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IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos. 1260/3/3/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

20 November 2017

Before:

THE HON. MR. JUSTICE SNOWDEN
(Chairman)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Applicants

- and -

OFFICE OF COMMUNICATIONS

Respondent

- with -

VIRGIN MEDIA LIMITED
GAMMA TELECOM HOLDINGS LIMITED
CP GROUP (TALKTALK TELECOM GROUP PLC, VODAFONE LIMITED,
COLT TECHNOLOGY SERVICES AND HUTCHISON 3G UK LIMITED)
CITYFIBRE INFRASTRUCTURE HOLDINGS PLC

Interveners

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HEARING (IN PRIVATE)¹

¹ Although this hearing took place in private the confidentiality restriction on the transcript was lifted on 23 November 2017 pursuant to the ruling of the Chairman of 20 November 2017 ([2017] CAT 26 at [26]).

A P P E A R A N C E S

Mr Daniel Beard QC, and Mr David Gregory (instructed by BT Legal) appeared on behalf of British Telecommunications plc.

Mr Mark Vinall and Mr Daniel Cashman appeared on behalf of the Office of Communications.

Mr Duncan Liddell (of Ashurst LLP) appeared on behalf of Virgin Media Limited.

Mr Tim Ward QC (instructed by Towerhouse LLP) appeared on behalf of TalkTalk Telecom Group plc, Vodafone Limited, Colt Technology Services, Hutchison 3G UK Limited.

Mr Paul Stone (of Charles Russell Speechlys) appeared on behalf of the Intervener Gamma Telecom Holdings Limited.

Mr Aiden Robertson and Ms Julianne Kerr Morrison (instructed by Preiskel & Co LLP) appeared on behalf of CityFibre Infrastructure Holdings Limited plc.

1 THE CHAIRMAN: Good afternoon.

2 MR BEARD: Sir, good afternoon. Thank you very much for convening the hearing at short
3 notice. I appear with Mr Gregory for BT. On my far right is Mr Liddell for Virgin Media;
4 on my left is Mr Robertson and Ms Kerr Morrison for CityFibre, further left is Mr Ward for
5 the CP Group, and then at the far end of the bench are Mr Vinall and Mr Cashman for
6 Ofcom.

7 I understand that you have received a bundle, and indeed a skeleton argument from BT.

8 I think the bundle misses out one or two of the very most recent pieces of correspondence,
9 but I'm not sure that is going to be particularly significant for this afternoon.

10 You will have seen the position as set out in BT's skeleton argument. We have put it in
11 writing in order effectively to accelerate this afternoon. You will have seen what we say
12 which is, in very broad and loose terms, "just hold on". The urgency that Ofcom is praying
13 in aid of its position is urgency that only arises when the order is made.

14 Before I proceed any further, I should note that we're working on the basis that the only
15 people in this room are members of the confidentiality ring. I think that's correct for all
16 parties.

17 THE CHAIRMAN: Right. Should we formalise that, in fact, by going into private session?

18 MR BEARD: I think probably that's appropriate.

19 MR VINALL: We'd certainly invite you to do that.

20 THE CHAIRMAN: Can we put the notice on the door, thank you.

21 MR BEARD: We checked beforehand that---

22 THE CHAIRMAN: It was going to be a fairly early question.

23 MR BEARD: As I say, the position that we have put forward in our skeleton argument is
24 relatively straightforward, which is that it's only if the Tribunal now makes the order that
25 the urgency that Ofcom intends to pray in aid in making emergency measures, or measures
26 under its emergency powers, arises. Of course, one of the key---

27 THE CHAIRMAN: We'll try and take this reasonably logically. Ever since the Tribunal gave its
28 decision in July, and certainly since it has handed down its judgment, but since it gave its
29 decision to everybody in July, people must have appreciated, surely, that consequent upon
30 the quashing of the decisions there would come into being a situation which Ofcom would
31 need to address. I say it relatively neutrally. You say that you want a period of time. That
32 period of time cannot conceivably extend to the sort of consultation period that Ofcom are
33 indicating that they will need to use to take full account of what the Tribunal has decided
34 and to conduct a review.

1 MR BEARD: Absolutely.

2 THE CHAIRMAN: So if it's not to be that long, what sensibly can be done in a shorter period?

3 MR BEARD: There is a range of issues that might be explored by Ofcom. The central concern
4 that Ofcom expresses is there will be a regulatory lacuna, as they put it, I think. There'll be
5 a hole in regulation in relation to matters which weren't subject to challenge. BT, for its
6 part, is not standing here saying it wants to take advantage of a situation where formally the
7 market definition findings are undermined in relation to the whole of the BCMR statement,
8 but it wasn't challenging many of the remedial matters.

9 So BT's position is not that it's seeking to take advantage of a regulatory lacuna at all.

10 THE CHAIRMAN: You challenged, as it were, take geographic market definition. Your
11 challenge started with the extent of the CLA, and continued. There's not much left if your
12 challenge is successful, as to some extent it has been obviously in the sense that Ofcom
13 have been sent back to think about geographic market definition. There was always going
14 to be a big lacuna.

15 MR BEARD: Yes, that's absolutely right.

16 THE CHAIRMAN: To ask my question again, you say that some things could potentially
17 happen. Can I start from the other end? I am primarily interested, at least in the first
18 instance, in understanding whether the order which has been put forward gives effect to the
19 ruling that the Tribunal has given. At least on the face of it, nobody is actually suggesting
20 that it doesn't. You've withdrawn your consent to it, but also I think, and I can't remember
21 the exact turn of phrase used, nobody has actually said that the order doesn't give effect to
22 the Tribunal ruling.

23 MR BEARD: No.

24 THE CHAIRMAN: Although some of the other interveners have floated the idea that the
25 Tribunal might be persuaded to start engaging in a process of, effectively, regulation by
26 order over the next three years, or whatever, by starting to be very, very granular about
27 which bits of the decisions should be left *extant*, the reality of that is that Ofcom made a
28 decision upon an SMP determination and upon a market definition which has been proven
29 to be flawed, and whatever else this Tribunal is, it isn't a regulator in the wings.

30 MR BEARD: No, absolutely, we entirely accept that.

31 THE CHAIRMAN: So I ask again: what, in fact, is going to happen over a shorter, and how
32 long, delay that this Tribunal should, in fact, be concerned about?

33 MR BEARD: I think the position is that whilst we can see that the specific measures adumbrated
34 in the order would give effect in terms of removing particular directions following on from

1 the Tribunal's ruling and the reasons given for it, the way in which that order is put in place
2 will impact upon how the supposed regulatory lacuna will actually be dealt with. So what
3 Ofcom have chosen to do is suggest that you should make the order urgently thereby
4 enabling them, they say, to exercise emergency powers. We say they wouldn't be entitled
5 to do so, but leave that to one side for the moment----

6 THE CHAIRMAN: Sorry, if you accept that the consequence of - the statutory scheme, as
7 I understand it, put very simply, is that in order to regulate and in order to impose any form
8 of regulation in this market place, Ofcom have, first of all, to make a product market and a
9 geographic market definition.

10 MR BEARD: Yes.

11 THE CHAIRMAN: They've got to issue definitions.

12 MR BEARD: Yes.

13 THE CHAIRMAN: Once, and only once they've done that can they then make an SMP finding,
14 and once they have done that and found SMP, can they impose regulations?

15 MR BEARD: Yes.

16 THE CHAIRMAN: So it's an edifice, or it's a progression, call it what you will----

17 MR BEARD: Yes, whichever direction one----

18 THE CHAIRMAN: -- if you cut it off at the start, everything else falls, doesn't it? How can you
19 salvage, other than by consent - which Ofcom aren't open to decide whether or not they do
20 in their regulatory role - how can the Tribunal preserve parts of Ofcom's decision?

21 MR BEARD: I think the issue here actually arises in relation to the way in which Ofcom have put
22 forward the way they're going to deal with the position in the interim.

23 THE CHAIRMAN: Right, but that is not the subject of this appeal. Whatever complaint you
24 may have about Ofcom and the way that they are proposing to respond to the decision the
25 Tribunal has reached, that may be the subject of a separate challenge, who knows, but why
26 is that the subject of this Tribunal's determination?

27 MR BEARD: Because it is only by reason of the Tribunal making an urgently determined order,
28 which Ofcom is pressing for, that the emergency measures could be put in place.

29 THE CHAIRMAN: Sorry, you say only by reason of making an urgent determined. Suppose
30 I was to say, okay, next week?

31 MR BEARD: The difficulty which underlies all of this----

32 THE CHAIRMAN: The week after, month after, how long do you need? What do you want?
33 What's going to happen?

1 MR BEARD: What we have indicated is that the suggestion that is the sensible one to deal with
2 this is that the Tribunal does not make the order today or tomorrow as Ofcom is pressing
3 for, and that in circumstances where if we are able to take instructions in relation to these
4 matters, and therefore can confirm that we are content with the order, notwithstanding what
5 is going to be done in relation to interim relief, then we will be able to confirm that for the
6 hearing that's scheduled for 4th December. So we're not talking about extending the period
7 substantially, but what we are concerned about is being told on the 15th that the basis on
8 which Ofcom is proceeding towards the terms of this order, because it's Ofcom that has put
9 forward this material in justification of the order, that we are not in a position to take
10 instructions in relation to those matters. If we can do that----

11 THE CHAIRMAN: Pause there, you've tied together in your submissions two things, and I, at
12 the moment, am not sure why they are tied together so far as this Tribunal's jurisdiction is
13 concerned. You say that if there is a delay it will enable you to see whether you are content
14 with the order bearing in mind what Ofcom propose to do. There's an assumption about
15 that, that the first part of that goes with the second part. Whether or not the order reflects
16 the ruling of the Tribunal seems to me at the moment to be something which is entirely
17 separate from the question of how the regulator will respond to it. You've made a
18 connection which, at the moment, I'm struggling to see in terms of this Tribunal's
19 jurisdiction.

20 MR BEARD: In terms of being able to get confirmation from our principals as to whether or not
21 they are content to agree to the terms of that order----

22 THE CHAIRMAN: The thing that you say that might lead them not to be content has nothing to
23 do with whether this order matches this ruling. You can take instructions to test it this way:
24 you can take instructions from your principals on whether, looking at the non-confidential
25 version of the ruling which has been released, it matches the order which is proposed.
26 There's nothing that requires you to go beyond that.

27 MR BEARD: With respect, we say that's not correct, because the reason that Ofcom has
28 proffered this material is in justification of the order. Therefore, in those circumstances it is
29 appropriate that principals are able to take account of the justifications proffered by Ofcom
30 in relation to these matters.

31 THE CHAIRMAN: I think what Ofcom were doing, unless I've missed it, is Ofcom were saying
32 other people - other providers, CPs, or whatever - have raised a number of issues, which
33 I don't think Ofcom accepted were relevant to whether the order matched the judgment, but

1 said in order to perhaps do what they thought would be helpful, they gave, as it were, a
2 sighting shot, or a sight of what they were planning to do.

3 MR BEARD: We understand that.

4 THE CHAIRMAN: It wasn't that they need this confidential statement as to what they are
5 proposing to do to justify the order which stands as a reflection of the Tribunal's ruling.

6 MR BEARD: Sir, you asked how the two things are connected. The first is that that account
7 that's given in the letter is used to respond to criticisms that are levelled in relation to terms
8 of the order, and that in order properly to take instructions on whether or not consent should
9 be given to the order, we need to be able to take instructions in relation to those matters.
10 There is a further issue here that we have outlined in the skeleton argument, that the process
11 being followed by Ofcom in relation to the emergency measures we say is unfair. We say
12 that we understand----

13 THE CHAIRMAN: You may be right, assume you are, it's not this Tribunal that will be
14 determining that.

15 MR BEARD: No, that would be correct. We accept that entirely, but what we do say is that, as
16 an incident of this Tribunal disposing of cases justly and proportionately, which inevitably
17 engages principles of fairness, it would not be appropriate for this Tribunal to make the
18 order in the timeframe that Ofcom is seeking and in terms where we aren't able to take
19 instructions, when to do so is, as we've explained, unfair. In particular, we have highlighted
20 the fact that no notice of the fact of a decision has been provided to the parties who would
21 be concerned by it, nor any opportunity for representations. In those circumstances, we've
22 highlighted why, notwithstanding the statutory scheme which they would be relying on in
23 relation to these emergency measures, common law duties of fairness apply which require a
24 body to properly give notice and accept representations prior to the finalisation of a
25 decision.

26 Ofcom has no apparent answer to those issues because it cannot properly say that the sort of
27 considerations that would justify no notice, no scope for representations, actually apply in
28 the context of this case. We've attached just for the benefit of the Tribunal in summary
29 terms from one of the textbooks the common law treatment, the common law consideration
30 of----

31 THE CHAIRMAN: What am I supposed to do? Are you saying that this Tribunal, as part of its
32 ancillary powers, should try the question of whether what Ofcom proposes is in accordance
33 with the requirements of natural justice or what?

1 MR BEARD: No, we can't say that it's a matter for you to try these matters. We accept that that
2 would be a matter for judicial review - we see that. So we're not trying to expand the scope
3 of this Tribunal's jurisdiction. We realise that we have to go elsewhere in relation to such
4 challenges, but in circumstances where it would be the Tribunal's own act in putting in
5 place the order in circumstances where the proposed approach of Ofcom was only first
6 raised with us three days ago, and we don't have opportunity to take instructions from our
7 principal in relation to it, and we have explained why proceeding on that basis is unfair, that
8 in those circumstances this Tribunal should hold fire on finalising the order, and it's a
9 matter that we should revisit on 4th December.

10 THE CHAIRMAN: Okay, you say 4th December simply because that happens to be a date which
11 is currently in the diary.

12 MR BEARD: Yes.

13 THE CHAIRMAN: I go back to the question I asked a little while ago: what, in fact, is going to
14 happen in a week - what's 4th December, two weeks?

15 MR BEARD: Yes.

16 THE CHAIRMAN: So a week or two, what's going to happen?

17 MR BEARD: This is why it is linked to the issue in relation to instruction. By precluding us
18 from taking instructions in relation to these matters, on the notional basis of market
19 sensitivity, which we simply don't understand----

20 THE CHAIRMAN: Okay, in a minute I'll be asking Ofcom about why they've adopted the
21 course they've adopted so that I understand it. In terms of progressing the debate in relation
22 to either the terms of the order or the regime which is going to follow the making of the
23 order which you accept can't wait for months or a year or whatever, what do you say is
24 going to happen in the meantime?

25 MR BEARD: If we can properly take instructions, whether because----

26 THE CHAIRMAN: Yes, if you can take instructions - it's not in my gift, is it, to order that you
27 should be entitled to do that?

28 MR BEARD: No, it's not in your gift to order them to change the terms on which confidentiality
29 in relation to this communication is put in place. Again, that would be a separately
30 judicially reviewable decision, we can see that. But, on the other hand, it is in this
31 Tribunal's gift not to make the order in circumstances where this Tribunal can indicate,
32 pursuant to general duties of fairness, that instructions being taken in relation to these
33 matters would enable the resolution of the dispute in relation to the terms of the order, that
34 can be done quickly. We emphasise that.

1 THE CHAIRMAN: Okay, sorry, I can say all sorts of things, but what jurisdiction do I have to
2 embark upon a critique, criticism, investigation, of how Ofcom chooses to exercise its
3 regulatory powers in relation to making confidential information available and reaching a
4 decision on emergency powers when you have accepted that the actual challenge that you
5 would mount to the way Ofcom is proposing to act is for another Tribunal?

6 MR BEARD: I recognise that it is for another Tribunal. It would be for the Administrative
7 Court, we can see that. In those circumstances, what we do say is that where it is plain that
8 the process that is being followed by precluding us from taking instructions in relation to
9 these matters is plainly unfair, this Tribunal should not be acting to facilitate that unfairness.
10 It's for that reason that we emphasise that the sensible course here, and the appropriate
11 course, is to defer the completion of the order. Indeed, if what Ofcom is suggesting is that
12 BT, if it objects to the confidentiality arrangements, should be rushing off and issuing a
13 judicial review, it would still not be sensible for this order to be made immediately. What
14 we don't want to have is a situation where a judicial review is being pursued, interim relief
15 in relation to that judicial review has to be sought on a very expedited basis in
16 circumstances where Ofcom are warning that they are going to otherwise impose these
17 measures directly, measures which, because they will be announced as emergency
18 measures, are ones that it's quite appropriate that all of the parties, but in particular BT and
19 its principals, are appraised of such that when our investors hear about these things and
20 make enquiries we are in a position properly to answer those questions.

21 THE CHAIRMAN: I understand that you say you want to speak to other people within BT than
22 are currently within the scope of the confidentiality ring.

23 MR BEARD: Yes.

24 THE CHAIRMAN: What do you think Ofcom - it takes two to tango in this world that you are
25 suggesting - what is it that Ofcom are under any obligation to do, or could be ordered to do
26 by me that might change the situation between now and 4th December? If Ofcom have
27 taken a view that they're going to make their decision, they have got no obligation, have
28 they, to do anything between now and then?

29 MR BEARD: If they continue in that position that they neither provide it to us in terms that
30 enables us to take proper instructions, or provide it to the world on a 'minded to' basis,
31 because we've said that to Ofcom as well. The normal course, of course, is to put forward
32 proposals, then there's no possible issue in relation to market sensitivity. If they do that,
33 you can have a compressed period, we understand you want to get on with it, there would

1 be no regulatory lacuna in the meantime because the order wouldn't have been made, and in
2 those circumstances these problems will have been purged.

3 THE CHAIRMAN: So you're saying that Ofcom could put forward to the world at large what it
4 proposes to do when the order is made?

5 MR BEARD: Yes. It is mind boggling that it has sat on these issues which it's clearly been
6 gestating for some time and not intimated it to anybody, and not suggested that in reaction it
7 would do so. We understand----

8 THE CHAIRMAN: What, in practical terms, does adopting that approach, namely to say I would
9 expect Ofcom to announce what it proposes to do in response to the making of the order and
10 the remittal ahead of the making of the order and remittal - in other words, granting a short
11 period - do for everybody?

12 MR BEARD: Well, first of all, it means that for the market what we don't have in place are a set
13 of emergency measures being just dropped on the market as a whole. It means that, in
14 terms of being able to take instructions, there is not a change in the legal position overall
15 during the course of which we can properly take instruction. Of course, going back to the
16 points that we have made about the common law duties of fairness, quite properly Ofcom
17 would have to keep an open mind in relation to whether it was going to pursue these
18 emergency measures in the light of representations that could be made. The situation is
19 very different if those measures have been made and a challenge has to be brought in order
20 for them to be withdrawn. It is precisely for that reason that it seems to us that a course of
21 action that has clearly been long in gestation with Ofcom should sensibly have been put
22 forward to the world if not to the interested parties in order to enable us to deal with these
23 issues of fairness which are acute in relation to the position that is being adopted by Ofcom
24 here.

25 So it is for that reason that we wrote to Ofcom and said there are two options: we don't
26 understand your market sensitivity points, in parentheses, "If you're concerned about share
27 dealing there are a bunch of rules that stop individuals engaging in insider trading, and in
28 any event if that's your concern we can put in place undertakings. We are not talking about
29 a long period in relation to these matters. If you still have concerns about individuals
30 having this material, then it put it out on an urgent 'minded to' basis, we can all deal with it
31 on that basis, you can take into account our representations, these issues of fairness will
32 have been dealt with." The way in which Ofcom is dealing with these matters is very
33 surprising, to put it at its mildest. I imagine principals, when told about these things, might
34 use different language.

1 So it's for that reason that we say the sensible course is not to make the order in these
2 circumstances. I am happy to take you, Sir, through the details of the points we make in
3 relation to why fairness is obviously being breached in relation to these matters.

4 THE CHAIRMAN: I'll probably try and get the lie of the land more generally before you take
5 me through the nitty-gritty of fairness to see whether I need to get into that.

6 One thing I did notice tucked at the tail end of your submissions was a reference to a major
7 bond issuance by BT being due to complete. How can I take that into account on the basis
8 of one sentence in your skeleton argument?

9 MR BEARD: This is something that is going to happen tomorrow. It is public knowledge that
10 there is intended to be a major bond issuance completion. This is simply an example of the
11 sort of situation where if Ofcom were to be able to follow its course of just dropping
12 emergency measures on the market we will be in a situation where BT is seeking to make
13 announcements in relation to, for example, tomorrow, a major bond issuance completion, at
14 the same time being asked by investors about what's going on in relation to the regulatory
15 scheme where emergency measures are being put in place. So it's only an example of these
16 problems.

17 THE CHAIRMAN: Okay, because at the moment I don't understand the logistics of that, or, in
18 fact, why it was that you wouldn't actually have wanted the events to take place sooner
19 rather than later, because the way I read your skeleton now it suggests that because you
20 want there to be a delay, you want your bond issue to go out without the people who are
21 subscribing for bonds to know about what is proposed.

22 MR BEARD: No, I'm sorry, that isn't the impression that is intended to be made by that. It's not
23 that.

24 THE CHAIRMAN: How can I possibly deal with that.

25 MR BEARD: It's being able to explain the position in circumstances where - this is one example
26 that's being given. There will be all sorts of steps and currencies that are operating in the
27 market and it simply reinforces----

28 THE CHAIRMAN: Whilst there is uncertainty which has existed since the decision has been
29 given, presumably any communication with your potential bond holders would have to take
30 that into account and BT could adjust the timing of its bond issue?

31 MR BEARD: Of course, in relation to issues of *extant* uncertainty, those have to be taken into
32 account in relation to a whole range of communications. Just to be clear on two matters,
33 first of all, it is no part of what BT are doing or seeking to do here to create or maintain
34 some sort of regulatory lacuna apart from in relation to the matters that were obviously for

1 substantive challenge, and we don't treat that as a lacuna, we treat that as being the outturn
2 of the Tribunal's judgment. So we're not trying to create a lacuna here, and it's for that
3 reason we say that the order shouldn't be made, because until the order is made the
4 directions don't fall.

5 In relation to the issues raised here, one of the key concerns is the lack of ability of anyone
6 outside the two lawyers within BT's confidentiality ring to speak to any of these matters if
7 and when investors make enquiries about these things, regulatory news being given. So it's
8 that context that is being highlighted here.

9 THE CHAIRMAN: It goes back to the point that that's all to do with the consequences of the
10 order rather than simply deciding whether the order reflects the ruling which the Tribunal
11 has made public.

12 MR BEARD: The other thing to emphasise is that here BT is not seeking to slow up the process
13 of getting rid of uncertainty. That is not what we're in the interests of doing. We're happy
14 to move quickly in relation to these matters. What you'll have seen from the
15 correspondence is, with Ofcom coming out saying, "Can we agree to an order, we'd like to
16 agree the terms of an order", what you see is no sense of any sort of foot dragging by BT.
17 BT is endeavouring to engage frankly with Ofcom, explaining its position, highlighting the
18 fact that it has difficulties taking instructions when Ofcom is pressing it to agree to certain
19 matters, but doing so, as it turns out, not frankly with a full explication of what was going
20 on in the background for Ofcom.

21 THE CHAIRMAN: Shall we pause there and let anybody else add any substantive points.

22 MR BEARD: May I just take one minute? (After a pause) Yes, Mr Dupas emphasises that, of
23 course, one of the things that has been raised in the correspondence is the possibility of
24 other arrangements being put in place, voluntary commitments, and so on, which have been
25 put in place in other cases.

26 THE CHAIRMAN: Confidentiality arrangements?

27 MR BEARD: No, actually commitments in relation to substantive matters relating to the
28 operation of the market. It's highlighted in correspondence. I think, Sir, you've referred to
29 this at the outset as one of the possible other avenues for dealing with these sorts of matters,
30 which, of course, Ofcom hasn't explored at all, given the approach it has adopted.

31 THE CHAIRMAN: The question as to whether to seek voluntary assurances as to conduct, or
32 whether to put in place emergency powers regulation is one that must be for the regulator,
33 must it not?

1 MR BEARD: It's for the regulator obviously subject to the terms of public law and further
2 challenge. That we accept. I'm just highlighting----

3 THE CHAIRMAN: I understand it's potentially something that's available, but I don't see how
4 that, any more than any of the other things, at the moment is within my Tribunal remit.

5 MR BEARD: It's not for you to make an order in that regard. We're not suggesting that. None
6 of what we're saying is seeking this Tribunal to make prescriptive orders in relation to those
7 matters. What we're asking the Tribunal to do is act in such a way as to facilitate fair
8 procedure in circumstances where we say the procedure being followed is not fair and, as
9 I also indicated, in circumstances where the communications given were provided by
10 Ofcom in the context of the provision of the order and we have not been able to take
11 instructions in relation to them.

12 THE CHAIRMAN: Right, okay. For now, shall we pause there?

13 MR BEARD: I'm grateful.

14 THE CHAIRMAN: Does anyone else want to come in behind Mr Beard, other CPs or other
15 parties, before I turn to Ofcom.

16 MR LIDDELL: Yes, Sir, just some brief comments on behalf of Virgin Media. I think we're
17 obviously in the same situation as BT in the sense that we can't take instructions.
18 I think the issue that is likely to be of most concern to our clients, building on what the
19 consequences of the order will be, relates to the Dark Fibre remedy and the suggestion that
20 there will be a consultation on whether it would be appropriate to impose that following use
21 of emergency powers to determine markets and SMP.

22 THE CHAIRMAN: Just pause, and in a sense I'm going to repeat myself, for which apologies,
23 I think it follows from what you've just said to me, the matters that most concern you, such
24 as that, that you can't take instructions on at the moment are not referable to the terms of the
25 order, the sort of Ofcom dealing with the consequences, aren't they?

26 MR LIDDELL: Well, we think that there may well be a linkage here in the sense that as far as the
27 Dark Fibre remedy is concerned, there has never been a Dark Fibre remedy put in place
28 previously. The power to, or Ofcom's intention to impose that Dark Fibre remedy, was
29 based on findings on market power and market definition which the Tribunal has found
30 error with. We are a little concerned that, actually, the circumstances we've got into mean
31 that Ofcom is effectively going to be able to avoid the impact of the Tribunal's judgment
32 and indeed the Tribunal's jurisdiction in respect of Dark Fibre. That comes about because
33 effectively, as we understand it, Ofcom are saying, "We can't revisit and look at all of these
34 issues in anything less than towards the end of 2018, - we therefore need to put in place

1 emergency determinations, and we're going to consult on the appropriateness of imposing a
2 Dark Fibre remedy on the back of those emergency determinations".

3 THE CHAIRMAN: Just pause, and I'll put the same point to you as I put to Mr Beard: the first
4 question about which you can consult with your clients at the moment as it seems to me
5 would be, look at this non-confidential version of the Tribunal's ruling, there's nothing
6 that's marked confidential which affects the question about whether the order that gives
7 effect to that properly gives effect to it and reflects the Tribunal's ruling. You can do that
8 with your clients on an open basis using publicly available documents. All the concern that
9 you've just been explaining to me about the Dark Fibre remedy and what Ofcom might do
10 on the back of the emergency powers in relation to a Dark Fibre remedy is not on my desk.
11 It's not on this appeal, is it?

12 MR LIDDELL: I would say it is - in the sense that if your remittal is to say to Ofcom, "Please go
13 back and look at these issues that are relevant to the question of whether you can impose a
14 Dark Fibre remedy", and they're saying, "That's going to take too long, what we're going to
15 do is use emergency powers and on the back of that consult on whether we can impose a
16 Dark Fibre remedy." If they impose Dark Fibre remedies on the back of those emergency
17 determinations, effectively they will have sidestepped the purpose of the remittal, because
18 once a Dark Fibre remedy is in place I think it's common ground in front of this Tribunal
19 that you can't go back on that once it's available to third parties. So you'll have a situation
20 where you have remitted matters relevant to whether it's appropriate to impose a Dark Fibre
21 remedy - Ofcom can circumvent that, use emergency powers to effectively achieve an
22 objective which, on the face of it, they should be consulting on properly having regard to
23 your findings.

24 THE CHAIRMAN: But that's a complaint to a different Tribunal if - if - they do that.

25 MR LIDDELL: It certainly could be a complaint to another Tribunal, but I suppose there is also
26 the question for you, Sir, as to whether or not it's right that the effect of your judgment
27 could be avoided through those mechanisms. I think if we were going to consult our client
28 on this issue, and we were able to - I am only guessing because of course I haven't been
29 able to do that - they may want us to make representations to you on that issue.

30 THE CHAIRMAN: Right, yes.

31 MR LIDDELL: I think that's really all I had to add.

32 THE CHAIRMAN: All the other things that are non-BT specific presumably you support
33 Mr Beard?

34 MR LIDDELL: Yes, absolutely.

1 THE CHAIRMAN: Thank you. Others before Ofcom?

2 MR ROBERTSON: Can I just add a word from CityFibre, which is we think this is a case which
3 just cries out for some judicial pragmatism.

4 THE CHAIRMAN: I can be very pragmatic. What about jurisdiction though? I'd like to think
5 that I'm as pragmatic as the next judge, which may not be saying much, I don't know, it
6 depends on your point of view of the judiciary. What's my remit, what's my jurisdiction to
7 throw my weight around?

8 MR ROBERTSON: You don't have to make the order now, you can make the order at the
9 hearing originally listed on 4th December.

10 THE CHAIRMAN: If you're saying that's the pragmatic approach, what's going to happen
11 between now and the 4th that I'm, as it were, facilitating or being pragmatic about, do you
12 say?

13 MR ROBERTSON: It will give us the opportunity, firstly, to take instructions from our clients;
14 and secondly, to make representations to Ofcom.

15 THE CHAIRMAN: Right.

16 MR ROBERTSON: And to repeat the old *John v Rees* case, we know the world is full of cases
17 which appear to be open and shut, and you give the opportunity to make some
18 representations and it turns out there's more to be said and views do alter.

19 THE CHAIRMAN: Just pausing there, taking your two points, you say take instructions from
20 your clients. That presupposes that I also do something in the meantime to facilitate that,
21 doesn't it?

22 MR ROBERTSON: It means waiting until the original listing of this hearing, which was
23 4th December.

24 THE CHAIRMAN: Hang on. If I do nothing else other than just simply say, "Thanks very much,
25 it was lovely to see you all, good-bye, see you again on 4th December", you're in no
26 different position about taking instructions from your client, are you? Either I need to do
27 something or Ofcom needs to move from their existing position that they don't---

28 MR ROBERTSON: Yes, it gives us the opportunity to make representations to Ofcom.

29 THE CHAIRMAN: That was your second point, I'm still on the first. The first requires me,
30 doesn't it, to do something, or it requires Ofcom voluntarily to do something that up until
31 now they are not prepared to do. There's no other means of facilitating your first point.

32 MR ROBERTSON: I'm not suggesting that you can direct them, Sir, but you can express a view
33 that it would seem sensible to give us the opportunity to take instructions from our clients.
34 As Mr Beard has explained, it's an elementary part of fairness.

1 THE CHAIRMAN: It either needs me to do that - you accept that I can't order it - is that right?

2 MR ROBERTSON: Yes.

3 THE CHAIRMAN: It means that I would say something and then it would be still up to Ofcom
4 to decide whether they pay any attention or they don't?

5 MR ROBERTSON: Yes, and it's for them to see, whether acting reasonably, they refuse to allow
6 us to talk to our clients.

7 THE CHAIRMAN: Okay, so that's the first possibility. Then the second thing is, it allows you
8 to make representations to Ofcom?

9 MR ROBERTSON: Yes.

10 THE CHAIRMAN: The people who are within the existing ring can make representations now,
11 and I daresay they have. The ability to make representations in the two weeks on a wider
12 basis depends upon the first?

13 MR ROBERTSON: The ability to talk to our clients, yes.

14 THE CHAIRMAN: So we come back to that first point.

15 MR ROBERTSON: Yes. Ofcom, they may decide to hold the line and say, "No, you can't talk
16 to your clients", but they would have to demonstrate that was a reasonable approach to take.

17 THE CHAIRMAN: Or some other Tribunal.

18 MR ROBERTSON: A separate decision.

19 THE CHAIRMAN: It would have to be that some other Tribunal would say, "You weren't acting
20 reasonably, Ofcom", yes.

21 MR ROBERTSON: That's my point on judicial pragmatism.

22 THE CHAIRMAN: Right, thank you very much, is there anything else?

23 MR ROBERTSON: No, there's nothing else CityFibre would wish to add.

24 THE CHAIRMAN: Okay, thank you.

25 MR WARD: Sir, I'm here for the CP Group. The CP Group did put in a submission that, Sir,
26 hopefully you will have seen, at end of last week.

27 THE CHAIRMAN: I have read all the correspondence, but to say that I've got instant recall of
28 every paragraph of it, or otherwise - let me just make sure I've picked it up. Hang on.

29 MR WARD: It's actually in tab 38 of BT's bundle. It advocates a somewhat different approach,
30 and the point is really this: of course, we have not taken instructions from our clients on
31 Ofcom's new urgent proposal, but we are supportive of it, and we anticipate our clients
32 would be supportive of it, to the extent that it achieves by a different route essentially the
33 same thing that we were urging upon the Tribunal in the submission.

1 Of course, what has happened here is that BT has been successful in significant parts of its
2 appeal, but that does not impugn the entirety of the subject matter of Ofcom's decision.
3 What we argued for in the submission to the Tribunal is that the Tribunal should produce
4 what would be, in essence, a targeted remittal.

5 THE CHAIRMAN: Okay, so have you got a draft order for me to look at it?

6 MR WARD: I don't have today, Sir, but of course we can produce one.

7 THE CHAIRMAN: Why not?

8 MR WARD: Well, Sir, I'm sorry, it----

9 THE CHAIRMAN: Sorry, I'm not just saying, "You haven't done your homework, naughty
10 boy", sort of thing, this is a more substantive point. It's really a litmus test of this
11 submission, if you're saying that what the Tribunal could and should do is to target a
12 remittal, the final statement is a public document. Everybody has known since July that we
13 were quashing the three findings.

14 MR WARD: Yes.

15 THE CHAIRMAN: Since there was an embargoed version of the judgment made available on,
16 I think, 3rd November, everybody has known why we were going to do it. What concerns
17 me is that it's all very well to say we might target, but I've looked now at the detail - or at
18 least I've looked at how thick the detail is - of the directions and regulations which are put
19 in place, which are being now cut away. How on earth is the Tribunal to be expected to go
20 through that sort of material and put in place a regulatory regime in part that would last for
21 the next three years, which is what effectively you're suggesting?

22 MR WARD: No, Sir, I wouldn't be. I'd be suggesting that the Tribunal remit to Ofcom with the
23 task of doing that, and it wouldn't be insurmountably difficult to indicate what the
24 parameters of that should be. Just to take, for example, the question of product market
25 definition, plainly the appeal leaves untouched products up to and including 1Gbit/s. We
26 can see that from para.115 of the Tribunal's judgment, and no one disputes that.

27 THE CHAIRMAN: Hang on, that's not quite right. BT has said they don't accept, in fact, that
28 there was a single product - unless I've misremembered this. BT said, "We don't accept
29 there is a single product market below 1Gbit/s, but since we recognise that even if there
30 were a number of separate product markets, BT would have SMP in each of them, it's
31 pointless us contesting." But I think there was a marker put down, I think in part because of
32 the logical consequence of accepting that there was a single product market for everything
33 up to 1Gbit/s. There was a marker put down so BT were being, as it were, pragmatic about
34 their approach up to 1Gbit/s, and so we all just moved on. The idea that the Tribunal could

1 say, "On that basis, we, the Tribunal, will find that up to 1Gbit/s there is a single product
2 market."

3 Anyway, let's move on from that, what about geographic market?

4 MR WARD: Sir, can I just come back on that very briefly?

5 THE CHAIRMAN: Go on.

6 MR WARD: Of course I wasn't here, I don't know how the argument was put. I've been
7 learning all about it from the judgment over the weekend. The essence of it really is this:
8 the appeal challenged certain things. In some respects, but not all, it was successful. Those
9 things are now bad, they must go away, they must be quashed. The question is, what does it
10 leave? Of course, in public law it's a perfectly common concept that one has partial
11 invalidity where a decision maker gets some things wrong but not others. Matters which
12 have not been effectively challenged by BT do, in our submission, still stand.

13 Sir, you asked me about geographic market. Again, as I learned over the weekend, the real
14 argument before the Tribunal was about central business districts and about whether they
15 are sufficiently homogenous with the rest of the UK. If we're talking about, say, about rural
16 rest of the UK and a line of 1Gbit/s, the appeal has not touched upon that.

17 THE CHAIRMAN: Okay, I think what you're saying is, to try and boil it down, that, for
18 example, the Tribunal could say, what, that nobody would dispute, at least on the basis of
19 what it's heard, nobody would be likely to dispute, that up to 1Gbit/s in the rest of the UK,
20 excluding the central business districts, query how are they defined for this purpose, would
21 be a market that still merits some regulation.

22 MR WARD: Sir, you wouldn't need to make such a contentious formulation. I would submit the
23 position is simply that that has not been challenged on appeal, that's the point, that the
24 actual substance of the appeal did not touch on those matters.

25 When I heard Mr Beard say that earlier that BT doesn't want to take advantage of a lacuna,
26 I understood him to be saying that in those areas that have not been unravelled by the appeal
27 BT accepts that some kind of continuing regulation is - and now I am putting words into his
28 mouth, but, in my submission, necessary and appropriate, simply because they're outside
29 the parameters of the argument that succeeded.

30 Now, Ofcom has come up with a different way of trying to achieve this result through its
31 use of urgent powers. My clients, I anticipate, would support that because - Sir, sorry.

32 THE CHAIRMAN: Sorry, it's something you said. You've suddenly moved into what Ofcom
33 may do as a consequence.

34 MR WARD: Let's leave that, Sir.

1 THE CHAIRMAN: I'm sure we'll get on to that. What I think Ofcom have done in relation to
2 the current proposal of the order, which I think is where we were debating----

3 MR WARD: Yes.

4 THE CHAIRMAN: -- was to say, there is this logical progression, which I outlined to Mr Beard,
5 in fact, that the way regulation works is, in order to regulate, to have the power to regulate,
6 you have to make a finding of SMP, and in order to make a finding of SMP you have to
7 have defined your product market and your geographic market. If you get it wrong at stage
8 one, you can't actually then start regulating at the tail end. To take an illustration of that,
9 one of BT's arguments - and I appreciate you've come to this perhaps a little bit more
10 recently than the rest of us, for which you probably should be grateful! - one of the findings
11 was that the Tribunal was unable to be satisfied that Ofcom had properly assessed - and
12 I paraphrase now, probably slightly badly - we were unable to be satisfied that Ofcom's
13 arriving at the CLA, the boundaries of the CLA, had been done on a basis of an actual
14 assessment as to what was required for full competition.

15 MR WARD: Yes.

16 THE CHAIRMAN: They might have done it appropriately, they might have done, but we
17 couldn't be sure because we didn't actually have anybody who'd been involved in that part
18 of the process to assist us. So when we were asking ourselves the question, "Given the
19 other errors that we've identified, can these decisions be upheld on other grounds?" which
20 was part of the remit we had, we couldn't. My understanding is that, for example, Ofcom
21 are saying that because of even that question, because of the way the Tribunal was
22 uncertain, Ofcom are not even going to, as it were, continue their directive in relation to not
23 regulating the CLA, and one of the things they want me to quash, and I will ask Ofcom
24 about this in a moment, is quashing their finding that they weren't going to regulate in the
25 CLA, as defined.

26 It just gives you an illustration of the complexity of trying to segment, or for the Tribunal to
27 fight its way through the various bits of the directions that are being given, the regulations
28 that are being given and the regulations that are made and to take a piecemeal approach.

29 MR WARD: Sir, may I say two things about that: firstly, obviously there's devil in the detail
30 here and I don't presume to address you about that this afternoon. It's a question of whether
31 one can identify and irreducible call in the decision which has not been successfully
32 impugned through this challenge. I do understand Mr Beard to have said that BT does not
33 wish to take advantage of its successes and extend them into areas where it has not
34 succeeded.

1 The second thing I just wanted to touch on is why that is so important, because of course
2 my clients are the purchasers of these products, and the regulatory lacuna that we're talking
3 about is a very real practical concern to them. It's not just a question of whether the price
4 controls are applied, but, as you will recall, Sir, there's a whole series of requirements
5 imposed by Ofcom in terms of quality of service issues, and the like. So this isn't some sort
6 of hypothetical or abstract debate from their point of view.

7 THE CHAIRMAN: You don't need to persuade me. People aren't here just for some sort of
8 hypothetical pleasure.

9 MR WARD: Of course, Sir, but I'm saying the debate we're having this afternoon is really of
10 importance. Will there be a lacuna, because, on the face of it, the draft order that was
11 agreed bilaterally between BT and Ofcom just causes the entire decision to collapse, and
12 then there is a big gap where there is no regulatory protection for my clients in the type of
13 products that are within the scope of that order. Their great anxiety is that that would leave
14 them unprotected in respect of BT. Again, that's exactly why the regulation is there. It
15 will, of course, take time for Ofcom to fully digest the implications of the ruling and to give
16 effect to a new market determination.

17 So the question is, what happens in the interim? The CP Group proposal was an attempt to
18 say the Tribunal, with the assistance of the parties, no doubt, could identify a core of that
19 ruling which has not been invalidated by the Tribunal's ruling. The rural 1Gbit/s is just an
20 obvious example of that.

21 Then I was going to just say something about Ofcom's proposal, but I don't want to rush
22 from one to the other.

23 THE CHAIRMAN: Just again pause on that point. You pose the question: why can't the parties
24 come to a view as to whether there is irreducible core to Ofcom's decision which can't be
25 impugned in the light of the judgment? That doesn't require any access to confidential
26 information or anything like it. It's actually something that could have been done for some
27 period now?

28 MR WARD: Sir, all I can say is, evidently, what's happened here is that the proposals between
29 BT and Ofcom started circulating on or around 10th November, triggered a response in the
30 terms of the correspondence you've seen from CP Group, and I think also Gamma wrote in
31 reasonably similar terms. Why we got there then, I obviously can't assist with. We do say
32 that is a way forward here to preserve regulation in a way that is very obviously in the
33 public interest.

1 THE CHAIRMAN: Right, but to the extent that, as you say, this irreducible core is, in your view,
2 to take the rural 1Gbit/s and below, this is something which BT isn't trying to suggest they
3 don't have SMP in, you would say----

4 MR WARD: Yes.

5 THE CHAIRMAN: -- and therefore they should be regulated and Ofcom would presumably say
6 they must be regulated.

7 MR WARD: Yes.

8 THE CHAIRMAN: But Ofcom are planning to do that, aren't they, in what they propose?

9 MR WARD: That's their proposal, Sir, which I was going to come on to. I think, if my clients
10 were to hear of their proposal, which of course they haven't yet, they would be welcoming
11 of it. The concern about it only is the rapidity with which BT started threatening collateral
12 challenge to it. The ink was barely dry on Ofcom's first letter before there are, effectively,
13 threats by BT of litigation. It is absolutely right, Sir, that that is not a matter for this
14 Tribunal, as you put to Mr Beard. That would be a question of a further challenge on
15 another day.

16 THE CHAIRMAN: I just need to be clear what it is you're worried about. You're not so much
17 worried that Ofcom will drop the ball as BT will succeed in challenging Ofcom's handling
18 of it - is that right?

19 MR WARD: Sir, that's one way of characterising it. What we are worried about is a lacuna, the
20 very lacuna that Mr Beard talked about. Sir, if you were to make an order dismissing the
21 challenge in sweeping terms, as Ofcom and BT have sought, Ofcom then seeks to fill that
22 lacuna through use of its urgent powers, BT then bogs down in litigation, that's evidently a
23 concern.

24 THE CHAIRMAN: I just want to be very clear where your concern really comes in. You don't
25 want there to be a lacuna, I understand that.

26 MR WARD: That's our concern.

27 THE CHAIRMAN: That's number one. Your concern is not that if the order is made, Ofcom
28 will allow there to be a lacuna because they've indicated that that's not what they're
29 planning to do, and to the extent that you don't think that they properly plugged the gap,
30 you can tell them that. But your main concern is that BT might bog them down in some
31 litigation about it?

32 MR WARD: I wouldn't go that far, Sir. Our main concern is the lacuna, and we've presented a
33 way of dealing with it. Ofcom has another way of dealing with it. We're happy with that.
34 The reason why it's not just straightforward and that there's a big argument this afternoon is

1 that BT is already marshalling its weapons to attack it. We're not very concerned about
2 what form the solution takes, we just don't want a lacuna.

3 THE CHAIRMAN: Right. So you what, say that I ought to - strangely enough, although you
4 don't obviously join forces with BT in general terms, you say it would be appropriate to
5 have a couple of weeks or something to allow people to investigate your middle way?

6 MR WARD: Sir, this is where I do get into difficulties on the outer limits of my instructions,
7 because I anticipate that my clients would like everything done as quickly as possible, but
8 I can see, with the greatest respect, that there is virtue in allowing some time to let that be
9 explored, and indeed let Ofcom's proposal be explored as well. I think my clients would
10 much rather that than have everything fall into a hole.

11 THE CHAIRMAN: Yes. I'm sensing it's not really a hole into which it will fall. It will either
12 get bogged down into a quagmire of litigation about Ofcom's filling of the hole, or we're
13 just delaying the digging. I've got to using these analogies, but you're basically saying that
14 there's no reason to rush, at least today, you just need a bit of breathing space to try and
15 avoid----

16 MR WARD: May I just take instructions for a moment, Sir?

17 THE CHAIRMAN: Yes.

18 MR WARD: (After a pause) The short answer, Sir, is yes, but we'd like them to get on with it -
19 in other words, we don't want weeks and weeks of delay. On the other hand, if you make
20 an order today that forecloses the possibility that a CP solution approach could be effective,
21 it may trigger immediately a wave of retaliatory - I'm sorry 'retaliatory' is an unfair word -
22 a wave of litigation from BT. At least a breathing space to see if there can be some
23 common ground approach to this might be beneficial.

24 THE CHAIRMAN: So you join forces with BT, but not for the same reasons?

25 MR WARD: Not for many purposes, Sir.

26 THE CHAIRMAN: Right, okay. Thank you. Anybody else want to have a go before Ofcom?
27 No. You've probably got a vague sense of a few of the questions that have been posed at
28 you.

29 MR VINALL: Yes, Sir.

30 THE CHAIRMAN: Do you want to, before I dive in, take them in your own time?

31 MR VINALL: Yes, please, Sir. The first one essentially is why should there be a remittal order?
32 That essentially is the one where everyone except Mr Ward appears to be *ad idem* that the
33 consequence of the Tribunal's judgment essentially, or exactly as you've set it out, Sir,

1 logically you can't have an SMP condition without an SMP finding without a market over
2 which to have significant market power.

3 So while there might be all sorts of reasons why it might be preferable to have some sort of
4 partial order, Ofcom's position is that's simply not logically possible, and that the
5 appropriate order which reflects the Tribunal's judgment is the one that we have formulated,
6 and the one that I think you find in tab 20. We do say that anyone who wanted to make
7 substantive submissions, both as to legally why the whole edifice doesn't fall, and also
8 practically as to which bits of the edifice somehow remain standing, has had ample time to
9 set that out, both as to the principle and as to the detail, and has had no obstacles in its way
10 in terms of taking instructions as to that aspect of the case.

11 THE CHAIRMAN: Okay. So this is, in a sense, dealing with the CP Group immediately, isn't it?

12 The first suggestion from one of your supporters, as it were, is that actually you, in order to
13 avoid litigation from BT for jumping in rather too soon, should take at least a short period
14 of time to listen to somebody to see if there can be a partial quashing which is to be said to
15 be within the possible scope of a remittal order. Assume jurisdictionally that it is for a
16 second - I appreciate your first point - is that something which you have contemplated, do
17 not want to contemplate? What's Ofcom's position on why it shouldn't have a short period
18 of time to find out whether there is, in fact, another way which doesn't require the use of
19 emergency powers? That's what really being put. I'm trying to paraphrase an amalgam of
20 the points that are put against you.

21 MR VINALL: Yes, Sir, I'm not sure that Mr Ward's submission, and I may be wrong about this,
22 went anywhere close to saying that you could not only do some partial quashing, but you
23 could do some partial quashing that not only leaves some stuff standing, but leaves enough
24 standing to provide adequate regulation going forward and everybody is protected, and
25 there's no need to exercise any powers at all. I didn't understand Mr Ward to go that far.
26 In relation to timing----

27 THE CHAIRMAN: I'm not sure we got down to that level of detail, to be honest.

28 MR VINALL: In relation to timing, and this is perhaps moving on from Mr Ward and coming on
29 to Mr Beard, there is, as everybody I think has accepted, concern about uncertainty in the
30 market, but there is a fundamental difference between Ofcom and BT in terms of the
31 submissions that were made to you about where that uncertainty comes from. The
32 submission that was made to you and it's made, among other places, in para.3 of BT's
33 skeleton, is that the urgency, the need to act, only arises once the Tribunal makes its order
34 and quashes the various regulatory instruments. That is not Ofcom's position.

1 As far as Ofcom is concerned, for reasons I'm going to explain, Ofcom has been concerned
2 about uncertainty ever since the outcome of the Tribunal proceedings was announced. You
3 will have seen in the bundle, Sir, at tabs 1 and 3 letters from Ofcom to the Tribunal
4 expressing concern about that uncertainty.

5 So we say it's not once a quashing order is made that there is a problem, the status quo is,
6 itself, problematic and is not sustainable and action needs to be taken to deal with it. Let me
7 explain why I say that. First, there's uncertainty about the current effect of the conditions
8 which are in place. To give you an example, at tab 5 there is correspondence between
9 CityFibre and the Commission which, if I've understood it correctly, involves CityFibre
10 making a submission to the Commission that the continued imposition of any remedy or the
11 charge control is unacceptable. One could certainly envisage an argument whereby if any
12 attempt was made to enforce this regulation today, it might be met with a collateral
13 challenge to its validity based on the Tribunal's reasons. So there's uncertainty first about
14 whether there is actually any enforceable regulation in place at all as we sit here now.

15 THE CHAIRMAN: If you're going to want me to look at what's in tab 5----

16 MR VINALL: I'll just go there briefly, if I may, Sir.

17 THE CHAIRMAN: This is material that I haven't seen before.

18 MR VINALL: I can take it fairly lightly. It's an exchange of letters between Preiskel & Co on
19 behalf of CityFibre. The first letter is the covering letter from Preiskel & Co, and then over
20 the page there's a letter from the Commission, then there is a letter dated 5th October from
21 CityFibre's solicitors, and one can see the point that is being made over on p.3 of that letter:

22 "Our most recent correspondence reminds Ofcom and BT that the continued
23 imposition of any remedy or the LLCC based charges would be unacceptable."

24 I may have misunderstood what's being said in that letter or I may not, but there may be a
25 suggestion that, in the light of the Tribunal's criticisms of the process and reasoning by
26 which Ofcom made these instruments, these instruments don't actually operate now, or they
27 can't be enforced against anybody.

28 Whether or not that's right, there is a practical problem about enforcing these instruments.
29 Some of them, and important ones at that, in particular the charge control and the quality of
30 service provisions, and, Sir, you heard from Mr Ward about the importance of the quality of
31 service provisions, and the importance of the charge control is, in my submission, obvious.
32 Those conditions operate by reference to a regulatory year which runs to March. So the
33 way in which one assesses whether or not BT has complied with its obligations under the
34 charge control and under the quality of service provisions is you get to March, you look at

1 the full year's performance and you assess it by reference to certain benchmarks. If the
2 position is that everybody sitting here now knows that something is going to happen before
3 March which will mean that that regulation is not going to remain in place then, as a
4 practical matter, that regulation is a dead letter now. BT could raise its price - I know they
5 say they won't but they could raise their prices or fail to hit the quality of service standards,
6 and there would be real practical difficulties in enforcing those obligations if they're not
7 going to run for the full regulatory year.

8 The third kind of uncertainty that is present in the status quo is the uncertainty about what
9 remedy the Tribunal is actually going to grant. You've heard my learned friend Mr Ward
10 suggest that it is not obvious that the appropriate remedy is to quash everything, that, in
11 fact, some bits of the regulation might survive. To the extent that that's an opinion that's
12 shared more generally in the market whether by people who might subscribe to BT's bonds
13 or anybody else, that is problematic, we say. It's worth noting, Sir, that if one looks for
14 BT's current pricing in this market, it's stated in a notice which contains an express
15 reservation of rights to change and/or withdraw the price notification at any time as a result
16 of and/or in light of any order made by this Tribunal.

17 So for those reasons we say it's not that things are satisfactory now, but when you make the
18 order there will be a problem which will need to be addressed urgently. Ofcom's view is
19 that there has been a problem about market uncertainty ever since the decision of this
20 Tribunal was announced, and it needs action to deal with it.

21 THE CHAIRMAN: Okay. I think what is actually said is a little bit more nuanced than that.

22 I think what's actually said against you is you may be right in the sense that since we
23 announced the decision in July everybody has been wondering why. We gave the answer in
24 early November, a little while ago now, but they may have been wondering over the
25 summer. There's been uncertainty, and assuming there's uncertainty now, why does it need
26 to involve Ofcom stepping in tomorrow as opposed to, say, next week, or indeed the week
27 after, the 4th December. What is, I think, said against you is what is so crushingly urgent
28 that you want to put in place emergency regulation tomorrow, which can't wait for another
29 two weeks? Admittedly, you have undesirable uncertainty, but I think it is said that you
30 may, in fact, make things worse rather than better. What is the urgency that has now driven
31 the requirement to announce tomorrow?

32 MR VINALL: Sir, I think there are two answers to that. The first is the one I've already given,
33 which is the uncertainty, which in Ofcom's view has gone on for quite long enough and
34 needs to be dealt with now. The second----

1 THE CHAIRMAN: Sorry, that's not actually an answer to my question. Why have Ofcom taken
2 the view that the uncertainty has gone on long enough that it needs to be dealt with
3 tomorrow. Bearing in mind there's been the uncertainty, as you've pointed out to me, since
4 July, Ofcom could have put an end to that uncertainty at an earlier stage, could it not? It
5 could have said, "The Tribunal have said we've got it wrong on this, that and the other". If,
6 logically, the conclusion that Ofcom has reached is that the Tribunal has no other basis for
7 doing anything other than to quash the whole, because that's the only logical thing the
8 Tribunal could do, what has stopped Ofcom from saying at any time up until now publicly,
9 "In the light of what the Tribunal has announced, subject to seeing the detailed reasoning,
10 the only logical way the Tribunal can go is to quash all the regulation, and in that scenario
11 don't worry, market, Ofcom won't allow there to be a lacuna, and Ofcom will be putting in
12 place some form of emergency regime to make sure that there's no lacuna."

13 I think one of the points that has been made is that that could have happened, could still
14 happen now, but you seem not to be interested in doing that because you want to have
15 something tomorrow, and I'm asking you why now? Why now?

16 MR VINALL: Sir, what you're seeing is the end of a process, and that process that has involved
17 Ofcom looking at this in a thorough and diligent way as soon and as expeditiously as it
18 possibly could. The position, to take the first period between the announcement of the
19 decision and the announcement of the reasons, Ofcom took the view that it couldn't go
20 public on any decision without knowing exactly what the Tribunal's criticisms were. There
21 was obviously some information in the very short form announcement, but Ofcom took the
22 view that there was not enough detail about exactly where and in what respects Ofcom was
23 found to have gone wrong in order to actually produce a remedial proposition.

24 Nevertheless, Ofcom did start work during the summer.

25 THE CHAIRMAN: Hang on. I'm struggling to match that with your first submission to me,
26 which is that the only logical thing I can do, given that the Tribunal had announced at the
27 start it was going to quash the three findings, the only logical consequence from that is that
28 the whole of the final statement, the whole of the regulation based upon it, had to go.

29 MR VINALL: Sir, we're talking about two different things, in my submission.

30 THE CHAIRMAN: Are we?

31 MR VINALL: You're talking about what's the remedy, quash everything; I'm talking about
32 what happens next, what do we put in place?

33 THE CHAIRMAN: No, no, your very first submission to me was that the consequence of what
34 the Tribunal decided was that you can't have regulation without a valid decision, and if the

1 decision was invalid because Ofcom had not got the geographic market, product market
2 definition right, then there can't be any valid regulation based upon that decision. I thought
3 your first submission to me, when you very first started, was that actually, logically, we
4 have to go the full hog.

5 MR VINALL: That's right, and I don't in any way resile from that, but the question is----

6 THE CHAIRMAN: If that is right then Ofcom have known that that's the position they were
7 going to be in since July.

8 MR VINALL: Yes, they've known they were going to have to do something, but what they
9 couldn't know until they got the reasons was what it would be open to them to do, what it
10 would be open to them to put in place? They can't see what the parameters of possible
11 solutions are without knowing what they went wrong with before.

12 THE CHAIRMAN: I appreciate that they wouldn't know precisely what form the use of the
13 emergency powers would take, but the fact that they knew that they would need to use them
14 or consult must have been apparent since July. I'm sorry, maybe I'm misunderstanding
15 what you're saying to me.

16 MR VINALL: So in July Ofcom started essentially scenario planning, looking at what it might
17 do in various different scenarios about what reasons would come up. Ofcom has been
18 working hard from 26th July through August. They started writing up the reasoning for
19 potential temporary measures documents in August, but they couldn't actually say what
20 temporary measures would be open to them without knowing what errors they were found
21 to have taken.

22 THE CHAIRMAN: That I do understand.

23 MR VINALL: In parallel with that, as I've said, Ofcom wrote to the Tribunal on 27th September
24 expressing concern about the uncertainty that was in place. They wrote again on
25 30th October - those are tabs 1 and 3 of the bundle. Then, once they got the embargoed
26 copy of the reasons on 3rd November, Ofcom immediately started considering within the
27 embargo ring the justification for imposing temporary measures in the light of what the
28 Tribunal actually found. On 6th November, as part of that process, Ofcom wrote to the
29 Tribunal to request the inclusion of economists within the embargo ring. The decision
30 actually comes down on 10th November, and then by 14th November Ofcom is in a position
31 to put a proposal before its Board, and the Board consider on 14th November, is this an
32 appropriate case for the exercise of the power to make temporary measures, and is this the
33 appropriate measure to take? The Board considered that, and then on 16th November you
34 have the letter that you find at tab 20 that sets out Ofcom's proposals. So, in my

1 submission, Ofcom has acted as quickly and as diligently as it could. It has been concerned
2 about this uncertainty since July, and it has done everything it can to get this replacement in
3 order.

4 THE CHAIRMAN: Yes, but I don't think that's actually the thrust of my question to you.

5 MR VINALL: I'm sorry, Sir.

6 THE CHAIRMAN: Other than perhaps misunderstanding what you'd said to me a little bit earlier
7 about what Ofcom could or couldn't do in July, I don't think the gist of what's being said is
8 that Ofcom haven't, as it were, been doing what they could do, or thinking about what they
9 could do.

10 Sorry, let me go back. I don't think the gist of what I was putting to you is that Ofcom have
11 been sitting on their hands and not thinking about this before now. I think the gist of the
12 question I was putting to you is, assume that Ofcom have reached a view, what is said is,
13 why does it need to be today? Why can't Ofcom take representations over the course of the
14 next, say, one week or two weeks as to what they have concluded? Parties in the industry
15 have not actually, it is said, had the opportunity to tell you, other than in a litigation
16 scenario, why there may be a more viable alternative open to Ofcom.

17 It's not so much that you've been dragging your feet up until now, it is the 'why now? Why
18 now, as opposed to next week or the week after? I think that's where certainly a number of
19 parties are anyway.

20 MR VINALL: Yes, Sir, there are several answers to that. The first is that Ofcom has a number of
21 consultation duties, and it takes consultation very seriously. There is a concern that when
22 has very, very short consultation periods, that's not a real consultation. You've already
23 heard from Mr Beard before we've even published our decision that it's going to be argued
24 that, because we've taken temporary measures, if we then, as we say we will, invite
25 representations about the temporary measures we've taken, it will be suggested that we have
26 a closed mind and that we can't deal with those representations properly.

27 There's a need for action now. There will need to be a more extended period for people to
28 make representations, and it really comes down to this, Sir: what's the difference between
29 putting the measures in place and then being willing to listen to representations. I don't
30 think, Sir, you've got Ofcom's letter of today, but that makes very clear that it will be open
31 to parties to make representations about the temporary measures once they've been taken,
32 than doing it the other way round.

33 THE CHAIRMAN: Should I have look at the letter? Is it in----

34 MR VINALL: I don't know if I've got multiple copies. Let me hand this up.

1 THE CHAIRMAN: It's not in the bundle at the moment?

2 MR VINALL: Does everybody else have it? (Same handed) The points that are made in this
3 letter are these, Sir: Ofcom has a range of statutory obligations to consult. It also has
4 powers to take temporary measures without consultation. That's what the statute says.
5 Ofcom has considered whether or not it is appropriate to exercise those powers, whether the
6 pre-conditions for exercising those powers are met, and that it is actually appropriate to
7 exercise them. Ofcom's decision is that, yes, it is appropriate to exercise them.

8 THE CHAIRMAN: Sorry, are you reading a different letter to me?

9 MR VINALL: I'm glossing the letter, it is fair to say! I'm now going to come on to the letter,
10 and that's what the first substantial paragraph of this letter does. It sets out in the first and
11 second sentences that Ofcom has considered whether the criteria are met, and it concludes
12 that they are. Then it goes on, the last sentence of that paragraph:
13 "If having read that document ..."
14 that we are going to publish on Tuesday -
15 "BT does not agree with our reasons, it will of course be free to make
16 representations to us or to appeal our decision in the normal way."

17 THE CHAIRMAN: Pause there. If I've got this right, what Ofcom is saying is, "Look, the only
18 logical way to proceed for the Tribunal in the light of its decision and the fact that it, in
19 essence, undercuts the basis of Ofcom's current set of regulations is to quash". There are a
20 number of ways in which, potentially, that might have been addressed, but Ofcom has
21 considered the position and has decided that it's appropriate to exercise the power to
22 regulate without consultation.

23 MR VINALL: Yes.

24 THE CHAIRMAN: "That's our decision, we're the regulator, not anybody else, not the Tribunal,
25 not the regulated, it's our decision, we're the regulator, we've taken into account the various
26 factors we have, if you don't like it then you can whatever action is available to you in the
27 ordinary way", and Ofcom has decided that that's what it's going to do.

28 MR VINALL: That's right, but also we've said we will listen to representations once the
29 temporary measures have been put in place.

30 THE CHAIRMAN: Fine. In fact, in a sense that could just be designed to make me feel a little
31 more cosy. In reality, actually I think what you're really saying is, "From my perspective,
32 the way you decide to proceed in light of the logical consequence of the Tribunal's decision
33 is a matter for you, be it on your own head."

34 MR VINALL: With great respect to the Tribunal, yes.

1 THE CHAIRMAN: You don't need to beat around the bush. If you're basically saying I have a
2 limited remit here and we've reached our decision and we've made it, and all the rest of the
3 concern about how you're proposing to act is something that's on Ofcom's head, and if
4 Ofcom, in full knowledge of the fact that everybody else seems to be unhappy about it,
5 decides to go ahead then actually it should be allowed to do so and take the consequences.

6 MR VINALL: I don't shrink from that submission, Sir, that is the submission.

7 THE CHAIRMAN: That was sugar coating it. That's really, I think, essentially, what that first
8 paragraph says, isn't it?

9 MR VINALL: Yes, and I also seek to persuade you that actually the decision that Ofcom is
10 wanting to make is a sensible and appropriate one, but---

11 THE CHAIRMAN: Lovely you should try, but I think, in fact, the logic of your argument is that
12 actually it's not on my desk, it's not my job.

13 MR VINALL: Sir, there's simply no logical connection with what you're being asked to do
14 today, which is to delay making the order remitting the matter back to Ofcom, and the real
15 concerns that these CPs have.

16 THE CHAIRMAN: There is no legal connection, I think is what you're saying, Legally what
17 you're saying, I think, is the Tribunal has reached its decision, it can give effect to it
18 logically by the order that has been floating around, because that's the only logical
19 consequence, and the decision as to what to do about it, as indeed the decision as to whether
20 to entertain any half way house or anything in the meantime and whether to go ahead and
21 regulate without consultation or with retrospective consultation is just down to Ofcom.

22 MR VINALL: That's right, Sir.

23 THE CHAIRMAN: And I can be, to use an expression which I don't use in any derogatory way,
24 I can be as pragmatic as I like, but at the end of the day my jurisdictional remit stops at
25 Ofcom's door in this respect.

26 MR VINALL: Yes. I don't think I can submit to you that you don't have jurisdiction to decide
27 when you make a quashing order, plainly you do, but I would suggest that the purposes for
28 which you're being asked to delay the making of that quashing order are not properly
29 matters for this Tribunal.

30 THE CHAIRMAN: If I put it another way, which you won't necessarily agree with, but it's sort
31 of perhaps pragmatic: you've decided for better or for worse that you want to do it by
32 putting in place the regulation first and listening later.

33 MR VINALL: Yes, there's a power for us to do that and that's what we're doing.

1 THE CHAIRMAN: And your decision to do that may be challengeable in the normal way,
2 I think, as you say in the letter, but it's not for me to tell you or to try and cajole you to do it
3 any other way?

4 MR VINALL: Yes, I do say that. As I say, I also have submissions about why the various
5 proposals that are being made about other ways are not sensible ones, but is a matter for
6 you, Sir, as to whether you want to hear those submissions.

7 THE CHAIRMAN: That's, when we cut through it, the hard legal analysis. The pragmatism,
8 other than you've come to the end of your process, your internal process and reached your
9 decision as to what to do now, you're still not, in a sense, saying that there's any particular
10 magic about tomorrow or the next day or the next day. Is this right, it's a sliding scale, you
11 just don't want the uncertainty to go on any longer, or what?
12 I'm now addressing this question that you - we get away from the legal analysis that I've
13 just outline - if you accept, as I think you just did, that I have a discretion as to when I quash
14 and remit, you say that the concerns that I've heard shouldn't lead me to delay.

15 I understand that.

16 If I was to ask it from the other way round, what prejudice or harm beyond just a few more
17 days from the already uncertain period that has gone on since July, what actual other
18 prejudice do you say anybody would suffer if, for example, I was to say a few more days?
19 Is there any reason----

20 MR VINALL: I am being asked to take instructions. (After a pause) Sir, there are two answers
21 to that. The first is the one that you're sick of hearing from me, which is that every day that
22 passes is another day when consumers are potentially at risk and there is uncertainty in the
23 market.

24 The second point is----

25 THE CHAIRMAN: Sorry, why are consumers at risk? Is that because you say people may not
26 agree to - why are consumers at risk, sorry? There is *extant* regulation, which, apart from
27 the point that people may treat it as a dead letter, what's the----

28 MR VINALL: That is the point, Sir.

29 THE CHAIRMAN: I thought the dead letter was to do with annual reporting rather than anything
30 else.

31 MR VINALL: Let me put it another way: Mr Ward's clients buy these products. They are
32 entitled under the regulation to a particular standard of quality of service when they buy
33 them. In normal circumstances, BT is incentivised to provide that quality of service,
34 because if you get to the end of the year and Ofcom finds that it hasn't provided that

1 standard of service on average over the year, then Ofcom can take action against BT to
2 enforce that.

3 The problem now is that there is no incentive, or there isn't the same incentive, for BT to
4 deal with its prices in the way that the *extant* regulation provides for, and to provide a
5 quality of service in the way that the *extant* regulation provides for, because if the year is
6 not going to come to an end then there is essentially no mechanism, or there's a doubt about
7 the effectiveness of the mechanism, for enforcing those obligations.

8 Sir, could I have a moment to take instructions?

9 THE CHAIRMAN: Sure.

10 MR VINALL: (After a pause) The other point that has been given to me, and I am grateful, is
11 that when one comes to the temporary measures they would operate on the basis of calendar
12 months, and so a delay into December, even early December, would effectively prevent
13 Ofcom from taking temporary measures that bit until January.

14 I don't know if that's right as a matter of law, but as a matter of practice, that is how it
15 would be likely to work. I'm told that it's to do with the way in which the costs modelling
16 works. There would have to be a re-calculation if you didn't do it within calendar months,
17 which would cause practical problems.

18 THE CHAIRMAN: You're saying that, effectively, by delaying until December, I'd be delaying,
19 in effect, whatever regime you put in place biting until the beginning of the calendar month?

20 MR VINALL: At least in relation to the charge control, as I understand it.

21 THE CHAIRMAN: Okay. All right, that's the position in relation to, you'd say, leaving Ofcom
22 to go and regulate, the first paragraph of this letter.

23 The second paragraph of the letter deals with the question of the content of temporary
24 conditions is market sensitive.

25 MR VINALL: Yes.

26 THE CHAIRMAN: Just so that I do understand one thing which puzzled me when I looked at
27 your letter to the parties of the 16th. I didn't actually understand at the bottom of p.2 (tab
28 20), you have said:

29 "Ofcom considers [in summary] that there is sufficient evidence to conclude that
30 BT has significant market power in relation to CISBO services at and below
31 1Gbit/s in the London periphery, the central business districts of Bristol and
32 Manchester, and the rest of the UK (excluding Hull, the Central London Area and
33 the central business districts of Bristol, Manchester, Birmingham, Leeds and
34 Glasgow)."

1 I couldn't quite at the moment understand why Bristol and Manchester had been mentioned
2 twice there. Is it a typo or am I just not understanding something?

3 MR VINALL: The words in brackets qualify the rest of the UK. Essentially, we were told to go
4 away and look again at geographic market definition with particular reference to the CBDs,
5 because some of the CBDs might be more competitive than we thought they were. It's a
6 crude summary of what you and your colleagues decided, Sir.

7 THE CHAIRMAN: Okay.

8 MR VINALL: And so the way in which Ofcom is proposing to deal with that is to define
9 different geographic markets. So the first one that's referred to in this letter - and obviously
10 a different product market as well, but we're talking about below 1Gbit/s.

11 THE CHAIRMAN: Is the import of that that Ofcom doesn't think that BT has significant market
12 power in the central business districts of Birmingham, Leeds and Glasgow?

13 MR VINALL: For the purposes of the temporary conditions, yes.

14 THE CHAIRMAN: I see.

15 MR VINALL: Taking a conservative approach, and without prejudice to what conclusion we
16 may reach after full consultation, we've got to do something.

17 THE CHAIRMAN: Okay, I was just trying to understand. That's a point of detail I just didn't
18 understand when I read it quite closely, but I do understand it now.

19 MR VINALL: I am grateful, Sir.

20 THE CHAIRMAN: You say the content of the temporary conditions is market sensitive. In what
21 sense does Ofcom mean 'market sensitive'? What I'm really going to come on to is, just so
22 I understand, why Ofcom doesn't consider it appropriate to enter into bilateral
23 confidentiality arrangements to enable people outside the current confidentiality ring to
24 have any notice of the restrictions you're going to put in place, Ofcom is going to put in
25 place.

26 MR VINALL: Sir, to state the obvious point first, the presence or absence of regulation and the
27 content of any regulation obviously affects the balance between different operators in this
28 market, and at least has the potential to affect the values of those companies and the prices
29 at which their shares trade.

30 Ofcom often deals with market sensitive information, and is concerned not to upset the
31 integrity of capital markets. In respect of the proposal of bilateral confidentiality
32 arrangements, Ofcom has considered whether that would be a satisfactory arrangement, and
33 it has concluded that that would not.

1 THE CHAIRMAN: Those two things, although they are wrapped up into the same paragraph,
2 they're not necessarily the same. As I understand it, what you're saying is the imposition of
3 restrictions could have an effect, once known, on the share price of an operator?

4 MR VINALL: Yes, as I understand it, that's what we mean by 'market sensitive'.

5 THE CHAIRMAN: That's what I was trying to get from you, and that's my understanding.

6 MR VINALL: Just so that you have a flavour of the way Ofcom deals with this, as a matter of
7 general practice - obviously, it makes announcements in all sorts of communications
8 markets that can move prices.

9 THE CHAIRMAN: You don't need to explain market sensitivity. I am very familiar, in a
10 different market context perhaps, with market sensitivity of that type. That doesn't address
11 the question about whether specific nominated people, on terms that they accede to a
12 confidentiality undertaking, are let into the knowledge of what Ofcom is proposing so that
13 instructions can be taken, which is a second issue.

14 MR VINALL: Yes. Sir, the first point is that contractual bilateral confidentiality obligations are,
15 as we understand it, not enforceable by Ofcom through regulatory action, not enforceable
16 by this Tribunal's contempt powers. The only way they would appear to be enforceable is
17 by running off to the Chancery Division and obtaining damages for breach of confidence,
18 which would obviously not be an adequate remedy for a breach of such a contractual
19 obligation. So there's a real issue about enforcement.

20 The second issue is that we fundamentally disagree with the way in which the position is
21 put in BT's correspondence on this issue. BT says, "Look, we are the ones who you're
22 going to be doing this to, we're in a special position". That is absolutely wrong, in our
23 submission. This is a step that we take that affects the whole market, buyers and sellers of
24 these products. BT is not in any kind of privileged position when it comes to getting
25 advance notice.

26 To the extent that Mr Beard's clients want to address queries from their investors, no doubt
27 so do Mr Ward's clients.

28 So that's a lot of bilateral contracts in order to make that fair to everyone. That gives
29 corresponding rise to a greater risk, and I'm not casting any aspersions on anybody, a
30 greater risk that the information will leak.

31 So, in broad summary, Sir, those are Ofcom's concerns about bilateral confidentiality
32 arrangements.

33 The way that Ofcom makes these announcements, it makes them at 7 am before the markets
34 open.

1 THE CHAIRMAN: Right. Again, presumably you say - is this right - the same sort of thing as in
2 the first paragraph, that if you take the view, as a regulator, that that is so, it's not for me to
3 say, "I think you're wrong, think again."

4 MR VINALL: Again, with great respect, we do say that. There is another point actually, Sir,
5 I don't now recall whether this sort of issue - I think I wasn't involved at the time it would
6 have arisen, so I don't know whether in this case there were the usual disagreements about
7 which individual should be inside and outside particular confidentiality rings.

8 THE CHAIRMAN: There was a very small one. Actually, there were, there was a small spat at
9 the start.

10 MR VINALL: You'll have experience in practising in such cases.

11 THE CHAIRMAN: I have experience of this one. I can remember there was a little bit of a----

12 MR VINALL: It's not always straightforward.

13 THE CHAIRMAN: Anyway, you say that Ofcom has got a rational reason for not wishing to
14 entertain that suggestion.

15 MR VINALL: Yes.

16 THE CHAIRMAN: And again, it's on your head be it, to put it bluntly.

17 MR VINALL: Yes, Sir.

18 THE CHAIRMAN: And so the third paragraph of the letter is saying that the draft order that's
19 currently floating around, which is one to which I don't think anybody has actually said it
20 doesn't work, people have said, "Well, we don't support it any more", or people have said,
21 "There may be another way of doing it in a more considered way or a more nuanced way" -
22 I am trying to summarise Mr Ward's submissions - "there may be another way of doing
23 this." Nobody has actually said there's something wrong with the order which has been
24 floating around.

25 MR VINALL: That's right, and, Sir, as you observed, I think to Mr Beard, I can't remember who
26 it was, that is something on which there has been no impediment to taking proper
27 instructions from clients.

28 THE CHAIRMAN: Yes.

29 MR VINALL: Sir, unless I can assist further, those are my submissions.

30 THE CHAIRMAN: No, thank you very much. Mr Beard, any reply?

31 MR BEARD: I think the transcript is going to make interesting reading in relation to these
32 matters. As I understand Ofcom's position, there's a concern that a short consultation
33 process might be criticised, and so it's much better to have no consultation process. That

1 seemed a remarkable proposition from a public authority in circumstances where we
2 recognise that any time period for consultation would be very brief.

3 The second point that is remarkable is the idea that putting in place a determination and then
4 asking for representations is somehow the same as giving a 'minded to' determination, and
5 then considering representations that come in.

6 Apart from it being an astonishing submission, it's also contrary to law, as we pointed out in
7 para.22 of our skeleton, because there is obviously a public body that is not open-minded in
8 considering further representations when a determination has already been taken.

9 So on basic points of fairness, the manner in which Ofcom is dealing with these issues is
10 remarkable.

11 There are various aspersions being cast on what BT might be doing. Pricing has been
12 referred to, quality of service has been referred to. In particular, Mr Vinall emphasised that
13 the pricing arrangements put in place by BT are subject to a condition saying, "These are
14 subject to the outcome of CAT proceedings. Mr Vinall notably didn't suggest that BT has
15 in any way diverged from the leased line charge control, nor indeed would it, nor indeed
16 should it or could it in circumstances where the order in question has not been made.

17 Now, I will re-emphasise the point I made at the outset: those concerns about fairness
18 really do inform this Tribunal's discretion in relation to timing in respect of which it should
19 make the order. We only heard about these proposals three working days ago. We've not
20 had an opportunity to take instructions. The references being made to market sensitivity to
21 transpire to relate to share dealing. Mr Vinall is not right that there are ineffective
22 enforcement mechanisms. If someone engages in insider trading and breaches an order of
23 this Tribunal, it's very difficult to unwind these matters----

24 **THE CHAIRMAN:** The broader point that came through, as I think became apparent when I was
25 questioning Ofcom, was that at the end of the day I have a limited remit, and all the
26 argument about the way in which Ofcom is proposing to proceed may be valid argument,
27 but I'm not in a position to adjudicate upon that, I just can't reach a view, but in any event
28 it's not within my remit to reach a view. It's Ofcom who have decided upon a course of
29 action which they say I, in a sense, have no jurisdiction to force them to deviate them from,
30 and they acknowledge that, good, bad or indifferent, their conduct and process in that
31 respect may be open to challenge in another Tribunal and they will take that on the chin.

32 **MR BEARD:** Let me make two further points. First of all, just going back to this letter of
33 20th November, it's in response to a letter sent by BT on 17th November, which is at tab 40
34 in the bundle. As I mentioned in the course of my opening submissions, BT, quite properly,

1 put forward two ways that Ofcom could deal with the fundamental unfairness of the
2 position it was adopting. One can see that on p.2, the long paragraphs, we can see two
3 options. The first is enabling a small number of additional people to see the material so that
4 instructions can properly be taken. Frankly, the idea that the logistics of dealing with,
5 I think it was two people from each of the relevant parties and five it must be said from BT,
6 would be small.

7 THE CHAIRMAN: Assume for a minute that there is force in what you say. If Ofcom say “not
8 interested”----

9 MR BEARD: We have to challenge it, understood.

10 THE CHAIRMAN: -- I can't do anything about that.

11 MR BEARD: You can't do anything about it to overturn that, but the fairness does go to your
12 discretion whether or not to make the order tomorrow.

13 THE CHAIRMAN: That became very obvious I thought when I was engaged with others. Just
14 allowing more time doesn't help anybody unless the time can be used by yourself and CPs
15 to consult with other people, and therefore the critical question is, can there be consultation
16 with other people, with your clients for this purposes, but just say clients, beyond the
17 current confidentiality ring? On that, if I can't order Ofcom to do it, Ofcom say, “Heard
18 what you say, but no, thank you very much”, then there is no point.

19 MR BEARD: There are two points. The reason I took you to this letter was (a) to highlight that
20 we'd spelled out two options; and (b) that Ofcom have not engaged with the second of
21 those options. You will see that the second option obviates the need for bilateral
22 confidentiality arrangements. It's the 'minded to' decision, and one looks at the letter of
23 20th November, and there is no reference to it at all.

24 THE CHAIRMAN: You're quite right, and I think it may be my fault in not putting that point to
25 Mr Vinall which I probably ought to have done. I think I probably ought to do that. You're
26 right, that point hasn't been taken up, but that is my fault.

27 MR BEARD: It's a matter for you, Sir, but Mr Vinall has not come up with a response. We
28 wrote, and this is the response we've had to deal with it.

29 THE CHAIRMAN: He's probably reeling from the other questions I was putting to him. I do
30 need to put that question to him and you're quite right, because it was raised in opening.
31 My fault. Sorry, you've got another one.

32 MR VINALL: Not reeling at all, Sir!

33 THE CHAIRMAN: Okay, Ofcom should, it is said, obviate the necessity to worry about bilateral
34 confidentiality restrictions, and Ofcom ought simply to say publicly tomorrow what it----

1 Let me put it in this way: if I was to say to you at the moment I'm wholly unattracted by
2 the idea of crafting some half way house type order that effectively carves out bits of the
3 regulation that should be left standing because it's just not within my remit, or I find it
4 illogical, or whatever. So you get that steer. You know where you're going to end up,
5 you're going to end up with an order of the type that you, yourself, say is the only logical
6 order. That's the hypothesis. Assume that's right, you know where you're going to be. It
7 is said what you could do is simply to announce that's where you're going to be in, say, two
8 weeks time, and tell the market openly and across the piece that your proposal to deal with
9 that is to put in place emergency regulation on the making of that order in two weeks time.
10 That way people have the opportunity to tell you that you're about to make some
11 horrendous error. Why not give them the chance? You may reject it. You may decide that,
12 actually, after all, it's fine, but why not at least give yourself the chance to have two weeks
13 of correspondence from the market in general who would then not be able to accuse you of
14 not listening at all, albeit that they might accuse you of only listening for a very short period
15 of time, in the sense that at least you would have had the opportunity to listen for, say, a
16 week or two weeks in the meantime. I think that's really the way it would run.

17 MR VINALL: Yes, Sir, so three points on that, if I may. The first is that the way in which the
18 statutory provisions operate is there is the general power to make conditions with
19 consultation, and there is the exceptional power to make temporary provision without
20 consultation. So we're dealing with a particular statutory regime where, on certain
21 conditions, Ofcom is entitled to exercise a power without consultation. That's not a
22 complete answer, but that's the background.

23 THE CHAIRMAN: Sorry, wait a minute. Are you say Ofcom has either got to consult fully or it
24 only has a power to do it without consultation? What, it's banned from consulting?

25 MR VINALL: No, I don't make that submission at all, Sir.

26 THE CHAIRMAN: We haven't actually looked at the emergency powers, at least I haven't,
27 because I couldn't find them strangely enough. They must be a very recent addition, are
28 they?

29 MR VINALL: I'll take you to them in a moment, Sir.

30 THE CHAIRMAN: They haven't made it on the Government legislation website as far as I can
31 tell.

32 MR VINALL: In terms of the substance, issuing a 'minded to' decision would cause further
33 delay. How much further delay, one might ask. We've heard a week, two weeks. If you
34 imagine the kind of submissions that Ofcom would receive, if Ofcom publishes a proposal

1 saying it is minded to define the geographic markets that you can see that the letter at tab
2 20, the product markets as you can see in the letter at tab 20, and to impose particular SMP
3 conditions on all of those things, we are going to get a lot of people saying a lot of things,
4 which may be perfectly reasonable and sensible but which will need to be considered
5 properly. We are not in the business of doing sham consultations. When we do
6 consultations we do them properly, and a week is simply not going to do the trick here.
7 When we consult, it's with a view to make an informed decision after we've properly
8 considered the representations made by the consultees.

9 THE CHAIRMAN: So what you're saying is that the reality of the situation is that you simply
10 couldn't properly deal with the submissions that you would get in the sort of period of time
11 that we're talking about and you don't go in for half-baked consultations. Is this right: it is
12 a regulatory decision. You either consult properly over an extended period or you don't
13 consult at all, because otherwise it's a half-baked consultation.

14 MR VINALL: I don't think, Sir, you're suggesting that we're presenting a false choice between
15 no consultation and a very long consultation, but when you consider the substance of what
16 we're likely to get, if we're going to consider it, it would need to be considered properly.
17 With respect, I don't think I have to put it as high as you put it, Sir. It's a balancing
18 exercise. The regulator has to decide, is it better in the interests of the objectives of Ofcom
19 to act now and then have an opportunity to listen to representations once the regime is in
20 place, or is it better to do what BT is suggesting?
21 I'm not suggesting that you couldn't have a reasonable regulator that decided the other
22 thing, but that's not what Ofcom has decided.

23 THE CHAIRMAN: Is this right: essentially, again, it's a regulatory decision as to how to
24 consult?

25 MR VINALL: Yes, Sir.

26 THE CHAIRMAN: Can you just show me, because I probably should have asked for this first of
27 all when we got into it, but where is the power that you are proposing to exercise?

28 MR VINALL: Sir, there are three of them, they're in tab 41. The reason that there are three of
29 them is that the Act provides differently for conditions generally, SMP conditions and
30 something else. Sir, the three are (i) market definitions, (ii) market power definitions, and
31 (iii) directions under SMP conditions. (After a pause) I'm very grateful to my learned
32 junior. First of all, it's market definition and market power definition, and you find that in
33 s.78 to 86; secondly, and I'll take you to the particular bits, SMP conditions, and that's in
34 s.45; and thirdly, directions, approvals and consents pursuant to those conditions, and that's

1 s.49. I'm sorry that was a bit laborious, but we got there in the end. So under each of those
2 three sets of provisions, there is a broadly equivalent power to take temporary measures.

3 THE CHAIRMAN: Right.

4 MR VINALL: Can I take you, just by way of example, to the ones in s.78 to 86. Section 78 is
5 towards the back of the tab.

6 THE CHAIRMAN: Yes, I've got 78, "Circumstances required for the setting of SMP
7 conditions".

8 MR VINALL: Yes. The consultation requirements start at s.80A. Normally, under s.80A, there
9 has to be domestic consultation and that has to be for at least a month, subject to Ofcom's
10 power to reduce that period. No, there is no power to reduce that period, I'm so sorry.
11 There's a carve-out to that at s.80A(2).

12 MR BEARD: I think you ought to look at subsection (7) as well.

13 MR VINALL: I was right first time. There is a power to adopt a shorter period. Section 80A(2)
14 disapplies the requirement of a domestic consultation in the circumstances there set out. In
15 Ofcom's opinion, and in my submission that has some importance, (a) there are exceptional
16 circumstances; and (b) there is an urgent need to act in order to safeguard competition and
17 to protect the interests of consumers.

18 THE CHAIRMAN: 80A(2), "where the proposal is of EU significance and in Ofcom's opinion" -
19 is that what this is?

20 MR VINALL: Yes, this all takes place under the Common Regulatory Framework.

21 THE CHAIRMAN: That's what EU significance means?

22 MR VINALL: Yes.

23 THE CHAIRMAN: Yes, okay, so it's not that it just applies to domestic markets, it comes from
24 an EU regulatory base in terms of Directives, and the like?

25 MR VINALL: Yes, and flowing on from that, Sir, there's also in 80B a requirement for what's
26 known as EU consultation, which is sending the proposal to the Commission.

27 THE CHAIRMAN: Right. The point that I inadvertently latched on to, you can make a
28 determination - is this right - with such short period of consultation as you consider
29 reasonable in the circumstances, or with no consultation at all----

30 MR VINALL: Yes.

31 THE CHAIRMAN: -- if you take the view that there's an urgent need in order to safeguard
32 competition and protect the interests of consumers.

33 MR VINALL: So the criteria are different. In order to shorten the one month period under sub
34 (7) there have got to be exceptional circumstances; and in order to disapply the section

1 completely under sub (2), there have got to be exceptional circumstances and an urgent
2 need to act in order to safeguard competition and protect the interests of consumers.

3 THE CHAIRMAN: Right, but at the end of the day the question of whether that's right or wrong
4 is one that somebody has to make a decision on, and at least under the statute Ofcom has,
5 itself, to form the opinion or be satisfied, and it's your decision and you will stand or fall on
6 it?

7 MR VINALL: Yes, Sir.

8 THE CHAIRMAN: The point is it's not for me to say, actually, I don't think, sitting with this
9 level of knowledge or insight, you should be doing X or Y?

10 MR VINALL: Sir, yes, leaving aside questions of jurisdiction, the point you make is, in my
11 respectful submission, a correct one, you simply don't have the material to answer that
12 question.

13 THE CHAIRMAN: Yes.

14 MR VINALL: I think I'm right in saying that the other two groups and sections work in the same
15 way.

16 THE CHAIRMAN: So in answer to the point that Mr Beard reminded me I hadn't asked you, in a
17 sense why can't you make a general announcement as to what you intend to do? Your
18 answer, in summary, is, "We would get a lot of people giving us input, we couldn't treat
19 that as a proper consultation, and the decision as to what consultation is appropriate, if we
20 are satisfied of the other requirements for the use of these powers is a matter for our
21 judgment and not anybody else's", subject to challenge?

22 MR VINALL: I'm grateful, Sir, yes.

23 THE CHAIRMAN: That's the answer?

24 MR VINALL: Yes.

25 THE CHAIRMAN: Okay, thank you. So, Mr Beard, that is the answer to the point that you
26 raised at the start and I didn't put.

27 MR BEARD: Yes, with respect, as a matter of law, it's no answer at all. We accept that it's not
28 for you to determine absolutely the fairness, albeit Mr Vinall is wrong to say fairness is a
29 matter of the reasonable appreciation of the decision maker. Fairness is, of course, a matter
30 of law which is determined by the court.

31 The point here is we transparently have a lack of fairness. We don't have a good reason on
32 the part of Ofcom why it is that it is acting as it is doing restricting access to instructions,
33 failing to carry a 'minded to' approach. It is a remarkable submission to say, "If we

1 consulted we'd get responses, therefore we don't want to consult because it would be too
2 much within the period".

3 THE CHAIRMAN: There are two questions. One, is it within my jurisdiction to start down an
4 investigation of that, because that is investigating a decision which is in the course of being
5 taken, as it were, or has already been taken in terms of what is planned by Ofcom; and
6 secondly, how can I, in fact, on the basis of what I know, form any sensible view as to
7 whether Ofcom are rightly satisfied or are rightly of the opinion - I can't do a sort of cheap
8 and cheerful judicial review here and now?

9 MR BEARD: Two points: first of all, we say the position is absolutely clear. It's not just the
10 statutory consultation exercise. The reason we put in the skeleton argument was to explain
11 that you still have the requirements, the common law and fairness to notify and give
12 reasons.

13 THE CHAIRMAN: It amounts to the same thing. You're still asking me to apply - whether it's
14 the common law or any other law, you're still asking me essentially to embark upon an
15 examination of Ofcom's conduct in relation to their decision about the imposition of these
16 powers as a result of the decision which we have reached and to form a view that it's
17 obvious that they're breaching natural justice, or whatever.

18 MR BEARD: We say that it is obvious, but clearly in so far as, Sir, you might simply say, "I'm
19 not going to determine the matter but I have real concerns about these matters", that would
20 be instructive in and of itself.

21 We go back to the central proposition that we put forward, which is to ask the Tribunal not
22 to make the order today or tomorrow, but to delay that process. That process being delayed
23 may give Ofcom time for mature reflection in relation to these fairness argument which they
24 are putting forward today which are, from a public authority, remarkable. But more than
25 that, if the position that Ofcom is sustaining is, "You go off and judicially review us", then
26 in order to bring a judicial review on an orderly basis, we are going to need time to do that,
27 even if the judicial review challenge were to be simply that we need to be able to take
28 instructions. In those circumstances, Sir, we would be asking the Tribunal not to make the
29 order in order to provide that opportunity. In circumstances where we would be asking in
30 that situation for at least a week to do it, and given that we have the period running up to
31 hearing, and given, with respect to Mr Vinall, that in circumstances where Ofcom have been
32 thinking about these matters and have chosen not to indicate to any of the parties what it
33 might be thinking about at any time since July, that supposed gross uncertainty continuing
34 for two weeks is not material. We do not accept the submission that calculations in relation

1 to any regulatory matter can only be done by calendar months, and therefore moving
2 matters through to December somehow is disruptive.

3 So in those circumstances, perhaps it is Mr Robertson's pragmatism, but, Sir, you can have
4 regard to your sense of the fairness of these matter without determining them, and in those
5 circumstances we do ask you, for the reasons we've given, whether because it enables
6 further interaction or to enable proper challenge to be brought on an orderly basis, that the
7 order is not made today or tomorrow but is deferred for the December hearing.

8 Unless I can assist, Sir, further, those are our submissions in response.

9 THE CHAIRMAN: Thank you very much. Does anybody else want to add anything? No.

10 Thank you very much. I will take about ten minutes or a quarter of an hour just to review
11 my notes and then I'll come back and give you a decision.

12 (Short break)

13 (For judgment, see separate transcript)

14 MR BEARD: No, we don't have any comments on the draft. If there were anything, it would
15 simply be, as you have indicated, Sir, there may be need for recourse to other Tribunals in
16 relation to these matters. Obviously one of those challenges would be in relation to the
17 decision not to afford the opportunity to take instructions. It's obviously important that that
18 challenge can be brought, if it is going to be brought, before any action is taken by Ofcom.
19 I don't know what Ofcom's intention is. You would deprive the principals of the company
20 from the opportunity to decide how they were going to deal with Ofcom's proposed action
21 if Ofcom's action went ahead before that challenge could be determined, or at least got
22 before a court with an interim relief application.

23 It may be that Ofcom are not going to deal with this until later in the week. If so, that may
24 fall away.

25 THE CHAIRMAN: Fine, let's take this in stages. The form of the order as it stands----

26 MR BEARD: We're not making any drafting----

27 THE CHAIRMAN: -- that's been circulated between the parties, you've got an application to
28 amend which is included within it, which I grant for the reasons which are set out in the
29 decision. You're happy with the schedule, as correctly reflecting what is to be quashed.

30 MR BEARD: As far as we're aware, we haven't identified difficulties with that.

31 THE CHAIRMAN: Nobody else, as I understand it, takes any view, obviously subject to the
32 suggestion that there might have been a medium way. Nobody suggests that the actual
33 terms of this order don't reflect the terms of the judgment and it isn't an order that
34 I shouldn't make.

1 MR BEARD: I'm not aware of that, but obviously----

2 THE CHAIRMAN: Nobody else is going to jump up and say no. Right, so it's simply a question
3 of the mechanics. I have a draft, which I think has been included within the bundle. It can
4 be drawn up by the Tribunal and issued whenever, not tonight, but certainly it can be done
5 during the course of tomorrow. Is what you are suggesting that I should delay that for a
6 period of time tomorrow to enable you to move another court or Tribunal, if necessary?

7 MR BEARD: Yes, we would ask you not to complete the order tomorrow, so that we've got
8 tomorrow in order to be able to consider with those that are within the ring whether or not
9 there is going to be an application for a challenge in relation to both instructions and the
10 broader manner in which Ofcom has dealt with these matter.

11 THE CHAIRMAN: Yes, i.e. to challenge Ofcom's refusal to allow you to consult, etc, etc?

12 MR BEARD: Yes, exactly.

13 THE CHAIRMAN: So the timing - unless anybody has got anything to say on the substance of
14 the order, it's a question of timing, Mr Vinall. Is there any reason why your announcement
15 can't be made, say, after close of business tomorrow?

16 MR VINALL: Sir, if you would allow me to take instructions.

17 THE CHAIRMAN: Or indeed Wednesday?

18 MR VINALL: Sir, I'm told that the answer to your question is, yes, in practice we wouldn't
19 announce it at 7 am tomorrow, it would be probably 7 am the following day.

20 THE CHAIRMAN: That's what I envisaged. So, in reality, BT and anybody else who wants to
21 do so, has the opportunity to consider during the course of tomorrow. Admittedly, they'll
22 have to move fast, but in a sense it's not - I think in reality that's a sufficient period of time
23 for a decision to be made to move.

24 MR BEARD: Well, there are a number of people to talk to about it obviously.

25 THE CHAIRMAN: Otherwise I just get into the same basic point, that you want longer and
26 longer.

27 MR BEARD: Let me just turn my back. (After a pause) I'm not going to pretend it's ideal, but
28 I think - the difficulty is, taking advice and then preparing an application, because the
29 logistics of actually preparing the application are not entirely straightforward just in terms
30 of completing a draft, and so on.

31 THE CHAIRMAN: What are you suggesting? In essence, any announcement in response to an
32 order that's made by the Tribunal - as Ofcom have indicated any announcement should take
33 place before the markets open, which will require an announcement to be made in the

1 morning. So the real issue is whether this announcement will occur on Wednesday morning
2 or Thursday morning.

3 MR BEARD: We would ask that the Tribunal put in place arrangements so that it would end up
4 being made on Thursday morning, and that will give us appropriate time to take instructions
5 and to draft an application in relation to these matters if so instructed.

6 THE CHAIRMAN: Okay. Mr Vinall, in reality, the choice is between me saying that the order
7 can be sealed and publicised by the Tribunal tomorrow or Wednesday. Is there any material
8 difference other than just the fact it's another day?

9 MR VINALL: Again, I don't want to misrepresent the position, Sir, so if I may take instructions.
10 (After a pause) Sir, obviously we're in your hands. BT has made this application, it has
11 failed. It has nevertheless secured one day's delay, it's in your hands as to whether it's to
12 be one or two.

13 THE CHAIRMAN: I was asking you earlier, why tomorrow? In a sense, you gave me the
14 answer that it's the sooner the better, and so I now have to perform a balancing exercise. Is
15 there a choreography, as it were, that you think is appropriate from the Tribunal's point of
16 view. If you are going to issue your announcement to the market and make your
17 determinations before the markets open in the morning, which I understand is what you're
18 proposing----

19 MR VINALL: Yes.

20 THE CHAIRMAN: -- should the Tribunal's ruling take effect with the remittal order the previous
21 day at any particular time? How do you envisage it working? There will inevitably be a
22 lacuna, I think, even for a very short period of time. Do you just want me to date the order
23 to take effect from a certain time?

24 MR VINALL: My instructions are that fractions of a day are not of great concern to my client.

25 THE CHAIRMAN: Are not?

26 MR VINALL: Not. Sir, as I understand it, and I'm sure I'll be corrected if I am wrong, the
27 normal position is that orders take effect when made, as in when pronounced. You are
28 proposing a departure from that, Sir, so I would assume that what you're proposing is a
29 regime where it takes effect when published on the website.

30 THE CHAIRMAN: I'm sorry, I don't know what the CAT Rules actually contemplate in that
31 respect. I rather thought that, since I've not made a pronouncement in open court - we are
32 here in private session - what I am going to do will only take effect when it is published on
33 the Tribunal's website. What I've done here today, we are in private session, so I was
34 rather assuming that, as it were, for the outside world, which is what I understand I'm

1 addressing at the moment, the outside world will only be aware of the lacuna, if there is a
2 lacuna or whatever, when the order is published on the Tribunal's website. Is that not the
3 case?

4 MR VINALL: Yes, I see that, Sir. (After a pause) Sir, I've got no submission to make.

5 THE CHAIRMAN: The Référendaire has pointed out to me, when I actually look at the order
6 that's been drafted, it's curious. Paragraph 1 says that the decisions are quashed, but you
7 shall revoke any instruments giving effect to the identifier's decisions by the dates seven
8 days after the making of the order, so you've got, in fact, seven days to revoke the
9 instruments. How does it actually work, and do I need to give a day? I was working on the
10 assumption, perhaps wrongly, that - sorry?

11 MR VINALL: No, Sir, I'm listening to you.

12 THE CHAIRMAN: I appreciate it's very difficult. I was working on the assumption that the
13 quashing might have an immediate effect upon the instruments. If the assumption is that the
14 instruments actually have a life of their own independently of the quashing decision, then in
15 truth I can make the order whenever I want. The key question is when you would revoke
16 the instruments and then make your announcement?

17 MR VINALL: Yes, and the answer to that, as I understand it, is that it would be done in one go.
18 There would be three separate documents published and announced at the same time, one of
19 which revokes, one of which imposes a new regime, and one of which requires the
20 consultation which is referred to in the letter at tab 20.

21 As I understand the instructions I'm getting, Sir, you're right, the timing of your order is not
22 critical in terms of the regulations falling away.

23 THE CHAIRMAN: This is not exactly a matter of, as it were, general public interest in the sense
24 that there would be rioting in the streets if I make an order. Anybody who understands any
25 of this stuff will probably understand that what's critical is the revocation of the
26 instruments, especially if they actually see the order in the form that's now currently in
27 play. So they will know that although that is what is to happen, the critical moment, as it
28 were, will be when you do everything in one and the same breath to avoid there being a
29 lacuna.

30 MR VINALL: Yes, Sir.

31 THE CHAIRMAN: I suppose the only issue is when you are proposing to do that and whether
32 you can give an undertaking not to do it until a specified morning to enable any challenge to
33 be mounted, or whether I have to artificially delay my order to achieve the same result.

1 MR VINALL: Let me take instructions? (After a pause) I have instructions to offer the Tribunal
2 an undertaking that we will not publish these documents until 7 am on Thursday, Sir.

3 THE CHAIRMAN: Thursday. Harmony seems to have broken, because I think that's the most
4 they were going to get anyway, as it were.

5 The Tribunal can make an order in this form at its leisure during the course of tomorrow.
6 I think it might get too complicated to record that undertaking in an open order, because if
7 I start recording what you're undertaking not to do in an open order it potentially lets the cat
8 out of the bag, doesn't it?

9 MR VINALL: The undertaking has been given, Sir.

10 THE CHAIRMAN: Yes, exactly, so I don't need to record that in the order. You should just give
11 the undertaking that you will not make the revocation instrument or bring into force your
12 emergency regime until shortly before 7 am on Thursday morning.

13 MR VINALL: Yes.

14 THE CHAIRMAN: That gives BT and any others who wish to do so a chance to at least take
15 instructions and, if necessary, make arrangements to move a Tribunal, court, I don't know
16 which it would be, in the intervening days.

17 Is there anything else? We will publish that order during the course of tomorrow in the
18 form that has been provided to us.

19 MR VINALL: Sir, in relation to your judgment, obviously it's made in private session.

20 THE CHAIRMAN: A transcript will have been taken, and undoubtedly I will want to try and just
21 tidy it up a little bit, as is inevitably the case.

22 MR VINALL: It seems to us that once the announcement has been made there is no reason why
23 that judgment can't be made public, it's simply a question of timing.

24 MR BEARD: I don't think we would have any objection. I'll take formal instructions and
25 communicate if we do.

26 The only issue I would add is not a matter, strictly speaking, for the Tribunal, but in the
27 circumstances - I know the transcript providers are very efficient, but if there were any
28 chance of us getting a transcript later tonight or tomorrow morning we would be most
29 grateful. I know that they are listening.

30 THE CHAIRMAN: Well, you may have to engage with others on that. In a sense, I think they
31 would almost certainly, wouldn't they, let me see the draft first rather than just release it.

32 MR BEARD: Yes.

33 THE CHAIRMAN: I am in court tomorrow morning at least, but as soon as I see it I will attempt
34 to approve it.

1 MR BEARD: I am most grateful.

2 THE CHAIRMAN: You've got a note. Hopefully it will look something similar, although a little
3 more tidy perhaps.

4 MR BEARD: If the remainder of the transcript, which, Sir, you wouldn't be approving could be
5 released without your approval - in other words, the transcript of submissions - that would
6 be of benefit.

7 THE CHAIRMAN: I certainly have no objection. I'm not sure it's within my remit.

8 MR BEARD: It's just in case there was any objection. Thank you.

9 MR VINALL: Sir, we are obviously going to be seeing one another again on, certainly,
10 4th December.

11 THE CHAIRMAN: It's the 4th and 5th, and I would have thought----

12 MR VINALL: Is it the 4th and 5th?

13 THE CHAIRMAN: Just the 4th, sorry.

14 MR VINALL: It is possible, putting it no higher, that one of the issues in dispute before you on
15 the 4th will go to costs. Just for the record, if you could reserve the costs of today to the 4th?

16 THE CHAIRMAN: I think at 5.20 that's a very sensible solution----

17 MR VINALL: I'm grateful.

18 THE CHAIRMAN: -- if a consensual one can't be reached between the parties.

19 MR WARD: Sir, I wonder if I could address something else, not costs, I'm pleased to say. The
20 whole session this afternoon has been closed. The judgment is closed. We obviously, all of
21 us in the room, have clients who would like to know something about what's happened
22 today. I ask out loud and really the question is: is there anything they can be properly told?
23 The Tribunal is going to produce an order disposing of the appeal tomorrow. Could they at
24 least be told that?

25 THE CHAIRMAN: The order will be public as far as I'm aware tomorrow, so yes is the answer
26 to that. The reasons for my making the order tomorrow will probably have to await 7 am on
27 Thursday, or whatever may incur in the meantime.

28 MR WARD: And I anticipate the position must be that they can't be told about what we've
29 understood this afternoon and what Ofcom is planning to do, because obviously that's been
30 the subject of a great deal of debate.

31 THE CHAIRMAN: I think that must be right.

32 MR WARD: I think it must be right.

33 THE CHAIRMAN: I think you just have to say there was a hearing. Once the order is made
34 public, you simply have to say that the hearing and the substance of the matters that have

1 been dealt with during the course of the hearing can't be communicated until after Ofcom
2 has announced.

3 MR WARD: Yes.

4 THE CHAIRMAN: I think at that stage the confidentiality attaching to this hearing and my ruling
5 will fall away, won't it?

6 MR BEARD: I think that's right, yes, and I think that was what Mr Vinall was suggesting, but
7 we'll double check that and confirm, but I think that will be the case, yes.

8 THE CHAIRMAN: In which case, I think the answer to your question then is that, as and when
9 Ofcom have made - assuming that nothing intervenes in the meantime, and if it makes its
10 announcement at 7 am, or just before 7 am on Thursday of the change in regulatory regime,
11 the removal of the current regime and the implementation of new measures, then I will
12 thereafter release the transcript and my judgment when it's approved in an open form, and
13 they can then be referred to.

14 MR WARD: Can I ask one further question, not to push my luck, but just so I'll be able to tell
15 my clients what I can and can't tell them, can they be told Ofcom is planning to make an
16 announcement on Thursday about the future of this case? I think the answer is no.

17 MR LIDDELL: Sir, whilst we're on that point, certainly in previous cases it's been possible to
18 tell clients after close of business the evening before it's published that they may expect
19 something the next morning. It would certainly be useful to have that because otherwise
20 they could be very much blindsided.

21 MR VINALL: My instructions are, Sir, that that is something which Ofcom will consider and on
22 which those sitting behind me will take instructions as to whether it would be possible for
23 the relevant policy people within Ofcom after the markets close on Wednesday afternoon to
24 provide that kind of information, but I'm not able to commit to that.

25 THE CHAIRMAN: I think there are two separate points that I've been asked. One is whether
26 everybody can just be told, "Ofcom will be announcing something on Thursday morning
27 before the markets open" - that's number one, say no more than that.

28 MR VINALL: And we would object to that, Sir.

29 THE CHAIRMAN: (After a pause) At the risk of interrupting you, and I'll let you take
30 instructions properly in a moment, the way I see this playing out is that the Tribunal would
31 issue an order tomorrow in open form which would indicate to those who are switched on
32 enough to read it that within seven days the existing regulatory regime is going to come to
33 an end.

1 The natural reaction of most clients is going to be, “And?” to which the question is, can
2 they be told simply Ofcom will make an announcement before the markets open on
3 Thursday. In other words, they are told, can’t tell you, but you should look out for an
4 announcement before the markets open on Thursday.

5 MR VINALL: We’ve no objection to that, Sir.

6 THE CHAIRMAN: Let’s be quite clear. Tomorrow at some point the Tribunal will be issuing an
7 order which, if anybody reads it tomorrow - that is Tuesday - it will let somebody know that
8 at some point in the next seven days the existing regime will come to an end. Their
9 immediate question from their clients tomorrow may be, “And what happens then?” or,
10 “Why has that order been made now?” to which the question that’s being posed is: can they
11 be told by those in this room, “I can’t tell you, save to say that Ofcom will be making an
12 announcement before the markets open on Thursday morning, query, and you may be lucky
13 enough to be contacted by Ofcom’s people overnight on Wednesday”, but all that can
14 actually be said is, “The formal position is Ofcom will be announcing something before the
15 markets open on Thursday”. So that’s question one.

16 The second question which was raised separately was: will there be more information given
17 after the markets close, and no doubt on a confidential basis, overnight on Wednesday,
18 which will be more than just there will be an announcement before seven o’clock in the
19 morning?

20 To avoid this being inconvenient, I don’t mind, even though it’s getting a bit late, rather
21 than have you all in a huddle while I’m sitting here and everybody is watching you, do you
22 want five minutes just to think about this and the choreography of it?

23 MR VINALL: We would be very grateful, Sir.

24 THE CHAIRMAN: It’s always very difficult. You have to have two ears, and I want to hear
25 what’s going on behind you, and nobody wants to hear what I’m saying, so it’s much easier
26 if I give you now five or ten minutes just to have a quick chat and possibly even between
27 you to get the choreography right.

28 MR VINALL: Thank you, Sir, we’re very grateful.

29 THE CHAIRMAN: I’ll rise and you let me know when you’re ready.

30 (Short break)

31 THE CHAIRMAN: I don’t know whether that was quite long enough.

32 MR VINALL: We’re most grateful for the opportunity to take instructions. Sir, in answer to
33 your questions, Ofcom’s concern is this: if the Tribunal makes an order tomorrow and the
34 announcement is not made until 7 am on Thursday, the gap is simply too long. There will

1 be two days of speculation in the market place, or at least there's a risk that that will take
2 place.

3 There are two possible solutions to that, in my respectful submission. The first is that the
4 Tribunal doesn't make the order until as close to 5 pm as possible on Wednesday, and what
5 my various learned friends' clients can be told before then is restricted. Alternatively, if it
6 is thought overwhelmingly important that the order be made tomorrow, then we might need
7 to reconsider the undertaking on the timing.

8 THE CHAIRMAN: The order, in a sense, can probably be made by me here and now, but it's an
9 order made at a hearing in private and won't be released to the public such that it can be
10 mentioned to anybody outside the confidentiality circle until it appears on the Tribunal's
11 website. To that extent the order can be made today but not drawn and published until
12 whatever time and date people think is most convenient. I don't see any particular reason
13 why I can't treat the order as having been made today, but not drawn until Wednesday and
14 not published until point in time on Wednesday. That gives BT or anybody else the
15 opportunity to make whatever application they want in the meantime, including, amongst
16 other things, presumably if they were to be successful in some endeavour, not actually
17 having my order published, if that would complicate things.

18 If they're not successful in their endeavour or don't seek to persuade any other Tribunal the
19 order is then publicised at a time which gives a small period of time before your market
20 announcement.

21 MR VINALL: Yes. I'd be very grateful for that indication, Sir.

22 THE CHAIRMAN: If that works then I would have thought that, as far as I'm concerned, the
23 Tribunal will only publish its order on the Tribunal website on Wednesday at, say, 4.30.

24 MR VINALL: Yes, we're very content with that, thank you very much.

25 THE CHAIRMAN: That gives everybody a chance to do whatever they want to do in the
26 meantime, and until then it's not necessary to deal with the question of what people can be
27 told outside the confidentiality ring that has resulted from this hearing,

28 MR VINALL: That would be my submission.

29 THE CHAIRMAN: Because the hearing is in private. In fact, nobody outside the ring should
30 know it's even taking place, or at least, if they do, they---

31 MR VINALL: Shouldn't be asking too many questions about it.

32 THE CHAIRMAN: Well, shouldn't be told too many answers anyway.

33 MR WARD: They do know, I should make clear, that a hearing is taking place.

1 THE CHAIRMAN: They may know that a hearing is taking place, but they can't know---- All
2 we're doing is perpetuating the current situation where they can't be told what it's about.

3 MR WARD: Absolutely.

4 THE CHAIRMAN: So we're in no worse position per se, other than obviously they're just keen
5 to know.

6 MR WARD: To be able to tell there will be an order on Wednesday would obviously be helpful
7 to them. They're bound to want to know. I'm sorry if I'm just going back over the
8 argument we've been over in the last 45 minutes.

9 THE CHAIRMAN: I don't see any particular reason why if somebody - if people know that this
10 hearing has taken place who are outside the confidentiality club then I suppose what they
11 should simply be told is an order will be publicised by the Tribunal during the course of
12 Wednesday afternoon. Then the other question is whether they thereafter can be told that an
13 announcement is to be made by Ofcom before the opening of business the following day,
14 which was the next question.

15 MR VINALL: We would have no objection to that occurring after the markets close at
16 five o'clock on Wednesday.

17 THE CHAIRMAN: If it's five o'clock, then I suppose, rather than saying 4.30, I should have said
18 five o'clock. So, simultaneously with the order going on to the Tribunal's website at
19 five o'clock on Wednesday, any eagle eyed person who asks the question can then be told
20 that Ofcom will be making an announcement before the markets open the following
21 morning. Does that make it clear?

22 MR VINALL: Yes.

23 THE CHAIRMAN: The witching hour is five o'clock on Wednesday.

24 MR VINALL: We're very grateful for your careful consideration, Sir.

25 MR BEARD: Yes, there is one other matter. There have been discussions with Ofcom regarding
26 the entering into bilateral arrangements on confidentiality between Ofcom and BT to enable
27 Mr Bruce Breckenridge to be made privy to the letter in particular of 16th November. He is
28 the head of competition at BT. The reason for it is because if a judicial review were to be
29 pursued, it is appropriate that it is Mr Breckenridge that is privy to discussions, advice and
30 decision making, given his seniority within the company. I'm alerting the Tribunal to it
31 because it would be a bilateral arrangement between BT and Ofcom. The one issue that
32 will arise is release of today's transcript to Mr Breckenridge, since I think, on its face, it's
33 restricted to the members of the confidentiality ring.

1 THE CHAIRMAN: As I think is inherent in the nature of a bilateral arrangement, it's a bilateral
2 arrangement which relates to matters other than to which the confidentiality ring relates.
3 I can only control what goes on in my proceedings. If Ofcom are content that
4 Mr Breckenridge has access to the transcript for purposes which are specified, that's a
5 matter for Ofcom, I think. For my part, if Ofcom were satisfied then I, personally, don't
6 have an objection.

7 MR BEARD: The latter I think is the key, but the reason it's raised with you is because----

8 THE CHAIRMAN: It's a matter for Ofcom.

9 MR BEARD: -- it's a unilateral matter or a bilateral matter because it falls within the scope of the
10 confidentiality ring.

11 MR WARD: It's not a bilateral matter at all, because it involves all the rest of us who are in the
12 confidentiality ring, and the other parties. It's a bilateral arrangement. Mr Beard is not
13 asking you to make the arrangement or even to approve it, but plainly the rest of us have an
14 interest and the rest of us are suffering under the very restricted circulation of this
15 information.

16 THE CHAIRMAN: Yes.

17 MR WARD: At the very least, we may need to make the same application is really what I'm
18 saying.

19 THE CHAIRMAN: I suppose, in a sense, each application for release of a transcript be on the
20 confidentiality club until the confidentiality club comes to an end. The problem is, the
21 confidentiality club as originally envisaged was to deal with confidential information in the
22 case papers. It's rather been pressed into service in relation to this set of issue in a form
23 which it barely is appropriate for.

24 MR BEARD: Well, I'm not sure it actually applies in relation to - Ofcom's position in the
25 correspondence is that the confidentiality that they're imposing on it is co-terminus with
26 the----

27 THE CHAIRMAN: Wait a minute. When you think about - sorry to cut across you, Mr Beard -
28 the only reason we're talking about the confidentiality club is, as it so happens, everybody
29 in this room is subject to the confidentiality club.

30 MR BEARD: Yes, and we assume that the transcript of today----

31 THE CHAIRMAN: Can go into the confidentiality club.

32 MR BEARD: -- can go into the confidentiality club and will be covered by those rules, and it's
33 only for that reason---- There are two reasons: one, because it's a bilateral arrangement
34 that BT and Ofcom are entering into, it's right that we make clear that that is the position

1 and the reason why; and the second is in order to release the transcript to Mr Breckenridge,
2 which, for the avoidance of concern, we raise with you, Sir.

3 MR WARD: More than that, it's absolutely necessary to raise it with the Tribunal, because what
4 Mr Beard is saying is they want to go beyond the terms of the confidentiality order that the
5 Tribunal has made.

6 THE CHAIRMAN: I suppose, first things first, what is Ofcom's position about
7 Mr Breckenridge?

8 MR VINALL: Sir, in terms of bilateral arrangements generally, I've explained Ofcom's position
9 earlier. The predicament that, as I understand it, BT is in is that it is at least seriously
10 contemplating bringing judicial review or analogous proceedings to challenge what Ofcom
11 is going to do. This Tribunal has given BT the opportunity to have some time to do that.
12 As I understand it, the predicament that BT is in is that in order to take those proceedings it
13 needs to involve a more senior lawyer in that decision making process. Ofcom does not
14 consider that it would be desirable for Ofcom to impede that if that really is necessary for
15 BT to effectively exercise the rights which this Tribunal has sought to give it.

16 THE CHAIRMAN: To deal with Mr Ward's point, if any other party was genuinely to form a
17 similar intention or view and, as it were, could persuade you of their genuine intention to do
18 so, then they could make a similar application to me.

19 MR VINALL: Yes.

20 THE CHAIRMAN: Otherwise the thing is going to break down.

21 MR VINALL: For that purpose, yes.

22 MR WARD: It's quite foreseeable that, if my clients were to know about all of this, they would
23 be very interested, if not concerned, about judicial review proceedings. So we welcome the
24 acknowledgement from Mr Vinall that, if so advised, a similar approach could be made.

25 THE CHAIRMAN: Okay, that's fine. At the moment BT are saying that they are able to take the
26 view that they are seriously considering it from within their current group. I appreciate
27 there's a sort of **Catch 22** situation here, but in the absence of you being in a position to tell
28 me that there is an identified person whom you need to consult at your client for a similar
29 purpose, I don't think I'm going to go further than say I will, in the light of Ofcom's
30 indication, permit Mr Breckenridge to receive a transcript of the proceedings and, as and
31 when released, the judgment.

32 I would have envisaged that by 7.01, or whenever it is, on Thursday morning at the latest,
33 the transcript of this hearing can then be made more generally available, together with my
34 judgment if and when it's available. So the period of time in which your clients might be

1 inconvenienced in that sense is limited. Unless they were themselves planning, or you
2 could persuade me that they were actually planning to institute their own proceedings, I'm
3 not minded at the moment to give any wider liberty to anybody to show anything to
4 anybody.

5 MR WARD: I'm not asking for that.

6 THE CHAIRMAN: There is a liberty to apply if the position changes, but somebody will actually
7 have to identify the person and in the first instance persuade Ofcom and then me that there's
8 a genuine intent.

9 MR WARD: Thank you, Sir.

10 THE CHAIRMAN: Are we at a risk of calling it a day there? Right. In which case, I think, as
11 regards the 'choreography', as I have described it, probably the sensible thing to do would
12 be for somebody to exchange between the parties and the Tribunal early tomorrow a note
13 of, as it were, the timings and what has been envisaged so that there is no risk of confusion.
14 I think, in the first instance, I'll ask Ofcom to do that.

15 MR VINALL: Yes, Sir.

16 THE CHAIRMAN: In other words, so that everybody can see what we think we've now, at
17 six o'clock arrived at, because it won't be recorded in the order because that would cause its
18 own confusion, and the order won't, itself, be made public until five o'clock on Wednesday.
19 If you can do that, please, and circulate tomorrow, including to the Tribunal, the order will
20 contain a reference to the fact that there has been this hearing and it may be, depending on
21 what I discuss with the Registrar, that you'll see it in draft tomorrow. If I'm satisfied that it
22 corresponds with what you sent to us there's probably no need. Then whatever other steps
23 are needed can be taken by whoever wishes, failing which, or in any event, I'm due to see
24 you all, or some of you, on 4th December.

25 I would only add that I would obviously be grateful for any written submissions in good
26 time, ideally I think on the Thursday before, if possible, please, to enable them to be
27 circulated to the other Tribunal members. Did we say Wednesday previously? Then I'll
28 keep it at Wednesday, I'm not going to give you any extra time. I'm told reliably it was
29 Wednesday, so Wednesday, please, to enable the Tribunal to be circulated.

30 Thank you very much.

31 MR VINALL: Thank you, Sir, we're very grateful for the Tribunal staff.

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