Neutral citation [2010] CAT 15

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1146/3/3/09

Victoria House
Bloomsbury Place
London WC1A 2EB

11 June 2010

Before:

MARCUS SMITH QC
(Chairman)
PROFESSOR PETER GRINYER
RICHARD PROSSER OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

- supported by -

CABLE & WIRELESS UK
VIRGIN MEDIA LIMITED
GLOBAL CROSSING (UK) TELECOMMUNICATIONS LTD
VERIZON UK LIMITED
COLT TELECOMMUNICATIONS

Interveners

JUDGMENT (PRELIMINARY ISSUES)

APPEARANCES

Mr. Graham Read QC, Miss Anneli Howard and Mr. Ben Lynch (instructed by BT Legal) appeared for the Appellant.

Mr. Pushpinder Saini QC, Mr. Hanif Mussa and Mr. James Segan (instructed by the Office of Communications) appeared for the Respondent.

Miss Dinah Rose QC and Mr. Tristan Jones (instructed by Olswang LLP) appeared for the Interveners.

I. INTRODUCTION

1. On 14 October 2009, the Office of Communications ("OFCOM") issued a determination in respect of certain disputes between British Telecommunications plc ("BT") and various other communications providers regarding BT's charges for partial private circuits. These other communications providers are collectively described as the "Altnets" and comprise:

   (a) Cable & Wireless UK ("Cable & Wireless");

   (b) Virgin Media Limited ("Virgin");

   (c) Global Crossing (UK) Telecommunications Limited ("Global Crossing");

   (d) Verizon UK Limited ("Verizon"); and

   (e) Colt Technology Services ("Colt").

2. There was a sixth communication provider in dispute with BT, THUS plc ("THUS"). THUS is now part of the Cable & Wireless group.

3. OFCOM's 14 October 2009 determination ("the Determination") is contained in a document entitled "Determination to resolve disputes between each of Cable & Wireless, THUS, Global Crossing, Verizon, Virgin Media and COLT and BT regarding BT's charges for partial private circuits".

4. The Determination was made pursuant to OFCOM's power to resolve disputes under sections 185 to 191 of the Communications Act 2003 ("the Dispute Resolution Process"). BT has appealed the Determination under section 192(2) of the Communications Act 2003 ("the 2003 Act"), this being an appealable decision under section 192(1)(a). The Tribunal must dispose of this appeal in accordance with the provisions of section 195.

5. BT's contentions are pleaded in its Amended Notice of Appeal ("the Notice of Appeal"). The Notice of Appeal raises many points regarding the Determination. Only two are material for present purposes. First, BT suggested that its appeal might involve "price control matters" (paragraph 4 of the Notice of Appeal). If this was right, then the Tribunal would be obliged to refer such matters to the Competition Commission.

6. Secondly, BT contended that OFCOM had been fundamentally wrong to use the Dispute Resolution Process to resolve the dispute between it and the Altnets, either as a matter of jurisdiction or in the exercise of its discretion (paragraph 51 of the Notice of Appeal). This was because the Dispute Resolution Process presupposed an actual, ongoing dispute relating to the provision of network access and did not extend to "historic" matters (paragraph 53 of the Notice of Appeal). The dispute between BT and the Altnets, *pace* BT, involved at least some historical matters.

7. OFCOM did not accept either of these contentions. At a hearing on 11 February 2010, at which the Altnets were also given permission to intervene, the Tribunal ordered that the following matters be determined by the Tribunal as preliminary issues:

   (a) Whether, on the proper interpretation of the Communications Act 2003 and the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004, BT's appeal raises any specified "price control matters" within the meaning of section 193 of the Communications Act 2003 and rule 3 of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004.

   (b) Whether, on the proper interpretation of the Communications Act 2003, the dispute resolution process provided for in sections 185 to 192 of the Communications Act 2003 only extends to current or prospective issues and not to historical issues.

8. Submissions on these preliminary issues were heard on 25 and 26 May 2010. In addition to the benefit of oral argument on those days, the Tribunal was also assisted by the pleadings and by the skeleton arguments submitted by the parties.

II. THE FIRST PRELIMINARY ISSUE: "PRICE CONTROL MATTERS"

(i) Introduction

9. Section 193 of the 2003 Act (in combination with rules made under that provision) requires the Tribunal to refer "price control matters" arising out of a section 192(2) appeal (as this is) to the Competition Commission.

10. Whereas BT contended that its appeal might involve price control matters (paragraph 4 of the Notice of Appeal), OFCOM submitted that it did not, a submission with which the Altnets agreed. The reason for this difference was that the parties had fundamentally different views as to the definition of price control matters. BT's contention was that the term had a much wider meaning than was contended for by OFCOM and the Altnets.

(ii) The statutory provisions relating to the obligation on the Tribunal to refer price control matters to the Competition Commission

11. Section 193 of the 2003 Act provides for the reference of price control matters by the Tribunal to the Competition Commission. Section 193 provides as follows:

> "(1) Tribunal rules must provide in relation to appeals under section 192(2) relating to price control that the price control matters arising in that appeal, to the extent that they are matters of a description specified in the rules, must be referred by the Tribunal to the Competition Commission for determination.
>
> (2) Where a price control matter is referred in accordance with Tribunal rules to the Competition Commission for determination, the Commission is to determine that matter –
>
> (a) in accordance with the provision made by the rules;
>
> (b) in accordance with directions given to them by the Tribunal in exercise of powers conferred by the rules; and
>
> (c) subject to the rules and any such directions, using such procedure as the Commission consider appropriate.

(3) The provision that may be made by Tribunal rules about the determination of a price control matter referred to the Competition Commission in accordance with the rules includes provision about the period within which that matter is to be determined by that Commission.

(4) Where the Competition Commission determines a price control matter in accordance with Tribunal rules, they must notify the Tribunal of the determination they have made.

(5) The notification must be given as soon as practicable after the making of the notified determination.

(6) Where a price control matter arising in an appeal is required to be referred to the Competition Commission under this section, the Tribunal, in deciding the appeal on the merits under section 195, must decide that matter in accordance with the determination of that Commission.

(7) Subsection (6) does not apply to the extent that the Tribunal decides, applying the principles applicable on an application for judicial review, that the determination of the Competition Commission is a determination that would fall to be set aside on such an application.

…

(9) For the purposes of this section an appeal relates to price control if the matters to which the appeal relates are or include price control matters.

(10) In this section "price control matter" means a matter relating to the imposition of any form of price control by an SMP condition the setting of which is authorised by –

(a) section 87(9);

(b) section 91; or

(c) section 93(3)."

(iii) The statutory meaning of an "SMP condition"

12. An "SMP condition" is a "significant market power condition" (section 45(2)(b)(iv) of the 2003 Act). Section 45(1) affords OFCOM a general power to set various conditions, including SMP conditions (section 45(2)(b)(iv)). It is clear from section 45(7) that an SMP condition can either be an "SMP services condition" (further defined in section 45(8)) or an "SMP apparatus condition" (further defined in section 45(9)). The persons to whom such conditions apply are defined in section 46(7)-(9).

13. The conditions under which OFCOM may set or modify an SMP condition are described in section 47 of the 2003 Act:

> "(1) OFCOM must not, in the exercise or performance of any power or duty under this Chapter –
>
> (a) set a condition under section 45, or
>
> (b) modify such a condition,
>
> unless they are satisfied that the condition or (as the case may be) the modification satisfies the test in subsection (2).
>
> (2) That test is that the condition or modification is –
>
> (a) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
>
> (b) not such as to discriminate unduly against particular persons or against a particular description of persons;
>
> (c) proportionate to what the condition or modification is intended to achieve; and
>
> (d) in relation to what it is intended to achieve, transparent."

14. Section 48 then lays down a procedure for setting, modifying or revoking conditions.

15. Sections 87 to 92 then make specific provision regarding OFCOM's power or duty regarding the imposition or modification of SMP services conditions; section 93 does the same in relation to SMP apparatus conditions.

(iv) The SMP conditions in the present case

16. In the present case, following a market review of leased lines initiated by OFCOM's predecessor, Oftel, OFCOM published a "Review of the retail leased lines, symmetric broadband origination and wholesale trunk segments markets" on 24 June 2004. We shall refer to this review as the "2004 LLMR Statement", "LLMR" standing for "leased lines market review".

17. In the 2004 LLMR Statement, OFCOM concluded (under section 79 of the 2003 Act) that BT held significant market power in various markets, including in the

provision of wholesale trunk segments at all bandwidths within the United Kingdom (Annex D of the 2004 LLMR Statement, paras 1(d) and 2, pp432-433).

18. As a result, OFCOM "in accordance with section 48(1) of the Act and section 79 of the Act hereby set pursuant to section 45 of the Act the SMP services conditions on [BT] as set out in Schedules 1 and 2 respectively to this Notification to take effect, unless otherwise stated in those Schedules on the date of publication of this Notification" (Annex D of the 2004 LLMR Statement, para 3, p433).

19. The SMP services conditions applicable in the case of the provision of whole trunk segments are set out in Schedule 1 to Annex D (pp435ff of the 2004 LLMR Statement) and take effect as Conditions H. The relevant parts of Conditions H are set out below:

> **"Condition H1 – Requirement to provide network access on reasonable request**
>
> H1.1 Where a Third Party reasonably requests in writing Network Access, the Dominant Provider shall provide that Network Access. The Dominant Provider shall also provide such Network Access as Ofcom may from time to time direct.
>
> H1.2 The provision of Network Access in accordance with paragraph H1.1 shall occur as soon as reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may from time to time direct.
>
> H1.3 The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition.
>
> **Condition H2 – Requirement not to unduly discriminate**
>
> H2.1 The Dominant Provider shall not unduly discriminate against particular persons or against a particular description of persons, in relation to matters connected with Network Access.
>
> H2.2 In this Condition, the Dominant Provider may be deemed to have shown undue discrimination if it unfairly favours to a material extent an activity carried on by it so as to place at a competitive disadvantage persons competing with the Dominant Provider.
>
> **Condition H3 – Basis of charges**
>
> H3.1 Unless Ofcom directs otherwise from time to time, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of Ofcom, that each and every charge offered, payable or proposed for Network Access covered by Condition H1 is reasonably

derived from the costs of provision based on a forward looking long run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed.

H3.2 The Dominant Provider shall comply with any direction Ofcom may from time to time direct under this Condition."

20. It is common ground that BT did not seek to appeal against the 2004 LLMR Statement, as it could have done, and that the SMP conditions set out therein were not subsequently modified, at least expressly. As will be seen, BT did contend that the SMP conditions were, in effect, modified by the Determination. That point is considered further in paragraphs [35] to [39] below.

(v) The Tribunal's rules

21. Section 193(1) of the 2003 Act requires Tribunal rules to provide in relation to appeals under section 192(2) relating to price control that the price control matters arising in that appeal, to the extent that they are matters of a description specified in the rules, must be referred by the Tribunal to the Competition Commission for determination.

22. The Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (SI 2004 No. 2068) ("the 2004 Tribunal Rules"), make such provision in rule 3. This provides:

"(1) For the purposes of subsection (1) of section 193 of the Act, there is specified every price control matter falling within subsection (10) of that section which is disputed between the parties and which relates to-

(a) the principles applied in setting the condition which imposes the price control in question,

(b) the methods applied or calculations used or data used in determining that price control, or

(c) what the provisions imposing the price control which are contained in that condition should be (including at what level the price control should be set).

(2) In a notice of appeal under principal rule 8 [principal rules are the Competition Appeal Tribunal Rules 2003, (SI 2003 No. 1372)], the appellant may include a statement indicating the extent to which –

(a) the appeal relates to price control, or

(b) a specified price control matter arises in the appeal.

(3) In a defence under principal rule 14, the respondent may include a statement indicating the extent to which the appeal relates to price control or a specified price control matter arises in the appeal, including a statement in rebuttal of a statement under paragraph (2).

(4) In a request to intervene under principal rule 16, the person making the request may include a statement indicating the extent to which the appeal relates to price control or a specified price control matter arises in the appeal, including a statement in rebuttal of any statement under paragraph (2) or (3).

(5) The Tribunal shall refer to the Commission for determination in accordance with section 193 of the Act and rule 5 every matter which, either upon consideration of any statement provided for in paragraphs (2) to (4) or in the subsequent course of the appeal, it decides is a specified price control matter.

(6) The Tribunal may make a reference to the Commission under paragraph (5) at any time before it delivers its decision.

(7) The rule applies in all cases in which the Tribunal has not delivered its decision before 25th August 2004."

(vi) Price control matters

23. In *Hutchison 3G UK Limited v Office of Communications* [2007] CAT 26, the Tribunal held that the effect of section 193 of 2003 Act and rule 3 of the 2004 Tribunal Rules was that three conditions needed to be satisfied in order for a matter to be a price control matter. These conditions were as follows:

(a) The matter must fall within the definition of a "price control matter" under section 193(10) of the 2003 Act.

(b) The matter must be disputed between the parties within the meaning of rule 3(1) of the 2004 Tribunal Rules.

(c) The matter must relate to the matters stipulated in rules 3(1)(a), (b) or (c) of the 2004 Tribunal Rules.

24. This approach is plainly right given the statutory provisions, and we follow it here. None of the parties questioned its correctness.

25. OFCOM and the Altnets emphasised that a price control matter is a matter "relating to the imposition of any form of price control by an SMP condition…", to quote in part from the words of section 193(10). OFCOM and the Altnets contrasted the imposition of a price control (on the one hand) with subsequent compliance with, and the interpretation for compliance purposes of, that price control (on the other hand). The former, *per* OFCOM and the Altnets, is a price control matter within section 193(10); the latter is not.

26. BT, on the other hand, contended for a much wider construction, based on the fact that section 193(10) did not define a price control matter as a matter imposing any form of price control, but as a matter relating to the imposition of any form of price control. This, BT suggested, appeared to give the section a wider scope than simply the imposition of a price control.

27. The source for the parties' different contentions was thus in substance the first of the three *Hutchison* conditions. However, BT also prayed in aid the third *Hutchison* condition: BT suggested that section 193(1) of the 2003 Act gave the 2004 Tribunal Rules "added primacy". This, according to BT, was because of the words "to the extent they are matters of a description specified in the rules" in section 193(1). BT therefore contended that rule 3 needed to be taken into account when construing section 193(10), and that the framing of rule 3 indicated or suggested a wide construction of that provision. This was contested by OFCOM and the Altnets, who asserted the primacy of legislation over the implementing rules. They also contended that the 2004 Tribunal Rules were entirely consistent with their suggested construction of section 193(10) of the 2003 Act.

28. For their part, OFCOM and the Altnets also made much of the fact that BT was unable to identify with specificity the price control matters that were "disputed between the parties" and that it was suggesting the Tribunal was obliged to refer to the Competition Commission. This, so it was suggested, undermined BT's approach to the construction of price control matters, because it could not be said (at least with any degree of precision) what was "disputed" between the parties.

29. We consider these matters in turn below.

The meaning of the first condition: a "price control matter" under section 193(10)

30. Section 193(10) of the 2003 Act states that a "price control matter" means a matter relating to the imposition of any form of price control by an SMP condition the setting of which is authorised by one of sections 87(9), 91 or 93(3) of the 2003 Act.

31. It was common ground that Condition H3 was authorised by section 87(9) of the 2003 Act.

32. Section 193(10) explicitly refers to the "imposition" of a price control. It does not state that a price control matter means a matter relating to the "compliance with" any form of price control by an SMP condition. We do not see how section 193(10) can be construed as extending to questions of compliance. If there had been an intention to define a price control matter as one embracing compliance issues, the section would have said so explicitly.

33. Of course, it is right to say that section 193(10) does not define a "price control matter" as a matter imposing any form of price control, but as a matter relating to the imposition of any form of price control. The words "relating to" have to be given their due meaning. However, we do not consider it remotely plausible that these words could enable a definition that is explicitly to do with the imposition of price control to extend to compliance with price control. That would be to allow words ancillary to the term "imposition" effectively to re-write the statutory definition.

34. Had the statutory definition of "price control matter" in section 193(10) been confined to "a matter imposing any form of price control by an SMP condition", then the extent to which important questions of price control could be referred to the Competition Commission would be curtailed. For instance, it is difficult to see how the Competition Commission could be asked to consider alternatives to the SMP condition in fact imposed in any given case. This is precisely the sort of question that rule 3(1)(c) of the 2004 Tribunal Rules allows to be referred.

35. BT contended that even if this distinction between imposition and compliance was correct, this was a case where price control had (at least implicitly) been imposed. BT contended that OFCOM's Determination amounted to a re-writing of the SMP conditions imposed by the 2004 LLMR Statement. This was because of the nature of the test (the so-called distributed stand-alone cost or "DSAC" test) that OFCOM adopted for the purposes of assessing BT's compliance with those conditions, combined with OFCOM's application of that test to BT's charging from the date Condition H3 was imposed.

36. We do not consider this contention to be correct. Section 193(10) defines a price control matter by reference to a specific SMP condition. A price control matter is something that is imposed by an SMP condition, in this case, Condition H3. The starting point, as OFCOM emphasised, must be the framing of this condition.

37. Condition H3 imposes on BT an obligation to secure, and to be able to demonstrate to the satisfaction of OFCOM, that each and every charge offered, payable or proposed for Network Access covered by Condition H1 was reasonably derived from the costs of provision based on a forward looking long run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed.

38. This is the price control that was imposed on BT. The precise meaning of Condition H3 is not a matter for these preliminary issues, but it is clear that:

    (a) Condition H3 leaves it to BT to decide how and what to charge for its services, provided always these charges are "reasonably derived from the costs of provision based on a forward looking long run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed".

    (b) Condition H3 imposes on BT an obligation to "demonstrate to the satisfaction of Ofcom" that this obligation has been complied with.

39. OFCOM used DSAC as a first order test of BT's compliance with Condition H3. That is not the same as Condition H3 imposing DSAC as a price control. We do not consider that OFCOM's Determination can have imposed DSAC as a form of price control. Either OFCOM used an appropriate methodology for the purposes of assessing BT's obligations – in which case, all OFCOM did was monitor compliance with a pre-existing obligation; or OFCOM used an inappropriate methodology in order to monitor compliance, in which case that is a matter that can be corrected on appeal. Either way, no form of price control will have been imposed by the Determination.

40. It goes without saying – but we say it nonetheless – that these are questions that do not arise for present determination but which fall to be determined, if at all, on the substantive hearing of BT's appeal.

The 2004 Tribunal Rules

41. As was described in paragraph [27] above, BT sought to support its wide construction of section 193(10) by reference to the 2004 Tribunal Rules. In paragraph 18 of its skeleton argument, BT contended that:

> "This wider meaning appears to be reflected in the Rules themselves. Perhaps unusually for statutory instruments, the Rules appear to be given added primacy in that s193(1) requires provision of rules concerning referral to the [Competition Commission] of "price control matters" to "the extent they are matters <u>of a description specified in the rules</u>". Accordingly s190(10) cannot be considered in isolation but has to be read in conjunction with the more detailed "description" contained within paragraph 3 of the Rules." [Emphasis in original.]

42. On the basis of this passage, it appeared that BT was contending that the 2004 Tribunal Rules could – by virtue of the words in section 193(1) – extend the meaning of "price control matters" in section 193(10). Before us, Mr Read QC for BT disavowed any such contention. Rather, the width of the 2004 Tribunal Rules served to illustrate the width of the section 193(10) definition; the Rules did not, however, extend that definition.

43. Mr Read was plainly right to clarify BT's contention in this way. Section 193(1) accords no kind of "primacy" to the 2004 Tribunal Rules. The sub-section simply

makes provision for Tribunal rules requiring price control matters, to the extent they are specified in the rules, to be referred to the Competition Commission. Obviously, such Tribunal rules must respect, and operate within the ambit of, the statutory definition of a "price control matter" contained within section 193(10).

44. This is precisely what rule 3 of the 2004 Tribunal Rules (set out in paragraph [22] above) does. Rule 3(1) specifies, for the purposes of section 193(1) of the 2003 Act, every price control matter that:

(a) *Falls within section 193(10) of the 2003 Act*. By definition, therefore, rule 3 cannot be wider in scope than section 193(10); the rules, on their own terms, are sub-ordinate to section 193.

(b) *Which is disputed between the parties*. This represents a qualification to the section 193(10) definition. Hypothetical disputes are not to be referred to the Competition Commission: there must be an actual dispute between the parties. This is considered further in paragraphs [46] to [52] below.

(c) *Which relates to*:

i. *the principles applied in settling the condition which imposes the price control in question*. This limb of the rule enables questions relating to the exercise carried out by the regulator in determining whether the condition should be imposed to be referred to the Competition Commission.

ii. *the methods applied or calculations used or data used in determining that price control*. This limb of the rule enables questions relating to the manner in which the SMP condition was formulated to be referred to the Competition Commission.

iii. *what the provisions imposing the price control which are contained in that condition should be (including at what level the price control*

should be set). This limb enables questions relating to the content of the SMP condition to be referred to the Competition Commission.

45. An examination of the three limbs of rule 3(1) demonstrates very clearly that they are all concerned with the imposition of price control matters by way of an SMP condition. There is nothing in the rule to suggest that a price control matter is anything to do with compliance with an SMP condition. In this, rule 3(1) is completely consistent with the scope of the statutory definition of price control matter in section 193(10) of the 2003 Act.

46. This consistency between rule 3(1) and section 193(10) sheds little light on the true construction of section 193(1), save to confirm our conclusion at paragraph [32] above. In these circumstances, it seems unnecessary to consider the case-law to which we were taken by BT regarding the circumstances in which a piece of subordinate legislation can properly be used to construe a statute.

The significance of the second condition: "disputed between the parties"

47. In *Hutchison 3G UK Limited v Office of Communications* [2007] CAT 26, the Tribunal noted (at paragraph [36]) that "the matters referred to the Competition Commission must be such that, when the determination comes back from the Competition Commission, the Tribunal can use that determination to decide the appeal on the merits and by reference to the grounds of appeal set out in the Notice of Appeal". The Tribunal went on, at paragraph [37]:

> "This points to a price control matter being a matter which is a fundamental aspect of the appeal, capable of being identified as a potential price control matter from an examination of the Notice of Appeal."

We concur with these statements, and although rule 3(5) makes provision for the reference of price control matters identified after service of statements of case "in the subsequent course of the appeal", it is obviously desirable that matters for reference to the Competition Commission be formulated as soon as possible.

48. It is essential that a question to the Competition Commission be capable of formulation, in such a manner that the Competition Commission's determination

can be deployed by the Tribunal in its decision on the appeal. This is all the more important given that the Tribunal has no discretion in referring price control matters.

49. BT's Notice of Appeal states, in paragraph 4, that "[t]he challenge to OFCOM's use of the DSAC test as the basis for assessing BT's compliance with its "Basis of Charges" SMP services obligation raises questions concerning the principles, methodology and data that OFCOM has used for cost orientation and may be a "specified price control matter" which might need to be referred to the Competition Commission."

50. That is all the Notice of Appeal says on the point, and it is clear that BT has declined the opportunity given by rule 3(2) of the 2004 Tribunal Rules to define more specifically what matters might need to be referred. Under cover of a letter dated 24 May 2010, BT provided "three questions that could possibly be referred to the Competition Commission which are put forward as an aid for identifying the issues involved". These questions were, however, simply put forward as possibilities.

51. BT's lack of specificity made it difficult for OFCOM and the Altnets to respond in anything other than a very general way in their statements of case. But both OFCOM and Altnets made the point that the fact that BT did not identify, with any specificity, what had to be referred to the Competition Commission, suggested that there was, in fact, no price control matter "which is disputed between the parties".

52. In the light of the conclusions we have reached regarding the meaning of section 193(10) of the 2003 Act, and rule 3(1) of the 2004 Tribunal Rules, this is of course correct: BT's Notice of Appeal does not raise price control matters within the sense of these provisions. It is, therefore, not surprising that BT could not formulate the price control matters it said might be in issue with any specificity.

(vii) Conclusion on the first preliminary issue

53. For the reasons we have given, our unanimous conclusion is that the answer to the first preliminary issue set out in paragraph [7(a)] above is "No".

III. THE SECOND PRELIMINARY ISSUE: "SCOPE OF THE DISPUTE RESOLUTION PROCESS"

(i) Scope of the preliminary issue

54. In paragraph 44 of its skeleton argument, BT suggested that this preliminary issue might extend beyond the pure question of the scope of OFCOM's jurisdiction to determine disputes under sections 185 to 192 of the 2003 Act. On reflection – later on in the same paragraph – BT concluded that "the issue as defined is necessarily limited to matters of pure jurisdiction". The skeleton arguments of OFCOM and the Altnets were confined purely to jurisdictional questions.

55. For the avoidance of doubt, the second preliminary issue was always confined to jurisdictional questions. Argument before us on 25 and 26 May 2010 proceeded on this basis, and this decision does likewise.

(ii) OFCOM's powers to resolve disputes

56. Sections 185 to 191 of the 2003 Act make provision for OFCOM's power to resolve disputes. Section 192 makes provision for appeals against OFCOM's resolution of such disputes.

57. Sections 185(1) and (2) define the disputes to which this section applies, and the parties between whom such disputes may arise. Section 185(3) provides that "[a]ny one or more of the parties to the dispute may refer it to OFCOM". It is for OFCOM to stipulate the manner in which such a reference is to be made: sections 185(4)-(6).

58. Sections 185(1) and (2) are considered further below. In the present case, it is important to note that OFCOM accepted jurisdiction to resolve the disputes between

the Altnets and BT under section 185(1)(a) of the 2003 Act. This is clear from various parts of the Determination, including paragraphs 1.17 and 2.1. This point is of potential significance, because (for the purposes of this appeal) OFCOM sought to contend that even if it had no jurisdiction under section 185(1)(a), it had jurisdiction under section 185(2).

59. BT contended that OFCOM could not, at this stage, change the basis upon which it, OFCOM, had accepted jurisdiction over the dispute. We consider this matter after the scope of sections 185(1) and (2) has been resolved, when the basis for OFCOM's jurisdiction is clear.

60. Section 186 governs the steps that follow where a dispute is referred to OFCOM under section 185. This section provides:

> "(1) This section applies where a dispute is referred to OFCOM under and in accordance with section 185.
>
> (2) OFCOM must decide whether or not it is appropriate for them to handle the dispute.
>
> (3) Unless they consider –
>
> (a) that there are alternative means available for resolving the dispute,
>
> (b) that a resolution of the dispute by those means would be consistent with the Community requirements set out in section 4, and
>
> (c) that a prompt and satisfactory resolution of the dispute is likely if those alternative means are used for resolving it,
>
> their decision must be a decision that it is appropriate for them to handle the dispute.
>
> (4) As soon as reasonably practicable after OFCOM have decided –
>
> (a) that it is appropriate from them to handle the dispute, or
>
> (b) that it is not,
>
> they must inform each of the parties to the dispute of their decision and of their reasons for it.
>
> (5) The notification must state the date of the decision.
>
> (6) Where –
>
> (a) OFCOM decide that it is not appropriate for them to handle the dispute, but

(b) the dispute is not resolved by other means before the end of the four months after the day of OFCOM's decision,

the dispute may be referred back to OFCOM by one or more of the parties to the dispute."

61. OFCOM's powers to resolve referred disputes are set out in section 190:

"(1) Where OFCOM make a determination for resolving a dispute referred to them under this Chapter, their only powers are those conferred by this section.

(2) Their main power (except in the case of a dispute relating to rights and obligations conferred or imposed by or under the enactments relating to the management of the radio spectrum) is to do one or more of the following-

(a) to make a declaration setting out the rights and obligations of the parties to the dispute;

(b) to give a direction fixing the terms or conditions of transactions between the parties to the dispute;

(c) to give a direction imposing an obligation, enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by OFCOM; and

(d) for the purpose of giving effect to a determination by OFCOM of the proper amount of a charge in respect of which amounts have been paid by one of the parties of the dispute to the other, to give a direction, enforceable by the party to whom the sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment."

62. As we stated in paragraph [4] above, we refer to this process as the Dispute Resolution Process.

(iii) The parties' contentions as to the scope of OFCOM's jurisdiction under the Dispute Resolution Process

63. As we have made clear, this second preliminary issue is concerned only with OFCOM's jurisdiction to deal with certain types of dispute, as opposed to questions of discretion and judgment, which (if necessary) are to be the subject matter of a further hearing, due to be heard in October 2010.

64. This issue of jurisdiction turned on whether OFCOM had the ability, under section 186, to resolve "historical" disputes.

65. In paragraph 53 of its Notice of Appeal, BT drew a distinction between "current" or "prospective" disputes and "historical" disputes as follows:

> "Section 185(1) of the Act refers to "a dispute relating to the provision of network access". Plainly this is not to be given an overly restrictive meaning: see, for example, *Orange v OFCOM* [2007] CAT 36. However, it does presuppose an actual dispute relating to the provision of network access. This inferentially suggests some issue about current or prospective network access. It is very difficult to see how CPs raising historic matters years after the event can truly be "a dispute relating to the provision of network access" when it is focussed effectively on previous allegedly unjust enrichment." [Emphasis in original.]

66. As BT acknowledged in paragraph 32 of its skeleton, phrases such as "retrospective", "current" and "prospective" can be a source of confusion unless they are clearly defined at the outset. It appears from paragraph 34 of its skeleton, that BT was drawing a distinction between:

(a) a dispute relating to matters going forward from the date when that dispute first became "live" (or a "challenge had first been made"); and

(b) a dispute relating to matters pre-dating this point in time – i.e. before matters became "live" (or a "challenge had first been made").

67. According to BT, the first class of disputes are "current" – and within the Dispute Resolution Process – whereas the second class of disputes are "retrospective" – and not within the Dispute Resolution Process.

68. An example may assist. Whereas BT sought to illustrate its points by reference to the facts in *T-Mobile v Office of Communications* [2008] CAT 12, we prefer to use a hypothetical example:

(a) Suppose that, on date T0, a communications provider ("CP-1") begins to act in breach of an SMP condition imposed on it. For a certain period of time, the persons to whom CP-1 provides services ("CP-2", "CP-3" and "CP-4") remain ignorant of CP-1's breach of the SMP or are investigating the possibility of CP-1's breach without overtly challenging CP-1's conduct.

(b) On date T+30, CP-2 overtly challenges CP-1's conduct, and alleges that CP-1 is in breach of the SMP condition. CP-1 continues to provide CP-2 with services (albeit that, according to CP-2, CP-1 continues to do so in breach of the SMP condition). CP-1 and CP-2 are unable to resolve their dispute, and the dispute is referred to OFCOM on date T+100.

(c) On date T+40, CP-3 overtly challenges CP-1's conduct, and alleges that CP-1 is in breach of the SMP condition. CP-1 continues to provide CP-3 with services until T+60 (albeit that, according to CP-3, CP-1 continues to do so in breach of the SMP condition), when CP-3 finds an alternative provider and ceases to utilise the services of CP-1. CP-1 and CP-3 are unable to resolve their dispute, and the dispute is referred to OFCOM on date T+100.

(d) On date T+50, CP-4 overtly challenges CP-1's conduct, and alleges that CP-1 is in breach of the SMP condition. However, after some further communications, CP-1 persuades CP-4 that there is in fact no breach of the SMP condition, and CP-4 takes the matter no further. However, on date T+110, CP-4 hears of the disputes referred to OFCOM by CP-2 and CP-3. It raises the dispute with BT again on T+110, and makes its own reference to OFCOM on date T+120.

(e) When OFCOM comes to determine the disputes between CP-1 and CP-2, CP-3 and CP-4:

i. On OFCOM's case, it has jurisdiction to determine all of these disputes, going back to T0 (the date CP-1 commenced its breach of the SMP condition).

ii. On BT's approach, OFCOM does not have jurisdiction – in any of these cases – to determine matters back to T0. In each case, OFCOM's jurisdiction only goes back to T+30 (in the case of CP-2) and T+40 (in the case of CP-3).

iii. As regards CP-3, on BT's approach, although CP-3's dispute with CP-1 might appear purely "historical", in that CP-3 ceases using CP-1's services from date T+60, OFCOM would (on BT's approach) nevertheless have jurisdiction regarding the dispute in respect of CP-1's breaches between T+40 and T+60.

iv. As regards CP-4, on any view, on BT's approach, OFCOM only has jurisdiction going back to T+50, the date of first overt challenge. However, the fact that CP-4 let the dispute lapse after T+50 might (on BT's approach) disentitle CP-4 from contending that it had raised a dispute as early as T+50. OFCOM's jurisdiction might go back only so far as T+110.

69. The scenario regarding CP-4 might appear unduly hypothetical. However, it is intended to reflect a point made by BT in respect of Cable & Wireless' dispute with BT. In paragraph 36 of its skeleton, BT notes that Cable & Wireless first challenged BT's prices in the context of the present dispute on 21 January 2008, citing for this purpose paragraph A9.6 of the Determination. Footnote 48 of the skeleton then goes on to say:

> "It should be noted that in the previous paragraph [of the Determination] OFCOM refers to Energis [now a part of Cable & Wireless] raising an issue in August 2004 and [Cable & Wireless] expressing concerns to OFCOM (but not BT) in 2005. BT deals with this in its Reply, but given the way that OFCOM closed its own initiative investigation in December 2005, BT contends it is not possible for [Cable & Wireless] to contend that it had raised a specific challenge to BT's PPC prices until 21 January 2008."

We express no view on the specific facts. But it is clear that BT is contending that an overt challenge can lapse, and such a lapse can affect the jurisdiction of OFCOM.

70. As Mr Read accepted before us, there are nuances, and no single dispute is likely to be precisely the same as any other. That said, all parties (including BT) broadly accepted Miss Rose QC's formulation before us, as follows:

> "On BT's case, in order for OFCOM to decide whether it has jurisdiction to receive a complaint it must first answer the following questions. First, has a

> dispute been raised by one party to the other? Secondly, what was the date when a dispute was first raised? Thirdly, was the dispute raised at that time the same as the dispute that is now being referred to the Regulator? If it was different, was it so significantly different as to deprive OFCOM of jurisdiction? How significant must the difference be for that to be the case? Finally, have any subsequent events caused that dispute to lapse so that a fresh dispute would have then to be raised and, if so, has it been and does it satisfy those conditions? All of those questions would have to be investigated in any case before OFCOM could decide that it had jurisdiction." [Transcript, Day Two, page 6 at lines 19 to 28.]

71. As we noted in paragraph [66] above, terminology can be a source of confusion unless clearly defined. For the purposes of this decision, we shall refer to disputes over which BT contends OFCOM to have no jurisdiction as "historical disputes"; we shall refer to disputes over which BT contends OFCOM does have jurisdiction as "non-historical disputes".

72. In paragraph 35 of its skeleton, OFCOM suggested that in reality, BT's contentions did not amount to a jurisdictional argument, so much as "an implied constraint on OFCOM's remedial powers under section 190(2)(d)". Section 190(2)(d) of the 2003 Act entitles OFCOM, for the purposes of giving effect to a determination by OFCOM of the proper amount of a charge in respect of which amounts have been paid by one of the parties of the dispute to the other, to give a direction, enforceable by the party to whom the sums are to be paid, requiring the payment of sums by way of an adjustment of an underpayment or overpayment.

73. It may very well be that the consequence of BT's jurisdictional argument is, in effect, very similar in effect to an implied constraint on section 190(2)(d). But the fact is that BT put its case as one on jurisdiction, and so focussed on the true meaning of section 185 of the 2003 Act. We will consider the argument on this basis.

(iv) The parties' arguments

74. A number of points were raised by each of the parties in support of their position. These may be broadly classified under three heads:

(a) *Points of construction*. OFCOM and the Altnets contended that there is nothing in the statutory wording providing for the Dispute Resolution

Process that recognises the distinction that BT was seeking to draw between historical and non-historical disputes. BT, on the other hand, contended that disputes necessarily had to refer to non-historical disputes. Both parties relied upon the EU's Common Regulatory Framework, which provides the source for the Dispute Resolution Process provisions in the 2003 Act, as well as the Dispute Resolution Process provisions themselves. This decision accordingly first considers the relevant provisions of the Common Regulatory Framework, and how these inter-relate with the Dispute Resolution Process provisions in the 2003 Act (paragraphs [75] to [84] below). The decision then goes on to consider whether these provisions support the historical/non-historical distinction contended for by BT (paragraphs [85] to [96] below).

(b) *The schema of the 2003 Act*. BT suggested that sections 94 to 104 of the 2003 Act provided an explicit mechanism for the review of a party's historical compliance with its cost orientation conditions. These, *pace* BT, provided for a detailed process for conducting precisely the sort of review that OFCOM had conducted using the Dispute Resolution Process. BT suggested that where such a mechanism exists, "it is necessarily an important factor in construing the other sections of the Act" (paragraph 38 of BT's skeleton), and that it pointed in favour of its (narrow) construction of the dispute resolution process. OFCOM and the Altnets, on the other hand, denied that this was the right inference to be drawn from the schema of the 2003 Act. This point is considered in paragraphs [97] to [104] below.

(c) *Points of practical convenience*. All of the parties made submissions based upon (to use a neutral term) the "practical convenience" of particular constructions of the 2003 Act. BT cited section 314 of Bennion et al, *Bennion on Statutory Interpretation,* 5th ed (2008), which states:

> The court seeks to avoid a construction that causes unjustifiable inconvenience to persons who are subject to the enactment, since this is unlikely to have been intended by Parliament. Sometimes however there are overriding reasons for applying such a construction, for example where it appears that Parliament really intended it or the literal meaning is too strong.

Thus, BT contended that the Dispute Resolution Process was intended to be a swift and basic procedure, not suited to certain types of dispute (specifically, historical disputes). On the other hand, the Altnets suggested that the distinction proposed by BT was unworkable (in that it can be very difficult to determine when a dispute begins) and undesirable (in that it might encourage the formulation of "pre-emptive" disputes by communications providers with a view to ensuring that OFCOM had the widest jurisdiction). These points are considered in paragraphs [105] to [110] below.

(v) The Common Regulatory Framework and the Dispute Resolution Process provisions

75. Section 185 of the 2003 Act was enacted to implement certain of the UK's obligations under EU law regarding electronic communications. The Common Regulatory Framework comprises Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (the "Framework Directive"), and four more specific directives, known as the "Specific Directives". One of these – the only one relevant for present purposes – is the "Access Directive", Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities.

76. Article 20 of the Framework Directive and Article 5(4) of the Access Directive both describe powers that Member States must confer on national regulatory authorities, such as OFCOM, in order to resolve disputes between electronic communications providers.

Article 20 of the Framework Directive

77. Article 20 of the Framework Directive provides as follows:

> "(1) In the event of a dispute arising in connection with obligations arising under this Directive or the Specific Directives between undertakings providing electronic communications networks or services in a Member State, the national regulatory authority concerned shall, at the request of either party, and without prejudice to the provisions of paragraph 2, issue a binding decision to resolve the dispute in the shortest possible time frame and in any case within four months except in

> exceptional circumstances. The Member State concerned shall require that all parties cooperate fully with the national regulatory authority.
>
> (2) Member States may make provision for national regulatory authorities to decline to resolve a dispute through a binding decision where other mechanisms, including mediation, exist and would better contribute to the resolution of the dispute in a timely manner in accordance with the provisions of Article 8. The national regulatory authority shall inform the parties without delay. If after four months the dispute is not resolved, and if the dispute has not been brought before the courts by the party seeking redress, the national regulatory authority shall issue, at the request of either party, a binding decision to resolve the dispute in the shortest possible time frame and in any case within four months.
>
> (3) In resolving a dispute, the national regulatory authority shall take decisions aimed at achieving the objectives set out in Article 8. Any obligations imposed on an undertaking by the national regulatory authority in resolving a dispute shall respect the provisions of this Directive or the Specific Directives.
>
> (4) The decision of the national regulatory authority shall be made available to the public, having regard to the requirements of business confidentiality. The parties concerned shall be given a full statement of the reasons on which it is based.
>
> (5) The procedure referred to in paragraphs 1, 3 and 4 shall not preclude either party from bringing an action before the courts."

78. Article 8 of the Framework Directive states the policy objectives and regulatory principles that national regulatory authorities should aim to achieve.

Article 5(4) of the Access Directive

79. Article 5(4) of the Access Directive provides:

> "With regard to access and interconnection, Member States shall ensure that the national regulatory authority is empowered to intervene at its own initiative where justified or, in the absence of agreement between undertakings, at the request of either of the parties involved, in order to secure the policy objectives of Article 8 of Directive 2002/21/EC (Framework Directive), in accordance with the procedures referred to in Articles 6 and 7, 20 and 21 of Directive 2002/21/EC (Framework Directive)."

80. As was noted in paragraph [11] of *Orange Personal Communications Services Limited v Office of Communications* [2007] CAT 36, there is an obvious and clearly stated overlap between Article 20 of the Framework Directive and Article 5(4) of the Access Directive. Article 5(4) applies "[w]ith regard to access and interconnection"; Article 20 applies in relation to disputes "arising in connection with obligations arising under this Directive or the Specific Directives between

undertakings providing electronic communications networks or services in a Member State", which includes disputes "[w]ith regard to access and interconnection".

Sections 185(1) and 185(2) of the 2003 Act

81. As has been stated, section 185 seeks (at least in part) to implement into UK law these provisions. Sections 185(1) and (2) provide as follows:

> "(1) This section applies in the case of a dispute relating to the provision of network access if it is –
>
> (a) a dispute between different communications providers;
>
> (b) a dispute between a communications provider and a person who makes associated facilities available;
>
> (c) a dispute between different persons making such facilities available;
>
> (d) a dispute relating to the subject-matter of a condition set under section 74(1) between a communications provider or person who makes associated facilities available and a person who (without being such a person) is a person to whom such a condition applies; or
>
> (e) a dispute relating to the subject-matter of such a condition between different persons each of whom (without being a communications provider or a person who makes associated facilities available) is a person to whom such a condition applies.
>
> (2) This section also applies in the case of any other dispute if –
>
> (a) it relates to rights or obligations conferred or imposed by or under this Part or any of the enactments relating to the management of the radio spectrum that are not contained in this Part;
>
> (b) it is a dispute between different communications providers; and
>
> (c) it is not an excluded dispute."

82. It is necessary to consider the inter-relationship between sections 185(1) and 185(2):

(a) It is worth observing that, whereas the various limbs of section 185(1) are disjunctive, the provisions of section 185(2) are cumulative. Section 185(2) only applies:

i. in the case of a dispute between different communications providers;

ii. provided the dispute is not an "excluded dispute", a term defined in section 185(7);

iii. where it relates either:

1. to rights or obligations conferred or imposed by or under Part 2 of the 2003 Act; or

2. to any of the enactments relating to the management of the radio spectrum that are not contained in Part 2 of the 2003 Act.

(b) In paragraph [14] of *Orange Personal Communications Services Limited v Office of Communications* [2007] CAT 36, the Tribunal held that sections 185(1) and 185(2) "are mutually exclusive so that a dispute cannot fall within both subsections". This conclusion (with which we agree) is borne out by the opening words of section 185(2): "[t]his section also applies in the case of any other dispute…". The words "also applies" suggest that, but for section 185(2), a dispute falling within that provision would not be covered by section 185(1). Equally, the words "any other" suggest a dispute that is not embraced by section 185(1).

(c) The opening words of section 185(1) provide that "This section applies in the case of a dispute relating to the provision of network access…". "Network access" is itself a term defined in sections 151(1) and (3) of the 2003 Act. Section 151(3) provides:

> "In this Chapter [ie Chapter 1 of Part 2, being sections 32 to 151 of the 2003 Act] references to network access are references to –
>
> (a) interconnection of public electronic communications networks; or
>
> (b) any services, facilities or arrangements which –
>
> (i) are not comprised in interconnection; but

> (ii) are services, facilities or arrangements by means of which a communications provider or person making available associated facilities is able, for the purposes of the provision of an electronic communications service (whether by him or by another), to make use of anything mentioned in subsection (4);
>
> and references to providing network access include references to providing any such services, making available any such facilities or entering into any such arrangements."

From this, it is clear that section 185(1) is intended to implement that part of Article 5(4) of the Access Directive which requires the national regulatory authority to be able to intervene in the absence of agreement between the parties with regard to the access and interconnection matters covered by that Article.

The basis for OFCOM's jurisdiction in this case

83. So far as the disputes between BT and the Altnets in this case are concerned, we find that OFCOM was right to conclude that its jurisdiction for resolving the disputes arose out of section 185(1)(a) of the 2003 Act. The disputes in question were between communications providers, and related to "the provision of network access" as that term is defined in section 151(3). As OFCOM itself pointed out in the Determination (para 1.17), section 185(8)(a) makes clear that "disputes that relate to the provision of network access include disputes as to the terms or conditions on which it is or may be provided in a particular case".

84. It follows from our conclusion at paragraph [82(b)] above that we do not consider that OFCOM had jurisdiction under section 185(2) of the 2003 Act. It also follows that we do not need to consider whether, subsequent to making the Determination and during the course of an appeal of the Determination, OFCOM could (as it sought to do, as an alternative case) successfully have contended for an alternative basis for its jurisdiction. Suffice it to say that we would have had some misgivings in pursuing such a course without at least remitting the matter back to OFCOM for

it to reach a view on its jurisdiction, after having heard representations from interested parties.

(vi) Does OFCOM have jurisdiction, under section 185(1), to determine historical disputes?

85. The case put forward by OFCOM and the Altnets is shortly stated: there is nothing in section 185(1) to suggest the sort of constraint contended for by BT, still less to require the implication of such a constraint. Section 185(1) simply refers to "a dispute relating to the provision of network access". For its part, BT accepted that it was contending for an implicit restriction to section 185(1), confining OFCOM's jurisdiction to non-historical disputes. BT contended that the reference in section 185(1) of the 2003 Act to "a dispute relating to the provision of network access", and the reference to "access and interconnection" in Article 5(4) of the Access Directive, had this effect.

86. "Access" and "interconnection" are both terms that are specifically defined in Article 2 of the Access Directive. Article 2(a) provides (in part):

> "'access' means the making available of facilities and/or services, to another undertaking, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services. It covers inter alia: access to network elements and associated facilities…"

87. Article 2(b) provides:

> "'interconnection' means the physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking. Services may be provided by the parties involved or other parties who have access to the network. Interconnection is a specific type of access implemented between public network operators[.]"

88. The definition of "network access" under the 2003 Act has already been set out in paragraph [82(c)] above. BT's point was that these provisions are all drafted in the present tense, and so imply ongoing provision of network access.

89. BT contended that this approach was reinforced by various of the recitals to the Framework Directive and the Access Directive. In particular, we were referred to the following:

(a) Recital (32) of the Framework Directive, which provides:

> "In the event of a dispute between undertakings in the same Member State in an area covered by this Directive or the Specific Directives, for example relating to obligations for access and interconnection or to the means of transferring subscriber lists, an aggrieved party that has negotiated in good faith but failed to reach agreement should be able to call on the national regulatory authority to resolve the dispute. National regulatory authorities should be able to impose a solution on the parties. The intervention of a national regulatory authority in the resolution of a dispute between undertakings providing electronic communications networks or services in a Member State should seek to ensure compliance with the obligations arising under this Directive or the Specific Directives."

(b) Recital (5) of the Access Directive, which provides:

> "In an open and competitive market, there should be no restrictions that prevent undertakings from negotiating access and interconnection arrangements between themselves, in particular on cross-border agreements, subject to the competition rules of the Treaty. In the context of achieving a more efficient, truly pan-European market, with effective competition, more choice and competitive services to consumers, undertakings which receive requests for access or interconnection should in principle conclude such agreements on a commercial basis, and negotiate in good faith."

(c) Recital (6) of the Access Directive, which provides (in part):

> "In markets where there continue to be large differences in negotiating power between undertakings, and where some undertakings rely on infrastructure provided by others for delivery of their services, it is appropriate to establish a framework to ensure that the market functions effectively. National regulatory authorities should have the power to secure, where commercial negotiation fails, adequate access and interconnection and interoperability of services in the interest of end-users…"

90. We accept that these recitals make clear that national regulatory authorities are to have the power to determine non-historical disputes as to access. That is not controversial between the parties.

91. It is not surprising that it was felt necessary by the drafters of the Directives to make clear that national regulatory authorities should have the power to determine questions of current access. In legal terms, a dispute normally concerns *entitlement*, a conflict of claims or rights, where *A* contends that *B* is obliged to do something, which *B* denies. The provisions of the Directives and the Dispute Resolution Process go well beyond this, and give the national regulatory authority the power to *impose* terms and *create* entitlements.

92. But the fact that it was considered necessary to make clear that national regulatory authorities should have the power to resolve disputes as to current access by (if necessary) imposing terms on communications providers does not mean that the converse pertains. It does not follow from this that historical disputes are excluded. Given that it is an inevitability that some time will pass – no matter how quickly a national regulatory authority acts – before a dispute can be resolved, had it been the intention to exclude a certain class of dispute, then one would have expected that to have been clearly stated, both in the Directives and in the 2003 Act.

93. Yet the Directives and the 2003 Act contain no such clear distinction. Such a distinction would be all the more necessary given that the historical/non-historical distinction put forward by BT is by no means the only distinction that could be made regarding past, present and future disputes between communications providers.

94. Reverting, for a moment, to the example of CP-3, described in paragraph [68] above. On BT's case, OFCOM has jurisdiction to deal with CP-3's dispute with CP-1, despite the fact that the dispute has nothing to do with the on-going provision of network access.

95. Of course, BT could have contended for a construction of section 185(1) that was solely confined to disputes relating to the on-going provision of network access. Such a construction would be entirely "forward-looking", and would be entirely consistent with the recitals cited in paragraph [89] above. An obvious difficulty with such an approach is section 190(2)(d) of the 2003 Act, which makes provision for the payment of sums by way of adjustment of underpayments or overpayments.

Plainly, the existence of such a provision is wholly inconsistent with a purely forward-looking construction of section 185(1).

96. Hence, BT's acceptance that the section 185(1) jurisdiction was – to an extent at least – "backward looking". On BT's case, the "backward looking" extent of the jurisdiction ended with the date of commencement of the dispute between communications providers. According to BT, anything before that point in time is historical. But we see nothing in section 185 compelling such a conclusion.

(vii) The schema of the 2003 Act

97. BT contended that the Dispute Resolution Process could not be considered in isolation from other provisions in the 2003 Act, and that a construction of sections 185 to 191 of the 2003 Act needed to be informed by other provisions in the 2003 Act, including in particular sections 94 to 104. We shall refer to these provisions as the "Compliance Process".

98. The Compliance Process makes provision for the enforcement by OFCOM of conditions, being conditions under section 45 of the 2003 Act. In contrast to the Dispute Resolution Process, where OFCOM must wait for a dispute to be referred to it, the Compliance Process can be invoked by OFCOM in its own right. Section 94(1) provides that where OFCOM determines that there are reasonable grounds for believing that a person is contravening, or has contravened, a condition set under section 45 (as to which, see paragraph [12] above), OFCOM may give that person a notification under section 94, and that person is entitled to make representations, take steps to comply with the condition and/or remedy any consequences. The process can involve both civil enforcement (section 95(5)-(6) of the 2003 Act), penalties for contravention of a condition (sections 96 and 97 of the 2003 Act), and potential criminal sanctions (section 103 of the 2003 Act).

99. Finally, section 104 creates a statutory duty on persons subject to the Compliance Process. This section provides:

> "(1) The obligation of a person to comply with –

(a) the conditions set under section 45 which apply to him,

(b) requirements imposed on him by an enforcement notification under section 95, and

(c) the conditions imposed by a direction under section 98 or 100,

shall be a duty owed to every person who may be affected by a contravention of the condition or requirement.

(2) Where a duty is owed by virtue of this section to a person –

(a) a breach of the duty that causes that person to sustain loss or damage, and

(b) an act which –

(i) by inducing a breach of the duty or interfering with its performance, causes that person to sustain loss or damage, and

(ii) is done wholly or partly for achieving that result,

shall be actionable at the suit or instance of that person.

(3) In proceedings brought against a person by virtue of subsection 2(a) it shall be a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid contravening the condition or requirement in question.

(4) The consent of OFCOM is required for the bringing of proceedings by virtue of subsection 1(a).

(5) Where OFCOM give a consent for the purposes of subsection (4) subject to conditions relating to the conduct of the proceedings, the proceedings are not to be carried on by that person except in compliance with those conditions."

100. It was BT's case that historical disputes were more appropriately to be dealt with by way of the Compliance Process than the Dispute Resolution Process. OFCOM and the Altnets, by contrast, contended that the mere fact that there were multiple routes by way of which the same, or a similar, result could be achieved did not militate in favour of narrowing OFCOM's jurisdiction under section 185.

101. In our view, if it had been intended by Parliament to confine the Compliance Process to certain disputes, and the Dispute Resolution Process to other, different, disputes, then this would have been clearly stated in the 2003 Act. Instead, no such delineation between processes is evident on the face of the 2003 Act.

102. We have already noted in paragraphs [64] to [96] above that section 185(1) contains no distinction between historical and non-historical disputes, both apparently being within the jurisdiction of OFCOM. Equally, the Compliance Process appears capable of applying to both historical and non-historical contraventions. In particular, section 94(1) refers to a case where "a person is contravening, or has contravened, a condition set under section 45".

103. The statutory duty in section 104 of the 2003 Act equally contains no distinction of the sort contended for by BT.

104. There is thus a substantial potential parallel jurisdiction. This is anticipated by the 2003 Act:

(a) Even though OFCOM may be obliged to accept and resolve a dispute under the Dispute Resolution Process, there is express provision enabling OFCOM to commence its Compliance Process in parallel (section 187(2)(a) of the 2003 Act).

(b) OFCOM's ability to decline to accept a dispute that is referred to it under the Dispute Resolution Process is narrowly circumscribed by section 186(3) of the 2003 Act, set out in paragraph [60] above. But, provided the parameters of section 186(3) are satisfied, OFCOM could properly decline jurisdiction under the Dispute Resolution Process on the grounds that appropriate notification under the Compliance Process had been, or was about to be, given. In this regard, it is worth noting that the Compliance Process is not intended to be slow. Section 94(4) of the 2003 Act envisages a response to a notification within "the period of one month beginning with the day after the one on which the notification was given".

(c) Where there are legal proceedings with respect to a matter to which a dispute relates and to which the Dispute Resolution Process applies, for instance, a claim for breach of statutory duty under section 104, section 187(3) can potentially apply. This provides:

> "If, in any legal proceedings with respect to a matter to which a dispute relates, the court orders the handling of the dispute by OFCOM to be stayed or sisted –
>
> (a) OFCOM is required to make a determination for resolving the dispute only if the stay or sist is lifted or expires; and
>
> (b) the period during which the stay or sist is in force must be disregarded in determining the period within which OFCOM are required to make such a determination."

(viii) Points of practical convenience

105. BT suggested that dispute resolution was intended to be a swift and basic procedure, and that this in some way indicated that historical disputes did not fall within the scope of the Dispute Resolution Process.

106. It is, of course, entirely right that the Dispute Resolution Process is intended to be a swift one, to be concluded within four months, save in exceptional circumstances (section 188(5) of the 2003 Act). This reflects Article 20(1) of the Framework Directive, which refers to the resolution of disputes "in the shortest possible time frame".

107. We do not agree that the consequence that BT sought to draw from this – namely, that historical disputes are excluded from the Dispute Resolution Process – follows. BT's point was that historical disputes were in some way (i) more complex than non-historical disputes and (ii) therefore more suited to other forms of resolution, notably the Compliance Process. We consider neither point to have force:

(a) In the first place, it is by no means the case that historical disputes are always more complex or more difficult to resolve than non-historical disputes. Some historical disputes will be more complex and difficult than some non-historical disputes; and some non-historical disputes will be more complex and difficult than some historical disputes. Generalisations, of the sort advanced by BT, are very likely to be wrong.

(b) Secondly, the distinction that BT contends for between historical and non-historical disputes will, in many cases, not lead to a simplification of the

issues before OFCOM, but merely limit the extent to which OFCOM can do justice between the disputing parties. Reverting to our hypothetical example in paragraph [68] above, in the case of each dispute between CP-1 and, respectively, CP-2, CP-3 and CP-4, the effect of the distinction being drawn by BT will not especially narrow the issues. In all of these cases, the question of whether CP-1 is in breach of its SMP condition will still have to be considered. What is restricted, if BT is right, is OFCOM's remedial power under section 192(2)(d). Such a restriction will not, generally speaking, limit the issues that OFCOM will have to consider.

108. On the other hand, were BT's contention to be accepted, considerable practical inconvenience would result:

(a) First, as the Altnets stressed, OFCOM would have to spend an enormous amount of time and effort in considering whether and, if so, to what extent, it had jurisdiction. BT's historical/non-historical distinction would require OFCOM to consider a number of questions, over and above the rather more straightforward one of whether there exists a dispute between two parties.

(b) Secondly, there is a basic injustice in restricting OFCOM's jurisdiction to that point in time when a party's conduct is overtly challenged. To revert, once again, to our hypothetical example in paragraph [68], why should CP-2 be confined to adjustments of underpayments or overpayments relating back only so far as date T+30? If OFCOM has determined that an adjustment should be made under section 190(2)(d), then OFCOM should have jurisdiction to order that such adjustment relates back to the date when the breach of the SMP condition began, namely date T0. Any other approach would encourage pre-emptive and legally dictated challenges designed to extend OFCOM's jurisdiction, rather than the commercial approach that informs parties subject to the 2003 Act at present.

109. Of course, this final point does raise an important question going the other way. Suppose CP-2 did not refer its dispute with CP-1 to OFCOM on date T+100, but on date T+1000? What control is there against late disputes being referred? Mr Saini

QC for OFCOM frankly conceded that there was no jurisdictional control in respect of such conduct, but that this might be a factor to be taken into account by OFCOM when determining the dispute. Section 190(7)(b) of the 2003 Act envisages a costs sanction in the case of frivolous or vexatious or otherwise abusive references of disputes.

110. Given the clear conclusion we have reached regarding the proper construction of section 185(1), we question the extent to which questions of practical convenience can assist. However, to the extent that they are relevant, we consider that they support the conclusion that we have reached, instead of gainsaying it.

(ix) Conclusion on the second preliminary issue

111. For the reasons we have given, our unanimous conclusion is that the answer to the second preliminary issue set out in paragraph [7(b)] above is "No". We do not consider that the Dispute Resolution Process – at least when initiated under section 185(1) – draws any distinction between current, prospective or historical disputes. The same conclusion probably pertains in relation to section 185(2), but (for the reasons given in paragraph [84] above) we have not had to construe section 185(2), and we do not do so.

Marcus Smith QC Professor Peter Grinyer Richard Prosser OBE

Charles Dhanowa
Registrar Date: 11 June 2010