C8501 and, yes, it is in the remit of this Court to determine and to make a
24 judgment on whether the non-domestic rates regime actually constitutes State aid. That has
25 been well-established, it was established, for instance, in the *Lunn Poly* case in the late '90s.

26 THE CHAIRMAN: But not in these proceedings that you are seeking to intervene in, because
27 these proceedings that you are seeking to intervene in relate to a projected future regime
28 that Ofcom has designed.

29 MR. PAUL: But I am raising the point, again, Sir, that the cause of this is the asymmetry in the
30 rating regime. If, as a preliminary issue, the CAT determined that that actual cause was
31 because of a misapplication, an illegal application of the law of the tax regime, which it is
32 quite entitled to do under the Commission Notice on Enforcement.

33 THE CHAIRMAN: But you have not separately asked this Tribunal to do that, if you say this
34 Tribunal has the jurisdiction to do it, you are seeking to intervene----

1 MR. PAUL: I have, Sir, in the notes that we submitted, I have indicated the fact that in the past
2 the CAT has, indeed, engaged with State aid issues.

3 THE CHAIRMAN: True, but you are seeking to intervene in somebody else's vehicle without an
4 interest in the outcome of that dispute. If you are right, surely the appropriate thing for you
5 to do would have been to institute your own complaint, not to try and use somebody else's
6 vehicle in which you do not have an interest.

7 MR. PAUL: Entirely possible, but, again, we came across this very late. The original form of
8 the letter that we addressed was simply to provide assistance to the Tribunal. The Registrar
9 to the Tribunal said: "Yes, but here are the Rules on Intervention, do you want to be
10 considered for that?" I do not have a problem if the Tribunal wishes to receive further
11 information on why the application of non-domestic rates constitutes State aid, because, as I
12 said, if that was determined it would remove TalkTalk's objection immediately, and it
13 would remove the necessity for Ofcom to construct, or to suggest, an artificial regime.
14 Remember, what Ofcom has proposed, and that is that BT stays in rateable occupation, is in
15 itself a modification of the rating law. It goes against the cases that were decided, and it is
16 another further modification for side-stepping what amounts to the 'elephant in the room',
17 and that is the fact that there is a significant asymmetry in the non-domestic rates regime.

18 THE CHAIRMAN: But that is for the Government to decide as a legislator, surely?

19 MR. PAUL: Why would it not be something that the CAT would engage with and that would
20 then resolve----

21 THE CHAIRMAN: But not in this appeal, because, as I understand it, this appeal takes a decision
22 of Ofcom which is appealed against, Ofcom have said: "The law is what the law is". Ofcom
23 are trying to persuade the Government to change the law quite independently, but they
24 recognise that they can only do that outside these proceedings by lobbying the Government,
25 and the Government will either do it or it will not. But, Ofcom have then said: "We assume
26 that the Government is not going to change the law", so everybody has to work then within
27 the law, and Ofcom have said: "Assuming that is the law, this is the rating regime, how do
28 we design a price control in accordance with the law – the rating regime as then exists?"
29 TalkTalk are just saying: "You got it wrong. You should have done it differently", and that
30 is what this appeal is actually about. It is against Ofcom's----

31 MR. PAUL: I am very well aware of it, but I come back to the point I originally made, and at the
32 source of the problem is the asymmetry in the rates system and, as I say again, it seems to
33 me that that is a subject with which the Competition Appeal Tribunal could quite readily
34 engage with, and has done so in the past. It then addresses the direct cause of the

1 complaint, and it addresses that issue directly rather than 'round the back' if you like, by
2 trying to put sticking plaster on something which Ofcom itself recognises is discriminatory
3 and unlawful – or it should do.

4 THE CHAIRMAN: But Ofcom, as it were, could not themselves just simply ignore what the
5 current law is in designing----

6 MR. PAUL: Not ignore it, but for instance it, itself, could open up an investigation and has not
7 done so. The elephant in the room is that everybody in this room sitting behind me knows
8 that for the last 10 years the rating system is, how shall we say, "odd" I think would be the
9 politest way of putting it. Everybody knows, TalkTalk said: "I am not going to support
10 your intervention but I am very sympathetic, Mr. Paul".

11 THE CHAIRMAN: Everybody says that the rating regime, as applied to BT is different to that as
12 applied to other people.

13 MR. PAUL: That is right.

14 THE CHAIRMAN: We will just leave it there; everybody understands what we are talking about.

15 MR. PAUL: As I said, that is what I would go on and suggest to you that it goes further than that,
16 because of this difference of treatment. The very, very heart of the TalkTalk complaint is
17 that the different treatment causes a distortion in the market because TalkTalk's tax burden
18 when it occupies for rating purposes Dark Fibre, is different to the application that BT
19 would get itself. Now, if that is a fact, then that is unlawful. That is the start of the thing.
20 You do not then go and say, with the greatest respect: "Let's put a sticking plaster" – having
21 determined it is unlawful, "Let's put it in our back pocket and forget about it".

22 It is quite up to the CAT and the CMA to investigate these matters. When I have raised
23 them in the past they have refused to do so. Ofcom is well aware of this, and has been for a
24 very long time but will not engage with it.

25 When this issue was raised and, for instance, I discussed with, after he had left, Brian
26 Carlsberg, this issue, he said: "It is very simple, Mr. Paul. If the people at Ofcom had any
27 guts they would be writing to the Minister saying that they cannot comply with their
28 statutory obligations to regulate competition in the telecoms industry because of the
29 asymmetry in the rating system." So it is not something which is outside and entirely
30 unconnected with the matters in hand.

31 I have taken this long to get at it, I can give you the background on the effective part of the
32 original State aid complaint, but that State aid complaint only existed and applies up to the
33 end of 2005, we are now 10 years on.

1 It is quite clear again, the Commission Notice on Enforcement to State Aid Law by National
2 Courts, it is open to you to consider these matters. Article 87(1) of the Treaty states:

3 ". . . that any aid granted by a Member State or through State resources in any form
4 whatsoever which distorts or threatens to distort competition by favouring certain
5 undertakings or the production of certain goods shall, in so far as it affects trade
6 between Member States . . ."

7 and it meets all those criteria. So, you have this issue, the elephant in the room is what the
8 TalkTalk proposal suggests, if its facts are correct, is that the application of that tax is
9 unlawful, period.

10 I would respectfully put it to you that the right order of this thing is, as I said, not to put
11 sticking plaster on it afterwards, but do not ignore the elephant in the room and actually
12 engage with the fact. It may be that TalkTalk have got it completely wrong – I do not
13 believe they have. One of the first issues that has to be decided is whether the factual basis
14 of TalkTalk's complaint is correct. If it is, then it is unlawful, period. Or, at any rate, it has
15 to be then in my view open to the CAT to look very carefully at whether that is the origin of
16 this problem.

17 Again, there are mechanisms here. It is something which the CMA is quite capable of
18 considering as part of the overall issue, and it is affected by anything else, because
19 inevitably it does come back to the price control mechanisms of this. For instance, I will
20 give you another example, at the moment we know, because finally some elements in
21 Government have recognised the distortion, and the chilling effect that this has on this.
22 People at the Treasury are now lobbying to get this regime changed. The recognition
23 merely that there is change needed is a recognition that the current position is wrong, and it
24 is that current position which causes the distortion and is at the heart of the TalkTalk
25 complaint.

26 If you get rid of that issue the TalkTalk complaint simply falls away, because the regime
27 then would be in place that all parties renting a kilometre of fibre would be treated the same,
28 and that causes a competition issue.

29 THE CHAIRMAN: Everybody understands that if the Government changes the regime the
30 TalkTalk appeal falls away because the basis for the Decision by Ofcom, which TalkTalk
31 are appealing against will have been negated.

32 MR. PAUL: But, Sir, you underestimate your own position in this, and that is, frankly, if this
33 Tribunal determines that there is State aid through that arrangement it is not a question of
34 asking the Government nicely, the Government will have to, in the same way as it did with

1 Lunn Poly and the Insurance Premium Tax, the same as the issues determined within
2 insurance in the European Court of Justice.

3 THE CHAIRMAN: TalkTalk are not asking me, as I understand it, to make that determination.

4 MR. PAUL: No, I have opened up that further point because, again, for the assistance of the
5 Tribunal I have indicated an immediate way of addressing that, and that is if the Tribunal
6 determines the fact that discriminatory treatment is, in its own right, unlawful, the
7 Government fixes it, the problem goes away. You see, the regime goes further than that---

8 THE CHAIRMAN: So, let me get this right, you say you would want to intervene to persuade the
9 Tribunal to rule that the current rating regime is unlawful because it amounts to unlawful
10 State aid to BT.

11 MR. PAUL: Or provide, again under the procedure here, a request can go to the European
12 Commission to determine the same thing, but to grapple with that issue, yes. To engage
13 with the fundamental issue which causes the problem rather than trying to put sticking
14 plaster on the problem.

15 THE CHAIRMAN: But, if you were right, the consequence of that would be to cause a change in
16 a proposed regime, which was the subject of the Ofcom Decision in which, as such, you
17 have no interest. Your interest is actually in a different set of circumstances which involve
18 the recovery of historic overpayments, I assume.

19 MR. PAUL: It is not, it goes right through, because we are representing the company, it is a
20 current liability as well. If we have the 2010 list, as it stands at the moment they were done
21 in five year intervals, they are now done in seven. So the appeal that we are into in 2010, if
22 we get it altered, will also flow through to 2017, so it is not just historic, it is a continuing
23 interest in this.

24 THE CHAIRMAN: But your company that is seeking to intervene is not active in the
25 telecommunications industry. It is just a collection vehicle for moneys on behalf of the
26 shareholders of a company that has sold its telecommunications business in 2014.

27 MR. PAUL: No, but it is acting for the current subsidiary, which does have an ongoing and
28 current rates liability.

29 THE CHAIRMAN: Your company does not have the interest then, in which case it is them that
30 has the interest.

31 MR. PAUL: We do in the sense that we are acting, and we have been appointed to act on rating
32 matters in respect of the 2010 list, and that goes through to 2017. So, from that point of
33 view we have a current interest in it as well, we are the agent for the company and so in that
34 sense we are no different, in a sense, to my learned friends here in terms of the interest, and

1 we have the support of the current management of Interoute Vtesse Limited, which is one of
2 the entities rated in that, and it will have an effect on the entire group if this Tribunal
3 determined that, in fact, there was unlawful State aid, or provided sufficient information to
4 assist us in the other Tribunal.

5 As I say again, Sir, this Tribunal as far as I can see from my reading, with the assistance of
6 Aidan O'Neill QC, the Commission Notice on Enforcement to State Aid Laws puts this
7 immediately within your remit.

8 THE CHAIRMAN: That document you have been referring to, is that a document you have a
9 copy of that I can see.

10 MR. PAUL: I have provided it to the Registrar. It is the Commission Notice on the Enforcement
11 of State Aid Laws by National Courts and the Official Journal of European Union, the
12 reference no. is 2009C8501.

13 THE CHAIRMAN: I am sorry, give me the reference again that you have been reading from.

14 MR. PAUL: It is looking at the whole State aid. "Accordingly, the main purpose of this notice is
15 to inform national courts----"

16 THE CHAIRMAN: Where are you reading from?

17 MR. PAUL: This is para. 6:

18 "Accordingly, the main purpose of this Notice is to inform national courts and third
19 parties about the remedies available in the event of a breach of State aid rules and
20 to provide them with guidance as to the practical application of those rules. In
21 addition, the Commission seeks to develop its co-operation with national courts by
22 introducing more practical tools for supporting national judges [yourself] in their
23 daily work."

24 and it goes on, first, identifying whether there is an issue. I have raised that to your
25 attention. It may be that the facts that TalkTalk are concerned with do not raise an issue
26 with State aid, but if they do, here is the mechanism for dealing with them – you can either
27 decide the matter yourself or you can refer it to the European Commission for comment,
28 and they have a four-month window to reply to that.

29 THE CHAIRMAN: Wait a minute, this is an information notice. This does not purport to be
30 anything which gives jurisdiction to a judge.

31 MR. PAUL: But you do have jurisdiction, Sir.

32 THE CHAIRMAN: I have jurisdiction within the scope of the Competition Act and the Tribunal
33 Rules.

34 MR. PAUL: Indeed.

1 THE CHAIRMAN: And the current matter that I am dealing with is an appeal against a Decision
2 of Ofcom. It is not a roving inquiry.

3 MR. PAUL: But, Sir, you are engaging in the matter where Ofcom and TalkTalk have a
4 disagreement over the remedy for the distortion in the rating system; that matter is central to
5 this issue. It is the cause----

6 THE CHAIRMAN: No, their disagreement presupposes there is a distortion. Ofcom have said:
7 "On the assumption that the distortion", as you have it "remains, this is how it should be
8 dealt with", and TalkTalk disagree.

9 MR. PAUL: I say that is unlawful.

10 THE CHAIRMAN: What you say is that you want to intervene to require a different question to
11 be determined, namely, should there be a distortion or not.

12 MR. PAUL: No, my question is, is the distortion caused by illegality?

13 THE CHAIRMAN: Yes.

14 MR. PAUL: That is not quite the same thing, because if you were to determine that actually that
15 distortion was, indeed, illegal then, again, the matter falls away.

16 THE CHAIRMAN: A determination that the rating legislation is an unlawful State aid would
17 have to be made in proceedings to which all relevant parties were given the opportunity to
18 appear and make representations, so presumably that would include the Government, would
19 it not?

20 MR. PAUL: At their choice.

21 THE CHAIRMAN: But, you see, it becomes a different case than the one I am trying, it becomes
22 a challenge to the legality of the existing legislation, which is not the case in which you are
23 trying to intervene.

24 MR. PAUL: But you are going to come out with a ruling one way or another on this about
25 putting the sticking plaster on something rather than fixing the complaint, so whether you
26 like it or not the elephant is in the room.

27 THE CHAIRMAN: Sure, but the ruling is – assuming that there is a problem – was the sticking
28 plaster that Ofcom decided to deploy the correct sticking plaster? But nobody in the room,
29 as I understand it – and I would like to hear from the others in a moment – is actually
30 raising in this matter in which you are trying to intervene the underlying question that you
31 are interested in.

32 MR. PAUL: Yes, but I would, again using your analogy of the sticking plaster, all I am
33 suggesting instead of sticking a sticking plaster on an infected wound you cauterise it. I
34 would respectfully suggest to you that the cauterisation of the wound, rather than sticking

1 the sticking plaster and continuing to let it fester, is a better approach than the one you are
2 suggesting.

3 THE CHAIRMAN: If you were right, then it may be that these are not the proceedings in which
4 you should be trying to urge somebody to do that.

5 MR. PAUL: In which case, Sir, I can also say that there are other proceedings going on, and you
6 are going to be faced with that problem anyhow because if there is a halfway change
7 halfway through this----

8 THE CHAIRMAN: If there is a change halfway through it then everybody understands that
9 certain parts of this case will fall away.

10 MR. PAUL: But, as I say, you have the ability to determine this, it is certainly within your remit
11 to look at, I do not think there is anything in the CAT Rules which would prevent you from
12 looking at it, and it is the thing that fixes the issue.

13 THE CHAIRMAN: All right. Is there anything else you want to add at this stage before we open
14 the floor to others who want to comment.

15 MR. PAUL: Yes, I would. The objections have been raised on the basis that this issue has been
16 determined, it has not. There are two parts to the original Decision. There was 176:

17 "There is no evidence the application of a different valuation method to BT and to
18 Kingston has resulted in an advantage".

19 THE CHAIRMAN: Is this the Court of Appeal decision?

20 MR. PAUL: No, this is the original Commission Decision.

21 THE CHAIRMAN: The way it works is if you are going to quote something out then you had
22 better give me something – what is it you are reading through.

23 MR. PAUL: The back page of the Decision dated 28.12.2006. The Official Journal reference no.
24 is L383/95 on the top, right at the back page where it is signed off by Neelie Kroes.

25 Paragraph 176:

26 "There is no evidence that the application of a different valuation method to BT
27 and to Kingston has resulted in an advantage . . ."

28 So that is the principal issue that was condensed down from the previous analysis, and the
29 basis of determining whether or not it was aid.

30 Article 1 then says:

31 "The application by the United Kingdom of the tax on non-domestic property to
32 BT plc and Kingston Communications plc from 1995 until the end of 2005 does
33 not constitute aid . . ."

1 It does not say anything about what the position is now, and it was very, very deliberately
2 time limited, and I was told that.

3 THE CHAIRMAN: All right, but get me back to what is your company's interest, Vtesse Harlow
4 Limited's economic interest – as opposed to, as it were, general interest – economic interest
5 in the way this regime will function from 1st October next year onwards?

6 MR. PAUL: Because if you determined that the cause of the TalkTalk complaint was unlawful
7 State aid, it would affect our continued ability to ensure that Interoute Vtesse Limited
8 continues to be taxed properly. Interoute Vtesse Limited is active in the market. It has
9 large amounts of customers, and we are acting as their agent in relation to rating matters, so
10 it does have a current interest. We are acting as agent for that company, and that company
11 has an ongoing interest. There is a direct connection with these current proceedings.

12 THE CHAIRMAN: You say you are acting as their "agent"?

13 MR. PAUL: Yes.

14 THE CHAIRMAN: What do you mean "agent"?

15 MR. PAUL: We are appointed in all rating connected matters to act for them.

16 THE CHAIRMAN: What, on the basis of a fee or a----

17 MR. PAUL: Yes. We have an ongoing economic interest in the settlement of these issues.

18 THE CHAIRMAN: I understand you said that Vtesse Harlow has an interest, it is a footnote 1 to
19 your note "in any settlement in relation to business rates", that would be the prior business
20 rates?

21 MR. PAUL: It is also the current business rates, Sir, because the matter in dispute in the
22 Valuation Tribunal is the setting of the valuation for the period from 2010 to 2017, it is
23 current.

24 THE CHAIRMAN: Okay. And what is the name of the company which you say is currently the
25 rate payer?

26 MR. PAUL: The rate payer, the now name of the company is Interoute Vtesse Limited.

27 THE CHAIRMAN: Let me see if I have understood this, Interoute Vtesse Limited you say is a
28 rate payer----

29 MR. PAUL: Yes.

30 THE CHAIRMAN: --who would be affected by a change to the rating regime.

31 MR. PAUL: And also the remedies available here, because they are an operating----

32 THE CHAIRMAN: But Interoute Vtesse, for example, has not issued proceedings against
33 anybody, or is not planning to do so, claiming that the current rating regime is unlawful
34 State aid.

1 MR. PAUL: It is, it will be in front of the Valuation Tribunal tomorrow.

2 THE CHAIRMAN: Right, so you have already got proceeding underfoot in which that issue is
3 going to be raised, so why are you trying to get me to raise it separately? You are seeking
4 to raise the same question here and it is already in front of another court.

5 MR. PAUL: Not in front yet. Tomorrow, again is almost identical to this, is the case management
6 hearing.

7 THE CHAIRMAN: Yes, but you cannot generally pursue the same – you cannot ride two horses.
8 Interoute Vtesse Limited is disputing the legality of the rating treatment which it is current
9 receiving as unlawful State aid in the rating forum, then that is where it is going to be
10 determined.

11 MR. PAUL: No, because what would happen is if you did engage with those issues, and the
12 CMA considered it as part of the general pricing associated issues, we would stay the VTS
13 until the matter was decided.

14 THE CHAIRMAN: And if I say I am not interested you will carry on and raise the same thing as
15 in the rating forum.

16 MR. PAUL: Yes, that is quite possible.

17 THE CHAIRMAN: But this is not like an à la carte menu of courts. If the actual party at issue
18 Interoute Vtesse Limited is already disputing its rates' liability in, whatever it is called, the
19 Valuation Tribunal – you probably know better than I – and is raising the question of State
20 aid in that forum saying "We should not be subject to this treatment because it is unlawful
21 State aid, then I do not see how it could be appropriate for you to seek to raise the same
22 point in front of this Tribunal where you do not have all the relevant parties in front of this
23 Tribunal at the same time in the hope that you will get one or other of the Tribunals to bite.
24 You have to identify the forum in which you are bringing your claim and you pursue it in
25 one forum not a multitude. It is an abuse of process to do it in a multitude.
26 If you are actually running the argument elsewhere then I do not see how you can ask me
27 to----

28 MR. PAUL: You may find as a result of this that certain of the other parties to this may, in fact,
29 put that issue on the table anyhow; I suppose it is open to them to do so.

30 THE CHAIRMAN: Nobody at the moment, as I understand it, is rushing to amend their
31 pleadings, or their statements of intervention – or, sorry, to indicate that they want to run
32 this argument in these proceedings. I will wait and see if anybody does.

33 MR. PAUL: The CityFibre intervention, for instance, raises exactly that issue, raises the issue
34 about the asymmetry of the----

1 THE CHAIRMAN: Yes, raises the asymmetry, but it does not say it is unlawful State aid, which
2 is the point you want me to----

3 MR. PAUL: Sir, my understanding of the Notice on the European Institution is you cannot
4 simply turn a blind eye to a possible illegality that has been raised.

5 THE CHAIRMAN: I am not turning a blind eye. I am dealing with a Decision of Ofcom as to
6 how to deal with the asymmetry----

7 MR. PAUL: Yes.

8 THE CHAIRMAN: --in circumstances where Ofcom has said that it is lobbying the Government
9 to remove the asymmetry, but if the Government decides not to, Ofcom is saying "We will
10 have to deal with it", and the question is whether Ofcom has dealt with it appropriately or
11 not. As I understand it, you, or the party that is actually economically affected by this,
12 Interoute Vtesse Limited is running, as you have told me, the State aid argument in the
13 forum which is directly relevant to its rating liability.

14 MR. PAUL: It will be doing so, but one of the issues we have had with the Valuation Tribunal is
15 they do not believe competition matters. So, for instance one of the principal things that
16 comes out from the Valuation Office Agency is the 1601 Act of Elizabeth, which is the
17 basis of the current rating regime, pre-dates 1972, so none of this has any effect, which is
18 one of the reasons why this has not been properly engaged with.
19 Again, it comes back to the original----

20 THE CHAIRMAN: But then you pursue a line which you, I know, have pursued in the past,
21 which is you appeal the Decision of the rating Tribunal.

22 MR. PAUL: But, again, I come back to the original reason for being here, and that was the
23 original letter which I wrote was to provide assistance to the Tribunal if it wished to do so,
24 and engage with the matter of State aid because that would fix the problem.
25 Again, I have put the matter in front of the Tribunal. If the Tribunal chooses not to engage
26 with it, that is up to it, but it does seem bizarre to then go where we have a solution and the
27 suggestion of cauterising the wound rather than fiddling with sticking plaster, in a regime
28 where, if you determine that all parties under these circumstances had to be treated equally,
29 that would simply get rid of the problem, and the pricing issues associated with it.
30 Whether you choose to take those points from me in intervention, or whether you choose to
31 look at the European Commission suggested co-ordination, or whether the CMA chooses to
32 engage with these issues, because it is pretty fundamental to determining any of these
33 pricing issues, in a sense beyond a certain point is, indeed, up to you. If you do not wish to
34 avail yourself of that and prevent me from intervening and all the rest of it, then I suppose I

1 could challenge it but you have probably got a good point. But it does seem to me odd, if I
2 am providing you with what I would describe as an 'elegant' way of dealing with what
3 would otherwise be an extremely complicated issue, that you do not avail yourself of that
4 and take the point.

5 Whether you allow me to argue the point, or whether you simply take the point and ask the
6 CMA to look into the matters, that is entirely up to you. I would rather not be here trotting
7 around, sitting in front of all of this for the next six months. I do have better things to do in
8 some respects, but if necessary I will. So I will leave the point with you.

9 The point is that the original decision was: (a) time limited, (b) there was no evidence of an
10 advantage, but that if you then read the beginning of the Commission's note: Article 87(1),
11 it is now 107 – all these numbers have changed, it is a continual nightmare –

12 "Any aid granted by a Member State or through State resources in any form
13 whatsoever which distorts or threatens to distort competition by favouring certain
14 undertakings or the production of certain goods shall, in so far as it affects trade
15 between Member States . . ."

16 is unlawful.

17 Again, Sir, I say to you, whether you allow me to argue the point or not, there is evidence of
18 illegality in the submission made by TalkTalk. The question then in the preliminary issue
19 is: are those facts correct? Is there a distortion? They claim there is. If there is, it is
20 unlawful.

21 Thank you, Sir.

22 THE CHAIRMAN: Thank you. Who would like to have a go? TalkTalk?

23 MR. WOOLFE: Sir, I shall be fairly brief. First, I think I should clarify that our case does not
24 challenge the non-domestic rate treatment of BT, whether on grounds of fairness or State
25 aid or otherwise. What we do is take the way the NDR operates as a given and then we
26 bring the challenge to a specific decision of Ofcom.

27 With that having been said, in a sense the reality there is an overlap between what Vtesse is
28 interested in and some of the factual elements we will be discussing in the appeal; that is the
29 height of it. They do not actually have an interest in the outcome as you have identified.

30 The challenge is brought to the specific decision and I think you have to bear in mind your
31 jurisdiction which, in this respect is defined by s.195 of the Communications Act 2003. I
32 did not bring a copy because I did not think we were going to refer to it.

33 THE CHAIRMAN: I might have it.

34 MR. WOOLFE: I am afraid I have been looking it up electronically.

1 THE CHAIRMAN: I can look it up electronically in a moment, I am just going to see whether I
2 have it manually – it is the Communications Act?
3 MR. WOOLFE: Yes, Sir, not the Competition Act.
4 THE CHAIRMAN: (After a pause) The Communications Act – do you have a reference to it?
5 MR. WOOLFE: I am afraid I do not.
6 MR. HOLMES: Sir, if you are working from the same edition as me it is p.1058 that you will
7 find s.195 on.
8 THE CHAIRMAN: It is the Communications Act 2003?
9 MR. WOOLFE: That is right, s.195.
10 THE CHAIRMAN: I have it.
11 MR. WOOLFE: This is in the section dealing with disputes and appeals, and this is what actually
12 confers jurisdiction on the Tribunal in this respect. Section 192 provides the right of appeal,
13 s.195 tells the Tribunal what to do with it. Section 195:
14 (1) The Tribunal shall dispose of an appeal under section 192(2) in accordance
15 with this section.
16 (2) The Tribunal shall decide the appeal on the merits and by reference to the
17 grounds of appeal set out in the notice of appeal.
18 (3) The Tribunal’s decision must include a decision as to what (if any) is the
19 appropriate action for the decision-maker to take in relation to the subject-
20 matter of the decision under appeal."
21 And you remit under s.195(4).
22 The short answer is that the Commission guidance about enforcement by national courts
23 says, I think, para. 70 – you need not look it up, Sir, it is a simple point, that national
24 procedural rules apply subject to the requirements of effectiveness and equivalence. So you
25 apply a national procedure rule, you have internal allocations of jurisdiction, you apply
26 those unless it means that EU law cannot be effectively enforced, that is not the case. There
27 is no reason why you cannot bring a complaint about State aid to the appropriate court.
28 THE CHAIRMAN: Would the appropriate place to bring the complaint in this particular case for
29 Interoute Vtesse be the rating Tribunal.
30 MR. WOOLFE: It would be whoever has jurisdiction over the relevant tax treatment.
31 THE CHAIRMAN: I do not know what the official title of the rating Tribunal is.
32 MR. WOOLFE: It may be that the High Court has some residual jurisdiction. In tax cases you
33 have this sort of----
34 THE CHAIRMAN: Right, but it is not----

1 MR. WOOLFE: What I am saying, Sir, is that there is a specific decision that is being challenged
2 here, and your jurisdiction is to consider that challenge to that decision.

3 THE CHAIRMAN: Wherever it is you say it is not here because I am here to decide your appeal
4 on its merits by reference to the grounds of appeal?

5 MR. WOOLFE: That is right, and also just a final rider which is that although we do raise
6 distortion of competition, that is only one element of State aid challenge, and there is a
7 practical problem that if you let people in to argue other points to these proceedings, a
8 whole lot of issues they are interested in, neither the CMA nor the Tribunal could decide
9 they are a State aid solely on the basis of distortion of competition.

10 THE CHAIRMAN: Your first point, as I understand it, is you say you simply take the non-
11 domestic rates regime as it is, you pass no judgment as to whether you like it or you do not
12 like it, that is not in your case.

13 MR. WOOLFE: Not for the purposes of the appeal.

14 THE CHAIRMAN: Not for the purpose of this appeal. But you say that for the purposes of this
15 appeal Ofcom did not deal with it correctly when formulating their price control remedy.

16 MR. WOOLFE: That is correct. Unless I can be of further assistance those are my submissions.

17 THE CHAIRMAN: Thank you.

18 MR. BEARD: Very briefly, from BT's point of view, first, to emphasise the point that you, Sir,
19 referred to just then and Mr. Woolfe is emphasising, the whole basis of the TalkTalk appeal
20 is not to do with challenging the non-domestic rates regimes, so there is no proper interest
21 under the relevant test. Furthermore, as Mr. Woolfe also says, this is not the right forum,
22 and this court should be very cautious about making any sort of prognostications about what
23 the appropriate forum should be. The State aid regime that operates at a European level
24 uses systems of notification and complaint. Indeed, the Commission decision that you were
25 handed was actually an investigation by the European Commission that had been triggered
26 by a complaint made by Vtesse Networks, and it was rejected. So that course was followed
27 by Vtesse in relation to these matters, and the primary authority in the European Union that
28 deals with these matters dismissed it. There is no basis for consideration of State aid
29 matters either in CAT proceedings or in a price control Reference off to the CMA, and
30 therefore it is a broad matter of principle, quite apart from the fact that in this case there is
31 no basis for an interest arising in relation to intervention, the intervention here should be
32 rejected.

33 THE CHAIRMAN: Thank you. Does anybody else wish to say anything?

1 MR. HOLMES: Sir, we respectfully agree that this application to intervene should be refused.

2 As you observed, Rule 16 permits interventions by parties with a sufficient interest in the
3 outcome of the proceedings. The Tribunal determines the outcome of the proceedings in
4 accordance with s.195, and, as Mr. Woolfe has shown you, Sir, s.195(2) requires the
5 Tribunal to decide the appeal on the merits by reference to the grounds of appeal set out in
6 the notice of appeal.

7 The Tribunal in this case cannot provide Mr. Paul with the outcome that he is interested to
8 achieve. The applicability of the business rating rules with the State aid rules has not, in
9 fact, been raised as a ground of appeal, as Mr. Woolfe has confirmed. That is so whether or
10 not the Tribunal could, in principle, entertain a collateral challenge to the lawfulness of the
11 rating rules if brought by an appellant.

12 As a matter of European Union law, Mr. Paul must be entitled to raise the compatibility of
13 national measures with the State aid rules before the national courts, but national procedural
14 rules determine the appropriate forum and the rules regarding the time at which any appeal
15 must be brought, and that is clear from para. 70 to which Mr. Woolfe has already referred
16 you.

17 THE CHAIRMAN: Paragraph 70 of?

18 MR. HOLMES: Of the Commission's guidance, Notice on the Enforcement of State aid by
19 national courts.

20 THE CHAIRMAN: He said "do not turn it up", so can I just look at it. This is the information
21 document, yes?

22 MR. HOLMES: Yes, Sir.

23 THE CHAIRMAN: (After a pause) Yes.

24 MR. HOLMES: In our submission there are other appropriate fora in which Mr. Paul may pursue
25 his challenge to the lawfulness of the rating rules, and it appears that he is already doing so
26 in the valuation Tribunal, and it would not be appropriate for this Tribunal in circumstances
27 where no appeal is brought regarding the lawfulness of the rating rules by reference to the
28 State aid rules of the European Union to entertain a similar challenge.

29 THE CHAIRMAN: Yes.

30 MR. JOHNSTON: Sir, I am conscious that I am only an intervener myself, but my instructions
31 are that my client is candidly rather sympathetic to Vtesse's position, but also of the view
32 that this matter has to be decided by reference to the grounds of appeal that are raised by the
33 appealing parties.

1 MR. SHARPE: We have immense sympathy with Vtesse, but I will do no more than endorse
2 what has been said, especially on behalf of Ofcom. The correct forum here, I would have
3 thought, is either the rate Tribunal or whatever, or seeking a declaration in the High Court
4 with the possibility of a further reference in relation to the time period within which he is
5 concerned.

6 For the avoidance of doubt, CityFibre's interest in non-domestic rates is quite strong,
7 because just to differentiate our position, we are concerned that the remedy put forward to
8 deal with BT's alleged significant market power in the leased lines market, namely,
9 mandating Dark Fibre, and the prices at which Dark Fibre should be supplied is, by Ofcom's
10 own admission, frustrated by the existing rates' regime, so Ofcom, as you saw, are keen to
11 change that regime, they are gambling on a change before the decision takes effect, and our
12 case, in a sense, is that it is simply not open to Ofcom to produce a decision which rests
13 upon a hypothetical future change in Government policy.

14 Apart from that, regrettably, I am afraid I am aligning myself with my learned friends, and
15 fear that this is not an appropriate matter for his intervention.

16 THE CHAIRMAN: Do you want to respond?

17 MR. PAUL: Well, of course, I am extremely disappointed, but I would hope that you would, at
18 least, consider part of those things.

19 The secondary issue, which I asked for in the first letter, was access to the information
20 which would allow us properly to have this issue determined elsewhere, and I would be
21 perfectly happy with that. You will consider that?

22 THE CHAIRMAN: I will consider it. The difficulty is though that if you have no sufficient
23 interest in the outcome to justify your intervention, just saying you would like to see the
24 documents does not get you home, I think.

25 MR. PAUL: So I have to get another court order in order to be able to do that then, do I?

26 THE CHAIRMAN: You may have to. What you can get access to, I am afraid, is not within my
27 power other than in these proceedings. So, in order to get documents in these proceedings
28 you have to get into them first, otherwise you are just bootstrapping yourself up by saying:
29 "I'd like to get the documents, therefore that gives me a sufficient interest to get in, therefore
30 I can get the documents."

31 MR. PAUL: So, therefore, that decision does impede on our other hearing?

32 THE CHAIRMAN: No, if there are----

1 MR. PAUL: So how do you comply with the charter of fundamental rights, and my right to a fair
2 trial in the other proceedings if you will not give me access to the information so I can argue
3 it?

4 THE CHAIRMAN: If you have a right to the documents you can apply in the other proceedings –
5 it is a big "if".

6 MR. PAUL: Right, but they can be disclosed by you, this Tribunal?

7 THE CHAIRMAN: No, no, no, because I do not have any documents *per se*, they are not my
8 documents. If you want to get access to documents which are in the possession of any of
9 the parties to these proceedings then you have to find a court or tribunal which has
10 jurisdiction over a claim, which is properly made in front of it, that has the power to order
11 non-parties to produce documents to you and I am not going to give you advice as to
12 whether that is. All I can do is say that in order to get access to the documents in these
13 proceedings you have to get into the proceedings properly first. You cannot, as it were,
14 bootstrap yourself in by saying: "I would like to see the documents in these proceedings.
15 That gives me a sufficient interest to get into the proceedings to see the documents in the
16 proceedings."

17 MR. PAUL: Fair enough.

18 THE CHAIRMAN: That seems to be boot strapping.

19 MR. PAUL: So that is it, is it?

20 THE CHAIRMAN: I was going to give a short ruling, but is there anything else which you want
21 to add before I do?

22 MR. PAUL: No, the only consolation I have is that at least I have not wasted money on lawyers.
23 (Laughter).

24 THE CHAIRMAN: I will not give a ruling on that point! (Laughter)
25 (For Ruling see separate transcript)

26 THE CHAIRMAN: So, I am afraid, not here, you will have to try your luck somewhere else, Mr.
27 Paul.

28 MR. PAUL: Well, at least my Easter holiday will not be interrupted! (Laughter)

29 THE CHAIRMAN: I should say, obviously, you do not need to wait; if you want to go I certainly
30 will not take offence if you choose to leave, but you can stay if you wish.

31 MR. PAUL: When were you proposing to break.

32 THE CHAIRMAN: We will be breaking at 1 o'clock.

33 MR. PAUL: I will stay and listen if that is all right.

34 THE CHAIRMAN: That is fine.

1 MR. BEARD: Sir, if I may then, I think that disposes of all issues relating to interventions in all
2 appeals. That then takes us in the Agenda to TalkTalk's stay application, but I think that has
3 now gone effectively with the timetabling.

4 THE CHAIRMAN: Yes, I think I indicated, and nobody came back and argued hard that----

5 MR. BEARD: I have double-checked with Mr. Woolfe, there is no further issue there. That takes
6 us to confidentiality and disclosure. I had thought we had got to a point of agreement, but it
7 may be that there is a nuance of issue here.

8 If, Sir, you have the correspondence bundle, at tab 73 you have the letter from BT which
9 sets out our position on the case management agenda, but also includes by way of appendix
10 6 a proposed confidentiality ring order. The order itself is in relatively standard form, I do
11 not think there is any issue about that. Attached to it is a schedule of people that have to be
12 named. Again, nothing unusual about that.

13 THE CHAIRMAN: Can I just break in for a second – I notice that it says in para. 2(b) of the
14 order that relevant advisers are those persons who are listed and who have given a signed
15 undertaking, who are authorised by the Tribunal upon further application. Can you give
16 some thought or, in fact, can I suggest to you, that an alternative mechanism for doing this
17 would be simply to allow the parties to agree between themselves any alteration to the list
18 and then provided that if the person is added that they have signed the relevant
19 documentation, and you can simply inform the Tribunal? The reason for that is that this is a
20 big case, there are lots of people involved. There are going to be people coming and going,
21 even over the course of the next few months, and if every time a new trainee comes into the
22 fold there has to be an application to the Tribunal, simply a name on a piece of paper but
23 who has signed the undertaking, it seems to be just an exercise in paper pushing.

24 MR. BEARD: I do not imagine there will be any objection on any side with agreement,
25 arrangements could be made.

26 THE CHAIRMAN: If all the parties are agreed, and the person who is to be added to the ring has
27 signed the document, what I would simply suggest is that you then have liberty simply then
28 to inform the Tribunal that that is the change that has been made, and lodge the relevant
29 confidentiality copy, which means that it can take effect immediately and you do not have
30 to wait for me or the Registry to confirm the application, which will inevitably happen
31 unless they know something about the person----

32 MR. BEARD: Yes, unless there is an objection.

1 THE CHAIRMAN: Yes, if there is an objection then it is not going to be consent in the first
2 place. I have wittered on long enough, other people have had chance to think about it.
3 Does anybody have a problem with that as a matter of principle?

4 MR. BEARD: No one does. We will go away and do the drafting on that. As I am sure you
5 know, in cases of this sort, a confidentiality ring is a standard process, and the terms of this
6 confidentiality ring were canvassed before we attached it on 23rd September. Just for your
7 note, Ofcom does not oppose any of the terms that have been included, and also for your
8 note that is in their letter which is at tab 72 in sections 5 to 6 on p.2. So Ofcom do not
9 object.
10 CityFibre, again for your notes, they raise no objection, that is at tab 74. The CP Group
11 made submission on this, which can be found at tab 76.

12 THE CHAIRMAN: Sorry, just to cut through a second so I am focused. The issues, as I
13 understand it are, first, whether documents need to be redacted, whether we are talking here
14 about the confidential documents which disclose the names of people who have provided
15 information to Ofcom, or whether they can be anonymised. That is the first question,
16 because some people have said in the letter which I have seen very recently, we are content,
17 but we would only be content for our confidential information to be disclosed to parties if it
18 is anonymised.

19 The second question I think then goes to the question of the ring, and particularly the two
20 in-house BT lawyers and what provision is to be made for them?

21 MR. BEARD: Certainly, in relation to the second question I think we have moved beyond that. I
22 do not think there is an in principle objection to those people being involved on
23 anonymization. I was just showing you what has happened, because what you have is a
24 situation where Ofcom, CityFibre, the CP Group and, indeed, Virgin, were all content with
25 the provision of the relevant confidential information only to members of the ring and that
26 no further process of anonymization would be required. Indeed, the CP Group, when they
27 put in their submissions did make two suggestions as to the terms of the arrangements that
28 should be put in the confidentiality ring, and I was just taking you, Sir, to that at tab 75.

29 THE CHAIRMAN: All right, I will be quiet! Sorry, I was just trying to leap ahead, but okay,
30 fine.

31 MR. BEARD: Absolutely in the right place, second question has really gone. The first question,
32 we are not quite sure to what extent it exists, but I am just giving you the background so that
33 we can resolve it.

1 If we look at CP Group's submissions on confidentiality and disclosure, p.2 starting at para.
2 5. I will not read them out to you, but what they raise is at para. 6, that they would like some
3 further provisions, that there will be specific provision requiring that where there is a
4 relevant adviser there are special steps taken. At 6(2) the relevant adviser employed by BT,
5 they should undertake to treat information disclosed within the ring as being customer
6 confidential information under special undertakings.

7 Those were undertakings that were given back in 2005, when the Openreach entity was
8 created. Although we do not have those undertakings here, that is terminology that is
9 understood by those within the industry. So those were two provisions put forward, and if
10 you flip back to where we were in tab 73 with the terms of the order, what you see is after
11 the schedule of various people that would be provided with the relevant material, part B are
12 the undertakings that get signed----

13 THE CHAIRMAN: Paragraph 8.

14 MR. BEARD: Paragraph 8 is that, but 6 and 7 cover the other parts that CP Group wanted in, so
15 those are accommodated, and were duly taken into account. TalkTalk just for your notes,
16 tab 75, had adopted the same position as CP Group, so we then had a situation where we
17 thought everything was done, dusted and signed off. Then we got a copy of this letter,
18 yesterday, from Ofcom, where Ofcom – and this is at tab 103 in the bundle, I do not know if
19 you have it separately. This is undoubtedly the letter, Sir, you were referring to.

20 THE CHAIRMAN: Yes, that I read last night. Just before you go on to that, what about Ms.
21 Sorensen.

22 MR. BEARD: I believe those matters have been resolved.

23 MR. WOOLFE: It has been resolved. Why do we not finish this point and then we will update
24 you as to how it has been resolved briefly for your note, later.

25 THE CHAIRMAN: Fine, so we are into the Ofcom----

26 MR. BEARD: I am sorry, I was not trying to skate over Ms. Sorensen at all, I just understood it
27 had gone away.

28 What I have at tab 103 is that Ofcom had been making inquiries about confidential
29 information

30 If you go over the page: "Responses to Third Parties", you had the reference to Surf
31 Telecoms.

32 THE CHAIRMAN: You have the table of people----

33 MR. BEARD: Yes, but just going through those bullet points, the four third parties: "Vodafone,
34 TalkTalk, Level 3 and Virgin Media, have objected to disclosure into any confidentiality

1 ring, including Openreach in-house counsel." That might have been said in response to
2 Ofcom, but what we have seen in the submissions that were put in, following our letter is a
3 different position. Virgin are content with the arrangements, and as we have just seen from
4 Vodafone and TalkTalk, at least, what we had were submissions saying: "Yes, we are okay
5 with that, could we have those additional provisions in."

6 What we say is that you may have said that previously to Ofcom, but we have been
7 engaging with you, you have sensibly engaged, you said this was not a problem, and now it
8 feels like if there is anything now being raised about this, this is rowing back from the
9 submissions you had maintained. It is just worth noting, to be fair to Vodafone, that
10 Vodafone was requesting that the same information be anonymised for all CPs to ensure
11 that it is not obvious to all. But there is a sense here that they want a level playing field as
12 to how everyone is treated, and we understand that, and entirely accept that point. We do
13 see that the same approach should apply to all, and that is essentially the way that we have
14 dealt with matters.

15 Going through an anonymization process is just not necessary. It is a wholly onerous
16 process in circumstances where the concerns, so far as anonymization are concerned, it is
17 not clear that they apply to external lawyers or advisers at all, but it is not separated out in
18 those terms, it is just talked about as anonymization being wanted.

19 Then, when we turn to the in-house lawyers it has been well recognised, and for good
20 reason by this Tribunal that in-house lawyers, limited numbers of them, because you always
21 want to limit the numbers in a confidentiality ring, are subject to the same professional
22 obligations as external solicitors. They do take special measures to ensure that they protect
23 the confidential information and, of course, provision can be made in the relevant orders
24 and undertakings as, indeed, we have done here, and we have seen many orders in this
25 Tribunal and, in particular, in the field of telecommunications, where it is recognised that
26 because of the way in which advice and instructions are provided in relation to these
27 proceedings, that it is necessary that in-house lawyers are able to access all of the relevant
28 material, and anonymization in those circumstances is just an unnecessary onerous step and
29 one which, to be fair to CPs, in their submissions had been saying was not going to be
30 required. I have some copies of other orders where confidentiality rings have been put in
31 place, and, indeed, a judgment by Mr. Justice Henderson saying there is no good reason for
32 differentiating----

1 THE CHAIRMAN: Right, so you are basically saying that if you are dealing with external legal
2 advisers, there is no reason for anonymization because the information, as it were, will stop
3 with the external legal advisers.

4 MR. BEARD: Yes.

5 THE CHAIRMAN: And you are saying that there is no reason to differentiate between external
6 legal advisers and internal legal advisers, provided that the internal legal advisers are
7 subject to these extra controls about IT, ring-fencing, and passwords and treating the
8 information as particularly customer confidential information, because that recognises the
9 greater risk of inadvertent disclosure internally and that is the measure to deal with it, and
10 therefore you do not need to go the extra step to anonymise.

11 MR. BEARD: Absolutely.

12 THE CHAIRMAN: So that is what you are saying?

13 MR. BEARD: Exactly. We have taken all these points into account, and then we see this letter,
14 and we say this is just an unnecessary step in the circumstances.

15 THE CHAIRMAN: So, is anybody in the room, as opposed to people who are, as it were, writing
16 to Ofcom, saying that there ought to be anonymization as well.

17 MR. BEARD: I had not understood it to be the case until this morning, but Mr. Woolfe wishes to
18 speak.

19 MR. WOOLFE: There has been a certain amount of change in the position and I am candid about
20 that. I am sorry that that has been the case. It was a lack of clarity in our position, but it is
21 more important that we get it right than go through that.

22 THE CHAIRMAN: And you are now----

23 MR. WOOLFE: I am speaking for the CP Group, and specifically for Vodafone and TalkTalk in
24 this respect, but of course generally.

25 We do say that anonymization in respect of papers going to BT's in-house counsel is a
26 measure worth considering. We are not advocating anonymization across the board for the
27 rings, we see no need for it for external legal advisers and so on. As you, Sir, have already
28 said, there is a heightened risk with in-house lawyers. One risk is inadvertent disclosure,
29 and the other risk is when they sit with the same client that is their employer over a long
30 period of time deals with, with advice across a range of issues. Once something is in your
31 mind you cannot remove it from your mind, and there is that issue as well.

32 Just to give you a feel for the kind of information we are talking about, there are, for
33 instance assessments by CPs of what their customers may do in response to certain
34 situations, rules of thumb used in pricing, that may be sensitive in terms of bidding for

1 particular projects, information about plans to use dark fibre, information about reach and
2 network revenue, volumes of sales – there is quite a range of serious and confidential
3 information. We respect BT's in-house lawyers, they are professional people, regulated by
4 their professional bodies, we are not saying anything about their integrity at all, it is simply
5 that it is sensible to take steps.

6 THE CHAIRMAN: I think everybody operating in this business is very attuned to the problems
7 of confidentiality, and nobody is suggesting that anybody is not and, frankly, if they were,
8 nothing of what we are discussing is going to make a difference anyway.

9 MR. WOOLFE: Indeed.

10 THE CHAIRMAN: So the question really then is why are the additional protections in relation to
11 the two in-house BT lawyers not sufficient extra protection for you to require
12 anonymization, which I am told, although I do not know how much extra work it will
13 require, but will require some extra work.

14 MR. WOOLFE: It is a matter of balancing how onerous things are, the need for the fairness in
15 proceedings, and the need to protect the confidentiality of the information.
16 In respect of the confidentiality of the information, it is specifically a concern about this,
17 you cannot clear things out of your mind. Obviously, in respect of large tables of data
18 people do not seem to recall stuff, but the general thrust of things and, for instance,
19 particular plans that CPs may have, proposed applications and the like, the link of that with
20 a name or, for instance, a rule of thumb used in pricing, that applies how a CP may price
21 particular projects. Knowing who that is, is the sort of thing that businesses care about
22 when they are bidding and once it is in your mind it is in your mind. It is for that reason.
23 There is a certain level of risk, and it would help to address that level of risk. There are
24 clearly other measures that are also being taken. That is what I am advocating.

25 THE CHAIRMAN: Is this right, those other measures are primarily designed to prevent external
26 access, is that right, to the in-house lawyers' files, IT and that sort of thing.

27 MR. WOOLFE: As I understand it, it is----

28 THE CHAIRMAN: Your main concern is that once an in-house lawyer knows that TalkTalk is
29 planning to do X, or TalkTalk thinks its customers would respond favourably to a particular
30 initiative, let us say, if that is in the material – and I do not know whether it is or it is not –
31 that they cannot forget that and they will inevitably, or might just let something slip?

32 MR. WOOLFE: Sir, that is right, or it could affect the advice it would deliver, or something of
33 that sort.

1 THE CHAIRMAN: You say that would be cured by anonymization in the sense that they would
2 still know that somebody out there thinks that, but they would not identify it with you.

3 MR. WOOLFE: It is an additional measure on top of other measures. I should say, I said, before
4 you asked me whether or not would the undertakings do in respect of customer confidential
5 information, I am not actually in a position to give you a full account of the full range of
6 those undertakings because they are quite extensive; I just want to be clear about that.
7 Anonymization would be an additional measure that would help mitigate the risk further,
8 and that is our point.

9 The other point I should make, Sir, which is not a point in my favour just simply for you to
10 be aware of, is that I think some parties who are not before the Tribunal want
11 anonymization generally and not just for BT's in-house lawyers.

12 THE CHAIRMAN: Yes, I had picked that up, some people just say "It ought to be anonymised,
13 full stop." The most targeted risk, or the most identifiable risk is not the external legal
14 advisers who have duties to their own clients, and are engaged on this particular case, but it
15 is in-house lawyers who have a wider range of duties, I think that is the issue.

16 MR. WOOLFE: I have one final point then I think I will have done everything I can to assist you.
17 It is simply that, of course, if down the line it becomes apparent in conversation between the
18 external and internal legal advisers that it is really important for the purposes of the case for
19 the internal legal adviser to know the name they can come back. That is simply a point
20 of----

21 THE CHAIRMAN: All right, thank you. It will fall to you to do the anonymization, will it not?

22 MR. HOLMES: Yes, Sir.

23 THE CHAIRMAN: And tantalizingly in the letter it just says something like: "It will be a
24 significant exercise", but what sort of exercise. If it is a balance, for example, if it can be
25 done at the flick of a switch, or a word search and replace, it is relatively easy to say: "What
26 is the harm?"

27 MR. HOLMES: It is a bigger exercise than that. It is a 2000 page document, with confidential
28 information interspersed in the text as well as in tables and spreadsheets, and so it will be
29 necessary to do a careful line by line review for the purposes of replacement. It is not
30 simply a question, I think, of doing a word search, you have to look at the context in order
31 to make sure that there is no risk of revealing the identity of particular operators. We are
32 mindful that this is really an exercise that should either be done for no one or for everyone.
33 For example, one cannot take an individual operator----

34 THE CHAIRMAN: No, no, it would not make any sense because----

1 MR. HOLMES: It would be obvious who they were.

2 THE CHAIRMAN: --you would just be able to check who does not appear and then that is who it
3 is.

4 MR. HOLMES: Indeed, so the exercise has to be done properly and, having taken instruction, the
5 best estimate that my client is able to give is a week might be required, so one could, on that
6 basis, push back the dates in the timetable by a week to allow for the exercise to be
7 undertaken – obviously, my client would use its best endeavours to do it as rapidly as
8 possible, but I do not want to over promise and then find that there is a hitch further down
9 the line.

10 THE CHAIRMAN: There is also a broader issue here, is there not – and then we will break. Is
11 there a broader issue that people supply information to Ofcom in confidence? There is a
12 public interest, presumably, in people being as candid with you as they should be?

13 MR. HOLMES: Yes, Sir.

14 THE CHAIRMAN: Are they more likely to be candid if this extra little protection is given to
15 them, rather than if it is not? How does the public interest in your functioning operate here?

16 MR. HOLMES: Ofcom depends upon the candour of industry parties, and their willingness to
17 provide commercially sensitive material, both informally and, of course, on occasions they
18 are obliged to provide information pursuant to formal powers. There are specific duties
19 upon Ofcom under the legislation in relation to how it then handles the confidential material
20 which show the significant importance of confidentiality and the significant public interest
21 that applies to maintaining confidentiality, and it is for that reason that Ofcom has gone
22 through this rather drawn out and elaborate process of writing to all of the parties, so we
23 recognise fully that there is a strong public interest.

24 THE CHAIRMAN: But what I am asking you, in essence, is for Ofcom's view, and you may
25 want to come back to me at 2 o'clock on this having taken instructions, for the sake of a
26 week and some work for the people behind you, are you in a better place with your
27 'constituency' – if I can call it that – for future operations by having to do the job, which I
28 appreciate people do not like doing jobs, but on the whole----

29 MR. HOLMES: Yes.

30 THE CHAIRMAN: --you are in a better place than if you do not do it.

31 MR. HOLMES: Yes, I understand, Sir.

32 THE CHAIRMAN: For the sake of a week and a little bit of rejigging of this timetable, tight
33 though it is – 'ish'. Because if you had said it was going to be a month and would involve
34 basically a whole team working solidly for a month then that would be one thing. If it is a

1 week and it is do-able with care, and it might have benefits to you otherwise, I am not sure
2 at the moment what the downside to that is, because the main downside that has been put
3 forward, I think, is that it is a bit of a job for you.

4 MR. BEARD: I am sorry, I think it is important to be clear, Sir, the major downside – I think we
5 have to start from the right end of the telescope here. We are bringing an appeal in relation
6 to a decision that seriously affects BT. The starting point is we should be entitled and our
7 client should be entitled to see all of the relevant material.

8 THE CHAIRMAN: We may need to get down into detail at 2 o'clock, why does it matter to you
9 to know that when it says: "Operator A" and then there is some data or whatever, or some
10 confidential information, that Operator A is, say, TalkTalk, as opposed to just having A, B,
11 C, D, anonymised.

12 MR. BEARD: Because you are talking about a real market. You are not talking about a
13 hypothetical market, and it is for that reason that legal advisers, both internal and external,
14 and economic advisers enter these rings and are able to see who it is that we are talking
15 about, because that matters because we are talking about a real world, not hypothetical data.

16 THE CHAIRMAN: But what I cannot tell at the moment, because I have not looked at this data,
17 is whether in a sense you are in anyway actually disadvantaged in your analysis of it by not
18 knowing the actual person who is identified, because I just have not seen this stuff.

19 MR. BEARD: I think the answer is, in principle, you are disadvantaged if there are tables of data
20 and evidence talking about participants in the market and you are not able to critique that,
21 because in essence what you are doing is you are looking at a situation where it is being said
22 that certain players can do certain things, or cannot do certain things in a regulatory
23 decision, and you want to be able to test that. Normally, it would be that you could ask your
24 client to provide evidence and opinion in relation to those propositions that are being put
25 forward.

26 We recognise that there is a compromise here that has to be reached, given confidentiality,
27 but to take away the identity of all of the parties in relation to data pertaining to market
28 definition, activities on a market, how markets develop, would seriously undermine the
29 ability of external advisers both legal and economic. Apart from those that are referred to
30 who are not here in the room, no one in this room has suggested that external legal advisers
31 and economists should not see this material, or that it is not highly relevant for them in
32 terms of their interpretation of these materials and being able to respond. They need that
33 material.

1 The fact that BT, through its legal function, uses some of its internal lawyers to do some of
2 that work does not mean that they should be treated in some sort of special situation.

3 THE CHAIRMAN: There are some people out there, I agree not the ones in the room, who are
4 saying actually they do not want their identity disclosed at all.

5 MR. BEARD: Yes, they are a minority.

6 THE CHAIRMAN: Even within the ring.

7 MR. BEARD: It is the minority, because the vast majority of the other providers and the
8 respondents are not saying that. It is just worth bearing in mind in relation to this that,
9 although Mr. Woolfe emphasises the role of internal legal advisers, and says that special
10 terms are required, the solicitors and economic advisers we are talking about here are
11 specialists in these fields. They are working case after case after matter after advisory
12 project and so these issues arise in relation to all of these people.

13 THE CHAIRMAN: Right. I will adjourn now anyway, but I will hear the final word on this after
14 the break. But what may assist – I appreciate you probably cannot give me an example
15 drawn from the documentation, but it would be useful if somebody could give me at least a
16 conceptual example of why it is you say, for example, you need to know that it is TalkTalk
17 rather than just operator A. I am not asking you to do it by reference to the actual
18 documents for obvious reasons, but it is just to illustrate that point. The other point we need
19 to identify, apart from what I have asked Ofcom, is the question of whether it could be done
20 on any form of anonymization and then when you see, as it were, the material then you have
21 to come back and say: "Actually, we really cannot make sense of this now, without seeing
22 the individual things", because otherwise I am being asked to resolve a debate in almost a
23 complete vacuum without reference to any particular material.

24 MR. BEARD: As I say, up until we received this copy of the letter, we had thought that, at least,
25 in relation to all those in the room this matter was resolved.

26 THE CHAIRMAN: There are other people – I have now got to take into account what is said in
27 the Ofcom letter.

28 MR. BEARD: Understood, yes.

29 THE CHAIRMAN: Hopefully, we are still on track to finish comfortably this afternoon?

30 MR. BEARD: Yes.

31 THE CHAIRMAN: Shall we say 2 o'clock, please?

32 MR. BEARD: Yes.

33 (Adjourned for a short time)

34 THE CHAIRMAN: Yes?

1 MR. BEARD: Sir, I was just going to pick up on points to do with confidentiality and
2 anonymisation. I made the point before the short adjournment that when we are looking at
3 this we have to look at the fact that we are dealing with compromises, that we recognise that
4 the ordinary state would be that all of this information comes out, but we compromise the
5 process of disclosure of that material, given its commercial sensitivity, but ensuring that
6 parties are able properly to represent themselves. That compromise should not be
7 dependent on the nature of the lawyers that a party has working on a particular case,
8 whether or not it uses external lawyers or internal lawyers. That is the approach that this
9 Tribunal has taken over the last ten years. It has admitted internal lawyers into a
10 confidentiality ring and once they are in, it does not distinguish them from external lawyers
11 working on various issues.

12 That is entirely understandable, given the fact that external lawyers can be working on a
13 range of relevant matters and therefore suffer from the same concern about not being able to
14 put information from their mind; but also because this Tribunal, rightly, is not prescriptive
15 about how you retain legal counsel. Of course, all of these lawyers are under the sorts of
16 professional obligations, whether they are internal or external, that mean that they cannot
17 properly use this sort of material outside the proper confines of the limitations of the ring.
18 When we are talking about the BT, of course, we are talking about an organisation that has
19 very large numbers of lawyers, but you have very specialised teams working on pieces of
20 litigation like this, and the two lawyers that we are talking about are specialist regulatory
21 lawyers. So this idea that there is a broader risk of use of this sort of material in commercial
22 and contractual negotiations, and so on, it does not fit with what the practical situation is.
23 When we are thinking about the practical situation, what we have got here is on each order
24 we have got a group of lawyers and a group of external economic advisers. Those are the
25 people that look at this confidential information and pull together the case, taking factual
26 input from others within the relevant client, or indeed third parties. Within that tight group,
27 one needs to be able to communicate efficiently and effectively. If you start applying
28 different rules to different members of that group, it is instantly recognisable the difficulties,
29 and practical difficulties which will be engendered in taking instructions, giving
30 instructions, and preparing the case, phone calls, notes, preparation of drafts. You suddenly
31 have to be doing two different versions.

32 THE CHAIRMAN: At the moment you are targeting a suggestion that the material should be
33 anonymised for supply to the BT in-house lawyers and not anonymised for everybody else.

34 MR. BEARD: I am.

1 THE CHAIRMAN: I understand the point you have just made and the practical difficulties that
2 would cause. I appreciate that is the position taken by some of the parties in the table, but
3 some of them say that it should be anonymised, full stop, I think.

4 MR. BEARD: I think really the only candidate that comes forward that maintains that is Surf. It
5 does that on a basis that is a wrong predicate, effectively, as to the position in relation to the
6 protection of confidentiality. I think Level 3 was another one, but their concerns have now
7 been met. When we are talking about Surf, its concern, the real concern, was that it thought
8 that all other CPs were wanting anonymisation of the material. That is not the position that
9 is being put forward by----

10 THE CHAIRMAN: Where do you get that from?

11 MR. BEARD: Annex 2, box 1, tab 103.

12 THE CHAIRMAN: I have got it. I am reading it. Why do you say that Surf is only doing this on
13 the basis that it thinks everybody else is doing it?

14 MR. BEARD: If we look at the second bullet point here on Surf:

15 "We believe that other market players would also expect their confidential
16 information to remain anonymous in a similar manner to ourselves and that not
17 objecting will disadvantage Surf Telecom."

18 So they are predicated on the basis that everyone else is going to want this, and they are just
19 wrong. That is not the basis on which----

20 THE CHAIRMAN: It is one of their predications. They state their own position first. They do
21 not just say, "We want it because we think everybody else wants it", they actually do say...

22 MR. BEARD: Sir, I can see that one can look at this and say these are two wholly independent
23 grounds, but this is not the way we read this. What their concern is is that they do want to
24 protect confidentiality. That, of course, is understandable. They think that everyone else is
25 going to be pressing for anonymisation. On that they are, in fact, wrong. Everybody else is
26 not pressing for general anonymisation. The position of others is, therefore, focused on the
27 position of the internal lawyers, which is the target I have aimed at.

28 THE CHAIRMAN: I see. So you say no reason to distinguish between in-house lawyers who are
29 similarly bound professionals and are working to the same restrictions and standards as
30 external lawyers. To the extent that they are in-house there are additional technological
31 protections which we have discussed. Then you say that, in fact, what it would do is to
32 cause a rather awkward position because if the internal lawyers have a meeting with the
33 external lawyers then it becomes impossible to police and very difficult to organise, so it
34 has got to be one or all.

1 MR. BEARD: Yes, and I think it is also just worth picking up the point that you made about
2 special technological constraints. Yes, there are additional provisions that were put in at the
3 request of the CP Group, but they are not just technological, because I did highlight the
4 reference to the undertakings and protection of customer confidential information. That is
5 part of a wider set of undertakings that apply to those lawyers. It is to do with how they can
6 use information internally as a product of the way that BT is structured.

7 THE CHAIRMAN: Obviously nobody has taken me to it, but that customer confidential
8 information is what - specific to BT because of the way in which BT handles, as it were,
9 connections for others?

10 MR. BEARD: Yes, essentially that is right. When Openreach was being internally separated,
11 effectively, or the division that was being made by Ofcom in relation to Openreach and the
12 definition of that access business, one of the things that was of concern was the extent to
13 which information flows could continue within BT, and certain undertakings had to put in
14 place in relation to those information flows. What this order is doing, or what these
15 undertakings are doing, is confirming that the information that would be provided falls
16 within a particular category within that set of undertakings.

17 So the point I am raising that it is more than just technological constraints and destruction.
18 It is actually saying, because it is BT, because that whole regime was in place, we must
19 make sure that this information falls squarely within that extra protection regime.

20 Those points, and I emphasise this because this is obviously not the first of these skirmishes
21 involving Ofcom and many telecommunications companies which have given rise to
22 concerns about confidentiality that this Tribunal has had to deal with. I think everyone
23 recognises that there have been in-house lawyers brought into confidentiality rings and it
24 has never been the case that anonymisation separately for them should occur.

25 THE CHAIRMAN: So you say do not distinguish and since everybody other than Surf appears to
26 be happy with the externals getting the non-anonymised version it is just practically
27 impossible.

28 MR. BEARD: It is practically impossible, but it is also fundamentally wrong. You should not be
29 requiring an organisation to effectively have to staff their team with external lawyers in
30 order to be able to have access to the complete set of confidential material. The fact that BT
31 chooses to employ people that are subject to professional obligations to run this sort of
32 litigation is a legitimate choice and it is one that should not be undermined save in the most
33 exceptional circumstances. One never says never, but this is not the situation where that
34 should appropriately be done.

1 Just to pick up the question, Sir, that you raised before the short adjournment about how this
2 practically matters in terms of taking instructions, it is difficult to specify without actually
3 seeing information----

4 THE CHAIRMAN: That is my problem, yes.

5 MR. BEARD: Just thinking about it, propositions made by individual entities that Ofcom relies
6 upon and says, “This is evidence of how the market works in a particular way”, in order to
7 test and challenge the credibility of such propositions, you actually need to know who is
8 making them. There is a vast range of people out there in the market, and some people may
9 make statements that are inconsistent, for example, with what they have said previously
10 publicly, and so on. So that sort of information is material.

11 THE CHAIRMAN: My problem is that I do not know whether anything like that appears in the
12 confidential sections because obviously I have not seen them.

13 MR. BEARD: One would have to do a full audit. Just taking it more specifically in relation to,
14 for instance, what Mr. Woolfe referred to as pricing rules of thumb, how people operate
15 pricing rules of thumb. He said that is the sort of thing that might be sensitive and you do
16 not want to have the identity of the author of those pricing rules of thumb, who operates
17 those pricing rules of thumb disclosed to other parties. That is precisely the sort of
18 information that might be highly relevant when you are deciding what the definition of a
19 market is or how a market is competitive. The way that a party with 0.01 per cent of the
20 market decides it is going to price is very different to the overall analysis from the way that
21 someone with 30 per cent of the market might decide to price; or people with different
22 strategies, different infrastructures, who enter the market with different sets of equipment or
23 arrangements. You need to be able to consider and test those things. That is why, quite
24 properly, apart from Surf, everyone here recognises that all of this material is highly
25 relevant, or potentially highly relevant, to the way in which you carry on an appeal. That is
26 why they accept that external lawyers and advisers need them.

27 Just to crystallise it specifically, one of the key issues in this case is whether or not Ofcom
28 has got its analysis of geographic market correct, and whether or not it has got that
29 geographic market analysis saying there is competition in particular areas or lack of
30 competition in particular areas. You need to know who it is that you are talking about as
31 operating in a particular area. It is no good saying, “So and so, X, Y or Z might be entrant
32 here or is an entrant here”, you actually need to know the identities in order to test those
33 sorts of propositions.

1 Frankly, the difficulty could well arise that in order really to make this anonymous you
2 actually need to do quite a lot of work. In doing that, you would deprive more and more
3 those involved of access to key information which they do need in order to pursue their
4 appeal.

5 We can see it just in terms of challenges to credibility, matters that go to market definition,
6 specific issues to do with entry and operation where, because you are dealing with a very
7 lengthy report that draws on all sorts of bits of material provided by third parties, and relies
8 in part on those pieces of information and data provided, you do need to be able to test it
9 and that is why externals - external lawyers, external economists and indeed the internal
10 lawyers - need to see it too. I do not actually think that that proposition is contentious.

11 We recognise that this is a compromise, it is always a compromise in a confidentiality ring,
12 but these abbreviation measures or anonymisation measures would create very significant
13 practical problems, they would hamper the proper defence by BT of its position in bringing
14 this appeal. Frankly, it would not protect vast amounts of the core confidential information
15 that these people would in any event be getting about strategies in the market. We have in
16 place mechanisms to protect in relation to those. This anonymisation mechanism would be
17 unnecessary in the circumstances.

18 Unless I can assist further.

19 THE CHAIRMAN: Thank you.

20 MR. WOOLFE: I will reply only very briefly. Just to clarify, our proposal is simply that, for the
21 purposes of the BT internal lawyers only, the names of CPs are redacted from the versions
22 of things that they receive. I am not advocating anything wider.

23 THE CHAIRMAN: The way you envisage it is that BT's external lawyers will get the full thing?

24 MR. WOOLFE: Yes.

25 THE CHAIRMAN: And their internal lawyers will get the redacted?

26 MR. WOOLFE: That is correct.

27 THE CHAIRMAN: How do they then practically function as a team. There has to be
28 communication between internal and external lawyers where some of that team, as it were,
29 knows the identity and can work off one document, and the people have to work off a
30 different redacted document. That is not going to be practical, is it?

31 MR. WOOLFE: Competition lawyers spend a lot of their life in confidentiality rings where they
32 cannot discuss certain things with their clients. It is actually no different in terms of
33 protecting information than that. The question which Mr. Beard is posing is whether or not
34 that actually handicaps BT in its position in the appeal, in prosecuting its appeal. The

1 answer is actually that it may turn on the particular facts or particular pieces of information.
2 Clearly a lot of the time a name is not going to be even relevant. It will not really matter.
3 Sometimes it may be relevant. The question is, will those points actually arise?
4 Up to a point, there is a limit to the extent I can assist you with that, Sir, simply because I do
5 not know how BT proposes to put its case six months down the line. In a sense, I appreciate
6 I cannot really help you. It is a three way balancing act between the needs of confidentiality
7 and minimising risks in that respect, the fairness to the proceedings and practicality. My
8 submissions are only really to assist in respect of the confidentiality aspect.

9 THE CHAIRMAN: Thank you. I should have asked BT, and I was going to and apologies for
10 forgetting, but practically what is the issue, as you see it, if there was provision of
11 anonymised copies to the in-house team at BT with an ability to apply for, as it were, 'de-
12 anonymisation'? It is picking up the point that was made by Mr. Woolfe, that at least then
13 we could have the debate with the proper context in front of us, with the document in front
14 of us.

15 MR. BEARD: As I have already said, from our point of view that must be the wrong starting
16 point. You should be providing the confidential information to the legal team and the
17 economic advisers so that BT can properly prepare its case. There is no good reason----

18 THE CHAIRMAN: The point is, if you cannot properly prepare the case without having the full
19 version you will get it. That judgment call can be made on the basis of actually looking at
20 the context and the document rather than, as it were, doing it in general terms, like we have
21 been.

22 MR. BEARD: I quite understand the point. My initial response is that that is starting from the
23 wrong point of view. When you are saying there is a compromise because we are not
24 giving everything out to the client, who is the person bringing the appeal, but we are
25 allowing that to be limited only to a narrow ring, you have to ask yourself, why should you
26 narrow that further? You need to have real and particular concerns about the differences in
27 relation to internal lawyers which, with respect to Mr. Woolfe, he does not make out in
28 relation to these individuals. In these circumstances, the starting point should be all of that
29 confidential material should go to all of BT's legal team and external economic advisers
30 who are dealing with these matters in order that they should put their case properly. They
31 should not have to go to through any process of going along and trying to justify why it is
32 that they should need this material.

33 In practice, the difficulty will come that you end up with a great deal of time and effort
34 being spent on trying to work out what you can manage to do through discussions where

1 people have to, effectively, duck out of a room periodically when a name is going to be
2 referred to, and a name may or may not be germane, so that people can talk about whether
3 or not there is a formulation that can be put to the internal lawyers such that they can then
4 be asked to comment on these matters.

5 This way, frankly, vast amounts of work, a degree of madness lies in relation to process,
6 and it vastly outweighs any possible benefit.

7 THE CHAIRMAN: I hope you were overstating it just a little bit for forensic effect here.

8 MR. BEARD: No, no, I have sat in meetings where people have tried to do these things.

9 Unfortunately, it is acutely painful. It is like a strange game of charades that you are
10 engaged in.

11 THE CHAIRMAN: So you say it would again become impractical to, as it were, consider how
12 you would have to come and make that application?

13 MR. BEARD: Yes, it is the wrong starting point. You should not have to do it that way. In
14 practice, the real risk is that you come back saying, "Look, we do need to understand these
15 names, they are being referred to in the Decision because Ofcom considers the reference,
16 the source of information data, to be relevant to their conclusions", and we therefore want to
17 understand what that is.

18 THE CHAIRMAN: Thank you. Mr. Woolfe, did you want to come back just on that point? I
19 should have raised it before.

20 MR. WOOLFE: No, there is nothing else I really need to add.

21 THE CHAIRMAN: You have seen all this stuff? What is Ofcom's position, having thought
22 about it?

23 MR. HOLMES: There is a general consensus that there is obviously a balance to be struck here
24 between, on the one hand, preserving confidentiality, and on the other hand allowing
25 Mr. Beard to prosecute his appeal fairly.

26 Ofcom's position is that general anonymisation, that is to say for both externals and
27 internals, appears excessive. We have heard what BT has to say about this, and it needs to
28 see which data belongs to which operators, at least its external lawyers and advisers do, in
29 order to be able to understand the context and to respond on particular points. We have
30 sympathy with that position.

31 You mentioned, Sir, Surf's position. In our submission, that should not be decisive in this
32 context. Surf is one of the 31 parties that Ofcom consulted. None of the other 30 has raised
33 such a general opposition to the disclosure of non-anonymised data to externals as well as
34 internals.

1 Secondly, Sir, we do consider that there may be concerns specific to internal lawyers on the
2 part of the CP Group. They are embedded in a competitor organisation and they work
3 regularly with business people who sell to, or compete with, BT. For that reason, we can
4 understand why there is a particular concern in relation to internal lawyers. We have heard
5 what Mr. Beard said about the workability of distinguishing between internal and external
6 lawyers. We concur with Mr. Woolfe that that problem is a general one that arises in the
7 context of confidentiality rings, which always require a distinction to be drawn between
8 those giving instructions at the client and those who are within the confidentiality ring and
9 have seen the relevant material. Very often in appeals before the Tribunal, no one at the
10 internal level has access to the data or information at all.

11 If a problem arises our submission would be that a proportionate approach would be for
12 Mr. Beard to apply back to the Tribunal for disclosure of a more focused and limited set of
13 data where particular problems have arisen. It is very difficult for you, Sir, in the abstract,
14 and without particular problems before you, to form a considered view about that.

15 Finally, Sir, the question arises of what form redactions should take. Having discussed the
16 matter with my client over the short adjournment, it became clear that there is a problem
17 with removing the names of particular operators and substituting particular identifiers which
18 are then consistently used throughout the text - Operator A, Operator B - the reason being
19 that it will be very clear from the context of some parts of the statement who Operator A is.
20 For example, it might be said that Operator A has a network which is focused on a
21 particular geographical area, and from that it will be very apparent that Operator A is a
22 particular operator. So you will not achieve very much protection in terms of anonymity if
23 you follow route.

24 I raised that point with Mr. Woolfe and I understand that his clients are content if BT's in-
25 house counsel receive a version of the decision in which the identity of particular operators
26 is simply excised completely, so there will be scissor marks wherever a particular operator
27 is referred to. That avoids the risk that you will be able to identify, from all of the
28 references to Operator A that occur, who Operator A is and therefore see which data belong
29 to Operator A.

30 THE CHAIRMAN: Does that not also give rise to a potential problem that you might need to
31 know to understand the document that the two numbers both relate to the same operator? If
32 you just have every operator scissored you would never be able to make that comparison.

33 MR. HOLMES: In some of the tables I suspect that is not a concern, because the data will all be
34 clearly linked within a table to a particular operator, but it could occur in other contexts.

1 Sir, it is simply about trying to find a practicable solution that will attend to the concerns of
2 the CP Group, while allowing Mr. Beard to prosecute his case fairly.

3 In the end, the external advisers will all see the data and they will all see to which operator
4 the data relates. Doing the best one can in an imperfect world, that appears to Ofcom to be
5 the fairest solution given the concerns that have been expressed.

6 THE CHAIRMAN: You gave me an estimate of about a week to do this exercise. Is that still
7 what you envisage?

8 MR. HOLMES: If the exercise is as I have described it - that is to say, simply removing the
9 names and inserting scissors, we hope that that could be done more quickly. We will, of
10 course, release this information as quickly as possible within the confidentiality ring, but to
11 allow for the practicalities can we say three days?

12 THE CHAIRMAN: For example, one thing that obviously has been suggested is that we do this
13 in stages: you provide the scissored version as the document which will go to the in-house
14 BT lawyers, and you provide the unexpurgated version to external legal advisers. The
15 quicker that is done, the quicker it will then become apparent to Mr. Beard that there is
16 actually a problem that he can identify for me to be able to rule upon. If it was going to take
17 longer, then he is disadvantaged because the timetable is ticking.

18 MR. HOLMES: Sir, I appreciate that. Would you give me one moment just to take instructions?

19 THE CHAIRMAN: Yes, of course.

20 MR. HOLMES: (After a pause) Sir, I am being told that Ofcom would like until Wednesday, if
21 that is possible. Monday is the day on which the unexpurgated version will go. They ask to
22 have until Wednesday to produce the scissored version. That would be 5th October.

23 THE CHAIRMAN: So your suggestion is that there are two documents, which you think is
24 viable, or at least is something which can be operated, and presumably you accept that if
25 your expectation does not satisfy Mr. Beard you say he has got the chance to come back and
26 actually point out to me on a concrete basis why it is he cannot make head nor tail of your
27 scissors, and why his in-house lawyers need to see it to properly serve his client?

28 MR. HOLMES: Yes, Sir, that seems a sensible solution and it may be, of course, that a solution
29 can be reached by agreement between BT and the parties to whom the data is confidential.

30 THE CHAIRMAN: That is Ofcom's proposal at the moment?

31 MR. HOLMES: Yes, Sir.

32 THE CHAIRMAN: Mr. Beard, your chance to have a final word on the subject.

33 MR. BEARD: Yes, a final word. First of all, Sir, you already have the point about the Ofcom
34 proposal. You are plainly going to be generating a document that is pretty much

1 unintelligible in terms of connecting who is saying what across the document. By operating
2 it by references to scissors, rather than specified anonymisation, it is going to be incredibly
3 difficult for anyone, these internal lawyers, to be able to understand the identity of people
4 who are making submissions on different topics.

5 THE CHAIRMAN: You may be right, I do not know.

6 MR. BEARD: I think we can have a good deal of confidence in that. I think this is also getting
7 away from the very basic proposition that Mr. Holmes' whole submission is, you have got
8 to do this special stuff because these two lawyers are 'embedded', was his word. That is not
9 a good reason. These lawyers are specialist that know their duties. They are really not in a
10 materially different position, save for their particular employment contracts, from a number
11 of the external legal and economic advisers, who are effectively retained by these
12 companies over very long periods of time over advisory work and over litigation. So it just
13 distinguishing people and discriminating against people on the basis of their employment
14 characteristics without jurisdiction. This is the wrong way of approaching this. It is not
15 something that has been done previously. It is not until today something that Ofcom has
16 been proposing. The very individuals that we are talking about have, themselves, been, or
17 at least two of them have been, in confidentiality rings previously.

18 One other practical issue: the timetable is suggesting that we should be making
19 amendments to our notice of appeal eight days after Mr. Holmes' scissored version is
20 provided to us. This timetable is not going to work on that basis. We recognise that if this
21 was some overwhelming issue of fairness, a timetabling issue should not slow it down.
22 This is a matter that has been raised right at the last minute in circumstances where we had
23 consulted on the confidentiality order and all of those in this room had come back with no
24 objection to the arrangements we had put forward. This is now putting an encumbrance, an
25 unfair encumbrance, on BT and its arrangements for legal counsel that is unjustified and
26 unfair on the part of Ofcom. It would be wrong to do this sort of 'suck it and see' with a
27 chaotic scissored document where we cannot see what is where.

28 I think it would be an unfortunate precedent for this Tribunal to be setting when it has
29 managed to eschew such collateral arrangements.

30 Just one final point, Sir: the comparison is drawn between confidentiality ring dealings and
31 this situation. Yes, all of those that have been involved in confidentiality rings know that at
32 the edge of the ring you need to be particularly careful with confidential information. What
33 you are doing with these people is conferring on them lots of confirmation information and
34 say, "We trust you, you are not going to provide that confidential information outside the

1 ring, because we are not going to give you particular pieces of it, so it is going to hugely
2 hamper the way in which you deal internally”. That is a very, very different situation from
3 the general confidentiality ring situation with which we have to deal often in cases like this.

4 MR. WOOLFE: Sir, I hesitate to rise, I am just going to say one thing. I am not going to respond
5 generally to Mr. Beard. He has said a number of times this has never been done before.
6 That actually is not correct. In one of the *Pay TV* cases, wholesale must offer obligation
7 case, and the reference is 2016 CAT 1, there was a confidentiality ring with two BT in-
8 house lawyers. I am not saying there is any comparable nature of the case, I just want it to
9 be clear it has been done, it is a question of whether it was appropriate. Mr. Beard has made
10 lots of submissions about that.

11 MR. BEARD: No, I am sorry, that is not right. That case is starting on Monday. There is no
12 anonymisation arrangement. There are different confidentiality rings.

13 (For ruling, see separate transcript)

14 MR. BEARD: I am most grateful. I am not sure if there are other issues relating to requests for
15 disclosure of confidential materials that are on the agenda that need to be dealt with now.

16 MR. WOOLFE: Sir, there was an issue between CityFibre and the CP Group regarding the
17 inclusion of Ms. Sorensen within the ring. We have reached an agreement which is that she
18 should be in the ring, but CityFibre’s lawyers will remove any confidential information in
19 TalkTalk’s appeal, and she will only get the fully confidential versions in the BT and
20 CityFibre appeals, but not in the TalkTalk appeal.

21 THE CHAIRMAN: You will need to run that past me again. First of all, who is Ms. Sorensen?

22 MR. WOOLFE: Mr. Sharpe will explain better than me.

23 MR. SHARPE: Sir, Ms. Sorensen is an independent consultant who has been advising CityFibre
24 and has proved of inestimable value in the preparation of the appeals. Neither BT nor
25 Ofcom objected to her presence in the confidentiality ring, only TalkTalk did.

26 THE CHAIRMAN: She is not a lawyer?

27 MR. SHARPE: No, she is not, nor is she an expert. It is an exceptional situation, but one in
28 which I think we were content to move forward on, and happily so was TalkTalk. The
29 agreement that has been put together, as I understand it, is that she would be available to
30 consider all documents in the confidentiality ring, save those confidential documents which
31 emanate from TalkTalk.

32 MR. WOOLFE: I understand the CP Group as well.

33 MR. SHARPE: Yes, indeed, the interveners.

34 THE CHAIRMAN: So you have reached agreement.

1 MR. SHARPE: We are content with that. It is not 100 per cent satisfactory, but the good is not
2 the enemy of the best.

3 THE CHAIRMAN: That will be reflected in what, the terms of her confidentiality undertaking,
4 or would it be reflected in the terms of the order? The only reason I ask is because
5 everybody was very keen that this order should get drawn speedily.

6 MR. SHARPE: We can do it either way. It will either have exactly the same effect. I am
7 'agnostic' about the way we do it.

8 THE CHAIRMAN: If you have a form of wording - it is up to you, but certainly if you had a
9 form of wording which you have agreed to cater for her specifically you probably need to
10 provide it, or who will draw the order, or alternatively you need to have it in your own
11 document and it will be referred to.

12 MR. SHARPE: Can we absolutely clear what has been agreed. TalkTalk will provide documents
13 as confidential information which will pass into the ring and be available to all the parties in
14 the ring. CityFibre will be able to identify those documents, mark them in an appropriate
15 way and ensure that they do not pass to Ms. Sorensen. I think that is what understood. Sir,
16 on that basis, we are very content.

17 THE CHAIRMAN: All right.

18 MR. WOOLFE: We also understood that there will be a need to prepare a version of what comes
19 from Ofcom, the Ofcom disclosure. Anything in that would have to be----

20 MR. SHARPE: I think we are talking about TalkTalk documents generically, whether they are
21 supplied by Ofcom, by TalkTalk, or anybody else.

22 MR. WOOLFE: Sir, I think we are agreed. The simplest way might be to deal with it like this:
23 as you suggested, anybody can now enter the ring with consent if they give the appropriate
24 undertaking. Therefore, if this was to be dealt with within Ms. Sorensen's undertaking
25 rather than the body of the order, the order can be finalised and she can be added to the ring
26 tomorrow, or when we have agreed how that should be done.

27 MR. SHARPE: The first part is unexceptional. The second part is the terms will have to be
28 bespoke. It is most unlikely that anybody else would be subject to that.

29 MR. WOOLFE: No, indeed, there would be an undertaking for her that would include this.

30 MR. SHARPE: I am content for the order, as drafted, to be agreed as soon as convenient. We, in
31 turn, will draft a specific form of words which will bind Ms. Sorensen to the terms of the
32 order in respect of the TalkTalk documents.

33 THE CHAIRMAN: Fine.

34 MR. SHARPE: Sir, does it fall to me now to deal with specified price control matters?

1 MR. BEARD: I was going to say it is worth just tidying up the rest of the future conduct stuff,
2 because that all fits with timetabling. I do not in any way want to cut off Mr. Sharpe, but
3 the specified price control is somewhat autonomous. The rest of it, it will be an enormous
4 disappointment, Sir, but I think there is quite a good deal of agreement.

5 THE CHAIRMAN: All right.

6 MR. BEARD: If we turn to 8 of the agenda, would it be appropriate for the same Tribunal to hear
7 the appeals, and the consensus is that it would. I do not think there is any issue there at all.

8 THE CHAIRMAN: Yes.

9 MR. BEARD: Mr. Sharpe rightly said that point 7 naturally comes after point 6, but I was
10 skipping to 8 because these are somewhat timetabling issues. Same Tribunal to hear
11 appeals, we think everyone agrees with that.

12 To consider to what extent, if at all, the issues raised by any of the appeals overlap and
13 affect one another: I think the consensus is that the CityFibre and BT appeals should be
14 heard together, and there is no issue at all on that, subject of course to the points on price
15 control and Mr. Sharpe is going to come back to that.

16 Next, consider whether to direct that evidence in one appeal would stand as evidence in the
17 other appeals: as between CityFibre and the BT appeals that is undoubtedly right; as
18 regards TalkTalk we think it is just a different issue, and therefore there is no need.

19 MR. WOOLFE: Sir, if I could just rise on that. I think we are on the same page: I am not sure
20 whether a direction is necessary in respect of the CMA proceedings or not. However, given
21 that both CityFibre and TalkTalk will be heard together by the CMA, and clearly their
22 minds will be affected by the evidence in both appeals that may go to general context and
23 whatever, even though they are separate issues. It clearly should not be the case that there
24 is going to be some separation of the evidence in CityFibre.

25 MR. BEARD: I certainly do not want to cut across what the CMA might want to do in relation to
26 these issues. I was doing something much narrower. Obviously it depends on where, Sir,
27 you come out on the position in relation to price control matters.

28 THE CHAIRMAN: Let us come back to that. Certainly, so far as BT and CityFibre are
29 concerned, the answer is yes to that question.

30 MR. BEARD: Then 11 was a short supplementary report by one of our experts. There is no
31 objection to that. It just needed approval.

32 Then 12 is a particular issue as to the status of the report. I hand over there to Mr. Sharpe?

1 MR. SHARPE: It is not an issue any more. It has been agreed between ourselves and Ofcom,
2 who objected to Dr. Cadman, that he would be elevated from a mere reporter to an expert
3 witness. That is agreed, and he, of course, will then join the confidentiality ring.

4 THE CHAIRMAN: I think that must be right. If he forms the basis for somebody else's view
5 and evidence, and he has to be there in some way shape or form.

6 MR. BEARD: Then when we get to 13, I think we have essentially dealt with that through the
7 timetabling discussion and Mr. Holmes' submissions.

8 Whether and how many witnesses of fact will be called by the parties: obviously from BT's
9 point of view we have put in four witness statements and three expert reports, so we have
10 set out our position, at least broadly, at this stage. I am not sure how much further one can
11 take this in advance of the further close of pleadings. Again, I am very happy to sit down
12 and leave it to the others to comment.

13 THE CHAIRMAN: The way I understand this works is that at the time that people put in their
14 pleadings and/or their statements of intervention, they serve the evidence upon which they
15 intend to rely.

16 MR. BEARD: Exactly.

17 THE CHAIRMAN: There is then the question of whether anybody takes objection to any of that
18 evidence, or everybody says that can just be read, that person does not need to come and
19 attend. It is the sort of thing we probably ought to take a look at at the CMC in January, is
20 it not?

21 MR. BEARD: That was precisely what I was going to say, that we should perhaps leave it until
22 then unless others have particular interjections. Obviously the position in relation to
23 CityFibre is also clear by reason of their appeal as well.

24 THE CHAIRMAN: Certainly that is the case with witnesses of fact. What about experts - is it
25 quite the same? People, as it were, tender their experts in the same way and then there is a
26 debate about whether they are all necessary or whether they should then meet and agree or
27 whatever?

28 MR. BEARD: I think it was mentioned, I do not know whether it was by you, Sir, or by
29 Mr. Holmes, a process of meetings between experts. That may well be highly appropriate.

30 THE CHAIRMAN: Yes, I certainly mentioned it. Can we leave that until January?

31 MR. BEARD: I think that probably is right, but even if it is not and it would be sensible to
32 engage with this earlier than January, it is perhaps best at this stage to leave it for a
33 discussion between the parties rather than trying to lay down any rubric, I think, unless I
34 hear otherwise from anyone else. I have not heard to the contrary.

1 THE CHAIRMAN: The expectation is that people will tender their proposed expert witnesses
2 and evidence, and then, in a sense, we can have the debate on the back of the actual material
3 rather than in a vacuum.

4 MR. BEARD: Yes, it is a contrast between these proceedings and High Court proceedings where
5 everything really does get front end loaded in terms of evidence coming forward. I think it
6 is the expectation of everyone here that any submissions they put in will be backed by any
7 evidence they are relying upon, because that is the way that this Tribunal's Rules work.
8 That then leads us to directions on experts, and so on, and meetings, which, Sir, you are
9 already anticipating. I think it should be left until January. 16 is January, so that covers
10 those matters.

11 Then 17 is duration. At the moment, Sir, you have given the indication of a window. We
12 have put in our submissions saying that we think it is going to be a three to four week case.
13 Given the marking down of a window at the moment and the fact that we are going to have
14 a January CMC, I wonder whether there is any merit in any further debate about those
15 issues.

16 THE CHAIRMAN: I have allocated a window which sounds generous, but also, as I indicated,
17 allows for the fact that occasionally cases take longer than you think. There may need to be
18 a slightly longer break in the middle depending upon who it is who is able to be recruited in
19 the meantime to fill the spaces, or indeed anything else which just comes up.

20 MR. BEARD: Absolutely. Then 18 is teach-ins or technical primers.

21 THE CHAIRMAN: Leave that again until January.

22 MR. BEARD: Yes, I think leave until January. I think the working assumption is that a primer
23 may be more practicable than working out who says what and how and why at a teach-in,
24 but let us leave that until January. It is one further item for the agenda.

25 THE CHAIRMAN: Certainly a primer, because that is just a question of asking the parties who
26 know the industry and the terminology and the technology to make it as comprehensible as
27 they can in a document. I see a few wry smiles when I said that. I am very conscious of the
28 fact that, even with a bit of a technical background, some of the stuff in the documents is
29 reasonably opaque to anybody who is not versed in the terminology and the physical
30 practicality of the industry.

31 The reason that a teach-in was put on the agenda - and I ask you to continue to, together,
32 consider it - is that I do know it has worked in other intellectual property cases. I appreciate
33 it means that you have got to try and find somebody who you all trust to be neutral and, as it

1 were, not be pouring trickling poison into the Tribunal's ear, but actually trying to help the
2 Tribunal get to grips in a really efficient way with a very technical subject.

3 We will leave it until the CMC in January anyway, because I cannot possibly deal with it
4 today. I do ask you or those behind you to at least seriously consider whether there is
5 somebody out there who can be relied upon to educate the Tribunal in a neutral way, other
6 than by just reading something on a page.

7 MR. BEARD: Understood, and we will take that away and think about it and have further
8 discussions, certainly in advance of January.

9 That, I think, concludes matters in relation to the issues pertaining to the BT appeal and in
10 relation to BT's position in the TalkTalk appeal, save that, as Mr. Read rightly reminds me,
11 although we have had something of a discussion on the confidentiality ring order for the BT
12 and CityFibre appeals, I think it will be a separate confidentiality ring order that will be
13 drawn up in relation to the TalkTalk appeal. Mr. Read may be better placed to just deal
14 with that.

15 MR. READ: Sir, if I can just briefly follow Mr. Beard's eloquence by adding a few words on the
16 TalkTalk confidentiality right. Essentially, both Ofcom and BT accept that there needs to
17 be a separate confidentiality ring for it. TalkTalk I do not think has commented on it, but
18 accepts that its appeal is a discrete and singular issue and so, therefore, there seems to be no
19 reason why they should be involved in the confidentiality rings for the main appeal.
20 There will be a different team for BT, so the order will have to be slightly differently
21 drafted, but that is only in respect of schedule A. Other than that we would anticipate that
22 the order actually follows the existing one in the BT and CityFibre appeals.

23 THE CHAIRMAN: Is the in-house pair common to both?

24 MR. READ: It would be one of the in-house pair plus a separate one dealing with the TalkTalk
25 information.

26 THE CHAIRMAN: But the same parameters in relation to both?

27 MR. READ: Exactly the same parameters would be imposed. Sir, obviously I am very keen that
28 everyone is on board with that proposal so that we can get it out as quickly as possible,
29 because obviously it impacts on the issue of disclosure thereafter.

30 Other than that, I think all issues relating to which confidential sections of the material have
31 been agreed now between the parties. There was an issue between TalkTalk and Ofcom, I
32 think, about how extensive the disclosure should be, but I think that issue has now been
33 dealt with. So, apart from re-drafting the confidentiality ring order slightly differently, I
34 think those are all the issues in the TalkTalk appeal that I need to comment upon.

1 THE CHAIRMAN: Thank you. Mr. Woolfe?

2 MR. WOOLFE: We have no objection to there being a separate ring. I think it just keeps the
3 right information going to the right people, but we are fine with that.

4 THE CHAIRMAN: I will come back right at the end as to how mechanically all these various
5 agreements are going to be correctly encapsulated quickly and accurately in a document,
6 because I am becoming ever conscious that it would be placing a very great burden on the
7 Tribunal staff to necessarily get all this right off their own bat. Perhaps while Mr. Sharpe is
8 making his submissions and we are dealing with the other matters, people can give some
9 thought as to how an accurate document can be effectively produced in short order.
10 Mr. Sharpe, that probably will not involve you, I am sure it will be somebody behind or
11 alongside you who will be responsible for that.

12 MR. SHARPE: I hardly think I am going to present them with a challenge, because I am going to
13 significantly briefer than Mr. Beard anticipated. Sir, it will come as perhaps some relief to
14 you that we are no longer proposing to run what I will call the price control point, not
15 because it is a bad point. It is a very good point, but it has been overtaken by events,
16 namely that we are faced with, happily, a reference to the CMA in relatively short order,
17 and my learned friend has abandoned his ambitions for a stay.

18 THE CHAIRMAN: If I can paraphrase it in this way: your point was, if I have got it right - you
19 will howl, I am sure, if I have it wrong - if you design it so badly that it actually frustrates
20 your statutory purpose, it is a question of law as to whether it can be done, at a specified
21 price. That is your argument.

22 MR. SHARPE: *A fortiori*, if you admit that that remedy will be frustrated by the current rate
23 regime, which is precisely what Ofcom said at para A23.107.

24 THE CHAIRMAN: You are not running, so I will not lengthen it, but does it not, in fact, all go
25 just to how bad the design is?

26 MR. SHARPE: No, effectively we would rely quite heavily upon the *Hutchison 3G* case where
27 an almost identical point was raised: is a price control mechanism the appropriate way to
28 deal with the mischief that the Regulator has identified? It was put, as it no doubt would
29 have been put against me, "No, no, that is a price control matter and should be dealt with by
30 the CMA". That was rejected by this Tribunal on the basis that there was an anterior
31 question of whether or not that price control was appropriate in order to discharge Ofcom's
32 statutory obligations.

33 THE CHAIRMAN: If you thought this was not a specified price control matter that was
34 appropriately remitted to the CMA, are you giving up the point simply because it can be?

1 MR. SHARPE: I am giving up the point because pragmatically, if it was regarded simply as the
2 contents of a costs stack, how do you account for rates in the calculation of a price control
3 mechanism? If it is narrowly so regarded, then it is plainly a price control matter. Our
4 primary submission is that it was not. However, I do not need to run that argument, because
5 the circumstances which gave rise to the thought, namely the lengthy delay caused by the
6 stay application and the possibility of an even longer delay before any reference to the
7 CMA, no longer obtain. However good the point may have been theoretically, we are
8 content to run it as a price control matter.

9 THE CHAIRMAN: I have got jurisdiction to do it, and nobody else is saying that I have not, and
10 you are not suggesting I have not, so pragmatism rules.

11 MR. SHARPE: In other words, our grounds 3 and 4(b) - I do not think there is any argument that
12 4(a) is not a price control matter - will in due course be the subject of a reference.

13 On inspection, they are actually two sides of the same coin. They rest upon the criticism of
14 the design of the price control and its possible remedy - in other words, if it is wrong, how
15 should it be put right?

16 THE CHAIRMAN: You mean 3 and 4(b)?

17 MR. SHARPE: Yes, 4(b).

18 THE CHAIRMAN: And 4(a) is not of the same type because 4(a) is really just saying you should
19 have chosen a duct access rather than----

20 MR. SHARPE: Yes, 4(a) and 4(b) both really deal with remedies. 4(a) says price control is the
21 wrong way forward here, there should have been an alternative and more proportionate way
22 to encourage competition to the leased lines. That means competitor access to BT's ducts
23 and access so the costs of entry are reduced. That is 4(a), not a price control matter, not an
24 issue.

25 Then 4(b), the way Ofcom went about it was they said that price will be related essentially
26 to BT's costs. BT is a huge organisation with very significant economies of scale. It is very
27 likely that no competitor could compete on equal terms however efficient it may be at any
28 level of scale, simply because they serve so many people in so many areas. A Regulator,
29 properly advised and aware of its statutory duty, will have taken a different basis, and the
30 basis we are saying is REO, the costs of a reasonably efficient operator.

31 That is actually the narrow question which will pass to the CMA in due course.

32 THE CHAIRMAN: Yes, together with the TalkTalk issue so that they can have a look at the
33 whole lot. The other thing that concerned me, as I understand it - a rudimentary

1 understanding at the moment - is that a number of these points could actually interact with
2 each other. I think that is a point which seems to be perfectly sensible.

3 MR. SHARPE: And in correspondence the CMA have, I think, absolutely properly recognised
4 that it makes sense for them to organise this as one panel and to deal with it in tandem so
5 that they get economies of scale as well.

6 THE CHAIRMAN: So that one is no longer... Is there any other substantive point that I need to
7 deal with before we get down to the practicalities of how we reflect on paper what we have
8 done today? No, good.

9 My understanding is that ordinarily the staff sitting in front of me would try and produce an
10 order. I am not suggesting that they could not, I am sure that they could and would do a
11 very good job of it and may well already have embarked upon the process, but it does occur
12 to me that there are a number of moving parts in the agreements that have been reached, for
13 example, in relation to the bespoke confidentiality agreement and one or two of the other
14 little agreements that have been debated. What is the most practical way to get the order
15 agreed and signed off by everybody? The Référéndaire has kindly suggested that we will
16 start the ball rolling with what we think is a template, or as much as we can do, and then the
17 parties who have been here today will need to then send their drafting comments in. To the
18 extent that you need to agree drafting points between you, you should do it and then send
19 the results of that in to the extent that they need to be sent in, so that, for example, we have
20 got a copy of the appropriate agreed bespoke confidentiality agreements.

21 Does that work for people? The pressure is off Ofcom of having to produce a scissored
22 version. You have just got to produce one within the time available. Anything that you
23 know that is on your side of the fence, do not wait, send it once you have agreed it, but we
24 will start the ball rolling with a composite order, I would suggest.

25 MR. BEARD: Would it be useful if we prepared the confidentiality order element of it and
26 passed that back? I do not think it is controversial, we just need to add the point that you,
27 Sir, indicated in relation to agreement. Your Référéndaire indicated to me earlier that a
28 form of words might be found in a recent order that we can usefully draw upon. We can
29 make that amendment and that saves at least a little bit of time.

30 THE CHAIRMAN: All right, that sounds like a plan. Has anybody got any other better plan?

31 No.

32 Has anybody got anything else that they need to say, other than obviously there is liberty to
33 apply, as we discussed earlier on many, many occasions?

1 I am informed that ordinarily, if you are an intervener and you want to call an expert
2 witness, or potentially rely upon an expert witness, special provision is made for that. I am
3 looking particularly at the CP Group who envisage calling one expert economist. Either we
4 can say, that is fine, you have permission now, but in reality should we not just stick it in as
5 a piece of evidence together with the statement of intervention, and we can deal with that in
6 January when we look at experts generally?

7 MR. WOOLFE: That seems sensible, if looked at it in context and the value which it adds can be
8 viewed in that context?

9 THE CHAIRMAN: Yes. Does that apply to anybody else?

10 MR. LIDDELL: Sir, I think it might also apply to Virgin Media. At this stage we have not yet
11 decided whether or not we submit expert evidence. It may be, on review of the materials
12 that we are expecting very shortly, that we decide that we do, at which point---

13 THE CHAIRMAN: In which case, the thing to do is to serve what you want to rely upon and
14 then we will take a view more generally in January as to what value we get from it.

15 MR. JOHNSTON: If it assists, we are not intending to file any expert evidence at this stage.

16 THE CHAIRMAN: All right, if the position changes, I will not hold you to it and you have got
17 liberty to apply as well.

18 MR. WOOLFE: We may not as well.

19 THE CHAIRMAN: I generally encourage people not to file more pieces of paper rather than to
20 file more pieces of paper, and in the meantime thank you all very much indeed.

21 _____
22